**DISCUSSION PAPER SUBMISSION: INCARCERATION RATES OF ABORIGINAL AND**

**TORRES STRAIT ISLANDER PEOPLES**

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*I gratefully acknowledge the Dharug, Kuringgai, and Ngarigo Peoples, on whose lands the research for this submission was undertaken, and pay my respects to their Elders — past, present, and future. I also wish to thank the Australian Law Reform Commission for the opportunity to present this submission, in response to the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples, Discussion Paper No 84 (July 2017).*

I INTRODUCTION

Disproportionate incarceration of minority Indigenous Peoples is a prevalent trend in prisons around the world.[[1]](#footnote-1) While the United Nations (‘UN’) Permanent Forum on Indigenous Issues estimates Indigenous Peoples make up five per cent of the global population,[[2]](#footnote-2) prison populations in some countries are comprised of well over 85 per cent Indigenous detainees.[[3]](#footnote-3) In the United States (‘US’), for example, Native American First Nations Peoples are imprisoned at one and a half times the rate of white Americans;[[4]](#footnote-4) in Canada, First Nations, Inuit, and Métis Peoples are incarcerated at approximately ten times the rate of non-Indigenous people;[[5]](#footnote-5) and, here in Australia, Aboriginal and Torres Strait Islander adults are imprisoned at more than 13 times the rate of non-Indigenous adults.[[6]](#footnote-6)

From the tabling of the Royal Commission into Aboriginal Death in Custody’s (‘RCIADIC’) *National Report* in the Australian Parliament over 25 years ago, to contemporary scholarly literature, the positive impact of Indigenous Peoples’ self-determination on reducing disproportionate incarceration is well established. As recently as 2013, the UN Expert Mechanism on the Rights of Indigenous Peoples again emphasised the crucial importance of self-determination in helping to address overrepresentation of Indigenous Peoples in prisons across the globe.[[7]](#footnote-7) I am, therefore, concerned that the material assembled in the Australian Law Reform Commission’s (‘ALRC’) Discussion Paper on *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* contains no references to — and little substantive consideration of — the right of Aboriginal and Torres Strait Islander Peoples to self-determination. As such, I respectfully submit the ALRC has not yet comprehensively addressed its mandate under the Commonwealth Attorney-General’s ‘Indigenous Incarceration Inquiry: Terms of Reference’; in particular, to consider ‘relevant international human rights standards and instruments’.[[8]](#footnote-8) This includes the right of Aboriginal and Torres Strait Islander Peoples — and indeed, all peoples — to self-determination.

‘Punishment by imprisonment represents perhaps the antithesis of what is required by self-determination’.[[9]](#footnote-9) Yet in 2016, 2346 per 100 000 Aboriginal and Torres Strait Islander adults were incarcerated in Australian prisons,[[10]](#footnote-10) compared with a general population incarceration rate of 151 per 100 000[[11]](#footnote-11) — a two-fold increase since the ‘grossly disproportionate’[[12]](#footnote-12) incarceration of Aboriginal and Torres Strait Islander Peoples was first identified by the RCIADIC over 25 years ago.[[13]](#footnote-13) I offer this submission to highlight the imperative of Indigenous Peoples’ self-determination for mitigating the overrepresentation of Aboriginal and Torres Strait Islander Peoples in Australia’s prisons; not only because self-determination is a tenet of international human rights law relevant to the ALRC’s current inquiry,[[14]](#footnote-14) but because ‘[g]lobal evidence suggests that stronger futures for Aboriginal people will require more self-determination’.[[15]](#footnote-15)

II SELF-DETERMINATION AND INDIGENOUS PEOPLES

Self-determination is a human right, which attaches to a culturally and politically distinctive group of people, as a group. Self-determination protects people groups, by ensuring their political participation, and their control over their own economic, social, and cultural activities. The *Charter of the United Nations*,[[16]](#footnote-16) as well as two foundational human rights treaties of the 20th century to which Australia is party — the *International Covenant on Civil and Political Rights*, and the *International Covenant on Economic, Social and Cultural Rights* — clearly establish the inalienable right of all peoples to ‘determine their political status and freely pursue their economic, social and cultural development’.[[17]](#footnote-17) Two further international human rights standards — the *United Nations Declaration on the Rights of Indigenous Peoples* (‘*UNDRIP*’),[[18]](#footnote-18) and the International Labour Organization’s *Indigenous and Tribal Peoples Convention 1989* (‘*ILO 169*’)[[19]](#footnote-19) — confirm Indigenous Peoples possess the right of self-determination.[[20]](#footnote-20)

For decades, Indigenous Peoples have been calling on national governments to respect their right of self-determination. Contemporary research, international best practice, and international legal principles concur lack of self-determination represents a key underlying cause across a broad spectrum of critical Indigenous issues; including the ‘grossly disproportionate’[[21]](#footnote-21) incarceration of Aboriginal and Torres Strait Islander Peoples in Australia’s prisons. In Australia alone, almost every Commonwealth-funded inquiry into the situation of Aboriginal and Torres Strait Islander Peoples in recent decades has resonated with self-determination as a non-negotiable ingredient for any sustainable future progress.[[22]](#footnote-22)

III THE ASSOCIATION BETWEEN INDIGENOUS PEOPLES’ SELF-DETERMINATION AND INCARCERATION RATES

I have recently completed a year-long research project into the association between incarceration rates of Indigenous Peoples in OECD countries, and the legal interfaces in place between Indigenous Peoples and national governments. This paper is currently being revised for publication, and supports the findings of contemporary international scholarship and best practice which show mitigating overrepresentation of Indigenous Peoples in prisons demands governments recognise and respect the right of Indigenous Peoples to self-determination. I provide here a very succinct overview of my methodology and some relevant findings, in the hope these will be of assistance to the ALRC in fulfilling its mandate to have regard to ‘existing data and research in relation to … best practice laws, [and] legal frameworks that reduce the rate of Aboriginal and Torres Strait Islander incarceration’.[[23]](#footnote-23)

A *Methodology*

My research examines the situation of Indigenous Peoples in member nations of the Organization for Economic Cooperation and Development (‘OECD’).[[24]](#footnote-24) Of the 35 member countries currently comprising the OECD, reports from international bodies, government entities, and non-government organisations establish at least 18 of these countries have self-identifying Indigenous Peoples within their territorial borders. My research attributes a score to each of these countries, based on the degree to which the national legal framework recognises and respects the right of Indigenous Peoples to self-determination. These scores are then compared with national Indigenous incarceration rates in order to analyse the association between the two factors.

It is important to note that the elements of national legal frameworks examined for the purposes of this research were identified using the rich body of literature produced by Indigenous Peoples regarding the right of self-determination, supplemented with Country Reports from the UN Special Rapporteur on the Rights of Indigenous Peoples, and a range of government and non-government sources.[[25]](#footnote-25) Indicators examined include (but are not limited to) support for the *UNDRIP*, ratification of *ILO 169,* constitutional recognition, reserved seats for Indigenous representatives in national governments, treaties, and Indigenous Peoples’ self-government.

B *Findings*

My research demonstrates overrepresentation of Indigenous Peoples in prisons occurs in almost half of OECD countries examined, with Aboriginal and Torres Strait Islander Peoples experiencing the third highest recorded level of disproportionate Indigenous incarceration in the OECD. Australia also exhibits a below average ‘self-determination score’ for Aboriginal and Torres Strait Islander Peoples when compared with other OECD countries — and, a significantly lower score when compared with other ‘CANZUS’ countries (that is, Canada, New Zealand, and the United States).

Based on the data from the OECD, countries which have incorporated greater degrees of Indigenous Peoples’ self-determination into their national legal framework exhibit a reduced likelihood of disproportionate Indigenous incarceration. Overall, my findings support and highlight the long-understood principle that for Indigenous Peoples, ‘the starting point for access to justice at every level is directly related to, dependent upon, and connected to the right to self-determination’.[[26]](#footnote-26) In the context of its current inquiry, therefore, I urge the ALRC to emphasise the critical importance of Aboriginal and Torres Strait Islander Peoples’ self-determination — not only because it is one of Australia’s key obligations under international human rights law, but also because it is a non-negotiable foundation for mitigating the profound overrepresentation currently experienced by Aboriginal and Torres Strait Islander adults and children in Australia’s criminal justice system.[[27]](#footnote-27)

IV CONCLUSION

In October 1987,[[28]](#footnote-28) James Henry Muirhead was appointed to examine the extraordinary number of Aboriginal and Torres Strait Islander people dying ‘whilst in police custody, in prison, or in any other place of detention’.[[29]](#footnote-29) Following its three-year investigation, the RCIADIC found ‘Aboriginal people in custody are more likely to die than others in custody … because the Aboriginal population is grossly over-represented in custody’.[[30]](#footnote-30) Tabling the findings in Parliament, Senator the Hon Peter Cook (then Federal Minister for Industrial Relations) noted that of the 339 recommendations made, one principle ‘looms large as central to change for Aboriginal people … self-determination’.[[31]](#footnote-31)

When greater degrees of Indigenous Peoples’ self-determination are woven into a country’s national legal framework, Indigenous Peoples are less likely to be overrepresented in prisons. The Australian Government cannot continue to lament the causes of this ‘national tragedy’,[[32]](#footnote-32) when unwillingness to recognise and respect Indigenous Peoples’ right of self-determination has been demonstrated as a key underlying cause for over 25 years. The evidence clearly shows that self-determination of Aboriginal and Torres Strait Islander Peoples must be the foundation — and compass — of any progress toward addressing Australia’s disproportionate Indigenous incarceration rates. I would like to conclude by drawing the ALRC’s attention to the recent Uluru Statement from the Heart:

Makarrata is the culmination of our agenda: *the coming together after a struggle*. It captures our aspirations for a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination.[[33]](#footnote-33)

1. \* The author of this submission is a graduate of Macquarie Law School (LLB, Hons I). This submission is based on legal research undertaken by the author between 2016 and 2017, on the association between Indigenous Peoples’ self-determination and Indigenous incarceration rates in OECD countries. The full findings of this research are currently being revised for publication. This submission has been drafted to be as succinct as possible, in accordance with the submission instructions on the Australian Law Reform Commission website; please contact the author using the details provided in the online submission form if further information is required.

   Commission on Human Rights, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen*, 60th sess, Agenda Item 15, UN Doc E/CN.4/2004/80 (26 January 2004) paras 23–32, 38–40; Expert Mechanism on the Rights of Indigenous Peoples, *Access to Justice in the Promotion and Protection of the Rights of Indigenous Peoples*, 6th sess, Agenda Item 5, UN Doc A/HRC/EMRIP/2013/2 (29 April 2013) paras 41, 43. [↑](#footnote-ref-1)
2. Secretariat of the United Nations Permanent Forum on Indigenous Issues, ‘State of the World’s Indigenous Peoples’ (Media Release, 14 January 2010) 1. [↑](#footnote-ref-2)
3. See, eg, Human Rights Council, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: The Situation of Kanak People in New Caledonia, France*, 18th sess, Agenda Item 3, UN Doc A/HRC/18/35/Add.6 (14 September 2011) para 49. [↑](#footnote-ref-3)
4. Executive Office of the President of the United States, ‘Economic Perspectives on Incarceration and the Criminal Justice System’ (Report, April 2016) 29. [↑](#footnote-ref-4)
5. Office of the Correctional Investigator, ‘Aboriginal Offenders — A Critical Situation’ (Background Report, Government of Canada, 16 September 2013) <http://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20121022info-eng.aspx>. [↑](#footnote-ref-5)
6. Steering Committee for the Review of Government Service Provision, ‘Overcoming Indigenous Disadvantage Key Indicators 2016’ (Commonwealth of Australia, 2016) 4.110; Expert Mechanism on the Rights of Indigenous Peoples, *Access to Justice in the Promotion and Protection of the Rights of Indigenous Peoples*, above n 1, para 43. [↑](#footnote-ref-6)
7. Expert Mechanism on the Rights of Indigenous Peoples, *Access to Justice in the Promotion and Protection of the Rights of Indigenous Peoples*, above n 1, 19–22. [↑](#footnote-ref-7)
8. Commonwealth Attorney-General, ‘Indigenous Incarceration Inquiry: Terms of Reference’ (December 2017) para 4. [↑](#footnote-ref-8)
9. Richard Edney, ‘Self-Determination and Aboriginal Imprisonment’ in *Best Practice Interventions in Corrections for Indigenous People Conference* (Australian Institute of Criminology, 2001) 7. [↑](#footnote-ref-9)
10. Australian Bureau of Statistics, ‘Prisoners in Australia, 2016’ (Report No 4517.0, Australian Bureau of Statistics, 8 December 2016). [↑](#footnote-ref-10)
11. Roy Walmsley, ‘World Prison Population List’ (11th ed, Institute for Criminal Policy Research, October 2015). See also Keith Hamburger et al, ‘A Safer Northern Territory Through Correctional Interventions’ (Report of the Review of the Northern Territory Department of Correctional Services, BDO, Perth/Knowledge Consulting, 31 July 2016) 46. [↑](#footnote-ref-11)
12. Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 1, preface. [↑](#footnote-ref-12)
13. Ibid vol 1, 1.3.3. [↑](#footnote-ref-13)
14. See, eg, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘*ICCPR*’) art 1; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976) (‘*ICESCR*’) art 1. See also Human Rights Committee, *CCPR General Comment No 12: Article 1 (Right to Self-Determination) The Right to Self-Determination of Peoples*, 21st sess, UN Doc HRI/GEN/1/Rev.9/Vol.1 (13 March 1984) para 2. [↑](#footnote-ref-14)
15. Jon Altman, ‘Arguing the Intervention’ (2007) 14 *Journal of Indigenous Policy* 140. [↑](#footnote-ref-15)
16. *Charter of the United Nations* art 1(2). [↑](#footnote-ref-16)
17. *ICCPR* art 1; *ICESCR* art 1. See also Human Rights Committee, *General Comment No 12*, above n 14, para 2. [↑](#footnote-ref-17)
18. GA Res 61/295, UN GAOR, 62st sess, 107th plen mtg, Supp No 49, UN Doc A/Res/61/295 (13 September 2007) art 3. [↑](#footnote-ref-18)
19. See, eg, arts 1(2), 2, 22(3), 23(1). [↑](#footnote-ref-19)
20. Thalia Anthony, *Indigenous People, Crime and Punishment* (Routledge, 2013) 19. [↑](#footnote-ref-20)
21. RCIADIC, above n 12, vol 1, preface. [↑](#footnote-ref-21)
22. See, eg, RCIADIC, above n 12; Human Rights and Equal Opportunity Commission, ‘Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families’ (Report, Commonwealth of Australia, 1997) 14; Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, ‘Ampe Akelyernemane Meke Mekarle: “Little Children Are Sacred”’ (Northern Territory Government, 2007) 273–4. See also ‘Uluru Statement from the Heart’ (26 May 2017) <https://www.referendumcouncil.org.au/sites/default/files/201705/  
    Uluru\_Statement\_From\_The\_Heart\_0.PDF>. [↑](#footnote-ref-22)
23. Commonwealth Attorney-General, above n 8, para 2(a). [↑](#footnote-ref-23)
24. Resource constraints demanded I confine my research to English language primary sources. [↑](#footnote-ref-24)
25. See, eg, Megan Davis and Marcia Langton (eds), *It’s Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform* (Melbourne University Press, 2016); Marcia Langton et al (eds), *Settling with Indigenous People* (Federation Press, 2006); Irene Watson, *Raw Law: Aboriginal Peoples, Colonialism and International Law* (Routledge, 2015); Sheryl Lightfoot, *Global Indigenous Politics: A Subtle Revolution* (Routledge, 2016); Sarah Maddison and Morgan Brigg (eds), *Unsettling the Settler State: Creativity and Resistance in Indigenous Settler-State Governance* (Federation Press, 2011); Sarah Maddison, *Black Politics: Inside the Complexity of Aboriginal Political Culture* (Allen & Unwin, 2009); Walter R Echo-Hawk, *In the Light of Justice: The Rise of Human Rights in Native America* (Fulcrum, 2013); Leo van der Vlist (ed), *Voices of the Earth: Indigenous Peoples, New Partners and the Right to Self-Determination in Practice* (The Netherlands Centre for Indigenous Peoples, 1994); Commission on Human Rights, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen: Mission to Mexico*, UN ESCOR, 60th sess, Agenda Item 15, UN Doc E/CN.4/2004/80/Add.2 (23 December 2003) Addendum; Human Rights Council, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: The Situation of the Sami People in the Sápmi Region of Norway, Sweden and Finland*, UN ESCOR, 18th sess, Agenda Item 3, UN Doc A/HRC/18/35/Add.2 (6 June 2011). [↑](#footnote-ref-25)
26. Wilton Littlechild and Elsa Stamatopoulou (eds), Indigenous Peoples’ Access to Justice, Including Truth and Reconciliation Processes (Institute for the Study of Human Rights, Colombia University, 2014) 5. [↑](#footnote-ref-26)
27. See, eg, ‘Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families’, above n 22, 14; Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, above n 22, 273–4; RCIADIC; see also ‘Uluru Statement from the Heart’, above n 22. [↑](#footnote-ref-27)
28. Chris Cunneen, ‘The Royal Commission into Aboriginal Deaths in Custody: An Overview of Its Establishment, Findings and Outcomes’ (Monitoring and Reporting, Aboriginal and Torres Strait Islander Commission, 1997) 2; Commonwealth, *Parliamentary Debates*, Senate, 9 May 1991, 3075 (Peter Cook). [↑](#footnote-ref-28)
29. National Archives of Australia, ‘Aboriginal Deaths in Custody: The Royal Commission and Its Records, 1987–91’ (Australian Government, 16 October 1987) Appendix 1 <http://guides.naa.gov.au/aboriginal-deaths-in-custody/appendixes/1.aspx>. [↑](#footnote-ref-29)
30. RCIADIC, above n 12, vol 1, 1.3.3. [↑](#footnote-ref-30)
31. Ibid vol 2, ch 20; Commonwealth, *Parliamentary Debates*, Senate, 9 May 1991, 3075 (Peter Cook). [↑](#footnote-ref-31)
32. Attorney-General for Australia, ‘ALRC Inquiry into Incarceration Rate of Indigenous Australians’ (Joint Media Release, Attorney-General’s Department, 27 October 2016). [↑](#footnote-ref-32)
33. ‘Uluru Statement from the Heart’, above n 22 (emphasis in original). [↑](#footnote-ref-33)