

UN-led Universal Periodic Review highly critical of Australia's record on human rights and health for Indigenous Australians

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In November 2015, Australia completed its second Universal Periodic Review (UPR), a high level United Nations Human Rights Council (UN HRC)-led peer review conducted by UN Member States once every 4 years. The UPR is a bold innovation in international diplomacy as it is the only mechanism of its kind for scrutinising the human rights records of all 193 UN Member States. It can be seen as an exemplar for motivating global collective action in areas such as the achievement of development goals, development assistance, climate change targets and health. The process involves the submission of a national report by the country in question on its human rights record, separate reports submitted by UN-affiliated human rights experts, national human rights institutions and non-government stakeholders, and recommendations by UN Member States. Australia's review comes at a crucial time. While defending its 'long tradition of commitment to human rights' against unprecedented international criticism for its treatment of asylum seekers, and Aboriginal and Torres Strait Islander (hereafter referred to as Indigenous) Australians, Australia also announced its campaign for a seat on the Human Rights Council from 2018.¹

Australia generally ranks among the highest performing nations on most health and social indicators with the 10th highest per capita income in the world, a well-established universal health system and an average life expectancy of 80 and 84 years for males and females, respectively.^{2,3} It is unsurprising therefore that the extreme health disparities that exist between Indigenous and non-Indigenous Australians have been called to attention by the international community. In particular, Indigenous incarceration, education, employment, constitutional

Key questions

What is already known about this topic?

- ▶ Indigenous Australians disproportionately experience poor health, high rates of incarceration and deaths in custody.

What are the new findings?

- ▶ The 2015 UN-led Universal Periodic Review (UPR) featured recurring criticisms by Australia's global peers regarding the incarceration of Indigenous Australians.
- ▶ Australia's defiance presents challenges for promoting intergovernmental protection of human rights and health through the UPR process.

Recommendations for policy

- ▶ Justice targets, investment into evidence generation for policy innovations as well as sustainable funding for Indigenous programs are needed to reduce Indigenous incarceration rates.

recognition, self-determination and representation in decision-making have remained the focus of concern. Following its last review, 54 of all 145 recommendations made by UN Member States directly related to the plight of Indigenous Australians who are disproportionately affected by chronic disease and injury.⁴ Australia accepted 90% of all recommendations, however, only 10% of the recommendations have been fully implemented, and none of those entailed Indigenous-specific initiatives.⁵

Since the inception of the UPR process, justice issues have remained front and centre. Over only two cycles, justice issues were raised 3600 times and, subsequently, rank fourth out of the top five issues raised in UPRs globally.⁶ Australia's latest UPR was no different. UN Members advised the Australian government that its commitment to justice had been seriously undermined not only because it had continued to defend (legitimately, according to a recent High Court decision) its detention of asylum



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seekers offshore⁷—but as well because Indigenous Australians are part of one of the most incarcerated Indigenous populations globally and this issue attracted widespread concern. During Australia's inaugural 2011 UPR, UN Member States expressed concern for the high level of Indigenous deaths in detention and inadequate provision of legal advice impacting Indigenous Australians.⁵ Yet, Australia's 2015 UPR national report on progress was underwhelming and lagged behind progress made by high-income nations such as New Zealand (NZ), the USA and Canada.^{1 8–10} Following their first-cycle reviews, all these three nations introduced legislation or policy initiatives to facilitate effective, culturally sensitive crime prevention with Indigenous communities at the forefront of decision-making.^{8–10} In Australia's national report, the government defended decreases in funding for Indigenous services, which included cuts of \$13.4 million from the Indigenous Legal Aid and Policy Reform Programme, which funded legal assistance, community legal education and advocacy including for those incarcerated. In addition, it omitted substantial cuts to preventative health, and prioritised incarceration in a bid to make 'communities safer to live in'.¹

During the November 2015 UPR, Australia's global peers held Australia's recalcitrance to account. Not only were the recommendations more extensive than in 2011, but they called for strong, often legislative responses.¹¹ Uruguay, Ireland and Kenya urged Australia to intensify efforts to reduce persistently high rates of Indigenous incarceration. Lithuania called for the removal of children from adult facilities. Botswana and the Czech Republic recommended the abolition of mandatory sentencing. Uruguay, Denmark and Iceland called for Australia to raise the age of criminal responsibility in line with international standards. Iran called on Australia to guarantee the end of unwarranted incarceration of people with disabilities. Uzbekistan called for poor conditions including overcrowding and high rates of deaths in custody to be addressed.¹¹ Effective interventions in the areas highlighted by UN Member States may have the potential to impact the absolute and relative levels of Indigenous incarceration. As such, we discuss below the core justice issues raised in the 2015 UPR, highlighting the differing accounts of the current state of play contained in government and non-government stakeholder reports.

AUSTRALIA'S APPROACH TO REDUCING INDIGENOUS PEOPLES' INCARCERATION

International human rights instruments recognise that the active participation of Indigenous peoples in their local communities is integral to their health and well-being.^{12 13} The UN, as well as Indigenous communities and their advocates, have long called for the prevention of Indigenous over-representation by addressing the social determinants of incarceration as well as the elements of the justice system (eg, policing and judicial

decision-making) that disproportionately impact Indigenous people.

The incarceration of Indigenous people is associated with high rates of chronic and communicable disease as well as poor outcomes for communities (eg, low rates of higher education and the separation of parents from their children).¹⁴ In prisons that allow smoking, 87% of Indigenous dischargees smoked tobacco and 26% had seen a doctor or nurse due to an accident or injury while in prison. Use of illicit drugs was reported in 10% while in prison and 6% reported injecting drugs while in prison, while 4% reported using a needle that had been used by someone else while in prison.¹⁴

With regard to educational outcomes, for 47% of Indigenous prison dischargees (compared with 30% of their non-Indigenous counterparts), the highest year of completed school was below year 10, while only 8% completed qualifications in prison. Incarceration also impacts Indigenous families. Of the prison entrants, 53% (compared with 43% non-Indigenous) had children who depended on them for their basic needs.¹⁴

In spite of this, there is evidence that, on the basis of a number of health indicators, three in five Indigenous prison dischargees reported that their health improved in prison.¹⁴ In a separate study, almost half of Indigenous prisoners reported a decrease in suicidal thoughts since entering prison.¹⁵ These figures may reflect that, despite the significant health risks associated with incarceration, the prison system may provide, in relative terms, more routine access to mental health and other services than that found in the community setting.

A coordinated national approach does not exist, and states and territories may independently decide on their approach to incarceration, with federal government support. Accordingly, the Australian government declared in its national UPR report that it intended to prioritise initiatives that would have an immediate impact on community safety including boosting police infrastructure and permanent police presence in remote Indigenous communities. In particular, specific funding for police officers would be allocated to the Northern Territory. In addition, the government would champion tough alcohol regulations nationwide. Australia suggested that current funding of early intervention and recidivism prevention projects would suffice in targeting the long-term drivers of poor community safety. Details of specific projects, and targets and their outcomes, were not specified.¹

In response, non-government stakeholders highlighted key concerns regarding increased police presence. The Australian government was warned that policing was excessive and effectively applied welfare controls over entire populations. From 2010 to 2014, Indigenous youth were detained 22–26 times more than their non-Indigenous counterparts. Half of prisoners in one western Australian jail had been incarcerated due to traffic offences, and many Indigenous communities in rural and remote areas with little public transport did not have driving licenses, which left them particularly vulnerable.¹⁶

Further, several Australian jurisdictions had recently expanded or introduced mandatory sentencing laws. Subsequently, and due to the broad scope of judicial discretion, rates of incarceration had risen. Many detention facilities in regional and remote areas remained unhygienic and overcrowded, and lacked air conditioning. Individuals often received inadequate medical and mental healthcare, which contributed to the ongoing incidence of deaths in custody.¹⁶

ACCESS TO LEGAL ASSISTANCE

The Australian delegation maintained that it prioritised funding for frontline legal services and had committed \$358 million over 5 years in legal assistance services. It was held that this funding demonstrated an ongoing commitment to improving access to justice for Indigenous Australia.¹

Independent stakeholders highlighted that the figures reported represented existing funding, not the recommended intensified funding. Further, Australia had recently threatened to substantially cut funding (by a further \$25.5 million over 2 years). A recent review commissioned by the Australian Productivity Commission had argued against planned cuts to the Indigenous Legal Aid and Policy Reform Programme, instead calling for an annual injection of \$200 million to the legal assistance sector.¹⁷ This recommendation had not been pursued.¹⁶

Recent policy initiatives had also impacted rights to freedom of expression, association and the right to participate in public and political life. Community legal centres had been prohibited from using commonwealth funds for law or policy reform and advocacy, substantially restricting the work of Indigenous rights organisations.¹⁶

USE OF FORCE BY POLICE

On the prevention of torture, Australia defended its approach to the use of force by police, maintaining that only reasonable and necessary force was used when executing a warrant or making an arrest. These powers were used as a last resort, in a manner that did not endanger the public.¹ However, non-government stakeholders challenged this assertion, maintaining that Indigenous people continued to be disproportionately targeted and that excessive use of force by police and deaths in custody remained a serious issue due to inadequate regulation and training.¹⁶

THE INCARCERATION OF PEOPLE WITH DISABILITIES

UN Member States heard that Australian states and territories had measures in place to assist people with disabilities and complex needs in engaging with the justice system including access to services for those with mental issues. The Australian government declared that the issue of mental illness and cognitive disability was an

area of ongoing review. No specific steps and no milestones in improving outcomes were declared, although major state and federal government reviews had been conducted.¹

Non-government stakeholders highlighted that Indigenous people with disabilities suffered a double disadvantage in being exposed to the current system of incarceration. They reported that Indigenous people deemed unfit to stand trial, including those with intellectual disabilities, were detained in prison. Safeguards were inadequate, leading to significant overrepresentation in those unfit to plead (eg, due to cognitive impairment or brain injury). The minimum age of criminal responsibility remained 10 years (a policy stance that has been criticised by the UN for decades) and children were still detained in adult facilities.¹⁶

Core components of the UPR are transparency and accountability. Consequently, it is concerning that the rise in rates of incarceration and deaths in custody were not acknowledged in the Australian government report. The number of Indigenous prisoners has been at its highest since 2004, with a 10% increase since June 2013.¹⁸ Further, exposure to incarceration has encouraged recidivism. Over three in four Indigenous people (77%) in prison have been imprisoned under a sentence previously, compared with half (52%) in the non-Indigenous population.¹⁸ By comparison, Canada had seen a decline in recidivism in Indigenous people, and NZ had decreased the number of young Māori coming to court by 30% through a package of prevention interventions.^{8 9} Further, facilitating its own accountability, NZ declared Indigenous-specific targets and time frames for further reductions in first-time and repeat offending.

The postcolonial experiences of Indigenous Australia have seen persistent human rights contraventions. Some research suggesting that the primary cause of overrepresentation is widespread criminality rather than systemic bias has attracted controversy and many argue that racial discrimination in the justice system continues to affect disadvantage.^{19–21} For instance, Australia's historic 1991 Royal Commission into Aboriginal Deaths in Custody (RCIADIC) held that imprisonment should be a sanction of last resort.²² However, it has been widely reported that mandatory sentencing has resulted in unnecessary incarceration and preventable deaths. Some examples include a 15-year-old Indigenous boy who received a 20-day mandatory sentence for stealing pencils and stationery and ultimately committed suicide in custody; and an Aboriginal woman, a first-time offender, who received a 14-day prison sentence for stealing a can of beer.²³ Furthermore, the ratio of Indigenous to non-Indigenous deaths in custody has increased from one in seven at the time of the 1991 RCIADIC to currently one in four.¹⁶

Recent disinvestments in the prevention of lifestyle-related disease and injury do not bode well for reductions in incarcerations. It has been suggested that

alcohol could be a factor in up to 90% of all Indigenous contacts with the justice system.²⁴ Yet, the preventative health institutions best positioned to address alcohol-related harms including the Australian National Preventative Health Agency, and the National Indigenous Drug and Alcohol Committee, have been dismantled.²⁵ Their defunding could damage the credibility of successive UPRs as their work and scrutiny of government policy initiatives are no longer available to the peer review system.

The UN as well as non-government stakeholders have called for local solutions underpinned by sustainable funding and policy innovations that enable self-determination. For instance, justice reinvestment, a crime prevention strategy that diverts a portion of the funds for imprisonment to local communities experiencing high rates of offending, has sparked significant interest and widespread support. Diverted funds are reinvested into services prioritised by the community and are designed to address the root causes of crime (eg, poor school attendance, parental neglect, drug and alcohol abuse, and unemployment). Some commentators argue that the absence of a clear theoretical and normative base (often devoid of thresholds for effectiveness or cost-effectiveness of target interventions) may be problematic, given that budgetary devolution to support local solutions (eg, through block grants) is a key characteristic of justice reinvestment.²⁶ This may suggest the concept lacks the necessary infrastructure to attract investment over other competing models and to achieve sustainable change. Nevertheless, justice reinvestment is currently being pursued in the UK, and in the USA at the state level in 30 US states and at the local level in 18 counties in six states.²⁷ The Australian Human Rights Commission has targeted the adoption of justice reinvestment as well as performance measurement tools such as 'justice targets' including targets for reduced incarceration rates as necessary steps to progress.^{27 28} Serious investment in evidence generation is needed before projections can be made as to the time period over which reductions in incarceration might be seen. A crucial first step is the setting of targets. In 2013, the Australian government committed to setting justice targets, before withdrawing support shortly afterwards.²⁷ It is also imperative that potentially effective interventions such as the justice reinvestment model are trialled at scale. This will require cross-jurisdictional government support, leadership and coordination. In addition, a shift from persisting government inaction, potentially due to fiscal pressures, the complexity of community engagement and consensus building as well as perceived challenges in measurement and evaluation, is crucial.

The UPR has been praised for its innovative system of peer review, whereby nations under review are held to account by fellow UN Member States, which are free to nominate their own representatives. UN Members states may also decide on how to approach the data and circumstances held within the country reports, as the role

of the UN HRC is designed to be facilitative rather than prescriptive. This system is distinct from traditionally confrontational reviews by UN or state-appointed international experts. To ensure its survival and credibility, it must be seen to add value in facilitating intergovernmental human rights protections. This will be exceedingly difficult without the willingness of governments such as that of Australia to meet its obligations and acknowledge international criticism. The defiance evident in Australia's response to the first cycle of UPR in 2011, characterised by its lack of progress and failure to implement recommendations it has previously accepted, highlights the challenges ahead in promoting international collective action as a means of protecting the human rights and health of disadvantaged minorities such as Australia's First Peoples.

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