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# The Value of a Justice Reinvestment Approach to Criminal Justice in Australia

Submission to the Senate Standing Committee on Legal and  
Constitutional Affairs

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## About the Human Rights Law Centre

The Human Rights Law Centre is an independent, non-profit, non-government organisation which protects and promotes human rights.

We contribute to the protection of human dignity, the alleviation of disadvantage, and the attainment of equality through a strategic combination of research, advocacy, litigation and education.

The HRLC is a registered charity and has been endorsed by the Australian Taxation Office as a public benefit institution. All donations are tax deductible.

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## Contents

1.	OVERVIEW AND RECOMMENDATIONS	1
2.	WHAT IS JUSTICE REINVESTMENT?	6
3.	A HUMAN RIGHTS FRAMEWORK	6
3.1	Relevance of Human Rights	6
3.2	Obligations in a Federal State	8
3.3	Value of a Human Rights Framework	8
4.	RELEVANT HUMAN RIGHTS OBLIGATIONS	9
4.1	Non-Discrimination and Equality	10
4.2	Progressive Realisation of Economic, Social and Cultural Rights	10
4.3	Liberty and Security of the Person	10
4.4	Humane Treatment in Detention	11
4.5	Promoting Rehabilitation	12
4.6	Right to a Fair Trial	12
4.7	Rights of the Child and Juvenile Offenders	13
4.8	Participation of Affected Groups	14
5.	IMPLEMENTING A JUSTICE REINVESTMENT APPROACH	14
5.1	Addressing Social and Economic Determinants of Crime	14
5.2	Policing Practices	17
5.3	Access to Justice	18
5.4	Sentencing and Diversion	18
5.5	Conditions in Detention	20
6.	DISPROPORTIONATE IMPACTS ON ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES	23
6.1	Unacceptably High Imprisonment Rates	23
6.2	Socio-Economic Status	24
6.3	Access to Justice	25
6.4	Policing Practices	26
6.5	Deaths in Custody	27

# 1. Overview and Recommendations

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1. The Human Rights Law Centre (**HRLC**) welcomes the inquiry by the Senate Standing Committee on Legal and Constitutional Affairs into the value of a justice reinvestment approach to criminal justice in Australia (**Inquiry**). Imprisonment rates in Australia are increasing, together with associated social and economic costs. The impacts of interaction with the criminal justice system also have a disproportionate impact on particular groups, including Aboriginal and Torres Strait Islander peoples, young people and people experiencing homelessness.
2. A justice reinvestment approach provides a valuable framework to prevent crime and promote community safety, reduce imprisonment rates, focus on diversionary measures and the promotion of rehabilitation within the criminal justice system, and deliver associated social and economic benefits for the broad community.
3. The principles of a justice reinvestment approach are therefore entirely compatible with respect for human rights and the Terms of Reference for this Inquiry raise issues that directly engage Australia's international human rights obligations. Indeed, in its recommendations to Australia in 2010, the UN Committee on the Elimination of Racial Discrimination specifically recommended that Australia “adopt a justice reinvestment strategy, continuing and increasing the use of Indigenous courts and conciliation mechanisms, diversionary and prevention programs and restorative justice strategies”.<sup>1</sup>
4. This submission does not address all of the Committee’s Terms of Reference. Rather, it focuses on how a human rights framework supports the adoption of a justice reinvestment approach by all Australian governments and, indeed, how a justice reinvestment approach would contribute to the protection and promotion of human rights and fulfilment of Australia’s international legal obligations. This submission:
  - (a) explains the relevance and benefits of a human rights approach to justice reinvestment;
  - (b) provides an overview of relevant human rights obligations;
  - (c) outlines relevant recommendations made by various UN human rights that relate to the implementation of a justice reinvestment approach in Australia; and
  - (d) considers, in particular, issues faced by Aboriginal and Torres Strait Islander peoples in their interaction with the criminal justice system.

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<sup>1</sup> UN Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/15-17 (2010), [20].

5. The HRLC strongly supports the adoption of a justice reinvestment approach to criminal justice in Australia and makes the following recommendations:

***Recommendation 1:***

That the Committee recognise the direct link between a justice reinvestment approach and respect for human rights and incorporate a human rights framework into its report on the Terms of Reference for this Inquiry.

***Recommendation 2:***

That in considering the implementation of a justice reinvestment approach in Australia and the scope for Federal Government action the Committee be guided by relevant human rights principles and standards and Australia's international legal obligations.

***Recommendation 3:***

That given the direct links between economic, social and cultural rights and the criminal justice system in Australia a justice reinvestment approach should contain a key focus on the protection and promotion of economic, social and cultural rights in order to addressing the underlying social and economic determinants of crime.

***Recommendation 4:***

That a justice reinvestment approach should promote the review of policing practices in states and territories around Australia in order to minimise and avoid arbitrary, unreasonable or discriminatory interaction with the criminal justice system, particularly for marginalised and vulnerable groups including Aboriginal and Torres Strait Islander peoples, young people and people experiencing mental illness.

**Recommendation 5:**

That a justice reinvestment approach should ensure that priority be given to adequate funding of legal aid commissions, community legal services and specialist legal services for Aboriginal and Torres Strait Islander peoples in order to ensure adequate legal representation for people who come into contact with the criminal justice system and to advocate for alternatives to imprisonment where appropriate.

**Recommendation 6:**

That a justice reinvestment approach should ensure that the criminal justice system places an emphasis on rehabilitation and diversion from prison, rather than a focus solely on punishment.

**Recommendation 7:**

Given the correlation between ill-treatment in detention and the increased likelihood of reoffending, a justice reinvestment approach should place an emphasis on promoting the humane treatment of people in detention, including adequate access to appropriate health care, and a focus on rehabilitation and reintegration into the community. This includes taking steps to ensure the independent monitoring and oversight of places of detention such as prisons and police cells, including by the ratification of the *Optional Protocol to the Convention against Torture or other Cruel, Inhuman or Degrading Treatment or Punishment*.

**Recommendation 8:**

That a justice reinvestment approach should contribute to appropriate steps being taken to reduce the imprisonment rates of Aboriginal and Torres Strait Islander peoples. This should be achieved by:

- (a) adding 'justice' as an additional national 'Closing the Gap' target;
- (b) reviewing sentencing legislation in all states and territories to ensure that it does not discriminate against or disproportionately impact on Aboriginal and Torres Strait Islander peoples (particularly the use of mandatory sentencing);
- (c) increasing the use of courts and conciliation mechanisms, diversionary, prevention programs and restorative justice that specifically focuses on the needs of Aboriginal and Torres Strait Islander peoples;
- (d) incorporating customary law into the criminal justice system, where appropriate, including by allowing for community dispute mechanisms; and
- (e) conducting an independent inquiry on the interaction of Aboriginal and Torres Strait Islander peoples with the criminal justice system, with a view to implementing strategies to reduce imprisonment rates.

**Recommendation 9:**

That a justice reinvestment approach should encourage the Federal Government, as well as state and territory governments, to work directly with Aboriginal and Torres Strait Islander communities in the design of "Closing the Gap" initiatives so that solutions are locally driven and controlled, thus providing pathways for self-determination and a higher chance of sustainability of outcomes.

**Recommendation 10:**

That a justice reinvestment approach should require all public service providers who have contact with Aboriginal and Torres Strait Islander peoples to undergo relevant cultural training and the review of all relevant policies to ensure culturally appropriate public service delivery to address socio-economic disadvantage.

***Recommendation 11:***

That a justice reinvestment approach should place greater emphasis on access to education and rehabilitative services in prison and on post-release programs and support for Aboriginal and Torres Strait Islander peoples, including in the areas of health care, housing and education.

***Recommendation 12:***

That a justice reinvestment approach should provide adequate resources to improve access to culturally appropriate legal assistance services and for the establishment and ongoing delivery of a national Aboriginal and Torres Strait Islander interpreter service. The Federal Government should also work with Aboriginal and Torres Strait Islander legal assistance providers to provide greater outreach services and improve the provision of access to justice information to Aboriginal and Torres Strait Islander peoples.

***Recommendation 13:***

That a justice reinvestment approach should encourage the Federal Government to convene meetings of all states and territory governments to agree on adopting legislation and policies to reduce discrimination against Aboriginal and Torres Strait Islander peoples in policing and the criminal justice system. In particular, all governments should require all police officers to regularly undergo training on their legal duties under anti-discrimination legislation and regularly undertake appropriate cross-cultural and anti-racism training.

***Recommendation 14:***

That a justice reinvestment approach should revisit the recommendations of the Royal Commission into Aboriginal Deaths in Custody in 1991 and, in consultation with Aboriginal and Torres Strait Islander communities, identify the unimplemented recommendations which remain relevant and commence a program of implementation.



## 2. What is Justice Reinvestment?

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6. At its core, the concept of justice reinvestment involves re-directing government money spent on prisons towards community-based initiatives aimed at addressing the underlying causes of crime. A justice reinvestment approach is based on the notion that:
- (a) prison populations are increasing, largely as a result of tougher 'law and order' policies adopted by governments;<sup>2</sup>
  - (b) prison is an ineffective, harmful and expensive way to combat crime; and
  - (c) research indicates that early intervention programs targeting at-risk children and youth, providing stable housing and employment opportunities and court sentencing programs that address the underlying causes of crime are effective and efficient ways to prevent crime and reduce re-offending.<sup>3</sup>
7. In addition to reducing crime, a justice reinvestment approach can address the disadvantage and inequality that promotes crime and has significant economic benefits by obviating the need for significant government prison spending.

## 3. A Human Rights Framework

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### 3.1 Relevance of Human Rights

8. Human rights are fundamental rights and freedoms that are recognised as belonging to everyone in the community. Of particular relevance to this Inquiry, individuals who come into contact with the criminal justice system are highly likely to experience multiple characteristics of severe disadvantage. A brief snapshot of prisoners in Australia indicates that:
- (a) Aboriginal and Torres Strait Islander peoples are 15 times more likely to be in prison than other Australians and comprise just over a quarter (27%) of the total prisoner population;<sup>4</sup>

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<sup>2</sup> For example the Victorian Department of Justice stated in its 2010-11 Annual Report at page 30 that "Sentencing reform – such as the abolition of home detention and suspended sentences, as well as the proposed mandatory minimum sentencing for certain serious offences – is expected to be the main driver of growth in prison bed demand.

<sup>3</sup> For an excellent overview of what is justice reinvestment, see *Smart Justice Fact Sheet*, "Justice reinvestment: investing in communities not prisons", 16 April 2012, available at [http://www.smartjustice.org.au/cb\\_pages/files/SMART\\_Reinvestment.pdf](http://www.smartjustice.org.au/cb_pages/files/SMART_Reinvestment.pdf).

<sup>4</sup> Australian Bureau of Statistics, *Prisoners in Australia 2012*, 4517.0 (2013), 8.

- (b) imprisonment of Aboriginal and Torres Strait Islander peoples is increasing at a substantially faster rate than that of non-Indigenous people (77% compared with 18% from 2002 to 2012);<sup>5</sup>
- (c) female imprisonment is increasing at a faster rate than males (between 2002 and 2012, the number of male prisoners increased 29% and the number of female prisoners increased by 48%);<sup>6</sup>
- (d) the majority of prisoners (55%) have been in prison before;<sup>7</sup>
- (e) 50% of the Victorian prison population had two or more characteristics of serious disadvantage including being of Aboriginal or Torres Strait Islander descent, being unemployed, lack of education, having an intellectual disability, having drug or alcohol issues, having previously been admitted to a psychiatric institution or being homeless;<sup>8</sup>
- (f) only 6.5% of male and 18% of female Victorian prisoners completed secondary, trade or tertiary education;<sup>9</sup>
- (g) around one in every five prisoners in Australia suffers from serious mental illness.<sup>10</sup> There is both a causal and consequential link between imprisonment and mental illness; people with mental illness are more likely to be incarcerated, particularly having regard to the lack of support provided by the poorly resourced community mental health sector, and people in prison are more likely to develop mental health problems, with prisons not being conducive to good mental health;
- (h) people with acquired brain injury (**ABI**) are substantially overrepresented in the prison population with a recent study finding 42% of male prisoners and 33% of female prisoners in Victoria have an ABI;<sup>11</sup>
- (i) prisoners often face major health issues including high rates of injecting drug use and high rates of sexually transmitted disease;<sup>12</sup>
- (j) 69% of male and 49% of female Victorian prisoners were unemployed when they were imprisoned;<sup>13</sup> and

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<sup>5</sup> Ibid, 16.

<sup>6</sup> Ibid, 8.

<sup>7</sup> Ibid, 8, 16.

<sup>8</sup> Department of Premier and Cabinet, *Growing Victoria Together Progress Report, 2005-06* (2006), 358-359.

<sup>9</sup> Department of Justice, *Statistical Profile of the Victorian Prison System 2005-06 to 2009-10* (2010), 37.

<sup>10</sup> J P R Ogloff et al, 'The Identification of Mental Disorders in the Criminal Justice System', Australian Institute of Criminology, March 2007.

<sup>11</sup> Department of Justice, *Acquired Brain Injury in the Victorian Prison System* (2011), 6.

<sup>12</sup> Australian Institute of Health and Welfare, *Australia's Health 2006* (2006) 249.

(k) 87% of female prisoners in Victoria were victims of sexual, physical or emotional abuse, with the majority being victims of multiple forms of abuse.<sup>14</sup>

9. Human rights are also particularly relevant to conditions of people held in detention and to the promotion of prisoner rehabilitation and reintegration back into the community.

10. Accordingly, respect for and promoting the realisation of human rights – in addressing the underlying causes of interaction with the criminal justice system, in relation to treatment while in detention, and also in promoting rehabilitation and reintegration into the community – is central to any measures relating to the criminal justice system and a justice reinvestment approach.

### 3.2 Obligations in a Federal State

11. The international human rights framework makes it clear that both federal and state authorities have responsibilities in relation to the realisation of human rights. In particular, article 50 of the ICCPR expressly provides that, in federations such as Australia, the obligations of the Covenant are binding on the federation as a whole and must extend across all parts of that federation, without any limitations or exceptions. This means that, in Australia, all branches of government (legislative, executive and judicial) and other public or governmental authorities, at whatever level – national, state or local – must act to respect, protect and fulfil human rights.<sup>15</sup> This obligation provides the Federal Government with an opportunity – as well as an obligation and imperative – to take greater steps to ensure the protection of human rights within the criminal justice system and to encourage the adoption of justice reinvestment strategies by all Australian governments.

### 3.3 Value of a Human Rights Framework

12. The experience in comparative jurisdictions, such as the United Kingdom, Canada and New Zealand, is that a human rights approach to the development by governments of laws and policies can have significant positive impacts. Some of the benefits of using a human rights approach include:

(a) enhanced scrutiny, transparency and accountability in government;

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<sup>13</sup> Department of Justice, *Statistical Profile of the Victorian Prison System 2005-06 to 2009-10* (2010), 38.

<sup>14</sup> Johnson, *Drugs and Crime: A Study of Incarcerated Female Offenders*, Australian Institute of Criminology (2004), xiv.

<sup>15</sup> UN Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add13 (2004), [4]. See also art 27 of the Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), which provides that a state party “may not invoke the provisions of its internal law as justification for its failure to perform a treaty”.

- (b) more participatory and empowering policy development processes and more individualised, flexible and responsive public services;
  - (c) better public service outcomes and increased levels of ‘consumer’ satisfaction; and
  - (d) “new thinking”, as the core human rights principles of dignity, equality, respect, fairness and autonomy help decision-makers “see seemingly intractable problems in a new light”.<sup>16</sup>
13. There is strong evidence that the language and ideas of rights can be used to secure positive changes not only to individual circumstances, but also to policies and procedures resulting in systemic change. Ensuring a human rights approach to the current Inquiry will assist to develop recommendations that promote community safety, reduce crime and reoffending, guarantee the effective administration of justice and ensure that all individuals have the opportunity to participate in the community on an equal basis.

**Recommendation 1:**

That the Committee recognise the direct link between a justice reinvestment approach and respect for human rights and incorporate a human rights framework into its report on the Terms of Reference for this Inquiry.

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## 4. Relevant Human Rights Obligations

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14. Australia is a party to a number of international human rights treaties which create legal obligations to protect and promote the rights enshrined in those treaties. These obligations arise under the International Covenant on Civil and Political Rights (**ICCPR**), International Covenant on Economic, Social and Cultural Rights (**ICESCR**), International Convention on the Elimination of All Forms of Racial Discrimination (**CERD**), Convention on the Elimination of All Forms of Discrimination against Women (**CEDAW**), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**), Convention on the Rights of the Child (**CRC**), and the Convention on the Rights of Persons with Disabilities (**CRPD**). This section outlines the human rights that are most relevant to the terms of this Inquiry.

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<sup>16</sup> See, generally, Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (July 2006); British Institute of Human Rights, *The Human Rights Act: Changing Lives* (2007); Audit Commission (UK), *Human Rights: Improving Public Service Delivery* (October 2003).

#### 4.1 Non-Discrimination and Equality

15. The rights to non-discrimination and substantive equality are fundamental components of human rights law that are entrenched in a wide range of human rights treaties.<sup>17</sup>

Non-discrimination and equality constitute basic and general principles relating to the protection of all human rights.<sup>18</sup>

16. As discussed further below, many criminal laws have a disproportionate effect on particular groups and raise concerns regarding discrimination. Enacting laws and promoting policies that effectively address discrimination and promote equality is central to the Australian Government's fulfilment of its international human rights obligations.

#### 4.2 Progressive Realisation of Economic, Social and Cultural Rights

17. As identified above, as a group prisoners are highly likely to have experienced serious disadvantage. Measures to address the underlying causes of crimes must therefore promote the progressive realisation of economic, social and cultural rights, including the right to an adequate standard of living, the right to education, the right to work and the right to the highest attainable standard of physical and mental health.

#### 4.3 Liberty and Security of the Person

18. Freedom from arbitrary detention and the right to liberty and security of person is enshrined in article 9 of the ICCPR. The right broadly encompasses the rights of persons:

- (a) to liberty and security;
- (b) not to be arbitrarily arrested or detained;
- (c) not to be deprived of liberty except in accordance with law;
- (d) to be informed of the reasons for being arrested and of any proceedings to be brought against them; and
- (e) to promptly be brought before a court and brought to trial.

19. Detention must always be a measure of last resort and be the least restrictive option to achieve the objective sought. This principle is particularly important in a justice reinvestment context where an emphasis should be placed on diverting people away from the criminal justice system. Mandatory sentencing laws, for example, clearly raise concerns with the right

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<sup>17</sup> See, for example, arts 2 and 26 of the ICCPR; art 2 of ICESCR; art 2 of CEDAW; arts 2 and 5 of CERD; art 5 of the CRPD.

<sup>18</sup> UN Human Rights Committee, *General Comment No. 18: Non-discrimination (Thirty-seventh session, 1989)*, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.6 (2003) at 146.

to be free from arbitrary detention where imprisonment can be imposed for the most trivial of offences and are counter to the value of a justice reinvestment approach.

#### 4.4 Humane Treatment in Detention

20. The right to be treated humanely when deprived of liberty is protected in article 10 of the ICCPR. The right applies to anyone deprived of liberty under the laws and authority of the state, which includes prisons, police cells and youth detention facilities.<sup>19</sup> The right relates largely to conditions of detention and breaches of article 10 have been found in cases where prisoners are denied adequate bedding, food, exercise or medical attention; are exposed to unsanitary food/water and/or living conditions; physical abuse; extended periods of isolation; overcrowding; lack of educational opportunities, work or reading materials; and physical, psychological and verbal abuse.<sup>20</sup>
21. Article 10 of the ICCPR also complements the prohibition against torture or other cruel, inhuman or degrading treatment or punishment contained in article 7 of the ICCPR and also in CAT. The purpose of article 7, according to the UN Human Rights Committee, is to “protect both the physical and mental integrity ... and the dignity of the individual”.<sup>21</sup> Article 7 therefore prohibits “not only ... acts that cause physical pain but also ... acts that cause mental suffering to the victim”.<sup>22</sup> The Committee has also stated that ‘what constitutes inhuman or degrading treatment falling within the meaning of article 7 depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim’.<sup>23</sup>
22. The right to be free from cruel, inhuman or degrading treatment also extends to a duty to prevent, investigate and punish ill-treatment in detention. In this respect, independent monitoring and oversight of places of detention plays an important role in preventing ill-treating and is an essential element in ensuring respect for articles 7 and 10 of the ICCPR and the CAT.

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<sup>19</sup> UN Human Rights Committee, *General Comment No 21 (Replaces General Comment 9) concerning Humane Treatment of Persons Deprived of Liberty* (1992), [2].

<sup>20</sup> See, eg, *Robinson v Jamaica*, HRC, Communication No 731/1996, UN Doc CCPR/C/68/D/731/1996 (2000); *Sextus v Trinidad and Tobago*, HRC, Communication No 818/1998, UN Doc CCPR/C/72/D/818/1998 (2001); *Lantsova v Russian Federation*, HRC, Communication No 763/1997, UN Doc CCPR/C/74/D/763/1997 (2002); *Freemantle v Jamaica*, HRC, Communication No 625/1995, UN Doc CCPR/C/68/D/625/1995 (2000).

<sup>21</sup> UN Human Rights Committee, *General Comment No 20: Replaces General Comment 7 concerning Prohibition of Torture and Cruel Treatment or Punishment* (2001) [1]–[2].

<sup>22</sup> *Ibid* [2].

<sup>23</sup> *Ibid* [9.2]. See also *Ireland v United Kingdom* (1979-80) 2 EHRR 25, [162].

#### 4.5 Promoting Rehabilitation

23. Article 10(3) of the ICCPR states that the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. The UN Human Rights Committee has emphasised that every corrections system must seek to realise that aim and must not be “only retributory”.<sup>24</sup>
24. There is evidence that prison may increase the likelihood of people reoffending after release. As a community, we therefore have a vested interest in ensuring that conditions of prison are humane and promote rehabilitation and reintegration into society. This right is therefore a key aspect of a justice reinvestment approach.

#### 4.6 Right to a Fair Trial

25. The right to a fair trial, or a fair hearing, is enshrined in article 14 of the ICCPR and applies to persons charged with criminal offences as well as to civil proceedings. The concept of a fair hearing contains many elements and the standards against which a hearing is to be assessed in terms of fairness are interconnected.
26. In the context of criminal proceedings, article 14 relevantly includes the rights:
- (a) to have enough time and facilities to prepare a defence and to communicate with a lawyer;
  - (b) in certain circumstances, to have legal aid provided; and
  - (c) if necessary, to have the free assistance of an interpreter, assistants and communication tools and technology.
27. The right to a fair trial and the broader notion of access to justice is essential to ensure the proper administration of justice. The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way.<sup>25</sup> Adequate funding of legal aid and community legal centres plays a central role in ensuring access to the administration of justice and guaranteeing that no individual is deprived of their right to claim justice.

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<sup>24</sup> Ibid [10].

<sup>25</sup> UN Human Rights Committee, *General Comment No 32: Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc CCPR/C/GC/32 (2007), [10].

#### 4.7 Rights of the Child and Juvenile Offenders

28. There are also a number of rights that protect children in the criminal process which are enshrined in the ICCPR as well as the CRC. In relation to a fair trial, article 14(4) of the ICCPR provides that in the case of juveniles the procedure must take account of their age and promote their rehabilitation. Rights of children in the criminal process also include:
- (a) the right of a child who is detained to be segregated from adults in detention;
  - (b) the right of an accused child to be brought to trial as quickly as possible (which goes beyond the requirement of 'a reasonable time' as required in respect of adults);<sup>26</sup> and
  - (c) the right of a child who has been convicted to be treated in a way appropriate to their age.
29. A number of other international instruments are also relevant to children in the criminal process, including:
- (a) the United Nations Rules for the Protection of Juveniles Deprived of their Liberty;<sup>27</sup>
  - (b) the United Nations Standard Minimum Rules for the Administration of Juvenile Justice;<sup>28</sup> and
  - (c) the United Nations Guidelines for the Prevention of Juvenile Delinquency.<sup>29</sup>
30. In relation to Australia, the UN Human Rights Committee in 2009 expressed concern at "the notable gaps in the protection of children and juveniles in the criminal justice system, and that children and juvenile can be detained in adult facilities" and recommended that Australia "ensure that children in conflict with the law, including those in detention, are treated in consistence with the Covenant and the UN Rules for the Protection of Juveniles Deprived of their Liberty."<sup>30</sup>

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<sup>26</sup> See, eg, *Perovic v CW* (Unreported, ACT Children's Court, Magistrate Somes, 1 June 2006) available at <http://acthra.anu.edu.au/cases/case.php?id=49>.

<sup>27</sup> Adopted by General Assembly resolution 45/113 of 14 December 1990, available at [http://www.ohchr.org/english/law/res45\\_113.htm](http://www.ohchr.org/english/law/res45_113.htm).

<sup>28</sup> Adopted by General Assembly resolution 40/33 of 29 November 1985, available at <http://www.ohchr.org/english/law/beijingrules.htm>.

<sup>29</sup> Adopted and proclaimed by General Assembly resolution 45/112 of 14 December 1990, available at <http://www.ohchr.org/english/law/juvenile.htm>.

<sup>30</sup> UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, UN Doc CCPR/C/AUS/CO/5 (2009), [24].



## 4.8 Participation of Affected Groups

31. Particularly given the disproportionate impacts of the criminal justice system on Aboriginal and Torres Strait Islander peoples (as discussed further below), it is essential that Aboriginal and Torres Strait Islander peoples participate directly in the design and implementation of measures designed to address over-incarceration and the impacts of the criminal justice system. Meaningful participation is consistent with the right of self determination enshrined in article 1 of both the ICCPR and ICESCR. Policies targeted at addressing socio-economic disadvantage and reducing crime will only be effective if Aboriginal and Torres Strait Islander peoples are directly involved in their design and implementation.

### **Recommendation 2:**

That in considering the implementation of a justice reinvestment approach in Australia and the scope for Federal Government action the Committee be guided by relevant human rights principles and standards and Australia's international legal obligations.

## 5. Implementing a Justice Reinvestment Approach

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32. This section identifies specific recommendations made by various UN human rights bodies relating to a justice reinvestment approach and which are required for Australia to comply with international human rights obligations. Based on concerns raised by these international bodies, it is clear that Australia's criminal justice system is currently incompatible with international human rights standards. Addressing these issues will support a justice reinvestment approach as it will contribute to crime prevention and a lower prison population.

### 5.1 Addressing Social and Economic Determinants of Crime

33. Recommendations by various UN human rights bodies have identified on concerns with the protection and realisation of economic, social and cultural rights in Australia. As identified below, many of these recommendations have also drawn direct links between the enjoyment of economic, social and cultural rights and interactions with the criminal justice system in Australia.

**(a) Health and Mental Health Services**

34. In 2009, the UN Special Rapporteur on the right to the highest attainable standard of health undertook a Country Visit to Australia. During his visit, the Special Rapporteur focused on the health of people in prison and the standard of living and quality of health care and health services for Aboriginal and Torres Strait Islander peoples, among other issues. In his report released in June 2010, the Special Rapporteur made a number of recommendations, including that Australia:
- (a) develop a national health policy which includes a detailed plan for the full realisation of the right to health;
  - (b) increase engagement with community health providers by prisons, which would improve continuity of care and facilitate reintegration into the community;
  - (c) increase resource allocation for diagnosis, treatment and prevention of mental illnesses within prisons;
  - (d) assess and invest in the primary health care sector throughout the prison system; and
  - (e) undertake research regarding Aboriginal and Torres Strait Islander incarceration issues as a matter of urgency.
35. Mental health services are significantly under-resourced in Australia and there are widespread problems with access to care, quality of care and adequate accommodation for people requiring mental health services. In 2009, Australia was reviewed for its compliance with ICESCR, with the Committee noting its concern with “the insufficient support for persons with mental health problems, as well as the difficult access to mental health services, in particular for Aboriginal and Torres Strait Islander peoples, prisoners and asylum seekers in detention”. In this regard, the Committee recommended that Australia:
- (a) allocate adequate resources for mental health services and other support measures for persons with mental health problems in line with the United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care;
  - (b) implement the recommendations of the Australian Medical Association’s 2008 report on Aboriginal and Torres Strait Islander health;
  - (c) reduce the high rate of incarceration of people with mental diseases; and
  - (d) ensure that all prisoners receive an adequate and appropriate mental health treatment when needed.

**(b) Education**

36. A number of groups in Australia confront significant barriers to education and do not have equal access to educational opportunities, including children with disability, Aboriginal and Torres Strait Islander children, children from low income families, and children from rural and remote areas. Particularly given the extremely low completion rate of secondary, trade or tertiary education by people who end up in the criminal justice system, it is essential that all Australian governments adopt strategies and invest more significantly in education for disadvantaged groups.
37. In 2009, the Committee on Economic, Social and Cultural Rights specifically expressed its concern with the disparities in access to the educational system for Aboriginal and Torres Strait Islander peoples.<sup>31</sup>

**(c) Employment**

38. While unemployment remains relatively low in Australia, there are some communities who face significant barriers to workforce participation, in particular Aboriginal and Torres Strait Islander peoples and people with disability. In 2009, the Committee on Economic, Social and Cultural Rights recommended that Australia adopt special programmes and measures to address the significant barriers to the enjoyment of the right to work faced by many Aboriginal and Torres Strait Islander peoples, asylum seekers, migrants and people with disabilities.<sup>32</sup>

**(d) Poverty and Homelessness**

39. In 2009, the Committee on Economic, Social and Cultural Rights recommended that Australia take all necessary measures to combat poverty and social exclusion and develop a comprehensive poverty reduction and social inclusion strategy. The Committee noted with concern that “despite the State party’s economic prosperity, 12 per cent of the Australian population lives in poverty, and poverty rates remain very high among disadvantaged and marginalized individuals and groups such as indigenous peoples, asylum seekers, migrants and persons with disabilities”.<sup>33</sup> The Committee also recommended that Australia take effective measures to address homelessness and implement the recommendations of the Special Rapporteur on the Right to Adequate Housing contained in the report of his mission to Australia in 2006.<sup>34</sup>

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<sup>31</sup> Ibid [31].

<sup>32</sup> UN Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/AUS/CO/4 (2009), [18].

<sup>33</sup> Ibid [24].

<sup>34</sup> Ibid [26].

**Recommendation 3:**

That given the direct links between economic, social and cultural rights and the criminal justice system in Australia a justice reinvestment approach should contain a key focus on the protection and promotion of economic, social and cultural rights in order to addressing the underlying social and economic determinants of crime.

## 5.2 Policing Practices

40. Many policing practices around Australia raise concerns in relation to the right to non-discrimination and equality before the law, the right to a fair trial and, in many instances, freedom from arbitrary detention. Failure to respect human rights in a policing context can often result in arbitrary, unreasonable or discriminatory interaction with the criminal justice system and therefore be counter-productive to promoting community safety and lower crime in the long term. Unnecessary or unwarranted interaction with the criminal justice system is inconsistent with a justice reinvestment approach.
41. Many disadvantaged and vulnerable groups experience being targeted by law enforcement officials. For example, in the Northern Territory, a significant proportion of policing targets Aboriginal and Torres Strait Islander peoples for minor offences. During 2005-2006, there were a total of 476 prison sentences handed down for driving offences, with 467 of those sentenced (98 per cent) being Aboriginal and Torres Strait Islander peoples.<sup>35</sup>
42. Other marginalised groups are also disproportionately targeted by police, including:
  - (a) homeless people, against whom police often inappropriately use move-on powers;<sup>36</sup>
  - (b) young African refugees, including reports about police brutality, harassment and racism;<sup>37</sup> and
  - (c) young people, particularly young homeless people.<sup>38</sup>
43. Many of these practises raise concerns in relation to Article 9 of the ICCPR, as well as the right of non-discrimination.

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<sup>35</sup> Northern Territory Department of Justice, *Correctional Services Annual Statistics – 2005-2006* (2006), available at [http://www.nt.gov.au/justice/policycoord/documents/statistics/20061127\\_ntcs\\_stat\\_summary.pdf](http://www.nt.gov.au/justice/policycoord/documents/statistics/20061127_ntcs_stat_summary.pdf).

<sup>36</sup> Monica Taylor and Tamara Walsh (ed), *Nowhere to Go: The Impact of Police Move-on Powers on Homeless People in Queensland* (2006) 72 available at [http://www.qpilch.org.au/\\_dbase\\_upl/Nowhere%20To%20Go.pdf](http://www.qpilch.org.au/_dbase_upl/Nowhere%20To%20Go.pdf).

<sup>37</sup> Liz Porter, 'Police Accused of Race Attacks on Africans', *The Age* (Melbourne), 30 September 2007, available at <http://www.theage.com.au/news/national/police-accused-of-race-attacks-on-africans/2007/09/29/1190486635545.html>.

<sup>38</sup> *Australia's Homeless Youth* (2008) National Youth Commission chapter 18, available at [http://www.nyc.net.au/files/Australias\\_Homeless\\_Youth.pdf](http://www.nyc.net.au/files/Australias_Homeless_Youth.pdf).

**Recommendation 4:**

That a justice reinvestment approach should promote the review of policing practices in states and territories around Australia in order to minimise and avoid arbitrary, unreasonable or discriminatory interaction with the criminal justice system, particularly for marginalised and vulnerable groups including Aboriginal and Torres Strait Islander peoples, young people and people experiencing mental illness.

### 5.3 Access to Justice

44. Access to justice is an essential aspect of both the right to a fair hearing and the right to equality before the law. In Australia, funding for legal aid commissions, community legal services and specialist legal services for Aboriginal and Torres Strait Islander peoples is inadequate. Indeed, in 2009 the UN Human Rights Committee noted with concern “the lack of adequate access to justice for marginalized and disadvantaged groups” and recommended that Australia “take effective measures to ensure equality in access to justice”.<sup>39</sup>

**Recommendation 5:**

That a justice reinvestment approach should ensure that priority be given to adequate funding of legal aid commissions, community legal services and specialist legal services for Aboriginal and Torres Strait Islander peoples in order to ensure adequate legal representation for people who come into contact with the criminal justice system and to advocate for alternatives to imprisonment where appropriate.

### 5.4 Sentencing and Diversion

45. Consistent with the principle that detention must be a measure of last resort, criminal laws must be reviewed to ensure that there is an emphasis on rehabilitation and diversion from prison, rather than a focus solely on punishment. This is particularly the case for minor offences and ones which disproportionately impact on particular groups, such as Aboriginal and Torres Strait Islander peoples, people experiencing homelessness and young people.

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<sup>39</sup> UN Human Rights Committee, *Concluding Observations on Australia* (2009), [25].

46. Where a pattern of sentencing reveals that certain groups are more likely to receive the harshest penalties, sentencing is discriminatory. The discriminatory impact of particular laws, such as stop and search powers and mandatory sentencing in Western Australia, raises concerns with a number of human rights. Particularly in light of the known characteristics of severe disadvantage that are likely to lead to increase interaction with the criminal justice system, it is important that laws, policies and practices are reviewed to ensure that such interaction is not arbitrary, unnecessary or discriminatory.

**(a) Stop and Search Powers**

47. There are concerns about the disproportionate impact on particular groups of legislation introduced in many states and territories as part of a commitment towards “tackling the growing incidences of drunkenness, disorderly behaviour and violence”.<sup>40</sup> Such legislation significantly extends the coercive powers available to police to search and apprehend individuals including, in some instances, without any need for suspicion on reasonable grounds regarding the commission of an offence. The legislation has had a disproportionate effect and impact on young people, Aboriginal and Torres Strait Islander peoples, homeless and mentally ill individuals. Police in the field regularly exercise their discretion to arrest persons accused of minor offences when other more appropriate alternatives that do not compromise a person’s liberty are available.

**(b) Mandatory Sentencing**

48. The operation of mandatory sentencing provisions in Western Australia has a particular impact on Aboriginal and Torres Strait Islander peoples, particularly young people.<sup>41</sup> Mandatory sentencing laws limit judicial discretion in sentencing and prevent courts from taking account of the cultural background and responsibilities of offenders, and the economic and social difficulties that they face. The CAT Committee has recommended that mandatory sentencing be abolished “due to its disproportionate and discriminatory impact on the indigenous population”.<sup>42</sup>

49. The arbitrary nature of mandatory sentencing laws is also compounded by some aspects of police practices. The exercise of police and prosecutorial discretion effectively determines whether or not an offender is subject to a period of imprisonment.

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<sup>40</sup> See, for example, the *Summary Offences and Control of Weapons Acts Amendments Act 2009 (Vic)*.

<sup>41</sup> Australian Bureau of Statistics, *Prisoners in Australia*, ABS Catalogue No 4517.0 (2007), available at [http://www.abs.gov.au/Ausstats/ABS@.nsf/Latestproducts/4517.0Main\\_Features22007?opendocument&tabname=Summary&prodno=4517.0&issue=2007&num=&view](http://www.abs.gov.au/Ausstats/ABS@.nsf/Latestproducts/4517.0Main_Features22007?opendocument&tabname=Summary&prodno=4517.0&issue=2007&num=&view) .

<sup>42</sup> UN Committee against Torture, *Concluding Observations of the Committee against Torture: Australia*, UN Doc CAT/C/AUS/CO/3 (2008), [23].

50. The disproportionate effect of mandatory sentencing is reflected in the incarceration statistics in Western Australia, where Aboriginal and Torres Strait Islander peoples are 21 times more likely to be in prison.<sup>43</sup> Young Aboriginal and Torres Strait Islander peoples, who are a small fraction of the total youth population of Western Australia, constitute three quarters of those sentenced in mandatory sentencing cases. The UN Committee on the Rights of the Child expressed its concern about the over-representation of Indigenous children in the juvenile justice system.<sup>44</sup>

**Recommendation 6:**

That a justice reinvestment approach should ensure that the criminal justice system places an emphasis on rehabilitation and diversion from prison, rather than a focus solely on punishment.

## 5.5 Conditions in Detention

51. Unacceptable conditions in detention, including lack of access to adequate health care and overcrowding, raise serious human rights concerns in Australia. In Victoria, for example, the Ombudsman has described some prisons as “not fit for human habitation due to the age, condition, lack of basic facilities or a combination of all these factors”.<sup>45</sup>
52. Evidence demonstrates that harsher prison conditions over the course of a sentence “do not generate a greater deterrent effect, and ... such conditions may lead to more violent reoffending”.<sup>46</sup> From a justice reinvestment perspective, harsh prison conditions are therefore not only ineffective but also counter-productive because exposing someone to prison doesn’t reduce reoffending and may in fact increase it.<sup>47</sup> Two major issues relating to conditions of detention in Australia’s prisons are inadequate access to health care, particularly mental health care, and overcrowding.

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<sup>43</sup> Australian Bureau of Statistics, *Prisoners in Australia*, 2007.

<sup>44</sup> See UN Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Australia*, UN Doc CRC/C/15/Add.268 (2005), [73]-[74].

<sup>45</sup> Ombudsman Victoria, *Twenty-Ninth Report of the Ombudsman* (2002), 32. See further Ombudsman Victoria, *Conditions for Persons in Custody: Report of Ombudsman Victoria and Office of Police Integrity* (2006), available at [http://www.ombudsman.vic.gov.au/resources/documents/Conditions\\_for\\_persons\\_in\\_custody.pdf](http://www.ombudsman.vic.gov.au/resources/documents/Conditions_for_persons_in_custody.pdf).

<sup>46</sup> Sentencing Advisory Council, *Does Imprisonment Deter? A Review of the Evidence* (2011), 22.

<sup>47</sup> *Ibid.* See also, Lulham, Weatherburn & Bartels “The recidivism of offenders given suspended sentences: A comparison with full-time imprisonment” (2009) NSW Bureau of Crime and Justice Statistics, 10.

**(a) Inadequate Access to Adequate Health Care**

53. As identified earlier, prisoners as a group experience social and psychological disadvantage and the links between imprisonment and mental illness are well established. There is substantial evidence from across Australia that access to adequate mental health care in prisons is manifestly inadequate, that the mentally ill in prison are often 'managed' by segregation, and that such confinement – often for very long periods – can seriously exacerbate mental illness and cause significant psychological harm.<sup>48</sup>
54. Following his visit to Australia in 2009, the UN Special Rapporteur on the right to the highest attainable standard of health, Mr Anand Grover, made the following specific recommendations relating to health services in prisons:
- (a) increase engagement with community health providers by prisons, which would improve continuity of care and facilitate reintegration into the community;
  - (b) increase resource allocation for diagnosis, treatment and prevention of mental illnesses within prisons;
  - (c) assess and invest in the primary health care sector throughout the prison system; and
  - (d) undertake research regarding Aboriginal and Torres Strait Islander incarceration issues as a matter of urgency.
55. Similar recommendations were also made by the Committee on Economic, Social and Cultural Rights in 2009,<sup>49</sup> as well as the CAT Committee in 2008 which made recommendations relating to the insufficient provision of mental health care in prisons and mentally ill inmates being subject to excessive use of solitary confinement. Reports have also emerged from the Northern Territory about the increase in intellectually disabled and mentally ill people who remain incarcerated due to lack of appropriate care facilities.

**(b) Overcrowding**

56. Overcrowding is also a real problem in many Australian prisons. In its recent Concluding Observations on Australia, the Committee against Torture expressed concern about overcrowding in prisons, particularly in Western Australia, and recommended that the Australian Government undertake measures to reduce overcrowding, including consideration of non-custodial forms of detention.<sup>50</sup> The most effective and cost-efficient way to reduce overcrowding and obviate the need for more prisons to be built is to reduce crime and reoffending.

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<sup>48</sup> See, for example, Forensicare (Victorian Institute of Forensic Mental Health), *Submission to Senate Select Committee on Mental Health*, May 2005, 4, 5, 19 & 20.

<sup>49</sup> UN Committee on Economic, Social and Cultural Rights, *Concluding Observations on Australia*, [29].

<sup>50</sup> Committee against Torture, *Concluding Observations of the Committee against Torture: Australia*, [23], UN Doc CAT/C/AUS/CO/1 (2008).



**(c) Independent Monitoring and Oversight of Places of Detention**

57. Mechanisms for investigation and inspection of places of detention by independent bodies are essential to ensure the effective prohibition of and protection against torture and other forms of ill-treatment. A comprehensive system of inspection and investigation is required *in addition to* a complaints-based system in order to adequately protect the human rights of persons deprived of their liberty.
58. Particularly given the links between ill-treatment in detention and the risks of reoffending, preventing ill-treatment in detention is particularly important and relevant to a justice reinvestment approach. However, the mechanisms for the inspection of detention facilities throughout Australia are not well developed and, where such procedures do exist, many of these mechanisms lack proper independence. The Human Rights Council, through the Universal Periodic Review, called on Australia to ensure the humane treatment of prisoners and the ratification of the *Optional Protocol to the Convention against Torture or other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT) on the treatment of prisoners.<sup>51</sup>

**Recommendation 7:**

Given the correlation between ill-treatment in detention and the increased likelihood of reoffending, a justice reinvestment approach should place an emphasis on promoting the humane treatment of people in detention, including adequate access to appropriate health care, and a focus on rehabilitation and reintegration into the community. This includes taking steps to ensure the independent monitoring and oversight of places of detention such as prisons and police cells, including by the ratification of the *Optional Protocol to the Convention against Torture or other Cruel, Inhuman or Degrading Treatment or Punishment*.

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<sup>51</sup> See UN Human Rights Council, *Universal Periodic Review of Australia* (2011), recommendations at 86.1, 86.2, 86.3, 86.4, 86.5, 86.6 and 86.71.

## 6. Disproportionate Impacts on Aboriginal and Torres Strait Islander Peoples

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59. Many Aboriginal and Torres Strait Islander peoples in Australia confront serious human rights issues in the criminal justice system. A justice reinvestment approach would deliver significant benefits for Aboriginal and Torres Strait Islander peoples.

### 6.1 Unacceptably High Imprisonment Rates

60. Aboriginal and Torres Strait Islander peoples in Australia are among the most incarcerated people in the world. The national rate of imprisonment of Aboriginal and Torres Strait Islander peoples is 15 times higher than the rate for non-Indigenous Australians. Aboriginal and Torres Strait Islander children between 10 and 14 years of age are 30 times more likely to be incarcerated than their non-Indigenous peers. Aboriginal and Torres Strait Islander women are almost 20 times more likely to be incarcerated than non-Indigenous women.<sup>52</sup>

61. The high imprisonment rates of Aboriginal and Torres Strait Islander peoples have been the subject of repeated recommendations by a number of UN human rights bodies, including the UN Human Rights Committee, Committee on Economic, Social and Cultural Rights and even the Committee against Torture. In its 2010 Concluding Observations, the Committee on the Elimination of Racial Discrimination recommended that Australia “dedicate sufficient resources to address the social and economic factors underpinning Indigenous contact with the criminal justice system” and specifically encouraged Australia to “adopt a justice reinvestment strategy, continuing and increasing the use of Indigenous courts and conciliation mechanisms, diversionary and prevention programs and restorative justice strategies”.<sup>53</sup>

62. The Committee also highlighted the need for Australian governments to:

- (a) consult with Aboriginal and Torres Strait Islander communities;
- (b) take immediate steps to review the recommendations of the Royal Commission into Aboriginal Deaths in Custody, identifying those which remain relevant with a view to their implementation; and
- (c) ensure the provision of adequate health care to prisoners.<sup>54</sup>

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<sup>52</sup> See generally, Australian Bureau of Statistics, *Prisoners in Australia 2006* (2006) which reveals that prison numbers across Australia increased by 42% between 1996 and 2006 and that Aboriginal people constitute 24% of the prison population compared with approximately 2% of the general population.

<sup>53</sup> UN Committee on the Elimination of Racial Discrimination, *Concluding Observations on Australia*, [20].

<sup>54</sup> *Ibid.*

**Recommendation 8:**

That a justice reinvestment approach should contribute to appropriate steps being taken to reduce the imprisonment rates of Aboriginal and Torres Strait Islander peoples. This should be achieved by:

- (a) adding 'justice' as an additional national 'Closing the Gap' target;
- (b) reviewing sentencing legislation in all states and territories to ensure that it does not discriminate against or disproportionately impact on Aboriginal and Torres Strait Islander peoples (particularly the use of mandatory sentencing);
- (c) increasing the use of courts and conciliation mechanisms, diversionary, prevention programs and restorative justice that specifically focuses on the needs of Aboriginal and Torres Strait Islander peoples;
- (d) incorporating customary law into the criminal justice system, where appropriate, including by allowing for community dispute mechanisms; and
- (e) conducting an independent inquiry on the interaction of Aboriginal and Torres Strait Islander peoples with the criminal justice system, with a view to implementing strategies to reduce imprisonment rates.

## 6.2 Socio-Economic Status

63. The inequality faced by Aboriginal and Torres Strait Islander peoples in all aspects of life in Australia is staggering. In all social indicators, Aboriginal and Torres Strait Islander peoples rate as among the most disadvantaged peoples in Australia. Aboriginal and Torres Strait Islander peoples rate far worse in education, employment, health, standard of living and incidence of family violence. They are also grossly over-represented in the child protection and criminal justice systems.
64. In 2010, CERD reiterated its "serious concern about the continued discrimination faced by Indigenous Australians in the enjoyment of their economic, social and cultural rights" and recommended that Australia "ensure that resources allocated to eradicate socio-economic disparities are sufficient and sustainable" and that "all initiatives and programmes in this regard ... seek to reduce Indigenous socio-economic disadvantage while advancing Indigenous self-empowerment"<sup>55</sup>

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<sup>55</sup> Ibid 22.

65. The Australian Government's current response to the levels of disadvantage faced by Aboriginal and Torres Strait Islander peoples has been the "Closing the Gap" strategy. Due to lack of consultation with Aboriginal and Torres Strait Islander communities, ill-conceived program design and ineffective execution, to date the strategy has resulted in little change on the ground for Aboriginal and Torres Strait Islander peoples.

**Recommendation 9:**

That a justice reinvestment approach should encourage the Federal Government, as well as state and territory governments, to work directly with Aboriginal and Torres Strait Islander communities in the design of "Closing the Gap" initiatives so that solutions are locally driven and controlled, thus providing pathways for self-determination and a higher chance of sustainability of outcomes.

**Recommendation 10:**

That a justice reinvestment approach should require all public service providers who have contact with Aboriginal and Torres Strait Islander peoples to undergo relevant cultural training and the review of all relevant policies to ensure culturally appropriate public service delivery to address socio-economic disadvantage.

**Recommendation 11:**

That a justice reinvestment approach should place greater emphasis on access to education and rehabilitative services in prison and on post-release programs and support for Aboriginal and Torres Strait Islander peoples, including in the areas of health care, housing and education.

### 6.3 Access to Justice

66. Many Aboriginal and Torres Strait Islander peoples confront serious obstacles to access and participate meaningfully in the justice system, which are compounded by limited access to legal and interpretive services. Reductions in funding have occurred despite Australian parliamentary and governmental inquiries into this problem and recommendations to increase funding to specialist Aboriginal services and to work collaboratively with service providers and Aboriginal communities to ensure that funding is appropriate and strategically directed.<sup>56</sup>

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<sup>56</sup> See Australian Human Rights Commission, *Statistical Overview of Aboriginal and Torres Strait Islander Peoples in Australia* (2006), available at [http://www.hreoc.gov.au/social\\_justice/statistics/index.html](http://www.hreoc.gov.au/social_justice/statistics/index.html); Attorney-

67. The CERD Committee has encouraged the Australian Government to increase funding for Aboriginal legal aid in real terms to reflect “the essential role that professional and culturally appropriate Indigenous legal and interpretive services play within the criminal justice system”.<sup>57</sup> During the UPR, a recommendation was made to Australia that the provision of legal advice and translation services to Indigenous people, especially Aboriginal and Torres Strait Islander peoples in remote communities, should be increased.<sup>58</sup>

**Recommendation 12:**

That a justice reinvestment approach should provide adequate resources to improve access to culturally appropriate legal assistance services and for the establishment and ongoing delivery of a national Aboriginal and Torres Strait Islander interpreter service. The Federal Government should also work with Aboriginal and Torres Strait Islander legal assistance providers to provide greater outreach services and improve the provision of access to justice information to Aboriginal and Torres Strait Islander peoples.

## 6.4 Policing Practices

68. The factors contributing to high levels of imprisonment for Aboriginal peoples are varied and complex.<sup>59</sup> Part of the reason for over-representation is the way in which Aboriginal and Torres Strait Islander peoples are policed, which suggests institutional discrimination against Aboriginal and Torres Strait Islander peoples. One survey showed that 23.4% of Aboriginal and Torres Strait Islander peoples reported experiencing race-based discrimination by police, compared with 6.1% of people from Anglo-Celtic and non-Anglo/Celtic background.<sup>60</sup> The lack of appropriate non-custodial sentencing options in rural and remote areas, particularly in the

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General's Department, Australian Government, *A Strategic Framework for Access to Justice in the Federal Civil Justice System: Report by the Access to Justice Taskforce*, (September 2009); Senate Legal and Constitutional References Committee, *Legal Aid and Access to Justice* (June 2004), recommendations 27 and 26-27. Inadequate funding persisted despite Senate Inquiries in 2003-4 and 2009 recommending urgent increases in funding to specialist services. The Government has not implemented the recommendations set out in the Federal Attorney-General's *Strategic Framework for Access to Justice in the Federal Justice System*.

<sup>57</sup> UN Committee on the Elimination of Racial Discrimination, *Concluding Observations on Australia*, [19].

<sup>58</sup> See UN Human Rights Council, *Universal Periodic Review of Australia*, recommendation 86.92.

<sup>59</sup> See Australian Human Rights Commission, *Social Justice Report 2009*, [2.3] – [2.4] available at [http://www.hreoc.gov.au/social\\_justice/sj\\_report/sjreport09/chap2.html#s2\\_4](http://www.hreoc.gov.au/social_justice/sj_report/sjreport09/chap2.html#s2_4).

<sup>60</sup> See discussion of Gallaher Survey, in Vic Health, *Building on Our Strengths: A Framework to Reduce Race-based Discrimination and Support Diversity in Victoria* (December 2009) page 31, available at <http://www.vichealth.vic.gov.au/Resource-Centre/Publications-and-Resources.aspx>

Northern Territory,<sup>61</sup> coupled with the disproportionate impact of certain criminal laws to Aboriginal peoples have further compounded the high rates of Aboriginal peoples' incarceration.

**Recommendation 13:**

That a justice reinvestment approach should encourage the Federal Government to convene meetings of all states and territory governments to agree on adopting legislation and policies to reduce discrimination against Aboriginal and Torres Strait Islander peoples in policing and the criminal justice system. In particular, all governments should require all police officers to regularly undergo training on their legal duties under anti-discrimination legislation and regularly undertake appropriate cross-cultural and anti-racism training.

## 6.5 Deaths in Custody

69. The death of Aboriginal and Torres Strait Islander peoples in custody continues to be of serious concern despite recommendations of the Royal Commission into Aboriginal Deaths in Custody 20 years ago.<sup>62</sup> The Royal Commission made 339 recommendations relating to improvements in the criminal justice system and reducing the number of Aboriginal peoples in the Australian prison system. Its principal thrust was directed towards the elimination of disadvantage and the empowerment of Aboriginal peoples. However, many of the recommendations have never been implemented.

**Recommendation 14:**

That a justice reinvestment approach should revisit the recommendations of the Royal Commission into Aboriginal Deaths in Custody in 1991 and, in consultation with Aboriginal and Torres Strait Islander communities, identify the unimplemented recommendations which remain relevant and commence a program of implementation.

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<sup>61</sup> See Northern Territory Department of Justice, *Correctional Services Annual Statistics – 2008-2009* (2009), 4, available at <http://www.nt.gov.au/justice/policycoord/researchstats/index.shtml>; Evidence to House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, 6 May 2010 (Magistrate Oliver), available at <http://www.aph.gov.au/hansard/reps/commttee/R12981.pdf>

<sup>62</sup> Commonwealth of Australia, Royal Commission on Aboriginal Deaths in Custody, *National Report* (1991) vol 1-5.