

# ACCESS TO JUSTICE IN AUSTRALIA - ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES EXPERIENCE

National Congress of Australia's First Peoples  
Tammy Solonec and Katie Kiss

## Introduction

The Aboriginal and Torres Strait Islander Peoples of Australia comprise the oldest living cultures in the world. Our cultures are underpinned by distinct political, cultural, social and economic institutions, and our cultures and identities form an integral part of our way of life.

Despite over two hundred years of colonial history, our ways of being, knowing and doing have survived, and differ greatly from those of the dominant population in Australia. Today, the majority of Aboriginal and Torres Strait Islander Peoples live each day between two worldviews: the Aboriginal and Torres Strait Islander worldview and the western worldview.

This has created significant challenges for Aboriginal and Torres Strait Islander Peoples and their communities, particularly in our ability to access justice, which is one of the critical issues facing our peoples, and is fundamental to our ability to access and exercise our human rights.

The ability of Aboriginal and Torres Strait Islander Peoples to access justice must be understood within a historical context. Colonisation has brought with it a justice system which includes government, legal and policy frameworks that were imposed on us without our input, consultation or consent.<sup>1</sup> The western justice system supports the dominant ideology, but it does not accommodate the needs or different experiences of those who are forced to comply with it,<sup>2</sup> nor does it adequately reflect the customary laws, traditions and values

1 United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49, article 19.

2 *Supra* note 1, preamble, para. 2.

of Aboriginal and Torres Strait Islander Peoples.<sup>3</sup> In fact, in Australia the western justice system has been and continues to be used as a tool of dispossession, oppression, control, assimilation, dislocation and discrimination.

Aboriginal and Torres Strait Islander Peoples across Australia are overrepresented in all contact with the western justice system, and our engagement with the criminal justice system in particular is at critical levels. For example, we are more likely to be victims of offences.<sup>4</sup> We are more likely to have contact with police. We are more likely to be charged with offences. We are more likely to be convicted of offences, and we are more likely to receive harsher sentences for offences, including receiving higher fines. On the flipside, we are less likely to receive police cautions, we are less likely to receive bail, we are less likely to receive sentences that are alternatives to incarceration, we are less likely to be granted parole once incarcerated, and we are less likely to receive access to rehabilitative and through care programs. The cycle then continues; with our people more likely to repeat offend.<sup>5</sup> 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>6</sup>

3 *Supra* note 1, article 27.

4 Productivity Commission 2011, Overcoming Indigenous Disadvantage: Key Indicators 2011, Productivity Commission (Canberra: Council of Australian Governments, 2011), [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) (viewed 01 March 2013).

5 Tammy Solonec, "The role other economic, social and cultural factors to Indigenous offending and solutions to overcoming the high incarceration rates of Indigenous individuals, including women and youth," Presentation made to Expert Mechanism on the Rights of Indigenous Peoples Expert Seminar on Access to Justice for Indigenous Peoples, including Truth & Reconciliation Processes (New York: Columbia University, 1 March 2013) p. 4.

6 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, Michael Livingston & Susan Dennison Transitions and Turning Points: Examining the Links Between Child Maltreatment and Juvenile Offending, (Griffith University: Office of Crime Statistics and Research, 2005), [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).

If the current gap in access to justice for Aboriginal and Torres Strait Islander Peoples is to be closed, innovative responses that respect cultural difference and that are based on concepts including restorative justice and justice reinvestment are necessary.

Access to justice for Aboriginal and Torres Strait Islander Peoples must be about how we are able to access and use both the Indigenous and western systems of justice to ensure the greatest possible quality of life for all Aboriginal and Torres Strait Islander Peoples.<sup>7</sup> As such, access to justice for Aboriginal and Torres Strait Islander Peoples must include procedural and substantive protections across political, social, cultural, economic and environmental areas, as well as the right to impartiality, non-discrimination and access to fair and just remedies to breaches of rights.<sup>8</sup>

This article examines the challenges experienced by Aboriginal and Torres Strait Islander Peoples in accessing justice more broadly in Australia, and it proposes a way forward. It also considers two options that address the overrepresentation of Aboriginal and Torres Strait Islander Peoples within the criminal justice system and the high incarceration rates: justice reinvestment and the inclusion of national justice targets in the ‘Closing the Gap’ policy framework.

### **Aboriginal and Torres Strait Islander Peoples’ Access to Justice in Australia**

Aboriginal and Torres Strait Islander People interact on a daily basis with the western justice system and it has an impact on many areas of our lives, including:

- self-determination and governance,
- equality and non-discrimination,
- recognition as First Peoples, including in the nation’s Constitution,
- access to remedies for stolen generations and stolen wages, including compensation,

<sup>7</sup> *Supra* note 1, article 5.

<sup>8</sup> Human Rights Council, 21<sup>st</sup> Session, Panel Discussion on Access to Justice for Indigenous Peoples (18 September 2012) Palais des Nations, Geneva.

- 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,
- family matters including child protection, family and domestic violence,
- wills and intestacy,
- accident and injury,
- credit and debt,
- consumer issues, and
- taxation.<sup>9</sup>

The 2011 National Census found that 548,370 people identified as being of Aboriginal and/or Torres Strait Islander descent. While Aboriginal and Torres Strait Islander Peoples represent only 2.5% of the Australian resident population,<sup>10</sup> we are overrepresented in all aspects of the justice system. For example:

- Aboriginal and Torres Strait Islander adults are incarcerated at 15 times the rate of non-Indigenous adults,<sup>11</sup>

9 See Fiona Allison, et al., Indigenous Legal Needs Project: NT Report, (James Cook University, Cairns 2012).

10 Australian Bureau of Statistics (ABS), 2011 Census Counts — Aboriginal and Torres Strait Islander Peoples, (Canberra: ABS 2011), (<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2075.0main+features32011> (accessed 7 February 2013)). In 2011, 35.9% of the Aboriginal and Torres Strait Islander population was aged between 0–14 years, while 3.8% were aged 65 years and over. The median age for Aboriginal and Torres Strait Islander peoples was 21 years compared with 37 years of age for non-Indigenous people.

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

- The imprisonment rate for Aboriginal and Torres Strait Islander women has grown by 58.6% between the years 2000 to 2010, and it has grown by 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-Aboriginal and Torres Strait Islander young people,<sup>12</sup>
- Aboriginal and Torres Strait Islander Peoples are 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,<sup>13</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>14</sup> nearly eight times that of non-Indigenous children, and are ten times more likely to be in out-of-home care (comprising 31% of all children in care),<sup>15</sup> despite making up only 4.2% of the population of all children and young people,<sup>16</sup> and are increasingly being placed with non-Aboriginal and Torres Strait Islander foster care homes,
- Aboriginal and Torres Strait and Islander Peoples who are affected by substance abuse, auditory hearing loss, cognitive and/or mental disability; as well as those who have received limited formal education, been the victim of family or domestic

12 Australian Institute of Health and Welfare, Juvenile Justice in Australian 2010–11, Juvenile Justice Series no. 10, (Canberra: AIHW 2011) Cat No JUV 10, p. 7.

13 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, (Sydney: ALRC, 1986).

14 Australian Institute of Health and Welfare, Child Protection Australia 2011–12, in AIHW, Child Welfare Series no. 55, (Canberra: AIHW 2013) p. 17.

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

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

violence (including members of the Stolen Generations), and those who are poor are also overrepresented in the justice system.<sup>17</sup>

Cross-sectoral research has consistently affirmed that ‘social determinants,’ which include a person’s social and economic position in society, early life experiences, exposure to stress, educational attainment, employment status, and past exclusion from participation in society, can all influence social and emotional wellbeing and interaction with society throughout life.<sup>18</sup> The impact of social determinants on justice outcomes for Aboriginal and Torres Strait Islander Peoples are highlighted by examples in recently published studies and reports of national inquiries. For example:

- 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.<sup>19</sup>

17 Tammy Solonec, “The role other economic, social and cultural factors to Indigenous offending and solutions to overcoming the high incarceration rates of Indigenous individuals, including women and youth”, Presentation made to Expert Mechanism on the Rights of Indigenous Peoples Expert Seminar on Access to Justice for Indigenous Peoples, including Truth & Reconciliation Processes (New York: Columbia University, 1 March 2013) p. 5.

18 See the Report of the Royal Commission into Aboriginal Deaths in Custody, released in 1991, which investigated 99 deaths and made 339 recommendations, many of which are yet to be actioned. Royal Commission into Aboriginal Deaths in Custody, at: <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/> (viewed 01 March 2013). See also The Bringing Them Home Report on the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, released in 1995. Royal Commission into Aboriginal Deaths in Custody, at: <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/> (viewed 01 March 2013). See also United Nations Human Rights Council, Report by the Special Rapporteur on the situation of human rights fundamental freedoms of indigenous people: Situation of indigenous peoples in Australia, \* UNHRC, 15<sup>th</sup> Sess., A/HRC/15/37/Add.4 (2010) on of indigenous peoples in Australia. At: <http://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/CountryReports.aspx> (viewed 01 March 2013).

19 Pamela Snow & Martine Powell, “Youth (in) justice: Oral language competence in early life and risk for engagement on antisocial behaviour on adolescence” (2012) 435 Trends and Issues Australian Institute of Criminology.

- A study of Aboriginal and Torres Strait Islander Peoples 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%.<sup>20</sup> The study concluded that the overrepresentation 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.

### **Systemic Barriers to Access to Justice for Aboriginal and Torres Strait Islander Peoples—The Australian Policy Environment**

Aboriginal and Torres Strait Islander overrepresentation in the justice system is the result of a complex interplay of historical and contemporary factors and social determinants. These historical factors have led to contemporary disadvantage that increases our likelihood of coming into contact with the justice system and being incarcerated.

As demonstrated in the analysis above, the drivers of access to justice are inter-related with other factors which lie outside the direct responsibility of the justice sector. Criminal justice issues are a major concern for Aboriginal and Torres Strait Islander People, and they are also a major focus of the justice response in Australia. Unfortunately, little attention is paid to civil and family law issues and the collective rights of Aboriginal and Torres Strait Islander Peoples to develop and maintain our own institutions that support access to justice, and are based on our own customs, traditions, procedures and juridical systems.

There is currently no coordinated national commitment, strategy or agreement that binds the federal and state and territory [provincial] governments to address the overrepresentation of Aboriginal and Torres Strait Islander Peoples across the spectrum of the justice system. 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

<sup>20</sup> Edward Heffernan, et al., “Prevalence of mental illness among Aboriginal and Torres Strait Islander people in Queensland prisons” (2012) 197 Medical Journal of Australia, p. 1.

with the justice system, in particular the criminal justice system as compared with non-Aboriginal and Torres Strait Islander people.

### *Historical and Constitutional Background*

The Australian juridical system was inherited from the British at colonisation in 1788 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. As a result, the right of Aboriginal and Torres Strait Islander Peoples to self-determination has been denied, and our sophisticated systems of customary law that existed prior to colonisation have effectively been ignored in the establishment of the Australian juridical system.<sup>21</sup>

The Australian Constitution, which established the Commonwealth of Australia in 1901, was drafted at a time of overt discrimination in the spirit of *terra nullius* (land owned by no one) and therefore without the input of Aboriginal and Torres Strait Islander Peoples, including women. Despite being in place for more than 100 years, the Constitution remains silent on the existence and recognition of Aboriginal and Torres Strait Islander Peoples as the First Peoples of Australia, and it contains provisions that permit and anticipate racial discrimination.<sup>22</sup> A national debate is currently underway to address these constitutional deficiencies through a referendum. While there is currently bipartisan support from the major political parties in Australia to recognise Aboriginal and Torres Strait Islander Peoples in the Constitution, maintaining this level of support throughout the course of the referendum process will be critical.

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

22 Section 51 (xxvi) of the Australian Constitution, 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. Section 25 of the Australian Constitution currently contemplates the exclusion of voters based on race.



*Australia's Federated System of Government*

A particular complication of the system established by the Constitution is Australia's federated system of government.<sup>23</sup> 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 Peoples—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, and economic and social rights such as health, housing and education—are laws that are primarily the responsibility of Australia's provincial governments, known as States and Territories. This means that national action on any issue requires the agreement and cooperation of nine separate governments.

Also, as there is no constitutional entrenchment of human rights, they can be taken away at the whim of successive governments. As Aboriginal lawyer and academic Megan Davis, observes:

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 the ATSIC [Aboriginal and Torres Strait Islander Commission], the *Racial Discrimination Act* and native title.<sup>24</sup>

This is demonstrated by the fact that on all three occasions that the Racial Discrimination Act 1975 (Cth) (RDA) (the federal legislation enacted by the Australian Government to embed into domestic law the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination), has been compromised, it involved Aboriginal and Torres Strait Islander issues. The most recent example is the Australian Government's Northern Territory Emergency

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

24 Megan Davis, "A woman's place..."(2009) 24 *Griffith Review*, p. 157.

Response (NTER) legislation, which commenced in 2007, affecting 73 remote Aboriginal communities in the Northern Territory.<sup>25</sup>

In its original application, the NTER was not subject to the RDA. The NTER ended in 2012, and while the subsequent policy platform, *Stronger Futures in the Northern Territory*,<sup>26</sup> has reinstated the application of the RDA, some have argued that elements of the legislation may still be indirectly discriminatory because of the high number of Aboriginal and Torres Strait Islander people that live in the Northern Territory and due to its application through over-regulation and over-policing.<sup>27</sup>

Unfortunately, relying on Parliaments 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 concerning Aboriginal and Torres Strait Islander Peoples comply with both international human rights standards and domestic legal requirements.

25 Northern Territory National Emergency Response Act 2007 (Cth.).

26 Australian Government, Department of Families, Housing, Community Services and Indigenous Affairs, *Stronger Futures in the Northern Territory*, (Cth.), <http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/programs-services/stronger-futures-in-the-northern-territory-0> (accessed 13 August 2013). The *Stronger Futures* legislative package includes three pieces of legislation: *The Stronger Futures in the Northern Territory Act, 2012* (Cth.); *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act, 2012* (Cth.); and the *Social Security Legislation Amendment Act, 2012* (Cth.), <http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/programs-services/stronger-futures-in-the-northern-territory/additional-information-on-stronger-futures-legislation> (viewed on 13 August 2013).

27 Australian Human Rights Commission, *Submission to the Senate Community Affairs Legislation Committee, Stronger Futures in the Northern Territory Bill 2011 and two related Bills* (Sydney: AHRC 2012) p. 28, <https://www.humanrights.gov.au/submission-stronger-futures-northern-territory-bill-2011-2012> (viewed 13 August 2013).

*Compliance with human rights standards and 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.”<sup>28</sup> The Declaration also reflects existing international human rights law including that contained within the International Covenant on Civil and Political Rights as it relates specifically to access to justice.

When the Declaration was endorsed by the Government of Australia in 2009, the Minister for Indigenous Affairs stated:

Today Australia takes another important step to make sure that the flawed policies of the past will never be re-visited... The Declaration is historic and aspirational... While it is non-binding and does not affect existing Australian law, it sets important international principles for nations to aspire to... Australia’s existing obligations under international human rights treaties are mirrored in the Declaration’s fundamental principles... The Declaration needs to be considered in its totality—each provision as part of the whole... Through the Article on self-determination, the Declaration recognises the entitlement of Indigenous peoples to have control over their destiny and to be treated respectfully.<sup>29</sup>

Despite the growing jurisprudence on the Declaration, the Australian Government continues to assert that the Declaration is not legally binding on States because it does not hold the same legal status as an international covenant or treaty. Recognition and use of the Declaration across the Parliament and the bureaucracy has largely been dependent on individuals, rather than a co-ordinated policy approach or national standard.

28 *Supra* note 1, at article 43.

29 The Hon. Jenny Macklin, Minister for Families, Community Services and Indigenous Affairs, Statement regarding United Nations Declaration on the Rights of Indigenous Peoples (3 April 2009), <http://jennymacklin.fahcsia.gov.au/node/1711> (viewed 2 August 2013).

This has meant that where the participation of Aboriginal and Torres Strait Islander Peoples in the design, development, implementation and evaluation of laws and policies is encouraged in some sectors, in other sectors it is not. Consequently laws and policies that affect Aboriginal and Torres Strait Islander Peoples are not coordinated or strategically linked across sectors. In many instances policy responses are not culturally appropriate, or needs-based, and they are more often than not imposed on Aboriginal and Torres Strait Islander people and their communities as a blanket approach, rather than being implemented either in partnership with or by Aboriginal and Torres Strait Islander Peoples.

### *Aboriginal and Torres Strait Islander Peoples Self-determination and Governance*

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 Aboriginal and Torres Strait Islander Peoples to form and develop our own distinct institutions; determine our social, cultural, economic and political priorities; and fully participate in decisions that affect us.

Unfortunately, the right of self-determination for Aboriginal and Torres Strait Islander Peoples has long been contentious in Australia. Since colonisation, Australia has experienced waves of policy that undermine Aboriginal and Torres Strait Islander Peoples' rights to self-determination.

While Australian governments have on one hand supported institutional and community capacity building; on the other hand, they create policy or legislative arrangements that restrict the capacity of those institutions, organisations and communities. A number of examples reflect this.

With regard to Aboriginal and Torres Strait Islander autonomy and good governance within our own institutions, organisations and service providers, our national and state based peak bodies and our regional representative organisations play an important role in the

lives of Aboriginal and Torres Strait Islander Peoples. They provide a means of self-management, communication with Government, policy advice and service delivery on behalf of the communities they serve. Many of these organisations face the ongoing threat of abolition through policy reform and the withdrawal of funding support. These decisions are most often made by members of the bureaucracy in isolation of Aboriginal and Torres Strait Islander Peoples.

In 2009, a number of years after the governments' abolition of the ATSIC and in response to the *Our Future in Our Hands Report*,<sup>30</sup> the Australian Government committed \$29.2 million for the period 2010–2013, for the establishment and operation of a national representative body for Aboriginal and Torres Strait Islander Peoples, the National Congress of Australia's First Peoples (Congress).

The *Our Future in Our Hands Report* also recommended that in order to secure the future sustainability and independence of the Congress, the allocation of an Establishment Investment Fund would be necessary. Committing to the investment fund was the only recommendation from the *Our Future in Our Hands Report* that has not yet been adopted by the Australian Government. As demonstrated above, without this financial security, Congress is vulnerable to the withdrawal of government funding support, 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.

A further \$15 million over three years from 2014–15 was committed to Congress in the Australian Budget 2013–14 to “enable the Congress to effectively represent Aboriginal and Torres Strait Islander peoples and to provide a vehicle for engagement and consultation on

30 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. (Sydney: AHRC 2009), [http://humanrights.gov.au/social\\_justice/repbody/report2009/index.html](http://humanrights.gov.au/social_justice/repbody/report2009/index.html) (accessed 20 February 2013).

government policy and processes.”<sup>31</sup> However, a federal election was held in September 2013, and the newly elected government announced in late December 2013 that it was unlikely to honour this funding commitment.<sup>32</sup> Without this financial backing and the investment fund, the future of Congress is unclear.

As part of local government reforms in 2008, the Northern Territory Government amalgamated 60 Aboriginal Community Councils into eight ‘Super Shires’.<sup>33</sup> These Community Councils played a central role in communities that included advocacy and an interface with government, service delivery, and dispute resolution. Mick Gooda, the Aboriginal and Torres Strait Islander Social Justice Commissioner observes that:

The impact of the reforms has significantly diminished the capacity of communities to determine and address their specific needs. While the Community Council model was not working well in every context, Community Councils themselves had provided a vehicle through which communities balanced their particular community decision-making models with the structures required by government. In contrast, the establishment of the Shires removed the capacity for discrete Aboriginal communities to prioritise their own issues. Instead the Shires model has centralised decision-making regarding service delivery across many communities.<sup>34</sup>

In order for Aboriginal and Torres Strait Islander Peoples to be truly self-determining and to engage effectively with the broader societal

31 Australian Government, Budget 2013–14, Budget Paper No. 2, May 2013, [http://www.budget.gov.au/2013-14/content/bp2/html/bp2\\_expense-10.htm](http://www.budget.gov.au/2013-14/content/bp2/html/bp2_expense-10.htm) (accessed 10 January 2014).

32 The Australian, Aboriginal congress told funding will go, 19 December 2013, <http://www.theaustralian.com.au/national-affairs/policy/aboriginal-congress-told-funding-will-go/story-fn9hm1pm-1226786220338#> (accessed 10 January 2014).

33 Local Government Act, 2008 (NT).

34 Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Social Justice Report 2012, (Sydney: AHRC 2012), p. 126. Available at: <http://www.humanrights.gov.au/publications/social-justice-report-2012> (viewed 13 August 2013).

and political structures, the independence and economic sustainability of these organisations is critical. Unfortunately, many Aboriginal and Torres Strait Islander organisations are over-regulated, under-funded and under-resourced, and they face great uncertainty with regards to their future.

For example, while government funding is provided to the Aboriginal and Torres Strait Islander Legal Services (ATSILS) and the Family Violence Prevention Legal Services (FVPLS), this funding is insufficient to meet the need,<sup>35</sup> and the overrepresentation of Aboriginal and Torres Strait Islander People in prison has meant that clients facing incarceration are prioritised by ATSILS over other needs such as family or civil law issues;<sup>36</sup> and funding guidelines limit FVPLS programs to rural and remote locations, restricting service provision to urban areas.<sup>37</sup> Limited resources have also resulted in a reduced capacity for services such as those that provide preventative, early intervention and diversionary services as well as law and policy reform advice and advocacy. Despite this, the Australian Government, elected in September 2013, have confirmed that funding for Legal Policy Reform and Advocacy Funding, the program under which the ATSILS and FVPLS are funded, will be reduced by \$43.1m over a four year period.<sup>38</sup> This coupled with withdrawing funding from Congress

35 National Aboriginal and Torres Strait Islander Legal Services, Submission to the Expert Mechanism on the Rights of Indigenous Peoples: Access to Justice for Aboriginal and Torres Strait Islander peoples in Australia (2013), pp. 19–20., <http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/StudyAccessToJustice/NATSILS.pdf> (accessed 8 August 2013).

36 Melanie Schwartz & Chris Cuneen "Working Cheaper, Working Harder: Inequity in Funding for Aboriginal and Torres Strait Islander Legal Services" (2009) 7 *Indigenous Law Bulletin*, p. 4. <http://www.worldlii.org/au/journals/ILB/2009/4.html> (accessed 20 February 2013).

37 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 (New York: NCAFP 2013) pp. 35–36. At: <http://nationalcongress.com.au/wp-content/uploads/2013/07/20130220CongressEMRIPSubmissionAccess-to-Justice.pdf> (viewed 2 August 2013).

38 Australian Government, *Budget 2013–14*, Mid Year, Economic and Fiscal Outlook, December 2013, <http://www.budget.gov.au/2013-14/content/myefo/html/index.htm> (accessed 10 January 2014).

affects the ability of Aboriginal and Torres Strait Islander peoples to collectively advocate for policy and law reform, and to effectively promote the rights of Aboriginal and Torres Strait Islander peoples both domestically and internationally.

The ATSILS have also identified the “great need” for Aboriginal and Torres Strait Islander Peoples to be able to access highly trained interpreters, particularly where they are required to appear in Court, and have “little or no comprehension of what happens inside a court room.” This need is further exacerbated by the fact that approximately 11% of Aboriginal and Torres Strait Islander Peoples speak an Aboriginal or Torres Strait Islander language as their main language at home and this increases to 42% in many remote areas of Australia;<sup>39</sup> and that almost one in five or 19% of Aboriginal and Torres Strait Islander language speakers report that they do not speak English well.<sup>40</sup>

With regard to land justice, each State and Territory has some form of land rights and in response to the High Court’s *Mabo* decision in 1992,<sup>41</sup> the Australian Government with some input by Aboriginal and Torres Strait Islander Peoples enacted the *Native Title Act 1993* (Cth) (NTA). The NTA provides the federal legislative framework for recognising at common law, the effects of colonisation including dispossession, and the rights of Aboriginal and Torres Strait Islander Peoples to our lands, territories and resources.

The federal native title system provides one avenue for securing economic development opportunities through native title agreements concerning lands, territories and resources; and independent community governance through the establishment of Prescribed Bodies

39 Australian Bureau of Statistics, National Aboriginal and Torres Strait Islander Social Survey (2008) Australian Bureau of Statistics, as cited by National Aboriginal and Torres Strait Islander Legal Services, Submission to the Expert Mechanism on the Rights of Indigenous Peoples: Access to Justice for Aboriginal and Torres Strait Islander peoples in Australia (2013) p. 20, <http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/StudyAccessToJustice/NATSILS.pdf> (accessed 8 August 2013).

40 Australian Bureau of Statistics, Population Characteristics, Aboriginal and Torres Strait Islander Australians (2006), as cited by National Aboriginal and Torres Strait Islander Legal Services, Submission to the Expert Mechanism on the Rights of Indigenous Peoples: Access to Justice for Aboriginal and Torres Strait Islander peoples in Australia (2013) p. 21, <http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/StudyAccessToJustice/NATSILS.pdf> (accessed 8 August 2013).

41 *Mabo v Queensland* 1992 (No 2) 175 (C.L.R.), p. 1.



Corporate, set up to manage native title rights and interests. However, the adversarial nature of the native title system and the decisions of successive governments have resulted in the significant watering down of the land rights of Aboriginal and Torres Strait Islander Peoples.

Under the NTA, the burden of proof is currently on Aboriginal and Torres Strait Islander Peoples to prove a continuous connection to country; and 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.

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 Way Forward**

In order to facilitate access to justice across all areas that impact on the daily lives of Aboriginal and Torres Strait Islander Peoples, the historical barriers that hinder progress need to be addressed. This includes as a first step constitutional reform that recognises the unique place of Aboriginal and Torres Strait Islander Peoples as Australia’s First Peoples and which provides constitutional redress against laws that negatively affect Aboriginal and Torres Strait Islander Peoples which are racially discriminatory.

Relationships based on principles of justice, democracy, respect for human rights, non-discrimination and good faith must also be established between the State and Aboriginal and Torres Strait Islander Peoples. This is achieved by the State working with Aboriginal and Torres Strait Islander Peoples to ensure that policy and legislative structures empower, enable and facilitate access to justice as well as political, social, cultural and economic development.

*The United Nations Declaration on the Rights of Indigenous Peoples*

The Declaration provides the most comprehensive guide and a framework for facilitating access to justice broadly for Aboriginal and Torres Strait Islander Peoples across Australia and for Indigenous Peoples globally.

Using the Declaration as a framework and guide in the development of all policy and legislation affecting Aboriginal and Torres Strait Islander Peoples will ensure our full and effective participation in those processes; and will promote and protect our collective rights to develop and maintain our own customs, traditions, procedures and juridical systems and decision-making institutions.

*Targeting justice*

The current policy response designed to ‘close the gap’ in Indigenous disadvantage in Australia is the Coalition of Australian Governments (COAG)<sup>42</sup> *Closing the Gap* framework.<sup>43</sup> This response was driven by Aboriginal and Torres Strait Islander peak health organisations and non-governmental health organisations focused on addressing the life expectancy gap between Aboriginal and Torres Strait Islander Peoples and the general Australian population.<sup>44</sup>

COAG committed to closing this gap in November 2007 and in October 2008, they adopted the following six targets to support this:

42 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.

43 Australian Government, Department of Families, Housing, Community Services and Indigenous Affairs, *Closing the Gap, The Indigenous Reform Agenda*, (Canberra: AG, 2008), <http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/programs-services/closing-the-gap> (accessed 8 August 2013).

44 The Australian Bureau of Statistics estimates for 2009 show life expectancy for Indigenous Australians to be lower than the non-Indigenous population by approximately 11.5 years for males and 9.7 years for females. See Australian Government, Department of Families, Housing, Community Services and Indigenous Affairs, *Closing the Gap, the need to act*, <http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/programs-services/closing-the-gap/closing-the-gap-the-need-to-act> (accessed 8 August 2013).

- close the gap in life expectancy within a generation,
- halve the gap in mortality rates for Aboriginal and Torres Strait Islander children under five years old within a decade,
- ensure all Aboriginal and Torres Strait Islander 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 Aboriginal and Torres Strait Islander children within a decade,
- halve the gap in Aboriginal and Torres Strait Islander students in year 12 attainment or equivalent attainment rates by 2020, and
- halve the gap in employment outcomes between Aboriginal and Torres Strait Islander and non- Aboriginal and Torres Strait Islander Australians within a decade.<sup>45</sup>

This commitment is secured through the National Indigenous Reform Agreement (NIRA),<sup>46</sup> which commits all jurisdictions to achieving these targets. The NIRA also identifies 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

45 Australian Government, Department of Families, Housing, Community Services and Indigenous Affairs, Closing the Gap: Targets and building blocks (Canberra: AG, 2008), <http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/programs-services/closing-the-gap/closing-the-gap-targets-and-building-blocks> (accessed 8 August 2013).

46 Australian Government, Department of Families, Housing, Community Services and Indigenous Affairs, Closing the Gap: National Indigenous Reform Agreement, <http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/programs-services/closing-the-gap/closing-the-gap-national-indigenous-reform-agreement> (accessed 8 August 2013).

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.<sup>47</sup>

However, the Safe Communities ‘Building Block’ is not yet accompanied by agreed targets, funding or by explicit strategies and actions to achieve this target. It has been recommended that COAG consider the adoption of ‘justice-specific, Indigenous, closing-the-gap targets.’<sup>48</sup>

At the time of writing, the Australian Government was in caretaker mode for a forthcoming election. The Minister for Indigenous Affairs announced that the Australian Labor Party’s election platform includes a commitment to the inclusion of a justice target in the ‘Closing the Gap’ policy framework.<sup>49</sup>

The Steering Committee for the Review of Government Service Provision has also developed a series of ‘headline indicators,’ against which data is compiled for the Productivity Commission’s annual *Overcoming Indigenous Disadvantage* reports.<sup>50</sup> These include indicators in relation to family and community violence, adult imprisonment, youth detention, youth diversions and repeat offending. While this is a positive step in the right direction, these are simply indicators. A national commitment to achieving change is required.

47 Coalition of Australian Governments (COAG), National Indigenous Reform Agreement (Closing the Gap), ‘COAG Framework,’ (Canberra: COAG2012) Box 1: Building Blocks, p. 7., [http://www.federalfinancialrelations.gov.au/content/npa/health\\_indigenous/indigenous-reform/national-agreement\\_sept\\_12.pdf](http://www.federalfinancialrelations.gov.au/content/npa/health_indigenous/indigenous-reform/national-agreement_sept_12.pdf) (accessed 7 February 2013).

48 Standing Committee of Attorneys General, *Communique*, 21 & 22 July 2011 (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).

49 Australian Labor, Media Release, *Closing the Gap, Arnhem Land*, (9 August 2013), [http://www.alp.org.au/cm5\\_090813](http://www.alp.org.au/cm5_090813) (accessed 13 August 2013).

50 Australian Government, Productivity Commission, Overcoming Indigenous Disadvantage, <http://www.pc.gov.au/gsp/indigenous> (accessed 6 August 2013).

*Justice Reinvestment*

In addition to specific justice targets in the Closing the Gap policy and the Productivity Commissions indicators, justice reinvestment is being actively promoted as a model to reduce the overrepresentation of Aboriginal and Torres Strait Islander Peoples in the criminal justice system.

Developed, tried and tested in the United States of America, justice reinvestment is built on a foundation of effective participation and self-determination. There are dual objectives of justice reinvestment including easing the financial burden on society by reducing the cost of funding the justice system; and increasing social well-being by decreasing crime and improving community safety.<sup>51</sup> This approach:

- is designed to help reverse the high levels of Indigenous incarceration and 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, and
- recognises that standardised data collection, prevention, early intervention and diversion are essential to building safe communities and reducing over-representation of Indigenous people in the criminal justice system.<sup>52</sup>

Over \$2.6 billion is spent on adult imprisonment in Australia every year.<sup>53</sup> As Aboriginal and Torres Strait Islander prisoners make up about a quarter of the prison population, approximately \$650 million is spent on imprisonment of Aboriginal and Torres Strait Islander adults each year.

51 Tammy Solonec, The value of a Justice Reinvestment approach to criminal justice in Australia, Speech presented at 'Celebrating Mowanjum's Future', (Perth 10 August 2013), p. 7.

52 Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Social Justice Report 2009, (Sydney: AHRC, 2012) pp. 15–16., <http://www.humanrights.gov.au/publications/chapter-2-introduction-social-justice-report-2009> (viewed 13 August 2013).

53 Australian Institute of Criminology, Australian Crime: Facts and Figures 2008, (Canberra: AIC, 2008) p. 110., [http://www.aic.gov.au/documents/E/4/0/%7BE4031E6F-031D-415C-B544-8CE865A3CA0C%7Dfacts\\_and\\_figures\\_2008.pdf](http://www.aic.gov.au/documents/E/4/0/%7BE4031E6F-031D-415C-B544-8CE865A3CA0C%7Dfacts_and_figures_2008.pdf) (viewed 14 February 2013).

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.

These programs might include for example, specialist rehabilitation and prisoner through care programs, pre-release centres,<sup>54</sup> supervised bail programs including bail hostels and home detention schemes,<sup>55</sup> alcohol and drug rehabilitation centres<sup>56</sup> and youth services including drop-in centres. Alternative forms of dispute resolution that are provided by Aboriginal and Torres Strait Islander service providers are also critical in diverting people away from the courtroom to resolving disputes through mediation, conciliation, arbitration and transitional and restorative justice initiatives.<sup>57</sup>

A long-term investment into justice reinvestment initiatives would pose a major policy shift for Australia away from a punitive hard on crime approach towards a diversion, rehabilitation and smart on crime approach.

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.

As identified above, a challenge for Australia in implementing a justice reinvestment approach is our federal system of government, where law and order is the jurisdiction of states and territories. If

54 See for example the Boronia Pre-Release Centre for women, <http://www.correctiveservices.wa.gov.au/prisons/prison-locations/boronia.aspx> (accessed 13 August 2013).

55 Justice Action, *Jail at Windsor*, (Sydney: JA, 2000) <http://www.justiceaction.org.au/cms/component/k2/item/307-jail-at-windsor> (accessed 13 August 2013).

56 See for example the various alcohol and drug treatment information services outlined at [http://www.adin.com.au/content.asp?Document\\_ID=38](http://www.adin.com.au/content.asp?Document_ID=38), including the Alcohol, Education and Rehabilitation Foundation.

57 See the National Alternative Dispute Resolution Advisory Council at <http://www.nadrac.gov.au/> and in particular their report, *Indigenous Dispute Resolution and Conflict Management*, available at: <http://www.nadrac.gov.au/publications/PublicationsByDate/Pages/IndigenousDisputeResolutionandConflictManagement.aspx> (accessed 13 August 2013).

justice reinvestment is to be adopted nationally, it will require the leadership, agreement and cooperation of all states and territories and the federal Government. Alternatively, we will need to rely on state and territory governments to commit to this approach within their own jurisdictions.

On a positive note, the Australian Government is currently investigating justice reinvestment as an option for dealing with the substantial overrepresentation of Aboriginal and Torres Strait Islander Peoples in the justice system.<sup>58</sup>

## **Conclusion**

Access to justice for Aboriginal and Torres Strait Islander Peoples is complex and multidimensional. This article presents a number of core elements, which are necessary if we are to ‘close the gap’ in Aboriginal and Torres Strait Islander Peoples’ access to justice in Australia.

First and foremost, Aboriginal and Torres Strait Islander Peoples must be in control of our own destinies and must be supported to determine what that destiny looks like. As outlined clearly in the Declaration, Aboriginal and Torres Strait Islander Peoples must be able to exercise self-determination in order to successfully navigate our way through the western justice system that has been imposed on us, while maintaining our own cultural institutions that provide the legal and moral frameworks by which we live our daily lives.

Secondly, justice policy must be co-ordinated in order to ensure that Aboriginal and Torres Strait Islander Peoples are able to access justice in parity with the dominant resident population in Australia; and address the broad spectrum of related issues that affect Aboriginal and Torres Strait Islander Peoples’ ability to access justice.

The effect of historical barriers such as structures that promote and permit systemic racism against, and exclusion and control of Aboriginal and Torres Strait Islander Peoples cannot be underestimated in our

58 Senate Legal and Constitutional Affairs Committee, Value of a justice reinvestment approach to criminal justice in Australia, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=legcon\\_ctte/justice\\_reinvestment/index.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/justice_reinvestment/index.htm) (accessed 20 February 2013).

efforts to increase access to justice and must be addressed. National responses including the recognition of First Peoples in national constitutions provides a starting point for addressing some of these historical barriers and provides a point of reference for legislative and policy development into the future.

Contemporary policy responses, including a national policy framework on Aboriginal and Torres Strait Islander Peoples' access to law and justice, are also necessary mechanisms that provide guidance to governments and their bureaucracies aimed at achieving better outcomes. However, in order for them to make any significant impact, the design, development, implementation and evaluation of such mechanisms must take into account the diversity within communities and cultural considerations, requiring the full participation of those affected—Aboriginal and Torres Strait Islander Peoples and their representative organisations and institutions.

Thirdly, innovative long-term policy and legislative responses such as justice reinvestment, that put Aboriginal and Torres Strait Islander Peoples in the driver's seat of the development of community based and led solutions is the way forward. This is particularly urgent in addressing critical areas of access to justice such as incarceration.

Finally, it is important to understand the roles that each key stakeholder plays. Aboriginal and Torres Strait Islander Peoples and our organisations must take up the challenge and demand equal access to justice, and work with Governments to ensure that the proposed responses are appropriate. The Government's role is to facilitate access to justice for all Australians. As this applies to Aboriginal and Torres Strait Islander Peoples, the Declaration provides clear and extensive guidance to States in this regard.