

**Human Rights and
Equal Opportunity Commission**



**Aboriginal Torres Strait Islander
Social Justice Commissioner**

Ms Louise Gell
Acting Secretary
Senate Legal and Constitutional Committee
Parliament House
Canberra ACT 2600



17 June 2003

Dear Ms Gell

I refer to your letter dated 6 May 2003 regarding questions taken on notice by the Human Rights and Equal Opportunity Commission during our appearance before the Senate Legal and Constitutional References Committee's inquiry into national progress towards reconciliation.

Please find attached answers to these questions.

Please do not hesitate to contact my office if you have any queries (Mr Darren Dick, Director – Social Justice Unit; Phone: (02) 9284 9782; Email: darrendick@humanrights.gov.au).

Yours sincerely

Dr William Jonas AM

Human Rights and Equal Opportunity Commission

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**Questions on notice – Senate Legal and Constitutional References
Committee inquiry into national progress towards reconciliation,
Sydney hearing, 4 April 2003**

Question 1: Is there any idea at this stage as to what has driven (the alarming rise in the imprisonment of Indigenous women) or where it is happening? (Senator Bolkus, Hansard – Senate Legal and Constitutional References Committee, 4 April 2003, page 28)

The *Social Justice Report 2001* reported on the situation of Indigenous prisoners in the decade following the Royal Commission into Aboriginal Deaths in Custody (RCIADIC). The report noted that the ten years since the Royal Commission have seen a rise in the adult prison population and an even sharper rise in numbers of Indigenous peoples in custody. While Indigenous men face unacceptably high rates of incarceration, the rate for Indigenous women is significantly higher¹ and is rising at a faster rate.² The *Social Justice Report 2001* noted that 'Aboriginal women remain largely invisible to policy makers and program designers with very little attention devoted to their specific situation and needs'³.

Chapter 5 of the *Social Justice Report 2002* then considered issues relating to the incarceration of Indigenous women in more detail. Overall, it found that:

Indigenous women face an unacceptably high risk of incarceration in prisons across Australia. The rising rate of over-representation of Indigenous women is occurring in the context of intolerably high levels of family violence, over-policing for selected offences, ill-health, unemployment and poverty. Studies of Indigenous women in prison reveal experiences of life in a society fraught with danger from violence. The consequences to the community of the removal of Indigenous women are significant and potentially expose children to risk of neglect, abuse, hunger and homelessness. Indigenous women also serve comparatively shorter sentences, suggesting a general failure to employ the principle of imprisonment as a last resort. Once imprisoned, recidivism statistics also indicate that Indigenous women are at greater risk of returning to gaol. Despite these factors, very little research has been conducted to explain the causes of it.⁴

Pages 136-152 of the report then provided an overview of what is known about Indigenous women prisoners over the past decade. A copy is attached.

In relation to where Indigenous women have faced increasing rates of imprisonment, the report notes:

¹ Kerley, K. and Cunneen, C., 'Deaths in Custody in Australia: The Untold Story of Aboriginal and Torres Strait Islander Women' in *Canadian Journal of Women and the Law* vol 8, no 2, 1995, p533.

² Cameron, M., 'Women Prisoners and Correctional Programs' No 194, Australian Institute of Criminology, Feb 2001, p1.

³ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001*, HREOC Sydney 2001, p15.

⁴ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002*, HREOC Sydney 2002, pp135-36.

- Imprisonment rates for Indigenous women have risen in all jurisdictions. Indigenous women are also over-represented in all jurisdictions for which data is available – see summary on pages 139-140 of the report; and
- The over-representation rate of Indigenous women is higher than for Indigenous males in all jurisdictions except the Northern Territory (with no data for the ACT or Tasmania) – see Table 3, p139 of the report.

The report also refers to statistical reports that identify the following geographic information:

- In New South Wales, Indigenous women represented 30 percent of the total female population in custody in October 2002⁵ despite constituting only 2 percent of the female population of the state⁶;
- In Queensland, the growth of Indigenous female offenders in Queensland secure and open custody over the five year period from 1994 -1999 was 204 per cent, compared with an increase of 173 per cent for all female offenders in Queensland over the same period.⁷ In February 2001, Indigenous women represented 28.2 per cent of the total female population in Queensland open and secure centres⁸;
- In Victoria, of the 4886 prisoners received into Victorian prisons in the 2000-01 period, only 539 were women⁹. Nevertheless, while female representation is low overall, Indigenous women are over-represented, constituting 8% of all female prisoners¹⁰;
- In Western Australia, reception data¹¹ shows that for the period 1 July 2001 to 30 June 2002, Aboriginal women represented 51.7 per cent of all women received into prison¹² despite constituting 3.2 per cent of the female population of Western Australia¹³;

⁵ NSW Department of Corrective Services Research and Statistics Unit, *Indigenous Inmates Statistics Report*, 6 October 2002, p1.

⁶ Community Profile Series 2001 Census, Indigenous Profile, NSW, 2001, Australian Bureau of Statistics, Commonwealth of Australia, 2002. Calculated from Table 1 02.

⁷ Aboriginal and Torres Strait Islander Women's Policy Unit of the Department of Corrective Services, Queensland, *Options for Diversion from Secure Custody for Indigenous Female Offenders*, May 2002, p8.

⁸ *Ibid*, p7.

⁹ 'Prisoner receptions by sex and race, 1996-97 to 2000-01' in *Statistical Report; Attachment One: Indigenous contact with the Criminal Justice System*, Indigenous Issues Unit, Department of Justice Victoria, 2002, p20.

¹⁰ Brenner, K., *Indigenous Women in the Victorian Prison System 2002: a snapshot*, Department of Justice, Victoria, June 2002, p4.

¹¹ 'Prison Census data records the information gathered from inmates in the institution on the nominated census day. Examination of quarterly prison statistics shows that numbers may fluctuate through throughout the year. Statistics based on reception data includes all prisoners received, and includes women who may serve short sentences and be absent on the census date.' Kerley, K. and Cunneen, C., *op.cit*, p536.

¹² Department of Justice, Western Australia, 'Receivals (Including Recaptures following Escape) from 01/01/01 to 30/06/02. The total number of women received for the period was 887. There were 459 Indigenous women received in the period. Twice as many women aged between 20-35 were received into WA prisons than any other age group.

¹³ Community Profile Series 2001 Census, Indigenous Profile, Western Australia, 2001, Australian Bureau of Statistics, Commonwealth of Australia, 2002. Calculated from Table 1 02.

- In the Northern Territory, Indigenous women constituted 57 percent of the total female prison population¹⁴ and 26 per cent of the female population of the Northern Territory.¹⁵

In relation to what has driven this increased imprisonment rate, the report notes that the causes of the increases are complex and vary between jurisdictions. It notes:

- The rise in imprisonment of Indigenous women, while being disproportionate to other groups, has taken place in the context of a general rise in imprisonment of all prisoners – see Table 1, p138 of the report;
- Recidivism rates for Indigenous women are much higher than for non-Indigenous women – see Table 4, page 141. This suggests that programs addressing the background and offending of Indigenous women need to be better focused;
- Statistics on the most serious offence committed by Indigenous women offenders indicates a steady increase across most categories of offences over the past decade. There has, however, been a significant increase in robbery offences which one study suggests may be directly linked to long term drug use – see Table 142-43 and commentary on page 143;
- Indigenous women are also significantly over-represented on charges of public drunkenness, violent offences and assault. A number of studies have suggested that there is a link between Indigenous women offending behaviour and alcohol or drug use, although there are regional variations in this – see pp143-48 of the report;
- Indigenous women tend to receive shorter sentences than non-Indigenous women which ‘tend to indicate that Indigenous women are not being provided with non-custodial sentencing options’ as well as appearing to be linked to ‘high rates of incarceration for public order offences’ – p146 of the report;

The report also notes that:

- In NSW, the Select Committee into the Increase in Prison Population found in 2001 that the most significant contributing factor in the increase in the Indigenous women prison population was the increase in the remand population. There was no evidence to suggest that an increase in actual crime accounted for the prison increase, although increases in police activity and changes in judicial attitudes to sentencing were also important¹⁶; and
- Indigenous women enter custody with poorer physical or mental health – pp 148-49; and
- ‘there is a consistent pattern indicating that incarcerated Indigenous women have been victims of assault and sexual assault at some time in their lives’ – pp149 – 150.

¹⁴ Northern Territory Correctional Services, *Annual Report 2000-2001*, Northern Territory Government, Government Printer of the Northern Territory, 2001, p73.

¹⁵ Community Profile Series 2001 Census, Indigenous Profile, Northern Territory, 2001, Australian Bureau of Statistics, Commonwealth of Australia, 2002. Calculated from Table 1 02.

¹⁶ Cunneen, C., *NSW Aboriginal Justice Plan - Discussion Paper*, 2002 p26.

Question 2: What questions should the ABS be asking to allow us to make these decisions? What sort of questions should be included in those surveys? (Senator Scullion, Hansard – Senate Legal and Constitutional References Committee, 4 April 2003, page 35)

The Social Justice Commissioner convened a workshop on benchmarking reconciliation in November 2002. The report of the workshop is incorporated into chapter 4 of the *Social Justice Report 2002*. The purpose of the workshop was to consider how human rights standards could be incorporated into efforts to measure progress towards reconciliation and in countering Indigenous disadvantage. The Workshop identified a number of concerns from a human rights perspective about the current development of indicators and benchmarks in respect of Indigenous disadvantage, and the collection of statistical data to underpin this.

In the report of the workshop the Commissioner identifies three main issues which relate to how the ABS and other agencies collect data. First, there were concerns about the regularity of data collection by the ABS. As noted at the public hearing, the Social Justice Commissioner has recommended that the IGSS be conducted every three years and not every six as currently planned to address this concern. Second, there is concern at the quality of data collection and in particular at the ability to disaggregate existing data. The Commission remains concerned at the significant gaps and deficiencies in data collection, and the lack of national consistency.

Third, is the importance of developing measures which reflect key objectives of Indigenous policy making. These include measurements of progress in strengthening Indigenous governance and community capacity; progress in recognising and protecting Indigenous culture and identity; as well as processes for involving Indigenous peoples and communities in decision making processes and service design and delivery.

As noted in evidence at the public hearing, the Commission has suggested that Indigenous peoples' own perceptions of how these issues are being addressed could form a useful measurement in this regard. Reference was made to the NSW Basic Needs Survey as an example of this. Measurements could be developed relating to issues such as whether Indigenous people continue to maintain a traditional relationship to land, whether they are able to exercise this traditional relationship and so on.

The Commission notes that the Steering Committee for the Review of Commonwealth State Service Provision in its report of consultations on the development of a reporting framework for Indigenous disadvantage provides a useful overview of the difficulties and issues in relation to developing appropriate measurements for these issues (see Steering Committee for the Review of Commonwealth State Service Provision, *Draft framework for reporting on Indigenous disadvantage – Report on consultations*, May 2003 – pages 15-22 in particular).

At this stage, however, the Commission does not have more concrete suggestions as to how the questions in the Indigenous General Social Survey by the ABS could be modified or what additional questions should be asked. The Commission notes that the results of the 2002 IGSS are due out shortly and that the availability of the results of this survey will provide greater guidance as to the adequacy and appropriateness of the existing survey questions.

Question 3: Would the questions that were asked in the original survey be available? (Senator Scullion, Hansard – Senate Legal and Constitutional References Committee, 4 April 2003, page 36)

An extract from the report of Aboriginal basic needs in New South Wales from 1983 is enclosed. The methodology of the survey is described in chapter 2, see particularly page 11 for a description of the survey questionnaire.

Question 4: Would you actually see that there is a role for (the Joint Standing Committee on Native Title) to continue? Should it also pick up the idea of your view that there should be a standing committee on reconciliation? Should that (Native Title) committee continue and, if it does, should it perhaps become the Joint Standing Committee on Native Title and Reconciliation? (Senator Crossin, Hansard – Senate Legal and Constitutional References Committee, 4 April 2003, page 39)

Background

The Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund was established under Part 12 of the *Native Title Act 1993*. Its functions are set out in section 206 of that Act. Section 207 states that this part of the Act ceases to be in force on 23 March 2004. The duties of the Committee are complementary to those of the Aboriginal and Torres Strait Islander Social Justice Commissioner under section 209 of the *Native Title Act* to report on the human rights implications of the Act.

The Council for Aboriginal Reconciliation recommended in its final report to Parliament (*Australia's challenge*) that the federal Parliament enact the *Reconciliation Bill 2001*. Section 13 of the Council's proposed Bill seeks to establish a Joint Parliamentary Committee on Reconciliation.

Role of the Native Title Committee

The Joint Parliamentary Committee has the potential to play an important role in monitoring the effectiveness of the National Native Title Tribunal and Indigenous Land Fund, as well as in identifying the extent of extinguishment and impairment of native title as a result of the *Native Title Act* (note: these are listed as duties of the Committee in section 206). As noted in evidence to this Committee, the Commissioner's view is that the Committee has not always been effective in discharging these duties and that there remains much potential for the Committee.

Recent High Court decisions demonstrate that there are significant problems with the operation of the native title system. This is particularly so given the confirmation of the ease, and extent, of extinguishment of native title by the High Court in *Ward v Western Australia*, *Wilson v Anderson* and *Yarmirr v Commonwealth*, and the difficulty of establishing native title in the High Court decisions such as *Yorta Yorta v Victoria* and *Ward*.

The Commission considers it would be inappropriate for the only regular parliamentary committee scrutiny of native title issues to be relegated to more procedural processes of scrutiny of annual reports. A specialist committee should continue to operate with the capacity to examine substantive issues relating to the operation of the native title system.

The Commission also considers that the scrutiny role of the Committee could be strengthened by requiring the Committee, on an annual basis, to examine any recommendations made by the Aboriginal and Torres Strait Islander Social Justice Commissioner in the annual *Native Title Report* prepared under section 209 of the *Native Title Act*.

Reconciliation Committee

The Commission considers it necessary for there to be a formal process for ongoing parliamentary scrutiny of issues relating to reconciliation. Accordingly it supports the proposed structure and duties of the Joint Parliamentary Committee on Reconciliation as set out by the Council for Aboriginal Reconciliation in section 13 of the *Reconciliation Bill 2000*.

Should there be one committee that considers both native title and reconciliation issues?

As the Social Justice Commissioner has noted in past *Native Title Reports*, native title has been segmented from broader policy debates about Indigenous social justice and reconciliation. This is a false dichotomy and native title needs to be given more extensive consideration in general policy debates about Indigenous issues. This is particularly so given that native title forms one of the few forms of recognition in our system of law of distinct Indigenous rights and its capacity and potential to link with economic development.

Accordingly, the Social Justice Commissioner supports the establishment of a Joint Parliamentary Committee on Reconciliation and Native Title which had the combined duties of the currently existing Native Title Committee (as set out in section 206 of the *Native Title Act*) and those proposed duties of the reconciliation committee set out in section 13 of the proposed *Reconciliation Bill*.

The Commissioner recommends, however, that such a committee should also be required to examine each annual *Native Title Report* and *Social Justice Report* prepared by the Aboriginal and Torres Strait Islander Social Justice Commissioner under section 209 *Native Title Act* and section 46C(1)(a) *Human Rights and Equal Opportunity Commission Act*, and to conduct inquiries into the response of the federal government to both reports from time to time.