Legal Aid ACT

INCARCERATION RATES OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES

Submission to the Australian Law Reform Commission Discussion Paper 84

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Contents

1. Introduction 3

2. Bail and the Remand Population 3

3. Sentencing and Aboriginality 4

4. Sentencing Options 8

5. Prison Programs, Parole, and Unsupervised Release 9

6. Access to Justice Issues 10

7. Conclusion 12

Introduction

Legal Aid ACT thanks the Australian Law Reform Commission (ALRC) for the opportunity to make submissions regarding the over-representation of Aboriginal and Torres Strait Islander (ATSI) Peoples[1] in Australian prisons. Legal Aid ACT will respond to the following sections of Discussion Paper 84:

1. Bail and the Remand Population;
2. Sentencing and Aboriginality;
3. Sentencing Options;
4. Prison Programs, Parole and Unsupervised Release; and
5. Access to Justice Issues.

1. Bail and the Remand Population

Proposal 2–1 The *Bail Act 1977* (Vic) has a standalone provision that requires bail authorities to consider any 'issues that arise due to the person's Aboriginality', including cultural background, ties to family and place, and cultural obligations. This consideration is in addition to any other requirements of the *Bail Act*. Other state and territory bail legislation should adopt similar provisions. As with all other bail considerations, the requirement to consider issues that arise due to the person's Aboriginality would not supersede considerations of community safety.

Proposal 2–2 State and Territory governments should work with peak Aboriginal and Torres Strait Islander organisations to identify service gaps and develop the infrastructure required to provide culturally appropriate bail support and diversion options where needed.

Legal Aid ACT supports the implementation of a provision across jurisdictions requiring bail authorities to consider any 'issues that arise due to the person's Aboriginality'. The benefits to such a provision are clear. In the first instance, it would likely aid the removal of lingering (if inadvertent) structural biases, promoting a more responsive and equitable system for ATSI offenders. Courts would be required to turn their minds to the diverse cultural institutions and community configurations that exist to support and condemn ATSI offenders, and consider these relevant to other Bail Act requirements. Far from being a race based 'bonus' card, the provisions aim would be to provide accurate insight and a more complete understanding of the risks and particularities relevant to the defendants at hand.

Further, a provision of this ilk promotes the kind of measured consideration that is key to obtaining individualised justice.[2] Consider, for example, an ATSI offender that has undergone cultural reprobation, and has undertaken reparative action to compensate the victim of their offence. This provision would allow a court to consider these factors relevant to whether bail should be granted, including in the context of the ongoing safety risk posed by the defendant to the community, and reach a decision that is well-informed, just and equitable. The provision is also likely to lead to another benefit: the potential reduction of (unnecessary) ATSI incarceration due to breaches of unsuitable,

[1] For ease of reference Legal Aid ACT has adopted the terminology used by the Australian Law Reform Commission in its Discussion Paper 84. Legal Aid ACT will also utilise the acronym 'ATSI' throughout this document. This is not intended to ignore or detract from the diversity of culture, language, or identification of the Aboriginal and Torres Strait Islander peoples across Australia, past and present, to whom Legal Aid ACT pays its respects.
[2] Individualised justice has been enshrined in Australian case law: see for e.g.*TM v Karapanos and Another* (2011) 250 FLR 366, 381 [104].

stock standard bail conditions. Increasing the ability of courts to make informed assessments, and fashion culturally sensitive and responsive conditions in turn increases the likelihood of ATSI compliance. Too often in Legal Aid ACT's experience, ATSI offenders feel the need to weigh cultural or familial commitments against the personal consequences of breach.

For the provision to have the intended results, State and Territory Governments will have to work closely with ATSI organisations, and invest significant funds in diversionary and supportive services. In Legal Aid ACT's experience, there is a marked lack of appropriate, well-resourced community based programs that have the capacity to provide appropriate support to both ATSI peoples and other offenders, and this impacts poorly on remand rates. This is explicated by the example of homeless persons considered ineligible for bail (as they have no fixed address), who are then remanded in custody. Due to overtaxed resources and stringent eligibility criteria, this then removes them from priority housing waiting lists, in turn decreasing their chances of being released into the community. This vicious cycle (fuelling disadvantage, institutionalisation, and potential recidivism) is reflected in national figures: between 2014 and 2015 the number of unsentenced prisoners in [adult] custody facilities in Australia jumped by 21%.[3] The following year this increased again, by a further 22%.[4] The existence of other diversionary programs, including drug and alcohol rehabilitation services, can be crucial to a courts assessment of whether bail is appropriate. Additional funding for community based service organisations, with a focus on supporting the communities' most vulnerable people, is therefore vital to ensuring the success of any provision implemented in the hope off reducing unnecessary remand and providing responsive solutions.

Legal Aid ACT also recommends the introduction of mandatory judicial education programs, designed to enhance understanding of the impact and meaning of 'Aboriginality'. It is Legal Aid ACT's view that, where judicial officers are equipped with good intentions but only rudimentary knowledge of ATSI affairs, the effectiveness of such a provision is likely to be curtailed.

2. Sentencing and Aboriginality

Question 3–1 Noting the decision in *Bugmy v The Queen* [2013] HCA 38, should state and territory governments legislate to expressly require courts to consider the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples when sentencing Aboriginal and Torres Strait Islander offenders? If so, should this be done as a sentencing principle, a sentencing factor, or in some other

As the ALRC has recognised, most current sentencing frameworks in Australia provide for consideration of a range of subjective factors including in some cases 'deprivation, poverty, trauma or abuse'.[5] Supplementing these legislative frameworks are various sentencing 'principles'.[6] These include the 'Fernando principles', which allow courts to give limited recognition to the 'disadvantages which arise out of membership of a particular group', the relevance of those disadvantages to the

[3] Australian Bureau of Statistics, *4517.0 – Prisoners in Australia, 2016* (8 December 2016) ABS http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0

[4] Ibid.

[5] Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples,* Discussion Paper No 84 (2017) 52-53.

[6] *Neal v R* [1982] HCA 55 (1982) [8]; *R v Pitt* [2001] NSWCCA 156 (2001) [21]; *Bugmy v The Queen* [2013] HCA 37 (2 October 2013) [37].

commission of a crime, and the way in which such understanding 'may assist in the framing of an appropriate sentence'.[7]

Legal Aid ACT recognises that the current approach, for the most part, satisfies the interests of justice with regard to sentencing non-indigenous offenders. However, with respect to ATSI offenders and particularly in light of the *Bugmy* decision, it requires significant revision. Numerous reports have recognised the ongoing 'complex effects of dispossession, colonisation and institutional racism on Aboriginal peoples',[8] including 'poverty, unemployment, [poor] education, alcohol abuse, isolation, racism and loss of connection to family culture, land or Indigenous laws'.[9] An approach that considers these factors in isolation, without a broader understanding of their impact or influence, is an approach that fails the ATSI peoples. Rather, ATSI offenders must be considered in the context of the historical subjugation and dispossession that has shaped, engendered, and perpetuated ATSI disadvantage. Legal Aid ACT acknowledges that whilst the *Fernando* principles provide some insight into the Indigenous situation, they are often unevenly applied and retain a limited scope.[10] The recent decision in *Bugmy* has made it clear that the High Court does not consider taking judicial notice of 'the systemic background of deprivation of Aboriginal offenders'[11] is appropriate within the current common law framework. Rather, as in other jurisdictions where this has been endorsed,[12] a legislative basis is required.

Legal Aid ACT thus strongly recommends the introduction of a specific, ATSI focused 'sentencing provision' across all jurisdictions. The provision should direct courts to expressly consider the 'unique systemic and background factors'[13] affecting Aboriginal and Torres Strait Islander peoples, including for example the effects of ATSI dispossession on ATSI offenders. Notably, the provision would not be a mechanism to reduce a sentence by virtue of 'race'. Rather, it would function as a 'legislative hook', allowing courts to properly explore relevant cultural factors, with the aim of consistently delivering equitable and apposite sentences.

Legal Aid ACT notes the ALRC's concern that a provision of this kind may be rendered invalid by the operation of s 10 of the *Racial Discrimination Act 1995* (Cth) (RDA). It is true that s 10 has broad application.[14] It applies both where a law operates to benefit a particular group (often termed 'positive discrimination'), and where a law imposes prohibitions on persons of a particular race to prevent enjoyment of certain rights. In the first instance s 10 expands the operation of the relevant law to include other races, ethnics groups and peoples, ensuring a similar or the same benefit is enjoyed by all. In the second, s 10 will confer the appropriate right or rights on the people so deprived. A provision

[7] *R v Pitt* [2001] NSWCCA 156 (2001) [21].

[8] Steering Committee for the Review of Government Service Provision, 'Overcoming Indigenous Disadvantage: Key Indicators 2016' (Report, Productivity Commission, 2016) 1.11; see also Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 4, ch 26; and Human Rights and Equal Opportunity Commission, Commonwealth of Australia, *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997) 12.

[9] Thalia Anthony, 'Is there Social Justice in Sentencing Indigenous Offenders?' (2012) 35(2) *University of New South Wales Law Journal* 563, 572.

[10] As the ALRC has noted, the Fernando principles have been substantially 'narrowed' in some jurisdictions: Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples,* Discussion Paper No 84 (2017) 57.

[11] *Bugmy v The Queen* [2013] HCA 38 [41].

[12] See for e.g. s 718.2(e) of the 1985 Canadian Criminal Code.

[13] Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples,* Discussion Paper No 84 (2017) 51.

[14] The High Court confirmed in *Gerhardy v. Brown* (1985) 159 CLR 70 at [18] that the words of s 10(1) are wide and the reference to 'rights' includes but is not limited to those listed in Article 5 of the attached Convention.

that contemplates what may be seen as 'special treatment', in that it departs or adds additional requirements to the principles used to sentence all other non-indigenous offenders, runs the risk of offending the first proviso of s 10. Other ethnic groups, races, minorities, standard and non-standard offenders are prevented, by virtue of their non-aboriginality, from the effects (be they beneficial or detrimental) of the provision. Art 5(a) of the RDA also makes it clear that s 10 contemplates this particular kind of 'right', stating persons have the 'right to equal treatment before the tribunals and all other organs administering justice'.[15]

Legal Aid ACT proposes two possible responses to this. The first is that, with careful and broad drafting, this difficulty may be circumvented. A general provision that does not designate a specific cultural group could be utilised to similar effect. Courts would be directed to contemplate any 'unique, systemic background factors' that may have impacted a defendant, and include in an explanatory note, examples such as the 'effects of ATSI dispossession and disenfranchisement' to make the intent and spirit of the legislation clear. Legal Aid ACT acknowledges that this approach could result in the provision losing some of its force. It also runs the risk of becoming a simple codification of the *Fernando* principles. Nonetheless, such a provision would still be of benefit for the certainty and consistency it would provide.

Alternatively, States and Territories could implement a provision that retains its specificity, and rely on the exception contained in s 8(1) of the RDA. Where 'special measures' have been taken ensure groups have equal enjoyment of rights and fundamental freedoms, those special measures will be valid, notwithstanding the operation of s 10.[16] The High Court has previously ruled certain laws implemented for the express benefit of ATSI people valid under s 8. In *Maloney v The Queen*[17] alcohol restrictions that had the practical effect of discriminating against Indigenous people in a particular area (contravening s 10) were upheld, as they 'protected' the residents from the effects of substance abuse and violence. As Stephen Sharpe has noted, *Maloney* indicates a willingness to 'defer to Parliament in determining whether a special measure was for an affected community's benefit and of ongoing necessity'.[18] This bodes well for a legislative provision that expressly requires courts to consider the unique systemic and background factors affecting ATSI peoples in the sentencing process. Legal Aid ACT submits that such a provision is a logical safeguard to ensuring justice across the board for ATSI offenders.

Question 3–3 Do courts sentencing Aboriginal and Torres Strait Islander offenders have sufficient information available about the offender's background, including cultural and historical factors that relate to the offender and their community?

Question 3–4 In what ways might specialist sentencing reports assist in providing relevant information to the court that would otherwise be unlikely to be submitted?

Legal Aid ACT submits that Australian courts do not currently have sufficient information to make consistently fair, tempered and appropriate sentencing decisions for ATSI people. While Pre-Sentencing Reports (PSRs) are available in most jurisdictions, Legal Aid ACT maintains that these

[15] *Racial Discrimination Act 1995* (Cth) Art 5(a).
[16] *Racial Discrimination Act 1995* (Cth) s 8(1); Paragraph 4 Article 1 of the Convention.
[17] [2013] HCA 28.
[18] Stephen Sharpe, 'Finding the balance between special measures and the prohibition of discrimination', *Constitutional Critique*, 9 February 2014, (Constitutional Reform Unit Blog, University of Sydney, http://blogs.usyd.edu.au/cru/).

reports generally lack the necessary depth and substance required to provide the court with a holistic, accurate picture. In Legal Aid ACT's experience, PSR's are usually compiled by community corrections officers and contain only rudimentary information about the offence, the offender's background, family and criminogenic factors linked with their offending behaviour and risk of re-offending. The sources of information for these reports include the offender's criminal history, Corrective Services files and records, drug and alcohol screening tools, and interviews with the offender. Generally speaking, PSRs follow a 'routine format',[19] making recommendations for 'traditional' sentencing options, and canvassing issues such as an offender's capacity to comply with the imposition of a fine, deferred sentence, good behaviour order or community service work condition. Whilst PSRs do make note of the offenders ATSI status[20] and are useful in some respects, Legal Aid ACT submits that in their current form they are unable to map the full impact of inter-generational and historical trauma on ATSI offenders.

Gladue reports are markedly different. In the first instance, they provide a far more comprehensive, detailed examination of the offenders' background and circumstances, describing various individual, familial, community sector, and cultural ties. *Gladue* reports then embed these findings and the offending behaviour within the broader context of systemic disadvantage, looking specifically at the effects of Indigenous disenfranchisement, dispossession, and historical (and deleterious) interactions with the State. Relevantly, and unlike PSRs, *Gladue* reports do not make explicit recommendations for specific sentencing options. Rather, they assist the court to achieve the object of individualised justice[21] by providing a complete evidentiary picture of an offender's background, and through exploring a variety of culturally appropriate habilitative options that may be suitable to assist with addressing complex offender issues. Legal Aid ACT maintains that these reports, which have been described as 'an indispensable sentencing tool',[22] are likely to increase courts understanding of the relevant of facts which 'exist only by reason of the offenders' membership of an ethnic or other group'.[23] While the weight to be given to the circumstances detailed by a *Gladue* report remains a matter for a sentencing court to determine, *Gladue* reports play a vital role in bringing the entirety of complex factors that may influence Indigenous offending to the fore.

Question 3–5 How could the preparation of these reports be facilitated? For example, who should prepare them, and how should they be funded?

The success of a *Gladue* style initiative is likely to be contingent on, in the first instance, the cooperation of all organs of the justice system and the broader community sector. We suggest that legislative entrenchment would assist with implementation, and would clarify the procedural mechanisms necessary to provide accurate reports to the court. We also suggest establishing ATSI-specific care and support programs, to ensure the policy intent of government is delivered. If the court is to be in a position to sentence an offender to the most appropriate penalty, they will need access to more ATSI-specific rehabilitation options.

[19] Campbell Research Associates, 'Evaluation of the Aboriginal Legal Services of Toronto Gladue Caseworker Program: Year Two, October 2005 - September 2006' (Report to Aboriginal Legal Services of Toronto, November 2006) 12.

[20] Legal Aid ACT notes that, in our experience, the language used in many PSR's is often inadvertently detrimental, pejorative and unnecessarily adversarial. For example, PSRs may state that a person 'claims to be Aboriginal', notwithstanding the existence of documented evidence that that the person does, and consistently has, identified as such.

[21] The principle of individualised justice is embodied for e.g. in the *Crimes (Sentencing) Act 2005* (ACT) s 6(c).

[22] *R v Ipeelee* [2012] 1 SCR 433.

[23] *Neal v The Queen* (1982) 149 CLR 305, 326.

Legal Aid ACT further recommends the ALRC adopt the phrase 'Experience Court Report' (ECR) in place of 'sentencing' or 'Gladue' report. This is for two reasons. The first is that the term '*Gladue'* is jurisdiction specific, deriving from the Canadian context, and may connote certain juridical and/or cultural idiosyncrasies that are not appropriate in the Australian context. The second is that use of the term 'sentencing' is potentially misleading. As noted above, ECR's should not purport to direct the exercise of judicial discretion in determining a specific sentence for a criminal offender, nor should they engage in risk assessment. Rather, the reports should provide relevant, detailed information compiled from a variety of sources that allows sentencing courts to gain a holistic and accurate understanding of the circumstances and future rehabilitation options for an offender, within the context of their individual experience as an ATSI person. It is Legal Aid ACT's view that ECR more accurately describes the purpose and nature of these reports.

Finally, Legal Aid ACT submits that ECR reports should not be treated by the court as expert reports, and the information they contain should not be subject to cross examination. This is because the reports are primarily descriptive and completely impartial, and in any case, the authors of the report will be under obligations to cross check data from a variety of sources, to ensure the accuracy of the information provided. This is further strengthened by the fact that the reports will be court ordered, rather introduced and tendered on the Indigenous offender's behalf (i.e. by Defence), and do not necessarily introduce mitigating factors.

For further information on the recommended content, methodology (including mechanisms for review), presentation, personnel, time and funding of these reports please see Legal Aid ACT's *Consultation Report to the ACT Justice and Community Safety Directorate: Aboriginal & Torres Strait Islander Experience Court Reports.*[24]

3. Sentencing Options

Question 4–2 Should short sentences of imprisonment be abolished as a sentencing option? Are there any unintended consequences that could result?

Question 4–4 Should there be any pre-conditions for such amendments, for example: that non-custodial alternatives to prison be uniformly available throughout states and territories, including in regional and remote areas?

Legal Aid ACT cautiously endorses the abolishment of short sentences of imprisonment. Clear advantages to this are readily apparent, the most obvious of which being that the commission of minor crimes would not result in prison time, incarcerations rates would likely decrease, and pressures on systems would ease. However, this support is subject to several caveats. The first is that sufficient, non-custodial sentences alternatives are readily available. The second is that judicial officers are widely educated on their existence, merits, and capacities. Legal Aid Act submits that over-taxed support programs that are expected to provide assistance over and beyond their capabilities may result in sentenced offenders committing inadvertent or unavoidable breach. For all offenders, but particularly ATSI offenders, tailored and responsive sentences are also key. It is obvious that blanket requirements such as abstaining from alcohol where, for example the offender is an alcoholic, effectively set the offender up to fail.

[24] Provided in confidence, not for further distribution.

Third, restrictions should be placed on the ability of judicial officers to order particular sentence lengths in relation to petty crimes. Legal Aid is concerned that without these restrictions, sentence lengths may be arbitrarily extended to meet the threshold sentence length (for example, 3 months and 1 day). Breaches of non-custodial sentences should also be dealt with responsively, with further consultation and adjustments to existing orders. Prison time should remain an option, but should not be the automatic response. However, Legal Aid ACT recommends an exception to this in the case of domestic, personal or family violence offences. It is Legal Aid ACT's view that in these case, due to the seriousness of the offence and the risk to the victim, offenders should immediately be placed in remand.

4. Prison Programs, Parole and Unsupervised Release

Proposal 5–1 - Prison programs should be developed and made available to accused people held on remand and people serving short sentences.

Legal Aid ACT supports the implementation of wide-spread programs focused on education, skill building and rehabilitation for people held on remand and people serving short-term sentences. Legal Aid ACT notes that the current *Standard Guidelines for Corrections in Australia (2012)* mandate:[25]

> Prisoners should be provided with access to programmes and services, including education, vocational training (and employment), that enable them to develop appropriate skills and abilities to support reduced re-offending when they return to the community.

Moreover, 'the treatment of remand prisoners should not be less favourable than that of sentenced prisoner', and remand prisoners should have 'the opportunity to work…[and] if education, vocational training or other approved activities are available, remand prisoners should be encouraged to avail themselves of these opportunities'.[26] Programs should be implemented to align with current national principles and guidelines.

Question 5–1 - What are the best practice elements of programs that could respond to Aboriginal and Torres Strait Islander peoples held on remand or serving short sentences of imprisonment?

In Legal Aid ACT's experience (i.e. in the ACT) there is a paucity of ATSI-specific programs and services that address the rehabilitation of ATSI offenders. Research shows that ATSI offenders face complex and interrelated issues, such as, 'low self-esteem; frustration; deculturation; separation from family; discrimination; identity issues; trauma; anger and loss… substance abuse; personal and emotional functioning… physical and mental health'.[27] Programs that are directed at the 'healing' of the offender,

[25] Australian Institute of Criminology, *Standard Guidelines for Corrections in Australia,* (2012) s 3.6, p. 30. Available: http://www.aic.gov.au/media_library/aic/research/corrections/standards/aust-stand_2012.pdf
[26] Ibid 17.
[27] Kelly Richards, 'Addressing the Offending-related Needs of Non-violent Indigenous Offenders' (Research Brief 20, Indigenous Justice Clearinghouse, September 2015) 2.

by addressing the multiplicity of underlying issues as set out in their individual ECR, are likely to help.[28] Other specialised programs for the rehabilitation of ATSI offenders may also assist with treating criminogenic factors 'directly related to criminal offending, such as cognitive deficits and drug or alcohol abuse'.[29] Legal Aid ACT recommends extensive consultation with ATSI organisations, service providers, and local communities to formulate appropriate programs with agreed upon best practice elements for both ATSI offenders serving short sentences of imprisonment (perhaps focused on rehabilitation) and ATSI persons held on remand.

Proposal 5–4 Parole revocation schemes should be amended to abolish requirements for the time spent on parole to be served again in prison if parole is revoked.

In various jurisdictions, including the ACT, if a parole order is cancelled 'the offender is taken not to have served any period (the remaining period) of imprisonment for the sentence that remained to be served on the offender's parole release date.' [30]

It is Legal Aid ACT's submission that parole revocation schemes be amended to ensure time served on parole is counted towards an offender's total sentence. As the ALRC has identified, these 'time again' requirements can operate as a significant disincentive to eligible inmates applying for parole, the results of which are readily apparent; the prison population remains high, resources are put under pressure, and inmates are eventually released from prison without undergoing supervised reintegration.[31] Legal Aid ACT submits that these provisions are also unnecessarily punitive. In effect, they impose an 'additional sentence' on offenders, for small contraventions that are often of a civil, rather than a criminal nature.

Relevantly, and as noted by the ALRC, it is often difficult for ATSI peoples to comply with standard parole conditions.[32] ATSI perceptions of inherent systemic bias (including that the system is 'stacked against them') are compounded by culturally insensitive parole orders. In our experience, ATSI offenders are likely to breach orders that require they remain confined to a particular place, particularly when (for their cultural and spiritual health) they feel compelled to visit a sacred community site and reorient themselves after a traumatic period of incarceration. It is Legal Aid ACT's view that parole revocation schemes should be further amended to ensure that parole boards (or whichever body is responsible for parole orders in a relevant jurisdiction) take into account the specific cultural indigenous affiliations and history of an offender before crafting an order. Recommendations could be sought from local ATSI communities or, if available, sourced from previously compiled sentencing (Gladue style) reports. These recommendations broadly align with the submissions detailed in Section 1.

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[28] Thalia Anthony, 'Is there Social Justice in Sentencing Indigenous Offenders?' (2012) 35(2) *University of New South Wales Law Journal* 563, 595.

[29] Robyn Gilbert and Anna Wilson, 'Staying Strong on the Outside: Improving the Post-release Experience of Indigenous Young Adults' (Research Brief 4, Indigenous Justice Clearinghouse, February 2009) 4.

[30] *Crimes (Sentence Administration) Act 2005* (ACT) s 160(3)

[31] Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples,* Discussion Paper No 84 (2017) 103.

[32] Ibid.

5. Access to Justice Issues

Proposal 11–3 State and territory governments should introduce a statutory custody notification service that places a duty on police to contact the Aboriginal Legal Service, or equivalent service, immediately on detaining an Aboriginal and Torres Strait Islander person.

Legal Aid ACT agrees with Proposal 11-3 that statutory custody notification services should be introduced in all jurisdictions that do not currently have the service in place. As the ALRC is likely aware, the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) made a specific recommendation in 1991 that statutory custody notification services be adopted Australia wide.[33] In NSW, the only jurisdiction where this has been statutorily implemented,[34] the scheme has been credited with saving the 'lives of Aboriginal people in custody', increasing early legal intervention and leading to lower sentencing rates.[35]

Legal Aid ACT suggests that for the service to be successfully implemented in a variety of jurisdictions, two additional requirements are needed. The first is an option for ATSI peoples to request a service, other than the Aboriginal Legal Service (ALS), be notified at first instance. This both protects and respects the choices and privacy of the ATSI person. Legal Aid ACT notes that many clients have chosen to contact our service, rather than the ACT ALS, for various reasons related to confidentiality,[36] range of services offered, and previous connections and good relations with particular service staff. Legal Aid ACT also submits that the first point of contact does not necessarily need to be a legal service provider. For example, an organisation such as Winunga in the ACT (an ATSI support and community group) may be the preferred and most culturally sensitive option for a distressed ATSI person. Community staff could then make contact with either Legal Aid or ALS service providers and alert them to the ATSI detention. Legal Aid ACT also recommends in this case that a set of community guidelines be developed, so that non-legal services are informed, and can expediently request the consent of the ATSI person to contact a legal service on their behalf (if that is what is required). Increased cultural awareness and legal education and training, for both legal and non-legal organisations, may also be necessary for this to be effective. In the instance that ATSI peoples have no particular preference, the ALS should be the default service notified.

Finally, Legal Aid ACT would like to emphasise the importance of ATSI engagement with mainstream service providers. While organisations such as the ALS are well placed to provide specialist assistance, Legal Aid Commissions also have a crucial role to play. In the last financial year alone Legal Aid ACT assisted over 300 ATSI persons with criminal matters (687 ATSI persons were assisted overall). Legal Aid ACT has also invested significant resources in improving our services, with the intent of increasing access to justice for ATSI offenders. Legal Aid ACT now has two highly trained Indigenous and Torres Strait Liaison Officers on staff, in addition to our existing Cultural Liaison Officers. Legal Aid ACT works

[33] Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 5, recommendation 224.

[34] It has also been implemented in the ACT, on a non-legal basis.

[35] Natasha Robinson and Anna Henderson, 'Hotline credited with saving lives of Aboriginal people in custody to be rolled out nationally' *ABC News,* 21 October 2016 (online) <http://www.abc.net.au/news/2016-10-21/indigenous-custody-notification-service-to-become-nationwide/7955152>

[36] This is not to imply that the ACT ALS in any way breaches its clients' confidentiality, or is not a service of the highest quality. Rather, Legal Aid ACT notes how, in our experience, many clients harbour a fear of running into family and/or friends at the ALS office, and of their situation becoming common knowledge in their community. Legal Aid ACT notes that this is unlikely to occur in the context of a first response phone call, however the perception may remain. In the interests of free choice and ensuring ATSI clients are assisted to feel as calm as possible as soon as possible, we recommend the inclusion of this option.

closely with indigenous community groups, other service providers and ATSI individuals to provide vital community legal education, make connections, and deliver benefits through outreach and assistance programs. Feedback is also gathered and acted upon, to ensure our service model is responsive, holistic and effective. These kinds of community connections and alternative assistance options (be they legal, social, or economically focused) are vital to ensuring ATSI offenders remain engaged with the wider community, and provide invaluable support in working towards better outcomes for ATSI peoples generally.

7. Conclusion

Legal Aid ACT has made various recommendations in response to the ALRC's inquiry into incarceration rates of Aboriginal and Torres Strait Islander Peoples, maintaining a particular focus on amended sentencing options and the necessity of investing in alternative programs and diversionary schemes. Legal Aid ACT believes that a substantial shift in the way ATSI people are treated within, and by, the criminal justice system is necessary to reduce rates of ATSI incarceration, and to ensure they are dealt with in an equitable and responsive way.