## ***Indigenous justice systems and coordination with ordinary justice systems***

1. **What national legal provisions establish recognition of indigenous justice systems?**

Australia’s criminal justice systems operate under the Westminster system and Australian courts do not recognise Indigenous customary law. Governments, however, have been working towards ensuring that legal practices are appropriately tailored to Indigenous peoples. This typically takes the form of Indigenous sentencing courts, sometimes known as circle sentencing. (see answer to question 13)

1. **Are there restrictions on the exercise of indigenous jurisdiction and if so, what are these restrictions? Can indigenous jurisdiction be exercised over non-indigenous individuals?**

Not Applicable

1. **Please provide examples of how jurisprudence of the ordinary justice system has referred matters relating to the indigenous justice systems?**

Not Applicable

1. **How do jurisdictions between the ordinary justice system and the indigenous justice systems cooperate and coordinate and how is this regulated?**

Not Applicable

1. **Are the decisions by the indigenous justice systems subject to appeals in, and review by, the ordinary justice system?**

Not Applicable

1. **What measures are in place to strengthen coordination between indigenous and ordinary justice systems? Is there any joint entity consisting of both indigenous and ordinary justice systems representatives?**

Not Applicable

1. **How is it ensured that those accused are not tried in both the indigenous and ordinary justice systems?**

Not Applicable

1. **What financial and technical assistance is provided by the States to the indigenous justice systems?**

Not Applicable

1. **Are there measures in place to ensure the ordinary justice system and the indigenous justice system is in line with international human rights standards and respect the rights of women, children, persons with disabilities and LGBT persons?**

Australia has a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between the Australian Government and the six states and two internal self-governing territories. Human rights are protected across Australia through a range of means.

Under Australia’s legal system, the recognition and protection of many rights and freedoms are enshrined in common law. The common law has developed principles of statutory interpretation that function to protect human rights. When interpreting legislation, courts will presume that the Parliament did not intend to interfere with fundamental human rights. Another principle applies in cases of ambiguity, where courts will presume that legislation is intended to be consistent with established rules of international law, including Australia’s international human rights obligations.

Mechanisms exist at the federal, state and territory level, which seek to ensure that governments act consistently with Australia’s international obligations. There is a legislative requirement that federal legislation be accompanied by a Statement of Compatibility with Human Rights. This process encourages early and ongoing consideration of human rights in policy and legislative development.

Domestic legislation further protects human rights. For example, anti-discrimination laws across all jurisdictions implement rights to non-discrimination and equality, and the *Privacy Act 1988* gives effect to the right to freedom from arbitrary or unlawful interferences with privacy. Two jurisdictions in Australia have enacted human rights charters.

The Australian Human Rights Commission (AHRC) plays a central role in protecting and promoting human rights in Australia. The Australian Government is committed to the Paris Principles and to their application to the AHRC as a National Human Rights Institution. Each Australian state and internal self-governing territory also has its own body dedicated to promoting human rights, anti-discrimination and equal opportunity (excluding Norfolk, Christmas, Cocos/Keeling islands). The AHRC handles complaints under anti‑discrimination legislation, and has the power to intervene in court proceedings that involve human rights matters. The AHRC is made up of a President and special purpose Commissioners for Aboriginal and Torres Strait Islander Social Justice, Children, Human Rights, Sex Discrimination, Disability Discrimination, Age Discrimination and Race Discrimination.

Australia is a party to the seven key international human rights treaties. Australia has signed and ratified:

* The International Covenant on Civil and Political Rights (ICCPR);
* The International Covenant on Economic, Social and Cultural Rights (ICESCR);
* The Convention on the Rights of the Child (CRC);
* The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);
* The Convention on the Elimination of All Forms of Racial Discrimination (CERD);
* The Convention on the Elimination of All Forms of Discrimination Against Women(CEDAW); and
* The Convention on the Rights of Persons with Disabilities (CRPD).

It is against these treaties that [human rights scrutiny](https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/Pages/default.aspx) processes under the *Human Rights (Parliamentary Scrutiny) Act 2011* are undertaken. Australia also has periodic [treaty body reporting](https://www.ag.gov.au/RightsAndProtections/HumanRights/United-Nations-Human-Rights-Reporting/Pages/Treaty-Body-Reporting.aspx) obligations under these treaties. Each of these treaties has a committee (or 'treaty body') that monitors States Parties’ compliance with their treaty obligations and decides on complaints against states when states have accepted the relevant complaints processes. Committees are composed of independent experts elected by states parties. Australia is an active participant in the [Universal Periodic Review](https://www.ag.gov.au/RightsAndProtections/HumanRights/United-Nations-Human-Rights-Reporting/Pages/Australias-Universal-Periodic-Review.aspx) process, which provides an in-depth analysis of Australia’s compliance with our international human rights obligations.

Australia has also signed and/or ratified a number of optional protocols to these treaties. For example:

* Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty;
* Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women;
* Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict;
* Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography;
* Optional Protocol to the Convention on the Rights of Persons with Disabilities; and
* Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).

Under international law, Australia is bound to comply with their provisions and to implement them domestically. Australia is also a party to the individual communications mechanisms under the CAT and the CERD.

Australia ratified OPCAT on 21 December 2017 and it entered into force in Australia on 20 January 2018. On ratification, Australia made a declaration under Article 24 of OPCAT to postpone National Preventive Mechanism (NPM) obligations for three years, to commence in January 2021. The delay allows time for the Australian Government to work with states and territories to establish Australia’s NPM. As each government is proposed to retain authority for oversight of places of detention in their jurisdiction, Australia’s NPM will be a cooperative network of Commonwealth, state and territory inspectorates, with the Office of the Commonwealth Ombudsman providing a facilitative coordination role.

On 1 July 2018, the Commonwealth Ombudsman commenced as NPM Coordinator and as the NPM Body for places of detention under the control of the Commonwealth. The Ombudsman Amendment (National Preventive Mechanism) Regulations 2019 formally confer on the Commonwealth Ombudsman the roles and functions of the NPM Coordinator and of the NPM Body for places of detention under the control of the Commonwealth under OPCAT.

The Australian Government continues to work with the states and territories to establish Australia’s NPM network.

In addition, the Australian Governments’ support for the [United Nations Declaration on the Rights of Indigenous Persons](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf) (the Declaration) demonstrates an important commitment to promoting and protecting the rights of indigenous peoples.

Australia’s Indigenous Affairs agenda is consistent with the Declaration and our domestic policies and programs give it practical effect.

Australian Governments undertake a collaborative approach across all spheres of Government to address disadvantage experienced by Indigenous Australians and help implement the 2030 Agenda, aligning to our Human Rights pillar to provide opportunities to assist indigenous peoples — both in Australia and overseas — to overcome social and economic disadvantage.

The Australian Government acknowledges the gap between Indigenous and non-Indigenous Australians in social and economic indicators remains unacceptably wide; and is committed to a genuine formal partnership with Aboriginal and Torres Strait Islander peoples on Closing the Gap.

The Closing the Gap framework is Australia’s national approach for Australian governments to invest in supporting better life outcomes for Aboriginal and Torres Strait Islander peoples.

The draft Closing the Gap Statement released by the Council of Australian Governments (COAG) in December 2018 outlined a strengths based framework, which prioritises intergenerational change and the aspirations and priorities of Aboriginal and Torres Strait Islander peoples across all Australian communities. This included draft targets across policy areas including justice and youth justice.

In March 2019, a ten-year partnership agreement came into effect, which includes as part of this commitment, the establishment by the Council of Australian Governments (COAG) of a Joint Council on Closing the Gap. The Joint Council is comprised of ministers from the Commonwealth, each state and territory, twelve members of the National Coalition of Aboriginal and Torres Strait Islander Peak Organisations, and one representative of the Australian Local Government Association. The new Closing the Gap framework and targets will be finalised in negotiation with the partnership during 2019.

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Like the 2030 Agenda, the commitment to closing the gap is a long-term effort aimed at intergenerational change.

Our commitment to genuine partnership and consultation, as seen in the development process for the Closing the Gap refresh, demonstrates our ongoing learning in how best to achieve practical effect.

## ***Indigenous people in the ordinary justice system***

1. **What are the main challenges faced by indigenous peoples in terms of accessing the ordinary justice system?**
* Social disadvantage in the areas of education, housing, employment, income and health.
* A lack of awareness of legal matters and the legal systems.
* Cross-cultural issues, including who has the rights to speak on particular topics, kinship relationships and issues such as gratuitous concurrence (the tendency to agree with the questioner).
* Indigenous Australians are less likely to seek help from mainstream legal services due to a perceived lack of cultural awareness.
* Financial barriers, such as court costs and travel.
* Geographic barriers (remoteness).
* Shortage of interpreters – in particular, certified interpreters with the skills and experience required to translate the complex concepts required by the justice system.
1. **Please describe how legal aid and the right to interpretation are provided in the ordinary justice system for indigenous victims, witnesses and those accused of having committed a crime?**

The Australian Government’s Indigenous Legal Assistance Program funds organisations to deliver culturally appropriate legal assistance services to ensure that Indigenous Australians receive the help needed to overcome legal problems and fully exercise their legal rights. Indigenous organisations are funded under the program to deliver legal assistance services at a number of permanent sites, court circuits and outreach locations in urban, rural and remotes areas.

The Australian Government also funds the Northern Territory Aboriginal Interpreter Service to provide interpreting services for legal and justice matters to Commonwealth Government funded legal service providers to Aboriginal people in the NT, the Aboriginal and Torres Strait Islander Legal Services (ATSILS) and Family Violence Prevention Legal Services (FVPLS) units, as well as Northern Territory law and justice agencies.

In all jurisdictions except the NT, when police are questioning an Aboriginal and/or Torres Strait Islander person, police have a legislative obligation to arrange for the services of an interpreter ‘where a person’s English is insufficient to enable them to understand the questioning or speak with reasonable fluency’. In the NT, the police manual incorporates the *Anunga rules*, which include the requirement for an interpreter during questioning.

The Protocol for Indigenous Language Interpreting for Commonwealth Agencies provides guidance to all agencies and their contracted service providers on policies and processes that are needed to promote engagement of Indigenous interpreters in policy and program development, engagement, consultation and service delivery.

1. **Are indigenous or non-indigenous experts called to give testimony during court proceedings involving indigenous persons in the ordinary justice system? Please give examples**

Within the Australian criminal justice system, state and territory governments have primary responsibility for police, courts and jails.

Indigenous sentencing courts: A number of states and territories hold Indigenous sentencing courts as a measure tailored to Aboriginal and Torres Strait Islander people. It is important to note that Indigenous sentencing courts do not practice or adopt Indigenous customary laws, rather they use Australian criminal laws and procedures while allowing Indigenous Elders, respected persons and community to participate in a culturally appropriate process.

New South Wales Circle sentencing: The objective of circle sentencing in New South Wales are set out in Schedule 4 of the NSW Criminal Procedure Regulation 2005 and include: involving members of Indigenous communities in the sentencing process; reducing barriers between Indigenous communities and the courts; providing more appropriate sentencing options for Indigenous offenders; and reducing re-offending.[[1]](#footnote-1)

Victorian Koori Court: The aims of the Koori Court were set out by the Victorian Attorney-General and the *Magistrates Court Act 1989*. The Court aims to reduce over-representation of Indigenous people in custody by directing an offender away from prison through the use of alternative sentencing options, decreasing the rate of offending and reoffending, incorporating Indigenous people in the sentencing process and creating a more accessible and culturally appropriate criminal justice system with and for Indigenous peoples. [[2]](#footnote-2)

1. **In relation to indigenous persons facing criminal penalties in the ordinary justice system, how are their economic, social, cultural characteristics taken into account and how is preference given to methods of punishment other than prison?**

Due to concerns about the disproportionate numbers of Indigenous Australians in the criminal justice system, governments have been working towards ensuring that legal practices are appropriately tailored to Indigenous peoples. This typically takes the form of Indigenous sentencing courts, sometimes known as circle sentencing. Indigenous sentencing courts emerged mainly from the efforts of individual magistrates and Indigenous community members who saw the need to create a court sentencing system that was culturally appropriate and accepted.

Indigenous sentencing courts: A number of states and territories hold Indigenous sentencing courts as a measure tailored to Aboriginal and Torres Strait Islander people. It is important to note that Indigenous sentencing courts do not practice or adopt Indigenous customary laws, rather they use Australian criminal laws and procedures while allowing Indigenous Elders, respected persons and community to participate in a culturally appropriate process.

Indigenous sentencing is sometimes also referred to as ‘circle sentencing’, though circle sentencing is more likely to occur in a venue that is culturally significant to the local Indigenous community instead of the mainstream Magistrates or Local Court, and the participants sit in a circle. Typically the persons present at an Indigenous sentencing court include the magistrate, prosecutor, victim, offender (and their supporters), a set number of respected Aboriginal Elders (who are significant to the offender), a representative of the support agencies and a lawyer from the Aboriginal Legal Service in that jurisdiction.

The group talks about the impact of the crime on the victim and looks at the background of the offender and what caused him or her to get on the wrong path. The discussion can last up to 3 hours, after which the group develops a circle sentencing outcome plan, to which all parties agree. The Elders make the most important recommendations, and the outcome has to be acceptable to the magistrate. Generally the defendant has to have plead guilty or been found guilty in a summary hearing to access an Indigenous sentencing court, and other formal or informal criteria may apply; for example, the risk of incarceration or the defendant’s readiness to change. In addition, a number of jurisdictions have limits on the types of offences that can be heard in their Indigenous sentencing courts; for example, most exclude sexual offences.

Restorative justice has also been explored in the justice system as a whole, with specific application to Indigenous Australians in some instances. Given the particularly high over-representation of Indigenous youth, these measures often focus on youth as the target group.

Restorative justice practices usually involve bringing the victim and offender together with facilitators, police and other support people to attempt to repair the harm caused by the offender’s actions and to devise an intervention plan or agree on an undertaking for the offender. The plan may include making an apology or reparation to the victim, doing community service or an education program, or working for the victim or their parent. It can also include drug and alcohol treatment where this is identified as an influence on the offending behaviour. Generally, the agreed outcomes must not be more onerous than a court would order. Offenders who do not comply with the outcomes of a conference may return to the ordinary criminal justice system.

1. **Are indigenous peoples over-represented in the pre-trial detention and prisons compared to non-indigenous population?**

Yes.

1. **What measures are in place to ensure that places of detention respect cultural and religious practices and culturally adequate health services?**

Within the Australian criminal justice system, state and territory governments have primary responsibility for police, courts and jails. Therefore, they are responsible for ensuring places of detention respect cultural and religious practices and provide culturally adequate health services.

All Australian jurisdictions are bound by the Standard Guidelines for Corrections in Australia (Australian Government 2012).  They represent a statement of national intent, around which each Australian State and Territory jurisdiction must continue to develop its own range of relevant legislative, policy and performance standards that can be expected to be amended from time to time to reflect 'best practice' and community demands at the state and territory level. Section 2 of the Guidelines (Care and Well-being) cover accommodation, religious and spiritual needs, psychological services and managing prisoners’ stress and health services.  Specifically, these Care and Wellbeing Guidelines include the following:

* Where practicable, Indigenous prisoners should be provided with the opportunity to be accommodated in family, community or language groups to provide a supporting environment (2.6);
* Prisoners should have the right to practise a religion of their choice and, if consistent with prison security and good prison management, join with other persons in practising that religion and possess such articles as are necessary for the practice of that religion. (2.16);
* Indigenous prisoners should be allowed access, where possible, to Elders who are recognised as Elders or leaders of their community to address the emotional and spiritual needs of Indigenous prisoners (2.17);
* Spiritual beliefs and needs of Indigenous prisoners should be taken into account when managing the welfare of these groups of prisoners during times of individual, family or community crisis (2.20);
* Consideration may be given to the use of family or identified community members, for the support of Indigenous and culturally and linguistically diverse (CALD) prisoners to manage self-harm and other psychological issues or episodes (2.25); and
* In the case of an Indigenous prisoner [upon death, serious illness or injury], the Aboriginal Legal Service and any Aboriginal spiritual advisers are also to be advised.

In 2019, the National Safety and Quality Health Standards will include six new actions that focus specifically on meeting the needs of Aboriginal and Torres Strait Islander peoples, including Aboriginal and Torres Strait Islander people accessing prison health services. The six actions include:

* The health service organisation works in partnership with Aboriginal and Torres Strait Islander communities;
* The health service organisation has a strategies to improve the cultural competency and cultural awareness of the workforce to meet the needs of its Aboriginal and Torres Strait Islander patients; and
* The health service organisation demonstrates a welcoming environment that recognises the importance of cultural beliefs and practices of Aboriginal and Torres Strait Islander peoples.

*State and Territory specific initiatives:*

The below content is based on information provided by the Australian state and territory governments to a 2018 review of the implementation by all Australian governments of the recommendations of the Royal Commission into Aboriginal Deaths in Custody (1991)[[3]](#footnote-3).

New South Wales: All Justice Health and Forensic Mental Health Network staff are mandated to undertake the Respecting the Difference training, which aims to increase cultural competency and promotes greater understanding of the processes and protocols for delivering health services to Aboriginal people. All Justice Health and Forensic Mental Health Network employees are required to complete cultural awareness training, including those in adult correctional centres.

Corrective Services New South Wales employs a full-time Aboriginal Cultural Awareness Trainer in the Aboriginal Strategy and Policy Unit, and conducts one-day sessions for all new and existing staff. The Unit has developed an Aboriginal Elders visiting initiative to provide cultural support to Aboriginal inmates in all New South Wales correctional centres and a means for inmates to maintain contact with the Aboriginal community.

Department of Health and Community Services officers are provided training on the medical needs of Aboriginal and Torres Strait Islander people. Staff in Youth Training Centres must also attend cultural awareness training.

Victoria: Section 2.2(7) of the Correctional Management Standards for Men’s Prisons in Victoria state that training must be provided to staff of Corrections Victoria with the aim of developing their understanding of the needs of Aboriginal and Torres Strait Islander people.

Queensland: In Queensland, cultural awareness is available to all juvenile justice staff. The Indigenous Mental Health Intervention Project is a culturally capable mental health service. This has been implemented within two women’s and men’s prisons in Queensland to deliver social and emotional well-being programs in custody.

South Australia: the South Australian Government stated that there is a cross-cultural awareness course offered to prison medical staff. The South Australian Government have also developed the Aboriginal Services Unit to provide cultural awareness training to staff.

WA: The Western Australian Code of Inspection Standards for Adult Custodial Services states that cultural training must be provided to medical staff. It is a requirement that all custodial medical employees complete mandatory cultural awareness education when commencing employment with the Department of Justice.

Tasmania: In Tasmania, prisoner medical services collaborate with the Aboriginal Health Service in meeting the needs of Aboriginal and Torres Strait Islander prisoners. There is also a cultural awareness program for prison medical and nursing staff. The Tasmanian Prison Service requires all recruits to complete a Cultural Awareness and Aboriginal Issues in Corrections session, and for all staff to complete an e-learning package called Interactive Ochre.

Northern Territory: All staff in the Northern Territory undergo cross cultural awareness training, and the employment of Aboriginal Health Workers is encouraged in Darwin and Alice Springs correctional centres.

Australian Capital Territory: The Australian Capital Territory Government provides training focused on working with people from diverse background to all youth justice staff. Additionally, the Aboriginal Health Services provides additional health services to prisoners and provides advice to Corrective Services medical staff.

*Custody Notification Services (CNS)*

Under the Commonwealth Indigenous Legal Assistance Program, managed by the Attorney-General’s Department, services are not required to provide a CNS specifically, but must ensure priority is given to certain clients, such as people at risk of being detained, those in custody, and prisoners.

While all states and territories have put in place arrangements that require notification to an Aboriginal legal service when an Aboriginal or Torres Strait Islander person is taken into custody, this has only been specifically mandated under statute in NSW and the ACT.

Since 2016 the Australian Government has been working with the states and territories to encourage and support them to introduce legislation mandating the use of a CNS in their jurisdiction. NSW and the ACT have legislation in place and the NT and WA have agreed to proceed. Remaining jurisdictions are still considering their approach.

1. **Please indicate and give examples of how the ordinary justice system has provided remedies and reparation for successful indigenous petitioners?**

*Native Title determinations*

There are two systems of Indigenous land ownership in Australia, native title and land rights legislation.

Native title is the recognition by the common law of Australia of rights and interests in relation to land and waters held by Indigenous people under their traditional laws and customs. The *Native Title Act 1993* *(Cth)* (NTA) establishes a national framework for addressing questions of where native title exists, who holds it, and the nature of rights that apply in particular areas and to particular developments on land.

The Commonwealth funds the administration of the native title system, including:

* National Native Title Tribunal;
* Federal Court of Australia; and
* 15 native title representative bodies and service providers (NTRB/SPs) to provide assistance to native title claimants and holders.

At 24 May 2019, there have been 263 native title determination applications and 463 native title determinations. Native title has now been recognised over 3 million square kilometres. A third of the recognised native title is an exclusive interest in land, and the rest has been determined to be non-exclusive native title.

Once a claim is successfully determined, a corporation is registered to represent the native title group. These corporations are known as registered native title bodies corporate (RNTBCs) or Prescribed Bodies Corporate (PBCs). There are currently approximately 200 PBCs.

On 13 March 2019, the High Court of Australia handed down its first decision on native title compensation in the Timber Creek compensation matter. The Court awarded approximately $2.5 million compensation to the Ngaliwurru and Nungali Peoples in the Northern Territory, including $1.3 million paid for ‘cultural’ for impacts on their native title rights. The award related to an area of approximately 1.26 square kilometres within the town.

The decision provides greater certainty about how native title compensation under the NTA should be assessed, and may result in more compensation claims and wealth transfer to native titleholders. The Government is meeting regularly with Indigenous representatives to consider how compensation matters can be resolved in a timely and just manner. As a matter of principle, the Australian Government supports agreement making over litigation.

1. For more information about NSW Circle Sentencing, see the Judicial Commission of NSW website: <https://www.judcom.nsw.gov.au/education/education-dvds/circle-sentencing-in-nsw/>. [↑](#footnote-ref-1)
2. For further information, see the Magistrates’ Court of Victoria website: <https://www.mcv.vic.gov.au/about-us/koori-court>. [↑](#footnote-ref-2)
3. The report of the *Review of the implementation of the recommendations of the Royal Commission into Aboriginal deaths in custody*, (August 2018) can be found at this link <https://www.pmc.gov.au/sites/default/files/publications/rciadic-review-report.pdf> [↑](#footnote-ref-3)