

**A STATUTORY DUTY TO NOTIFY:
A CRITICAL ANALYSIS OF PROPOSAL 11.3**

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LIST OF ABBREVIATIONS

ABS	Australian Bureau of Statistics
ACT	Australian Capital Territory
AIC	Australian Institute of Criminology
ALRC	Australian Law Reform Commission
ALRM	Aboriginal Legal Rights Movement
ALS	Aboriginal Legal Service
ALSs	Aboriginal Legal Services
ALSWA	Aboriginal Legal Service Western Australia
ATSILS	Aboriginal and Torres Strait Islander Legal Service
CAALAS	Central Australian Aboriginal Legal Aid Service
CNS	Custody Notification Service
NAAJA	North Australian Aboriginal Justice Agency
NSW	New South Wales
NT	Northern Territory
QLD	Queensland
RCIADIC	Royal Commission into Aboriginal Deaths in Custody
SA	South Australia
TACLS	Tasmanian Aboriginal Community Legal Service
UNDRIP	United Nations Declaration on the Rights of Indigenous People
VALS	Victorian Aboriginal Legal Service
WA	Western Australia

ABSTRACT

The Australian Law Reform Commission (**ALRC**) released a discussion paper on 19 July 2017, marking the beginning of public consultations for the Commission's inquiry into the high incarceration rates of Aboriginal and Torres Strait Islander peoples.¹ One of the proposals made in the paper recommended the introduction of a statutory custody notification service.² This service would place a duty on police to contact the Aboriginal Legal Service, or equivalent service, immediately on detaining an Aboriginal and Torres Strait Islander person.³ This paper critically examines Proposal 11.3, addressing the evidence basis for the proposal, the ability for Aboriginal legal services to respond to such notifications, and the adequacy of notifications to Aboriginal legal services.

Keywords: Aboriginal and Torres Strait Islander, Australia, custody notification service, police, incarceration, Aboriginal Legal Service.

¹ Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples (DP 84)* (19 July 2017) <<https://www.alrc.gov.au/publications/indigenous-incarceration-rates-dp84>>.

² Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper No 84 (2017) 15.

³ *Ibid.*

I INTRODUCTION

The ALRC's discussion paper, 'Incarceration Rates of Aboriginal and Torres Strait Islander Peoples' addressed the current issue in Australia of overrepresentation of Aboriginal and Torres Strait Islander people in custody. In addition to considering the social, economic and historic factors which contribute to over-representation, the ALRC primarily looked at the laws and legal frameworks which inform decisions to hold Aboriginal and Torres Strait Islander people in custody.⁴ Subsequently the ALRC's discussion paper sought submissions from the public on a number of questions and proposals, covering a range of issues including sentencing options, bail, police accountability and access to justice.⁵ Initial inquiries of the ALRC found that, unless obstacles to the provision of legal services were addressed, Aboriginal and Torres Strait Islander people will continue to enter into the criminal justice system.⁶

In consideration of this, the ALRC made Proposal 11.3, which states:

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.⁷

This paper critically examines three key elements of Proposal 11.3:

1. The **statutory duty to notify** the Aboriginal Legal Service
2. The **role of Aboriginal legal services** in the notification system
3. The proposal to notify the Aboriginal Legal Service, **or an equivalent service**

The first section of this paper examines the evidence basis for a statutory duty to notify the Aboriginal Legal Service, or equivalent service, upon the detention of an Aboriginal or

⁴ Ibid 20 [1.2].

⁵ Ibid 20-21 [1.6].

⁶ Ibid 187 [11.2].

⁷ Ibid 15.

Torres Strait Islander person. A review of the history of custody notification systems, along with a comparison of current notification duties, finds historical and statistical support for a statutory duty to notify.

Section 2 examines the capability of Aboriginal legal services to respond to such notifications. It finds that, as Aboriginal legal services are not-for-profit community organisations, a dedication to ongoing funding for a notification system is necessary to guarantee effect.

Section 3 reviews the adequacy of the phrase ‘equivalent service’ in addressing the distinct needs of Aboriginal and Torres Strait Islander women and children. It suggests inclusion of phrase ‘equivalent *and appropriate* service’, to ensure that suitable legal support is made available to Aboriginal and Torres Strait Islander women and children.

The paper concludes with a suggestion for a modified Proposal 11.3 which aims to ensure effectiveness for the proposed nationwide notification system.

A Definitions

With the ALRC discussion paper lacking definitions for the key phrases used in Proposal 11.3, this section considers what the ALRC intends to mean.

Proposal 11.3 states:

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.⁸ (emphasis added)

The ALRC discussion paper has based Proposal 11.3 on the Custody Notification Service currently operating in New South Wales (NSW).⁹ For this reason, the structure of the NSW

⁸ Ibid.

⁹ Ibid 204 [11.74].

service is the reference point for the interpretation of these phrases. Thus, a statutory custody notification service is understood to include both the duty which is place on police to notify, and the corresponding response service offered by the Aboriginal Legal Service, or equivalent.

As Proposal 11.3 has been based on the NSW model, the ‘Aboriginal Legal Service’ refers to the Aboriginal Legal Service (NSW/ACT). This is an Aboriginal community organisation which provides culturally appropriate legal advice and representation to Aboriginal and Torres Strait Islander people in NSW and the Australian Capital Territory (ACT).¹⁰ Each state and territory have similar organisations. This paper adopts the phrases Aboriginal legal service (ALS) and Aboriginal legal services (ALSs) to describe these organisations in general terms. The phrase ‘or equivalent service’ is interpreted to mean the Aboriginal and Torres Strait Islander specific legal aid organisation in the respective state or territory.¹¹

A lack of definitions in the discussion paper requires the interpretation of ‘immediately on detaining’ to come from the ordinary meaning of those words. The Oxford Dictionary states that ‘detain’ means to keep someone in official custody, typically for questioning about a crime.¹² The term ‘immediately’ means at once; instantly.¹³ Therefore to notify ‘immediately on detaining’ implies that notification is to occur instantly after bringing a person into police custody, for questioning or arrest. It is inferred that the inclusion of the phrase ‘immediately on detaining’ exempts notification for those already sentenced and in custody.

¹⁰ Aboriginal Legal Service (NSW/ACT), 'Aboriginal Legal Service (NSW/ACT) Annual Report 2015-2016' (Media Release, 30 September 2016), 5.

¹¹ For example, in Victoria the Victorian Aboriginal Legal Service (VALS) provides legal aid to Aboriginal and Torres Strait Islander people in Victoria. This would be considered an ‘equivalent service’.

¹² Oxford University Press, *Detain* (2017) <<https://en.oxforddictionaries.com/definition/detain>>.

¹³ Oxford University Press, *Immediately* (2017) <<https://en.oxforddictionaries.com/definition/immediately>>.

B *Research scope and limitations*

This paper is limited to a critical examination of the statutory custody notification system suggested in Proposal 11.3. It does not examine the reasons for the high incarceration rates of Aboriginal and Torres Strait Islander people or their overrepresentation in the criminal justice system.

The unavailability of quantitative data on death in custody rates from 2014 onwards placed limits on the ability to analyse any recent data trends. The ALRC's discussion paper lacked definitions for the key phrases in Proposal 11.3. Due to this limitation, this paper interprets these phrases based on context and the ordinary meanings of words. These limits have only allowed for speculation, with this paper only making tentative conclusions. Further research on the impact of statutory custody notification services on Aboriginal and Torres Strait Islander incarceration rates is necessary.

II METHOD

This paper uses a mixed method approach to research, combining quantitative and qualitative data. The research approach reflects the theory that qualitative and quantitative components combined offer a more complete understanding of policy issues than either would on their own.¹⁴ The combination of current academic thinking and statistical data is often used in research which informs policy making.¹⁵

The quantitative component of this paper consists of an analysis of statistics gathered from the Australian Institute of Criminology (AIC) and the Australian Bureau of Statistics (ABS). The data relates to Aboriginal and Torres Strait Islander deaths in custody from 2001 to 2013, and the corresponding Aboriginal and Torres Strait Islander custody populations during that period. These statistics were collated into an excel spreadsheet for analysis and subsequently translated into two tables for ease of reading (see Table 1 and Table 2).

The qualitative component of this paper consists of a doctrinal study. This method is unique to law, analysing legal concepts, legislation and policy.¹⁶ Specifically, doctrinal research ‘involves a critical conceptual analysis of all relevant legislation and caselaw to reveal a statement of the law relevant to the matter under investigation’.¹⁷ Proposal 11.3 suggests the implementation of new legislation which would create a statutory custody notification service. A doctrinal approach was used to analyse previous legislation and policy to determine the evidence basis for a statutory custody notification service.

¹⁴ John Creswell, *Research Design: Qualitative, Quantitative and Mixed Methods Approaches* (SAGE Publications, 4th ed, 2014) 4.

¹⁵ John Creswell, 'Mixed-Method Research: Introduction and Application', *Handbook of Educational Policy* (1999), 455.

¹⁶ Terry Hutchinson, 'Defining and describing what we do: Doctrinal Legal Research' (2012) 17 *Deakin Law Review* 83, 116.

¹⁷ Terry Hutchinson, 'Valé Bunny Watson? Law librarians, law libraries, and legal research in the post-internet era' (2014) 106(4) *Law Library Journal* 579, 584.

The initial step for this research was the identification and collation of relevant law and policy instruments. Journal articles, media articles, government reports and inquiries, and internet resources such as institutional webpages and publications then informed the analysis of those laws and policies. A desktop study of secondary sources assisted in the analysis of the role of ALSs in the notification system, and whether the term ‘equivalent service’ is sufficient.

III EVIDENCE BASIS FOR A STATUTORY DUTY TO NOTIFY

This section critically examines the evidence which supports placing a statutory duty on police to notify an ALS. Consideration is made to the historical origins of a duty to notify, specifically looking at the *Anunga* guidelines, the Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**) and the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**). It then analyses statistical data to determine if there is a connection between Aboriginal and Torres Strait Islander deaths in custody and a statutory duty to notify.

A *Historical Support for a Statutory Duty to Notify*

1 *Anunga Guidelines*

Justice Forster of the Northern Territory Supreme Court prescribed guidelines to ‘remove or obviate some of the disadvantages from which Aboriginal people suffer in their dealings with police’.¹⁸ In *R v Anunga* (1976) 11 ALR 412, his Honour rejected the admissibility of a transcript from an interview of the Aboriginal accused by a police officer. In his Honour’s judgement, Forster J set guidelines for the questioning of Aboriginal suspects (*Anunga guidelines*). Relevant to a duty to notify was the guideline that ‘if sought, reasonable steps should be taken to obtain legal assistance for the prisoners’.¹⁹

In response, the Northern Territory Police Circular included a requirement to notify the ALS following the arrest of an Aboriginal.²⁰ This duty to notify was the first instance in Australia’s quasi-legal landscape of a duty being placed on police to contact an ALS upon the arrest of an Aboriginal person. As part of an inquiry in 1986, the ALRC investigated

¹⁸ *R v Anunga & Ors; R v Wheeler & Anor* (1976) 11 ALR 412, 415.

¹⁹ *Ibid* 412.

²⁰ Australian Law Reform Commission, *Recognition of Aboriginal Customary Law*, ALRC Report No 31 (1986) [554].

problems in police interrogation of Aboriginal people.²¹ The inquiry found that the general terms of the requirement meant that notification to the ALS was often not made until after a person had been interrogated and charged.²²

2 *Royal Commission into Aboriginal Deaths in Custody*

The next push for a custody notification duty came in 1991, with the final report of the Royal Commission into Aboriginal Deaths in Custody.²³ Convened in 1987, the social, cultural and legal factors contributing to Aboriginal and Torres Strait Islander deaths in custody were investigated.²⁴ The underlying issues found in an examination of 99 deaths in custody provided the basis for the 339 recommendations made in the final report. Relevant to a duty to notify were recommendations 223 and 224. Recommendation 223 endorsed police and ALSs to reach agreements on ‘procedures and rules which should govern areas of interaction between police and Aboriginal people’, suggesting rules which would require police to notify an ALS upon the detention or arrest of an Aboriginal or Torres Strait Islander person.²⁵

Recommendation 224 advised:

That pending the negotiation of protocols referred to in Recommendation 223, in jurisdictions where legislation, standing orders or instructions do not already so provide, appropriate steps be taken to make it mandatory for Aboriginal Legal Services to be notified upon the arrest or detention of any Aboriginal person other than such arrests or detentions for which it is agreed between the Aboriginal Legal Services and the Police Services that notification is not required.²⁶

²¹ Ibid [543].

²² Ibid [554].

²³ Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 4, 111.

²⁴ Peter Nagle and Richard Summerrell, 'Aboriginal Deaths in Custody: The Royal Commission and its Records, 1987-191' (1996) 2 *National Archives of Australia*, 8.

²⁵ Commonwealth, above n 23.

²⁶ Ibid.

Recommendation 224 originates from the detailed inquiries into individual cases of deaths in custody which found that a mandatory duty placed on police to notify an ALS could prevent deaths. For example, the inquiry into the death of Malcolm Charles Smith highlighted that ALSs play a significant role in keeping Aboriginal and Torres Strait Islander people out of custody, or at least shortening the time spent in custody.²⁷

The inquiry into the death of Edward Cameron found that if police had taken all reasonable steps to contact Cameron's family, friends or the ALS, the likelihood of death would have been reduced.²⁸ The Police Minister's Council Guidelines already required this kind of notification, however the guidelines were not followed in Cameron's case.²⁹ The RCIADIC's finding supports the notion of a mandatory requirement to notify an ALS upon detention or arrest of an Aboriginal and Torres Strait Islander person.

Proposal 11.3 ignores Recommendation 223, and adopts an altered form of Recommendation 224. It goes beyond the mandatory duty found in Recommendation 224, a duty which could be found in internal police policy. Proposal 11.3 requires a statutory duty to be placed on police. This requires that the duty be enshrined in legislation. The *Anunga* guidelines and the RCIADIC support a mandatory duty to notify, but do not necessitate a statutory duty.

Recommendation 224 was made 'pending the negotiation of protocols referred to in Recommendation 223'. The community agreement between Katherine Regional Aboriginal Legal Aid Service and the Northern Territory Police informed the RCIADIC's finding in relation to Recommendation 223.³⁰ The community initiative created a requirement that efforts be made by police to contact the Legal Aid Service upon detention of an Aboriginal or

²⁷ J.H. Wootten, *Report of the Inquiry into the Death of Malcolm Charles Smith* (AGPS Press, 1989) 78.

²⁸ D.J. O'Dea, *Report of the Inquiry into the Death of Edward Cameron* (AGPS Press, 1990) 28.

²⁹ D.J. O'Dea, *Report of the Inquiry into the Death of the Young Man who Died at Geraldton on 31 December 1988* (AGPS Press, 1990) 28.

³⁰ Elliot Johnston, *Report of the Inquiry into the Death of the Man Who Died at Katherine on 21 November 1984* (AGPS Press, 1991) 74-5.

Torres Strait Islander person. In turn, the Service provided police with a call out roster of solicitors available to be contacted after hours. The Royal Commission found that the community agreement had been a success in Katherine by reducing deaths in custody.³¹

The context of Recommendation 224 suggests that a mandatory duty was to be a temporary measure. Local level agreement on notification duties, as advised in Recommendation 223, would meanwhile facilitate a cooperative relationship between police and ALSs.

3 *United Nations Declaration on the Rights of Indigenous People*

The UNDRIP supports community based approaches, like that seen in Katherine, as the preferred approach to addressing the strained relationship between police and Aboriginal and Torres Strait Islander people. Article 18 of the UNDRIP encourages the consultation and cooperation with Indigenous peoples before implementing legislative or administrative measures that affect them.³²

Australia officially endorsed the UNDRIP in April 2009 as a step to ‘reset’ the relationship between Indigenous and non-Indigenous Australians.³³ The UNDRIP prioritises the inclusion of Indigenous communities in the development of policy. The ALRC also recognises the importance of consultation with, and participation of, Aboriginal and Torres Strait Islander peoples in reforms to ensure solutions are community led and culturally appropriate.³⁴ It is unclear why the community based approach to a notification system expressed in Recommendation 223 has not been considered in the ALRC’s current proposal.

4 *Conclusion*

³¹ Ibid 75.

³² *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61-295, 3rd Comm, 61st sess, 107th plen mtg, Agenda Item 68, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) annex.

³³ Emma Rodgers, 'Aust adopts UN Indigenous declaration', *ABC News* (Online), 3 April 2009 <<http://www.abc.net.au/news/2009-04-03/aust-adopts-un-indigenous-declaration/1640444>>.

³⁴ Commonwealth, above n 2, 187.

There is over forty years of historical support for a mandatory duty to notify an ALS upon the arrest or detention of an Aboriginal or Torres Strait Islander person. Notifying an ALS can help to reduce the disadvantage faced by Aboriginal and Torres Strait Islander people in their interactions with police, and divert them from courts. The history of recommendations for custody notification duties provides support for Proposal 11.3, which stems from the RCIADIC Recommendation 224. It is worthwhile investigating further whether a local level protocol would be a better approach to establishing such a duty, as suggested in the RCAIDIC Recommendation 223 and supported by UDNRIIP Article 18.

B *Statistical Support for a Statutory Duty to Notify*

This sub-section explores the connection between Aboriginal and Torres Strait Islander deaths in custody and the duty of police to notify the ALS upon detention. When looking at the statistical basis for a statutory duty to notify it is helpful to examine recent data to determine if there is a correlation between a duty to notify and lower rates in deaths in custody. If there is a correlation, this may provide some support for the implementation of a nationwide statutory duty.

The AIC began the National Deaths in Custody Program in 2002.³⁵ The Program monitors and reports on trends in deaths in custody. The first report was delivered in 2002 and the last in 2013 (Table 1).³⁶

The AIC data shows that NSW, Victoria, Queensland (**QLD**), the ACT and Tasmania have the lowest numbers of Aboriginal and Torres Strait Islander deaths in custody, with no deaths recorded in Victoria, ACT or Tasmania since 2007. Western Australia (**WA**) and the

³⁵ Lisa Collins and Muzammil Ali, 'Deaths in Custody in Australia: 2002 National Deaths in Custody Program (NDICP) Annual Report' (2003).

³⁶ Australian Institute of Criminology, *Deaths in Custody* (27 August 2013) <http://www.aic.gov.au/criminal_justice_system/deaths%20in%20custody.html>.

Northern Territory (NT) have the highest numbers of Aboriginal and Torres Strait Islander deaths, with no indication of these numbers declining.

When considered in the context of Aboriginal and Torres Strait Islander custody populations in respective jurisdictions, these numbers become more significant. Table 2 shows that NSW, Victoria and QLD have had, on average, less than 0.5 deaths in custody per thousand Aboriginal and Torres Strait Islander detainees. With no deaths in custody recorded during from 2002 to 2013, ACT and Tasmania have an expected rate of 0. The NT, WA and South Australia (SA) experienced much higher rates of deaths in custody, ranging from an average of 1.3 to 1.9 deaths in custody per thousand detainees. With such drastic difference between jurisdictions, relating these statistics to current duties in place may provide support for a statutory duty to notify.

C Linking Statistics to Current Duties to Notify

1 New South Wales

New South Wales is the only State that has a statutory requirement for police to notify an ALS upon the detention of an Aboriginal or Torres Strait Islander person. The duty was first enshrined in legislation in 1998.³⁷ It is now found in the *Law Enforcement (Powers and Responsibilities) Regulation 2016* (NSW).³⁸ Regulation 37 states:

If a detained person or protected suspect is an Aboriginal person or Torres Strait Islander, then, unless the custody manager for the person is aware that the person has arranged for a legal practitioner to be present during questioning of the person, the custody manager must:

- a) immediately inform the person that a representative of the Aboriginal Legal Service (NSW/ACT)

Limited will be notified:

- i. that the person is being detained in respect of an offence, and

³⁷ *Crimes (Detention After Arrest) Regulation 1998* (NSW) reg 28.

³⁸ *Law Enforcement (Power and Responsibilities) Act 2002* (NSW) s87ZC; *Law Enforcement (Power and Responsibilities) Regulations 2016* (NSW) reg 37.

- ii. of the place at which the person is being detained, and
- b) notify such a representative accordingly.

There is no clear guidance on how Aboriginal and Torres Strait Islander people are to be identified. The *Law Enforcement (Powers and Responsibilities) Act* defines an Aboriginal person as a person who is a member of the Aboriginal race of Australia, and identifies as an Aboriginal person and is accepted by the Aboriginal community as an Aboriginal person.³⁹

There are no guidelines in the Act, the Regulations or NSW Police Force Handbook to assist in how police are to obtain knowledge of Aboriginality. With a cultural mistrust of police and history of discrimination based on race, it seems counterintuitive to expect an Aboriginal or Torres Strait Islander person to volunteer information of Aboriginality to the police when coming into custody.

Despite this limitation, the case of *Campbell & 4 Ors v DPP* highlights the benefits of a statutory duty.⁴⁰ In this case, the accused attended an interview at a police station which was organised outside of normal business hours. The police failed to notify the Aboriginal Legal Service (NSW/ACT) of the detention of the accused. The court found that the failure was deliberate, as the police had organised the interview for a time outside of office hours, knowing that the Aboriginal Legal Service (NSW/ACT) would be unattended.⁴¹ Justice Hidden found that the trial judge had erred in admitting the interview evidence, demonstrating an acknowledgement by the courts that the statutory duty affords special protection for vulnerable persons.⁴²

From 2002 to 2013, NSW recorded a total of 10 Aboriginal and Torres Strait Islander deaths in police custody. These numbers have declined over that period, with only 3 deaths recorded since 2007. Despite having the largest Aboriginal and Torres Strait Islander population in

³⁹ *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s3.

⁴⁰ *Campbell and 4 Ors v Director of Public Prosecutions (NSW)* [2008] NSWSC 1284.

⁴¹ *Ibid* [20].

⁴² *Ibid* [50].

custody in Australia, NSW has an average rate of 0.425 deaths in custody per thousand detainees.

2 *Commonwealth and Australian Capital Territory*

The *Crimes Act 1914* (Cth) s23H(1) states that:

(1) Subject to section 23L, if the investigating official in charge of investigating a Commonwealth offence believes on reasonable grounds that a person who is under arrest, or who is a protected suspect, and whom it is intended to question about the offence is an Aboriginal person or a Torres Strait Islander, then, unless the official is aware that the person has arranged for a legal practitioner to be present during the questioning, the official must:

(a) immediately inform the person that a representative of an Aboriginal legal aid organisation will be notified that the person is under arrest or a protected suspect (as the case requires); and

(b) notify such a representative accordingly.

This section also applies to the ACT by way of s187 of the *Crimes Act 1900* (ACT).⁴³ This section differs to that in NSW as it sets out how an investigating official is to determine Aboriginality, being through a test of 'believing on reasonable grounds'. Despite a degree of clarity and guidance, it is unclear if this provides better protection for Aboriginal and Torres Strait Islander people. Leaving the judgement of Aboriginality to the subjective belief of an officer creates a situation in which police may abuse power to racially discriminate. This power may cause further harm to the relationship between Aboriginal and Torres Strait Islander people and police.

Additionally, s23H(8) provides that:

An investigating official is not required to comply with subsection (1), (2) or (2B) in respect of a person if the official believes on reasonable grounds that, having regard to the person's level of

⁴³ *Crimes Act 1914* (Cth) s23A(6).

education and understanding, the person is not at a disadvantage in respect of the questioning referred to in that subsection in comparison with members of the Australian community generally.

This is another situation in which investigating officers have the ability to subjectively determine whether an Aboriginal and Torres Strait Islander detainee receives the protection provided by s23H(1). Aboriginal and Torres Strait Islander communities have expressed that many police are racist and judgemental, as well as stating that police 'don't know us'.⁴⁴ It seems that giving police this kind of power, enabling them to deny Aboriginal and Torres Strait Islander people's their statutory protections, could potentially strain the relationship between Aboriginal and Torres Strait Islander people and police further.

There are no statistics on deaths in custody in relation to Commonwealth crimes. Further, with zero deaths in custody in the ACT with very small prison population, it is not possible to draw any conclusions from the data which support a link between a statutory duty to notify and lower rates of deaths in custody.

3 *Victoria*

In Victoria, when an Aboriginal and Torres Strait Islander person is taken into custody, an Attendance module must be completed within 60 minutes of arrival at the police station.⁴⁵

This is performed through the E Justice software, which is used State-wide and requires police to complete 'Aboriginality' as a mandatory field.⁴⁶ This operation triggers an automatic email to the Victorian Aboriginal Legal Service (**VALS**) and the Statistical Records Branch of Victoria Police when a person identifies as Aboriginal.⁴⁷ The Statistical

⁴⁴ Christine Jennett, 'Policing and Indigenous Peoples in Australia' (Paper presented at the History of Crime, Policing and Punishment Conference, Canberra, 9 December 1999) 15.

⁴⁵ Victoria Police, 'Victorian Police Manual - Guidelines' (2017), 4.3.

⁴⁶ Victorian Department of Justice, 'Victorian Government Response to the Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody' (2005), vol 1, 390.

⁴⁷ *Ibid.*

Records Branch follow this up with a phone call to the VALS.⁴⁸ Although this is not a statutory duty, it is enshrined as a mandatory duty in internal police policy. The information technology which ensures compliance with this duty makes the custody notification especially effective.

From 2002 to 2013, there has been one death in police custody recorded in Victoria. Even with a significantly small custody population, the rate of deaths in custody is approximately 0.325 per thousand detainees. This is an impressively low rate and should not be underrated.

4 *Queensland*

In QLD, a statutory requirement imposes a duty to notify a legal aid organisation when a police officer wants to question an Aboriginal or Torres Strait Islander person.⁴⁹ This differs to the New South Wales duty as it only applies to situations when police intend to question the detainee, and not to situations where police arrest or detain the person.

The Memorandum of Understanding between the QLD Police and the Aboriginal and Torres Strait Islander Legal Service (ATSILS) underpins the working relationship which has seen notification extend to custody and detention.⁵⁰ As a matter of practice, police often notify the ATSILS when an Aboriginal or Torres Strait Islander person is taken into custody.⁵¹ The Queensland Police Operational Procedures Manual sets out to develop protocols for the supply of information to ATSILS in situations where an Aboriginal or Torres Strait Islander

⁴⁸ Aboriginal and Torres Strait Islander Legal Services, 'Custody Notification Service: An analysis of the operation of this service by each Aboriginal and Torres Strait Islander Legal Service (ATSILS)' (2009), 4 <<http://www.alsnswact.org.au/media/BAhbBlSfHOgZmSSJWMjAxMS8wNS8xMS8wNI8xMF8xNV82MTVfQVRTSUX0FuYWx5c2lzX29mX0N1c3RvZHIiTm90aWZpY2F0aW9uX1NlcnZpY2VzXzIwMDkucGRmBjoGRVQ>>.

⁴⁹ *Police Powers and Responsibilities 2000* (QLD) s420(2).

⁵⁰ Aboriginal and Torres Strait Islander Legal Services, *Fact Sheet: Safe Custody* <https://www.police.qld.gov.au/programs/community/CulturalAdvisory/Documents/Safe_Custody_Fact_Sheet.pdf>.

⁵¹ Aboriginal and Torres Strait Islander Legal Services, above n 48, 7.

person has been arrested.⁵² This could see the duty to notify ATSILS upon the arrest or detention of an Aboriginal or Torres Strait Islander person become enshrined in internal policy, affording more weight to the duty and greater compliance. This also reflects the approach of local level collaboration with Indigenous organisations found in Recommendation 223 of RCIADIC and UNDRIP Article 18.

In QLD there were nine deaths in police custody reported from 2002 to 2013. At an average rate of 0.493 deaths per thousand detainees, this is a considerably lower rate than that seen in some other jurisdictions.

5 *Western Australia*

In WA, internal police policy found in the Lockup Management Procedures requires police to notify the Aboriginal Legal Service of Western Australia (**ALSWA**) upon the detention of an Aboriginal person through fax.⁵³ This only applies when a detainee elects to have a Court Officer notified of their details.⁵⁴

This is a very limited duty when compared to NSW, Victoria and QLD. It may partially explain the 26 deaths in custody from 2002 to 2013. This number becomes even more significant when considered in the context that WA has a smaller custody population than NSW. At an average rate of 1.377 deaths per thousand detainees, this is an alarmingly high statistic.

6 *Northern Territory*

In the NT there are no requirements to notify an ALS on the detention or arrest of an Aboriginal or Torres Strait Islander person, in legislation or policy.⁵⁵ The duty placed on

⁵² Queensland Police Service, 'Operational Procedures Manual' (2017), 16.8.7.

⁵³ Aboriginal and Torres Strait Islander Legal Services, above n 48, 8.

⁵⁴ Ibid.

⁵⁵ Ibid 7.

police in the Northern Territory is limited to a general requirement of facilitate access to legal advice upon request by the detainee.⁵⁶ A specific mention is made the *Anunga* guidelines in the general orders, adding that when interviewing an Aboriginal person reasonable steps should be taken to seek legal assistance when sought by the detainee.⁵⁷ The expectation that detainees request legal assistance could disadvantage Aboriginal and Torres Strait Islander people, who often do not know of their rights or are not confident in exercising these rights. This is examined further in Section II.

Between 2002 and 2013 the NT reported 18 Aboriginal and Torres Strait Islander deaths in custody. At an average rate of 1.934 deaths per thousand detainees, the NT has the highest rate of deaths in custody and is remarkably higher than NSW, Victoria and QLD.

7 *Tasmania*

The Aboriginal Strategic Plan of the Tasmanian Police states that it is an objective of the police to reduce the number of Aboriginal people who are detained in custody.⁵⁸ One of the strategies developed to address this was to ensure the ALS is notified in every case where an Aboriginal person is in custody.⁵⁹ This has been incorporated in the Tasmania Police Manual, mandating that when an Aboriginal person is detained and/or interviewed, every effort should be made to notify a relative or friend and the ALS.⁶⁰ A suggestion to legislate this duty was made by the Tasmania Law Reform Institute in 2011.⁶¹

⁵⁶ Northern Territory Police, 'General Order Q1: Questioning and Investigations' (1998), [4.7].

⁵⁷ Northern Territory Police, 'General Order Q2: Questioning people who have difficulties with the English language - the "Anunga" guidelines' (1998), appendix A [8].

⁵⁸ Tasmania Police, 'Aboriginal Strategic Plan' (2014), 5.

⁵⁹ Natasha Robinson and Anna Henderson, 'Hotline credited with saving lives of Aboriginal people in custody to be rolled out nationally', *ABC News*, 21 October 2016 <<http://www.abc.net.au/news/2016-10-21/indigenous-custody-notification-service-to-become-nationwide/7955152>>.

⁶⁰ Department of Police and Emergency Management, 'Tasmania Police Manual' (2010), [7.10.2(1)].

⁶¹ Tasmania Law Reform Institute, *Consolidation of Arrest Laws in Tasmania* Final Report No 15 (2011) 50.

With zero deaths in custody between 2002 and 2013, it appears that this internal policy is successful. However, this figure must be taken into the context of the extremely small population size of Aboriginal and Torres Strait Islander people in detention in Tasmania.

8 *South Australia*

A requirement for police to notify the Aboriginal Legal Rights Movement (**ALRM**) upon the arrest of an Aboriginal and Torres Strait Islander person is found in internal police policy.⁶² General Order 3015 requires that an officer ensure the offender has no objection to his name and the nature of the charge being provided to the ALRM and if there is no objection, the details of the offender, the charge and the time and place of the court hearing are to be supplied to an Aboriginal Field Officer from the ALRM.⁶³

With only six deaths in custody reported between 2002 and 2013, South Australia has a low number of deaths in custody, especially when compared to WA and the NT. However, when relating this to the Aboriginal and Torres Strait Islander custody population in SA, the death in custody rate is 1.368 per thousand detainees. This is almost triple the rates seen in NSW, QLD and Victoria and is cause for concern.

9 *Conclusion*

With an analysis of the current duties to notify in Australia, it can be seen that most states and territories have taken some steps to implement Recommendation 224 of the RCIADIC and have a mandatory custody notification duty. In NSW, Victoria and QLD a mandatory requirement, whether in statute or policy, correlates with lower rates of deaths in custody. These duties to notify are supported by either comprehensive notification systems, or

⁶² Aboriginal and Torres Strait Islander Legal Services, above n 48, 7.

⁶³ Dina Yehia, 'Admissibility of Admissions: Aboriginal and Torres Strait Islander Suspects' (2012), 18.

collaborative approaches to notification between police and ALSs. This correlation is not seen in SA, a State which also has a mandatory duty found in policy.

In comparison, WA and the NT have no duty, or a duty which lacks practical effectiveness in requiring notification through fax. The higher rates of deaths in custody in these jurisdictions provides preliminary evidence to support a duty to notify.

D *Conclusion*

This section explored the historical basis of a duty to notify, found in the *Anunga* guidelines, the RCIADIC and the UNDRIP. The RCIADIC recommended a mandatory duty to notify.

The review of recent deaths in custody rates and the corresponding duty to notify appears to support this recommendation. For example, WA and the NT had substantially higher rates of deaths in custody and lacked sufficient mandatory duties. This compares to other jurisdictions that impose such a duty, either through legislation or effective internal policy.

In Victoria, a State which has no form of statutory requirement, there has only been one death in custody recorded between 2002 and 2013. This suggests that a *statutory* duty may not be essential, and that a *mandatory* duty enshrined in internal police policy, supported by information technology, will provide equal protection to Aboriginal and Torres Strait Islander upon detention.

IV ALS CAPACITY TO SUPPORT A DUTY TO NOTIFY

The effectiveness of a statutory duty to notify an ALS upon the detention of an Aboriginal or Torres Strait Islander person heavily relies upon how the Aboriginal Legal Service responds to that notification. This section analyses the services offered by ALSs in responding to custody notifications.

A *New South Wales and the ACT*

The Aboriginal Legal Service (NSW/ACT) operates a 'custody notification service' across NSW and the ACT.⁶⁴ The service commenced in response to the duty placed on police by the 1988 Regulations.⁶⁵

The custody notification service is a 24-hour, seven day a week hotline operated by solicitors.⁶⁶ It is a separate hotline only made available to police. When police use this hotline, notification of arrest is made to a solicitor who provides early legal advice to the detainee, often advising of rights not to give a statement or consent to an interview.⁶⁷

The solicitor will also ask the detainee about their mental and physical health as part of a welfare check.⁶⁸ The solicitors are trained to recognise ideation of suicide and self-harm, as well as ask important medical information that they then pass on to police.⁶⁹ This aspect of the notification service addresses one of the reoccurring criticisms found in the RCIADIC. The RCIADIC found that one factor underlying deaths in custody was the insufficient police

⁶⁴ Caleb Franklin, 'CNS- Custody Notification Service' (Paper presented at the Aboriginal Legal Service (NSW/ACT) Staff Conference, Unknown), 1.

⁶⁵ *Crimes (Detention After Arrest) Regulation 1998* (NSW) reg 28.

⁶⁶ Franklin, above n 64.

⁶⁷ *Ibid* 4.

⁶⁸ *Ibid*.

⁶⁹ Aboriginal Legal Service (NSW/ACT), *Custody Notification Service: Preventing Aboriginal Deaths in Police Cell Custody* (Media Release, 30 June 2015), 2.

procedures for collecting medical history and the lack of mental health assessments for detainees.⁷⁰

B *Victoria and Tasmania*

The VALS offers a 24-hour, seven day a week hotline for Aboriginal and Torres Strait Islander people.⁷¹ It is not a police notification specific hotline and is available to the public.⁷² Similarly to NSW, legal advice is provided to detainees to ensure they are advised of their rights. When a call is received after hours, a detainee will speak to an On-call Client Service Officer who is trained to deal with most matters.⁷³ The On-Call Client Service Officer uses their discretion to determine whether to involve an on-call solicitor.⁷⁴

In 2015 the VALS took over the Tasmanian Aboriginal Legal Centre's contract to provide legal services for Aboriginal and Torres Strait Islander people in Tasmania.⁷⁵ The Tasmanian Aboriginal Community Legal Service (**TACLS**) was established by the VALS, providing the same custody notification service to Tasmania.⁷⁶ During business hours, notification is made to the TACLS when an Aboriginal and Torres Strait Islander person is brought into custody. After hours calls go through to VALS who email details of the notification to TACLS, allowing them to act on accordingly.⁷⁷ When notification is made a community service

⁷⁰ J.H. Wootten, *Report of the Inquiry into the Death of Harrison Day* (AGPS Press, 1990) 7.

⁷¹ Aboriginal and Torres Strait Islander Legal Services, above n 48, 4.

⁷² Victorian Aboriginal Legal Service, *24 Hour Service* (2015) <<http://vals.org.au/legal-services/24-hour-service/>>.

⁷³ *Ibid.*

⁷⁴ Franklin, above n 64, 4.

⁷⁵ Lauren Waldhunter, 'Access to legal services a struggle for Indigenous Tasmanians, Aboriginal Centre says', *ABC News*, 28 August 2015 <<http://www.abc.net.au/news/2015-08-27/access-to-legal-services-a-struggle-for-indigenous-tasmanians/6730798>>.

⁷⁶ Jennifer Crawley, 'New Aboriginal community legal service in business', *The Mercury* (Tasmania), 17 September 2015 <<http://www.themercury.com.au/news/tasmania/new-aboriginal-community-legal-service-in-business/news-story/5f896586ccba59ddef7462a6a5596033>>.

⁷⁷ Franklin, above n 64, 5.

officer or office administrator will conduct a wellbeing check, ensuring the detainee is safe and well.⁷⁸ This is similar to the welfare checks provided by ALS (NSW/ACT).

C *Queensland*

The Aboriginal and Torres Strait Islander Legal Services (QLD) provide a 24-hour, seven day a week toll-free hotline.⁷⁹ In addition to providing legal advice through the hotline, ATSILS provides 24-hour assistance to clients at police stations when required.⁸⁰ Similarly to Victorian and Tasmanian service, this hotline is for general use and is not specific to police notification when a person is detained.

D *Western Australia*

The Aboriginal Legal Service of Western Australia provides legal advice during weekday office hours. Legal advice is only provided after office hours in emergencies.⁸¹ As the duty to notify the ALSWA only requires a fax to be sent, there is little utility in notifications made outside of office hours.⁸²

WA Police have expressed concerns regarding the lack of response from the ALSWA when contacted after hours.⁸³ Several Members of the WA Police Union indicated that when attempts were made to contact the ALSWA after hours, they would rarely, if ever, receive calls back or acknowledgement of faxes sent.⁸⁴ To ensure these notifications are received and acknowledged after hours, funding should be provided to allow the ALSWA to operate 24-hours, seven days a week. This would ensure that police are not discouraged from notifying

⁷⁸ Ibid 6.

⁷⁹ Ibid 4.

⁸⁰ Ibid.

⁸¹ Aboriginal Legal Service of Western Australia, *Services: Criminal Law* (2016) <<http://www.als.org.au/about/services/>>.

⁸² Franklin, above n 64, 12.

⁸³ WA Police Union, 'Inquiry into Custodial Arrangements in Police Lockups' (2013), 12.

⁸⁴ Ibid.

the ALSWA due to a ‘lack of interest’ they perceive from ALSWA, which is more likely attributed to inability to respond due to a lack of funding.⁸⁵

E *Northern Territory*

The North Australian Aboriginal Justice Agency (**NAAJA**) and the Central Australian Aboriginal Legal Aid Service (**CAALAS**) are the two Indigenous legal aid services in the NT, covering the north and south of the Territory respectively.⁸⁶ The NAAJA provides 24-hour legal advice over the phone from a solicitor.⁸⁷ Similarly, the CAALAS provides a 24-hour toll-free hotline for those who are in police lock up.⁸⁸

The ATSILS’s brief analysis of the effectiveness of the NT ALSs expressed concerns that many Aboriginal and Torres Strait Islander people are not aware of their rights to speak to a lawyer, or are not confident in exercising those rights.⁸⁹ The ATSILS attribute the small number of calls received after hours to this factor.⁹⁰ If this is the case, it is clear that Aboriginal and Torres Strait Islander people would benefit from a statutory or mandatory duty to notify an ALS like NAAJA or CAALAS.

F *South Australia*

The Aboriginal Legal Rights Movement provides two services through a telephone line which operates 24-hours a day, seven days a week.⁹¹ When contacted, one service provides access to field officers or solicitors can deliver legal advice over the phone, or even representation at police interviews.⁹² The other service applies when a detainee does not require

⁸⁵ Ibid.

⁸⁶ Franklin, above n 64, 7.

⁸⁷ North Australian Aboriginal Justice Agency, *Criminal Law* <<http://www.naaja.org.au/our-services/criminal-law/>>.

⁸⁸ Central Australian Aboriginal Legal Aid Service, *24 Hour Service* (2013) <<http://www.caalas.com.au/WHATWEDO/24hourservice.aspx>>.

⁸⁹ Franklin, above n 64, 23.

⁹⁰ Ibid.

⁹¹ Aboriginal and Torres Strait Islander Legal Services, above n 48, 5.

⁹² Aboriginal Legal Rights Movement, *Criminal Law* <<https://www.alrm.org.au/what-we-do/criminal-law/>>.

legal assistance. The Aboriginal Visitors Scheme provides detainees who are feeling anxious or stressed with a support person who help bridge communication with police, support police in their duties and bring any problems or concerns such as welfare issues to the attention of police.⁹³

G *Sufficiency of Funding*

All of the above ALSs are funded through grants from the Federal Government. The Attorney-General's Department funds a total of eight ALSs under the Indigenous Legal Assistance Programme.⁹⁴ Due to significant portions of funding information being 'omitted for privacy reasons' from the Department's Annual Grants Registers, the funding allocated to each service cannot be readily ascertained.⁹⁵

As noted above most states operate a 24-hour advice. Apart from NSW, these hotlines are available to the public. It is this general public service that police use to notify the Legal Service of the detention of an Aboriginal or Torres Strait Islander person. As the custody notification occurs through an already operating hotline, these organisations fund the custody notification service through existing funding.⁹⁶

In addition to general funding provided to the ALS (NSW/ACT) under the Indigenous Legal Assistance Program, the service also receives one-off annual grants from the Australian Federal Government. As the NSW/ACT Custody Notification Service (CNS) is a specialised hotline, not available to the public, it is provided with additional funding from the Attorney-General's Department.⁹⁷ Due to the uncertainty associated with one-off annual grants, the

⁹³ Aboriginal Legal Rights Movement, *Aboriginal Visitors Scheme (AVS)* <<http://www.alrm.org.au/what-we-do/aboriginal-visitor-scheme/>>.

⁹⁴ Attorney-General's Department, *Indigenous Legal Assistance Programme* (2016) <<https://www.ag.gov.au/LegalSystem/Legalaidprogrammes/Pages/Indigenous-Legal-Assistance-Programme.aspx>>.

⁹⁵ See, eg, Attorney General's Department, 'Grants Register 1 July 2016 to 30 June 2017' (2017).

⁹⁶ Franklin, above n 64, 11.

⁹⁷ Aboriginal Legal Service (NSW/ACT), 'ALS Funding' (2015).

ALS is required to continuously campaign to renew funding each year. In December 2015, as funding for the CNS drew to a close, the Federal Minister for Indigenous Affairs announced that the ALS (NSW/ACT) would receive \$1.8 million.⁹⁸ This commitment enables the CNS to remain subsidised until June 2019, providing a degree of relief to the service. At a cost of \$526,000 per annum, the ALS argues that funding the CNS a small price to pay, considering it is nearly the same amount it costs to hold two juveniles in detention for one year.⁹⁹

The NSW/ACT CNS model has received strong support from Nigel Scullion, Minister for Indigenous Affairs. Minister Scullion advocates for a nationwide roll-out of the model, even offering funding in October 2016 for the establishment of such services.¹⁰⁰ Despite offering funding for the establishment of such a service, controversy still lies around who is responsible for ongoing funding. The Federal government believes it is the responsibility of the New South Wales Government to fund, or at least share in funding, due to the statutory obligations placed on New South Wales Police.¹⁰¹ New South Wales Attorney-General Gabrielle Upton argues that, as the Commonwealth is responsible for Indigenous Affairs under the Constitution, it should be the Federal Government that funds such a service.¹⁰² If a nationwide statutory custody notification service is implemented it is essential that all funding arrangements, including continued funding commitments, are negotiated between governments.

When examining the proposal to introduce a statutory duty to notify an ALS upon detention of an Aboriginal or Torres Strait Islander person, the role played by these Indigenous organisations cannot be overlooked. In the NT the NAAJA and the CAALAS are available

⁹⁸ Sarah Gerathy, 'Indigenous custody notification hotline saved as Federal Government steps in with funding', *ABC News* (Online), 2 December 2015.

⁹⁹ Aboriginal Legal Service (NSW/ACT), above n 69, 1.

¹⁰⁰ Henderson, above n 59.

¹⁰¹ Gerathy, above n 98.

¹⁰² *Ibid.*

24-hours a day, yet receive a small amount of calls after hours, possibly due to a lack of knowledge around the availability of the service. In this situation, a statutory duty to notify would see these services being used to their full potential, which would likely require increased funding to support the additional workload. This increase in funding was seen in NSW for the CNS when a statutory duty was enshrined in legislation. Long term funding is essential to an effective notification system. When a duty is placed on police to notify an ALS the workload of Police and the relevant ALS are both increased. As seen in WA, when an ALS cannot respond to this workload effectively, it leads to frustration by police and ultimately non-compliance.

When funding is provided, however, the service seems to be a success. In NSW, the establishment of a specialised CNS has seen Aboriginal and Torres Strait Islander deaths in custody decrease, despite the Aboriginal and Torres Strait Islander population size increasing. If a statutory duty is to be placed on police, the ALSs which respond to notifications of detention must be adequately resourced to provide any practical effect. It is insufficient to require police to notify an ALS without consideration of the funding these services will receive to resource this system. As seen in NSW, when a statutory duty is established without simultaneously making funding arrangements, a burden is placed on the ALSs to campaign for funding. The ATSILS believes the effective implementation of such a proposal requires adequate resourcing made possible through appropriate funding.¹⁰³

¹⁰³ Franklin, above n 64, 1.

V AN EQUIVALENT SERVICE

This section of the research paper will critically examine best practices in providing legal services to Aboriginal and Torres Strait Islander peoples. It finds a key issue in access to justice for Aboriginal and Torres Strait Islander women and children, and a current gap in Australia's legal landscape for organisations to address these specific needs.

It is well recognised that Aboriginal and Torres Strait Islander people are the most socially and economically disadvantaged members of the Australian community.¹⁰⁴ The Aboriginal and Torres Strait Islander community have broad and numerous legal needs which can only be address through culturally sensitive legal assistance of high quality.¹⁰⁵ Although Aboriginal and Torres Strait Islander people can access general community legal services, they are less likely to do so. A number of factors contribute to the underuse of mainstream providers, such as distrust of the legal system, language barriers and a perceived lack of cultural awareness.¹⁰⁶ The social exclusion of Aboriginal and Torres Strait Islander people, arising out of historical dispossession and exclusion, as well as persisting Aboriginal and Torres Strait Islander values and practices, means that culturally appropriate organisations play an important role in assisting Aboriginal and Torres Strait Islander people navigate the mainstream legal system.¹⁰⁷

A *Women*

The intersectionality of disadvantage suffered by Aboriginal and Torres Strait Islander women due to a combination of gender and race makes them the most legally disadvantaged group in Australia.¹⁰⁸ This is of further significance when considered in the context of

¹⁰⁴ Senate Standing Committee on Legal and Constitutional Affairs, Commonwealth of Australia, *Access to Justice* (2009) 137.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ David Martin, 'Rethinking Aboriginal Community Governance' in Tim Reddel and Andrew Jones Paul Smyth (ed), *Community and Local Governance in Australia* (UNSW Press, 2005), 123.

¹⁰⁸ Senate Standing Committee on Legal and Constitutional Affairs, above n 104, [8.120]

increasing incarceration rates of Aboriginal and Torres Strait Islander women. In 1996 Aboriginal and Torres Strait Islander women accounted for 21% of all women prisoners.¹⁰⁹ By 2012, despite only accounting for 2.2% of the Australian population of women, Aboriginal and Torres Strait Islander women accounted for 34% of women prisoners.¹¹⁰ The intersection of race and gender needs particular to Aboriginal and Torres Strait Islander women must be considered when notifying an ALS.

Gender-specific services that are familiar with the cycles of abuse and offending in Aboriginal and Torres Strait Islander communities may be helpful in countervailing this intersectional disadvantage. The NSW Aboriginal Justice Advisory Council reported in 2001 that at least 80 per cent of Aboriginal women linked previous experiences of abuse indirectly to their offending.¹¹¹ This is an important factor to consider when examining situations involving Aboriginal and Torres Strait Islander women coming into police custody. With the incarceration rates of Aboriginal and Torres Strait Islander women increasing, ALSs are facing unexpected difficulties in providing legal advice to Australia's most vulnerable group. It is especially problematic when ALSs may be representing their partners in a family violence matter. Although intended to service the needs of all Indigenous people, Aboriginal and Torres Strait Islander Legal Services do not currently respond to the needs of men and women equally.¹¹² The key issue in representing Aboriginal and Torres Strait Islander women arises due to conflicts of interest in family violence situations. Where an Aboriginal and Torres Strait Islander woman is a victim of reported family violence, often the perpetrator seeks representation from an ALS. If that woman is to later be detained by police, even in an

¹⁰⁹ Peta MacGillivray and Eileen Baldry, 'Australian Indigenous Women's Offending Patterns' (Research Paper No 19, Australian Institute of Criminology, 2015).

¹¹⁰ *Ibid* 1.

¹¹¹ Australian Law Reform Commission, above n 2, 168.

¹¹² Scott Ludlam and Chiara Lawry, 'Closing the Justice Gap for Indigenous Australians' (2010) 7(17) *Indigenous Law Bulletin* 12, 13.

unrelated matter, the ALS will be unable to assist due to conflicts of interest.¹¹³ Under Proposal 11.3, where police are required to notify an ALS of the detention of an Aboriginal and Torres Strait Islander woman, there is no assurance that the detainee will be able to benefit from that notification.

In addition to conflicts of interest disallowing some women to access support, Aboriginal and Torres Strait Islander women suffer further disadvantage in accessing legal support. The role that ALSs play in representing perpetrators often makes women feel unsafe in accessing those services.¹¹⁴ Historically, Aboriginal and Torres Strait Islander have experienced children being forcibly taken, the loss of their specific roles as custodians of culture and subjected to violence, all with express or apparent legality.¹¹⁵ In addition to this, research shows that institutional settings such as prisons contribute to re-traumatisation of Aboriginal and Torres Strait Islander women, reinforcing powerlessness and vulnerability.¹¹⁶ It is evident that, in a situation where an Aboriginal or Torres Strait Islander woman is detained by police, notification must be made to a legal service which can *appropriately* respond to their particular needs. Even general women's legal aid services often cannot provide this specialised support, as they often lack the community connection and cultural appropriateness required.¹¹⁷

B Children

In light of the increasing rates of incarceration rates of Aboriginal and Torres Strait Islander women, it is important to consider the domino effect this can have on Aboriginal and Torres Strait Islander children. It has been recognised that family dysfunction is a significant factor

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ Australian Law Reform Commission, *Equality before the law*, Inquiry No 69 (1) (1994) [5.26].

¹¹⁶ Australian Law Reform Commission, above n 2, 168.

¹¹⁷ Senate Standing Committee on Legal and Constitutional Affairs, above n 104, [8.127].

in the high rates of Aboriginal and Torres Strait Islander juvenile offenders seen across Australia.¹¹⁸ However, this is only one of many factors which contribute to the high rate of Aboriginal and Torres Strait Islander juveniles in detention.

Young Aboriginal and Torres Strait Islander offenders are less likely to receive a police caution and more likely to be referred to court.¹¹⁹ As a result, Aboriginal and Torres Strait Islander juveniles are 28 times more likely to be placed in juvenile detention than their non-Indigenous counterparts.¹²⁰ The over-policing of Aboriginal and Torres Strait Islander youth has resulted in some astounding stories of juveniles unnecessarily coming into contact with the criminal justice system. For example, once case saw a 12year old boy charged with receiving stolen goods after found in possession of a chocolate bar which is friend allegedly stole. After a misunderstanding about court dates, the young boy was taken into custody for several hours for missing his first appearance.¹²¹ With the excessive use of police power in relation to often minor offences, access to early legal advice is vital to young Aboriginal and Torres Strait Islander persons taken into police custody.

ALSs have recognised the specific needs of juveniles. One ATSILS solicitor commented that very often they are the only resource available to youth in detention, and it is then up to the lawyer to take on the role of a social worker, liaising with schools and Family and Community Services.¹²² As a result of underfunding, ALSs are often unable to provide adequate representation in the youth court jurisdiction, despite the large proportion of Aboriginal and Torres Strait Islander juveniles appearing in that division.¹²³ The Standing Committee on Aboriginal and Torres Strait Islander Affairs recognised the deficiencies in

¹¹⁸ Standing Committee on Aboriginal and Torres Strait Islander Affairs, Canberra, *Doing Time - Time for Doing: Indigenous youth in the criminal justice system* (2011) [2.24].

¹¹⁹ Ibid [7.1].

¹²⁰ Australian Human Rights Commission, 'Inquiry into Access to Justice: Australian Human Rights Commission Submission to the Senate Legal and Constitutional Affairs Committee' (2009) <<https://www.humanrights.gov.au/inquiry-access-justice-2009>>.

¹²¹ Standing Committee on Aboriginal and Torres Strait Islander Affairs, above n 118, [7.26].

¹²² Ibid [7.66].

¹²³ Ibid [7.71].

funding to ALSs, especially in relation to representation of juveniles.¹²⁴ Based on this underfunding, it is unclear if Aboriginal and Torres Strait Islander children would be best served by ALSs who lack resources, or a general legal aid service which does not provide the cultural sensitivity needed. With both options having downfalls, it is necessary to increase funding to ALSs to enable expansion of services catering to the needs of Aboriginal and Torres Strait Islander women and children. Subsequent to sufficient funding, notification to ALSs facilitate the delivery of *appropriate* legal advice to Aboriginal and Torres Strait Islander juveniles.

C Conclusion

Proposal 11.3 requires police to notify the ALS or an equivalent service. It is unclear what ‘equivalent’ means. Does it refer to another Aboriginal and Torres Strait Islander specific or a any mainstream legal aid service? To clarify the ambiguity, it is suggested that the Proposal include the phrase ‘equivalent *and appropriate*’, to ensure the needs of the every Aboriginal and Torres Strait Islander detainee are equally provided for. Alternatively, there is support for a proposal that specifically refers to legal services catering to Indigenous women and children, especially in consideration of the high conflict of interest rates.¹²⁵

¹²⁴ Ibid [7.78].

¹²⁵ Joint Committee of Public Accounts and Audits, *Access of Indigenous Australians to Law and Justice Services* (2005) 22 June 2005, [3.68].

VI CONCLUSION

This paper critically examines Proposal 11.3 of the recent Australian Law Reform Commission's discussion paper, 'Incarceration Rates of Aboriginal and Torres Strait Islander Peoples'. The Proposal recommends the nationwide implementation of a statutory duty to notify the ALS, or equivalent, upon the detention of an Aboriginal and Torres Strait Islander person.¹²⁶ The paper examines three key elements of the Proposal: the statutory duty to notify, the role of ALSs, and the adequacy of the phrase 'equivalent service'.

In regard to a statutory duty, when deaths in custody data is related to the current duties of policy, support is found for a mandatory duty. Jurisdictions with a mandatory duty saw lower rates of deaths in custody, whether the duty was contained in law or policy. Recommendation 224 of the RCIADIC also supports a mandatory duty. Despite the evidence providing support for Proposal 11.3 in reinvigorating Recommendation 224, there is also evidence to support a renewal of Recommendation 223. With endorsement of the UNDRIP, local level protocols requiring engagement with Aboriginal and Torres Strait Islander communities would appear to have a stronger evidence basis. It is unclear why the ALRC have not considered this approach in its discussion paper.

For a duty to notify to work effectively, there must be adequate resources and funding available to the ALSs which will receive these notifications. The implementation of Proposal 11.3 without consideration of funding will result in overworked ALSs receiving notifications they cannot effectively respond to. Further, it will place an added burden on the services to campaign for more funding. Without Federal and/or state governments providing a commitment to long term funding, Proposal 11.3 will have little practical effect.

¹²⁶ Australian Law Reform Commission, above n 2, 204.

Although the phrase ‘equivalent service’ was interpreted to mean an Aboriginal and Torres Strait Islander specific organisation, there is no clear definition of what an equivalent service is in the discussion paper. Further, there is the potential that these services may be inadequate in serving the needs of Aboriginal and Torres Strait Islander women and children. The intersection of gender and race that Aboriginal and Torres Strait Islander women experience is not taken into consideration in Proposal 11.3. With significantly higher rates of family violence than their non-Indigenous counterparts, Aboriginal and Torres Strait Islander women are often unable to be represented by ALSs due to conflicts of interest. In addition to conflicts of interest, Aboriginal and Torres Strait Islander women often feel unsafe seeking support from ALSs who represent perpetrators of family violence. Further, with the over-policing of Aboriginal and Torres Strait Islander children and the higher likelihood that these children will face juvenile detention, it is necessary to find a legal service which can appropriately respond to notifications. Children are particularly vulnerable and rely heavily on legal aid support, and the gross underfunding of ALSs means they are often unable to assist juveniles to the same degree that mainstream organisations can. When notifying a legal aid organisation of the detention of an Aboriginal and Torres Strait Islander woman or child, an *appropriate* service should be found that can cater to the specific needs of these women and children. This paper suggests that the inclusion of the term ‘equivalent *and appropriate* service’ would provide further protection to Australia’s most legally disadvantaged groups, which Proposal 11.3 currently does not afford.

Twenty-six years have elapsed since the RCIADIC recommended that a mandatory duty be placed on police to notify the ALS of the detention of an Aboriginal and Torres Strait Islander person. Whilst most states have adopted this recommendation in some form, WA and the NT are falling behind in their progress. This paper suggests a connection between the staggeringly high rates of deaths in custody seen in these jurisdictions and the poor enactment

of a duty to notify. It finds support for the imposition of a mandatory duty on police, whether found in statute or internal police policy. The notification must be sent to a well-funded Aboriginal and Torres Strait Islander specific legal aid organisation that is able to effectively receive and respond to these notifications. The legal aid organisation that is notified must be appropriate to the client, necessitating funding to Aboriginal and Torres Strait Islander organisations which provide catered services for women and children.

On this basis, an alternative formulation of Proposal 11.3 may be:

State and territory governments should introduce a *mandatory* custody notification service that places a duty on police to contact the Aboriginal Legal Service, or equivalent *and appropriate* service, immediately on detaining an Aboriginal and Torres Strait Islander person. *Federal and state governments should coordinate to ensure a commitment to long-term funding of Aboriginal Legal Services is made prior to the implementation of a duty, particularly to those organisations providing assistance to women and children.*

	NSW			Victoria			QLD			WA			NT			SA			ACT			Tasmania		
	ATSI	Non ATSI	Total	ATSI	Non ATSI	Total	ATSI	Non ATSI	Total	ATSI	Non ATSI	Total	ATSI	Non ATSI	Total	ATSI	Non ATSI	Total	ATSI	Non ATSI	Total	ATSI	Non ATSI	Total
2002 ¹²⁷	3	3	6	0	1	1	0	3	3	1	2	3	2	0	2							0	1	1
2003 ¹²⁸	1	7	8	0	4	4	1	6	7	4	3	7	2	0	2	0	2	2						
2004 ¹²⁹	2	7	9	0	4	4	2	5	7	1	2	3	2	0	2	0	2	2	0	1	1			
2005 ¹³⁰	1	2	3	0	5	5	1	4	5	6	0	6			0	1	1							
2006 ¹³¹	0	6	6	1	3	4	1	1	2	2	2	4	1	0	1	1	1	2	0	1	1			
2007 ¹³²	0	5	5	0	7	7	2	3	5	0	4	4	0	2	2	2	4	6						
2008 ¹³³	0	4	4	0	6	6	0	4	4	1	10	11	3	2	5	0	2	2						
2009 ¹³⁴	0	6	6	0	3	3	1	7	8	1	7	8	4	1	5	2	4	6	0	0	0	0	0	0
2010 ¹³⁵	2	3	5	0	6	6	0	6	6	2	1	3	2	2	4	0	1	1	0	1	1	0	1	1
2011 ¹³⁶	1	4	5	0	1	1	1	6	7	5	1	6	0	0	0	0	2	2	0	1	1	0	2	2
2012 ¹³⁷	0	11	11	0	3	3	0	7	7	0	5	5	2	0	2	0	3	3	0	0	0	0	0	0
2013 ¹³⁸	0	6	6	0	2	2	0	2	2	3	3	6	0	0	0	1	0	1	0	0	0	0	1	1
Total	10	64	74	1	45	46	9	54	63	26	40	66	18	7	25	6	22	28	0	4	4	0	5	5

Table 1: Number of Aboriginal and Torres Strait Islander and non-Aboriginal or Torres Strait Islander deaths in custody

¹²⁷Collins and Ali, above n 35, 42.

¹²⁸Marissa McCall, 'Deaths in Custody in Australia: 2003 National Deaths in Custody Program (NDICP) Annual Report' (Technical and Background Paper No 12, Australian Institute of Criminology, 2004) 42.

¹²⁹Jacqueline Joudo and Marissa Veld, 'Deaths in Custody in Australia: National Deaths in Custody Program Annual Report 2004' (Technical and Background Paper No 19, Australian Institute of Criminology, 2005) 34.

¹³⁰Jacqueline Joudo, 'Deaths in Custody in Australia: National Deaths in Custody Program Annual Report 2005' (Technical and Background Paper No 21, Australian Institute of Criminology 2006) 33.

¹³¹Jacqueline Joudo and Jane Curnow, 'Deaths in Custody in Australia: National Deaths in Custody Program Annual Report 2006' (Research and Public Policy No 85, Australian Institute of Criminology, 2008) 16.

¹³²Jane Curnow and Jacqueline Judo Larsen, 'Deaths in custody in Australia: National Deaths in Custody Program 2007' (Monitoring Report No 3, Australian Institute of Criminology, 2009) 28.

¹³³Jacqueline Joudo Larsen and Laura Beacroft Mathew Lyneham, 'Deaths in Custody in Australia: National Deaths in Custody Program 2008' (Monitoring Report No 10, Australian Institute of Criminology, 2010) 34.

¹³⁴Mathew Lyneham and Andy Chan, 'Deaths in custody in Australia to 30 June 2011' (Monitoring Report No 20, Australian Institute of Criminology, 2013) 83.

¹³⁵Ibid.

¹³⁶Ibid.

¹³⁷Ashleigh Baker and Tracy Cussen, 'Deaths in custody in Australia: National Deaths in Custody Program 2011–12 and 2012–13' (Monitoring Report No 26, Australian Institute of Criminology, 2015) 22.

¹³⁸Ibid.

	NSW		Victoria		QLD		WA		NT		SA		ACT		Tasmania	
	Deaths in Custody	Custody Pop. ('000)	Deaths in Custody	Custody Pop. ('000)	Deaths in Custody	Custody Pop. ('000)	Deaths in Custody	Custody Pop. ('000)	Deaths in Custody	Custody Pop. ('000)	Deaths in Custody	Custody Pop. ('000)	Deaths in Custody	Custody Pop. ('000)	Deaths in Custody	Custody Pop. ('000)
2002 ¹³⁹	3	1.357	0	.161	0	1.157	1	.887	2	.457					0	.06
2003 ¹⁴⁰	1	1.528	0	.173	1	1.254	4	1.062	2	.601	0	.266				
2004 ¹⁴¹	2	1.696	0	.166	2	1.319	1	1.3	2	.6	0	.28	0	.009		
2005 ¹⁴²	1	1.737	0	.205	1	1.374	6	1.345			0	.31				
2006 ¹⁴³	0	1.894	1	.214	1	1.504	2	1.480	1	.686	1	.306	0	.007		
2007 ¹⁴⁴	0	1.966	0	.231	2	1.395	0	1.637	0	.692	2	.394				
2008 ¹⁴⁵	0	2.077	0	.251	0	1.448	1	1.663	3	.802	0	.410				
2009 ¹⁴⁶	0	2.244	0	.281	1	1.582	1	1.95	4	.886	2	.438	0	.023	0	.06
2010 ¹⁴⁷	2	2.238	0	.283	0	1.681	2	1.776	2	.928	0	.468	0	.036	0	.073
2011 ¹⁴⁸	1	2.136	0	.306	1	1.649	5	1.846	0	1.095	0	.485	0	.038	0	.083
2012 ¹⁴⁹	0	2.235	0	.352	0	1.799	0	1.969	2	1.239	0	.485	0	.043	0	.074
2013 ¹⁵⁰	0	2.430	0	.453	0	2.107	3	1.963	0	1.321	1	.545	0	.054	0	.067
Average	0.833	1.962	0.083	0.256	0.750	1.522	2.167	1.573	1.636	0.846	0.545	0.399	0	0.030	0	0.070
Rate ¹⁵¹	0.425		0.325		0.493		1.377		1.934		1.368		0		0	

Table 2: Rate of Aboriginal and Torres Strait Islander deaths in custody per thousand Aboriginal and Torres Strait Islander people in custody

¹³⁹ Australian Bureau of Statistics, 'Corrective Services - 4512.0' (2003), 20.

¹⁴⁰ Australian Bureau of Statistics, 'Corrective Services - 4512.0' (2004), 20.

¹⁴¹ Australian Bureau of Statistics, 'Corrective Services - 4512.0' (2005), 16.

¹⁴² Australian Bureau of Statistics, 'Corrective Services - 4512.0' (2006), 17.

¹⁴³ Australian Bureau of Statistics, 'Corrective Services - 4512.0' (2007), 14.

¹⁴⁴ Australian Bureau of Statistics, 'Corrective Services - 4512.0' (2008), 20.

¹⁴⁵ Australian Bureau of Statistics, 'Corrective Services - 4512.0' (2009), 20.

¹⁴⁶ Australian Bureau of Statistics, 'Corrective Services - 4512.0' (2010), 22.

¹⁴⁷ Australian Bureau of Statistics, 'Corrective Services - 4512.0' (2011), 22.

¹⁴⁸ Australian Bureau of Statistics, 'Corrective Services - 4512.0' (2012), 23.

¹⁴⁹ Australian Bureau of Statistics, 'Corrective Services - 4512.0' (2013), 23.

¹⁵⁰ Australian Bureau of Statistics, 'Corrective Services - 4512.0' (2014), Table 13.

¹⁵¹ Rates were calculated by dividing the average number of deaths in custody from 2002 to 2013 by the average custody population ('000) during the same period.

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