Human Rights and Equal Opportunity Commission

Submission to the Australian Law Reform Commission

Sentencing of Federal Offenders (DP 70)

Submission Contents

Introduction

1. The Human Rights and Equal Opportunity Commission (the Commission) is established by the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (HREOC Act). It is Australia's national human rights institution.

2. The Commission's relevant functions are set out in s 11 of the HREOC Act and include the power to promote an understanding and acceptance, and the public discussion, of human rights in Australia.[1]

3. The Commission makes this submission in response to Australian Law Reform Commission (ALRC) Discussion Paper No. 70, *Sentencing of Federal Offenders* (the Discussion Paper).

[1] Section 11(1)(g) of the HREOC Act.

4. This submission addresses aspects of Chapters 27-29 of the Discussion Paper only. In particular, it focuses on the principles of international law and the work of the Human Rights and Equal Opportunity Commission relevant to imprisonment and sentencing of:

   - young offenders
   - offenders with mental illness
   - offenders with intellectual disability
   - Indigenous offenders

5. This submission makes comments about various proposals made by the ALRC in the Discussion Paper. Where the Commission has not mentioned a certain proposal or a specific aspect of any one proposal, this means that the Commission has not had an opportunity to form a view on that issue. It should not be read as opposition to that proposal.

Young offenders (Chapter 27)

6. Paragraphs 27.32, 27.48, 27.50, 27.60, 27.64-65, 27.67, 27.76, 27.89, 27.91 of the Discussion Paper set out the international principles applicable when sentencing a young person. The Commission emphasises the importance of referring to these international principles when developing new legislative approaches to the sentencing of federal offenders.

7. Many offences committed by juveniles are public order offences and do not fall within the federal jurisdiction. However all sentencing laws should be developed to ensure that any juvenile who does come into contact with the criminal justice system is assured the special care, assistance and protection required by human rights standards.

Human rights principles relevant to young offenders

8. Australia has a duty to respect and apply its international human rights obligations to all individuals within its jurisdiction. As a party to the *Convention on the Rights of the Child* (CRC), Australia is bound to comply with its provisions in good faith and to take the necessary steps to give effect to its provisions under domestic law.[2]

9. In the context of sentencing and detention there are five articles of special importance in the CRC: articles 3(1), 6(2), 20, 37, 40.

10. The 'best interests' principle in article 3(1) reads as follows (emphasis added):

[2] Vienna Convention on the Law of Treaties, Article 26.

> *In all actions concerning children, whether undertaken by* public or private social welfare institutions, *courts of law, administrative authorities or legislative bodies*, the *best interests of the child* shall be *a primary consideration.*

11. The words of article 3(1) make it very clear that the 'best interests' principle is a fundamental principle of the CRC.[3] There is no one definition of what will be in the 'best interests' of each and every child. However, article 37 of the CRC provides some guidance in the context of sentencing decisions.

12. In particular, article 37(b) seeks to protect children from custodial measures, to the maximum extent possible, by requiring that:
    (a) detention is a measure of *last resort*; and
    (b) if detention does occur, it is for the *shortest appropriate period of time*.

13. Thus, in the context of sentencing, the 'best interests' principle, combined with the 'last resort' and 'shortest appropriate period' principles, requires a court to turn its mind to the individual circumstances of the child and ensure that his or her best interests are a primary consideration when making the ultimate decision. A judge must also take into account that a child's best interest will usually exclude a custodial measure and, if there is detention, that it should be for the shortest possible period of time.

14. Article 37 of the CRC also requires that:
    (a) neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by children (article 37(a))
    (b) every detained child shall be separated from adults unless it is considered in the child's best interest not to do so (article 37 (c))
    (c) every detained child shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances (article 37 (c));
    (d) every detained child shall have prompt access to legal and other appropriate assistance (article 37(d))
    (e) every detained child shall have the right to challenge the legality of detention and receive a prompt decision in relation to that challenge (article 37(d))

15. Article 40 of the CRC sets out fundamental protections for children involved in the juvenile justice system. In particular:
    (a) children accused of a crime should be treated in a manner consistent with the promotion of the child's sense of dignity and worth, taking into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society (article 40(1))

[3] As UNICEF notes, the concept of 'best interests' of children has been the subject of more academic analysis than any other provision of the Convention; see UNICEF, *Implementation Handbook for the Convention on the Rights of the Child* (Implementation Handbook), United Nations, Geneva, 2002, p41.

(b) there should be laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

- the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
- whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. (article 40(3))

(c) there should be a variety of alternatives to institutional care to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence (article 40(4))

(d) children should have legal representation in all proceedings (article 40(2)(b)(ii)-(iii))

(e) the right to appeal proceedings (article 40(2(b)(v))

(f) the right to an interpreter (article 40(2)(b)(vi))

(g) the right to privacy (article 40(2)(b)(vii)).

16. Thus article 40 of the CRC seeks to ensure that there are special measures to protect children involved in the criminal justice system. Again, there is an emphasis on the availability of non-custodial options.

17. Article 20 of the CRC also seeks to ensure special protection and assistance for children who are deprived of their family environment – including children in detention. In particular, it seeks to ensure that when children are in institutional care, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

18. In addition, article 6(2) requires States to 'ensure to *the maximum extent possible* the survival and development of the child' (emphasis added). The right to development includes not just physical growth but a child's mental and emotional development.[4] It is well documented that detention and institutional care is likely to have a negative impact on a child's development and on this basis should be avoided where possible. The Commission's report on immigration detention of children – *A last resort?* – goes into substantial detail about the impact on children of a failure to ensure that detention is used as a measure of last resort.[5]

19. As the ALRC recognises, many of the provisions in the CRC are reiterated in various UN standards on children. For example, the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* states that detention 'should be

[4] Committee on the Rights of the Child, *General guidelines regarding the form and contents of periodic reports to be submitted by States Parties under article 44, paragraph 1(b) of the Convention*, 20 November 1996, UN Doc CRC/C/58, para 40.
[5] See especially Chapter 6 and Chapter 9 of the Human Rights and Equal Opportunity Commission's Report of the National Inquiry into Children in Immigration Detention, *A last resort?*, (2004) http://www.humanrights.gov.au/human_rights/children_detention_report/report/index.htm

used as a last resort' and 'be limited to exceptional cases.'[6] The *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules) state that any detention should be brief[7] and that it should only occur where the child has committed 'a serious act involving violence.'[8] Those instruments have significant weight in the interpretation of the principles set out in the CRC. They provide substantial guidance and should be used by policy makers to ensure that new laws comply with the Convention.

20. In 2005, the United Nations Committee on the Rights of the Child issued concluding observations regarding Australia's compliance with the CRC. The Committee made the following recommendations to bring Australia's 'system of juvenile justice fully in line with the Convention, in particular articles 37, 40 and 39 and with other United Nations Standards in the field of juvenile justice':

    (a) consider raising the minimum age of criminal responsibility to an internationally acceptable level;

    (b) take all necessary measures to ensure that persons below 18 in conflict with the law are only deprived of liberty as a last resort; and detained separately from adults, unless it is considered in the child's best interest not to do so;

    (c) urgently remedy the over-representation of indigenous children in the criminal justice system;

    (d) deal with children with mental illnesses and/or intellectual deficiencies in conflict with the law without resorting to judicial proceedings;

    (e) improve conditions of detention of children and bring them in line with international standards;

    (f) take measures with a view to abrogating the mandatory sentencing in the criminal law system of Western Australia;

    (g) remove 17 years old from the adult justice system in Queensland…[9]

21. See the following section for discussion of the provisions in the CRC dealing with mental illness and intellectual disability.

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[6] *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, Rules 1 and 2. Rule 2 provides '[d]eprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases. The length of the sanction should be determined by the judicial authority, without precluding the possibility of his or her early release'.

[7] *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, Rule 17.1(b) provides that 'Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum'.

[8] Rule 17.1(c), provides that 'Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response'.

[9] See Concluding Observations of the Committee on the Rights of the Child, Australia, 40th Session, CRC/C/15/Add.268, para 74 at http://www.ohchr.org/english/bodies/crc/docs/co/CRC.C.15.Add.268.pdf

ALRC views and proposals 27-1, 27-2, 27-3, 27-4

22. While all of the principles in the Convention should be taken into account when developing new measures regarding young federal offenders, the overriding international principles are:

    (a) the best interests of the child must be a primary consideration in all decisions relating to children – including sentencing decisions (article 3(1))

    (b) children should only be detained as a measure of last resort and then only for the shortest appropriate period of time (article 37(b))

23. The Commission therefore endorses paragraphs 27.35-37 of the Discussion Paper which suggest that any federal sentencing laws should explicitly ensure that these principles are protected.

24. The Commission also endorses the following views expressed by the ALRC in the Discussion Paper:

    (a) young people should have the right to legal representation in all federal sentencing matters, whether or not the court intends to imposes a custodial sentence (paragraphs 27.56-57)

    (b) the identity of young people involved in federal criminal proceedings should be protected (paragraphs 27.61-27.62)

    (c) young federal offenders should not be treated more harshly than adult federal offenders in sentencing decisions (paragraph 27.66)

    (d) young federal offenders should have access to diversionary options available in the relevant State or Territory (paragraph 27.73)

    (e) young federal offenders should not be transferred to adult prisons until the age of 18, unless a court determines it is in the best interests of the child (paragraph 27.80)

    (f) young people who commit a federal crime while under 18 years old should be dealt with by the juvenile justice system irrespective of their age at trial or sentencing (paragraphs 27.85-86)

25. The Commission therefore supports the following proposals made by the ALRC, as a means to advance the implementation of the CRC in the context of sentencing young federal offenders:

    (a) Proposal 27-1 (b) – (c), (e) – (j).
    (b) Proposal 27-2 (a) – (b), (f) – (i)
    (c) Proposal 27-3

26. In relation to the diversionary schemes referred to in Proposal 27-1(h) and the national best practice guidelines referred to in Proposal 27-3, the Commission

refers the ALRC to the guidelines developed by the Aboriginal and Torres Strait Islander Social Justice Commissioner. While these best practice guidelines were developed in the context of protecting the cultural needs of Indigenous youth, they are applicable to all children.

1. Viable alternatives to detention.
Diversion requires the provision of viable community-based alternatives to detention. Options that involve settlement by victim restitution and those that seek to avoid future conflict with the law through temporary supervision and guidance are specifically commended. However, the specific form of diversion should be adapted to meet local needs. Public participation in the development of all non-custodial options should be encouraged (Tokyo Rule 17.1).[10]

2. Availability of diversionary options.
Diversion may be used at any point of decision-making by the police, the prosecution or other agencies such as the courts or tribunals (Beijing Rule 6.1).[11] It is clear that the earlier in the process diversion occurs, the more effective it can be in avoiding stigmatisation of the young offender. However, diversion should also be possible in the later stages of proceedings when the young person is before the court.

The fact that a juvenile has previously participated in a pre-court diversionary option should not preclude future diversion or referral to diversion in subsequent legal proceedings. If a juvenile offender breaches the conditions of a diversionary option, this should not automatically lead to the imposition of a custodial measure (Tokyo Rule 14.3).

3. Offences where diversion is appropriate.
Diversionary measures should not be restricted to minor offences. Diversion should be an option 'whenever appropriate'. There may be mitigating circumstances which make diversion appropriate even when a more serious offence has been committed (Commentary on Beijing Rule 11.4).

4. Criteria for diversion.
Agencies with the discretionary power to divert young people from formal proceedings must exercise that power on the basis of established criteria. Access to diversionary programs must not be arbitrary. Tokyo Rule 3.1 requires that the 'introduction, definition and application of non-custodial measures shall be prescribed by law'.

5. Training of justice personnel.
All law enforcement officials involved in the administration of juvenile diversion should be specially instructed and trained to respond to the needs of young persons (Riyadh Guidelines 58; Beijing Rule 12.1).[12] Justice personnel should reflect the diversity of juveniles who come into contact with the juvenile justice system (Beijing Rule 22.2). Beijing Rule 6.3 requires that those who exercise discretion at all levels of juvenile justice administration shall be specially qualified or trained to exercise that discretion 'judiciously and in accordance with their functions and mandates'.

[10] United Nations *Standard Minimum Rules for Non-Custodial Measure*s 1990 (the Tokyo Rules)
[11] United Nations *Standard Minimum Rules for the Administration of Juvenile Justice* 1985 (the Beijing Rules)
[12] United Nations *Guidelines for the Prevention of Juvenile Delinquency* 1990 (the Riyadh Guidelines)

6. Consent.
Diversion requires the informed consent of the young offender (or the parent or guardian) to the particular diversionary option (Beijing Rule 11.3). Young people should be given sufficient information about the diversionary options available and any consequences of withholding consent. They should not feel pressured into consenting to diversion programs (for example, to avoid a court appearance). Care should be taken to minimise the potential for coercion at all levels in the diversion process.

7. Procedural safeguards.
Diversionary options must respect procedural safeguards for young people as established in CROC and the ICCPR. These include the presumption of innocence, the right to be informed promptly and directly of the charges, the right to silence, respect for the privacy of the young person and their family at all times, equal treatment before the law, the right to access to legal assistance, to the presence of a parent or a guardian and access to an interpreter.

8. Review and accountability.
Any discretion exercised in the diversion process should be subject to accountability measures. The Beijing Rules emphasise the provision of specific guidelines on the exercise of discretion and the provision of systems of review and appeal to permit scrutiny of decisions and accountability in juvenile justice administration (Beijing Rule 6.2). They do not specify precise mechanisms of review and accountability because it is not possible to cover all differences among justice systems. However, efforts must be made to ensure sufficient accountability for the exercise of discretion at all stages and levels.

9. Complaints.
Tokyo Rules 3.5 and 3.6 provide that the participant in a non-custodial program shall be entitled to make a complaint to a judicial or other competent independent authority on matters affecting their individual rights in the implementation of a non-custodial measure and in respect of any grievance relating to non-compliance with human rights.

10. Monitoring.
An effective, fair and humane juvenile justice system requires mechanisms for monitoring and evaluation to curb any abuses of discretionary power and to safeguard the rights of young offenders. Beijing Rule 30 also requires that 'efforts be made to establish a regular evaluative research mechanism built into the system of juvenile justice administration and to collect and analyse relevant data and information for appropriate assessment and future improvement and reform of the administration'. Tokyo Rule 2.4 similarly requires non-custodial measures to be monitored and 'systematically evaluated'.[13]

27. Regarding Proposal 27-1(a), the Commission highlights that the United Nations Committee on the Rights of the Child recently commented that, in Australia, 'the age of criminal responsibility, set at 10 years, is too low, although there is a presumption against criminal responsibility until 14 years (common law doli

[13] A full explanation of these guidelines can be viewed at:
http://www.humanrights.gov.au/human_rights/briefs/brief_5.html

incapax)'.[14] The Commission therefore urges reconsideration of the definition of 'young person' as it applies to criminal responsibility.

28. Regarding Proposal 27-4, the Commission supports the monitoring, reporting, information gathering, coordination and advice functions proposed but has no concluded view on the most appropriate body to conduct those functions.

Offenders with mental illness and intellectual disability (Chapter 28)

29. Chapter 28 of the Discussion Paper considers Division 9 of Part 1B of the *Crimes Act 1914* (Cth) (Crimes Act) and issues relating to the sentencing, administration and release of federal offenders with a mental illness or intellectual disability.

30. The Commission's principal concerns are that:

    (a) people with mental illness and intellectual disability are disproportionately represented within the Australian state and territory criminal justice system;[15] and

    (b) people with mental illness and intellectual disability detained by the criminal justice system are frequently denied the human rights protections to which they are entitled.[16]

31. The Commission's concerns in relation to people with mental illness within the criminal justice system were reflected in the findings of its National Inquiry into Human Rights and Mental Illness in 1993.[17]

32. More recently, the disadvantage experienced by people with a mental illness in the criminal justice system was reported in *Not for Service: Experiences of Injustice and Despair in Mental Health Care in Australia,* the 2005 report of the Mental

[14] See Concluding Observations of the Committee on the Rights of the Child, Australia, 40th Session, CRC/C/15/Add.268, para 73 at http://www.ohchr.org/english/bodies/crc/docs/co/CRC.C.15.Add.268.pdf

[15] T. Butler and S. Allnut, *Mental Illness Among New South Wales Prisoners* (2003) NSW Corrections Health Service, p 2. New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report 80 (1996), ch 2.

[16] Human Rights and Equal Opportunity Commission, *Report of the National Inquiry into the Human Rights of People with Mental Illness* (1993), chapter 25; Mental Health Council of Australia and Brain and Mind Research Institute in association with the Human Rights and Equal Opportunity Commission, *Not for Service: Experiences of Injustice and Despair in Mental Health Care in Australia* (2005); New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report 80 (1996); Victorian Law Reform Commission, *People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care—Final Report* (2003); Simpson J, Martin M and Green J, *The Framework Report: Appropriate Community Services in NSW for Offenders with Intellectual Disabilities and those at Risk of Offending*, (NSW Council for Intellectual Disability: 2001).

[17] Human Rights and Equal Opportunity Commission, *Report of the National Inquiry into the Human Rights of People with Mental Illness* (1993).

Health Council of Australia and Brain and Mind Research Institute prepared in association with the Human Rights and Equal Opportunity Commission.[18]

33. The UN Committee on the Rights of the Child also noted that 'children with mental illness and/or intellectual disabilities are overrepresented in the juvenile justice system' in Australia.[19]

34. The Commission's overwhelming concern is to ensure that people with mental illness and people with intellectual disability within the criminal justice system are afforded the full range of human rights as recognised in the various international human rights instruments.

35. The Commission wishes to highlight that the issues facing people with a mental illness are separate to and distinct from the issues facing people with an intellectual disability. Accordingly, regard should be had to the particular issues and different contexts in developing responses to the concerns set out above. Any responses should also take into account the possibility that mental illness and intellectual disability may co-exist.

Human rights principles relevant to offenders with mental illness and offenders with intellectual disability

36. People with mental illness and people with intellectual disability within the criminal justice system have rights prescribed in international treaties including the *International Covenant on Civil and Political Rights* (ICCPR), the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and the *Convention on the Rights of the Child* (CRC).

37. The ICCPR requires that all State parties 'respect and ensure **to all individuals** within their territory and subject to their jurisdiction' the rights which the Covenant recognises. These rights include, relevantly for present purposes; the right to life (article 6); the right to freedom from cruel, inhuman or degrading treatment or punishment (article 7); and the right to be treated with respect for dignity and with humanity, if deprived of liberty (article 10). Article 2.2 of the ICCPR requires Governments to 'adopt such legislative or other measures as may be necessary to give effect to the rights recognised.'

38. The ICESCR requires State parties to 'recognise the **right of everyone** to the enjoyment of the highest attainable standard of physical and mental health' (article 12). State parties are required to 'take steps…by all appropriate means, including particularly the adoption of legislation' with a view to the progressive realisation of the rights which the Covenant recognises.

[18] For a copy of the report see http://www.mhca.org.au/notforservice/
[19] See Concluding Observations of the Committee on the Rights of the Child, Australia, 40th Session, CRC/C/15/Add.268, para 73 at http://www.ohchr.org/english/bodies/crc/docs/co/CRC.C.15.Add.268.pdf

39. While the ICESCR provides for progressive realization, it also imposes on States various obligations which are of immediate effect. States parties have immediate obligations in relation to the right to health, such as the guarantee that the right will be exercised without discrimination of any kind (article 2.2) and the obligation to take steps (article 2.1) towards the full realization of article 12. The Committee on Economic Social and Cultural Rights (established by the ICESCR as the interpreter of the Convention) has emphasised that States parties are under a specific legal obligation to refrain from denying or limiting equal access to health services for all persons, including to prisoners or detainees.[20]

40. The CRC explicitly recognises the right of children to enjoy the highest attainable standard of physical and mental health (article 24.1) and the obligation to promote full recovery and rehabilitation from past trauma (article 39). The CRC is also very explicit about the special efforts that must be made to ensure that children with disabilities have access to services designed to promote the maximum possible integration in the community (article 23).

41. In addition to the fundamental human rights enshrined in these Covenants, there are specific United Nations Principles that deal with some of the particular issues facing people with a mental illness, people with an intellectual disability and/or people detained within the criminal justice system. These include the *Declaration on the Rights of Disabled Persons*;[21] the *Declaration on the Rights of Mentally Retarded Persons*;[22] the *Principles for the Protection of Persons with Mental Illness and the Improvement of Health Care*;[23] the *Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment* (Body of Principles);[24] and the *Standard Minimum Rules for the Treatment of Prisoners* (Standard Minimum Rules).[25]

42. As noted above, as a matter of international law, these declarations are not binding of themselves on Australia. However, they are the product of agreement between States and as such are an indication and expression of States' consensus on a particular issue. On this basis they have an 'undeniable moral force'.[26]

43. Moreover, the declarations provide guidance to States in interpreting the scope and content of their treaty and other international obligations. The General Assembly in its Report on the drafting of the ICCPR stated that the Standard Minimum Rules should be taken into account when interpreting and applying

[20] Committee on Economic Social and Cultural Rights, General Comment No 14, 11 August 2000, UN Doc E/C.12/2000/4 at para 34.
[21] Proclaimed by General Assembly resolution 3447 (XXX) of 9 December 1975
[22] Proclaimed by General Assembly resolution 2856 (XXVI) of 20 Dec. 1971
[23] Adopted by resolution 46/119 of the UN General Assembly on 17 December 1991, UN Doc A/RES/46/119.
[24] Adopted by resolution 43/173 of the UN General Assembly on 9 December 1988, UN Doc A/RES/43/173.
[25] Adopted August 30, 1955, by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I and approved by the Economic and Social Council by resolution 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977).
[26] UN High Commissioner on Human Rights; http://www.ohchr.org/english/law/index.htm

article 10(1) of the ICCPR.[27] The United Nations Human Rights Committee has also indicated that compliance with the Standard Minimum Rules and the Body of Principles is the minimum requirement for compliance with the ICCPR's obligation that people in detention are to be treated humanely (article 10).[28]

44. It is with these international human rights obligations in mind, that the Commission makes the following comments about specific ALRC Proposals.

ALRC Proposal 28-1

45. The Commission supports ALRC Proposal 28-1:

> The Australian Government should initiate an inquiry into issues concerning the mentally ill and the intellectually disabled in the federal criminal justice system.

46. The Commission understands that the terms of reference allow the ALRC to inquire into, and report on, Division 9 of Part 1B of the Crimes Act and issues related to the sentencing, administration and release of federal offenders with a mental illness or intellectual disability.

47. The Commission is aware of a number of important issues for people with mental illness and people with intellectual disability within the criminal justice system that extend beyond these terms of reference. Examples of these issues, include, the following:

    (a) The Attorney-General is the decision maker in relation to the release or continued detention of a person found unfit to be tried or not guilty by reason of mental illness under Divisions 6 and 7 respectively of Part 1B of the Crimes Act. The Commission considers that this process that provides for the executive review of a person's detention is in breach of, inter alia, article 9(4) of the ICCPR. The Commission recommended in its 1993 report into human rights and mental illness that decisions concerning the release of such people should be made by courts or independent specialist tribunals.[29]

    (b) The conditions in some Australian prisons have been found to be in breach of Australia's international obligations under the ICCPR and the Standard Minimum Rules. These conditions have been found to be particularly damaging to the health of detainees affected by a mental illness.[30]

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[27] United Nations, Official Records of the General Assembly, Thirteenth Session, Third Committee, 16 September to 8 December 1958, pp 160-173 and 227-241.
[28] Human Rights Committee General Comment No. 21 (1992) at [5]. See also *Mukong v Cameroon* HRC Communication No. 458/1991, UN Doc CCPR/C/51/458/1991 at [9.3]; *Herbert Thomas Potter v New Zealand* HRC Communication No. 635/1995, UN Doc CCPR/C/60/D/632/2005 at [6.3]; *Safarmo Kurbanova v Tajikistan* HRC Communication No. 1096/2002, UN Doc CCPR/C/79/D/1096/2002 at [7.8].
[29] Human Rights and Equal Opportunity Commission, *Report of the National Inquiry into the Human Rights of People with Mental Illness* (1993) pp 797–802 and 941-2.
[30] Human Rights and Equal Opportunity Commission, *Report of the National Inquiry into the Human Rights of People with Mental Illness* (1993) p 940.

48. The Commission considers that a comprehensive inquiry should be conducted covering all issues concerning people with mental illness and people with intellectually disability within the criminal justice system. This inquiry should, if possible, cover both the federal system and the state and territory criminal justice systems. Any such inquiry should, of course, be cognisant of the separate issues facing people with a mental illness as distinct from people with an intellectual disability.

ALRC Proposal 28-13

49. The Commission supports Proposal 28-13:

> The Australian Government and state and territory governments should work together to improve service provision to federal offenders with a mental illness or intellectual disability.

50. The Commission notes, with concern, that treatment and services are not being provided to mentally ill persons within the criminal justice system in accordance with Australia's international human rights obligations. Support for these conclusions can be found in *Not for Service: Experiences of Injustice and Despair in Mental Health Care in Australia* (2005)[31] and findings of the Commission's National Inquiry into Human Rights and Mental Illness (1993).[32]

51. The Commission highlights the recommendations made in *Not for Service* regarding people with mental illness in the criminal justice system:

> 4(a) that all governments work to achieve the highest attainable standard of mental health care as required by the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child and apply the UN 'Principles for the protection of persons with mental illness and the improvement of mental health care';
>
> 4(b) that as a matter of urgency all jurisdictions develop nationally consistent guidelines on the assessment, sentencing and provision of specialised mental health care (according to the NMHS) for mentally ill people in contact with the justice and/or detention systems; and
>
> 4(c) that all Australian jurisdictions provide specialised legal services, diversionary and reintegration programs for people with a mental illness in contact with in the justice and/or detention systems.[33]

[31] Mental Health Council of Australia and Brain and Mind Research Institute in association with the Human Rights and Equal Opportunity Commission, *Not for Service: Experiences of Injustice and Despair in Mental Health Care in Australia* (2005).
[32] Human Rights and Equal Opportunity Commission, *Report of the National Inquiry into the Human Rights of People with Mental Illness* (1993) Chapter 25.
[33] See http://www.mhca.org.au/notforservice/summary/recommendations.html

ALRC Proposal 28-14

52. The Commission supports Proposal 28-14:

> The Corrective Services Administrator's Conference should develop and promote compliance with national standards for the assessment, detention, treatment and care of persons with a mental illness or intellectual disability who come into contact with the criminal justice system. These standards should comply with relevant international instruments.

53. The Commission refers to the international instruments set out above and submits that regard should be had to both the international covenants and the relevant declarations in setting national standards for the assessment, detention, treatment and care of persons with a mental illness or intellectual disability.

Indigenous offenders (Chapter 29)

54. As the ALRC recognises in paragraph 29.38, Aboriginals and Torres Strait Islanders are over represented in all jurisdictions in the criminal justice process. The Commission is particularly concerned about the incarceration of Indigenous children. In Australia, the contact of Indigenous youth with criminal justice processes has long been recognised as one of the most critical issues facing Indigenous Australians today.

55. In 1991, the Royal Commission into Deaths in Custody identified an 'urgent need for governments and Aboriginal organizations to negotiate together to devise strategies designed to reduce the rate at which Aboriginal juveniles are involved in the welfare and criminal justice systems, and, in particular, to reduce the rate at which Aboriginal juveniles are separated from their families or communities, whether by being declared to be in need of care, detained, imprisoned or otherwise.'[34]

56. There appears to be a paucity of statistics regarding the rate at which Indigenous people commit federal offences in particular. It is likely that most federal offences committed by Indigenous peoples will relate to breaches of the *Social Security Act 1991* (Cth). The Indigenous experience in the context of State and Territory offences should inform the approach to sentencing of Indigenous federal offenders.

57. In the Commission's submission to the Northern Territory Law Reform Commission's Inquiry into Aboriginal Customary Law, the Social Justice Commissioner noted the connection between increased incarceration and the breakdown of Indigenous communities and family structures. The Social Justice Commissioner indicated that this breakdown was due in part to the intervention of the formal legal system through the removal of individual offenders from their country, the historical lack of recognition of traditional rights to country and the

[34] Royal Commission into Aboriginal Deaths in Custody, *National Report, Vol. 2,* AGPS, Canberra, 1991, Recommendation 62, p 252.

non-recognition of customary law processes as an integral component of the operation of Aboriginal families and societies in Australia.[35]

58. There is also a direct correlation between the experience of socio-economic disadvantage in the Indigenous community and the rate of crime. In relation to juvenile offenders:

> The risk of crime is exacerbated by creating a community that is not inclusive of a diversity of families and youth, and it is exacerbated by not providing meaningful social pathways for its members. In the past 25 years, the percentage of dependent children living below the poverty line has nearly doubled increasing greatly the number of young people who are denied the opportunity to participate fully in social and economic life.[36]

59. Further, as far back as the 1970s, studies revealed that:

> Even a relatively short term in custody or on remand was found to significantly increase subsequent offending (64.3%) compared to being placed on remand at home (36.6%).[37]

60. Consequently, any reforms to federal sentencing should take into account that incarceration of Indigenous offenders may not achieve the stated aims of prevention, punishment and rehabilitation.

Human rights principles relevant to Indigenous offenders

61. There are three general human rights principles of special importance to Indigenous offenders: non-discrimination, the recognition of cultural identity and self-determination.[38] These three principles are contained in international treaties to which Australia is a party.

62. The principle of non-discrimination is recognised in every major international human rights treaty, including the ICCPR (article 2), the ICESR (article 2.2) and the *International Convention on the Elimination of All Forms of Racial Discrimination.* Further, the prohibition on racial discrimination has been incorporated into Australian domestic law through section 9(1) of the *Racial Discrimination Act 1975*.

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[35] Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law in the Northern Territory, 14 May 2004 at 2. Electronic copy available at http://www.humanrights.gov.au/social_justice/customary_law/nt_lawreform.html

[36] National Crime Prevention (1999) *Pathways to Prevention: Developmental and early intervention approaches to crime in Australia*, National Crime Prevention, Attorney-General's Department, Canberra, p.5.

[37] Kraus and Smith (1978) in Lynch, M. Buckman, J. & Krenske, L. (2003) 'Youth Justice: Criminal Trajectories', *Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology, Canberra, No.265.

[38] Dr William Jonas, 'Indigenous Community Expectations of best practice interventions in corrections' Panel discussion at the Corrections for Indigenous People Conference, Adelaide, 14 October 1999. Electronic copy available at http://www.humanrights.gov.au/speeches/social_justice/panel_discussion.html

63. Non-discrimination can be interpreted in one of two ways: 'substantive equality' or 'formal equality'.

64. In the decision of the International Court of Justice in the *South West Africa Case*, Judge Tanaka explains the principle of substantive equality:

> The principle of equality before the law does not mean the absolute equality, namely the equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal... To treat unequal matters differently according to their inequality is not only permitted but required.[39]

65. Such an understanding of equality acknowledges that racially specific aspects of discrimination such as socio-economic disadvantage, historical subordination and the failure to recognise cultural distinctiveness must be taken into account in order to redress inequality in fact.

66. In contrast, 'formal equality' relies on the notion that all people should be treated identically regardless of their differing circumstances. Such an approach 'denies the differences which exist between individuals and promotes the idea that the state is a neutral entity free from systemic discrimination.'[40]As Brennan J states in the High Court's decision in *Gerhardy v Brown*:

> …it has long been recognised that formal equality before the law is insufficient to eliminate all forms of racial discrimination… formal equality must yield on occasions to achieve… genuine, effective equality.[41]

67. The United Nations Human Rights Committee and the United Nations Committee on the Elimination of Racial Discrimination have adopted a substantive equality approach to the meaning of non-discrimination. The Human Rights Committee has indicated that equality 'does not mean identical treatment in every instance', and that the Committee is concerned with 'problems of discrimination in fact' not just discrimination in law.[42]

68. Regarding cultural identity, article 27 of the ICCPR states:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

69. This principle permits differential treatment where it would protect and ensure the survival or an ethnic or national minority. The Committee on the Elimination of Racial Discrimination has recognised that this principle applies equally to

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[39] *South West Africa Case (Second Phase)* [1966] ICJ Rep 6, pp303-304, p305.
[40] Thornton, M., The liberal promise: Anti-discrimination legislation in Australia, Melbourne, Oxford University Press, 1990, p16.
[41] *Gerhardy v Brown* (1984) 159 CLR 70 per Brennan J at 128-129.
[42] Human Rights Committee, *General Comment XVIII, Non-discrimination (1989)*, paras 8, 9, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI\GEN\1\Rev.1, p26.

indigenous peoples. Consequently, the Committee has called on State parties to the Convention to:

> Recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation…
>
> Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent;
>
> Ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.[43]

70. Self-determination is the collective right of peoples to determine and control their own destiny. Article 1 of the ICCPR states that:

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.[44]

71. As noted by the former Social Justice Commissioner, Dr Bill Jonas:

> Unless provided in accordance with the principle of self-determination, correctional services aimed at Indigenous people may be effectively inaccessible to them or where they are accessible, be unlikely to secure their objectives. As my predecessor Mick Dodson once commented:
>
> > *The aim (of self-determination) is not merely to participate in the delivery of... services, but to penetrate their design and inform them with Indigenous cultural values. The result is not merely services which are better structured to reflect the needs and identity of particular communities: there can be a resultant improvement in the effectiveness and efficiency of these services.*[45]

72. It appears that, at present, these principles are inadequately reflected at the three stages in the sentencing process namely: (1) the factors taken into account when a sentence is being determined; (2) the format of the sentencing hearing and (3) sentencing options.

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[43] Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII on the rights of indigenous peoples, para 3, in Compilation of General Comments and General Recommendations adopted by human rights treaty bodies,* UN Doc: HRI/GEN/1/Rev.5, 26 April 2001.
[44] Article 1 of the International Covenant on Economic, Social and Cultural Rights is worded identically, as is the current version of Draft Declaration on the Rights of Indigenous Peoples.
[45] Dr William Jonas, "Indigenous Community Expectations of best practice interventions in corrections" Panel discussion at the Corrections for Indigenous People Conference, Adelaide, 14 October 1999. Electronic copy available at: http://www.humanrights.gov.au/speeches/social_justice/panel_discussion.html

Sentencing factors and ALRC proposal 29-1(a)

73. ALRC Proposal 29-1(a) recommends that:

> (a) legislation should, endorse the practice of considering traditional laws and customs, where relevant, in sentencing an ATSI offender.

74. In recognition of the unique cultural factors that may influence the conduct of Indigenous peoples, sentencing legislation in various States and Territories permits a judge to take into account the cultural background, economic and social status of a particular offender. This power is not limited to Indigenous cases. It is present in s 16A(m) of the *Crimes Act 1914* (Cth).

75. However, there may be cases in which cultural practices are inconsistent with international human rights standards.

76. There is a long-established presumption that statutes are to be interpreted and applied, as far as the language permits, so as to be consistent with the comity of nations and established rules of international law.[46] This presumption operates where there is ambiguity in the meaning of the legislation. According to Mason CJ and Deane J in *Minister for Immigration and Ethnic Affairs v Teoh* :

> In this context, there are strong reasons for rejecting a narrow conception of ambiguity. If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail.[47]

77. The Commission recently addressed the issue of balancing customary law and human rights law in a submission prepared for an application to intervene in the Northern Territory Supreme Court (*The Queen v GJ*).[48] While the application to intervene was refused, the principles outlined in that submission may be useful to the ALRC in developing its final recommendations.

78. The submission suggests that any consideration given to Aboriginal customary law in a criminal sentencing process should be carried out consistently with human rights principles that are recognised in the international treaties to which Australia is a party. The recognition and protection given to the cultures of minority groups or the collective rights of indigenous peoples, however those cultural or collective rights are described, must be balanced against the rights of individuals, including those of indigenous women and children, and cannot prevail over the individual human rights to be free from violence and discrimination.

79. The submission expressed the Commission's view that, while all attempts should be made to reconcile the rights of individuals with the rights of Indigenous peoples

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[46] *Leroux v Brown* (1852) 12 C.B. 801; The Zollverein (1856) Swab. 96; The Annapolis (1861) Lush. 295; *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309; *Zachariassen v Commonwealth* (1917) 24 CLR 166. See also *Maxwell on the Interpretation of Statutes* (7 th Ed, 1929) at 127.
[47] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287-288
[48] No. CA 19 of 2005, On appeal from (BR) Martin CJ in proceedings No. 20418849.

to retain and enjoy their culture, the individual human rights, particularly those of children recognised by the CRC, must ultimately prevail and must be accorded due weight in any sentencing process.

80. A full copy of the submission prepared by the Commission can be found at http://www.humanrights.gov.au/legal/intervention/queen_gj.html.

81. Therefore, while the Commission does not disagree with ALRC Proposal 29-1(a), the Commission suggests the following additional Proposal 29-1(c):

    (c) legislation should ensure that in the event of any inconsistency between cultural considerations and international human rights principles in sentencing decisions, the latter will prevail.

Community participation in sentencing

82. In paragraphs 29.54-29.57, the ALRC notes the existence of a variety of processes that allow community participation in the sentencing process.

83. In its submission to the Northern Territory Law Reform Commission's Inquiry on Aboriginal Customary Law, the Commission considered the role of community justice systems in detail.[49] The Commission submitted that 'improved community justice mechanics have the potential to make a significant contribution to addressing the inequality and disadvantage experienced by Indigenous people.'

84. The submission on Aboriginal Customary Law also noted that the current criminal system is not culturally suited to the Indigenous community; it relieves Indigenous leaders of the power to govern and it often means that offenders are isolated from their community, its laws and support structure and placed in an environment that reinforces their feelings of anger and alienation.

85. The value of participation lies in its ability to enhance a sense of ownership, responsibility, build capacity and, ultimately, self-determination, in the Indigenous community.

86. However, while community justice is be encouraged, it must be allowed to evolve in an organic fashion:

> [A]ny initiatives seeking to formalise an interface between aspects of customary law and the western legal system should be organic, evolutionary and holistic. In order to be effective, any community justice initiatives will also involve a considerable investment in community consultation, participation and education: the emphasis should be on devolving power to the communities. A one-size-fits-all approach or the top-down application of a preconceived model is unlikely to yield long-term results and could even be counterproductive in resolving law and justice issues.[50]

[49] The Commission's submission is available in electronic format at: http://www.humanrights.gov.au/social_justice/customary_law/nt_lawreform.html
[50] Misplaced citation. Will find tomorrow.

87. The Commission is therefore in favour of any mechanism that promotes consultation with, and participation of, the Indigenous community in the criminal justice system. However, it cautions against the incorporation of a statute-based community justice mechanism if it prescribes the nature and style of the procedure. To do so would be to fail to recognise the intensely local character of many Indigenous dispute resolution mechanisms. A general approach, imposed from above, may undermine the self-determination process and have the effect of forcing still more culturally inappropriate processes upon Indigenous communities.

Indigenous young people with cognitive disabilities

88. Throughout 2005, the Social Justice Commissioner conducted a series of consultations, which culminated in a National Roundtable on the subject of Indigenous youth with cognitive disabilities who were entering the juvenile justice system.[51]

89. The category 'cognitive disabilities' includes a range of disorders relating to mental processes of knowing, including awareness, attention, memory perception, reasoning and judgment. Cognitive disabilities include intellectual disabilities, learning difficulties, acquired brain injury, foetal alcohol syndrome, dementia, neurological disorders and autism spectrum disorders.

90. The report highlighted the relationship between cognitive disability and the wider socio-economic disadvantages suffered by Indigenous Australians as a result of the impact of colonialism. The connection is particularly important because mental health, from an Indigenous perspective, is inextricably linked to physical, cultural and spiritual health and well-being. It is also linked to family relationships, sexual health and gender identity, education, employment and community cohesion.[52]

91. This link illustrates how Indigenous juvenile offenders with cognitive disabilities are often the victims of crimes themselves, or have been harmed by the degrading effect of social and economic privation.

92. Such matters must be taken into account when Indigenous youth come into contact with the juvenile justice system. Oppressive, or coercive, interaction with the criminal justice system is likely to compound, or create, cognitive disabilities.

93. It is difficult to identify the exact number of Indigenous juvenile offenders with cognitive disabilities. This is because:

    (a) there is no solid statistic data available;

[51] See *Indigenous young people with cognitive disabilities & Australian juvenile justice systems*. Electronic copy available at: http://www.humanrights.gov.au/social_justice/cognitive_disabilities.pdf
[52] Social Health Reference Group (2003) *Consultation Paper for the Development of a National Strategic Framework for Aboriginal and Torres Strait Islander Mental Health and Social and Emotional Well Being 2004-2009*, Commonwealth Department of Health and Ageing, p.vii.

(b) methods for assessing cognitive disabilities are not culturally appropriate;

(c) Indigenous and non-Indigenous communities have different ways of defining cognitive disabilities; and

(d) cognitive disabilities in Indigenous offenders are often 'masked' by other symptoms of severe socio-economic disadvantage.

94. However, the National Roundtable assembled information from a variety of sources that indicated that the problem was extensive. With due regard to cultural sensitivity, the *2003 New South Wales Young People in Custody Health Survey* estimated that 10% of Aboriginal and Torres Strait Islander juveniles in detention suffered from a cognitive disability.

95. There have been no studies conducted examining the impact of diversionary practices with Indigenous young people with cognitive/intellectual disabilities or mental health issues, therefore no comment can be made as to the effectiveness of diversion for this group. However community consultations revealed a concern about the adequacy of resources available in some communities to support those Indigenous young people with a cognitive disability and/or mental illness being diverted from formal justice settings.

96. The Commission recommends that there be further study into this area and highlights the following concerns to be addressed:

(a) youth offenders are only being assessed when they are displaying 'obvious' signs of cognitive or intellectual disability. Many children are not being diagnosed because their condition may be mild, or may not manifest itself until later;

(b) methods used to assess Indigenous youth may not be culturally suitable, leading to misdiagnosis;

(c) there appears to be limited access to culturally suitable mental health services in detention, which again leads to misdiagnosis;

(d) mental health services are unable, due to lack of resources, to deliver services post-release or during a community corrections order.