Submission to the Australian Law Reform Commission's Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander peoples

September, 2017

NATSILS

NATIONAL ABORIGINAL & TORRES STRAIT ISLANDER LEGAL SERVICES

1. Introduction

1.1. About NATSILS:

The National Aboriginal and Torres Strait Islander Legal Services (**NATSILS**) is the peak national body for Aboriginal and Torres Strait Islander Legal Services (**ATSILS**) in Australia. NATSILS brings together over 40 years' experience in the provision of legal advice, assistance, representation, community legal education, advocacy, law reform activities and prisoner through-care to Aboriginal and Torres Strait Islander peoples in contact with the justice system. NATSILS are the experts on the delivery of effective and culturally responsive legal assistance services to Aboriginal and Torres Strait Islander peoples. This role also gives us a unique insight into access to justice issues affecting Aboriginal and Torres Strait Islander peoples. NATSILS represent the following ATSILS:

- Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd (**ATSILS Qld**);
- Aboriginal Legal Rights Movement Inc. (**ALRM**);
- Aboriginal Legal Service (NSW/ACT) (**ALS NSW/ACT**);
- Aboriginal Legal Service of Western Australia Ltd (**ALSWA**);
- Central Australian Aboriginal Legal Aid Service (**CAALAS**);
- North Australian Aboriginal Justice Agency (**NAAJA**);
- Tasmanian Aboriginal Community Legal Service (**TACLS**); and
- Victorian Aboriginal Legal Service Co-operative Limited (**VALS**).

1.2. Introductory comments:

NATSILS welcomes the Australian Law Reform Commission's (**ALRC**) Inquiry into the incarceration rate of Aboriginal and Torres Strait Islander people (**the Inquiry**). NATSILS understands that the Inquiry is an opportunity for the development of a national, holistic, whole-of-government response to addressing the rate of incarceration of Aboriginal and Torres Strait Islander people.

NATSILS submission seeks to provide a response to a number of questions raised in the ALRC Discussion Paper (July 2017) under each of the twelve topics.

Throughout this submission, NATSILS have highlighted the centrality of culturally competent and culturally responsive service delivery in addressing incarceration rates of Aboriginal and Torres Strait Islander people. This submission is underpinned by NATSILS' understanding that the provision of services implemented to address Aboriginal and Torres Strait Islander incarceration must be supported by adequate and consistent investment in Aboriginal and Torres Strait Islander community controlled organisations. In this submission, NATSILS makes evident the impact a lack of investment in community controlled organisations, punitive laws and legislative frameworks have had upon the people who are helped by the eight ATSILS.

Whilst NATSILS commends the scope of the ALRC's Discussion Paper, NATSILS raise concern that the Discussion Paper omitted a focus on the following: children and youth, family violence, traditional lore, the relationship between child protection and the justice system, the implementation of previous recommendations made by landmark inquiries and commissions and Australia's

compliance with international human rights obligations. NATSILS have set out our concerns relating to the topics omitted from the Discussion Paper in **Appendix A.**

The terms of reference request that the ALRC examine the laws, frameworks and institutions and broader contextual factors that lead to the disturbing over‑representation of Aboriginal and Torres Strait Islander peoples in our prison system.[1]

As identified in NATSILS response to the ALRC's Terms of Reference, NATSILS considers it critical that the results of the Inquiry are analysed and met with a reciprocal plan for action and implementation, as well as independent oversight and monitoring. The plan for action must include Commonwealth, State and Territory Government commitment to implement the recommendations of the Inquiry and other inquiries and commissions, such as the Royal Commission into Aboriginal Deaths in Custody Report. Whilst NATSILS acknowledges the Australian Government for developing the terms of reference for the Inquiry, it is important that the Australian Government continue to demonstrate leadership and use its power to bring to an end the overrepresentation of Aboriginal and Torres Strait Islander people within our prisons.

The Australian Government has consistently said that criminal justice is a jurisdictional issue and has refused to intervene. However, the Australian Government cannot excuse itself of responsibility for implementing its human rights obligations and has the power to address many of the issues raised in this submission.[2] It is responsible for ensuring compliance with international human rights law and to ensure that special measures are taken to redress systemic discrimination.[3]

A plan for action to achieve better justice outcomes for Aboriginal and Torres Strait Islander men, women and children requires respect for the following key principles:[4]

- Aboriginal and Torres Strait Islander communities, their organisations and representative bodies must be directly involved in decision-making about matters that affect Aboriginal and Torres Strait Islander peoples;

- Aboriginal and Torres Strait Islander community controlled organisations are the preferred provider of culturally safe services and supports that understand and are, therefore, responsive to the particular needs and requirements of Aboriginal and Torres Strait Islander peoples;

[1] See Attorney-General's Department, 'Terms of reference – ALRC inquiry into the incarceration rate of Aboriginal and Torres Strait Islander peoples' (9 February 2017) (accessed 13 September 2017 at: https://www.ag.gov.au/Consultations/Documents/ALRC-inquiry-incarceration/Terms-of-reference-ALRC-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples.pdf).

[2] For example, the *Australian Constitution*, section 51(xxix) gives the Australian Government the power to legislate for "external affairs"; and section 51 (xxvi) gives the Australian Government the power to legislate for "the people of any race, for whom it is necessary to make special laws." Regarding the race power, however, we note the concerns from many advocates and academics and from the Committee on the Elimination of Racial Discrimination in 2010 that the power itself raises issues of racial discrimination. See: UN Committee on the Elimination of Racial Discrimination, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination on Australia' (13 September 2010) 16.

[3] See, for example, CERD General Comment 32: "The internal structure of States parties, whether unitary, federal or decentralized, does not affect their responsibility under the Convention, when resorting to special measures, to secure their application throughout the territory of the State. In federal or decentralized States, the federal authorities shall be internationally responsible for designing a framework for the consistent application of special measures in all parts of the State where such measures are necessary."

[4] See National Aboriginal and Torres Strait Islander Legal Services and National Family Violence Prevention Legal Services, 'Redfern Statement Joint Communique – Family Violence and Justice Workshop' (27 June 2017).

- Aboriginal and Torres Strait Islander community controlled organisations, including legal services, must receive adequate levels of funding to have the capacity to respond to community needs and demand;

- More flexible funding models should be established to enable Aboriginal and Torres Strait Islander community controlled organisations to deliver holistic wrap around services that are responsive to community needs and to ensure the collaboration of unique expertise across sectors; and

- Governments must shift away from punitive and law enforcement focused approaches, and towards approaches that prioritise prevention, early intervention and diversion from the criminal justice system.

2. Bail and the Remand Population

2.1. In relation to Bail and Remand Population, NATSILS recommends the following:

- Amend bail legislation to include a standalone provision that requires:

  (a) bail authorities to consider any matter relating to a person's Aboriginal and Torres Strait Islander identity, including culture, background and impacts of invasion; and

  (b) courts to consider the relevant matters both when determining whether the person will reach bail, and when attaching conditions to that bail.

- Resource ATSILS, community justice panels and interpreter services to research relevant matters relating to an Aboriginal and Torres Strait Islander person's identity to submit to the court.

- Train judicial officers and advocates to give appropriate consideration to information regarding a person's culture and background.

- Amend bail legislation to:

  (a) remove all separate offences for a failure to appear on bail and further offending while on bail; and

  (b) a presumption against the imposition of conditions of bail.

- Adopt best practices principles that prioritise diversion.

- Remove punitive consequences to breaches of bail conditions, particularly those that involve technical breaches or low level offending.

- Amend Northern Territory bail provisions to remove immediate review and stay of decision to grant bail.

2.2. 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.

States and territories should, in their bail legislation, adopt provisions equivalent to section 3A of the *Bail Act 1977* (Vic).

Such provisions should:

- be prescriptive – that is, they should require (as in Victoria), rather than permit (as in Queensland), the consideration of a person's Aboriginal and Torres Strait Islander background;

- refer specifically to a person's Aboriginal or Torres Strait Islander culture and background (not just a person's cultural background);

- be broad and flexible – that is, they should require consideration of any matter relating to the person's Aboriginal or Torres Strait Islander identity, culture, or heritage (including cultural background and other matters), rather than consideration of a special vulnerability that a person may have because of his or her background; and

- apply throughout the bail process, including both when making a bail determination and when imposing bail conditions.

However, NATSILS notes that although section 3A is a useful provision that should be used to guide legislative change in other jurisdictions, its use and understanding by the judiciary and practitioners is essential for effective implementation. VALS has noted that the Victorian judiciary and practitioners can often be confused as to the implication and use of information submitted under section 3A. As such, NATSILS considers it pertinent that any legislative amendment introducing a standalone provision that requires bail authorities to consider 'any issues that arise due to the person's Aboriginality' must be accompanied by judicial training to ensure a positive responsibility on the part of the judiciary to utilise information submitted under section 3A, and alike provisions, in favour of the Aboriginal and Torres Strait Islander person seeking bail.

Rationale for changes

Aboriginal and Torres Strait Islander peoples are treated unfairly by the current bail regime. NATSILS support amendments to State and Territory bail laws that address the following concerns:

- Bail regimes disproportionately impact upon Aboriginal and Torres Strait Islander people as a result of the disproportionate number of Aboriginal and Torres Strait Islander people being kept on remand, including children;

- Racially discriminatory policing , resulting in unreasonable and restrictive bail conditions, increases Aboriginal and Torres Strait Islander peoples contact with the justice system and likelihood of incarceration;

- Aboriginal and Torres Strait Islander people are less likely to be granted bail than non-Indigenous persons, in part due to concerns by bail authorities arising where the accused does not have a fixed place of residence or a stable place of employment; and

- courts regularly impose bail conditions which fail to recognise the specific cultural and community obligations, transport difficulties, transience and frequent short-term mobility (resulting in a lack of fixed address), living in a remote or regional community, poverty, or misunderstanding the purpose of bail that likely affect one's ability to meet strict bail conditions Aboriginal and Torres Strait Islander people.

Consideration of culture must be mandatory, and should occur throughout the bail determination process

A mandatory legislative provision which *requires* a court, when making a bail determination in relation to an Aboriginal or Torres Strait Islander person, to consider matters relating to an Aboriginal or Torres Strait Islander person's cultural background, family ties, living arrangements and relevant cultural obligations is necessary in all States and Territories to ensure Aboriginal and Torres Strait Islander do not continue to be treated unfairly by bail regimes.

NATSILS supports provisions in line with section 3A of the *Bail Act 1977* (Vic). The obligation to consider factors relevant to an Aboriginal and Torres Strait Islander person's background, family ties, living arrangements and cultural responsibilities should be enlivened on each occasion that the court makes a bail determination in respect of an Aboriginal or Torres Strait Islander person. It is helpful, but insufficient, to permit a court to consider such matters on its own motion or in its discretion. Similarly, although it is helpful, it is insufficient to require a court to consider such factors

only upon the receipt of submissions by a third party (as per section 16(2)(e) of the *Bail Act 1980* (Qld)). As noted in the Discussion Paper (at [2.48]–[2.50]), there are already other non-legislative frameworks in place which permit courts to consider a person's Aboriginal and Torres Strait Islander identity when making a bail determination, such as bench books. These frameworks are not adequate.

A court should be required to consider the relevant matters both when determining whether the person will reach bail, *and* when attaching conditions to that bail. In particular, a court should be required to consider the relevant matters when addressing each other bail concern – for example, a person's history of previous offending, particularly low-level offending, should be considered in context of his or her identity and history.

Courts should be required to consider a broad range of matters

NATSILS supports the introduction of broad provisions which require the court to take into account all possible considerations that relate to a person's identity. At a minimum, this should encompass the matters set out in section 3A of the *Bail Act 1977* (Vic), being that bail legislation should require a court to take into account (in addition to any other requirements of the Act) any matter relating to the person's Aboriginal or Torres Strait Islander identity, culture or heritage, which may include:

- connections with and obligations to extended family;
- traditional ties to place;
- mobile and flexible living arrangements; and
- any other relevant cultural issue or obligation.

It is essential for the judiciary when having regarding to these broad range of factors to consider the likely implication bail conditions will have upon an Aboriginal or Torres Strait Islander persons' contact with the justice system given the impacts of past and current discriminatory policies and practices, including impacts of invasion and current experiences of over policing and racial discrimination. Existing provisions which require or permit a court to consider:

- needs relating to the person's cultural background (as in the Northern Territory);
- any special vulnerability or needs the person has including because of … being an Aboriginal or Torres Strait Islander (as in NSW); or
- the person's relationship to his or her community, cultural considerations, or community ties … [including] ties to extended family and kinship and other traditional ties to place (as in the Northern Territory and NSW),

are simply too narrow or uncertain to be effective. As noted in the Discussion Paper, the intention and scope of the NSW provision is uncertain, and that provision is rarely used to help accused Aboriginal or Torres Strait Islander peoples to reach bail. Accordingly, while NATSILS supports the recent passage of legislative amendments designed to assist Aboriginal and Torres Strait Islander persons during the bail process (including the introduction of section 24(1)(B)(iii) of the *Bail Act* (NT) in 2015), NATSILS recommends that courts should be required to consider a broad range of factors, including connections with obligations to extended family, traditional ties to place, mobile and flexible living arrangements and any other relevant cultural issue or obligation.

Concerns regarding the practical operation of existing provisions in Victoria, the Northern Territory, Queensland and NSW

The following two key deficiencies in the practical operation of existing provisions have been identified by ATSILS.

First, in the experience of several ATSILS, not all judges and magistrates regularly give appropriate consideration to information regarding an accused's culture and background, even where that information is placed before the court. For example, while NATSILS notes that section 3A of the *Bail Act 1977* (Vic) is a useful provision that should be used to guide legislative change in other jurisdictions, its use and understanding by the judiciary and practitioners is essential for effectiveness. VALS has noted that in Victoria the judiciary can often be confused as to the extent information delivered under section 3A can be utilised. Similarly, practitioners have often not made submissions on section 3A. As such, VALS have identified that any legislative amendment of this nature in other jurisdictions must be accompanied by thorough judicial training to ensure a positive responsibility on the part of the judiciary to use factors identified under 3A and alike provisions in favour of the accused.

Accordingly, NATSILS considers it essential that further judicial training be undertaken to ensure that information which details community ties, special vulnerabilities arising from a person's cultural background, or other specified information which is placed before the court, is adequately understood by judicial officers. Such training should be designed to ensure that judicial officers:

- fully appreciate understand the impact of culture and background on the person's circumstances;
- understand possible cultural sensitivities that may arise when accessing information that relates to a person's ties to family or place; and
- can appropriately connect that information with the person's circumstances at the time of the relevant bail determination.

Such training should reflect a trauma-informed understanding of care, and should be developed and led in conjunction with Aboriginal and Torres Strait Islander controlled organisations, including the eight ATSILS.

Second, it is often the case that ATSILS and their clients will struggle to gather the requisite information, to assist with such bail determinations, without additional resources being made available to do so. Currently, ATSILS simply do not have the capacity to gather detailed information relating to a person's Aboriginal and Torres Strait Islander background, and present that information in a way that will be meaningful to the relevant bail authority. These difficulties are worsened where an interpreter is required in order to ensure information is gathered effectively. The information-gathering process is also made more challenging due to cultural sensitivities that may arise regarding the disclosure of such information. Community cultural considerations of this kind must be appropriately respected by the court.

Accordingly, in order for the legislative amendments described above to most effectively benefit Aboriginal and Torres Strait Islander peoples, additional investment is required in ATSILS and interpreter services to ensure that the complex matters and circumstances relating to an accused's background and culture can be adequately brought to the attention of the court. Further detail regarding how that investment can be most effectively made is set out in Section 10 (Access to Justice Issues) below.

2.3. 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.

NATSILS agrees with Proposal 2-2. Culturally appropriate bail support and diversion options should be developed based on the "best practice" approaches identified by Aboriginal and Torres Strait Islander controlled organisations and legal services, as set out below. Additional funding should be allocated to support these services, including to peak bodies which coordinate them.

Key gaps in service provision and support infrastructure: persons with a disability or cognitive impairment

The interaction of people with cognitive and mental health disability and the justice system has been identified by the Australian Government as an issue of national concern. The lack of available supports and services for Aboriginal and Torres Strait Islander people with disability, including FASD, is placing an increasing over-reliance on the criminal justice system.

Additional services are especially required to support Aboriginal and Torres Strait Islander persons living with a disability or cognitive impairments. Persons with cognitive and psychiatric impairments may have a history of offending related to their disability, and are less likely to live in secure accommodation. Accordingly they are at a greater risk of being refused bail. It can also be difficult for a person with these types of impairment to understand and comply with increasingly onerous bail conditions, particularly where bail conditions are imposed without the provision of additional support. This increases the chance that the person will breach the conditions of their bail. State and Territory Governments should work with Aboriginal and Torres Strait Islander organisations to develop stronger bail support and diversion options for such persons.

The Federal, State and Territory Governments must work with Aboriginal and Torres Strait Islander communities, their organisations and representative bodies to develop responses to the unique nature of disability that ensures that people with a disability, especially children and those at risk of being refused bail or being found unfit to stand trial, have access to culturally appropriate disability and legal support services before, during and after they come into contact with the justice system.

NATSILS recommends co-locating disability support workers within ATSILS as a way to ensure Aboriginal and Torres Strait Islander people with a disability are supported in the process of delivering to the court information relating to their cultural background, ties to family and place and cultural obligations.

Case Study

ALSWA

On 18 January 2017, 'Adam' was granted bail with the primary condition of bail that the CEO of the DCPFS sign for Adam's release from custody as a responsible adult as prescribed under Western Australia's Bail Act. Adam then spent 66 days in custody at Banksia Hill Juvenile Detention Centre after DCPFS refused to sign Adam's bail undertaking DCPFS has advised ALSWA that Adam was not be able to be released until suitable accommodation was found for A. Further, a DCPFS case worker has advised ALSWA that "ideally they (DCPFS) would like him (ie Adam) remanded in custody" on the basis that Adam was too difficult to deal with and a juvenile detention centre was a more convenient place to house him.

Adam appears to have a number of as yet undiagnosed serious cognitive and behavioural impairments, including Foetal Alcohol Spectrum Disorder (FASD).

Best practice approaches to culturally appropriate diversion

NATSILS recommends the following approaches, based on the experiences of ATSILS, including VALS:

(a) Lawyers and/or offenders should be permitted to make submissions (in person or written) on the appropriateness of the diversion program.

(b) Judicial training should be introduced in relation to cultural awareness, diversion protocols and options to support greater consistency from the bench.

(c) Magistrates should have final approval in respect of the diversion program.

(d) Diversion should be available for a broader range of offences. Diversion should be encouraged where there has been previous low level offending, a different type of offending or a significant break in offending.

(e) Conditions should be appropriate to the individual person's circumstances and reasons for offending.

(f) Diversion should be monitored – where there has been obstacles to complying with conditions, there should be scope for second opportunities, particularly if the individual is dealing with a lot of issues personally.

(g) Diversion should aim to address the underlying issues of offending and prevent people coming back. The conditions for diversion should address why people have gotten into a situation of offending – counselling, referrals to drug and alcohol and other supports should be considered.

(h) Actions that the person has taken to address their offending behaviour (independently of the diversion program) should be considered in lieu of, not in addition to, conditions of diversion.

(i) For young persons, conditions including attendance at school or continuing with sport or cultural activity could be appropriate.

(j) Magistrates Courts in different regions should look to create partnerships with Aboriginal and Torres Strait Islander organisations and other supports (such as health services with counselling programs) to create opportunities to link people into meaningful diversionary activities that address underlying causes of offending.

2.4. Other reforms to bail legislation

In addition to the reforms to bail laws proposed in the Discussion Paper, NATSILS recommends the introduction of reforms to existing bail legislation to:

- specify in legislation that bail conditions should only be imposed where justified,, having regard to the same circumstances that are considered by the court when determining whether to grant bail;

- specify in legislation that police are required, when exercising discretion in respect of a person who has breached or is considered likely to breach a bail condition, to have regard to the seriousness or triviality of that breach;

- end the detention of children who have not been sentenced;

- to remove immediate review and stay of decision to grant bail;[5] and

- ensure that breach of bail offences do not result in double jeopardy (which results in unfair punishment outcomes).

Bail conditions imposed on ATSILS clients are often onerous and complex, as well as failing to take into account circumstances arising from the person's Aboriginal and Torres Strait Islander identity. NATSILS supports the recommendations of the NSW Law Reform Commission, made in its recent *Bail Review*, that:

- neither a bail condition nor a conduct direction should be imposed unless it is justified and necessary to avoid detaining the person. The purpose of the imposition should be to limit the person's freedom only in ways that are justified by the relevant bail considerations; and

- the considerations that a court must take into account in deciding whether to impose a bail condition should be the same as those that apply when the court is determining whether it will grant bail. (Such considerations include whether the person has family, community or other support available to assist the person in complying; whether the condition is more onerous or restrictive on the person's daily life than necessary; whether compliance is reasonably practicable.)

In effect, such amendments could essentially operate as a presumption against the imposition of conditions on bail. NATSILS strongly supports the adoption of this recommendation in all States and Territories.[6]

Further, NATSILS notes that a failure to appear on bail should not amount to a further offence. Similarly, further offending while on bail should not constitute a separate and additional offence. Such offences amount to a form of double jeopardy. NATSILS refers to previous submissions made by CAALAS and NAAJA to the Review of the Bail Act conducted by the NT Government.[7]

Case Study

CAALAS

'Sam' a 10 year old Aboriginal boy from Broome with foetal alcohol syndrome and other behaviour issues, spent five days in police custody in August 2010. Whilst in custody he was allegedly mistreated by police who threatened to withhold food and take away his blanket. Sam was in custody for breaching bail conditions arising from a stealing charge. Sam had been trying to run away at night from the remote community where he was located. There was no responsible adult available for him. Sam was in custody after being refused bail by a Justice of the Peace on a Saturday in Broome due to the absence of a responsible adult. His family attended Broome shortly afterwards but the Justice of the Peace refused to re-list the matter and Sam remanded in custody until Monday. On that Monday, he was granted bail to reside at Mt Barnett Station but was to remain in custody until a responsible adult could transport him. As no responsible adult appeared and the road to Mt Barnett was flooded, Sam was driven by police to Mr Barnett after five days in police custody, after the floods had subsided.

[5] See for example, section 36A of the *Bail Act* (NT).

[6] NSW Law Reform Commission, 'Bail', Report No 133 (2012) 226-227.

[7] CAALAS, 'Submission from the Central Australian Aboriginal Legal Aid Service Inc to the Northern Territory Government, Review of the *Bail Act* (NT) (15 March 2017) (accessed on 30 August 2017 at: http://www.caalas.com.au/Portals/caalas/Submissions/2013/Submission%20to%20the%20Review%20of%20the%20Bail%20Act%20(NT)%20-%20March%202013.pdf); NAAJA, 'Submission to the Review of the Bail Act (NT)' (March 2013) (accessed on 30 August 2017 at: http://www.naaja.org.au/wp-content/uploads/2014/05/Bail-Act-Review.pdf).

Reform police practices relating to responses to breaches of technical bail conditions

Police discretion plays a significant role in enforcing bail conditions and returning Aboriginal and Torres Strait Islander peoples to jail. NATSILS supports the recently introduced breach reduction strategy applied in Bourke, NSW, to ensure that warnings are issued for technical breaches of bail (rather than immediate rearrest and return to remand). Bail should not be revoked immediately upon the breach of a condition of bail. Rather, breach of a condition should give rise to an option to bring the accused before the court, and/or other responses which should be available to police (as noted at paragraph 2.65 of the Discussion Paper).

As recommended by the NSW Law Reform Commission in its Bail Review,[8] the relevant police officer should be required to have regard to the relative seriousness or triviality of the breach (or perceived breach). NATSILS considers that State and Territory bail legislation should be amended to reflect this recommendation.

[8] NSW Law Reform Commission, 'Bail', Report No 133 (2012) 15.37.

3. Sentencing and Aboriginality

In relation to Sentencing and Aboriginality, NATSILS recommends the following:

- Legislate to expressly require courts to consider the unique systematic and background factors affecting Aboriginal and Torres Strait Islander peoples during the sentencing process.
- Where not currently legislated, State and Territory Governments should provide for reparation or restoration as a sentencing principle.
- Repeal the prohibition under section 16A(2A) of the *Crimes Act 1914* (Cth), and jurisdictional equivalents, to take customary law or cultural practice into account.
- Invest in Aboriginal and Torres Strait Islander community controlled organisations to ensure that sentencing reports are able to be prepared and delivered by Aboriginal and Torres Strait Islander community members.
- Incorporate Gladue style sentencing reports into Australian sentencing practices and ensure that the development of such reports are underpinned by legislation that direct the courts to consider cultural identity and the impacts of colonisation as sentencing factors.
- Increase investment in diversionary programs, caseworkers, report writers and appropriate training for judiciary to ensure the full implementation of Gladue style sentencing reports.

3.1. 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 way?

NATSILS recommends that State and Territory Governments legislate to expressly require courts to consider the unique systematic and background factors affecting Aboriginal and Torres Strait Islander peoples during the sentencing process. These factors should include a recognition of history of dispossession of land, removal of children and paternalistic policies imposed by Government.

The common law right to a fair trial is supplemented by a right to equality before the law.[9] To restrict evidence of customary laws and cultural practices relevant to Aboriginal peoples in front of the courts creates inequality before the law. State and Territory Governments should legislate to expressly require courts attention is directed to the unique background factors affecting Aboriginal and Torres Strait Islander peoples.

NATSILS notes that section 16A(2A) of the *Crimes Act 1914* (Cth) prohibits a court from taking customary law or cultural practice into account to either mitigate or aggravate the seriousness of criminal behaviour under a federal offence. NATSILS calls for section 16A(2A) and equivalent legislation in the Northern Territory to be repealed. Further, NATSILS notes that following the 2006

[9] *Nicholas v The Queen* [1998] 193 CLR 173 [74]; see generally: North Australian Aboriginal Justice Agency, 'Submission to the Freedoms Inquiry' (March 2015) 4 (accessed on 30 August 2017 at: https://www.alrc.gov.au/sites/default/files/subs/63._org_north_australian_aboriginal_justice_agency_naaja_freedoms_inquiry_submission_-_9_march_2015.pdf).

amendments to the Commonwealth Crimes Act, the phrase 'cultural background' was deleted from section 16A(2)(m). A court is no longer expressly required to consider an offender's cultural background in determining an appropriate sentence.

The term 'cultural background' was also deleted from section 19B(1)(b)(i). Cultural background is no longer a factor to which the court may have specific regard in deciding to dismiss a charge or discharge a person without proceeding to conviction.

3.2. Question 3-2

Where not currently legislated, should State and Territory Governments provide for reparation or restoration as a sentencing principle? In what ways, if any, would this make the criminal justice system more responsive to Aboriginal and Torres Strait Islander offenders?

The inclusion of reparation or restoration as a sentencing principle enables the judiciary to take into account the relationship between "traditional law" or "lore" and western law. This places the court in a position whereby a more considered, culturally appropriate, community led resolution to crime can occur.

NATSILS considers that the use of reparation and restoration as a sentencing principle is particularly important in the case of young persons. The consideration of restoration and reparation provides an opportunity for the severity of sentences relating to young persons to be minimized and yet also have a greater positive impact on the young person.

As acknowledged by the VALS, Koori courts often incorporate restoration and reparation into sentencing practices. However to ensure these practices occur on a consistent basis, the sentencing principle is required to be underpinned by legislation.

3.3. Questions 3–3, 3–4 and 3–5: Sentencing reports

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?

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

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

Courts sentencing Aboriginal and Torres Strait Islander peoples do not have sufficient information available in regards to an Aboriginal or Torres Strait Islander person's background, including cultural and historical factors that relate to the person and their community. Certain approaches to sentencing can be especially detrimental to Aboriginal and Torres Strait Islander peoples, and having regard to each offender's circumstances can avoid causing further harm through inappropriate sentencing. For example, short sentences are particularly problematic, as they disconnect individuals from their communities and support networks, and often mean that an important contributor is removed from the community, thereby harming the entire community. Further, prison can mirror past trauma and abuse (and inter-generational trauma), and reinforce themes of powerlessness, lack of control, and vulnerability. Often, diversionary options such as treatment, healing, family support, education and training programs that target the cause of the offending will be more appropriate. Therefore individual and cultural factors need to be considered by a court sentencing an Aboriginal or Torres Strait Islander person.

NATSILS supports specialist sentencing courts for Aboriginal and Torres Strait Islander peoples, which respond to the unique circumstances and disadvantage experienced by people who identify as Aboriginal and Torres Strait Islander. It is a common misconception that specialist sentencing courts are an easy way out for Aboriginal and Torres Strait Islander peoples. Rather, they aim to reduce Aboriginal and Torres Strait Islander recidivism, incarceration and deaths in custody by providing for the rehabilitation of offenders.[10] Jurisdictions where sentencing courts exist should ensure that, where possible, Aboriginal and Torres Strait Islander persons are sentenced at these courts, and new sentencing courts should be established in other jurisdictions.

The aims of sentencing courts should be modelled off those of existing sentencing courts. For example, the Nunga Court in South Australia is a specialist sentencing court that aims to provide a culturally appropriate setting, reduce the number of Aboriginal deaths in custody, improve court participation by Aboriginal people, break the cycle of Aboriginal offending, and address underlying crime-related problems with a view to making a difference.[11]

Certain factors which have been identified as essential to the success of the Murri Court in Queensland should be present in sentencing courts, including:[12]

- involvement of Elders and Respected Persons, and recognition of the expertise of these people through provision of a fee;
- access to treatment, intervention and rehabilitation programs to address the cases of offending behaviour;
- a specially trained magistrate; and
- clear and consistent operating procedures that also allow for local flexibility.

Koori Courts in Victoria are expected to provide an informal atmosphere and allow community participation, aiming to ensure that sentencing orders are appropriate for the cultural needs of offenders. These courts can establish their own processes, as long as they exercise their jurisdiction with as little formality and technicality, and in as timely a manner, as the proper consideration of the matters permit.[13] NATSILS supports the promotion of improved cultural awareness within the justice system, and the engagement and understanding of court processes within Aboriginal and Torres Strait Islander communities. All courts should seek to include in their legislative regime the restorative justice principles of these specialist sentencing courts.

NATSILS raises serious concern that no Australian jurisdictions expressly requires a person's Aboriginal or Torres Strait Islander heritage or cultural background to be taken into account by the authors of pre-sentencing reports. It is essential that courts sentencing Aboriginal and Torres Strait Islander people have sufficient information about the offender's background, including cultural and historical factors that relate to the offender and their community. Specialist sentencing reports can assist courts to take these factors into consideration. These details will assist courts to appropriately sentence offenders, with the aim of taking a holistic and restorative justice approach to sentencing.

NATSILS further recommends that any requirement for people to be on bail (and not in custody) in order to be referred to a specialist sentencing court be removed. This requirement currently exists in some jurisdictions. For example, an eligibility criteria of the Murri Court in Queensland is that the defendant is on bail or has been granted bail. The soon to be re-established Queensland Drug

[10] Queensland Courts, 'Murri Court Reinstatement: Feedback Report' (December 2015) 9.

[11] Ibid 53.

[12] Ibid 3.

[13] Ibid 60.

Court will allow those in custody with drug or alcohol related problems to be referred to it for sentencing, and will not be limited to persons who are on bail. NATSILS supports a similar approach with respect to Aboriginal and Torres Strait Islander peoples in order to ensure that all persons are sentenced appropriately and all sentences are culturally appropriate.

Australian jurisdictions should expressly require Aboriginal and Torres Strait Islander identity or cultural background as matters to be taken into account by the authors of pre-sentence reports.

In Australia, pre-sentence reports are documents that are usually prepared by a psychologist, government correctional or social services department outlining a person's personal history and other relevant factors provided to a court to assist in determining an appropriate sentence.[14]

A pre-sentence report could assist in providing relevant information to the court, including:

- providing a useful summary of the persons background and detailed history of their social, economic and cultural circumstances; and

- identifying underlying mental health and/or drug and alcohol issues.

Legislative provisions relating to the development of pre-sentence reports (and the contents of such reports) are generally broad. No Australian jurisdiction expressly requires Aboriginal and Torres Strait Islander identity or cultural background as matters to be taken into account by the authors of pre-sentence reports.

Intergenerational experiences of discrimination, dispossession and colonisation experienced by Aboriginal and Torres Strait Islander people should be included within pre-sentence reports.

The provision of pre-sentence reports would assist courts when determining the appropriate sentence for an Aboriginal and Torres Strait Islander person who comes before the court. Adequate pre-sentence reports have the opportunity to focus the court's attention on the intergenerational experiences of discrimination, dispossession and colonisation experienced by Aboriginal and Torres Strait Islander people. These factors are essential to understanding offending behaviour and responding to offending behaviour with appropriate, justified sentences which ensure community safety.

Pre-sentence reports should be prepared by Aboriginal and Torres Strait Islander community members

There is currently a lack of culturally competent writers and a lack of training for report writers that results in the issues described above becoming overlooked. NATSILS recommends that reports should be prepared by Aboriginal and Torres Strait Islander community members who possess appropriate expertise, including the requisite culturally expertise to understand and articulate circumstances affecting an Aboriginal or Torres Strait Islander individuals who come into contact with the justice system.

Gladue Reports

NATSILS recognises that there is no equivalent of Gladue reports in Australia. Whilst pre-sentencing reports are common in Australian criminal jurisdictions, Aboriginal and Torres Strait Islander identity and cultural background factors are not expressly taken into account by the authors of these reports. In Canada the utilisation of these reports allows the specific background and broader circumstances of an offender's Aboriginal community to be considered. These

[14] NATSILS, 'Factsheet on pre-sentence reports' (2016) (not publicly available – available on request).

considerations were recognised as important by the Canadian Supreme Court in *R v Gladue* [1999] 1 SCR 688.

NATSILS recommends including Gladue style sentencing reports in Australia. We currently have Gladue style sentencing reports on our NATSILS agenda for further investigation and a number of our members are developing proposals. However the NATSILS recognise that in order for an equivalent of Gladue style reporting to be successfully influential over sentencing practices in Australia, such reports must be underpinned by legislation that direct the courts to consider Aboriginal and Torres Strait Islander identity and the impacts of colonisation as sentencing factors, and also to consider each and every alternative to prison for Aboriginal and Torres Strait Islander peoples as per section 718.2(e) of the Canadian Criminal Code. Such reports must also be supported by investment in diversionary programs, case workers, report writers and appropriate training for judiciary.

Gladue style reports would be an important innovation for Australia, however we must not fail to utilise existing procedures which seek to engage Aboriginal and Torres Strait Islander community members in the court process such as Aboriginal Sentencing Conferences in South Australia which are legislated under section 9C of the *Criminal Law (Sentencing) Act 1988* (SA). In 2005, the Act was amended to include "Section 9C – Sentencing of Aboriginal defendants". Section 9C Aboriginal Sentencing Conferences empowers a court in any criminal jurisdiction to convene an Aboriginal Sentencing Conference.[15]

[15] See *R v Grose* (2014) 119 SASR 92.

4. Sentencing options

4.1. In relation to Sentencing Options, NATSILS recommends the following:

- Abolish mandatory and presumptive sentencing laws.
- Remove provisions that unreasonably and disproportionately criminalise Aboriginal and Torres Strait Islander people, including mandatory sentencing provisions in Western Australia and the Northern Territory.
- Implement alternative non-punitive sentencing responses that focus on rehabilitation and addressing the underlying causes of offending behaviour.
- Ensure full judicial discretion in all sentencing practices.
- Work with Aboriginal and Torres Strait Islander organisations to identify unmet need and develop culturally appropriate community based sentences, with a particular emphasis on the delivery of community based sentences in rural and remote locations.

4.2. Question 4-1: Mandatory sentences

Noting the incarceration rates of Aboriginal and Torres Strait Islander people:

(a) should Commonwealth, State and Territory Governments review provisions that impose mandatory or presumptive sentences; and

(b) which provisions should be prioritised for review?

Mandatory sentencing regimes are not effective as a deterrent and instead contribute to higher rates of reoffending. In particular, mandatory and presumptive sentences fail to deter persons with mental impairment, alcohol or drug dependency or persons who are economically or socially disadvantaged. They also have no rehabilitative value, disrupt employment and family connections (which is particularly relevant for low level offending), and diminish the prospects of people re-establishing social and employment links post release.

Significantly, mandatory sentencing prevents the court from taking into account the individual circumstance of the person, leading to unjust outcomes. This is an arbitrary contravention of the principles of proportionality and necessity, and mandatory detention of this kind violate a number of provisions of the International Convention on Civil and Political Rights.[16] The result can be serious miscarriages of justice.

Case Study

ALSWA

'John' was a young man represented by ALSWA for one charge of reckless driving, one charge of driving without a licence and one charge of failing to stop. John made a rash and unfortunate decision to drive a motor cycle to work because his employer was unable to do so.

When he saw the police he panicked, sped off, drove through a red light and veered onto the wrong side of the road. He had a relatively minor record – his only prior offences were failing to stop,

[16] See: Law Council of Australia, Policy Discussion Paper on Mandatory Sentencing (May 2014); Human Rights and Freedom Commissioner Tim Wilson, Queensland Law Society Mandatory Sentencing Policy Paper Launch, 4 April 2014; NATSILS Submission to Senate Inquiry, Access to Legal Assistance Services (April 2015); NATSILS IPO Country Report, Justice (not publicly available).

excess 0.02% and driving without a licence. These offences were dealt with in 2010 by the imposition of fines and John had not offended since that time.

When sentencing John, the magistrate observed that he 'had the potential to actually live a productive life', worked hard and that his prospects for staying out of trouble were very good. However, the magistrate had to impose the mandatory sentence of six months' imprisonment. The magistrate indicated that, if it was not for the mandatory sentencing regime, the sentence would have been less or possibly not one of imprisonment at all.

Further Case examples:

- *'Jack' a 16 year-old with one prior conviction received a 28 day prison sentence for stealing one bottle of spring water.*
- *'Dan'17 year old first time offender received a 14 day prison sentence for stealing orange juice and Minties.*
- *'Nathan' 15-year old boy received a 20-day mandatory sentence for stealing pencils and stationery. He died while in custody;*
- *'Hilary' a woman and first time offender received a 14 day prison sentence for stealing a can of beer.*

Abolish mandatory sentencing

State and Territory Governments should abolish mandatory sentencing provisions that unreasonably and disproportionately criminalise Aboriginal and Torres Strait Islander people. NATSILS strongly recommends that the abolition of mandatory sentencing provisions in the Northern Territory and Western Australia are a priority due to the extremely high rates of Aboriginal and Torres Strait Islander persons being sent to prison.

Commonwealth, State and Territory Governments should abolish mandatory sentencing offences for which Aboriginal and Torres Strait Islander persons find themselves disproportionately charged, including:

- offences relating to burglary;
- offences related to grievous bodily harm;
- offences relating to assaulting public officers, including police officers;
- offences of assault by intentionally hitting a person causing death, whilst intoxicated (ie, "one punch" laws);
- offences relating to breaches of a domestic violent order; and
- drug offences and certain aggravated property offences.

Commonwealth, State and Territory Governments should also abolish:

- all mandatory sentencing laws that apply to juveniles in Western Australia;
- laws which impose mandatory sentences on repeat offenders, where all alleged offences were committed during the same course of conduct (for example, where "three strikes" are incurred in one night);

- exceptions or defences to mandatory sentencing rules that still impose a term of actual imprisonment (e.g., section 78DE of the *Sentencing Act 1995* (NT)); and

- provisions which remove the availability of suspended sentences (or other sentencing alternatives) for certain classes of offences or at all.

Mandatory sentencing has a discriminatory effect on Aboriginal and Torres Strait Islander people. For example, a report on the 'three strikes' home burglary laws in Western Australia found that according to the Department of Justice review of the three strikes laws over 81% of juveniles sentenced under the laws were Aboriginal.[17] In 2006, the Law Reform Commission of Western Australia found that according to the Department of Corrective Services from 2000 to 2005 approximately 87% of all children sentenced under the mandatory sentencing laws were Aboriginal.[18]

4.3. Questions 4–2, 4–3 and 4–4: Short sentencing

Should short sentences of imprisonment be abolished as a sentencing option? Are there any unintended consequences that could result? If short sentences of imprisonment were to be abolished, what should be the threshold (e.g., three months; six months)? 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?

NATSILS does not support the abolition of short sentences as a sentencing option. It is essential that judicial discretion is retained in all sentencing practices. As described above, judicial discretion is critical to ensuring that the individual circumstances of a person are taken into account, and accords with the principle of proportionality.

NATSILS is concerned that the abolition of short sentences may create new problems in relation to fairness and sentencing practices as it may result in harsher sentences being imposed on accused persons, which are not proportionate to the crime. Indeed, where a minimum sentence threshold is legislated, NATSILS is concerned that sentencing judges and magistrates may commence the sentencing process having regard to that minimum threshold, even where that threshold is not appropriate having regard to the seriousness of the crime and particular circumstances of the person coming before the court.

This concern has been the experience of ALSWA, where having the threshold for short sentences increased from three months to six months has resulted in 'sentence creep' (ie, offenders receiving longer sentences over time). NATSILS is concerned that the likelihood of this occurring is increased in situations where alternatives to custodial sentences, such as diversionary or community-based sentences, are unavailable. As discussed in greater detail in sections 3.3 and 3.4 below, this is even more likely to be the case in regional and remote communities.

In the alternative, NATSILS considers that short sentences of imprisonment should only be abolished if supported by an increase in the availability of culturally responsive diversion and rehabilitative programs. The abolition of short sentences of imprisonment cannot assist the position of Aboriginal and Torres Strait Islander people who are in contact with the criminal justice system if the courts are not provided alternative sentencing options. It is vital that we increase the number of culturally responsive diversion and rehabilitation programs available.

[17] Neil Morgan, Harry Blagg & Victoria Williams, 'Mandatory Sentencing in Western Australia & the impact on Aboriginal Youth' (December 2001) [6].

[18] N Morgan, H Blagg and V Williams, 'Mandatory Sentencing in Western Australia and the Impact on Aboriginal Youth' (2001); The Law Reform Commission of Western Australia, 'Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture, Final Report' (2006).

4.4. Proposal 4-1: Availability of community-based sentencing options

State and Territory Governments should work with peak Aboriginal and Torres Strait Islander organisations to ensure that community-based sentences are readily available, particularly in regional and remote areas.

A lack of alternative community based sentencing options in regional and remote areas has resulted in Aboriginal and Torres Strait Islander people being sentenced to a term of imprisonment which would not have been imposed had they lived in a metropolitan area. In the experience of ATSILS, this is largely because alternatives to incarceration are more readily available in metropolitan areas. Where such alternative sentencing options are not available, imprisonment is increasingly chosen by the judicial officer regardless of whether the circumstances warrant a custodial sentence. Similarly, many offenders who are released on parole into regional or remote areas, or who are subject to community based dispositions in such areas, are not able to access services designed to address the core reasons they have come into contact with the criminal justice system. For example, in the Central Desert area of Western Australia, there are no counselling or mental health services made available to parolees or offenders undergoing community based orders.[19]

Consultation in developing alternative community based sentencing options must focus on the expertise and knowledge that Aboriginal and Torres Strait Islander communities and organisations have in relation to unmet need for community based sentences. It is essential that community based sentences are designed and driven by community and supported if necessary by community correction officers and other appropriate support structures. It is essential that resources are provided to communities and their representative organisations to obtain their free, prior and informed consent before adopting developing alternatives and so as to engagement is able to be facilitated.[20]

Case Study

CAALAS

Robert, a 16 year old Aboriginal boy from the Goldfields was charged with serious violent offences against another boy, in a similar fashion to offences he witnessed his father commit against his mother at a young age that resulted in her death. The boy did not receive counselling at the time of the domestic incident but has now been diagnosed with schizophrenia and had been living a shambolic life in the care of his maternal grandmother. He was illiterate and innumerate. He did not have assistance to regularly take medication for his schizophrenia or diabetes and had no access to psychological services. The Community Adolescent and Mental Health Services in the Goldfields were responsible for managing his mental health needs but did not provide services to the Central Desert where he resided nor was there a psychiatric service in this region. Prior to the offending, he was twice admitted to the Mental Health ward at Kalgoorlie Hospital in 2009 demonstrating a deteriorating mental state. The boy was sentenced to 15 months detention.

This case study illustrates that early intervention and access to services is critical. It also points to the particular issue of servicing in remote areas...While it is recognised that there are significant costs and challenges associated with delivering disability services in remote communities, expanding existing services and improving accessibility in remote communities is vital. Failure to do so simply results in increased costs (both economic and social) in other areas of government expenditure, most notably in the administration of the justice system and prisons.

[19] See discussion in NATSILS, 'Submission to Senate Legal and Constitutional Affairs Committee Inquiry into Justice Reinvestment in Australia' (March 2013).

[20] United Nations, 'Declaration on the Rights of Indigenous Peoples' (September 2007) article 19.

4.5. Question 4-5: Flexibility to tailor sentences

Beyond increasing availability of existing community-based sentencing options, is legislative reform required to allow judicial officers greater flexibility to tailor sentences?

NATSILS recommends that legislative reform should be adopted in all states and territories to allow judicial officers greater flexibility to tailor sentences.

Judicial officers should tailor sentences having regard to all available rehabilitative programs.

In particular, reforms should focus on judicial officers' ability to consider community-led strategies that can ensure culturally safe and adapted responses.[21] Whilst it is critical that all courts allow for judicial discretion of culturally safe and adapted responses, the further development of specialised Aboriginal and Torres Strait Islander sentencing courts will assist in conferring greater sentencing discretion on judicial officers.

However, in order for these legislative reforms (i.e., reforms which allow a more tailored approach) to be effective, additional legislative reform is required to ensure that a broader range of culturally sensitive diversion options are available. Additional funding is also required to ensure that such rehabilitation strategies and programs can be developed by community and are effective. Without proper funding for community-based sentencing options and diversion, the flexibility to tailor sentences is of limited value.

It is essential that with any reform concerning an expansion of discretion for judicial officers, cultural training and awareness is central to implementation, so as to ensure judicial officers have a thorough understanding of the complex and unique experiences of Aboriginal and Torres Strait Islander peoples' interaction with the justice system.

Case Study

ALS NSW/ACT

'Casey' a young Aboriginal child with an intellectual disability was represented by ALS NSW/ACT. After receiving a 12 month suspended control order and probation order for an indecent assault charge, Casey was arrested by police for possession of marijuana. This was not pursued by the police and he was released shortly after. A few weeks later, Casey breached his bail conditions by not reporting to police. The police filed a detention application to change the conditions of his bail. The Magistrate allowed the application and, if successful, would mean that Casey would receive a control order to spend in full time custody in a Juvenile Detention Centre.

The ALS was successful in ensuring Casey was only issued a caution under the Children (Criminal Proceedings) Act 1987 (NSW), and was not subjected to a full time custodial sentence. The ALS brought to the court's attention the fact that the marijuana belonged to Casey's father. Furthermore, Casey's intellectual disability and the fact that he had no prior drug offences, were also relevant factors. As a result, the Magistrate dismissed the police application with a caution and allowed Casey to remain on his previous suspended control order and probation orders.

[21] NATSILS, 'Submission to Senate Legal and Constitutional Affairs Committee Inquiry into Justice Reinvestment in Australia', (March 2013) 9.

5. Prison programs, parole and unsupervised release

5.1. In relation to Prison programs, parole and unsupervised release, NATSILS recommends the following:

- Ensure the availability of rehabilitative programs for all who enter places of detention, including accused persons held on remand and those serving short sentences.
- Develop culturally appropriate programs for prisoners on remand and prisoners serving short sentences that are individualised and holistic.
- Develop culturally appropriate programs are specific to the needs of Aboriginal and Torres Strait Islander female prisoners.
- Amend parole revocation schemes to abolish requirements for the time spent on parole to be served again in prison if parole is revoked.
- Ensure the operation of automatic court ordered parole is accompanied by well-resourced rehabilitation support services that connect people on parole with housing, health and job support services.
- Develop alternative sentencing options for Aboriginal and Torres Strait Islander parolees living in remote or regional communities that take into account local circumstances and needs.

5.2. Proposal 5–1

Prison programs should be developed and made available to accused people held on remand and people serving short sentences.

Prison programs should be developed and available to all who come in contact with the justice system, including accused persons held on remand and those serving short sentences.

NATSILS recommends that programs for prisoners on remand and prisoners serving short sentences should be individualised and holistic, providing practical assistance to support people reintegrating back into the community.

5.3. Question 5–1

What are the best practice elements of programs that could respond to Aboriginal and Torres Strait Islander prisoners held on remand or serving short sentences of imprisonment?

The ALRC should have regard to the best practice elements of programs including Throughcare projects (offered by NAAJA and ATSILS QLD) and the Fairbridge Bindjareb program.

Many of the best practice elements noted in this submission have been highlighted by NATSILS and by other Aboriginal and Torres Strait Islander organisations in previous submissions to other inquiries and reports, and NATSILS refers the ALRC to those submissions for greater detail.[22]

[22] Central Australian Aboriginal Legal Aid Service Inc, 'Submission from the Central Australian Aboriginal Legal Aid Service Inc to the Senate Legal and Constitutional Affairs Committee: Inquiry into the Value of a Justice Reinvestment Approach to Criminal Justice in Australia' (March 2013); Human Rights Law Centre, 'Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment' (May 2017) 16-18.

Throughcare projects

Throughcare programs involve the coordinated provision of support to prisoners. Such programs are designed to address the causes of, and contributing factors to, offending behaviour. The ultimate goal is to improve the lives of people post-release and therefore to reduce the prospect of them returning to prison. Such programs provide person-centred case management and continual support before and after release. Throughcare projects are currently operating in the Australian Capital Territory,[23] the Northern Territory[24] and Queensland.[25]

The Throughcare Project, which is supported by both NAAJA and ATSILS QLD, demonstrates best practice in prison programs for Aboriginal and Torres Strait Islander peoples.[26] Whilst in prison, Throughcare support workers help individuals by:

(a) providing information about parole to individuals in detention, as well as their families and communities;

(b) encouraging personal reflection;

(c) encouraging and promoting involvement in other programs;

(d) providing guidance around community re-integration;

(e) supporting individuals to complete their parole, including complying with any parole conditions; and

(f) assisting individuals in preparing for release.

Following release, NAAJA and ATSILS QLD's intensive case managers continue to provide support where needed. This extends to help with on-going rehabilitation, accommodation, employment, education, health, reconnection with family and community, and general problem-solving skills.[27]

Fairbridge Bindjareb program

The Fairbridge Bindjareb program was designed by, and continues to be operated by, Aboriginal people. The program operates out of Western Australia and is available to prisoners in custody in a Western Australian prison. Those placed in the program are relocated to Karnet Prison Farm and travel to Fairbridge Village daily to participate. The program is Aboriginal and Torres Strait Islander centric with a focus on employment as the catalyst for life-change. In this program:

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[23] ACT Corrective Services operate an "Extended Throughcare" at the Alexander Maconochie Centre, Hume. This program has been operational since 2013. See generally, Griffiths, Zmudzki & Bates, 'Evaluation of ACT Extended Throughcare Pilot Program: Final Report' (January 2017).

[24] North Australian Aboriginal Justice Agency operated an Aboriginal and Torres Strait Islander Throughcare Program at the Darwin Correctional Centre and Don Dale Juvenile Detention Centre. This program has been operational since 2009. See generally, North Australian Aboriginal Justice Agency, 'Throughcare Project' (accessed on 14 September 2017 at http://www.naaja.org.au/our-services/indigenous-throughcare-project/).

[25] Aboriginal & Torres Strait Islander Legal Service (Qld) Ltd operate a "Prisoner Throughcare Program" at a variety of correctional facilities including: Gatton Correctional Centre, Wolston Correctional Centre, Wacol Precinct (DP(SO)A), Brisbane Women's Correctional Centre, Brisbane Youth Detention Centre, Cleveland Youth Detention Centre – Townsville, Townsville Women's Correction Centre, Townsville Correctional Centre and Lotus Glen Correctional Centre – Mareeba. See generally, Aboriginal & Torres Strait Islander Legal Service (Qld) Ltd, 'Fact Sheet: Prisoner Throughcare Program' (August 2012) (accessed on 14 September 2017 at www.atsils.org.au/wp-content/uploads/2014/11/FACT-SHEET_PrisonerThroughcare.pdf).

[26] NATSILS also note the Throughcare Project being operated at the Alexander Maconochie Centre in Hume, ACT

[27] North Australian Aboriginal Justice Agency, 'Throughcare Project' (accessed on 14 September 2017 at http://www.naaja.org.au/our-services/indigenous-throughcare-project/).

(a) participants are employed by the Department of Corrective Services and contracted as trainees;

(b) participants work towards a Certificate II in Surface Extraction Operations and complete their training with qualifications in at least two types of machinery;

(c) participants receive a gratuity for their work;

(d) participants receive lifestyle and personal development training;

(e) participants are paired with mentors who work with participants and their families; and

(f) participants are offered temporary accommodation where necessary.[28]

Preliminary evaluations suggest this program has directly contributed to improved employment rates, improved numeracy and literacy, and a decrease in recidivism.[29]

5.4. Proposal 5–2

There are few prison programs for female prisoners and these may not address the needs of Aboriginal and Torres Strait Islander female prisoners. State and Territory corrective services should develop culturally appropriate programs that are readily available to Aboriginal and Torres Strait Islander female prisoners.

State and Territory corrective services should develop culturally appropriate programs that are readily available to Aboriginal and Torres Strait Islander female prisoners.

5.5. Question 5–2

What are the best practice elements of programs for Aboriginal and Torres Strait Islander female prisoners to address offending behaviour?

Female prisoners present with unique difficulties. Culturally appropriate responses are required to support and offer an opportunity of rehabilitation for Aboriginal and Torres Strait Islander females. In addition to the best practice elements referred to above, further tailoring is required to address the unique circumstances of Aboriginal and Torres Strait Islander female prisoners. In NATSILS' experience, best practice elements of programs for female Aboriginal and Torres Strait Islander prisoners include:

- engaging with prisoners before their release date to discuss and adopt post-release plans;
- ensuring that prisoners understand release conditions and provide advice about what to do when difficulties arise;
- regular meetings with prisoners who live remotely to provide target social work interventions (such as counselling or anger management);
- culturally supportive and sensitive approaches;

[28] Deloitte, "A cost benefit analysis of the Fairbridge Bindjareb Project" (15 February 2016) 7-9 (accessed 13 September 2017 at https://www2.deloitte.com/content/dam/Deloitte/au/Documents/Economics/deloitte-au-fairbridge-bindjareb-project-cost-benefit-analysis-pp-150216.pdf).

[29] Ibid 9.

- supervision and control by Aboriginal and Torres Strait Islander community controlled organisations;
- on-going case management (achieved through extension of Throughcare programs); and
- access to housing, family violence, drug and alcohol, mental health, Centrelink and child protection support.[30]

As noted in the Discussion Paper, the Kunga Stopping Violence Program is an excellent example of a prison program that address these concerns.

The Kunga program is operated by CAALAS and works with women from the Alice Springs Correctional Centre with a history of violent offending. The program is a Throughcare program, with a primary objective to support Aboriginal and Torres Strait Islander women transition from prison into community. The program is specifically designed for Central Australian Aboriginal women with an emphasis on the importance of culturally appropriate and specifically tailored to address Aboriginal women's needs in Central Australia. For example, given that all Kunga participants have disclosed histories of some form of domestic, family, sexual or community violence the program's training and case management has been designed to include:

- supporting women with strategies around risk in relation to alcohol and drugs;
- personal insight and practice around understanding and managing emotions such as anger, jealousy, trust and respect;
- intergenerational trauma, cultural safety, grief, loss, separation and mental health support;
- domestic, family and sexual violence support;
- supporting women with strategies around overcrowding and lack of stable accommodation; and
- self-reflection to promote positive thinking.

The Kunga Program recognises that many women, when released from prison, lack access to specialised support. Accordingly, the program ensures that women receive pre-release training whilst in custody and are supported via case management up to twelve months post-release, with a view to ensuring that women successfully transition to mainstream services post-release and minimise re-offending. In order to ensure that participants are appropriately supported while incarcerated and post-release, the program works collaboratively with the Alice Springs Correctional Centre, NT Corrections, NT Reintegration Officers, Community Corrections Probation and Parole Officers and primary support programs.

5.6. Proposal 5–3 and Question 5–3: Automatic parole

A statutory regime of automatic court ordered parole should apply in all states and territories.

A statutory regime of automatic court ordered parole applies in NSW, Queensland and SA. What are the best practice elements of such schemes?

[30] NATSILS has previously addressed these recommendations in its submission entitled, 'Feedback on Funding for Family Violence Legal Assistance Services Paper' (8 July 2016) at 11-12.

Court ordered parole provides scope for sentencing courts to prioritise rehabilitative objectives that minimise ones contact with the justice system. Importantly, it provides for certainty of release and duration of supervision on release to prisoners. It is essential that the operation of automatic court ordered parole is accompanied by well-resourced and rehabilitation support services that connect people on parole with housing, health and job support services.

Increasing the maximum sentence for court ordered parole beyond three years

Court ordered parole was introduced to address the over-representation of short-sentenced, low-risk offenders in Queensland correctional facilities.

NATSILS is supportive of proposals to increase the maximum sentence to which court ordered parole could apply, however, caution is required as this will see Aboriginal and Torres Strait Islander people on parole for longer periods of time, unavoidably limiting the ability of individuals to move on with their lives after prison. Past government policies have sort to control and oppress Aboriginal and Torres Strait Islander people and parole can be seen as another means of controlling individuals, families and communities. NATSILS does not believe that parole period should be for extended periods of time.

It is essential that these services must first have the resources and capacity to cope with any increase in the number of parolees needing assistance before the maximum sentence is increased.

Extended parole style conditions should be repealed

NATSILS expresses concern over recent legislation which has come to force in South Australia and whereby persons, who have completed the head sentence are still and continually subject to parole style conditions and in default or if in breach of those conditions further imprisonment applies. Section 11 of *Criminal Law (High Risk Offenders) Act 2015* (SA) which allows for conditions of extended supervision orders.

Other alternatives to court ordered parole that should be considered

NATSILS considers that courts need to have the discretion to impose sentences that align with the nature of the offence and the circumstances of the individual person, and, where relevant, to set release dates accordingly.

With respect to Aboriginal and Torres Strait Islander prisoners, parole conditions are often not achievable. Often this is because formal directions issued by a court (in accordance with bonds or parole orders) to individuals not to associate with specific people or engage in specific activities are likely to be either ineffectual (as an individual's obligations towards others are well established) or detrimental to traditional structures.

Alternative sentencing options for Aboriginal and Torres Strait Islander parolees living in remote or regional communities need to be developed, taking into account local circumstances and needs, and especially in conjunction with local justice mechanisms presently in existence or established in the future (eg community release orders to Elder supervision or to another appropriate authority).

Case Studies

ATSILS QLD

'Dane', a prisoner (serving a life sentence), who is a talented guitarist and had played lead guitar in the prison band, was released on parole. One of Dane's conditions was not to enter licenced premises. Dane is a Christian man who does not drink alcohol or take drugs. Since on parole, Dane had been attending church and had ambitions to guide young adult offenders to change their ways positively.

Dane was asked to audition to play guitar for a singer who was due to perform at the 2016 ANZAC day celebrations. Dane attended the audition which was held at approximately 12pm on a weekday at a coffee shop. The singer auditioning Dane had a vested interest in this coffee shop. Dane was unaware the coffee shop held a liquor licence. Dane's ATSILS's Prisoner Throughcare Officer (PTC Officer) was in attendance at this audition and confirms no alcohol was consumed by any party on the day.

A staff member from Parole and Probation saw Dane at the coffee shop and reported him to his parole officer. Dane was then called in and advised that he would be breached. He was not offered a warning or second chance.

Rather than complain, Dane advised his PTC Officer and waits at his halfway house to be arrested by the police. Dane asked his PTC Officer to look after his guitar and amp for him. Within 24-48 hours the parolee is returned to prison. According to fellow prisoners, this parolee rarely leaves his cell and has become a recluse.

ATSILS QLD

Alister a prisoner on an eight-year term was released into a boarding house, in New Farm – an area notorious for drugs. The parolee was doing well, compliant with treatment, and maintaining his programs. Two months into Alister's release he was breached and had his parole suspended following a positive urinalysis sample. Alister advised that he used drugs on one occasion to due to his mother being sick. Alister felt that he had no support in the community and that drugs were the only coping mechanism he knew that could take the pain away.

Since the breach, Alister has been in prison for a further 12 months, despite being approved for parole release again. Delay in his release is due to not being able to get suitable housing.

5.7. 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.

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.

6. Fines and Drivers Licences

6.1. In relation to Fines and Drivers Licences, NATSILS recommends the following:

- Abolish provisions that provide for imprisonment in lieu of unpaid fines.
- Develop culturally appropriate support programs that address underlying factors of disadvantage which have resulted in the imposition of the fine or inability to pay a higher amount.
- Ensure that any reform to infringement regimes is preceded by genuine consultation with Aboriginal and Torres Strait Islander peoples and community controlled organisations.
- Implement schemes equivalent to the NSW Work or Development Order scheme for vulnerable and disadvantaged fine defaulters in all Australian jurisdictions.
- Remove the enforcement measure of driver licence suspension for vulnerable and disadvantaged fine defaulters.
- Repeal offensive language offences in all jurisdictions.

6.2. Proposal 6–1

Fine default should not result in the imprisonment of the defaulter. State and Territory Governments should abolish provisions in fine enforcement statutes that provide for imprisonment in lieu of unpaid fines.

Fine default should never result in a prison sentence. State and Territory Governments should ensure that statutory provisions enabling imprisonment for fine default this should be repealed as soon as possible.

Western Australia provides an instructive example of failed policy

Aboriginal and Torres Strait Islander peoples, particularly women, are drastically over-represented as fine defaulters who are sent to prison.

Imprisonment for fine default is overwhelmingly more prevalent in Western Australia (**WA**) than in other States and Territories. The Aboriginal Legal Service of Western Australia Inc (**ALSWA**) noted the vast discrepancy between the more than 1000 people imprisoned each year in Western Australia exclusively for fine default, and the dozens or fewer in NSW and Victoria.[31] ALSWA has advocated an approach comprising "*treatment, education or training*" to address the causes of offending and has stated that the "*complex underlying problems that exist for these fine defaulters … will never be addressed by the current blunt fines enforcement system*".[32]

ALSWA also noted that the cost of keeping a fine defaulter in prison was estimated at between $345 and $770 per day, whereas unpaid fines are only 'cut out' at a rate of $250 per day.[33] Prison is therefore highly ineffective as a procedure to 'repay' fines to the state, as it potentially ends up costing the state more than three times the amount that it would recoup of the unpaid fines.

[31] ALSWA, 'Addressing fine default by vulnerable and disadvantaged persons: Briefing paper' (August 2016) 3.

[32] Ibid 2.

[33] Ibid 3-4.

Other jurisdictions also see imprisonment for fine default

Unlike Western Australia, South Australia does not have a similar prevalence of imprisonment for fine default and prison is not a mandated consequence of fine default under the legislation. However, the experience of ALRM is that imprisonment is often an indirect product of fine default. Clients who are on diversion programs for fine default are placed on community service orders, and when conditions of a community service order are breached, imprisonment can result.

This is reflected, for example, in section 71 of the *Criminal Law (Sentencing) Act 1988* (SA) which provides that "*an order requiring performance of community service is enforceable by imprisonment in default of compliance*" and allows discharge of 7.5 hours of community service for every one day of imprisonment (i.e. 24 hours), as well as a procedure to issue a warrant for arrest if it appears to the court that a community service order is not being complied with. Imprisonment to discharge community service cannot exceed 12 months.[34]

NATSILS considers imprisonment to discharge community service obligations as equivalent to imprisonment for fine default, and sees this occurring in South Australia quite regularly even though statistics relating to imprisonment for fine default do not reflect this. This same concern is reflected in relation to imprisonment for low-level driving offences. In some circumstances, fine default can cause a person's licence to be suspended, and offences relating to driving unlicensed can carry a term of imprisonment. This is discussed further below in our response to Question 6–7.

6.3. Question 6–1, Question 6–2 and Question 6–3

Should lower level penalties be introduced, such as suspended infringement notices or written cautions? Should monetary penalties received under infringement notices be reduced or limited to a certain amount? If so, how? Should the number of infringement notices able to be issued in one transaction be limited?

Fines cannot be separated from underlying factors

Any reform of the infringements regime should be preceded by genuine consultation with Aboriginal and Torres Strait Islander community controlled organisations to ensure there are no unintended consequences or disproportionate impacts of proposed reforms on marginalised communities.

Unpaid fines can causes stress, anxiety and feelings of hopelessness, in addition to the secondary legal ramifications. In line with previous submissions NATSILS submits that: "*[w]here fines are not paid due to poverty, these fees amount to a further penalty for those who can least afford it. In practise, fines act to punish further than the defendant. Fines can act to punish a defendant's family, including dependents, and in particular, children. Fines can affect a family's access to essentials such as food*".[35] Fines and enforcement fees are particularly problematic for itinerant or transient Aboriginal and Torres Strait Islander peoples, who often do not apply for pay-by-instalment or fine reduction options due to a lack of awareness of those avenues or the fact these options only become available when the fine is overdue.

There are a range of existing measures to mitigate or waive fines,[36] however, these are not always applied consistently. For example, ATSILS staff in the Northern Territory have noted that while "*in Victoria they have a system with a special circumstances list, where certain court ordered fines can be waived on the basis of homelessness, mental health … here, although there is an*

[34] *Criminal Law (Sentencing) Act 1988* (SA) s 71(10).

[35] NATSILS, 'Productivity Commission Inquiry into Access to Justice Arrangements' (November 2013) 7.

[36] See e.g., M Spiers Williams and R Gilbert, 'Reducing the Unintended Impacts of Fines', *Indigenous Justice Clearinghouse* (January 2011) 5.

exceptional circumstance provision, it is virtually ignored".[37] Also, while New South Wales has had success with reducing infringements through work and development orders, and the Australian Capital Territory operates a similar scheme for road traffic infringements, these are not always available to defendants or applied consistently.[38]

6.4. Question 6–4 and Question 6–5

Should offensive language remain a criminal offence? If so, in what circumstances? Should offensive language provisions be removed from criminal infringement notice schemes, meaning that they must instead be dealt with by the court?

Offensive language offences must be repealed. NATSILS supports positions previously stated by both the CAALAS and NAAJA that "*[p]ublic order laws disproportionately affect vulnerable members of society*" and activity of people, "*especially Aboriginal people who are homeless or are visiting town from remote communities, can become criminalised, directly or indirectly, because of their public visibility and the need to conduct much of their daily lives in public".*[39] The effect racist police practising has on Aboriginal and Torres Strait Islander people being charged with offensive language offences must be central to discussion surrounding the repeal of offensive language offences.

Improvements to the existing provisions could be developed

Offensive language is a "*significant pathway into prison for Aboriginal people"*,[40] and the Northern Territory Department of the Attorney-General and Justice noted the common situation whereby an initial apprehension for disorderly conduct or offensive language then leads "*to an altercation with arresting Police and consequent charges of 'resist Police' and then 'assault Police'*".[41] This fact scenario was most recently the subject of an appeal to the High Court in *Prior v Mole* [2017] HCA 10.

By way of example, in the current *Summary Offences Act* (NT), offensive language is criminalised under various provisions of the Act: (i) section 47(a) via "*riotous, offensive, disorderly or indecent behaviour … or using obscene language*" – which carries a penalty of $2000 and/or 6 months' prison; and (ii) section 53(7) in relation to "*objectionable words or behaviour".*

Doubling up of public order offences must be avoided and repealed where it exists in statutes regulating offensive speech, and if the offence is retained then offensive language should be separated from behaviour offences. Separation "*would offer the opportunity for a lesser penalty where … the offence is caused solely by the language used"*.

If the offence is retained, section 4A of the *Summary Offences Act 1988* (NSW) – which has a community service penalty option and no imprisonment – should be preferred as an improved alternative to the status quo.

[37] NATSILS, 'Productivity Commission Inquiry into Access to Justice Arrangements' (November 2013) 7.

[38] ALSWA, 'Addressing fine default by vulnerable and disadvantaged persons: Briefing paper' (August 2016) 21-24.

[39] CAALAS and NAAJA, 'Submission from the Central Australian Aboriginal Legal Aid Service Inc and the North Australian Aboriginal Justice Agency in relation to the Final Report on the Review of the Summary Offences Act' (September 2013) 4.

[40] Ibid 7.

[41] Northern Territory Government, 'Final Report: Review of the *Summary Offences Act*' (August 2013) 36.

6.5. Question 6–6 and Proposal 6–2

Should State and Territory Governments provide alternative penalties to court ordered fines? This could include, for example, suspended fines, day fines, and/or work and development orders.

Work and Development Orders were introduced in NSW in 2009. They enable a person who cannot pay fines due to hardship, illness, addiction, or homelessness to discharge their debt through:

- **community work;**
- **program attendance;**
- **medical treatment;**
- **counselling; or**
- **education, including driving lessons.**

State and Territory Governments should introduce work and development orders based on the NSW model.

NATSILS recommends that all states and territories should implement schemes equivalent to the NSW Work or Development Order (**WDO**) scheme for vulnerable and disadvantaged fine defaulters in all Australian jurisdictions. This type of scheme is the best alternative penalty to a monetary fine. However, NATSILS also considers that some improvements or modifications to the WDO scheme may be possible in consultation with the local participants.

The WDO scheme has been positive for New South Wales

The experience of services on the ground in NSW has been positive, with overwhelming support for the pilot scheme and subsequent evaluations.[42]

NATSILS recommends the implementation of a WDO scheme based on the NSW model for vulnerable and disadvantaged fine defaulters in all Australian jurisdictions.

The support for this recommendation is in line with NATSILS' view on addressing the underlying causes of fines in any legislative reform – this is discussed above in response to Questions 6-1, 6-2 and 6-3. Currently there "*is a clear gap in the failure to acknowledge the root causes of imprisonment and violence rates, including social determinants such as poverty and socio-economic disadvantage*".[43] Community work programs, medical treatment, counselling and education must be preferences over financial penalties to assist with addressing underlying causes of fine default such as homelessness, unemployment, family and domestic violence, mental health issues, substance addiction, intergenerational trauma and disability.

Improvements to the NSW scheme

The ALS NSW/ACT acknowledges that the availability and coverage of WDO sponsored work-sites in regional and remote areas of NSW and the ACT is less than ideal. ALS recommends the

[42] ALSWA, 'Addressing fine default by vulnerable and disadvantaged persons: Briefing paper' (August 2016) 21-22.

[43] NATSILS, 'The Redfern Statement', *Aboriginal and Torres Strait Islander Peak Organisation Unit* (9 June 2016) 11 (accessed on 30 August 2017 at: http://www.natsils.org.au/portals/natsils/The-Redfern-Statement-9-June-2016_FINAL.pdf?ver=2016-06-10-074343-317).

ALRC consider an 'incentive scheme' to encourage work-sites in regional and remote locations to sponsor WDO placements.

The recent ALSWA briefing paper on fine default discussed the structure and experience of the NSW scheme in detail, after consultation with involved stakeholders – including "*suggestions for improvements or modifications*".

It is evident that part of the NSW scheme could be adapted to suit the different legislative schemes of the various jurisdictions, but also the scope could be broadened to better assist Aboriginal and Torres Strait Islander peoples.

The flexible cut-out rate structure of the NSW scheme is important to retain in a wider rollout. ALSWA points out that the ability to tailor the cut-out to meet the needs and circumstances of clients is essential – for example "*in some regional locations the availability of psychologists for drug counselling is limited and it would be unfair to penalise the client for not attending more frequent counselling sessions given that the availability of sessions is beyond their control*".[44]

The WDO scheme is one option in Division 8 of the *Fines Act 1996* (NSW) for fine mitigation as an alternative to property seizure, wage garnishing, drivers' licence suspension and imprisonment (measures which often serve to entrench disadvantage). Eligibility for the WDO scheme is limited to those who can demonstrate "*one of the special disadvantages or vulnerabilities*" and that this "*vulnerability or disadvantage contributed to or is contributing to the person's inability to pay the fine*", and only if there is an enforcement order against the person but no community service order in force against the person.[45] Legal Aid NSW has also suggested that eligibility via acute economic hardship should be expanded to include Abstudy recipients and victims of family and domestic violence, with consideration given to including gambling addicts.[46]

Similarly, ALSWA has identified that the 'mentoring' option for discharging debt is the least frequently undertaken, and that the NSW "*definition is not ideal and does not clearly reflect the nature of mentoring in a social justice framework*".[47] NATSILS considers that a well-developed mentoring program as an approved WDO activity, defined as incorporating "*support, guidance and encouragement"*, could help address underlying issues while discharging fine debt.

6.6. Question 6–7

Should fine default statutory regimes be amended to remove the enforcement measure of driver licence suspension?

NATSILS recommends that the enforcement measure of driver licence suspension should be repealed as a possible consequence for vulnerable and disadvantaged fine defaulters. Instead, consideration must be given to:

(a) the role of driver's licence suspension in a common pathway to imprisonment for disadvantaged people; and

(b) the exacerbated effects that drivers licence suspension has on people living in regional and remote areas,

each of which disproportionately affect Aboriginal and Torres Strait Islander peoples.

[44] ALSWA, 'Addressing fine default by vulnerable and disadvantaged persons: Briefing paper' (August 2016) 17.

[45] Ibid 9.

[46] Ibid 11-12.

[47] Ibid 13.

As NATSILS has previously detailed:

> *"Suspension of a person's driver's licence needed for work will only exacerbate their level of disadvantage. In communities where no public transport is available, suspension of a person's driver's licence may also negate their access to health services, shops, and extended family. In Aboriginal and Torres Strait Islander communities, when a person's driver's license or a car's registration is suspended, the whole community can be affected if another licensed driver or registered vehicle is not available. Often cars are shared in communities and heavy reliance by other community members is placed upon those with licenses. If alternative transport is not available for essential services and travel, such as to work, health services or grocery shops, then a person is likely to drive unlicensed and unregistered, placing themselves at risk of convictions for more serious offences and imprisonment. In some remote communities where the nearest services can be hundreds of kilometres away, this is not an easy choice to avoid. In some circumstances it may also be a breach of customary law for a person to refuse a request to drive another person with whom they have a particular kinship relationship."*[48]

The suspension of a driver licence for vulnerable and disadvantaged persons exacerbates issues of 'secondary offending' – that is, the fine default may lead to offences for unlicensed or unregistered driving. As identified by the Australian Bureau of Statistics, in 2009, 5.5% of Aboriginal and Torres Strait Islander prisoners in Australia, or 408 people, had as their most serious offence 'traffic and vehicle regulatory offences'.[49]

Unless fine default regimes remove the enforcement measure of driver's licence suspension for vulnerable and disadvantaged persons, a pathway to prison for fine default will remain through driving offences in areas or roles where driving is required.

Suspension of drivers' licences is also an access to justice issue for vulnerable Aboriginal and Torres Strait Islander peoples. NATSILS has noted that in "*remote communities, access to justice has been described as "so inadequate that remote Indigenous people cannot be said to have full civil rights'"*[50] If people are to retain the capacity to participate fully in the justice system, including various services or opportunities under a WDO scheme, retaining the ability to drive without exacerbating legal problems is essential. Retaining licence suspension as an enforcement measure for fine default therefore has the capacity to work against any other improvements in legal provisions around fines and summary offences.

Case Study

ALS NSW/ACT

'Chelsea', an Aboriginal single mother with two children, pleaded guilty in the Kempsey Local court for driving whilst suspended. As a result, three previous section 9 bonds in relation to previous drug possession offences were called up. Chelsea was disqualified from driving for 12 months and received a $400 fine, and her bonds were changed to three section 12 bonds for a duration of 12 months.

An appeal was held in the Port Macquarie District Court, and was found that the initial sentences were too severe. The charge to driving whilst suspended was dismissed, which meant that our client was able to continue driving. This is important as Chelsea lived in a remote area inaccessible by public transport. Furthermore, Chelsea was able to remain under the section 9 bonds, but had to attend counselling and other Community Corrections programs as part of the bond conditions.

[48] NATSILS, 'Productivity Commission Inquiry into Access to Justice Arrangements' (November 2013) 8.

[49] Ibid, citing Australian Bureau of Statistics, *Prisoners in Australia* (2009).

[50] Ibid 24, citing C Cunneen and M Schwartz, *The Family and Civil Law Needs of Aboriginal People in NSW* (2008) 31.

This meant that Chelsea would no longer face the possibility of imprisonment if the bond conditions were breached. This outcome was important to our client as retaining her license allowed her to maintain access to medical services.

6.7. Question 6–8

What mechanisms could be introduced to enable people reliant upon driver licences to be protected from suspension caused by fine default? For example, should:

(a) recovery agencies be given discretion to skip the driver licence suspension step where the person in default is vulnerable, as in NSW; or

(b) courts be given discretion regarding the disqualification, and disqualification period, of driver licences where a person was initially suspended due to fine default?

In circumstances where there is greater need for a drivers licence, vulnerable and disadvantaged fine defaulters should be protected from suspension until other options are exhausted. This can be achieved by court, rather than debt recovery agency, oversight of this option.

Suspension of drivers' licences is not the only option, nor a logically necessary first step, for fine recovery. NATSILS has previously identified that authorities "*can utilise a further range of measures to recoup unpaid fines including the seizure of property and wages and the conversion of unpaid fines to a work or treatment order*", other than drivers licence suspensions.[51] While NATSILS is against any proposal for a compulsory scheme whereby outstanding fines may be deducted from social security payments, it supports greater awareness of repayment options and flexibility arrangements and the use of work or development orders as preferred mechanisms.

[51] Ibid 8.

7. Justice Procedure Orders

7.1. In relation to Justice Procedure Orders, NATSILS recommends the following:

- Invest in developing better infrastructure and support services to increase the availability of culturally appropriate community-based sentencing options.
- Invest in the design and implementation of culturally appropriate community-based sentencing options.
- Establish greater flexibility in funding models to enable Aboriginal and Torres Strait Islander community controlled organisations to deliver holistic wrap-around services that are responsive to community needs.
- Provide adequate resources to Aboriginal and Torres Strait Islander community controlled organisations to enable greater collaboration with Commonwealth, State and Territory Governments to identify gaps and design appropriate infrastructure that will increase the availability of culturally appropriate community based sentencing options.

7.2. Proposal 7–1

To reduce breaches of community-based sentences by Aboriginal and Torres Strait Islander peoples, State and Territory Governments should engage with Aboriginal and Torres Strait Islander organisations to identify gaps and build the infrastructure required for culturally appropriate community-based sentencing options and support services.

NATSILS supports:

- the development of better infrastructure and support services to support culturally appropriate community-based sentencing options;
- the establishment of culturally appropriate community-based sentencing options, to ensure that fewer breaches of sentencing orders arise; and
- more flexible funding models should be established to enable Aboriginal and Torres Strait Islander community controlled organisations to deliver holistic wrap-around services that are responsive to community needs and to ensure the collaboration of unique expertise across sectors.

Develop better infrastructure and support services to support culturally appropriate community-based sentencing options.

Many Aboriginal and Torres Strait Islander peoples subject to community based orders are "*not able to access services designed to address the core reasons for their offending behaviour"* such as counselling or mental health services which may not be available in remote communities.[52]

[52] NATSILS, 'Senate Legal and Constitutional Affairs Committee Inquiry into Justice Reinvestment in Australia' (March 2013) 9.

In other submissions, NATSILS has noted that:

> *" … in the Central Desert area of Western Australia, which includes a number of remote Aboriginal communities, there are no counselling or mental health services made available to parolees or offenders undergoing community based orders."*[53]

While the ALRC acknowledges the various options for custodial and non-custodial community-based sentences which exist in each State and Territory,[54] these are hampered in effectiveness due to lack of relevant culturally-appropriate services.

The ALS NSW/ACT has argued that the 'more subtle' criminal law remedies appropriate to Aboriginal and Torres Strait Islander disadvantage are "*the responsibility of the courts, which have, over time, built up a significant number of empirical studies related to restorative justice sentencing for Aboriginal offenders*".[55] The National Justice Chief Executive Officers Group have identified key principles for framing sentencing options for Aboriginal and Torres Strait Islander peoples:

> *"1. Begin efforts to assist offenders to successfully rehabilitate promptly upon imprisonment, and continue after release until reintegration is completed (Throughcare).*
>
> *2. Create effective partnerships between government and non-government organisations. (Information sharing and joined up service delivery are fundamental to the success of initiatives.)*
>
> *3. Ensure that programs are designed, developed and delivered in a culturally appropriate manner. (Evidence suggests that participants in programs that are delivered in a culturally appropriate manner are more likely to complete the program and less likely to re-offend.)*
>
> *4. Acknowledge the strengths of young Indigenous offenders and recognise achievements, ability and potential, while addressing the need to build capacity.*
>
> *5. Recognise and address the needs of victims, particularly where the victim lives in the same community as the offender.*
>
> *6. Address the cognitive and behavioural causes of offending including mental health and cognitive disability issues. (Research suggests that cognitive-behavioural skills programs are among the most effective in offender rehabilitation.)*
>
> *7. Address substance abuse. (Drug and alcohol abuse are risk factors for offending.)*
>
> *8. Address the individual in a holistic way and ensure that practical health, welfare and accommodation needs are met so that the client can effectively address behavioural change.*
>
> *9. Acknowledge that young offenders are in transition to adulthood, and ensure that connections are made with education, vocational training and I employment services.*
>
> *10. Empower individuals by imparting practical life skills, building self sufficiency and encouraging active participation in rehabilitation. ·*

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[53] Ibid

[54] Discussion Paper [7.5]–[7.7].

[55] ALS NSW/ACT, 'Inquiry into Sentencing in the ACT: Submission by the Aboriginal Legal Service (NSW/ACT) Limited' (30 October 2013) 6.

11. Where possible, maintain, re-establish and strengthen family and community relationships, and involve family members and elders in the reintegration process.

12. Address staff needs for ongoing professional development and job stability. (Trained and committed staff are key elements in program integrity.)

13. Match treatment styles with the learning styles of participants."[56]

Establish culturally appropriate community-based sentencing options,

There are ample statistics and data on the high cost of keeping a person in prison as opposed to the cost of community corrections. In 2009-10, 85% of total corrective services expenditure was spent on prisons, but that "*such levels of spending are unsustainable"* and "*[t]ax payers are not getting value for money in terms of current prison expenditure"*.[57] Imprisonment has been shown to be highly ineffective in reducing reoffending, particularly for Aboriginal and Torres Strait Islander peoples, and of minimal deterrent effect generally.[58]

However, it remains the case that "*lack of alternative community based sentencing options in regional and remote areas has resulted in people being sentenced to a term of imprisonment which they would not have received had they lived in a metropolitan area where such alternatives are routinely available"*.[59]

Improvements to pre-sentence reports in line with recommendations made above that particular attention to the circumstances of Aboriginal and Torres Strait Islander peoples should be inserted as a 'pre-sentence report matter' (there, in the example of section 40A of the *Crimes (Sentencing) Act 2005* (ACT)) is an appropriate way to place an onus on the judiciary to ensure Aboriginal and Torres Strait Islander people have access to culturally appropriate community based sentencing options. Mandating consideration of particular cultural requirements at the pre-sentencing stage may assist in developing appropriate community-based sentencing options.

[56] Ibid 6–7.

[57] NATSILS, 'Senate Legal and Constitutional Affairs Committee Inquiry into Justice Reinvestment in Australia' (March 2013) 15, citing Australian National Council on Drugs, 'An economic analysis for Aboriginal and Torres Strait Islander offenders: prison vs residential treatment' (2012) viii.

[58] NATSILS, 'Access to Legal Assistance Services' (April 2015) 20-21, citing Australian Bureau of Statistics, 'Prisoners in Australia 2014' (2014) Cat. no. 4517.0. Canberra.

[59] Ibid 9.

8. Alcohol

8.1. In relation to the Alcohol, NATSILS recommends:

- Abolish the criminalisation of drunkenness and replace all laws with measures that seek to prioritise rehabilitation.
- Utilise a human rights framework to develop laws, policies and practices to address alcohol use and abuse in Aboriginal and Torres Strait Islander communities, including in particular the recognition that alcohol abuse is a health issue.
- Ensure Aboriginal and Torres Strait Islander communities and community controlled organisations are involved in the design, planning, implementation and delivery, of programs that seek to address the link between alcohol and crime in Aboriginal and Torres Strait Islander communities.
- Prioritise effective harm reduction, treatment and support options.
- Ensure that strategies implemented to address alcohol misuse and alcohol-related harm focus on addressing the underlying social and economic determinants of misuse and harm and on ending intergenerational trauma.
- Introduce a community-developed and supported volumetric tax on alcoholic drinks where appropriate.
- Introduce a community-developed and supported restriction on liquor licencing regimes where appropriate.
- Abolish the Alcohol Protection Orders (APO) within the Alcohol Protection Orders Act 2013 (NT).
- Expand diversionary treatment programs for alcohol related offending, which are culturally competent, inclusive of family members and community supports.
- Enforce stronger restrictions on alcohol advertising.
- Increase investment in the provision of appropriate services to support the decriminalisation of public drunkenness, including sobering up centres and training of police and health care staff.
- Expand culturally competent diversionary treatment programs for alcohol related offending, particularly in rural and remote areas.

8.2. Proposal 8–1: Limiting alcohol sales

Noting the link between alcohol abuse and offending, how might State and Territory Governments facilitate Aboriginal and Torres Strait Islander communities, that wish to do so, to:

(a) develop and implement local liquor accords with liquor retailers and other stakeholders that specifically seek to minimise harm to Aboriginal and Torres Strait Islander communities, for example through such things as minimum pricing, trading hours and range restriction;

(b) develop plans to prevent the sale of full strength alcohol within their communities, such as the plan implemented within the Fitzroy Crossing community?

The approach to reform

The harmful effects of alcohol misuse on Aboriginal and Torres Strait Islander communities, and its connection to the overrepresentation of Aboriginal and Torres Strait Islander people in the criminal justice system, are well-documented and have been the subject of several detailed inquiries in recent years. [60] Investigating the harmful effects of alcohol in Aboriginal and Torres Strait Islander communities, the House of Representatives Standing Committee on Indigenous Affairs' June report said the Northern Territory Government's practice of criminalising alcohol abuse had no basis in evidence.[61]

It is essential that measures to address alcohol, are designed and supported by Aboriginal and Torres Strait Islander communities and community controlled organisations. Self-determination is key to ensuring Aboriginal and Torres Strait Islander communities are provided with autonomy to implement culturally appropriate solutions to address the link between alcohol and offending.

Furthermore, restrictions and discriminating of the kind where Aboriginal and Torres Strait Islander people are subjected to policies which seek to withhold things, including alcohol, from them are not new:

> *Restrictions of this nature are not new to post-contact Aboriginal Australia. From the early years of this century until the 1960s, Aboriginal people were subjected to a broad range of restrictions on their movements, employment and relationships, and these included restrictions on access to alcohol. Not until 1964 were Aborigines in Western Australia and the Northern Territory granted the right to drink liquor, and the prohibition on supplying liquor to Aborigines in South Australia remained until 1967 (d'Abbs 1987; McCorquodale 1984). In Queensland, Aborigines off reserves were granted access to liquor in 1965 but here, as elsewhere, the right remained a legal rather than a practical one for many Aboriginal people, as restrictions on the possession or consumption of liquor by Aborigines on reserves or missions continued well into the 1970s (Barber et al. 1988). Throughout the 1970s, however, the shift from a policy of assimilation to one of self-determination led to the removal of most of the restrictions on access, in practice as well as in theory, so that by the end of the decade Aborigines throughout most of Australia had full access to liquor.*
>
> *In the light of these changes, the use of 'restricted areas' as an instrument of Aboriginal alcohol control policy takes on new significance and raises new issues, if only because*

[60] See, eg, CAALAS, 'Response to the Northern Territory Alcohol Policies and Legislation Review Issues Paper' (July 2017) (**CAALAS NT Submission**) (accessed on 29 August 2017 at: http://www.caalas.com.au/Portals/caalas/CAALAS%20Response%20to%20NT%20Alcohol%20Policies%20and%20Legislation%20Review%20Issues%20Paper.pdf?ver=2017-07-13-165949-143); NAAJA, 'Response to the Northern Territory Alcohol Policies and Legislation Review Issues Paper' (July 2017) (**NAAJA NT Submission**) (accessed on 29 August 2017 at: http://www.naaja.org.au/wp-content/uploads/2014/05/NAAJA-Alcohol-Review-Submission.pdf); NATSILS and the Human Rights Law Centre, 'Submission to the Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities' (April 2014) **(NATSILS Submission to House Inquiry)** (accessed on 29 August 2017 at: http://www.natsils.org.au/portals/natsils/submission/NATSILS%20&%20HRLC%20Submission%20-%20Inquiry%20into%20the%20harmful%20use%20of%20alcohol%20in%20Aboriginal%20&%20Torres%20Strait%20Islander%20communities%20April%202014%20.pdf); CAALAS, 'Submission to the Inquiry into the harmful use of alcohol in Aboriginal and Torres Strait Islander communities' (April 2014) (accessed on 29 August 2017 at: http://www.caalas.com.au/Portals/caalas/Submissions/Central%20Australian%20Aboriginal%20Legal%20Aid%20Service%20-%20%20Submission%20to%20the%20Inquiry%20into%20the%20harmful%20use%20of%20alcohol%20in%20Aboriginal%20and%20Torres%20Strait%20Islander%20communities%20-%2017%20April%202014.pdf).

[61] Standing Committee on Indigenous Affairs, 'Report – Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities: Alcohol, hurting people and harming communities' (June 2015) (accessed on 29 August 2017 at: http://www.aph.gov.au/Parliamentary_Business/Committees/House/Indigenous_Affairs/Alcohol/Report).

any declaration of a restricted area today takes place in a context in which Aborigines have the same rights as anyone else to possess and consume liquor.[62]

To be effective, any law reform which attempts to address the link between alcohol abuse and offending must be based on 'ground up' rather than 'top down' models of community engagement. Accordingly, the development and implementation of liquor accords and other law reforms must be supported by community members, community sector organisations, social service providers and other key stakeholders. As noted in the Discussion Paper, "ownership" of solutions is critical, and should occur throughout the inception, planning, implementation, delivery, monitoring and evaluation of each and every program designed to address the link between alcohol and crime in Aboriginal and Torres Strait Islander communities.

NATSILS submits that this objective is not achieved by law reforms and legal frameworks which seek to criminalise drunkenness (such as alcohol mandatory treatment orders or alcohol protection orders, discussed in Section 8.2 below).

Further it is critical that alcohol is treated as a health issue rather than a criminal offence. Any policy which seeks to successfully address the link between alcohol and criminal conduct must first focus on effective **harm reduction, treatment and support options** which are supported by evidence. While NATSILS acknowledges that such programs are not the focus of the Commission's Inquiry, it is critical to ensure that health service providers and community leaders are involved in the design and implementation of legal frameworks.

NATSILS endorses the comments made by CAALAS and NAAJA in their recent submissions to the Expert Panel conducting the Northern Territory Alcohol Policies and Legislation Review, in July 2017.[63] It also restates comments made by the Standing Committee on Indigenous Affairs in its Report tabled in connection with the 'Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities: Alcohol, hurting people and harming communities'[64] (June 2015) (**House Inquiry Report**), and by NATSILS and the Human Rights Law Centre in their 'Submission to the Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities' (April 2014) (**NATSILS Submission to House Inquiry**).

Case Study

CAALAS

'Kae' is a middle aged non-drinker who was driving two friends around town to visit friends. Allegedly, when one of the passengers went into a friend's house, unbeknownst to Kae, he purchased secondary alcohol and smuggled it into the car. Kae's car was stopped, searched, the alcohol was discovered and the car was seized. Kae had no requisite intention to bring, possess or consume alcohol in a protected area. Kae had no intention of supplying or transporting alcohol in a protected area. CAALAS assisted Kae to get the car back. However there was a considerable period of time where Kae's freedom of movement had been detrimentally impacted through no fault of his own.

ALRM

The ALRM has been involved in assisting the Yalata community in its attempts to control access to alcohol since 1991. In that year, the South Australian Liquor and Gambling Commissioner

[62] Peter d'Abbs, 'Restricted Areas and Aboriginal Drinking', (accessed 13 September 2017 at http://www.aic.gov.au/media_library/publications/proceedings/01/dabbs.pdf).

[63] See NAAJA NT Submission and CAALAS NT Submission.

[64] Standing Committee on Indigenous Affairs, 'Report – Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities: Alcohol, hurting people and harming communities' (June 2015) (accessed on 29 August 2017 at: http://www.aph.gov.au/Parliamentary_Business/Committees/House/Indigenous_Affairs/Alcohol/Report) (**House Inquiry Report**).

initiated proceedings against the Nundroo hotel-motel, which resulted in a restrictive licence condition preventing sale of liquor to anyone resident in or travelling to that community. Two other hotels at Penong and Border Village had similar restrictions placed upon them. It was reported that there was a 40% reduction in presentations to the health service clinic for alcohol-related violence and trauma and illness after the imposition of the licence condition.

That licence condition was breached from time to time and ALRM was involved in numerous meetings throughout the 1990s with police, licensees and the Commissioner to improve its effectiveness. During that time and into the 2000s, alcohol-related violence, foetal alcohol syndrome, morbidity and alcohol-related deaths remained a tragic feature of life on the community, notwithstanding attempts to deal with it. One of the main contributors to this continued prevalence was the practice of 'grog-running', which meant that the hotels sold liquor to 'grog-runner', who would smuggle the liquor into the restricted community.

In 2012, the South Australia Police licensing enforcement branch took disciplinary proceedings against the Nundroo hotel-motel. As a result, the licensing court judge, His Honour Judge Gilchrist invited the communities concerned to make submissions as to appropriate new conditions for the licence. After months of negotiation and evidence before the court, including from Aboriginal Medical Service doctors, stringent new licence conditions were imposed on that hotel motel.

In addition, by application most other hotels and liquor outlets on the west coast of South Australia had similar license conditions imposed upon them, which ALRM (acting for the relevant Aboriginal communities) supported.

Minimising harm by limiting alcohol sales within communities

Taxes and minimum pricing

The effectiveness of a volumetric tax approach has been supported by many Australian public health organisations, as well as the National Preventative Health Taskforce[65] and subsequently the National Draft Drug Strategy. It has also been strongly supported by the Henry Tax Review and by the Senate Red Tape Committee in its recent 2017 interim report into the effect of red tape on the sale, supply and taxation of alcohol.[66] Most importantly, in the context of the link between alcohol and crime in Aboriginal and Torres Strait Islander communities, volumetric taxing and minimum pricing was supported by the House Inquiry Report[67] and continues to be supported by a number of the ATSILS.[68]

A minimum or floor price, which sets a minimum legal price per standard drink or unit of alcohol at which alcoholic beverages must legally be sold was recommended by in the House Inquiry Report.[69]

Trading hours and range restrictions

NATSILS supports community-developed and supported restrictions on liquor licencing regimes in order to reduce alcohol consumption. This includes restrictions on opening hours, the number of liquor licenses, the density of licenses, caps on take-away liquor sales, and on the types of alcohol sold.

[65] See generally the NATSILS Submission to House Inquiry 18.

[66] Commonwealth, 'Interim Report: Effect of red tape on the sale, supply and taxation of alcohol' (29 March 2017) (accessed on 29 August 2017 at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Red_Tape/Alcohol/Interim_report).

[67] House Inquiry Report [3.45].

[68] See eg CAALAS NT Submission 25.

[69] House Inquiry Report [3.46].

Such changes to liquor licensing laws have been recognised as being effective both in Australian Aboriginal and Torres Strait Islander communities and in international studies. NATSILS previously supported these restrictions in its NATSILS Submission to the 2014 House Inquiry.

Liquor accords between communities, retailers and stakeholders

The ALRC has sought submissions on the development and implementation of written 'liquor accords' between communities, governments and local alcohol retailers (eg, the Norseman liquor accord). In the Northern Territory, retailers and communities have developed 'Alcohol Management Plans'.

NATSILS strongly supports the highly effective approach taken in Fitzroy Crossing, where takeaway liquor sales are limited to low strength (2.75% maximum alcohol content) beverages. However, an essential ingredient of the approach taken in Fitzroy Crossing is that it is community driven.

In addition, NATSILS supports the Nhulunbuy Alcohol Management Plan where a permit is needed to buy, possess and drink takeaway alcohol within the East Arnhem region.[70]

8.3. Question 8–2: Banned drinkers registers

In what ways do banned drinkers registers or alcohol mandatory treatment programs affect alcohol-related offending within Aboriginal and Torres Strait Islander communities? What negative impacts, if any, flow from such programs?

Banned drinker registers

The Northern Territory Government has reintroduced a 'banned drinkers' register (**BDR**) which, from 1 September 2017, will require all persons to show photo identification which must be scanned and checked against a government-maintained register before that person can purchase takeaway alcohol. This will re-enliven a scheme operated in the Northern Territory between 2011 and 2012 which collected information on the identity of certain 'banned drinkers' and was designed to prevent registered individuals from purchasing alcohol. The register identified persons subject to a 'Banned Drinker Order' which could be issued by a police officer in certain circumstances prescribed by legislation.

Impact of the BDR

The proposed BDR will disproportionately impact upon Aboriginal and Torres Strait Islander peoples. NATSILS raises serious concern in relation to the criminalisation of alcohol consumption. The harmful consumption of alcohol must be addressed through rehabilitative programs that have a focus on positive health outcomes. It is entirely inappropriate for the harmful consumption of alcohol to be responded to through the implementation of punitive regimes that seek to criminalise rather than rehabilitate.

However, that if the proposed BDR were to be introduced, NATSILS considers that it should be implemented in the following way:

(a) a formal, independent evaluation of the program should be conducted;

(b) an independent arbiter should be introduced to determine the appropriateness of registering individuals on the BDR;

[70] Aboriginal Medical Services Alliance Northern Territory, 'Options for Alcohol Control in the Northern Territory' (2008) 2.

(c) the BDR should not be uniformly implemented across the Northern Territory but should be developed in consultation with local communities; and

(d) the offence of supplying alcohol to a person on the BDR should be amended so that it does not capture persons in local communities who are not selling liquor commercially.

Alcohol mandatory treatment programs:

Under section 128A of the *Police Administration Act* (NT), adults taken into police protective custody at least three times in two months for being intoxicated in public can be referred to the Alcohol Mandatory Treatment Tribunal. Under the *Alcohol Mandatory Treatment Act* (NT), a person can be legally held against their will for up to 9 days pending the decision of the Alcohol Mandatory Treatment Tribunal, whether or not the person meets the criteria for a mandatory treatment order. The Alcohol Mandatory Treatment Tribunal has the power to order that a person engage in community-based alcohol treatment for a period of up to three months, or may make an order detaining a person in a residential rehabilitation facility for up to three months. Income management orders must be made with any alcohol treatment order. A person who absconds from mandatory rehabilitation may be charged with a criminal offence, punishable by a fine or 3 months imprisonment.

NATSILS have previously raised serious concerns about the Northern Territory mandatory treatment model. The regime was introduced without outcomes measures. CAALAS has previously noted that the "*the lack of transparency surrounding Tribunal process and procedure, and the lack of legal safeguards in place, was and remains of particular concern given the vulnerability of those most at risk of being caught in the scheme and the significant powers conferred on the Tribunal to deprive individuals of their liberty*."

The scheme disproportionately targets Aboriginal people. This is not surprising, given the scheme is designed to pick up people who are drunk in public, and Aboriginal people experience much higher rates of homelessness than the rest of the Northern Territory population.[71] For obvious reasons the homeless are clearly more likely to drink in a public place.

Further, there is little evidence of success of the treatment program.

For these reasons and more, the scheme seems designed to deal more with a social "problem" — public drunkenness — than with chronic alcohol misuse of which it claims to be addressing.

Case Study

In the case of *RP v Alcohol Mandatory Treatment Tribunal of the Northern Territory* [2013] NTMC 3214, CAALAS successfully challenged the validity of an Alcohol Mandatory Treatment Tribunal order detaining 'Elodie', an RP in a residential facility for mandatory alcohol treatment. Elodie was from a remote community thousands of kilometres from Alice Springs and didn't speak English as a first language. She was not provided with an interpreter to prepare for the Tribunal hearing or to participate in the Tribunal hearing, nor was she provided with a legal representative or an advocate. On appeal, the Court found that: "*Without an advocate Elodie was effectively not being heard on factors crucial to the Tribunal's determination and as such I find that failure to appoint an advocate was a denial of natural justice.*"

In addition this regime has resulted in the criminalisation of public drunkenness and addiction rather than treating it as a public health issue, or recognising the underlying social and economic determinants of alcohol misuse and harm. CAALAS has recently noted:

[71] Australian Institute of Health and Welfare, 'National Social Housing Survey: detailed results 2016 (10 August 2017) (accessed on 14 September 2017 at: https://www.aihw.gov.au/reports/housing-assistance/national-social-housing-survey-detailed-2016).

"*[We] are concerned that this scheme targets Aboriginal people; no non Aboriginal people have been subject to an AMT order in Central Australia, to our knowledge. We are also concerned that the government has introduced this very expensive scheme without any evidence to support it. However, one of our biggest concerns with the scheme is that it criminalises public drunkenness, contrary to the recommendations of the Royal Commission into Aboriginal Deaths in Custody*."

Accordingly NATSILS does not support alcohol mandatory treatment programs. Stronger legal safeguards must be implemented.

8.4. Other reforms to alcohol regulation

NATSILS supports the following reforms to the regulation of alcohol and criminal justice laws and procedures:

- stronger restrictions on alcohol advertising. For example, the House Inquiry Report (at [3.58]) recommended that the Commonwealth Government should take steps to ensure a nationally consistent and coordinated approach to alcohol advertising, including measures which ban alcohol advertising during times and in forms of the media which may influence children and which ban alcohol sponsorship of sporting teams and events;
- ensure greater accountability of liquor license holders to adhere to liquor license rules and regulations- for example to prevent any person who is intoxicated being served alcohol;
- public drunkenness should be decriminalised in all Australian jurisdictions, as recommended by the Royal Commission into Aboriginal Deaths in Custody;
- where possible, Commonwealth, State and Territory Governments should fund increased investment in the provision of appropriate services to support the decriminalisation of public drunkenness, including sobering up centres and training of police and health care staff; and
- culturally competent diversionary treatment programs for alcohol related offending should be expanded and provided in regional and remote areas, in recognition of the fact that addressing an individual's alcohol misuse and dependence issues is a more effective means of rehabilitation than punitive measures or mandatory treatment.

The Alcohol Protection Orders Act 2013 (NT) should be amended to abolish Alcohol Protection Orders (APO), and equivalent schemes should not be considered in other states and territories.

NATSILS does not support the Norther Territory Government's use of Alcohol Protection Orders (**APO**), which can prohibit a person from possessing or consuming alcohol or entering licenced premises for 3, 6 or 12 months (with a breach possibly resulting in a jail term of up to 3 months). NATSILS has previously argued strongly against the introduction of APOs as being wrong in principle, and discriminatory and ineffective in practice. APOs will not prevent people from drinking but simply put more people in jail and confer excessive power on police, without adequate oversight mechanisms; and can prevent persons from even entering a licensed supermarket.

9. Females in contact with the criminal justice system

9.1. In relation to females in contact with the criminal justice system, NATSILS recommends the following:

- Amend criminal procedure laws and policies to require police, lawyers, courts and correction officers to prioritise diversionary options for Aboriginal and Torres Strait Islander women at all stages of the criminal process.
- Ensure reforms to laws and legal frameworks address and recognise the complex issues which are specific to Aboriginal and Torres Strait Islander women.
- Establish community based prevention and early intervention support programs that facilitate healing, family support, education and training programs.
- Amend all Bail laws that disproportionately affect Aboriginal and Torres Strait Islander women
- Establish dedicated family violence courts which employ a therapeutic approach to addressing cases of offending, accompanied by culturally competent programs and services.
- Develop Aboriginal and Torres Strait Islander -specific community controlled family dispute mediation services to incorporate Aboriginal and Torres Strait Islander notions of child-rearing, kinship and family.
- Increase investment in specialised and culturally safe prison programs (including Throughcare programs) to support Aboriginal and Torres Strait Islander women when they return to the community and facilitate rehabilitation.
- Establish a mandatory custody notification service nationwide.

9.2. Question 9–1

What reforms to laws and legal frameworks are required to strengthen diversionary options and improve criminal justice processes for Aboriginal and Torres Strait Islander female defendants and offenders?

It is critical that laws and legal frameworks are established to facilitate a criminal justice system that prioritises rehabilitation, diversion, and support for Aboriginal and Torres Strait Islander women.

State and Territory Governments should amend criminal procedure laws and policies to require police, lawyers, courts and correction officers to prioritise diversionary options for Aboriginal and Torres Strait Islander women at *all* stages of the criminal process.

Any reforms to laws and legal frameworks should recognise, and should be designed to address, the complex issues which are specific to Aboriginal and Torres Strait Islander women, and the intersection between the disadvantages experienced by such women. It is essential that reform to existing diversionary and criminal justice processes must be based upon an understanding of the following:

- Homelessness and poverty increase the chances of individuals entering the criminal justice system.[72] It is necessary for legal frameworks to support those who experience homelessness rather than further marginalise and criminalise experiences of homelessness. Additional support services are required to ensure the availability of accommodation options and stable housing to meet certain community based orders. Disconnection from country and culture, and the inter-generational effects of historic treatment of Aboriginal and Torres Strait Islander people, plays a role in the over-representation of Aboriginal and Torres Strait Islander people in prison.

- That in order for drug and alcohol abuse responses to be effective they must be guided by a health-focus and community driven and designed support programs.[73]

- A substantial number of Aboriginal and Torres Strait Islander women are entering the criminal justice system with an undetected disability. Aboriginal and Torres Strait Islander women with cognitive impairment have some of the highest rates of the criminal justice system of any social group, and are significantly overrepresented compared to men.[74] Experiences of disability and poor mental health must be a central focus of the development of culturally safe diversionary options.[75]

- Family violence and domestic violence is linked to offending and incarceration. The combination of family violence, removal of children and overrepresentation of Aboriginal and Torres Strait Islander women in prison necessitates immediate action to provide culturally competent and accessible family violence support services for both victims and perpetrators of family violence (See for example Kunga Stopping Violence Program, CAALAS).

9.3. Sentencing, diversion and bail

Diversionary options must be preferenced over incarceration

The criminal justice system punishes and entrenches disadvantage, rather than promoting healing, support and rehabilitation. Incarceration is particularly harmful for Aboriginal and Torres Strait Islander women because it disconnects women from their family and community support networks, increases risks of women losing employment or housing, and increases the risk that children are taken into child protection. Governments should move away from a "tough on crime" attitude which relies on incarceration as a default punishment for many offences.

Accessibility to culturally appropriate community based prevention and early intervention measures are critical to reducing Aboriginal and Torres Strait Islander women's contact with the justice system. Diversionary options, including treatment, healing, family support, education and training programs, reduce the likelihood of reoffending, and are the most cost-effective option for dealing with minor offences.

[72] NATSILS, 'Submission to the Inquiry on Domestic Violence and Gender Inequality' (April 2016) [4.5].

[73] Ibid.

[74] Discussion Paper [9.25].

[75] NATSILS, 'Submission to the Inquiry on Domestic Violence and Gender Inequality' (April 2016) [4.5]..

Sentencing and bail laws should be amended

NATSILS supports amendments to bail laws that disproportionately affect Aboriginal and Torres Strait Islander women. This includes:

- bail law amendments which allow for the imposition of appropriate conditions on bail, as discussed in Section 2 above. This may include conditions which provide for attendance at family violence programs; and

- amendments to sentencing laws, including community based orders, to address the underlying causes of offending behaviour, with a specific focus on family violence.

As described in Section 2 above, homelessness, financial circumstances and experiences of family violence, must be considered when determining bail conditions for Aboriginal and Torres Strait Islander women. Bail conditions must also be imposed with regard to an offender's ties to community and place, as well as family obligations.

It is entirely unacceptable that breaches of bail conditions are resulting in increases to the number of Aboriginal and Torres Strait Islander women in prison.[76]

Sentencing judges should be required to consider whether community-based diversion options are more appropriate than a fine, taking into consideration the persons socio-economic circumstances, and the hardship that a fine will impose on them.[77] Community based orders must be preferenced over prison sentences.

In addition, NATSILS supports Aboriginal and Torres Strait Islander sentencing courts, which modify the state's formal legal process and are more dialogue-based and involve community elders. The language, processes and formality of a courtroom can be intimidating, and alienation of Aboriginal and Torres Strait Islander women through court processes is compounded by oppression and discrimination associated with forces of colonisation. Specialised sentencing courts empower communities to take greater ownership of an element of the criminal justice process, provide a more culturally relevant sentencing process and encourage consideration of the wider circumstances of the lives of offenders and victims.[78]

Further, as discussed in greater detail in Section 3 above, NATSILS considers that State and Territory Governments should work with Aboriginal and Torres Strait Islander communities and community controlled organisations to determine whether (and if so, how) to adopt Gladue-type reports when sentencing, as the pre-sentencing reports relied upon in Australia do not adequately require consideration of issues related to individuals who identify as Aboriginal or Torres Strait Islander.[79]

Increasing the availability of prison programs for females subject to custodial sentences

There exists a limited availability of in-prison programs for Aboriginal and Torres Strait Islander women. Even fewer programs are specifically targeted towards them. As is described in greater detail in response to Section 5–2 above, NATSILS supports the development and implementation of specialised and culturally safe prison programs (including Throughcare programs) to support

[76] Human Rights Law Centre and Change the Record, 'Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment' (May 2017).

[77] Ibid.

[78] Ibid.

[79] Ibid.

Aboriginal and Torres Strait Islander women when they return to the community and reduce reoffending.

9.4. Other reforms to criminal justice processes

Establish a mandatory custody notification service

As outlined in greater detail in Section 11 below, NATSILS supports the introduction of a mandatory custody notification service. A mandatory custody notification service is essential to ensuring Aboriginal and Torres Strait Islander peoples receive legal and welfare support at the earliest possible contact with the criminal justice system. To ensure the effectiveness of a custody notification service, ATSILS must be adequately resourced to respond to notifications and provide necessary welfare checks

Establish dedicated family violence courts [80]

NATSILS supports the development of dedicated family violence courts which employ a therapeutic approach accompanied by culturally competent programs and services. to address experiences of family violence in Aboriginal and Torres Strait Islander communities.

NATSILS notes that justice reinvestment is an effective way to address family violence, and reduce the disproportionate levels of Aboriginal and Torres Strait Islander peoples in prisons. Such an approach involves government policy and investment focusing on the underlying causes of criminal behaviour through investment in key areas such as education, housing and healthcare.[81]

Access to legal representation for victims and alleged perpetrators of family violence should be improved

It is essential that Commonwealth, State and Territory Governments an increase in access to legal representation for victims and alleged perpetrators of family violence. This is critical because of the complex and interrelated legal issues associated with family violence, and the need for two streams of legal assistance to ensure multiple parties can be afforded access to justice.[82]

Further, it is critical that all responses to family violence incidents be guided by culturally appropriate supportive practices that seek to address the circumstance of the family violence incident. It is entirely inappropriate for an incident of family violence to be used as an opportunity to act upon an outstanding warrant against the victim, as this practice discourages victims to call the police or report violence.[83]

Culturally competent, community controlled ADR services should be available as an alternative to litigation

Alternative dispute resolution (ADR) services which are culturally competent and community controlled provide a useful alternative to litigation. This should include the establishment of Aboriginal and Torres Strait Islander specific community controlled family dispute mediation services to better incorporate Aboriginal and Torres Strait Islander notions of child-rearing, kinship and family. This is especially important in the context of family violence. However, the use of ADR in matters where there is a history of family violence should be approached with caution.

[80] For further information in relation to family violence, refer to Appendix A.

[81] NATSILS, Submission to the Inquiry on Domestic Violence and Gender Inequality' (April 2016) [6.13].

[82] Ibid [6.16]-[6.18].

[83] Human Rights Law Centre and Change the Record, 'Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment' (May 2017).

NATSILS also supports restorative justice approaches which enable victims to be part of the ADR processes. This approach takes into account the unique needs and culture of different Aboriginal and Torres Strait Islander communities, and may involve mediation to address the harm that has been caused, or family counselling, as long as it is done in a safe context.[84]

Essential to breaking the cycle of violence in Aboriginal and Torres Strait Islander communities is community driven, trauma informed approaches that prioritise cultural healing and restore strength, dignity and self-determination for Aboriginal and Torres Strait Islander families.

9.5. Reforms to substantive criminal laws

Laws and policies which indirectly discriminate against Aboriginal and Torres Strait Islander women should be reviewed

Laws and policies which unreasonably and disproportionately criminalise Aboriginal and Torres Strait Islander women should be reviewed, with specific amendments including:

- decriminalising minor offences that are more appropriately dealt with in non-punitive ways (for example public drinking and offensive language);
- implementing alternative non-punitive responses to low-level offending and public drunkenness;
- abolishing laws that lead to imprisonment for failure to pay fines (including licence suspension) as described in greater detail below;
- abolishing paperless arrest laws; and
- amending the consequences of breaches of bail conditions to not constitute an offence.

Consequences for fine defaults and minor offences should be reviewed with an aim of avoiding incarceration

Punitive fine default regimes have a disproportionate impact on Aboriginal and Torres Strait Islander women.[85]

Fine defaults have escalating consequences, and the detrimental effects of fines for minor offences are magnified for those experiencing poverty. For example, the inability to pay a fine may eventually result in the disqualification of a drivers' licence. Many Aboriginal and Torres Strait Islander women have family responsibilities which require them to drive, for example caring for children, so the impact of losing a driver's licence may lead to further offences (for example driving without a licence) that result in incarceration.

Consequences for minor offences (for example, speeding or offensive language) often consist of short prison sentences. Short sentences are especially problematic, as prison can mirror past trauma and abuse, and reinforce themes of powerlessness, lack of control, and vulnerability.[86] Culturally competent support and mental health treatments that may be afforded to prisoners serving longer sentences is often not accessible during short sentences. Short prison sentences also have other, life-altering effects. They present difficulties to families where the female is the

[84] NATSILS, 'Submission to the Inquiry on Domestic Violence and Gender Inequality' (April 2016) [6.15].

[85] Discussion Paper [9.16], recommended by UN Special Rapporteur: see United Nations Special Rapporteur on the Rights of Indigenous Peoples, 'End of Mission Statement by the United Nations Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz, on Her Visit to Australia' (2017).

[86] Ibid [9.6]-[9.7].

primary caretaker, can lead to a loss of housing and employment, and often cause disconnections from family and community.

NATSILS supports the development of WDO schemes (modelled on the NSW scheme), available as a response to fine defaults and as an independent sentencing option to avoid incarceration. Further detail regarding NATSILS' support for the expansion of WDOs to other jurisdictions is set out above in response to Question 6–6 and Proposal 6–2. In particular, NATSILS strongly recommends that family violence survivors should be eligible for WDOs. In addition, legal frameworks should be amended to ensure that judges and magistrates are required to consider whether a WDO is more appropriate than a fine, taking into account the offender's socio-economic status. Breach of a WDO should not result in further penalty.

Case Studies

NAAJA

In the case of Ms B, NAAJA was able to assist with making an application for victims of crime compensation out of time. Ms B had been in a violent relationship. She originally told NAAJA that she wanted to claim for physical injuries that her former partner had inflicted upon her. These were documented in medical records. However, over time NAAJA was able to encourage her to claim for the sexual assaults she had also been subjected to in that relationship. NAAJA assisted her to provide evidence in the form of a statutory declaration from a relative who had knowledge of the sexual assaults. As a result, Ms B was assessed as being entitled to the maximum awards under the Victims of Crime scheme due to the extent of her psychological injuries.

ALRM

In October 2015, ALRM successfully opposed an application made by the Minister seeking an immediate removal of a new born. ALRM represented the mother in the proceedings. The mother had just given birth and was due to be discharged from the hospital. The Minister's grounds for removal related to the father's propensity to violence including an outstanding criminal charge of an assault to a 17 month old baby relating to the father's ex partner's child. ALRM made submissions to the court that the 'risk' factor related to the father and not the mother. It was further submitted it would be appropriate for the court to make an order to restrain the father not to have contact with the mother and the new born, rather than granting a custody order in favour of the Minister which would mean separating the mother from her child. His Honour agreed and did not grant custody to the Minister and made an order for an injunction against the father instead. Following the hearing ALRM arranged for the father through his criminal solicitor to vary his bail conditions regarding his place of residence otherwise he would be in breach of the restraint order. ALRM also referred the mother to an external service provider to assist and monitor the mother's progress and to ensure the baby's emotional and physical needs were met

ALSWA

'Jane', a 16 year old Aboriginal girl with no criminal record was kept in custody for an unreasonable period in order to address her mental health needs. Jane was charged with two disorderly conduct offences that allegedly occurred on a Saturday in August 2009 in Geraldton. The allegations related to behaviour she exhibited at the hospital when taken by her family for a mental health assessment. According to the Statement of Material Facts, when police arrived they offered to restrain her while she was assessed but the hospital refused to assess her. Jane was taken into custody at about 6.00pm and appeared in court on the following Monday. Jane was very agitated and exhibited worrying behaviour in Court. She was granted bail but her family who were present indicated they would not take responsibility for her until her mental health was assessed. Jane was remanded in custody for the purpose of being observed and assessed and she was held in the police lockup in Geraldton. Upon arriving at the police lockup, ALSWA was informed Jane was naked in her cell. ALSWA queried why she was not being assessed and treated at the hospital

and was informed by police that there was nothing else to demonstrate she had a mental health problem. A female officer persuaded Jane to put on clothes and ALSWA spoke to her. Jane was behaving erratically. She had shredded a polystyrene cup and scattered it like confetti over the mattress. She alternated between appearing willing to speak to ALSWA and being aggressive. She made a number of seemingly random statements and claimed that her name was something else. Her biggest preoccupation throughout the day was that someone had "killed" her babies. Jane was taken to Perth on Tuesday morning. She was admitted to the Bentley Adolescent Mental Health Ward prior to her Court appearance on Friday and there was a report confirming her unfitness to plead. The prosecution, on invitation by the Magistrate, withdrew the charges effectively explaining that they were only "holder charges" intended to get Jane some treatment.

ALS NSW/ACT

'Frances' is a 53 year old Aboriginal woman who was charged with assault occasioning bodily harm. Frances had no prior convictions and was engaged in full time study. Frances lived with her roommate (the victim) in housing provided by the educational institution. Following a verbal altercation, which Frances recorded about half of, she attempted to leave the building and was stopped by the victim. A physical altercation ensued, which resulted in deep scratches, bruising, and ripped hair to the victim. Frances wanted to defend the matter, but was advised that it may result in her being found guilty. Frances was worried about the impact a guilty verdict would have on her professional career, and decided to enter a guilty plea of common assault if the assault occasioning bodily harm charge was dropped. The prosecution agreed and she was given a no conviction 6 month good behaviour bond.

10. Aboriginal Justice Agreements

10.1. In relation to Aboriginal Justice Agreements, NATSILS recommend the following:

- Renew and where not currently operating develop Aboriginal Justice Agreements in partnership with Aboriginal and Torres Strait Islander peoples.
- Establish justice targets, including a target to end the overrepresentation of Aboriginal and Torres Strait Islander peoples in prison.
- Establish measurable sub-targets, as part of the justice target, that focus on providing adequate resourcing to Aboriginal and Torres Strait Islander community controlled organisations.
- Establish a National Agreement to implement justice sub-targets and provide for a reporting mechanism.

10.2. Proposal 10-1

Where not currently operating, State and Territory Governments should work with peak Aboriginal and Torres Strait Islander organisations to renew or develop Aboriginal Justice Agreements.

NATSILS agrees with Proposal 10–1.

10.3. Question 10-1

Should the Commonwealth Government develop justice targets as part of the review of the Closing the Gap policy? If so, what should these targets encompass?

NATSILS recommends the Commonwealth Government and State and Territory Governments adopt justice targets and measurable sub-targets.[87]

Disproportionate rates of imprisonment and violence experienced by Aboriginal and Torres Strait Islander peoples is a national crisis. National justice targets should be established to end the disproportionate rates of over-imprisonment and violence experienced by Aboriginal and Torres Strait Islander peoples. National justice targets, which are aimed at promoting community safety and reducing the rates at which Aboriginal and Torres Strait Islander peoples come into contact with the criminal justice system, should include targets to reduce incarceration and violence rates, as well as child removal and disability. In addition, these targets should be accompanied by a National Agreement that includes a reporting mechanism, as well as measurable sub-targets. It is pertinent that forming part of the development of justice targets should be development of sub targets that focus on resourcing of Aboriginal and Torres Strait Islander community controlled organisations, who deliver front line services that would assist in meeting an identified and agreed upon justice target.

These targets should be developed with genuine collaboration between Aboriginal and Torres Strait Islander community controlled organisations and Government, and adopted as part of the refresh of the 'Close the Gap' framework and must be committed to by all Federal, State and Territory Governments.

[87] See: Change the Record, 'Policy Framework – Blueprint for Change' (2015) (accessed on 14 September 2017 at: https://changetherecord.org.au/policy-framework-lueprint-for-change).

The 'Safer Communities' Building Block of the Council of Australian Governments (**COAG**) 'Close the Gap' Strategy is the only area of the Closing the Gap that is not accompanied by specific targets. NATSILS believes this is a clear gap, and illustrates the failure to acknowledge the root causes of disproportionate incarceration of Aboriginal and Torres Strait Islander people. Accordingly, national justice targets which are aimed at promoting community safety and reducing the rates at which Aboriginal and Torres Strait Islander peoples come into contact with the criminal justice system should be introduced.

NATSILS recommends that the Commonwealth, State and Territory Governments undertake the following steps to develop and implement justice targets as part of the Closing the Gap review:

(a) COAG should develop (in collaboration with Aboriginal and Torres Strait Islander peak organisations) national justice targets, to:

(b) close the gap in the rates of imprisonment between Aboriginal and Torres Strait Islander people and non-Indigenous people; and

(c) cut disproportionate rates of violence against Aboriginal and Torres Strait Islander peoples to at least close the gap by 2040, with priority strategies for women and children.

(d) Targets must be developed in consultation with Aboriginal and Torres Strait Islander controlled organisations. Peak organisations such as NATSILS can assist in this respect.

(e) In addition, State and Territory Governments should recognise the value of Aboriginal Justice Agreements. As noted above, NATSILS supports Proposal 10–1. The renewal or development of Aboriginal Justice Agreements will significantly assist State and Territory Governments to establish and implement justice targets aimed at promoting community safety and reducing the rates at which Aboriginal and Torres Strait Islander peoples come into contact with the criminal justice system.

(f) Measurable sub-targets must be set, with a commitment to halve the gap in the above overarching goals by no later than 2030. Sub-targets should focus on providing adequate resourcing to Aboriginal and Torres Strait Islander community controlled organisations which deliver front-line services. This will in turn support the achievement of the overarching justice targets.

(g) The Commonwealth, State and Territory Governments should establish and enter into National Agreement to implement these sub-targets and provide for a reporting mechanism.

11. Access to Justice Issues

11.1. In relation to Access to Justice Issues, NATSILS recommends the following:

- Increase the availability of interpreter services and work with peak Aboriginal and Torres Strait Islander organisations to identify the gaps in interpreter services within the criminal justice system.
- Mandate in legislation the power of specialist sentencing courts for Aboriginal and Torres Strait Islander peoples.
- Prioritise investment in community based sentencing in regional and remote areas.
- Increase investment in prevention, early intervention, diversionary and rehabilitation programs/services for Aboriginal and Torres Strait Islander persons who are released on parole.
- Develop culturally appropriate wrap-around service delivery models in the justice systems to support Aboriginal and Torres Strait Islander people.
- Co-locate disability support workers within community controlled legal services and disability organisations.
- Provide for limiting terms through special hearing processes in place of indefinite detention when a person is found unfit to stand trial.
- Amend all State and Territory legislation to ensure that the relevant judicial officer possesses sufficient judicial discretion to impose an appropriate order having regard to all of the circumstances of the case for a person found unfit to stand trial.
- Commit to adequate long-term funding of ATSILS and NATSILS.
- Enact mandatory custody notification services nationwide.
- Implement the recommendations of NATSILS submission to the Senate Inquiry into the Indefinite Detention of People with a Cognitive and Psychiatric Impairment.[88]

11.2. Proposal 11–1

Where needed, State and Territory Governments should work with Aboriginal and Torres Strait Islander organisations to establish interpreter services within the criminal justice system.

NATSILS agrees with ALRC Proposal 11–1. The response to Question 11–2 below sets out the most significant gaps in interpreter services.

[88] NATSILS, 'Submission to the Senate Inquiry into the indefinite detention of people with cognitive and psychiatric impairment in Australia' (April 2016) (Accessed on 13 September 2017 at http://www.natsils.org.au/portals/natsils/NATSILS%20Submission%20Indefinite%20Detention%20080416.pdf?ver=2016-04-15-192658-320).

11.3. Question 11–1

What reforms to laws and legal frameworks are required to strengthen diversionary options and specialist sentencing courts for Aboriginal and Torres Strait Islander peoples?

The following areas of reform are essential to strengthening diversionary options and specialist sentencing courts for Aboriginal and Torres Strait Islander people.

The obligation on Australia to create special measures for the purpose of addressing the particular disadvantages of racial ethnic minorities is found in the Convention on the Elimination of Racial Discrimination (**CERD**) (see articles 1.4 and 2.2).[89] These legal matters were discussed in general terms by the High Court of Australia in *Gerhardy v Brown* (1984) 159 CLR 70.

Increase the availability of community-based sentencing in regional and remote areas

A lack of alternative community based sentencing options in regional and remote areas has resulted in damaging consequences for Aboriginal and Torres Strait Islander people. Due to a lack of alternative community based sentencing options in regional and remote areas Aboriginal and Torres Strait Islander people are currently being sentenced to a term of imprisonment which they would not have received had they lived in a metropolitan area where access to alternate community based sentencing options would be available. Inaccessibility of alternative sentencing options results in imprisonment often being the only choice a court can make regardless of whether the circumstances warrant such choices. The availability, cost and effectiveness of alternative sentencing options is discussed in more detail above in response to Proposal 4–1.

Further, NATSILS recommends that the power of specialist sentencing courts for Aboriginal and Torres Strait Islander people be mandated in legislation to ensure a long term commitment to providing specialist sentencing courts. In this respect, NATSILS recommends the statutory adoption of sentencing courts based on the Victorian Koori Courts model.

In addition to specialist sentencing courts, it is critical that all governments ensure that many of the positive aspects of specialist courts for Aboriginal and Torres Strait Islander people can be included in all courts to ensure that our justice system is one that is culturally responsive and is underpinned by principles of restorative justice.

The availability of court diversion programs must be increased

NATSILS recommends increasing the accessibility of prevention, early intervention, diversionary and rehabilitation programs/services for Aboriginal and Torres Strait Islander people who are released on parole.

Such programs are often not available in regional and remote areas, and where such programs do exist they are usually full.[90] In addition, in NATSILS' experience:

> *"[E]ligibility criteria for such programs/services often pose a barrier to entry for Aboriginal and Torres Strait Islander peoples. As a result, Aboriginal and Torres Strait Islander peoples are underrepresented in diversion statistics. For example, in 2009–10, out of a total 17,589 referrals from court diversion, 13.7 per cent were for Aboriginal and Torres Strait Islander peoples which is far lower than the proportion of Aboriginal and Torres Strait Islander peoples incarcerated. Language and literacy concerns are also frequently cited as barriers to engagement with Aboriginal and Torres Strait Islander people, and the lack*

[89] United Nations, 'International Convention on the Elimination of All Forms of Racial Discrimination' (entered into force on 4 January 1969) (**CERD**).
[90] Further submissions in relation to diversion options are contained in Section 2.3 of this paper in response to Proposal 2-2.

of culturally and linguistically adapted rehabilitation programs is a significant gap in service provision."[91]

Addressing these concerns will strengthen diversionary options and specialist sentencing courts for Aboriginal and Torres Strait Islander people.

11.4. Proposal 11–2

Where not already in place, State and Territory Governments should provide for limiting terms through special hearing processes in place of indefinite detention when a person is found unfit to stand trial.

NATSILS supports Proposal 11–2.

Special hearings

Legislative reform which requires courts to conduct a special hearing in respect of persons who are found unfit to stand trial, in order to test the evidence against that person is necessary.

As in Victoria, these special hearings should be used to determine whether the person is not guilty of the offence, is not guilty because of mental impairment, or committed the offence charged. This should entail a procedure for determining whether, on the evidence available, the accused committed the objective elements of the offence. If it cannot be proven that the accused committed those objective elements, the accused should be discharged.

In Victoria, under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), findings of "not guilty" and "not guilty because of mental impairment" are to be taken for all purposes as if they were findings made at a criminal trial. Findings that the accused "committed the offence charged" must be proven to the criminal standard of beyond reasonable doubt. This finding is subject to appeal in the same manner as if the accused had been convicted of the offence in a criminal trial.

In other jurisdictions, similar special hearings are conducted and the onus and standard of proof are the same as in a trial of criminal proceedings; however, the finding is not subject to appeal (see, e.g., the *Criminal Justice (Mental Impairment Act) 1999* (Tas)). NATSILS supports both the application of the criminal onus and standard of proof, and a right to appeal in respect of the findings of a special hearing.

NATSILS has serious concerns in relation to the regime in Western Australia, which permits an order to be made against a person who is unfit to stand trial even though evidence against the accused may be substantively lacking. Under the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA), the court must not impose a custody order unless satisfied that it is appropriate to do so, having regard to the strength of the evidence against the person; the nature of the alleged offence and the alleged circumstances of its commission; the person's character, antecedents, age, health and mental condition; and the public interest. However, the assessment of the strength of evidence against the person is only undertaken by reference to the written brief of evidence. No witnesses are called to give evidence, nor can they be cross-examined.

[91] NATSILS, 'Senate Legal and Constitutional Affairs Committee Inquiry into Justice Reinvestment in Australia' (March 2013) 19 (accessed on 30 August 2017 at http://www.natsils.org.au/portals/natsils/NATSILS%20Submission%20to%20Senate%20Justice%20Reinvestment%20Inquiry%20March%202013.pdf).

Finite orders for custody orders

NATSILS understands that numerous states and territories conduct special hearings of this kind, but that in some jurisdictions, such special hearings do not result in limiting terms and a finding of unfitness to stand trial can still result in indefinite detention. For example:

- The *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) requires that, where a court has identified a person as unfit to stand trial, that court must either impose an indefinite custody order or unconditionally release the accused. In contrast, where a person is acquitted on account of unsoundness of mind, the court has discretion to place that person on a community-based order, a conditional release order, or an intensive supervision order.

- In the Northern Territory, custodial supervision orders have no expiry date. The only way for an order to cease is if the Court accepts expert evidence that the person subject to the order is no longer a serious risk of harm to the community or themselves. The result is that once people are put on custodial supervision orders, there is a real risk of being held indefinitely.[92]

Both the CAALAS and NAAJA have reported that they have clients who have been detained on supervision orders for years beyond the likely length of sentence they would have received if they were fit or not mentally impaired at the time of offending.

The need for greater judicial discretion

Legislation which requires the court to either impose an indefinite custody order on a person found unfit for trial, or to unconditionally release that person, is plainly unsatisfactory. NATSILS does not support the imposition of what can effectively be mandatory indefinite custody orders for mentally impaired persons who are found unfit to stand trial.

Legislation should be amended in all State and Territory jurisdictions to ensure that the relevant judicial officer possesses sufficient judicial discretion to impose an appropriate order having regard to all of the circumstances of the case.

NATSILS supports the approaches adopted in Victoria and South Australia where the courts are not bound by legislation to make mandatory orders of imprisonment for mentally impaired accused under criminal legislation.

Co-locate disability support workers within Aboriginal and Torres Strait Islander Legal Services and community controlled disability organisations

As previously noted, the interaction of people with cognitive and mental health disability and the justice system has been identified by the Australian Government as an issue of national concern. The lack of available supports and services for Aboriginal and Torres Strait Islander peoples with disability, including FASD, is placing an increasing over-reliance on the criminal justice system.

The Commonwealth, State and Territory Governments must work with Aboriginal and Torres Strait Islander communities, their organisations and representative bodies to develop responses to the unique nature of disability that ensures that people with a disability, especially children and those at risk of being found unfit to stand trial, have access to culturally responsive disability and legal support services before, during and after they come into contact with the justice system.

[92] See Mindy Sotiri, Patrick McGee and Eileen Baldry, 'No End in Sight: The Imprisonment, and indefinite detention of Indigenous Australians with a Cognitive Impairment' (September 2012) 66 (accessed on 30 August 2017 at https://www.pwd.org.au/documents/pubs/adjc/NoEndinSight.pdf).

The Disability Support workers will support Aboriginal and Torres Strait Islander individuals with cognitive and mental health disability. The program will provide case work assistance to individuals, including providing:

- Communication assistance;
- Psychosocial counselling, mentoring and emotional support;
- Picture boards;
- Plain language;
- Family assistance; and
- Referral to health and community-based services (e.g. hearing impairment services, drug and alcohol, intellectual disability services, mental health services, and so on).

Working with the lawyers and other staff at community controlled legal services and through the courts, the Disability Support workers will:

- Assist lawyers to recognise the support needs of persons with disabilities;
- Model good communication to lawyers;
- Pursue, collate and explain relevant documents, such as disability assessments, service case files and so on; and
- Work with counsel to propose support packages for the accused person to prosecution, police and judges in order to reduce the risk of reoffending and avoid custodial sentences.

Moreover, working with broader services, the Disability Support workers will also help with the following objectives:

- Ensuring accountability of other services; for example, by bringing case managers, guardians, General Practitioners and other relevant services to the table to propose support packages to present to courts.
- Advocating to make sure existing services are responsive to the individual's needs and personal circumstances in providing support to or information regarding the person.
- Developing organisational links to existing disability services (e.g., the NDIA, education health providers, transport and housing support), including, where relevant, seeking to ensure cultural appropriateness or help develop cultural appropriateness of those services.

This proposal brings together and builds upon two initiatives that have developed separately from within the legal sector and the disability sector to build a nationally consistent model of support for people with cognitive and psychosocial disability who come in contact with the justice system. The two programs that have been initiated to date for which continuity funding is sought are:

- The Unfit to Plead Project – This research project was conducted by the Melbourne Social Equity Institute, University of Melbourne, in collaboration with NAAJA and VALS. As part of the project, three Disability Support Workers were employed by NAAJA, VALS and the Intellectual Disability Rights Service. The project was designed to assess the effectiveness of Disability Support Workers being co-located with community legal services. The funding

for these support positions has now expired. The preliminary analysis of the data suggests the Disability Support Worker function provides a positive benefit to justice outcomes, both in terms of cost-benefit to the system and a more just outcome for the person with a disability. VALS and NAAJA have tried to maintain employment of the support workers since the practical component of the Unfitness to Plead Project ended in November 2016. However, neither organization has the resources to continue supporting the critical program. This proposal seeks continuity-funding to allow the functions to continue whilst a full evaluation is competed.

- Youth Koori Court NSW – First Peoples Disability Network (**FPDN**) has been providing support to young Aboriginal people with disability who appear before the New South Wales Youth Koori Court. This support provides counselling, psychosocial and mentoring to young Aboriginal people with disability, many of who have multiple disabilities, have experienced significant trauma and most likely subject to violence and abuse prior to their coming in contact with the justice system. This support is provided by other young Aboriginal people with disability employed by FPDN, and is encouraged by the Childrens Magistrates, legal representatives and support workers attached to the NSW Department of Juvenile Justice. FPDN has initiated this program by drawing upon its reserves and receives no direct funding for the support program. This proposal seeks to provide a sustainable funding base for this program to continue.

11.5. Question 11–2

In what ways can availability and access to Aboriginal and Torres Strait Islander legal services be increased?

NATSILS recommends key ways in which Commonwealth, State and Territory Governments can increase the availability of and access to ATSILS:

- legislative reform to introduce mandatory custody notification services in all States and Territories, and appropriate funding to support such services. See NATSILS' response to Proposal 11–3, below;
- provide adequate long term funding and other resourcing to ATSILS to have an even greater impact within their communities;
- provide adequate funding and other support for Aboriginal and Torres Strait Islander language interpreters on a national basis;
- ensure that continuity of the Indigenous Legal Assistance Program to fund ATSILS and NATSILS;
- broaden the eligibility criteria and means test to allow ATSILS to assist an even greater number of Aboriginal and Torres Strait Islander people and organisations;
- increase and resource information technology methods within ATSILS and the Courts to assist a greater number of Aboriginal and Torres Strait Islander people and prevent unnecessary contact with the justice system;
- Throughcare programs to be rolled out across all ATSILS; and
- Implement culturally responsive wrap around service delivery models.

Increased funding and other resourcing for Aboriginal and Torres Strait Islander Legal Services

The eight ATSILS were set up in line with the principle of self-determination, with an understanding of the unique impact a lack of access to culturally responsive legal assistance services has upon Aboriginal and Torres Strait Islander people and communities.

ATSILS are the preferred and in many instances the only legal aid option for Aboriginal and Torres Strait Islander peoples.[93] ATSILS provide a unique legal service that recognises and responds to cultural factors that may influence and/or effect Aboriginal and Torres Strait Islander people. As noted in NATSILS' submission to the Senate Inquiry into Access to Legal Assistance in 2015:

> "*It is important to note that Aboriginal and Torres Strait Islander people don't just need access to more legal services; they need greater access to culturally appropriate legal services. … Cultural competency is essential for effective engagement, communication, delivery of services and the attainment of successful outcomes.*"[94]

This need for greater access to culturally appropriate legal services has been recognised by the Productivity Commission, which emphasised that funding should be increased, "*with priority to be given to Indigenous legal services as primary providers of legal assistance to Indigenous people*."[95]

The demand for ATSILS services continues to grow, with particularly high demand for:

- criminal services, including casework and advice matters;
- civil services, especially in the areas of tenancy and police complaints;
- child protection and family law services; and
- representation to defendants of Domestic Violence Orders, which the ATSILS are not currently funded to provide except for in very limited circumstances.

The growing demand for ATSILS services in each of these areas has been identified previously in several of NATSILS' previous submissions. With respect to criminal services, as noted in NATSILS' submission to the Senate Inquiry into Access to Legal Assistance:

> "*NATSILS are significantly under resourced to meet the criminal legal needs of many Aboriginal and Torres Strait Islander people. In this regard, it should be noted that ATSILS are funded at a lower level than other mainstream legal aid providers, despite the fact that many of ATSILS clients are particularly challenging in terms of having complex high level needs such as low literacy and cognitive impairments. This discrepancy in funding discriminates against Aboriginal and Torres Strait Islander peoples and denies equal access to justice.*
>
> *The ATSILS are also underfunded in terms of providing relevant support services and programmes that could assist their clients in achieving better outcomes in the criminal justice system. Such services include prisoner Through Care programmes which support prisoners, pre, during and following their imprisonment. Such services are critical given that 77% of Aboriginal and Torres Strait Islander offenders in prison have served a*

[93] NATSILS, 'Submission to the Senate Legal and Constitutional Affairs Committee: Inquiry into Access to Legal Assistance Services' (April 2015) 2 [2.2], citing Australian National Audit Office, 'Administration of the Indigenous Legal Assistance Programme' (17 February 2015) 16.

[94] Ibid 6–7 [3.5.1], [3.5.3].

[95] Ibid 7 [3.5.5], quoting Productivity Commission, 'Access to Justice Arrangements, Inquiry Report Overview' (September 2014) 24.

previous sentence. Yet currently, the ATSILS are not funded or are underfunded to deliver such services."[96]

Secondly, with respect to civil and family law services, a number of reports have highlighted the levels of unmet needs for civil and family law in Aboriginal and Torres Strait Islander communities.[97] It has been noted that an increasing proportion of services delivered by ATSILS relate to civil and family matters.[98] In particular, of the civil law issues experienced, a high number relate to housing and tenancy issues, and the rate at which Aboriginal and Torres Strait Islander people seek legal assistance for such issues is low. As stated in NATSILS' submission to the Productivity Commission's Inquiry into Access to Justice Arrangements:

"*In a NSW focus group of Aboriginal and Torres Strait Islander peoples 41.2 per cent said they had disputes with landlords. Out of those that identified such a dispute, some 25.4 per cent of participants indicated that they sought legal advice. Overall, 69.8 per cent of participants that had housing and tenancy problems indicated they did not seek legal advice.*

In an NT focus group of Aboriginal and Torres Strait Islander peoples 54.1 per cent said they had a dispute in relation to housing in the last two years. Only 34.2 per cent of people who said that they had experienced problems with their landlord sought legal advice in relation to those disputes."[99]

Research has found that unresolved civil and family law issues may escalate into criminal matters over time (as discussed above).[100] Despite these concerns, the Productivity Commission has noted that:

"[services are] vastly under-resourced in terms of capacity to address legal need in Aboriginal communities. Additional funding is urgently required for civil/family law work, with priority to be given to Indigenous legal services as primary providers of legal assistance to Indigenous people."[101]

Similar sentiments to this effect were also noted by the Commonwealth Attorney-General's Department.[102]

In light of this, NATSILS recommends that Commonwealth, State and Territory Governments implement these recommendations and adequately fund the ATSILS to meet the civil and family

[96] Ibid 5 [3.3.1]–[3.3.2].

[97] F Allison, M Schwartz and C Cunneen, 'The Civil and Family Law Needs of Indigenous People in WA (A report of the Australian Indigenous Legal Needs Project)' (2014); C Cunneen, F Allison and M Schwartz, 'Access to Justice for Aboriginal People in the Northern Territory' (2014) 49(2) *Australian Journal of Social Issues* 219.

[98] See NATSILS, 'Submission to the Senate Legal and Constitutional Affairs Committee: Inquiry into Access to Legal Assistance Services' (April 2015) 4, which noted that "[c]urrently 13% of the ATSILS legal assistances are civil needs and 9% are family law matters".

[99] NATSILS, 'Submission to the Productivity Commission: Inquiry into Access to Justice Arrangements' (November, 2013) 5 (accessed on 30 August 2017 at http://www.natsils.org.au/portals/natsils/submission/NATSILS%20Submission%20-%20Productivity%20Commission%20Inquiry%20into%20Access%20to%20Justice%20Arrangements%208-11-13.pdf), citing C Cunneen and M Schwartz, 'The Family and Civil Law Needs of Aboriginal People in NSW' (2008) 69; Fiona Allison et al, 'Indigenous Legal Needs Project: NT Report' (2012) 133.

[100] C Cunneen and M Schwartz, 'Civil and Family Law Needs of Indigenous people in New South Wales: the Priority Areas' (2009) 32(3) *University of New South Wales Law Journal*, 725; M Schwartz and C Cunneen, 'From Crisis to Crime: The Escalation of Civil and Family Law Issues to Criminal Matters in Aboriginal Communities in NSW' (2009) 7(15) *Indigenous Law Bulletin*, 18.

[101] NATSILS, 'Submission to the Senate Legal and Constitutional Affairs Committee: Inquiry into Access to Legal Assistance Services' (April 2015) 4 [3.2.5], quoting Productivity Commission, 'Access to Justice Arrangements, Inquiry Report Overview' (September 2014) 24.

[102] Ibid 5 [3.2.5], quoting Access to Justice Taskforce Commonwealth Attorney-General's Department, 'A Strategic Framework for Access to Justice in the Federal Civil Justice System' (2009) 143–4.

needs of Aboriginal and Torres Strait Islander people. In particular, that governments implement the finding of the Productivity Commission that an additional $200 million to the legal assistance sector is required to begin meeting this unmet need.[103]

Thirdly, child protection and representing defendants of Domestic Violence Orders are specific issues which could be greatly assisted through increased funding. In relation to child protection, there is a common perception amongst Aboriginal and Torres Strait Islander people that there is a lack of legal advice or representation for parents in cases where their children are being removed by child protection agencies.[104] In relation to family violence, NATSILS submits that in addition to the increased focus of the ATSILS' work in the area of family law more generally, it is important that there is a separate Aboriginal and Torres Strait Islander-specific service for *victims* of family violence because of the nature of the provision of legal representation by the ATSILS. There are situations where ATSILS may be required to choose between representing alleged victims of family violence or the accused person. This is especially problematic, where in practice it is common for the alleged perpetrator of family violence to make contact with an ATSILS before the alleged victim.[105]

Overall, despite the critical need and rising demand for ATSILS services, the amount of real funding provided to the ATSILS has been declining since 2013, while the cost of providing services has risen.

In the 2017-18 Federal Budget the Government restored funding cuts to ATSILS of $16.7 million over the forward estimates. However, after 2020, ATSILS will be subject to funding cuts as a result of the Government's 2013 ongoing savings measure. These cuts will have a major impact on highly vulnerable Aboriginal and Torres Strait Islander people and impact upon the ability of ATSILS to deliver services that ensure Aboriginal and Torres Strait Islander people are equal before the law and have access to a fair trial.

Increased funding and support for Aboriginal language interpreters nationwide

Commonwealth, State and Territory Governments must further invest in interpreter services to ensure the provision of highly trained interpreters in all Aboriginal and Torres Strait Islander languages.

The provision of interpreters is crucial to ensure access to justice for Aboriginal and Torres Strait Islander people, particularly those who do not speak English as a first, second or third language and are unfamiliar with police investigations and court procedures.

Poor communication at a person's first point of contact with the criminal justice system can have enormous implications. When language and communication difficulties go undetected, particular actions can be mistaken for indications of guilt during police interviews or in the court room. Alternatively, poor communication may result in a defendant having no comprehension of the proceedings taking place before them. This is particularly common where interpreters are used in complicated court proceedings where interpreters may lack the necessary skills or level of experience required to adequately interpret for our clients.

NATSILS considers that the availability of and access to Aboriginal and Torres Strait Islander legal services can be most effectively increased by targeting the following gaps in interpreter service provision:

[103] Ibid 5 [3.2.7], citing Productivity Commission, 'Access to Justice Arrangements, Inquiry Report Overview' (September 2014) 24.

[104] C Cunneen and M Schwartz, 'The Family and Civil Law Needs of Aboriginal People in NSW' (2008) 61, 63.

[105] NATSILS, 'Submission to the Senate Legal and Constitutional Affairs Committee: Inquiry into Access to Legal Assistance Services' *(*April 2015) 12–13 [5.3]–[5.4].

(a) there is a massive unmet need for more, and more highly trained, interpreters in numerous Aboriginal and Torres Strait Islander languages. Only a handful of Aboriginal and Torres Strait Islander interpreter services exist and those that do exist are insufficiently resourced to operate beyond limited geographical areas or provide interpreters in all necessary situations. This is an unacceptable situation given that in comparison the Commonwealth Government provides twenty four hour seven days a week interpreter services for hundreds of foreign languages and dialects through the Translating and Interpreting Service;

(b) in addition to interpreters in traditional Aboriginal and Torres Strait Islander languages, there is also a need for interpreters of Aboriginal English. While more traditional Aboriginal and Torres Strait Islander languages may be easily identified, many people are not aware that 'Aboriginal and Torres Strait Islander English' exists and often mistake it for proficiency in standard Australian English;

(c) language difficulties often exist in conjunction with even greater cultural differences which can further muddy the waters of effective and accurate communication;

(d) there is also a need for greater awareness of the need for interpreters for hearing impaired Aboriginal and Torres Strait Islander peoples Hearing loss can result in the same communication barriers as those produced by language difficulties and cross-cultural differences. Given the high rate at which Aboriginal and Torres Strait Islander people suffer from hearing loss, this is an issue that must be addressed;

(e) there is a critical need for the increased development of professional level accreditation testing for Aboriginal and Torres Strait Islander languages to ensure that interpreters are qualified to work in the legal arena; and

(f) greater awareness needs to be created amongst service providers in the justice system of how to identify when an Aboriginal and Torres Strait Islander person needs an interpreter as well as how to engage and work with an interpreter."[106]

Case Study

NAAJA

*NAAJA Civil worked closely with NAAJA Crime to assist a woman from a remote community prosecuted with fraud charges related to a Centrelink overpayment. The overpayment was caused by failing to declare income whilst receiving Parenting Payment. NAAJA Civil developed submissions to be put to the Commonwealth Director of Public Prosecutions (**CDPP**) that the prosecution was not in the public interest. Amongst other reasons the client was the victim of repeated domestic violence and was homeless during the overpayment period. NAAJA Civil's expertise in social security law assisted in identifying that the CDPP brief contained evidence that Centrelink was aware or should have been aware of these vulnerability factors at the time of the overpayment, but did not take steps to prevent the overpayment. The CDPP discontinued the prosecution on the grounds that it was not in the public interest.*

[106] NATSILS, 'Submission to the Senate Legal and Constitutional Affairs Committee, Inquiry into Access to Legal Assistance Services' (April 2015) [3.6]. See also: NATSILS, 'Submission to the Productivity Commission: Inquiry into Access to Justice Arrangements — Draft Report (May 2014) (accessed on 30 August 2017 at http://www.natsils.org.au/portals/natsils/submission/NATSILS%20Submission%20-%20Draft%20Report%20Productivity%20Commission%20Inquiry%20into%20Access%20to%20Justice%20Arrangements.pdf) ; and NATSILS, 'Productivity Commission: Inquiry into Access to Justice Arrangements' (November, 2013) [4.3], [4.5]–[4.7], [5.1.2] (accessed on 30 August 2017 at http://www.natsils.org.au/portals/natsils/submission/NATSILS%20Submission%20-%20Productivity%20Commission%20Inquiry%20into%20Access%20to%20Justice%20Arrangements%208-11-13.pdf).

NAAJA Civil has further referred the debt investigation from the same matter to the Commonwealth Ombudsman. When the client was initially interviewed by Department of Human Services Serious Non-Compliance team, it was clearly apparent that the client did not fully understand her rights, including the caution against self-incrimination. However, no interpreter or professional support person was provided and the interview continued. Due to this lack of interpretative assistance, the client was not able to confer or check her understanding of the charges and went on to make self-incriminating comments that ultimately formed part of the prosecution evidence. The outcome of the Commonwealth Ombudsman complaint was that we have been advised that DHS investigators will be trained further in appropriately managing such interviews.

11.6. 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.

A mandatory custody notification, in line with Recommendation 224 of the Royal Commission into Aboriginal Deaths in Custody[107], must be established nationwide to ensure greater access to justice for Aboriginal and Torres Strait Islander people at the earliest contact with the criminal justice system.

Purpose of a custody notification service

A custody notification service ensures that an Aboriginal or Torres Strait Islander person receives legal advice delivered in a culturally sensitive manner at the earliest possible opportunity, in order to prevent persons being detained from acquiescing to police demands in a manner which could jeopardise subsequent court proceedings. Further, notification requirements provide an opportunity for an Aboriginal or Torres Strait Islander person being detained to receive a culturally sensitive welfare check and assurance, and that where medical attention may be required, it is provided with immediacy.

The effectiveness of custody notification services in ensuring the provision of adequate, culturally sensitive legal advice is highlighted by the experiences of ATSILS in states that have implemented custody notification services, as compared to those states that have not implemented custody notification services.

NATSILS have conducted an analysis of the custody notification services operated by each of the eight ATSILS, including the statutory basis (if any), the procedures used, funding available and the effectiveness of each service (**CNS Report**).[108]

For example, in Western Australia, there is no mandatory custody notification service. ALSWA is notified by fax that an Aboriginal person is detained in custody if the Aboriginal person wishes for a Court Officer to be notified of their details. The Court Officer can be contacted after hours on an after hours number which is given to all Western Australian police commands:[109]

> "*The current arrangement of notifying ALSWA offices by fax of persons in police custody is of limited utility, especially when the notification takes place either after hours or on weekends. Legislative reform is necessary, along with appropriate funding to employ*

[107] Commonwealth, 'Royal Commission into Aboriginal Deaths in Custody, National Report' (1991).

[108] ATSILS, 'Custody Notification Service: An Analysis of the Operation of This Service by Each Aboriginal and Torres Strait Islander Legal Service (ATSILS)' (2017) (accessed on 30 August 2017 at: http://www.natsils.org.au/portals/natsils/CNS%20Table-%20for%20website-%20policy%20and%20advocacy.pdf?ver=2017-05-23-091719-470).

[109] Ibid 5.

> *additional staff, to make it mandatory for police to telephone ALSWA to advise of Aboriginal persons in custody*."[110]

In contrast, Tasmania has implemented a mandatory custody notification service. The Tasmanian police provide a 24 hour 7 day a week notification service to TACLS when an Aboriginal person is brought into custody. During business hours this notification is made directly to TACLS. After hours notifications go through to VALS. Notification occurs whenever an Aboriginal person is brought into custody, and regardless of whether or not they are to be remanded, charged and bailed, released pending summons or released unconditionally.[111] Reception to this notification service has been generally positive:

> "*TACLS holds regular meetings with the Tasmanian Police Aboriginal Liaison officer to compare CNS records. These figures regularly conflict. However, the Tasmanian Police attitude toward CNS is very positive and police appear to encourage remandees and interviewees to speak with TACLS. Recently some of our own clients have been taken into custody and we have not received a notification*."[112]

Establishing an effective custody notification service

In the experience of the ATSILS, an effective custody notification service requires:

(a) adequate resourcing made possible by appropriate funding;

(b) a constructive relationship with the relevant Police Service to promote co-operation and compliance; and

(c) underpinning by statutory provisions (legislation and/or regulation) to ensure compliance.

There is a clear need for notification requirements and procedures to be enshrined in legislation so as to create a system of notifications that is either mandatory in all instances, or at the very least consistent in application to prevent ad hoc compliance.[113] Existing applications of custody notification services with various police services have been mixed, and are marked by a lack of consistency across departments. Legislature reform could assist in this respect.[114] Further, a number of these services have no dedicated funding, or else only have one-off "special project funding", and are limited in their financial and human resources to properly implement a custody notification service.[115]

[110] Ibid 14.

[111] Ibid 5.

[112] Ibid 14.

[113] Ibid 13–15.

[114] Ibid 7–9.

[115] Ibid 10–12.

12. Police accountability

12.1. In relation to Police Accountability, NATSILS recommends the following:

- Establish independent oversight bodies, whose function is to investigate police complaints and deaths in police custody, which are hierarchically, institutionally and practically independent of the police. The independent body must have features to ensure that investigations are effective, comprehensive, prompt, and transparent, subject to public scrutiny and, in the case of deaths in custody, involve the family of the deceased.

- Ensure that independent oversight bodies can deal with low level police misconduct, as well as allegations of serious or systemic police misconduct and allegations of corruption.

- Provide independent oversight bodies with power to make recommendations about disciplinary action.

- Remove ability for independent oversight bodies to refer complaints about police personnel back to the police, including Chief Commissioners of Police and structures with police oversight.

- Remove freedom of information exemptions relating to complaints to and investigations by independent oversight bodies.

- Ensure that police publicly report annually on their engagement strategies, programs and outcomes with Aboriginal and Torres Strait Islander communities that are designed to prevent offending behaviour.

- Ensure that police are required to undertake programs and training which incorporates information on the history of Aboriginal and Torres Strait Islander-police relations and the role of police as enforcers of previous policies of expropriation, protection and assimilation, and that these programs be documented and undergo an outcomes evaluation

- Succession planning be put in place to ensure the continuity of the above program and training recommendation.

- Ensure police protocols, guidelines and training prioritise the protection of, and provision of support to, Aboriginal and Torres Strait Islander individuals subjected to violence, and emphasise gender-specific and culturally-appropriate police responses.

- Implement the remaining recommendations of the Royal Commission into Aboriginal Deaths in Custody aimed at reducing the over-incarceration of Aboriginal and Torres Strait Islander peoples by police, including legislation that places a statutory duty upon police to consider and use alternatives to arrest, charging and police custody.

- Ensure that State and Territory Governments introduce laws for fully-funded compulsory custody notification services, which require police to notify the relevant Aboriginal and Torres Strait Islander legal service every time an Aboriginal or Torres Strait Islander person is taken into custody.

- Ensure that State and Territory Governments mandate human rights and anti-racism training for police officers at all levels.

- Ensure that State and Territory Governments implement data-collection schemes to monitor and publicly report on incidences of racial profiling by police.

- Establish Reconciliation Action Plans in all police forces.

12.2. Question 12–1

How can police work better with Aboriginal and Torres Strait Islander communities to reduce family violence?

Family violence in Aboriginal and Torres Strait Islander communities extends to physical, sexual, emotional, spiritual, community and intergenerational abuse.[116] Police can play a crucial part in helping to reduce family violence. The historical relationship between Aboriginal and Torres Strait Islander communities and police, however, can leave victims reluctant to report and mistrusting of police responses.[117]

Addressing family violence requires a considered and culturally appropriate response from law enforcement agencies. It is crucial for police to work with Aboriginal and Torres Strait Islander communities to reduce family violence in the following ways:

(a) adopting a less confrontational approach to applying for intervention orders on behalf of victims to improve rapport and appease hostility;

(b) improving their understanding and awareness of the complexities of family violence in Aboriginal and Torres Strait Islander communities, preferably undertaken by Aboriginal and Torres Strait Islander organisations with expertise in assisting Aboriginal and Torres Strait Islander victims of family violence;

(c) improving their responsiveness to reports of family violence to improve community faith in law enforcement agencies;

(d) strengthening relationships with Aboriginal and Torres Strait Islander support services to provide crucial support to victims;

(e) increasing the number of Aboriginal and Torres Strait Islander community liaison officers at police stations to strengthen relationships between the police and the community; and

(f) implementing data collection training to ensure appropriate collection of data on the ethnicity of victims and provision of appropriate pathways.[118]

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[116] Victorian Aboriginal Legal Service, 'Royal Commission into Family Violence: Submission paper from the Victorian Aboriginal Legal Service' (undated) 2 (accessed on 30 August 2017 at: http://www.rcfv.com.au/getattachment/A132563E-EB5C-4964-BC5A-19D5B3B2EFE4/Victorian-Aboriginal-Legal-Service).

[117] Ibid 3. See also: Aboriginal Family Violence Prevention & Legal Service Victoria, 'Submission to the Victorian Royal Commission into Family Violence' (June 2015) 46 (accessed on 30 August 2017 at https://engage.vic.gov.au/application/files/4614/8609/4215/Submission_54_-_Attachment_-_submission_to_Royal_Commission.pdf); Law Reform Commission of Western Australia, 'Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture' (September 2006) 192 (accessed on 30 August 2017 at http://www.lrc.justice.wa.gov.au/_files/p94_fr.pdf); Human Rights Law Centre, 'Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment' (May 2017) 32 (accessed on 30 August 2017 at https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/59378aa91e5b6cbaaa281d22/1496812234196/OverRepresented_online.pdf).

[118] Aboriginal Family Violence Prevention & Legal Service Victoria, 'Submission to the Victorian Royal Commission into Family Violence' (June 2015) 6 and 53 (accessed on 30 August 2017 at https://engage.vic.gov.au/application/files/4614/8609/4215/Submission_54_-_Attachment_-_submission_to_Royal_Commission.pdf).

These recommendations have been made previously by the VALS in its Submission to the Royal Commission into Family Violence (**VALS Submission**).[119]

12.3. Question 12–2

How can police officers entering into a particular Aboriginal or Torres Strait Islander community gain a full understanding of, and be better equipped to respond to, the needs of that community?

It imperative that law enforcement agencies possess a comprehensive and sophisticated understanding of the needs of the relevant community.

Developing an understanding of the complex needs of specific Aboriginal and Torres Strait Islander communities is best achieved by actively listening to Aboriginal and Torres Strait Islander community groups, and ensure that responses to community need are driven and designed by community members. Police officers entering into particular Aboriginal or Torres Strait Islander communities must develop a better understanding of community groups in the ways outlined in paragraphs (b), (d), (e) and (f) in our submission on Question 12.1.

Case Studies

ALS NSW/ACT

'Vanessa' was a victim of domestic abuse and had trust issues with the police due to the way in which she felt they handled her case. Two police officers came to her house to ask her questions about an incident between her and her partner, and she wanted them to leave because she felt antagonised. When the officers refused to leave, Vanessa became agitated and used explicit language which has a particular meaning in that community. Despite officers having a familiarity of that community, they proceeded to place her under arrest for the use of that language. Vanessa refused and ran back to her house. The officers pulled her along the ground and handcuff her in front of her kids. They then dragged her along the ground and in to the police vehicle. Vanessa had drag marks all along her clothes and was in pain. Vanessa was charged with resisting arrest and intimidation. On first instance, the police officers were heavily cross-examined on their conduct. Despite this, the Local Court Magistrate issued our client with lengthy s9 supervised good behaviour bonds.

The ALS were successful in an all grounds appeal and the District Court annulled the convictions. The Judge found that the police officers were not assisting the court in relation to their conduct, but were submitting evidence that went towards convicting Vanessa. The Judge held that the actions of the police officers constitutes an unlawful arrest and reflected on the effect the arrest would have on our client's children. The Judge also reflected on the role of the court in ensuring there is accountability in terms of how powers of the executive are used against its citizens.

ALS NSW/ACT

'Braydon' was walking along the street at 8.45pm at night with his jumper over his backpack. Police officers approached him as they believed he was hiding something. The officers failed to mention their place of duty, did not caution him, and failed to provide a reason why they searched him. The

[119] Ibid 46–53; Law Reform Commission of Western Australia, 'Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture' (September 2006) 211-213 (accessed on 30 August 2017 at http://www.lrc.justice.wa.gov.au/_files/p94_fr.pdf); Change the Record and the Human Rights Law Centre, 'Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment' (May 2017) 32-34 (accessed on 30 August 2017 at https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/59378aa91e5b6cbaaa281d22/1496812234196/OverRepresented_online.pdf).

police searched Braydon's backpack, and later arrested and charged him with possessing a housebreaking implement and unlawfully obtaining goods.

The ALS was successful in arguing that the police had no reasonable suspicion to search Braydon. The Magistrate found that an unlawful search occurred, and all evidence that resulted from the search was inadmissible. This resulted Braydon being found not guilty and dismissed of all charges.

This result had a carry-on effect, as initially Braydon was refused bail on this matter as well as a number of other matters. Our client was granted bail for his other matters following this decision. Braydon was happy that the ALS was able to keep a check on police powers.

12.4. Question 12–3

Is there value in police publicly reporting annually on their engagement strategies, programs and outcomes with Aboriginal and Torres Strait Islander communities that are designed to prevent offending behaviours?

It is critical that police publicly report on their Aboriginal and Torres Strait Islander engagement strategies, programs and outcomes that are designed to prevent offending behaviours.

Public reporting is valuable because it aids in the collection of data and the analysis of police programs and initiatives. Moreover, public reporting enhances the accountability of police to deliver positive steps to prevent offending behaviour. For reasons discussed above, trust is a key aspect of strengthening the relationship between police and Aboriginal and Torres Strait Islander peoples. Publicly reporting on strategies and programs being undertaken by police demonstrates a commitment towards effecting change in this space.

12.5. Question 12–4

Should police that are undertaking programs aimed at reducing offending behaviours in Aboriginal and Torres Strait Islander communities be required to: document programs; undertake systems and outcomes evaluations; and put succession planning in place to ensure continuity of the programs?

There is very little information available on the efficacy of police programs. In order to collect data and ensure that the programs implemented are as effective as possible, it is essential that police document and evaluate these programs.

As such it is a requirement that police undertaking programs aimed at reducing offending behaviours in Aboriginal and Torres Strait Islander communities should be required to document such programs, undertake evaluations and put succession plans in place to ensure continuity.

Reporting is essential for transparency and accountability. There are a number of benefits:

(a) keeping communities and local organisations informed of police initiatives;

(b) ensuring that communities and organisations understand what measures are being taken by police the address local problems; and

(c) facilitating better collaboration between police and community organisations (such as the numerous ATSILS) on such programs.

12.6. Question 12–5

Should police be encouraged to enter into Reconciliation Action Plans with Reconciliation Australia, where they have not already done so?

Reconciliation Action Plans must be implemented in all police forces.

Reconciliation Action Plans (**RAPs**) strengthen relationships, promote awareness of provide Aboriginal and Torres Strait Islanders with greater opportunities.[120] RAPs, among many other great benefits, improve the perception of Aboriginal and Torres Strait Islander peoples, increase pride in Aboriginal and Torres Strait Islander cultures and increase the number of social interactions organisations have with Aboriginal and Torres Strait Islander peoples.[121]

A RAP will only improve police relationships with Aboriginal and Torres Strait Islander peoples.

12.7. Question 12–6

Should police be required to resource and support Aboriginal and Torres Strait Islander employment strategies, where not already in place?

Positive employment strategies should be implemented by respective State, Territory and Federal Governments to ensure Aboriginal and Torres Strait Islander people have ample opportunity to join the police force, to development and training programs during their employment with the police force, to promotion opportunities, and to have their cultural needs respected by their colleagues within the police force.

12.8. Other reforms to police accountability

The over-policing of Aboriginal and Torres Strait Islander communities, and use of excessive force against Aboriginal and Torres Strait Islander peoples, must be addressed, as these are contributing factors to the disproportionate number of Aboriginal and Torres Strait Islander people in custody. [122]

The large police presence in, and frequent police surveillance and patrols of, Aboriginal and Torres Strait Islander communities lead to feelings of harassment, discrimination and victimisation amongst these communities. The over-policing of these communities, and the resulting animosity between the communities and police officers, increase the negative contact that Aboriginal and Torres Strait Islander people have with police. These negative interactions lead to arrests and convictions, thereby increasing the rate of incarceration of Aboriginal and Torres Strait Islander peoples. [123] As Chief Justice of Western Australia Wayne Martin QC stated, Aboriginal people are significantly disadvantaged at every stage of our criminal justice system. [124] Over-policing and discrimination mean they are more likely to be questioned, arrested, and convicted, rendering Aboriginal and Torres Strait Islander people vulnerability when facing contact with police or the criminal justice system.

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[120] Reconciliation Australia, '2016 RAP Impact Measurement Report' (2016) (accessed on 30 August 2017 at https://www.reconciliation.org.au/wp-content/uploads/2017/04/2016_RAP_Impact_Measurement_Report.pdf).

[121] Ibid.

[122] House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, 'Doing Time–Time for Doing: Indigenous Youth in the Criminal Justice System' (2011), 200.

[123] The Senate, 'Finance and Public Administration References Committee: Aboriginal and Torres Strait Islander experience of law enforcement and justice services' (October 2016) 80-81.

[124] Ibid 70.

An additional issue associated with over-policing of Aboriginal and Torres Strait Islander communities is the excessive use of police force against Aboriginal and Torres Strait Islander peoples. This often occurs at the time of arrest or whilst individuals are in custody, and the effects of this use of force can be dreadful. In one instance, police tasered an Aboriginal man who reportedly required urgent medical assistance, and the mad died soon after. [125] In another case, a police officer filmed the use of excessive force against an Aboriginal woman, reportedly after arriving at the scene in response to a domestic violence incident. [126] The use of excessive force, and lack of regard for a duty of care towards those in custody, is unacceptable and must be addressed.

Complaints against police officers must be investigated and addressed. Current practices of allowing other police officers from the same agency to investigate claims is insufficient, [127] as it leads to obvious biases and inadequate outcomes for Aboriginal and Torres Strait Islander people bringing complaints. Currently there is no system for independent and impartial investigations in Australia, meaning that mistreatment of Aboriginal and Torres Strait Islander people in the criminal justice system is not properly addressed. NATSILS supports independent and impartial investigations into deaths in police custody, or allegations of torture or mistreatment. These investigations should be carried out by independent bodies, as prescribed by international law standards.[128]

Case study

Mulrunji Doomadgee was an Aboriginal man who died in a Palm Island police cell in 2004. Mulrunji had been arrested for public nuisance, and died 45 minutes after being arrested, as a result of injuries sustained. [129] The police failed to properly investigate Mulrunji's death,[130] did not communicate with the local community, and did not treat the officer who arrested Mulrunji as suspect. Following Mulrunji's death, police officers increased their presence in a show of force against the Palm Island Aboriginal community. In 2016, the Federal Court found that the police's conduct constituted racial discrimination,[131] and the racist way in which police confronted the investigation, and dealings with the local community, was an affront to the rule of law. [132]

[125] The West Australian, 'Man dies after being tasered by officers in East Perth' (12 May 2017) (accessed on 31 July 2017 at https://thewest.com.au/news/wa/man-dies-after-being-tasered-by-officers-in-east-perth-ng-b88474557z).

[126] Andrea Booth, 'Queensland police video: Rights organisations demand public independent investigation as police begin internal one', *Special Broadcasting Service* (22 January 2016) (accessed on 18 July 2017 at http://www.sbs.com.au/nitv/article/2016/01/21/queensland-police-video-rights-organisations-demand-public-independent).

[127] Office of Police Integrity, 'Review of investigations of deaths associated with police contact' (June 2011) 26 (accessed on 18 July 2017 at http://www.ibac.vic.gov.au/docs/default-source/reviews/opi/review-of-the-investigative-process-following-a-death-associated-with-police-contact---tabled-june-2011.pdf?sfvrsn=8.pdf?sfvrsn=4>).

[128] Craig Longman, 'Police investigators too in-house to probe deaths in custody', *The Conversation* (online) 15 April 2011 (accessed on 13 September 2017 at https://theconversation.com/police-investigators-too-in-house-to-probe-deaths-in-custody-838).

[129] Office of State Coroner, *Inquest into the death of Mulrunji,* (14 May 2010) (accessed on 14 September 2017 at: http://www.courts.qld.gov.au/__data/assets/pdf_file/0008/86858/cif-doomadgee-mulrunji-20100514.pdf).

[130] *Wotton v State of Queensland (No 5)* [2016] FCA 1457 [1199].

[131] Ibid.

[132] Ibid [1806].

13. Justice Reinvestment

13.1. In relation to Justice Reinvestment, NATSILS recommends the following:

- Establish a central coordinating agency for justice reinvestment.
- Develop and introduce laws and legal frameworks that facilitate justice reinvestment programs.
- Increase funding to support the development and expansion of justice reinvestment programs.

13.2. Question 13–1

What laws or legal frameworks, if any, are required to facilitate justice reinvestment initiatives for Aboriginal and Torres Strait Islander peoples?

NATSILS recommends that the Commonwealth Government legislate to create (and provide adequate funding for) an independent central coordinating agency for justice reinvestment. NATSILS also recommends that robust evaluation of initial justice reinvestment trials should be conducted, in order to assess outcomes and provide evidence as to their effectiveness.

NATSILS supports a program of justice reinvestment, and supports the objective of developing and resourcing a range of community-based programs, services and initiatives that address the underlying causes of crime and result in the diversion of young adult offenders away from imprisonment sentences. NATSILS supports the introduction of laws and legal frameworks that facilitate justice reinvestment programs by:

(a) creating an independent central coordinating agency for justice reinvestment;

(b) ensuring that this agency is led by Aboriginal and Torres Strait Islander communities and shows cultural expertise throughout the design and implementation of justice reinvestment programs;

(c) supporting evaluation of previous justice reinvestment initiatives; and

(d) supporting Commonwealth, State and Territory Governments to progress their previous commitments to introduce justice targets.

The creation of an independent central coordinating agency for justice reinvestment

In its submission to the Senate Legal and Constitutional Affairs Inquiry into Justice Reinvestment in Australia,[133] NATSILS recommended that the Commonwealth Government work with the Standing Council on Law and Justice (as it then was) to secure agreement with State and Territory Governments to commit to jointly establishing an independent central coordinating agency for justice reinvestment.

NATSILS continues to support the creation of a central coordinating agency for justice reinvestment and considers that this is critical to ensuring that justice reinvestment initiatives are

[133] NATSILS, 'Submission to the Senate Legal and Constitutional Affairs Committee: Inquiry into Justice Reinvestment in Australia' (March 2013) (accessed on 30 August 2017 at http://www.natsils.org.au/portals/natsils/NATSILS%20Submission%20to%20Senate%20Justice%20Reinvestment%20Inquiry%20March%202013.pdf).

effective in genuinely addressing the underlying causes of criminal conduct in Aboriginal and Torres Strait Islander communities (and the Australian community more generally) in the long term.

The key focus of that agency should be to build the evidence base that informs justice reinvestment initiatives, to assist in identifying locations for justice reinvestment initiatives and to inform modelling as to fiscal benefits that can be realised by any State and Territory Governments that have not yet signed on to justice reinvestment initiatives. Establishing a reliable evidence base will be critical to ensuring the long-term success of justice reinvestment initiatives and ensuring uptake by all State and Territory Governments. NATSILS recommends that, in doing so:

(a) any existing evidence should be collated and made publicly available. NATSILS emphasises that accurate and rigorous data collection should be a key component of justice reinvestment strategies; and

(b) where possible, data should be disaggregated by regions and communities to allow for the development of targeted responses to needs in specific areas. Governments should implement comprehensive data collection policies in consultation with local service providers.

Any central coordinating agency and any subsequent justice reinvestment initiatives in Aboriginal and Torres Strait Islander communities must have, and insist on, cultural expertise throughout the process of designing and implementing justice reinvestment initiatives. This involvement is key to ensuring programs are culturally safe, and is also consistent with the principles of community control, prior and informed consent, and self-determination. Local and peak Aboriginal and Torres Strait Islander organisations could assist here.

Appendix A

1.1 Children and Young People

Aboriginal and Torres Strait Islander children are highly disadvantaged within the criminal justice system and disproportionately over-represented in custody. In 2016 the Australian Bureau of Statistics reported that Aboriginal and Torres Strait Islander young people were imprisoned at 25 times the rate of non-Indigenous youth.[134]

The preliminary findings of the Special Rapporteur on the Rights of Indigenous Peoples visit to Australia in April 2017 observed that the offences Aboriginal and Torres Strait Islander children were imprisoned for were "*relatively minor…and in the majority of instances the initial offence[s] [for imprisonment] were non-violent*".[135] The Special Rapporteur concluded that Aboriginal and Torres Strait Islander children in the criminal justice system "*are essentially being punished for being poor and in most cases, prison will only aggravate the cycle of violence, poverty and crime*".[136]

Stop Aboriginal and Torres Strait Islander children being removed from families and communities

While Aboriginal and Torres Strait Islander children make up less than 6% of the nation's young people aged 10-17 years, they make up 54% of children in detention. And while boys make up the vast majority of Aboriginal and Torres Strait children in detention (9 out of 10), Aboriginal and Torres Strait girls are also far more likely to be in detention than their non-Indigenous peers, and their needs are often overlooked. With numbers like this, Aboriginal and Torres Strait Islander voices must be respected, heard, and given the power to lead the solutions to this national crisis and ensure all children are supported to meet their limitless potential.

Evidence shows that detention does not work to stop children re-offending

Evidence from Aboriginal and Torres Strait Islander led and culturally appropriate early intervention and diversion programs are having meaningful results.

Justice Reinvestment, as demonstrated by Bourke and Cowra, is proving to be a promising model and being implemented by states and territories around Australia. Despite this, in 2015-16 $486.6 million was spent on imprisoning children in Australia and less than half of that amount was spent on community based youth justice services ($216 million).

Repeal legislation which attempts to trial and sentence youth as adults

Up until late in 2016, Queensland had been treating 17-year-old children as adults in the criminal justice system since 1965. It was the only state or territory in Australia to try 17-year-olds in the adult criminal justice system and hold them in adult prisons, in breach of international law.

But on 3 November 2016, Queensland passed the Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Bill 2016 (Qld). When it comes into effect in 2017, 17-year-old children will be transitioned into the youth justice system and moved out of adult prisons.

Despite this the South Australian Government is attempting to introduce legislation under the Statutes Amendment (Youth Sentenced as Adults) Bill 2017 (SA) to trial and sentence children as adults.

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[134] Australian Bureau of Statistics, 'Corrective services Australia' June quarter 2016' (2016).

[135] United Nations Human Rights- Office of the High Commissioner, 'End of Mission Statement by the United Nations Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz of her visit to Australia' (3 April 2017) [10].

[136] Ibid.

In its attempt to treat children like adults, there are at least three international conventions that Australia is breaching and to which Australia is a signatory, including the United Nations Convention on the Rights of the Child (**CROC**), the International Covenant on Civil and Political Rights (**ICCPR**) and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (**The Beijing Rules**).

The UN has consistently criticised Australia (and in particular Queensland for treating 17 year olds as adults) for failing to bring Australia's treatment of children in the criminal justice in line with International standards which can be seen in the response from the United Nations to Australia's Report submitted for the 40th session:

> "*The Committee recommends that the State party bring the 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, including the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty and the Vienna Guidelines for Action on Children in the Criminal Justice System; and the recommendations of the Committee made at its day of general discussion on juvenile justice*."[137]

Develop a National Action Plan to prevent Aboriginal and Torres Strait Islander children being pushed into the juvenile justice system

Seizing upon the national exposure of the mistreatment of young people in the justice and child protection systems in the Northern Territory and in other areas, the Federal, State and Territory Governments should develop a National Action Plan to prevent Aboriginal and Torres Strait Islander children being pushed into the juvenile justice system. Such a plan must be developed in genuine partnership with Aboriginal and Torres Strait Islander communities, their organisations and representative bodies and contain concrete actions to both prevent and, where appropriate, divert young people from contact with the criminal justice system.

This National Action Plan should engage Aboriginal and Torres Strait Islander communities, their organisations and representative bodies to achieve Indigenous participation in, and equal access to alternatives to imprisonment for Aboriginal and Torres Strait Islander children and resource place-based community-led early intervention programs.

As noted in NATSILS joint written statement with Amnesty International Human Rights Council thirty-sixth Session, **NATSILS calls upon the Commonwealth, State and Territory Governments to commit to the following[138]:**

- Raise the age of criminal responsibility to at least 12 and address laws that breach children's rights.
- End detention of children who have not been sentenced.
- Ensure treatment and conditions in youth prisons provide children with the best chance to thrive
- Prioritize investment in early intervention, prevention and diversion to address the underlying causal factors of offending and ensure detention is a last resort.

[137] United Nations, 'Consideration of the Report Submitted by Australia for the 40th Session' (2005) [202-238].

[138] National Aboriginal and Torres Strait Islander Legal Services and Amnesty International , 'Joint NATSILS and Amnesty International Written Statement on the crisis of Indigenous Youth detained in Australia' (21 August 2017), accessed on 22 August 2017 at http://www.natsils.org.au/portals/natsils/Joint%20NATSILS%20and%20Amnesty%20Written%20Statement.pdf?ver=2017-08-28-121158-510

- Australian Government must establish or task a suitable national body to coordinate a national approach to data collection and policy development relating to Aboriginal and Torres Strait Islander imprisonment and violence rates

- Adequately fund Aboriginal and Torres Strait Islander community-controlled legal services.

- Set targets to end the overrepresentation of Aboriginal and Torres Strait Islander children in prison.

1.2 Connection between child protection and the youth justice system

Aboriginal and Torres Strait Islander children are over-represented at every point in the Child Protection System. The Australian Institute of Family Studies noted in a 2017 report that Aboriginal and Torres Strait Islander children are 7 times more likely to be the subject of substantiated reports to child protection services than non-Indigenous children and 9.8 times more likely to be placed in out-of-home care (**OOHC**).[139] Currently representing 36.3% of all children in OOHC,[140] the number of Aboriginal and Torres Strait Islander removed by child protection services is projected to triple by 2035.[141]

NATSILS raise concern in relation to the direct and identified links between the child protection and the youth justice system.[142] Recent studies have identified that young people placed in OOHC are 16 times more likely than the equivalent general population to be under youth justice supervision in the same year.[143] For young people in OOHC, there is also a recognised increased risk of involvement with the criminal justice system after leaving OOHC.[144] For example, in Victoria, 45% of young people in youth justice centres have been subject to a child protection order and 19% of young people in custody are currently clients of child protection and youth justice services.[145]

The risk of entering the juvenile justice system for children in OOHC increases significantly when the child or young person is Aboriginal or Torres Strait Islander.[146] In mid-2015, Aboriginal and Torres Strait islander children aged 10-17 were, on average, 26 times as likely as non-Indigenous children to be in detention,[147] and comprised, on average, 54% of the total population of young people in detention.[148] Involvement with the youth justice system is a strong predictor of incarceration as an adult, with the Public Health Association of Australia recognising that:

> *"86% of Aboriginal and Torres Strait Islander juvenile offenders enter the adult correctional system, compared with 75% of non-Aboriginal and Torres Strait Islander juvenile offenders, with 65%*

[139] Australian Institute of Family Studies 'Child Protection and Aboriginal and Torres Strait Islander Children. CFCA Resource Sheet – August 2017' (August 2017) accessed on 24 August 2017 at https://aifs.gov.au/cfca/publications/child-protection-and-aboriginal-and-torres-strait-islander-children.

[140] Australian Institute of Health and Welfare, 'Child protection Australia 2014–15' (21 April 2017) accessed online on 18 August 2017 at https://www.aihw.gov.au/reports/child-protection/child-protection-australia-2014-15/data

[141] Secretariat of the National Aboriginal and Islander Child Care, 'The Family Matters Report: Measuring trends to turn the tide on Aboriginal and Torres Strait Islander child safety and removal' (2016) [23].

[142] Katherine McFarlane, 'Care-criminalisation: The involvement of children in out-of-home care in the NSW criminal justice system' (2015).

[143] Australian Institute of Health and Welfare, 'Young People in Child Protection and under Youth Justice Supervision 2014–15' (2016).

[144] Raman, S., Inder, B. and Forbes, C., 'Investing for Success: The economics of supporting young people leaving care*' Centre for Excellence in Child and Family Welfare* (2005).

[145] Department of Health and Human Services, 'The Youth Parole Annual Report 2015-2016' (2016) accessed on 1 August 2017 at https://www.parliament.vic.gov.au/file_uploads/Youth_Parole_Board_Annual_Report_2015-16_L2jN9RxM.pdf.

[146] Catia G Malvaso, Paul H Delfabbro and Andrew Day, 'The Child Protection and Juvenile Justice Nexus in Australia: A Longitudinal Examination of the Relationship between Maltreatment and Offending' (2017) [64].

[147] Australian Institute of Health and Welfare, 'Youth Detention population in Australia 2015' (December 2015), accessed on 30 July 2017 at http://www.aihw.gov.au/publication-detail/?id=60129553700.

[148] Ibid.

serving prison terms compared with 41% of non-Aboriginal and Torres Strait Islander juveniles. Further, 91% of juvenile offenders who had been subject to care and protection orders progressed to the adult prison system."[149]

Establish a national target to eliminate the overrepresentation of Aboriginal and Torres Strait Islander children in out of home care

Given the inextricable connection between the child protection and youth justice systems, leading to the over-representation of Aboriginal and Torres Strait Islander children in both systems and contributing to the alarmingly high rates of incarceration for Aboriginal and Torres Strait Islander people generally, NATSILS recommends that a national target be established to eliminate the overrepresentation of Aboriginal and Torres Strait Islander children in OOHC by 2040, supported through a national strategy developed in partnership with Aboriginal and Torres Strait Islander peoples.

As described in NATSILS' Submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory's Child Protection Issues Paper:

> *"The escalating rate of removal of Aboriginal and Torres Strait Islander children is a national crisis that requires a coordinated national response. An integrated approach across all levels of government is necessary to redress the complex causes of child removal practices in influenced by federal and state powers including family support; inadequate housing and homelessness; social security; family violence; drug and alcohol misuse; health and mental health; early childhood education and care; and child protection."*[150]

NATSILS calls for the urgent implementation of a national target to reduce child removal incidence and a national strategy to eliminate over-representation that prioritises community-led early intervention and family support programs in order to prevent Aboriginal and Torres Strait Islander children coming into contact with the child protection system in the first place. This recommendation has been identified as an urgent reform by United Nations Special Rapporteur on the Rights of Indigenous Peoples.[151]

Implement appropriate and adequately resourced national frameworks for monitoring and reporting on compliance with the ATSICPP

The Aboriginal and Torres Strait Islander Child Placement Principle (**ATSICPP**) ensures that Aboriginal and Torres Strait Islander children remain connected to family, community, culture and country. However, as of 2016, only 66% of Aboriginal and Torres Strait Islander children in Australia were placed with family, kin or other Aboriginal and Torres Strait Islander carers.[152] The narrow conceptualisation and poor implementation of the ATSICPP must be urgently redressed through the full and proper implementation of the ATSICPP.

Increase the age of criminal responsibility to at least 12 years and retain 'doli incapax'

The current age of criminal responsibility in all Australian jurisdictions is 10 years with a rebuttable presumption that applies to children aged between 10 and 14 years. Aboriginal and Torres Strait Islander children aged 10- and 11-years-old are drastically over-represented in juvenile detention in Australia, making up more than 60% of all 10- and 11-year-olds in detention in 2012-13, which increased to 74% in

[149] Justice Health Special Interest Group, 'Incarceration of Aboriginal and Torres Strait Islander people policy', *Public Health Association of Australia* (2016) accessed on 1 July 2017 at www.phaa.net.au/documents/item/1704.

[150] Secretariat of the National Aboriginal and Islander Child Care, 'The Family Matters Report: Measuring trends to turn the tide on Aboriginal and Torres Strait Islander child safety and removal' (2016) [23].

[151] United Nations Human Rights- Office of the High Commissioner, 'End of Mission Statement by the United Nations Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz of her visit to Australia' (3 April 2017) [10].

[152] Australian Institute of Health and Welfare, 'Young People in Child Protection and under Youth Justice Supervision 2014–15' (2016).

2014-15.[153]

All Australian states should increase the minimum age of criminal responsibility to 12 years but also retain the presumption of doli incapax for children aged 12 and 13 years of age. The abolition of this doctrine would impact significantly on children of this age group, especially those with developmental delays and cognitive impairment, and because the doctrine appropriately allows for a gradual transition to full criminal responsibility.

Increase investment in community controlled early intervention and family support services

Early intervention and support programs are essential to ensuring that contact between Aboriginal and Torres Strait Islander children and the justice system is minimised.

An example of this is the Barreng Moorop program in Melbourne, run by the Victorian Aboriginal Child Care Agency (**VACCA**) is in partnership with Jesuit Social Services and VALS, for Aboriginal children aged 10 to 14 years old and their families. One of the key ingredients to the success of Barreng Moorop is its understanding that trauma reaches across generations. As such, working effectively with vulnerable and at risk Aboriginal children requires an aligned service delivery approach that focuses not only on the young person but their family.

Adequately resource ATSILS

The ATSILS are currently drastically underfunded to deliver legal services in child protection matters. The Productivity Commission has recognised that Aboriginal and Torres Strait Islander people face vast unmet legal need. The Productivity Commission also found that the "inevitable consequence of these unmet legal needs is a further cementing of the longstanding over-representation of Indigenous Australians in the criminal justice system".[154] Sufficient funding must be provided to the ATSILS who retain the expertise in delivering culturally responsive legal advice in family and child protection matters.

1.3 Traditional lore

NATSILS raise serious concern in relation to the ALRC's omission to include the importance of "traditional law" or "lore" in understanding and addressing the over incarceration of Aboriginal and Torres Strait Islander people.

Aboriginal and Torres Strait Islander peoples have complex systems of lore that are observed today. However, the operation of Westminster system of law and traditional lore have conflicted over the past two centuries of European invasion and colonisation. The intergenerational impacts of the imposition of the Westminster system of law, loss of country, of being punished for speaking language, attempted genocide and policies relating to the stolen generations must be central to an understanding of Aboriginal and Torres Strait Islander peoples experience and relationship with the criminal justice system.

The relevance of lore within the justice system was recognised by the Australian Law Reform Commissions 1986 report on Aboriginal Customary Law. However, many of the recommendations delivered in this report have since been ignored. As such, it is essential for this Inquiry, and inquiries alike, to recognise the importance of the operation of lore in understanding and addressing the experiences of Aboriginal and Torres Strait Islander people within the justice system.

[153] Australian Institute of Health and Welfare, 'Youth Detention population in Australia 2015' (December 2015) [Table S78b] accessed on 30 July 2017 at http://www.aihw.gov.au/publication-detail/?id=60129553700.

[154] Productivity Commission, 'Access to Justice Arrangements', (5 September 2014) accessed on 4 August 2017 at https://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-volume2.pdf.

1.4 Accountability and oversight in relation to inquiries and recommendations

NATSILS wishes to highlight the importance of Federal, State and Territory Government accountability in relation to recommendations that will be delivered by the ALRC in December 2017. Government accountability is an important facet of the Commission's Inquiry that must be considered in light of the lack of implementation of previous recommendations delivered by landmark inquiries, such as the *Royal Commission into Aboriginal Deaths in Custody* (1991) (**Royal Commission**).

For twenty-six years, the implementation of the 339 recommendations contained within the Royal Commission's Report by Federal, State and Territory Governments has remained largely incomplete. Although all but one of the 339 recommendations were supported by the Federal Government, and all recommendations relating to law and justice were endorsed by State and Territory Governments, the failure to properly implement these recommendations has been exposed, not only by a number of formative reviews regarding implementation,[155] but by current alarming statistics surrounding Aboriginal and Torres Strait Islander incarceration and deaths in custody.

In particular, the implementation of recommendations relating to law and justice is of serious concern to NATSILS. For example, although the Royal Commission had highlighted the clear need for imprisonment to be a measure of last report, since the Royal Commissions reporting, the rate of incarceration of Aboriginal and Torres Strait Islander people has more than doubled.[156] The national imprisonment rate for Aboriginal and Torres Strait Islander adults is currently 15 times higher than that for non-Indigenous adults.[157] Whilst Aboriginal and Torres Strait Islander people make up only 2 % of the national population, they account for 27% of the national prison population.[158]

Legislation disproportionately criminalising Aboriginal and Torres Strait Islander people across the nation, such as mandatory sentencing regimes, offensive language, fines and driver licenses offences highlighted in the Discussion Paper must be addressed through Federal, State, Territory Governments being held accountable for the implementation of punitive criminal laws and related criminal justice processes that ignore the principle of imprisonment as a measure of last resort.

Alarmingly, a recent New South Wales Bureau of Crime Statistics and Research report observed that changes to rates of incarceration of Aboriginal and Torres Strait Islander people in NSW were due to changes in policies rather than changes to offending behaviour.[159] The report found that over the last fifteen years, the Aboriginal and Torres Strait Islander prison population in NSW had more than doubled and that during this same period the rate of Aboriginal and Torres Strait Islander involvement in violent or property offences had decreased. Policies criminalising Aboriginal and Torres Strait Islander people cannot continue to be enforced under the auspice of 'tough on crime' campaigns.

As noted in NATSILS 2013 Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into Justice Reinvestment in Australia, the sentiment of which remains relevant in 2017:

> *"Crime rates have not been the driving force behind the growth of Australia's imprisonment rate. There has been no spike in the crime rate to which we can attribute such a significant increase in incarceration. Nor have increased incarceration rates led to any drop in the crime rate. Rather, the steady increase in imprisonment rates has been the result of legislative and policy changes implemented under the catch cry of being 'tough on crime'".*

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[155] Change the Record with Amnesty International & Clayton Utz, 'Review of the Implementation of RCIAIDC' (May 2015).

[156] Australian Bureau of Statistics, 'Corrective Services, Australia, June Quarter 2016, (2016) quoted in PricewaterhouseCoopers, 'Indigenous Incarceration: Unlock the Facts' (2017) [5] accessed on 20 August 2017.

[157] Australian Bureau of Statistics, 'Corrective Services Australia- June Quarter 2017' (June 2017) accessed on 4 July 2017 at http://www.abs.gov.au/ausstats/abs@.nsf/mf/4512.0.

[158] Australian Bureau of Statistics, 'Corrective Services Australia- June Quarter 2017' (June 2017) accessed on 4 July 2017 at http://www.abs.gov.au/ausstats/abs@.nsf/mf/4512.0.

[159] NSW Bureau of Crime Statistics and Research, 'New South Wales Custody Statistics Quarterly Update March 2017' (March 2017) [2.3.2].

Whilst the Attorney-General of Australia, Senator Hon George Brandis QC described Aboriginal and Torres Strait Islander incarceration as a 'national tragedy',[160] such recognition without accountability cannot continue to be the response to law and justice matters disproportionately affecting Aboriginal and Torres Strait Islander people.

It is the responsibility of all levels of Government to engage in direct action to implement the recommendations of the Royal Commission and address the underlying social and economic drivers of over-imprisonment of Aboriginal and Torres Strait Islander people.

Direct action must include the establishment of annual reporting measures by all levels of Government on the implementation of the recommendations contained in the Royal Commission's report. To ensure independent oversight in annual reporting, the Aboriginal and Torres Strait Islander Social Justice Commissioner and civil society must be provided with adequate resources.

Monitor and report against the implementation of the recommendations of the 1991 Royal Commission into Aboriginal Deaths in Custody.

Develop a reciprocal plan for action and implementation as well as independent oversight and monitoring for recommendations delivered by the results of the current ALRC inquiry.

1.5 International obligations

The United Nations Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz, released her Australia country report after her visit in March 2017 and has criticised the Australian Government for the soaring rates at which Australia locks up Aboriginal and Torres Strait Islander people, particularly children.

The Special Rapporteur said "the routine detention of young Indigenous children" was "the most distressing aspect of her visit" to Australia. The report found that Australia locks up Indigenous children, as young as 10 years old, at 24 times the rate of non-Indigenous children.

Ms Tauli-Corpuz emphasised that the Australian Government, not states and territories, is responsible under international law for Aboriginal and Torres Strait Islander people's "national detention crisis".

Commonwealth leadership is essential to ensuring recommendations delivered by various inquiries are addressed and implemented by State and Territory Governments. Whilst it is acknowledged that State and Territory Governments retain the power to create and amend criminal laws, it is the Commonwealth who is and should be held accountable to ensure the protection and advancement of human rights for Aboriginal and Torres Strait Islander people.

As such, the Commonwealth Government must advance its leadership in regards to Australia's compliance with international human rights obligations, such as those obligations articulated under the CERD, the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**), International Covenant on Civil and Political Rights (**ICCPR**) and the Optional Protocol to the Convention Against Torture (**OPCAT**).

Whilst NATSILS supports the Australian government's commitment to protect the rights of people in custody by ratifying the OPCAT by December 2017, NATSILS raise concern in relation to Australia's current compliance under ICCPR and CERD.

For example and relevant to this Inquiry, NATSILS raise concern in relation to Australia's compliance under Article 9.1 of ICCPR, that all persons shall be protected against inappropriate and unjust forms of detention. As discussed in the body of our submission, NATSILS argue that imprisonment as a result of fine default amounts to an inappropriate and unjust form of detention. As recognised by the Discussion paper, 'Aboriginal and Torres Strait Islander peoples are over-represented as fine recipients and are less likely than non-Indigenous people to pay a fine at first notice(attributed to financial capacity, itinerancy and

[160] Senator George Brandis, 'Incarceration Rates of Aboriginal and Torres Strait Islander Peoples' (Media Release, 27 October 2016).

literacy levels), and are consequently susceptible to escalating fine debt and fine enforcement measures'.[161] The criminalisation of fine default is an unjust and inappropriate measure that must be reviewed.

A further example NATSILS wishes to raise is Australia's compliance under Article 2.5 and 6 of CERD. In 2007, Australia passed legislation commonly known as the 'Northern Territory Intervention'. The legislation was then revised under a package known as the 'Stronger Futures legislation'. The package suspended the operation of the RDA and was condemned by the CERD Committee as discriminating on the basis of race, including through the use of so-called 'special measures'.[162] The Northern Territory has one of the highest imprisonment rates of Aboriginal people.

In 2017, the Special Rapporteur on the Rights of Indigenous Peoples noted in her End of Mission Statement that Stronger Futures legislation 'stigmatise Aboriginal communities by subjecting them to compulsory income management, forced participation in work for the dole schemes that pay individuals far less than an average reward rate as well as fines and welfare reductions for parents whose children are truant in school'.[163] NATSILS rejects the categorisation of the Stronger Futures legislation as a special measure, and as such considers the legislation package to exist in obstruction to the CERD.

Develop a framework to implement and raise awareness about the UNDRIP

This year marks the ten-year anniversary of the UNDRIP. As such, NATSILS considers this an important time for Government to reflect upon the implementation of UNDRIP in domestic law and policy. Important to this reflection is meaningful consideration of the Prime Minister's Closing the Gap Report handed down earlier this year. NATSILS considers that if Governments are to take seriously the disproportionate incarceration rate of Aboriginal and Torres Strait Islander people, Government must adopt Justice Targets.

For the last quarter century numerous reports have been delivered that repeatedly emphasise the importance of Aboriginal and Torres Strait Islander people having a genuine say in our own lives and decisions that affect our peoples and communities. However, there continues to exist a lack of genuine collaboration and meaningful engagement by Government with Aboriginal and Torres Strait Islander peoples and organisations.

NATSILS recommend that Government commit to obtaining the free, prior and informed consent of Aboriginal and Torres Strait Islander peoples in the development of policy that directly affects our communities, and to genuine collaboration by developing and implementing a framework for self-determination, outlining consultation protocols, roles and responsibilities and strategies for increasing Aboriginal and Torres Strait Islander participation in all institutions of democratic governance.

NATSILS considers it essential that there continues to grow emphasis on the importance of Aboriginal and Torres Strait Islander individual, family and community strengths. The prioritisation of self-determination and community-led strategies will ultimately ensure the development of culturally safe and effective responses to addressing complexities underlying social and political disadvantages suffered by Aboriginal and Torres Strait Islander people.

1.6 Family Violence

NATSILS raise concern in relation to the ALRC's terms of reference being narrowed to omit the influence of family violence on rates of incarceration of Aboriginal and Torres Strait Islander women, men and children. The prevalence of family violence and contact with the justice system as a result of exposure to

[161] Australian Law Reform Commission, 'Discussion Paper 84' (July 2017) [108].

[162] UN Committee on the Elimination of Racial Discrimination, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination on Australia' (13 September 2010) [16].

[163] United Nations Human Rights, Office of the High Commissioner, 'End of Mission Statement by the United Nations Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz of her visit to Australia' (3 April 2017) [10].

family violence has had devastating impacts of women, men and children's social, cultural, spiritual and economic lives in Aboriginal and Torres Strait Islander communities. For example, the impacts of family violence on women have been highlighted in recent studies which have indicated that of the Aboriginal and Torres Strait Islander women in Victoria's prisons, over 87% were victims of sexual physical or emotional abuse.[164] For children, family violence is a central contributing factor to the over-representation of Aboriginal and Torres Strait Islander children in out of home care, which is particularly concerning given the link that exists between child protection systems and youth justice.[165] Further, while men are less likely to experience family violence as adults, their experiences as victims must be considered in the delivery of support services, as recognised by the 2015 the Senate Finance and Public Administration References Committee.[166]

Pertinent to addressing family violence is the delivery of support services to assist both victims and perpetrators of family violence. The provision of support services to both victims and perpetrators is essential to eliminating family violence in Aboriginal and Torres Strait Islander communities.

Where support services for family violence are provided, there must be recognition of the importance of culture as a key protective factor that supports and strengthens both families and community. Tailored support must be designed and driven by community and include the provision of family support services, early intervention and prevention programs, community based healing programs, legal assistance for victims as well as perpetrators, trauma counselling and the provision of crisis housing and increased access to safe, stable and culturally safe long term housing options.

Further, NATSILS considers Justice reinvestment as an effective way to address family violence in Aboriginal and Torres Strait Islander communities and, more broadly, to reduce the disproportionate levels of Aboriginal and Torres Strait Islander people in the criminal justice system. As noted in NATSILS Submission to the Inquiry on Domestic Violence and Gender Inequality:[167]

> *"A justice reinvestment approach holds that in order to achieve long-term sustainably safer communities, government policy and investment need to address the underlying causes of criminal behaviour (including violence) through investment in key areas such as education, housing and healthcare"*

NATSILS further considers it is essential that all levels of Government ensure adequate and consistent funding of ATSILS and FVPLS' who hold the relevant expertise in the delivery of culturally safe family violence support services and legal advice to Aboriginal and Torres Strait Islander people.

Case Study

ALRM

In October 2015, the ALRM successfully opposed an application made by the Minister seeking an immediate removal of a new born. ALRM represented the mother in the proceedings. The mother had just given birth and was due to be discharged from the hospital. The Minister's grounds for removal related to the father's propensity to violence including an outstanding criminal charge of an assault to a 17month old baby relating to the father's ex partner's child. ALRM made submissions to the court that the "risk" factor related to the father and not the mother. It was further submitted it would be appropriate for the court to make an order to restrain the father not to have contact with the mother and the new born, rather than

[164] Aboriginal Family Violence Prevention & Legal Services Victoria, 'Submission to the Victorian Royal Commission into Family Violence' (June 2015) [18].

[165] Australian Institute of Health and Welfare, 'Young People in Child Protection and under Youth Justice Supervision 2014–15' (2016).

[166] The Senate Finance and Public Administration References Committee, 'Domestic Violence in Australia' (August 2015) [16].

[167] National Aboriginal and Torres Strait Islander Legal Services, Submission to the Inquiry on Domestic Violence and Gender Inequality, (April 2016).

granting a custody order in favour of the Minister which would mean separating the mother from her child. His Honour agreed and did not grant custody to the Minister and made an order for an injunction against the father instead. Following the hearing ALRM arranged for the father through his criminal solicitor to vary his bail conditions regarding his place of residence otherwise he would be in breach of the restraint order. ALRM also referred the mother to an external service provider to assist and monitor the mother's progress and to ensure the baby's emotional and physical needs were met.