



**NATIONAL CONGRESS**  
OF AUSTRALIA'S FIRST PEOPLES

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**Submission to the Australian Law Reform Commission on Incarceration Rates of  
Aboriginal and Torres Strait Islander Peoples**

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**September 2017**

## Executive Summary

In responding to six key proposals and questions in the Australian Law Reform Commission's report, Congress hereby recommends the following:

### ***Proposal 2-1 – Bail and Remand Population***

Congress acknowledges the impact of bail legislation and sentencing laws on Aboriginal and Torres Strait Islander incarceration.

- **Recommendation 1:** Bail authorities in every state should undertake consideration for 'issues that arise due to the person's Aboriginality', including cultural background, ties to family and place, intergenerational trauma, and cultural obligations in order to lower the disproportionately high rate of Aboriginal and Torres Strait Islander incarceration;

### ***Question 6.6 – Alternative penalties to court ordered fines***

Congress submits that imposing fines on financially disadvantaged individuals will have a disproportionately negative impact on lower socio-economic Australians.

- **Recommendation 2:** Congress urges state and territory governments to implement work and development order schemes for individuals experiencing financial hardship to repay outstanding fines, on the condition that adequate measures are taken to ensure that Aboriginal and Torres Strait Islander peoples are consulted and not subjected to unfair working conditions;
- **Recommendation 3:** Congress advances the proposition that funding should be allocated to developing Aboriginal and Torres Strait Islander-specific alternative rehabilitation schemes;

### ***Question 9.1 – Female Offenders***

The ongoing and intergenerational traumas experienced by Aboriginal and Torres Strait Islander women are inadequately addressed in Australia's criminal justice system.

- **Recommendation 4:** Congress proposes that minor offences, such as unpaid fines, vehicle offences, or public order offences, be adjudicated within Aboriginal communities so that the offender is not removed from her dependants;

- **Recommendation 5:** Congress strongly suggests that more funding is allocated towards developing specialised therapeutic and rehabilitation services specifically for Aboriginal and Torres Strait Islander women;

### ***Question 10-1 – Justice Target***

The establishment of a Justice Target as part of the Closing the Gap framework is vital for reducing rates of Aboriginal and Torres Strait Islander incarceration.

- **Recommendation 6:** Congress recommends for the establishment of a Justice Target to be included as part of the Closing the Gap framework. In collaboration with state and territory governments, we recommend that the Federal Government establish a target to halve the rate of Aboriginal and Torres Strait Islander incarceration from 2226 per 100,000 adults in 2016<sup>1</sup>, to 1100 per 100,000 adults in 2025;

### ***Question 12.1 – Police work in communities to reduce family violence***

Heightened police transparency is crucial for improved justice outcomes.

- **Recommendation 7:** To make mandatory the use of body cameras for all police officers in conjunction with strict regulations stipulating how and when those body cameras are used. Congress suggests that the relevant provisions are harmonised between the states and territories to promote consistency;
- **Recommendation 8:** For body cameras to be activated in all situations where the police think they may be, or know that they are, interacting with Aboriginal and Torres Strait Islander peoples, and that these recordings are deposited and kept in a central repository for a minimum of 5 years;

### ***Question 13-1 – Justice Reinvestment strategies***

- **Recommendation 9:** Congress urges for a statement of commitment for Justice Reinvestment by the Federal and all State and Territory Governments;
- **Recommendation 10:** The establishment of a national approach to data collection on justice indicators;
- **Recommendation 11:** Federal funding to be made available for mapping and analysis as part of Justice Reinvestment initiatives;

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<sup>1</sup> 'Change the Record: Smarter Justice, Safer Communities,' *Change The Record* (2016) available from <https://changetherecord.org.au/get-the-facts>

- **Recommendation 12:** The provision of operational support and resources for the commencement of community-led programs to implement Justice Reinvestment in targeted communities.

## Introduction

The National Congress of Australia's First Peoples (Congress) is the national representative body for Aboriginal and Torres Strait Islander Australians. Congress is a leader and advocate for protecting and advancing the wellbeing and empowerment of Aboriginal and Torres Strait Islander Peoples, and for securing our economic, political, cultural and environmental futures.

Congress has created one of the largest networks of our Peoples in the country. With almost 9000 individual members and 180 organisational members, these national peak bodies and community organisations further contribute the membership of tens of thousands of our Peoples to the Congress movement. We acknowledge and pay respect to our ancestors, our Elders and the diversity of traditional owners across this ancient land.

In making this submission to the Australian Law Reform Commission, Congress wishes to provide a voice for Aboriginal and Torres Strait Islander Australians on issues of incarceration, and recommends strategies and governmental action aimed at reducing the disproportionately high rates of Aboriginal and Torres Strait Islander imprisonment.

The state of access to justice for Aboriginal and Torres Strait Islander people and their overrepresentation in the criminal justice system is a national crisis, requiring urgent, effective, and collaborative action.

## Key Topic Areas

Congress has selected six key topic areas of the Commission's discussion paper as its focus for this submission. Congress stresses that the selection of six key areas does not discredit or devalue other areas not discussed hereafter. The chosen areas include:

- Proposal 2-1 – Bail and Remand Population
- Question 6.6 – Alternative penalties to court ordered fines
- Question 9.1 – Female Offenders
- Question 10-1 – Justice Target
- Question 12.1 – Police work in communities to reduce family violence
- Question 13-1 – Justice Reinvestment strategies

In selecting these topic areas for submission, Congress has attempted to provide recommendations and comments that cover a wide breadth of issues and factors surrounding Aboriginal and Torres Strait incarceration.

## Bail and the Remand Population

Access to justice for Aboriginal and Torres Strait Islander people and their overrepresentation in the criminal justice system is a national crisis. Since 2004 the number of Aboriginal and Torres Strait Islander people in custody has almost doubled, experiencing an increase of 95%.<sup>2</sup>

In accordance with proposal 2-1:

Proposal 2–1 The Bail Act 1977 (Vic) has a standalone provision that requires bail authorities to consider any ‘issues that arise due to the person’s Aboriginality’, including cultural background, ties to family and place, and cultural obligations. This consideration is in addition to any other requirements of the Bail Act.

Other state and territory bail legislation should adopt a similar provision.

As with all other bail considerations, the requirement to consider issues that arise due to the person’s Aboriginality would not supersede considerations of community safety.

Congress agrees that bail authorities in every state should undertake consideration for ‘issues that arise due to the person’s Aboriginality,’ including cultural background, ties to family and place, intergenerational trauma, and cultural obligations.<sup>3</sup> Congress advocates for these changes, recognising them as vital to lowering the disproportionately high rate of Aboriginal and Torres Strait Islander incarceration.

Congress asserts that low level offenders should seldom be placed on remand, or face subsequent custodial punishment.

As noted in clause 2.1 of the ALRC Discussion Paper:<sup>4</sup>

One third of Aboriginal and Torres Strait Islander peoples in prison are held on remand, while awaiting trial or sentence. A large proportion of Aboriginal and Torres Strait Islander peoples held on remand do not receive a custodial sentence upon conviction, or may be sentenced to time served while on remand. This suggests that many Aboriginal and Torres Strait Islander prisoners may be held on remand for otherwise low-level offending.

Noting that a significant proportion of Aboriginal and Torres Strait Islander Australians are held on remand and do not receive a subsequent custodial sentence, Congress suggests

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<sup>2</sup> The Redfern Statement (2016), available from <http://nationalcongress.com.au/wp-content/uploads/2017/02/The-Redfern-Statement-9-June-Final.pdf>, 11.

<sup>3</sup> ALRC Report, 44.

<sup>4</sup> ALRC Report, 35.

that this indicates an overuse and abuse of remand holdings in the judicial system, particularly for low level, non-violent offences.<sup>5</sup> Congress recognises the reduction in the number of Aboriginal and Torres Strait Islander Australians arrested between 2001 and 2015. In NSW, the rate of Aboriginal and Torres Strait Islander peoples arrested for violent offences experienced a 36.8% decline.<sup>6</sup> Despite this progress, the remand population of Aboriginal and Torres Strait Islander Australians has grown by 238% over the same period,<sup>7</sup> likely due to changes in law enforcement policy and practice.<sup>8</sup> Overall, this demonstrates an alarming disparity between the prevalence of violent crime, and the number of Aboriginal and Torres Strait Islander peoples in judicial custody.

Additionally, the percentage of Aboriginal and Torres Strait Islander Australians refused bail for justice procedure offences has risen 194%, from 275 in 2001, to 809 in 2015.<sup>9</sup> In NSW between 2001 and 2008, a study of the 48% rise in the Aboriginal and Torres Strait Islander imprisonment rate found that 25% of the increase was due to more people being remanded in custody, and 75% caused by more frequent custodial sentencing; none of the increase was due to more Aboriginal and Torres Strait Islander people being convicted of a crime.<sup>10</sup>

Cumulatively, we see falling rates of crime and arrests, yet disproportionate increases in the Aboriginal and Torres Strait Islander prison and remand population - an occurrence that Congress believes warrants immediate reformation to the current failing structure of the justice system, and the introduction of justice reinvestment programs.

The justice system's lack of consideration for cultural factors and Aboriginality plays a sizeable role in maintaining the disparity between rates of incarceration for First Australians and non-Indigenous Australians. Aboriginal cultural customs and laws foster increased empowerment and self-governance for the Aboriginal and Torres Strait Islander community;<sup>11</sup> Congress stresses that they should not be overlooked in the justice system. Beyond adjustments to bail consideration, Congress recommends that states and territories invest in community led initiatives, Aboriginal sentencing courts, and Aboriginal adjudication to further empower Aboriginal and Torres Strait Islander Australians.

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<sup>5</sup> Ibid, 4.

<sup>6</sup> Don Weatherburn and Stephanie Ramsey, 'What's Causing the growth in Indigenous Imprisonment in NSW?', *Issue paper no. 118* (August 2016). Available from: <http://www.bocsar.nsw.gov.au/Documents/BB/Report-2016-What%27s-causing-the-growth-in-Indigenous-Imprisonment-in-NSW-BB118.pdf>

<sup>7</sup> Ibid, 6.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Chris Cunneen, 'Time to Arrest Aboriginal Prison Rates,' *Insight 8* (2013), p. 23; available from: [http://vcoss.org.au/documents/2013/06/Insight8.ChrisCunneen.Final\\_.pdf](http://vcoss.org.au/documents/2013/06/Insight8.ChrisCunneen.Final_.pdf).

<sup>11</sup> Jonathan Hunyor, 'Custom and Culture in Bail and Sentencing: Part of the Problem or Part of the Solution,' 2007, *Indigenous Law Bulletin*, 6(29), 8.

As noted in clause 2.22, The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) concluded that failures to appear in court, along with a lack of Aboriginal and Torres Strait Islander persons having fixed residential addresses and stable employment contribute to 'Aboriginal disadvantage' in the bail process, as do curfews, exclusion zones and non-association orders.<sup>12</sup> Congress furthers these assertions, calling for increased consideration of situational and cultural factors by bail authorities to place downward pressure on the incarceration rate of Aboriginal and Torres Strait Islander persons, and break the cycle of imprisonment that perpetuates social inequality.

## Alternative Penalties to Court Ordered Fines

In response to Question 6.6:

Congress is concerned that 'tough on crime' laws (which primarily relate to unpaid fines and driving offences) criminalise behaviour that could be dealt with in a non-custodial way. We believe that enforcing pecuniary penalties against low socio-economic members of society is an affront to the notion of fairness. This is because the effect of issuing fines for low-level offences can be grossly disproportionate to the offence committed, particularly due to the potential for the individual to be imprisoned if they cannot pay.

Alternatives to court ordered fines are crucial to minimise the impact 'tough on crime' laws have on Aboriginal and Torres Strait people. One example of a non-custodial penalty is the 'Work and Development' order implemented by the NSW Office of State Revenue. This program allows eligible individuals to repay their outstanding fines through a variety of activities, including but not limited to voluntary unpaid work, mental health or medical treatment, alcohol or drug treatment programs, educational courses or counselling.<sup>13</sup> This enables individuals experiencing disadvantage to repay their debt without furthering their financial hardship. Congress stresses, however, that any implementation of 'Work and Development Orders' must be done in consultation with Aboriginal and Torres Strait Islander communities, and contain measures to ensure that our peoples are not subjected to unfair or overly strenuous working conditions, especially in comparison to non-Indigenous offenders.

Recommendation 1: Congress urges state and territory governments to implement Work and Development Order Schemes for individuals experiencing financial hardship to repay outstanding fines, on the condition that adequate measures are taken to ensure that Aboriginal and Torres Strait Islander peoples are consulted and

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<sup>12</sup> ALRC Report, 39

<sup>13</sup> 'Work and Development Order,' *NSW Office of State Revenue: State Debt Recovery*, available from [http://www.sdro.nsw.gov.au/lib/docs/forms/sfs\\_wdo\\_009.pdf](http://www.sdro.nsw.gov.au/lib/docs/forms/sfs_wdo_009.pdf)



not subjected to unfair working conditions.

Another alternative to court-ordered fines which Congress strongly recommends are Aboriginal and Torres Strait Islander-specific rehabilitation schemes, which better address the underlying causes of Aboriginal offending such as entrenched disadvantage, and financial and emotional hardship. This would be an effective means of acknowledging and identifying the ongoing hardship experienced by Aboriginal and Torres Strait Islander people. Autonomously-run programs could provide Aboriginal and Torres Strait Islander people with the opportunity to focus on healing and rebuilding confidence rather than reinforcing shame and disadvantage through incarceration.

Recommendation 2: Congress advances the proposition that funding should be allocated to developing Aboriginal and Torres Strait Islander-specific alternative rehabilitation schemes.

## Female Offenders

In response to Question 9.1:

The current incarceration rates of Aboriginal and Torres Strait Islander peoples are at crisis level. Since the RCIADAC report in 19xx, Aboriginal and Torres Strait Islander peoples have increased from 14 to 28% of the prison population, despite constituting about 2% of Australia's population.<sup>14</sup> Alarming, female Aboriginal and Torres Strait Islander incarceration rates have increased by 248%.<sup>15</sup> Congress strongly believes that to a considerable degree this increase is due to a combination of factors, such as intergenerational trauma and poverty,<sup>16</sup> which drastically increase the likelihood of offending behaviours.<sup>17</sup>

If the social determinants of crime are not considered in sentencing options, then Aboriginal and Torres Strait Islander Peoples will continue to experience disadvantage in the social justice system. Factors such as homelessness, poverty, mental illness, and disability are perpetuated, rather than mediated, by sending women into the criminal justice system.<sup>18</sup>

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<sup>14</sup> The 25th Anniversary of the Royal Commission into Aboriginal Deaths in Custody, *Parliament of Australia* (2016), available from [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/FlagPost/2016/April/RCADIC-25](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2016/April/RCADIC-25)

<sup>15</sup> Over-represented and overlooked: The crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment, *Human Rights Law Centre* (May 2017), 10.

<sup>16</sup> *Ibid*, 16-17.

<sup>17</sup> *Ibid*, 16.

<sup>18</sup> *Ibid*.

*In effectively punishing Aboriginal and Torres Strait Islander women for extreme disadvantage, the criminal justice system perpetuates and institutionalises discrimination and inequality.*<sup>19</sup>

Recidivism rates of Aboriginal and Torres Strait Islander women are disproportionately high. In NSW, 68% of Aboriginal and Torres Strait Islander women surveyed between 2001 and 2003 were re-incarcerated within 9 months of release.<sup>20</sup> This is compared to 56% of the general adult prison population, and within a period of ten years.<sup>21</sup> One of the main contributing factors in women's high recidivism rate is lack of stable housing due to financial insecurity,<sup>22</sup> meaning that Aboriginal and Torres Strait Islander women are more likely to reoffend by either breaching their parole or conditions of bail.<sup>23</sup>

Imprisoning Aboriginal and Torres Strait Islander women not only has a devastating effect on the individual, but also on her dependents. Eighty percent of imprisoned Aboriginal and Torres Strait Islander women are mothers,<sup>24</sup> compared with 60 percent of the female prison population generally.<sup>25</sup> When viewed in light of the disadvantages mentioned above, these statistics show a clear disadvantage to Aboriginal and Torres Strait Islander women and their children. This is especially if the woman is the sole caregiver of her dependents, as it means that her removal is likely to have a greater impact on their family. Without their primary caregiver, Aboriginal and Torres Strait Islander youths are more likely to be exposed to factors such as "disrupted education, poor health and unstable housing",<sup>26</sup> all of which increase their risk of exposure to the justice system,<sup>27</sup> thus entrenching cycles of imprisonment and poverty.

Congress's view is that the criminal justice system as it stands is inadequate to deal with the intergenerational and ongoing trauma that is experienced by many Aboriginal and Torres Strait Islander women. Indeed, a 2017 study showed that up to 90% of imprisoned

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<sup>19</sup> Ibid.

<sup>20</sup> Ibid., 17; citing Eileen Baldry et al, 'Ex-Prisoners, Homelessness and the State in Australia' (2006) 39(1) *Australian and New Zealand Journal of Criminology* 20, 25-6.

<sup>21</sup> 'Reoffending in NSW,' Bureau of Crime Statistics and Research: NSW Government, available from [http://www.bocsar.nsw.gov.au/Pages/bocsar\\_news/Re-offending-in-NSW.aspx](http://www.bocsar.nsw.gov.au/Pages/bocsar_news/Re-offending-in-NSW.aspx)

<sup>22</sup> 'Over-represented and overlooked: The crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment,' *Human Rights Law Centre* (May 2017), 18.

<sup>23</sup> Ibid.

<sup>24</sup> Behrendt, L.; Cunneen, C. & Liebesman, T. (2009) *Indigenous Legal Relations in Australia*, Oxford University Press, Melbourne.

<sup>25</sup> 'Crime and Justice: Women in Prison,' *Australian Bureau of Statistics*, available from <http://www.abs.gov.au/AUSSTATS/abs@.nsf/7d12b0f6763c78caca257061001cc588/781c132ae9185bedca256e9e002975fc!OpenDocument>

<sup>26</sup> 'Over-represented and overlooked: The crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment,' *Human Rights Law Centre* (May 2017), 13.

<sup>27</sup> Ibid, 13.

women in Western Australia have experienced violence,<sup>28</sup> which they often linked directly or indirectly to their offending.<sup>29</sup> Further, a 2003 NSW study showed that 70% of Aboriginal and Torres Strait Islander women were sexually abused as children, with a further 44% stating that they had experienced sexual violence in their adult life.<sup>30</sup>

*Many of the systems of prisons replicate the dynamics of power and control in violent relationships and can re-traumatise women.*<sup>31</sup>

Recommendation 1: Congress proposes that minor offences, such as unpaid fines, vehicle offences, or public order offences, be adjudicated within Aboriginal communities so that the offender is not removed from her dependants.

The damage inflicted on Aboriginal and Torres Strait Islander women can be aggravated by invasive and disempowering prison routines that may trigger past traumas. One such example is strip-searching, in which the woman experiences disempowerment and vulnerability that can be likened to experiences of family violence.<sup>32</sup> Although such routines may play an important functional role in the criminal justice system, Congress stresses that they must be used only where absolutely necessary, and that culturally appropriate measures should be taken to minimise their detrimental effects on Aboriginal and Torres Strait Islander women's mental health.

The intergenerational and ongoing trauma experienced by Aboriginal and Torres Strait women clearly demonstrates that alternative treatment is needed. Congress submits that mainstream service providers are unlikely to cater to the specific needs of Aboriginal and Torres Strait Islander women. Further, programs specifically for Aboriginal and Torres Strait Islander women, such as 'Sisters Inside,' while successful, do not have the funding or scope to instigate change on a national level.

As such, Congress submits the following recommendation:

Recommendation 2: Congress strongly suggests that more funding is allocated towards developing specialised therapeutic and rehabilitation services specifically for Aboriginal and Torres Strait Islander women.

<sup>28</sup> Ibid, 17; citing Matthew Willis, 'Non-Disclosure of Violence in Australian Indigenous Communities' (Trends & Issues in Crime and Criminal Justice, Australian Institute of Criminology, 2011), 1.

<sup>29</sup> Ibid, 5.

<sup>30</sup> Ibid, 17; citing Wendy Loxley and Kerryn Adams, 'Women, Drug Use and Crime: Findings from the Drug Use Monitoring in Australia Program' (Research and Public Policy Series No 99, Australian Institute of Criminology, 2009) 24

<sup>31</sup> Ibid, 17.

<sup>32</sup> Ibid, 17, citing Human Rights Law Centre, *Total Control: Ending the Routine Strip Searching of Women in Victoria's Prisons* (2017) 14.

## Aboriginal Justice Agreements: Justice Target

In response to Question 10-1:

Should the Commonwealth Government develop justice targets as part of the review of the Closing the Gap policy? If so, what should these targets encompass?<sup>33</sup>

Congress is a strong advocate for the establishment of a justice target to be included as part of the Closing the Gap framework. As per The Redfern Statement, Congress stresses that:

*Currently the Safer Communities Building Block of the COAG Closing the Gap Strategy is the only area that is not accompanied by any specific targets. This is a clear gap in the failure to acknowledge the root causes of imprisonment and violence rates, including social determinants such as poverty and socio-economic disadvantage.*<sup>34</sup>

Congress posits that the exclusion of an Indigenous Justice Target inhibits the attainment of all seven of the Closing the Gap goals, and is ultimately detrimental to all Aboriginal and Torres Strait Islander Australians, not just those in contact with the justice system. Incarceration has severe flow on effects on all factors of family and community life, particularly in the case of female incarceration, and thus impacts factors like life expectancy, health outcomes and education attainment – all aspects of the Closing the Gap measures.

Congress echoes the assertions of the Aboriginal and Torres Strait Islander Social Justice Commission, in the Social Justice and Native Title Report 2014, stressing that a Justice Target for Indigenous incarceration would increase the visibility of Aboriginal and Torres Strait Islander disadvantage: “exactly what needs to happen”<sup>35</sup> in the social and political discourse on Aboriginal and Torres Strait Islander over representation in Australian prisons.<sup>36</sup>

Further, Congress notes that the United Nations Special Rapporteur on the rights of indigenous peoples, Ms Tauli-Corpuz, recently urged the Federal Government to

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<sup>33</sup> ALRC Report, 184.

<sup>34</sup> Ibid, 1.

<sup>35</sup> ‘Social Justice and Native Title Report,’ *Aboriginal and Torres Strait Islander Social Justice Commissioner* (2014), 119.

<sup>36</sup> Ibid, 119.

implement a federal target to drive down imprisonment rates, a call that was rejected by the current Minister for Indigenous Affairs, Nigel Scullion.<sup>37</sup>

Congress highlights that incarceration impacts socio-economic status, employability, health and wellbeing, and family stability, facets of life that the Closing the Gap targets are attempting to improve for Aboriginal and Torres Strait Islander Australians, yet for which little progress can be seen. Only one of the seven Closing the Gap targets is on track to be reached<sup>38</sup>, indicating a failure of the Federal Government to adequately work toward the alleviation of social disparity between Aboriginal and Torres Strait Islander and non-Indigenous Australians.

Congress urges for the establishment of an Indigenous justice target as part of the current review of the Closing the Gap policy.

**Recommendation:**

In collaboration with state and territory governments, we recommend that the Federal Government establish a target to halve the rate of Aboriginal and Torres Strait Islander incarceration from 2226 per 100,000 adults in 2016,<sup>1</sup> to 1100 per 100,000 adults in 2025.

Congress asserts that for the successful implementation of a Justice Target, state and territory governments must genuinely consult and collaborate with Aboriginal and Torres Strait Islander communities, in the establishment of the targets, intervention programs and their ongoing evaluation in order to address the overrepresentation of Aboriginal and Torres Strait Islander peoples in the justice system. Congress rejects the suggestion that incarceration is a state-only issue, and that the Federal Government does not possess the means to achieve a Justice Target. Beyond the establishment of a justice target, Congress urges the Federal Government to invest in justice reinvestment programs, improved education in disadvantaged and remote communities, and other bottom-up, community led initiatives to tackle the rising incarceration rates of First Australians.

Congress wishes to work with the Federal Government in establishing and implementing a Justice Target to improve outcomes for all of Australia's First Peoples.

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<sup>37</sup> 'Nigel Scullion rejects United Nations' call for Australia to establish Indigenous justice target,' *ABC News* (5th of April 2017), available from: <http://www.abc.net.au/news/2017-04-05/nigel-scullion-rejects-un-call-for-indigenous-justice-target/8419570>

<sup>38</sup> 'Closing the Gap: Australia is failing on Indigenous disadvantage goals,' *ABC News* (14th of February 2017) <http://www.abc.net.au/news/2017-02-14/closing-the-gap-report-card-failing/8268450>

## Police Work in Communities to Reduce Family Violence

In response to Question 12.1:

Congress submits that it is imperative that police accountability is heightened to foster a relationship of trust and liaise with the Aboriginal and Torres Strait Islander community in an ongoing manner. As family violence is a deeply intimate matter, it is crucial that police work to improve transparency surrounding their actions.

One clear way to heighten transparency is through the use of body cameras. Though body cameras have been employed in Queensland and the Northern Territory, there is inconsistent implementation of body cameras throughout Australia and inharmonious legislation governing their usage. The general theme running through current relevant legislative provisions in the states and territories is that body cameras (where implemented) are only required to be engaged during the exercise of a police power, or when anticipating or applying use of force.<sup>39</sup> This demonstrates that engaging body cameras is discretionary, meaning that selective video recordings can be detrimental to vulnerable members of society as claims of police misconduct can be difficult to substantiate without documented evidence.

Increased transparency is crucial to forging a positive relationship between the police force and Aboriginal and Torres Strait Islander communities. Claims by Aboriginal and Torres Strait Islander people that they have been racially targeted can be difficult to substantiate without clear evidence, which could be provided if constant use of body cameras were mandated in legislation. Unless action is taken to build trust between police and Aboriginal and Torres Strait Islander peoples, Congress submits that delicate personal matters such as family violence are less likely to be reported to the police.

As such, Congress makes the following recommendations:

Recommendation 1: To make mandatory the use of body cameras for all police officers in conjunction with strict regulations stipulating how and when those body cameras are used. Congress suggests that the relevant provisions are harmonised between the states and territories to promote consistency.

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<sup>39</sup> 'Body Worn Cameras,' *Queensland Police*, available from <https://www.police.qld.gov.au/programs/bodyworncamera.htm>; 'Body Worn Video,' *NSW Police Force*, available from [http://www.police.nsw.gov.au/data/assets/file/0004/362992/English\\_BWV\\_DL\\_flyer\\_web\\_final.pdf](http://www.police.nsw.gov.au/data/assets/file/0004/362992/English_BWV_DL_flyer_web_final.pdf); 'Body Worn Video Trial,' *Northern Territory Police*, available from [http://www.police.nsw.gov.au/data/assets/file/0004/362992/English\\_BWV\\_DL\\_flyer\\_web\\_final.pdf](http://www.police.nsw.gov.au/data/assets/file/0004/362992/English_BWV_DL_flyer_web_final.pdf)

Recommendation 2: For body cameras to be activated in all situations where the police think they may be, or know that they are, interacting with Aboriginal and Torres Strait Islander peoples, and that these recordings are deposited and kept in a central repository.

## Justice Reinvestment

The concept of Justice Reinvestment is not a recent development. Embodying the principles of prevention, early intervention and diversion, it has shown to be socially and economically effective when applied in justice systems internationally, and locally such as in Bourke, NSW. Justice Reinvestment provides a catalyst for long-term reform regarding the overrepresentation of Aboriginal and Torres Strait Islander Peoples in the justice system.

There are many misconceptions regarding Justice Reinvestment. It is important to note that Justice Reinvestment does not advocate for reduced police intervention and protection for victims of crime.<sup>40</sup>

Further, Justice Reinvestment does not involve a watering down of police responses to serious offences – in fact, community safety is maintained, and ultimately improved. Justice Reinvestment involves using limited resources in a more efficient and effective manner than traditional punitive responses to crime, and in doing so, seeks to address both the causes and symptoms of overrepresentation of our Peoples.

Imprisonment has often been described as a “rite of passage” for Aboriginal and Torres Strait Islander peoples, such that it has lost its deterrent effect.<sup>41</sup> The Senate Standing Committee on Justice Reinvestment furthers this idea, acknowledging that ‘imprisonment has failed as an effective way of addressing crime in Australia and that prisons are essentially a failed institution as they do not rehabilitate and tend to breed more criminality.’<sup>42</sup> Such an ethos towards imprisonment was particularly evident during the

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<sup>40</sup> *Just Reinvest NSW* (2017), available from <http://www.justreinvest.org.au/>

<sup>41</sup> ‘Unnecessary and Disproportionate: The outcomes of Remand for Indigenous Young People According to Service Providers,’ Brenna Mathieson & Angela Dwyer, *Journal of Children’s Services*, 11(2), 141-156.

<sup>42</sup> ‘Value of a justice reinvestment approach to criminal justice in Australia,’ Senate Standing Committee 81, *Parliament of Australia*, available from: [http://www.aph.gov.au/parliamentary\\_business/committees/senate/legal\\_and\\_constitutional\\_affairs/completed\\_inquiries/2010-13/justicereinvestment/report/index](http://www.aph.gov.au/parliamentary_business/committees/senate/legal_and_constitutional_affairs/completed_inquiries/2010-13/justicereinvestment/report/index)

Maranguka Project in Bourke, NSW, where punitive responses to crime were viewed as trivial and commonplace by many Aboriginal and Torres Strait Islander youth.<sup>43</sup>

In terms of the reformation of existing laws and legal frameworks, as next steps in the implementation of Justice Reinvestment in Australia, Congress recommends:<sup>44</sup>

1. A statement of commitment for Justice Reinvestment by the Federal and all State and Territory Governments;
2. The establishment of a national approach to data collection on justice indicators;
3. Federal funding to be made available for mapping and analysis as part of Justice Reinvestment initiatives;
4. Provide operational support and resources for the commencement of community-led programs to implement Justice Reinvestment in targeted communities.

The 2009 Social Justice Report authored by the Human Rights and Equal Opportunity Commission (HREOC) identified four clear steps for the implementation of a Justice Reinvestment strategy:<sup>45</sup>

- 1. Analyses and Mapping**
- 2. Development of options to generate savings and improve local communities**
- 3. Quantify savings and reinvest in high needs communities**
- 4. Measure and evaluate impact**

Congress acknowledges that the collection, availability and sharing of data is essential to the successful implementation of a justice reinvestment approach. The first step of analysis and mapping requires standardised and efficient data collection about offending and offenders. Congress has previously identified the many inadequacies in data collection in the Australian criminal justice system, especially on a national level.<sup>46</sup>

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<sup>43</sup> 'Backing Bourke: How a radical new approach is saving young people from a life of crime,' *ABC News* (19 September 2016), available from: <http://www.abc.net.au/news/2016-09-19/four-corners-bourke-experiment-in-justice-reinvestment/7855114>

<sup>44</sup> 'Submission 53 to Senate Committee on 'Value of a justice reinvestment approach to criminal justice in Australia,' *National Congress of Australia's First Peoples* (2013)

<sup>45</sup> 'Chapter 2: Justice Reinvestment – A new solution to the problem of Indigenous over-representation in the criminal justice system,' *Australian Human Rights Commission* (2009) [https://www.humanrights.gov.au/publications/chapter-2-introduction-social-justice-report-2009#s2\\_2](https://www.humanrights.gov.au/publications/chapter-2-introduction-social-justice-report-2009#s2_2)

<sup>46</sup> 'Justice Policy,' *National Congress of Australia's First Peoples* (2013)



Congress has identified key priorities for improved data collection that include but are not limited to:<sup>47</sup>

- A nationally consistent approach to identification of Aboriginal and Torres Strait Islander people across all national justice data collection projects, based on identification by the individual rather than subjective assessment by criminal justice system personnel.
- Nationally consistent data collection in relation to family violence.
- Nationally consistent evidence on the effectiveness of programs for perpetrators of family violence, to inform the development and delivery of these programs.
- A nationally consistent approach to measuring the effectiveness of diversionary programs, including warnings, cautions, conferences and treatment programs that seek to address drug, alcohol and mental health issues.
- Nationally consistent data on the health and housing status of people released from prison and youth detention.

Congress calls for a coordinated national commitment, strategy or agreement to address the overrepresentation of Aboriginal people in the criminal justice system. By ‘national’ commitment, Congress refers to a commitment that binds the Commonwealth as well as State and Territory Governments. While there is a National Indigenous Law and Justice Framework, this imposes no particular obligations on governments and despite the issue remaining an agenda item in numerous government forums, action and progress is slow.

Whilst a national coordinated commitment on Justice Reinvestment is ideal, the history of implementing recommendations from the RCIADIC and numerous other inquiries has proven this to be problematic. Justice Reinvestment provides an opportunity to break the impasse between Federal and State and Territory Governments, providing a catalyst for broader reform, through direct funding by the Commonwealth.

Congress reiterates the recommendations from our National Justice Policy<sup>48</sup>:

A. The Commonwealth Government and State and Territory Governments commit to **Justice Targets** included in a fully-funded Safe Communities National Partnership Agreement as part of the **Closing the Gap strategy**. This commitment should be incorporated into the National Indigenous Reform Agreement and supported by significant

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<sup>47</sup> Ibid, 24

<sup>48</sup> ‘Justice Policy,’ *National Congress of Australia’s First Peoples* (2013)

improvements to data collection regarding Aboriginal and Torres Strait Islander people within the justice system.

B. Funding for Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Services must be increased, to allow them to respond to the full range of legal needs experienced by Aboriginal and Torres Strait Islander Peoples. This should be supported by a new **National Partnership Agreement on Aboriginal and Torres Strait Islander Legal Assistance Services**.

C. Strategies for **prevention, early intervention and diversion** of Aboriginal and Torres Strait Islander people in the criminal justice system must be implemented. This is to be supported by the Safe Communities National Partnership Agreement and include **standardised national data collection** and pilots of **Justice Reinvestment** strategies in a number of prioritised communities.

D. **Conditions for Aboriginal and Torres Strait Islander people in police custody and prison** must be improved. To ensure compliance with human rights obligations, Australia must 25 National Congress of Australia's First Peoples, (2013) 17/21 ratify the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as well as develop the required National Preventative Mechanism.

E. The **Safe Communities** building block of the Closing the Gap strategy should be addressed through a fully funded Safe Communities National Partnership Agreement that incorporates Justice Targets and strategies for prevention, early intervention and diversion. This NPA must take a broad approach to community safety and must recognise the importance of leadership by Aboriginal and Torres Strait Islander communities and organisations.