

**Submission to the Expert Mechanism
on the Rights of Indigenous Peoples:
Access to Justice for Aboriginal and
Torres Strait Islander peoples in
Australia**

February, 2013



NATSILS

**NATIONAL ABORIGINAL & TORRES
STRAIT ISLANDER LEGAL SERVICES**

Table of Contents

| | | |
|-----------|--|-----------|
| 1. | About the NATSILS..... | 2 |
| 2. | Introduction | 2 |
| 3. | Over-representation in the criminal justice system | 3 |
| | 3.1 Aboriginal and Torres Strait Islander peoples | 3 |
| | 3.1.1 Mandatory Sentencing | 5 |
| | 3.1.2 Criminalisation of poverty and homelessness..... | 6 |
| | 3.1.3 Australian Government response..... | 8 |
| | 3.2 Aboriginal and Torres Strait Islander young people..... | 9 |
| | 3.2.1 Over-policing | 9 |
| | 3.2.2 Cautioning, Restorative Justice Approaches and Diversion Options..... | 10 |
| | 3.2.3 Discriminatory effect of approach to bail..... | 11 |
| | 3.2.4 Lack of non-custodial sentencing options in regional and remote areas..... | 14 |
| | 3.3 People with a mental illness or cognitive/intellectual disability..... | 15 |
| 4. | Accountability and redress for wrongdoing | 18 |
| | 4.1 Use of force and independent investigations of complaints..... | 18 |
| 5. | Access to Legal Assistance..... | 19 |
| | 5.1 Aboriginal and Torres Strait Islander legal services (ATSILS)..... | 19 |
| | 5.2 Assistance for Aboriginal and Torres Strait Islander women..... | 19 |
| | 5.3 Aboriginal and Torres Strait Islander interpreter services..... | 20 |
| 6. | Detention..... | 22 |
| | 6.1 Limits on detention..... | 22 |
| | 6.2 Conditions in detention..... | 23 |
| | 6.2.1 Overcrowding in prisons, detention centres and police lock ups | 23 |
| | 6.2.2 Provision of health services in places of detention | 25 |
| | 6.2.3 Australia’s youth detention centres | 26 |
| | 6.2.4 The Right to be Separated from Adults whilst in Detention | 29 |
| 7. | Conclusion..... | 29 |

1. About the NATSILS

The National Aboriginal and Torres Strait Islander Legal Services (NATSILS) is the peak national body for Aboriginal and Torres Strait Islander Legal Services in Australia. The NATSILS have almost 40 years' on the ground 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. The NATSILS are the experts on justice issues affecting and concerning Aboriginal and Torres Strait Islander peoples. The NATSILS represent the following Aboriginal and Torres Strait Islander Legal Services (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 (Inc.) (ALSWA);
- Central Australian Aboriginal Legal Aid Service (CAALAS);
- North Australian Aboriginal Justice Agency (NAAJA); and
- Victorian Aboriginal Legal Service Co-operative Limited (VALS).

2. Introduction

In September 2012 the Human Rights Council requested the Expert Mechanism on the Rights of Indigenous Peoples (Expert Mechanism) to undertake a study into access to justice in the protection and promotion of the rights of indigenous peoples. The NATSILS would like to make this submission in response to the Expert Mechanism's subsequent call for submissions from indigenous individuals and peoples and/or their representatives, non-state actors including non-governmental organisations, national human rights institutions, and other relevant stakeholders.

Aboriginal and Torres Strait Islander peoples are the most disadvantaged peoples in Australia and as such, face multiple and serious access to justice issues. Most commonly however, access to justice issues centre around Aboriginal and Torres Strait Islander peoples' contact with the criminal justice system. Our submission below aims to provide further analysis and discussion of these issues.

3. Over-representation in the criminal justice system

Over-representation of Indigenous people in criminal justice systems has been recognised as a global issue.¹ This section outlines the underlying causes of such in Australia.

3.1 Aboriginal and Torres Strait Islander peoples

The over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system is the most significant access to justice issue in Australia. Aboriginal and Torres Strait Islander peoples are chronically over-represented in the criminal justice system. Aboriginal and Torres Strait Islander peoples are incarcerated at a rate 14 times higher than non-Aboriginal and Torres Strait Islander peoples, a rate which has increased from 2000 – 2010 by almost 59 per cent for Aboriginal and Torres Strait Islander women and 35 per cent for Aboriginal and Torres Strait Islander men.² Aboriginal and Torres Strait Islander children are 22 times more likely to be in detention than non-Aboriginal and Torres Strait Islander children,³ a situation which has been deemed a ‘national crisis’ by the Australian House of Representatives inquiry into Aboriginal and Torres Strait Islander youth and the criminal justice system.⁴

The over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system has been directly linked to the broader issues of social and economic disadvantage which Aboriginal and Torres Strait Islander peoples experience at a disproportionate rate.⁵ These include:

- High levels of poverty;
- poor education outcomes;
- high rates of unemployment;
- high levels of drug and alcohol abuse;
- high rates of mental illness;
- over-crowded housing and high rates of homelessness;
- over-representation in the child protection system;⁶

¹Expert Seminar On Access To Justice For Indigenous Peoples Including Truth And Reconciliation Processes Concept Note (2012) 1.

²Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage Key Indicators 2011*(2011) 4.12.1.

³ Australian Institute of Criminology, *Australian Crime: Facts and figures* (2009), 113.

⁴House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing* (2011), 2.4.

⁵ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing* (2011), 2.4

⁶ Stewart, A, *Transitions and Turning Points: Examining the Links Between Child Maltreatment and Juvenile Offending* (2005) at

<www.ocsar.sa.gov.au/docs/other_publications/papers/AS.pdf>. Stewart found that in Queensland 54 per cent of Aboriginal and Torres Strait Islander males, and 29 per cent of Aboriginal and Torres Strait Islander females, involved in the child protection system go on to criminally offend.

- high levels of family dysfunction; and
- a loss of connection to community and culture.⁷

A recent study examined the substantial rise in the Aboriginal and Torres Strait Islander imprisonment rate between 2001 and 2008⁸ and noted that there had not been a corresponding rise in the conviction rate for Aboriginal and Torres Strait Islander peoples over this period.⁹ As a result, it concluded that “the substantial increase in the number of Indigenous people in prison is mainly due to changes in the criminal justice system’s response to offending rather than changes in offending itself.”¹⁰ While the above factors relate to the underlying causes of offending, when it comes to imprisonment, Aboriginal and Torres Strait Islander peoples are imprisoned more often than non-Aboriginal and Torres Strait Islander people because they are disproportionately affected by the increasingly rigid approach to offending as described above which is associated with:

- an increasingly rigid approach to bail which, in particular, has had a discriminatory effect on Aboriginal and Torres Strait Islander young people and caused in increase in the amount of Aboriginal and Torres Strait Islander young people on remand;
- the spread of mandatory sentencing and other punitive laws which have disproportionately affected Aboriginal and Torres Strait Islander peoples in the Northern Territory and Western Australia ; and
- significant numbers of Aboriginal and Torres Strait Islander peoples in regional and remote areas being sentenced to imprisonment unnecessarily due to a lack of access to non-custodial sentencing options in these areas.

Through our experience on the ground the NATSILS have also identified the following as additional also factors which critically contribute to the over-representation of Aboriginal and Torres Strait Islander people in Australia’s prisons:

- conflicting practices under customary law and Australian law; and
- discriminatory legislative requirements in some jurisdictions that issues of Aboriginal cultural significance and customary law cannot be considered by criminal courts in sentencing.

⁷ Standing Committee on Aboriginal and Torres Strait Islander Affairs, above n 26, 12-13.

⁸ Between 2000 and 2008, the imprisonment rate for Aboriginal and Torres Strait Islander peoples increased by 34.5 percent, an increase almost seven times that of non-Aboriginal and Torres Strait Islander people in the same period. See Australian Bureau of Statistics (ABS) 2008. *Prisoners in Australia*. ABS cat.no. 4517.0. Canberra: ABS.

⁹ Fitzgerald, J, ‘Why are Indigenous Imprisonment Rates Rising?’ (2009) *NSW Bureau of Crime Statistics and Research Crime and Justice Statistics Issue Paper no. 41*, 6.

¹⁰ Ibid.

Below is further information as to specific policies which either directly or indirectly discriminate against Aboriginal and Torres Strait Islander peoples and contribute to their over-representation in the criminal justice system.

3.1.1 Mandatory Sentencing

One reason why Aboriginal and Torres Strait Islander peoples are imprisoned more often than non-Aboriginal and Torres Strait Islander peoples is that they are disproportionately affected by an increasingly rigid approach to offending.

The Northern Territory and Western Australia have had mandatory sentencing laws for some years and Victoria has recently announced plans to introduce statutory minimum sentencing laws for adults and young people aged 16-17 and adults who commit the yet to be defined offence of “gross violence”. Northern Territory legislation mandates that people convicted of sexual offences, certain violent offences and aggravated property offences must serve a term of actual imprisonment.¹¹ Additionally, adults and young people convicted of a second or subsequent breach of a Domestic Violence Order that involves harm to the protected person are required by legislation to serve at least seven days imprisonment or detention unless the court is satisfied it is inappropriate.¹² Just recently, the Northern Territory has also passed a significant suite of additional laws and amendments to further increase mandatory sentencing.

Western Australia has two types of mandatory sentencing laws. Adults and young people convicted of a home burglary must be sentenced to a minimum of 12 months imprisonment or detention if they have been convicted of two or more previous home burglaries.¹³ Additionally, adults, and young people between the ages of 16 and 18 years, who are convicted of an assault on police or other public officers, causing either bodily harm or grievous bodily harm, must be sentenced to a mandatory term of imprisonment or detention ranging from 3 to 12 months.¹⁴ Furthermore, Western Australia has recently announced a proposed extension to its mandatory sentencing laws by introducing legislation requiring a mandatory term of imprisonment for adults and young people who breach a Violence Restraining Order for a third time.¹⁵

Mandatory sentencing laws are arbitrary, often disproportionate to the crime and do not allow regard for the circumstances of the particular offence or offender.¹⁶ Furthermore, mandatory sentencing has been shown to be costly, ineffective in deterring criminal activity, increase the likelihood of reoffending and breach Australia’s human rights obligations. The NATSILS consider it essential to an effective criminal justice system that a decision maker be allowed to take into account an offender’s unique circumstances, and have the full host of sentencing

¹¹ *Sentencing Act* (NT) ss 78B, 78BA and 78BB.

¹² *Domestic and Family Violence Act* (NT) ss 121, 122.

¹³ *Criminal Code 1913* (WA) s401(4).

¹⁴ *Criminal Code 1913* (WA) s297, s318.

¹⁵ See <http://au.news.yahoo.com/thewest/a/-/breaking/9669122/warning-on-restraint-order-changes/>.

¹⁶ Australian Human Rights Commission, *Mandatory Detention Laws in Australia* (2009) at http://www.hreoc.gov.au/human_rights/children/mandatory_briefing.html.

options available when applying sentencing principles of general and specific deterrence and rehabilitation, and subsequently, when making a decision as to sentence.

Furthermore, as a result of the elevated contact of Aboriginal and Torres Strait Islander peoples with the criminal justice system, mandatory sentencing disproportionately affects Aboriginal and Torres Strait Islander peoples, resulting in greater Aboriginal and Torres Strait Islander incarceration rates. Importantly, mandatory sentencing laws breach Australia's obligations under international law.¹⁷

The Government has constitutional power to override mandatory sentencing laws but has explicitly chosen not to do so.¹⁸

3.1.2 Criminalisation of poverty and homelessness

In recent times, Australian governments have increasingly widened the scope of criminalised behaviours relating to the use and regulation of public space. The increasing criminalisation of public space offences, including begging and public drunkenness/consumption of alcohol, effectively criminalises poverty and homelessness. Australia's superior courts have recognised that the criminalisation of public space offences should not be used as a 'punishment for poverty'.¹⁹ However, according to the United Nations' Special Rapporteur on Adequate Housing, Miloon Kothari (Special Rapporteur):

In every urban centre in Australia, laws now exist which either criminalize essential human activities, such as sleeping, or create 'move on' powers that authorize policing authorities to continuously displace people who occupy and live in public spaces. Enforcement of public space laws criminalizes the homeless and may violate civil rights, including the right to be free from inhuman or degrading treatment or punishment. These regulations do not provide people living in public places and who are threatened with eviction the procedural or substantive rights recognized under international laws regarding forced evictions, and therefore may also violate the right to adequate housing.²⁰

The Special Rapporteur's comments reiterate that begging and other public space offences can, and do, act to criminalise poverty and homelessness. Given the high levels of poverty, overcrowded housing and homelessness experienced by Aboriginal

¹⁷*International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, I-14668, [arts 9, 10, 14, 24, 26 and 50] (entry into force 23 March 1976); *Convention on the Rights of the Child*, opened for signature 20 November 1989, I-127531, [arts 2, 3, 4 and 40] (entry into force 2 September 1990).

¹⁸ Human Rights and Equal Opportunity Commission, *Mandatory Sentencing laws in the Northern Territory and Western Australia* (2000), 1.

¹⁹ *Zanetti v Hill* [1962] HCA 62; (1962) 108 CLR 433, 442; *Moore v Moulds* (1981) The Queensland Lawyer 227, 230. See also Tamara Walsh, 'Offensive language, offensive behaviour and public nuisance: Empirical and theoretical analyses' [2005] University of Queensland Law Journal 5.

²⁰ Miloon Kothari, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari – Mission to Australia (11 May 2007) UN Doc No A/HRC/4/18/Add.2, para 47.

and Torres Strait Islander peoples,²¹ the NATSILS are concerned that such policies disproportionately affect Aboriginal and Torres Strait Islander peoples.

One reason cited for retaining the offence of begging is the annoyance that those who beg reportedly cause to members of the general public.²² However, the relevant legal question is whether the kind of 'harm' occasioned by individual members of society is severe or sufficient enough to attract the attention of the criminal law.²³ The NATSILS believe that there is no justification for criminalising annoying or so-called 'antisocial' behaviour. The most appropriate way to remedy the situation is clearly to meet the needs of the person begging in order to eliminate their need to beg in the first place. In a society which tolerates poverty, visible evidence of it must also be tolerated.²⁴

Recent Australian case law acknowledges the inappropriateness of criminalising an act which is symptomatic of both poverty and homelessness.

In *Parry v Denman* (Unreported, District Court, Queensland (Cairns), Appeal No 11 of 1997, 23 May 1997) the defendant was charged with begging and was sentenced to six weeks imprisonment. On appeal, Justice White held that the fact the appellant was a source of constant nuisance to the court and the community was not sufficient justification for a penalty of this nature to be imposed. Justice White stated that it should not be a criminal offence to be poor, and that 'one has to consider that a more useful approach from the community's point of view would be to effect some treatment of underlying causes of the begging'.²⁵

And

In *R v Mills* (Unreported, Magistrates' Court (Melbourne), 14 December 2001) the Victorian Magistrate's Court dismissed fines for public space offences imposed on an elderly homeless man who suffered from an acquired brain injury. The Court imposed a condition that the defendant comply with a case management plan which would enable the defendant to obtain stable accommodation and aged care support. In sentencing,

²¹ Approximately 40 per cent of Aboriginal and Torres Strait Islander peoples living in major cities, outer regional, remote and very remote areas of Australia live below the poverty line and this rate increases to over 50 per cent in inner regional areas (B. Hunter, *Assessing the evidence on Indigenous socioeconomic outcomes: A focus on the 2002 NATSISS* (2006) 100); The Steering Committee for the Review of Government Service Provision in its *Overcoming Indigenous Disadvantage: Key Indicators 2009 Overview* found that Aboriginal and Torres Strait Islander peoples are five times more likely to live in overcrowded households than non-Aboriginal and Torres Strait Islander people (p.49).

²² Robert C. Ellickson, 'Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows and Public Space Zoning' (1996) *Yale Law Journal* 1165.

²³ Jeremy Waldron, 'Homelessness and Community' (2000) 50 *University of Toronto Law Journal* 371, 379-80.

²⁴ *Ibid* 386-7; Maria Foscarinis, 'Downward spiral: Homelessness and its criminalisation' (1996) 14 *Yale Law and Policy Review* 1, 55-56; DM Smith 'A Theoretical and Legal Challenge to Homeless Criminalisation as Public Policy' (1994) 12 *Yale Law and Policy Review* 487, 496-7.

²⁵ PILCH, *We Want Change! Calling for the abolition of the criminal offence of begging* (2010) 10.

the Court stated that ‘there is great force to the argument that the community should accept responsibility for people in the offender’s position’.²⁶

3.1.3 Australian Government response

The Government’s overall approach to Aboriginal and Torres Strait Islander disadvantage is the Closing the Gap initiative²⁷. Within this initiative is a set of Building Blocks targeted at different areas of disadvantage, such as education and health for example. The ‘Safe Communities’ Building Block is the only building block that relates to justice and the relationship between Aboriginal and Torres Strait Islander peoples and the criminal justice system. Despite well recognised need, there is no target within this Building Block relating to reform in the justice system to address the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system. Also, unlike all the other Building Blocks under Closing the Gap, the Safe Communities Building Block lacks a National Partnership Agreement (NPA) to facilitate implementation.

In their recent report, *Doing Time – Time for Doing*, the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs stated that they do not accept the view that investment in education, health, housing and employment initiatives, as outlined in the other Closing the Gap Building Blocks, will be sufficient to close the gap in Aboriginal and Torres Strait Islander justice outcomes.²⁸ They further stated that the most effective means of focusing activity on the Safe Communities Building Block and for supporting activity under the other building blocks is through the development of a NPA dedicated to improving Aboriginal and Torres Strait Islander justice and community safety outcomes.²⁹

Previously the Government had developed the National Indigenous Law and Justice Framework (NILJF),³⁰ as a means to address the disproportionate level of contact between Aboriginal and Torres Strait Islander peoples and the criminal justice system. However, this Framework has never had any resources attached to it and does not require Australian governments to take any specific actions. While the NILJF could be very useful, until it becomes binding and resources are allocated to its implementation it is unlikely to make any inroads in addressing Aboriginal and Torres Strait Islander law and justice issues.

In order to effectively address the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system a coordinated whole of government approach is needed that will not only address underlying causes of offending but also those policies which directly and indirectly discriminate against Aboriginal and Torres Strait Islander peoples and contribute high incarceration rates.

²⁶ PILCH, *We Want Change! Calling for the abolition of the criminal offence of begging* (2010) 10.

²⁷ See <http://www.fahcsia.gov.au/sa/indigenous/progserv/ctg/Pages/default.aspx>.

²⁸ Standing Committee on Aboriginal and Torres Strait Islander Affairs, above n 26, 39.

²⁹ Ibid.

³⁰ Ibid 25.

3.2 Aboriginal and Torres Strait Islander young people

Aboriginal and Torres Strait Islander young people remain significantly over-represented in the criminal justice system. While rates of non-Aboriginal and Torres Strait Islander young people in detention have decreased, rates of Aboriginal and Torres Strait Islander young people in detention continue to increase.³¹ Aboriginal and Torres Strait Islander young people comprise 54 per cent of all young people in detention, despite comprising only 5 per cent of the 10-17 year old age group, and are detained at a rate 26 times higher than that of non-Aboriginal and Torres Strait Islander young people.³² There are a number of causal factors related to this over-representation.

In the recent Senate Committee report 'Doing Time – Time for Doing' the over-representation of Aboriginal and Torres Strait Islander young people in the criminal justice system has been linked to the same broader issues of social and economic disadvantage as outlined above in section 3.

In addition to these, through their experience on the ground the NATSILS have also identified the following as critical factors that contribute to the over-representation of Aboriginal and Torres Strait Islander young people in the criminal justice system:

- over-policing and poor utilisation of diversionary schemes by police;
- absence of crisis care accommodation, bail hostels and rehabilitation programs;
- limited access to legal advice;
- mandatory sentencing and other punitive laws; and
- Aboriginal and Torres Strait Islander young people being remanded in custody at higher rates.

3.2.1 Over-policing

Due to their public presence, it is generally accepted that young people are over-policed particularly if they have mental health issues, are homeless or are dark-skinned.³³ There are a number of laws within Australia which discriminate against Aboriginal and Torres Strait Islander young people. For example, a range of public space 'move on' laws across Australia are discriminatory as they disproportionately affect Aboriginal and Torres Strait Islander young people who are highly visible in public space as it is used as cultural space and used for congregation and socialisation as well as living space due to high levels of homelessness and low levels of property ownership. Also, these laws are implemented by police at disproportionate rates against young people. The Committee has raised concerns

³¹ Standing Committee on Aboriginal and Torres Strait Islander Affairs, above n 3, 8-9.

³² Australian Institute of Criminology, *Australian Crime: Facts and Figures* (2009), 113.

³³ National Crime Prevention Attorney General's Department, *Hanging out: Negotiating Young People's Use of Public Space* (1999) at

[http://www.ag.gov.au/agd/www/rwpattach.nsf/viewasattachmentPersonal/\(E24C1D4325451B61DE7F4F2B1E155715\)?no7_summary.pdf/\\$file/no7_summary.pdf](http://www.ag.gov.au/agd/www/rwpattach.nsf/viewasattachmentPersonal/(E24C1D4325451B61DE7F4F2B1E155715)?no7_summary.pdf/$file/no7_summary.pdf); Grosman, M and Sharples, J, *Don't Go There: Young People's Perspectives on Safety and Community Policing* (2010) at <http://www.vu.edu.au/sites/default/files/mcd/pdfs/dont-go-there-study-may-2010.pdf>.

about these laws in the past and despite ongoing domestic lobbying efforts, they continue to remain in place.³⁴ There is considerable evidence to show that move-on powers are used disproportionately against Aboriginal and Torres Strait Islander young people.³⁵ A survey of young people conducted in Queensland following the expansion of move on powers highlighted police practices such as a failure to inform young people of the nature or details of their move on notice (including its duration and what constitutes a breach) and disproportionate use of the powers against Aboriginal and Torres Strait Islander young people.³⁶

3.2.2 Cautioning, Restorative Justice Approaches and Diversion Options

There is evidence to suggest that while police cautioning and restorative justice measures have been successful in diverting young people from the criminal justice system, Aboriginal and Torres Strait Islander young people are often not afforded access to, or the benefits of, these and other diversionary measures.³⁷ While there are a range of diversionary options provided for in the legislation of each State and Territory, there is major concern surrounding the underutilisation of these options by police, particularly in relation to Aboriginal and Torres Strait Islander young people. For example, Aboriginal and Torres Strait Islander young people in Western Australia receive only 28 per cent of all cautions issued by police but represented 80 per cent of the total population of in young people in detention. Also, 80 per cent of non-Aboriginal and Torres Strait Islander young people are diverted whereas only 55 per cent of Aboriginal and Torres Strait Islander young people are diverted.³⁸

The following cases demonstrate an emerging pattern of police preferring to lock up Aboriginal and Torres Strait Islander young people for minor offences rather than divert them from the criminal justice system.

Case Studies: Locking Up Our Young people For Minor Offences

A 15 year old boy from Onslow was charged with attempting to steal a \$2.05 ice cream, where the offence could have been the subject of diversion or a Juvenile Justice Team referral. The boy was arrested by police, refused police bail, remanded in custody by a court, transported to a youth detention centre in Perth and then spent 10 days in custody prior to his matter being dealt with in Perth Children's Court. The charge was dealt with by way of a dismissal on the basis that the boy had already been punished as a consequence of the time spent in pre-sentence detention.

³⁴ Committee on the Rights of the Child, above n 2, [73 (e), 74 (h)].

³⁵ NSW Ombudsman, *Policing Public Safety* (1999) at <http://www.ombo.nsw.gov.au/publication/PDF/Other%20Reports/PPS%20Report-part%201.pdf>

³⁶ Paul Spooner, 'Moving in the wrong direction' (2011) *Youth Studies Australia*, vol. 20 no. 1, 29-30 in Youthlaw, *Position Paper: Police Powers in Victoria* (2011).

³⁷ Richards, K, 'Trends in Juvenile Detention in Australia' (2011) *Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice no.416*, 6.

³⁸ The Hon Dennis Mahony AO QC Special Inquirer, *Inquiry into the Management of Offenders in Custody and in the Community*(2005), 341

A 16 year old boy from Kalgoorlie attempted to commit suicide by throwing himself in front of a moving vehicle. The attempt was unsuccessful. The police were called and arrested the boy. The boy was charged with damaging the vehicle. At the time of the attempt the boy had a visible scar on his neck from a previous attempted suicide when he tried to slash his throat with a knife. The charge was later withdrawn after numerous representations to police were made by ALSWA.

An 11 year old girl, with no prior contact with the justice system, was charged with threats to harm following an incident at her primary school where she allegedly threatened her teachers whilst holding plastic scissors. The girl was arrested by police at her school, sprayed with capsicum spray, hosed down with cold water in the yard of her school after the capsicum spray was administered and then transported in police custody, without notifying her family, to a Perth police station. The case was not dealt with by way of either a police caution or a referral by police to a Juvenile Justice Team, but instead proceeded by way of a formal prosecution. The girl was ultimately found not guilty by a Magistrate at a defended hearing.

A 13 year old boy from Wyndham was throwing water balloons at his friends. A water balloon was thrown through the open window of a passing car. The balloon burst on impact inside the car. A rear seat passenger was covered in water. It was not suggested that the passenger was injured or that the driver's capacity to control the car was affected. The boy was charged with common assault. Repeated representations to police to withdraw the charge, effectively endorsed by the local Magistrate, have failed. The charge will be the subject of a defended hearing.

A 12 year-old boy faced the Children's Court in Northam on 16 November 2009 charged with receiving a stolen Freddo Frog chocolate bar, allegedly stolen by his friend. The Freddo Frog cost 70 cents. The boy had no prior convictions and faced a further charge involving the receipt of a stolen novelty sign from another store, which read, "Do not enter, genius at work". The boy missed the first court appearance due to a misunderstanding about Court dates and was then apprehended by police at 8.00am on a school day and taken into custody where he was imprisoned for several hours.³⁹ When the boy appeared before Justices of the Peace, after spending most of the day in the police lock-up, he was released to bail with conditions that he remain at his home between the hours of 7.00pm and 7.00am and that he not attend the central business district of Northam except in the company of his mother or older brother. The charges were eventually withdrawn and costs awarded to the boy, despite police defending their actions as "technically correct". ALSWA maintained the charges were scandalous and would not have occurred if the boy had come from a middle-class non-Aboriginal or Torres Strait Islander family.

3.2.3 Discriminatory effect of approach to bail

Recent changes increasing the onerous nature of bail conditions has also elevated the risk of young people either being denied bail because they cannot meet the requirements, or being remanded in detention for conditional or technical breaches of bail. As a result of some of the broader social and economic disadvantages faced by Aboriginal and Torres Strait Islander peoples, as described above, changes to bail laws disproportionately impact upon and therefore, indirectly discriminate against Aboriginal and Torres Strait Islander young people. For example, it is the NATSILS' experience that Aboriginal and Torres Strait Islander young people are often being

³⁹Farouque, F, 'Stolen Freddo: boy, 12, charged', *The Age*, November 16 2009 at <http://www.theage.com.au/national/stolen-freddo-boy-12-charged-20091115-igec.html>.

denied bail because they lack access to appropriate accommodation or due to family dysfunction, a responsible adult to whom they can be bailed. As a result, it is also the NATSILS' experience that many young people will choose to enter a plea of guilty simply to finalise their court matters quickly and avoid lengthy periods detained on remand.

The following case studies show how social and economic factors can both restrict Aboriginal and Torres Strait Islander young people's access to bail and make it difficult for them to comply with bail conditions once bail is granted, resulting in extended periods being spent detained on remand:

Case Study: Family Dysfunction and Bail

A 17 year old Aboriginal boy was arrested early on a Saturday morning in July 2010 in Karratha for breach of bail in relation to breaches of a conditional release order and a trespass charge. He was remanded in custody to the following Tuesday. On that Tuesday he was granted bail in relation to the charges on which he was arrested and other fresh charges. However, no responsible adult could be located until Wednesday and the boy therefore spent five days in the police lockup.

A 12 year old Aboriginal boy spent nine days in isolation in May 2011 in a police lockup designed for adult offenders in a small regional town in the Kimberley. No responsible adult could be found nor a bail hostel arranged for the boy to be released under supervision. The boy had been charged for burglary offences, later released and then remanded in custody by a Justice of the Peace after breaching a court-imposed curfew. He was remanded in custody while Juvenile Justice staff attempted to contact a responsible adult. He was eventually flown down to a youth remand centre in Perth, sentenced for the burglaries, and then flown back to the small town.

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. The boy was in custody for breaching bail conditions arising from a stealing charge. The boy had been trying to run away at night from the remote community where he was located. There was no responsible adult available for the boy. The boy 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 the boy was 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, the boy was driven by police to Mt Barnett after five days in police custody, after the floods had subsided.

In November 2010 a 14 year old Aboriginal boy from Geraldton spent an excessive period of 29 days in custody despite his young age and lack of criminal record. The boy had a lack of adult supervision or support which contributed to his offending and time in custody. Despite having an open file with the Department of Child Protection (DCP), no DCP case worker ever attended court as a responsible adult on upward of nine court appearances. The boy spent 29 days in custody before the matters were dealt with by way of no further punishment due to time spent in custody. Essentially, it would appear that the boy was subjected to excessive periods in detention for welfare, rather than criminal justice purposes.

A worrying pattern has also emerged whereby strict bail conditions of Aboriginal and Torres Strait Islander young people are being 'over-policed' in some communities. For example:

Case Study: Over-Policing of Bail

A 15 year old Aboriginal boy from Geraldton was released on bail to reside at his girlfriend's house as he had no suitable family with whom to stay in May 2009. His bail conditions included a curfew between 7.00pm and 7.00am that required him to present at the front door when requested by police. The police attended the address at different times every day, usually after midnight to confirm his compliance with his curfew. On one occasion, the police attended at his address in Geraldton at 4:30am. No one responded to police knocks as the household was asleep. Inside at the time was a responsible adult, the boy, his girlfriend and two other younger, primary school aged children. Two days later police attended the address at 9.00am and arrested the boy for breaching his curfew. He was held in custody until he appeared in court at midday. ALSWA submitted in court that given the natural state of deep sleep experienced at 4.30am, it is to be expected that no one was awakened by police knocks. ALSWA submitted it was unfair to charge the boy because no one answered the front door. The Magistrate agreed and stated if people were asleep in the house it hardly constituted a breach.

A 14 year old Aboriginal boy from Geraldton spent an unnecessary night in custody in May 2010 for associating with a boy whom the police wrongfully believed he was precluded from associating with as a result of bail conditions. The boy was on bail for a number of offences. At varying times, he was subject to a myriad of bail conditions imposed under different bail undertakings for the different charges. He had been bailed by both police and a Magistrate at different times on different charges. One condition of bail imposed by the Magistrate precluded the boy from contacting his co-accused. The boy pleaded guilty to all the charges and his matters were adjourned for a pre-sentence report. During this period of adjournment, police sought to revoke his bail stating he had been seen (not by the police) breaching his bail by talking to a person included in the non-association bail condition. The boy was arrested and questioned by police for the alleged breach of bail and spent one night in police custody. The boy instructed ALSWA he had not spoken to the person police alleged he had been speaking with. It became apparent the person whom police alleged he had spoken with had never been the subject of a non-association condition of the boy's bail.

In instances where Aboriginal and Torres Strait Islander young people are granted bail, cultural obligations can sometimes make the onerous conditions difficult to abide by and can thus, increase the risk of young people breaching those conditions and being taken into custody. The following is a case study example:

Case Study: Cultural Obligations vs. Strict Bail Conditions

Sam has been charged with unlawful entry, criminal damage and stealing from an incident which occurred at night time involving a group of young people breaking into the Sports Store and stealing sporting goods.

Sam was placed on bail which involved curfew and residential conditions. Sam's matter was mentioned in court and adjourned to allow Sam's lawyer to write representations for the charges to be amended.

In the meantime, a death occurred in Sam's immediate family. According to traditional custom, Sam's family had to vacate the house in which they lived and reside at an alternative location. The police breached Sam's bail because he was not residing at the prescribed address. Sam spent the morning in custody before being bailed to an alternative address.

The police continually checked on Sam throughout the night, irrespective of the fact that his family was going through Sorry Business.

One week later the end of the football season arrived and Sam decided to attend a party and celebrate with his friends. Sam was again breached and spent time in custody for not complying with his curfew bail condition.

Sam's family decided to move him to a remote community where some family lived, due to this trouble with the police. There was no High School on the community so Sam stopped attending school for a period of time. Three weeks later, facts had been agreed upon and Sam's matter was before the court. Sam received a without conviction good behavior bond for the offending.

The discriminatory effect of bail laws in Australia in relation to Aboriginal and Torres Strait Islander young people has resulted in a substantial increase in the proportion of juveniles in detention on remand. For example, the proportion of Aboriginal and Torres Strait Islander young people in detention on remand increased from 32.9 per cent in 1994 to 55.1 per cent in 2008.⁴⁰ The widespread and increasing use of remand is inconsistent with article 37 (b) of the *Convention on the Rights of the Child* and the right to detention as a last resort.⁴¹ It is also not proportional to the level of offending as only a small proportion of remand episodes result in the young person being convicted and sentenced to a custodial order.⁴²

3.2.4 Lack of non-custodial sentencing options in regional and remote areas

There is a stark lack of non-custodial sentencing options in regional and remote areas of Australia which disproportionately affects Aboriginal and Torres Strait Islander young people and is inconsistent with the principle of detention as a last resort. More specifically, there is a lack of community based projects available and high levels of disadvantage can often rule out home detention as an option for many Aboriginal and Torres Strait Islander young peoples. The remoteness of some communities can also reduce eligibility for, and the effectiveness of, supervision orders and has led some to say that this results in "justice by geography". Imprisoning offenders because of a lack of non-custodial options is expensive and counter-productive. It discriminates between regional and metropolitan residents,

⁴⁰ Richards, K, 'Trends in Juvenile Detention in Australia' (2011) *Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice no.416*, 4.

⁴¹ *Ibid* 5.

⁴² Mazerolle, P and Sanderson, J, 'Understanding Remand in the Juvenile Justice System in Queensland' (2008) *Griffith University*, 10.

and has the consequence that the former are more likely to go to prison.⁴³ In Western Australia, Chief Justice Martin has observed that

The judges and magistrates sentencing Aboriginal offenders in regional Western Australia commonly have no practical alternative to a custodial sentence because of the unavailability of non-custodial programmes, and limited availability of non-custodial supervision. Imprisoning offenders because of a lack of non-custodial options is expensive and counter-productive. It discriminates between regional and metropolitan residents, and has the consequence that the former are more likely to go to prison.⁴⁴

These issues were also recently highlighted by Magistrate Oliver from the Northern Territory in testimony before the House of Representatives 'Inquiry into the high level of involvement of Indigenous juveniles and young adults in the criminal justice system.' Her Honour stated:

I mentioned before that I am going to Borroloola next week. Last time I was out there, a month ago, there were no community projects. That is the case across many, many communities. Community work is not available. Home detention is not a viable option, sometimes because of overcrowding in the house or the sort of conduct that is being engaged in by other people who are living in the house. There are no surveillance officers available to go and check on people who have been ordered to serve home detention. So the sentencing dispositions are very limited.⁴⁵

Her Honour concluded by saying "the other thing I would note about rehabilitation is that it is basically only available in the major centres."⁴⁶ A lack of alcohol, drug and substance abuse facilities outside of major centres also often means that offenders from outside these areas cannot access these services as part of their sentence.

3.3 People with a mental illness or cognitive/intellectual disability

In Australia there is a failure of the justice system to deal with the mental illness and/or cognitive/intellectual disability of a person who has come into contact with the criminal justice system, for relatively minor offending, without resorting to judicial proceedings and detention. Given the high rates of mental illness amongst Aboriginal and Torres Strait Islander peoples, this can be seen as another aspect of the system which contributes to high Aboriginal and Torres Strait Islander incarceration rates.

⁴³The Hon Wayne Martin Chief Justice of Western Australia, *Corrective Services for Indigenous Offenders – Stopping the revolving Door* (2009) Presentation to Joint Development Day Department of Corrective Services, 14.

⁴⁴ The Hon Wayne Martin Chief Justice of Western Australia, *Corrective Services for Indigenous Offenders – Stopping the revolving Door*, Presentation to Joint Development Day Department of Corrective Services (2009) 14.

⁴⁵See the transcript of proceedings from the Darwin hearings at ATSIA 49: <http://www.aph.gov.au/hansard/reps/commtee/R12981.pdf> (last viewed 4 June 2010).

⁴⁶See the transcript of proceedings from the Darwin hearings at ATSIA 51: <http://www.aph.gov.au/hansard/reps/commtee/R12981.pdf> (last viewed 4 June 2010).

Remand and Imprisonment are increasingly being used in order to manage people with mental health concerns and cognitive disabilities. This can either be because the mental illness or intellectual/cognitive disability goes unidentified or because of a chronic lack of alternative support and treatment facilities in the community. Recent Australian research has highlighted the high number of Aboriginal and Torres Strait Islander peoples with a mental illness who are in prison. For example, in Queensland it was found that the number of Aboriginal and Torres Strait Islander prisoners with a mental illness was far higher than compared with community estimates. It was found that 86 per cent of female Aboriginal and Torres Strait Islander prisoners and 73 per cent of male Aboriginal and Torres Strait Islander prisoners were diagnosed with a mental illness in the preceding 12 months.⁴⁷ And,

In NSW, a 2011 report⁴⁸ found that the majority (87%) of young people in custody were found to have a psychological disorder. Possible intellectual disability was also common, with 20% of Aboriginal and Torres Strait Islander young people in custody assessed as having a possible intellectual disability and 7% of the non-Indigenous cohort. A 2008 study⁴⁹ examining over 2700 people who have been in prison⁵⁰ found that 28% of prisoners experienced a mental health disorder (defined as having any anxiety, affective or psychiatric problem in the past 12 months), 34% had a cognitive impairment and 38% had a borderline cognitive impairment.

The case studies below further illustrate types of situations which the NATSILS often witness:

Case Studies: Dealing with Mental Illness through Prosecution and Detention

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. The girl 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. She was taken into custody at about 6.00pm and appeared in court on the following Monday. The girl 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. The girl 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 the girl was naked in her cell. ALSWA queried why

⁴⁷ Edward Heffernan et al, *Prevalence of mental illness among Aboriginal and Torres Strait Islander people in Queensland prisons* (2012).

⁴⁸ D Indig et al, *2009 NSW Young People in Custody Health Survey: Full Report*, Justice Health and Juvenile Justice, 2011.

⁴⁹ E Baldry et al, *A critical perspective on Mental Health Disorders and Cognitive Disability in the Criminal Justice System*, 2008.

⁵⁰ Reference to people who have been in prison is used because the data for this study is drawn from two data collections (2001 NSW Prisoner Health Survey and the NSW State-wide Disability Services of Corrective Services client database) and those involved may have subsequently been released.

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 the girl to put on clothes and ALSWA spoke to her. The girl 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. The girl 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 the girl some treatment.

A 15 year old Aboriginal boy with a minor criminal history was charged with offences despite police knowledge about his mental health concerns. Additionally, he unnecessarily spent two nights in custody in late 2009 due to police delays in granting bail and his mother was granted a Violence Restraining Order (VRO) against him despite her maintaining contact with him. In September 2009 the boy spent one night in custody on charges of threatening behaviour and criminal damage, instigated by his mother, after police refused to grant him bail. It was evident that the boy had mental health concerns and prior to his arrest, police had taken the boy to hospital due to his behaviour causing an appointment to be arranged with Central West Mental Health Service. Despite these mental health concerns, charges were laid and police bail refused because the boy was in breach of a previous bail condition to reside with his grandfather when police arrested him at his brother's house. The arrest was purportedly due to "welfare concerns" and on this occasion the boy spent one night in custody before being granted bail by a Magistrate. As a result of the charges, the boy's mother applied for a VRO against the boy. In November 2009, the boy was charged with breaching the VRO with his mother. He was granted bail for the offence with a curfew condition which he breached. He instructed ALSWA that he had not understood that the curfew applied for the entire period of bail but had believed it was for only one night. As a result of the curfew breach, the boy spent a second night in police custody.

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.

The NATSILS recommend that in situations like these, a person's health concerns should be addressed as a priority over detention in the criminal justice system. The trend in the United States and other overseas jurisdictions is toward a therapeutic jurisprudence approach (for example, Mental Health Courts) where

the causes of the offending behaviour are identified and addressed through treatment and support services, while the person is monitored by the court. Reliance is upon external services to support clients.

Mechanisms should be in place to divert and support people with mental illness and intellectual/cognitive disability throughout all stages of the criminal justice system. For diversion to be available:

- More funds need to be injected into community mental health services, housing, general health care and support services;
- Education, training and appropriate screening tools for Police to identify and divert the mentally ill and/or intellectually/cognitively disabled. A precursor to the Police being able to divert people is that services are available to assist people;
- Court staff and legal representatives need to be able to identify mentally ill and/or intellectually/cognitively disabled people and a Court process must be devised where people can be referred to and supported by relevant services;
- Prison staff need to be educated and trained to identify mentally ill and/or intellectually/cognitively disabled inmates at the earliest possible time and link them to forensic mental health services; and
- Community Corrections and community services need to be linked with inmates prior to their release from prison so that they have support in all areas (treatment, medication, housing, money, support, housing, transport, etc) once released.

4. Accountability and redress for wrongdoing

4.1 Use of force and independent investigations of complaints

The increasing use of force by police as opposed to utilising de-escalation techniques, and the increasing use of Tasers and capsicum spray/foam as compliance tools, especially on people who are already in custody, and the inappropriate use of Tasers on children, women, the mentally ill and other vulnerable people is worrying trend in Australia.⁵¹ This is concerning given that Aboriginal and Torres Strait Islander peoples have disproportionately high levels of contact with police.

Greater training needs to be provided to police in de-escalation techniques and recognising and appropriately dealing with people who are in mental crisis to avoid resorting to the use of force. While national guidelines on police incident management, conflict resolution and use of force do exist, the fact that they are not enshrined in legislation is of detriment to the weight that they carry.

⁵¹ See Corruption and Crime Commission (WA), *The Use of Taser Weapons by Western Australia Police* (2010).

There is a need in Australia for independent investigations of complaints against police, police misconduct and deaths in custody and the implementation of all of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) recommendations.⁵² The Government must acknowledge that for investigative and regulatory bodies to be effective and for the public to have confidence in the process, regulatory bodies must be completely separate from police forces.

5. Access to Legal Assistance

5.1 Aboriginal and Torres Strait Islander legal services (ATSILS)

A core issue affecting the provision of legal assistance to Aboriginal and Torres Strait Islander peoples is the chronic underfunding of Aboriginal and Torres Strait Islander Legal Services (ATSILS). ATSILS have consistently been recognised as the preferred provider of legal assistance services to Aboriginal and Torres Strait Islander peoples in contact with the justice system due to their level of cultural competency. Without adequate funding the capacity of the ATSILS to provide quality legal assistance services to Aboriginal and Torres Strait Islander peoples in metropolitan, regional and remote communities is severely restricted. Despite recent increases in funding, the ATSILS still remain well below parity with mainstream legal aid services and are being forced to close some of their offices. Given that ATSILS can often be the only service provider in attendance at many remote circuit courts, having to close offices will inevitably mean that Aboriginal and Torres Strait Islander peoples go unrepresented at court.

5.2 Assistance for Aboriginal and Torres Strait Islander women

There are significant barriers faced by Aboriginal and Torres Strait Islander women experiencing violence in accessing appropriate services. These barriers exist in metropolitan, regional and remote areas of Australia. There is a distinct lack of culturally appropriate crisis accommodation services, counselling services and legal assistance services available to Aboriginal and Torres Strait Islander women who are victims of violence. In many regional and remote areas these services just do not exist, and in locations where they do exist, including in metropolitan areas, a lack of cultural competency can result in many women not being able to access them.

⁵² Committee Against Torture, *Concluding Observations*, 40th sess, [13,23,27] UN Doc CAT/C/AUS/CO/3 (2008); Committee on the Elimination of Racial Discrimination, *Concluding Observations*, 66th sess, [21], UN Doc CERD/C/AUS/CO/14 (2005); James Anaya The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *The Situation of Indigenous Peoples in Australia*, Human Rights Council, 15th sess, [51, 103], UN Doc A/HRC/15/ (2010); Human Rights Committee, *Concluding Observations*, 95th sess [21] UN Doc CCPR/C/AUS/CO/5 (2009); Committee on the Elimination of Racial Discrimination, *Concluding Observations*, 77th sess, [20] UN Doc CERD/C/AUS/CO/15-17 (2010); Human Rights Council, *Draft Report of the Working Group on the Universal Periodic Review Australia*, 10th sess, [86.91], UN Doc A/HRC/WG.6/10/L.8 (2011); National Police Accountability Network of the National Association of Community Legal Centres recent letter to the Commonwealth Attorney-General on 9th August 2011 at http://www.communitylaw.org.au/flemingtonkensington/cb_pages/files/RCIADIC%20letter%209%20August%202011.pdf).

There are particular issues surrounding access to Family Violence Prevention Legal Services (FVPLS) in that the Government does not provide funding to provide these services in metropolitan areas, denying many victims of family violence specialised legal and support services. The Government has stated that the rationale for this is that FVPLS are only provided in locations where there are no other legal assistance services available. However, many women who are victims of violence who live in metropolitan areas are unable to access alternative services such as the ATSILS or mainstream legal aid because these services because of conflict of interest issues or because they are culturally inappropriate.

The Australian Law Reform Commission has recently investigated the impact of Income Management (IM), whereby social security payments are quarantined for spending on government approved items, on victims of domestic violence and has raised concerns that IM may be detrimental to the safety of these victims. By restricting the products and services on which money can be spent, IM may restrict the ability of victims of domestic violence to escape dangerous residential or personal situations to improve the safety of themselves and their children. IM imposes further control over people's lives, adding to the existing disempowerment.

In relation to the Government's strategy to tackle the high rates of violence experienced by women in Australia, the NATSILS are concerned that the National Council's Plan to Reduce Violence Against Women and Their Children 2009-2021 and the National Framework for Protecting Australia's Children 2009-2020 do not compel Commonwealth, State and Territory governments to implement the strategies and actions contained therein and are also not specifically targeted at Aboriginal and Torres Strait Islander peoples.

5.3 Aboriginal and Torres Strait Islander interpreter services

There is a great need for Aboriginal and Torres Strait Islander interpreters. For example:

- Approximately 11 per cent of Aboriginal and Torres Strait Islander peoples speak an Aboriginal or Torres Strait Island language as their main language at home.⁵³ This percentage increases to 42 per cent in many remote areas of Australia.⁵⁴
- Almost one in five (19 per cent) Aboriginal and Torres Strait Island language speakers report that they do not speak English well or at all.⁵⁵

⁵³ Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Social Survey* (2008) Australian Bureau of Statistics
<<http://abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/4714.0Main%20Features52008?opendocument&tabname=Summary&prodno=4714.0&issue=2008&num=&view=#PARALINK4>> at 4th May 2010.

⁵⁴ Ibid.

⁵⁵ Australian Bureau of Statistics, *Population Characteristics, Aboriginal and Torres Strait Islander Australians* (2006)
<<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/70E4BD21542AAD18CA257718002A7CC1?opendocument>> at 4th May 2010.

- Aboriginal and Torres Strait Islander peoples suffer ear disease and hearing loss at ten times the rate of non-Aboriginal and Torres Strait Islander people and arguably at the highest rate of any people in the world.⁵⁶
- Given the growing over-representation of Aboriginal and Torres Strait Islander peoples within the criminal justice system, the need for high quality Aboriginal and Torres Strait Islander interpreter services within the criminal justice system is paramount.
- Many of Aboriginal and Torres Strait Islander peoples in contact with the criminal justice system have little or no comprehension of what happens inside a court room.⁵⁷ For example, it has been found that 95 percent of the Yolngu people from north-east Arnhem Land do not understand the meaning of the words 'bail', 'consent', 'remand', 'charge', 'illegal', 'comply', 'appear' and 'fine'.⁵⁸ Where people participate in court proceedings but do not fully understand them, the prospects of them complying with any order of the court are substantially impaired; and

There is a massive unmet need for more and more highly trained interpreters in numerous Aboriginal and Torres Strait Islander languages. This is particularly the case in regional and remote parts of Australia. It is not uncommon for interpreters to not be available and for defendants to be remanded in custody pending an interpreter being ordered and becoming available. It is also not uncommon for interpreters to be used in complicated court proceedings when they do not have the skills or level of experience required to adequately interpret for our clients. Unfortunately, because of the shortfall of highly qualified Aboriginal interpreters and the imperative of 'getting people through the system', most legal services seek to do the best with the resources available, an outcome that benefits no one and is of great detriment to our clients.

A lack of awareness about the need to determine whether an interpreter is needed can lead to language and communication difficulties going undetected. For example, during the parliamentary inquiry mentioned above one witness testified about the potential consequences of undetected communication issues:

One audiologist talked to me about dealing with a client who had recently been convicted of first-degree murder and had been through the whole criminal justice process. That had happened and then she was able to diagnose him as clinically deaf. He had been through the whole process saying, 'Good' and 'Yes'—those were his two words—and that process had not picked him up. Given the very high rates of hearing loss, you have to wonder about people's [sic] participation in the criminal

⁵⁶ Senate Community Affairs References Committee, Parliament of Australia, *Hear Us: Inquiry into Hearing Health in Australia* (2010) xv.

⁵⁷ See Christopher J Charles, 'A Few Words on Culture Shock' (2010) Ed 22, *Your Legal Rights Quarterly Newsletter Magazine of Aboriginal Legal Rights Movement Inc.*, 6.

⁵⁸ Aboriginal Resource and Development Service, *An Absence of Mutual Respect* (2008) 20-21

justice system as being fair and just if in cases like that people simply are not hearing or understanding what is going on.⁵⁹

The overall effect of this is that Aboriginal and Torres Strait Islander peoples are being locked out of court proceedings and the criminal justice system in general. In late 2012 the Government held a roundtable with key stakeholders, including NATSILS, to discuss the development of a national framework for the provision of Aboriginal and Torres Strait Islander interpreters. However, progress has stalled since this meeting with no update being provided as to when such a framework is envisaged to be completed by.

6. Detention

6.1 Limits on detention

In jurisdictions around Australia there is no legislated limit placed on the maximum period that an adult can be placed on remand. Given the over-representation of Aboriginal and Torres Strait Islander peoples in the detention, this disproportionately affects Aboriginal and Torres Strait Islander peoples. NATSILS have witnessed numerous cases in which a person spends a longer period on remand than the sentence they receive upon conviction, or would have received if convicted. It is wholly unacceptable that individuals who are not convicted of a crime spend time in custody equal to, and in some cases in excess of, that served by offenders convicted of the same crime. Lengthy remand periods are often associated with increasingly congested court lists which result in significant delays in obtaining hearing dates where an accused person is pleading not guilty to offences for which they are charged. Consequently, accused persons may be tempted to plead guilty to offences they did not commit in order to minimise time in custody. This significantly undermines the foundation of the justice system.

The NATSILS hold similar concerns in relation to people declared unfit to plead or mentally/cognitively impaired at the time of offending. Around Australia these people can either be placed on remand until a psychiatrist's report is completed or placed on supervision orders. The concern is that despite legislative requirements for psychiatrist's reports to be completed within 21 days, as is the case in Queensland, this is not often enforced in practice and it is not unusual for people to spend up to 3 months on remand and in some cases, up to 12 months on remand waiting for these reports.

In relation to supervision orders, in many cases in the Northern Territory supervision orders involve custodial supervision. That is, incarceration in the same correctional centres as all other prisoners. Supervision orders in the Northern Territory 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 at serious risk of harm to the community or themselves. The result is that once people are put on supervision orders, there is a real risk of being held indefinitely. CAALAS and NAAJA both have clients who have been detained on supervision orders for years beyond the likely

⁵⁹ Evidence to Senate Community Affairs References Committee, Parliament of Australia, Alice Springs, 18 February 2010, 1 [Tristan Ray]

length of sentence they would have received if they were fit or not mentally impaired at the time of offending.

In Western Australia, where a similar regime exists, a man has been detained under fitness to plead legislation for ten years despite the fact that the maximum sentence he would have received if convicted would have only been two years.

Again, given the high rates of mental illness amongst Aboriginal and Torres Strait Islander peoples such mechanisms disproportionately affect Aboriginal and Torres Strait Islander peoples.

6.2 Conditions in detention

The *Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment* provides protection for people's rights whilst in detention. Around Australia, sub-standard prison conditions can breach such rights. Given the over-representation of Aboriginal and Torres Strait Islander peoples in Australia's prisons, sub-standard conditions in detention are a significant access to justice issue.

6.2.1 Overcrowding in prisons, detention centres and police lock ups

Poor or inappropriate accommodation has been identified as a major catalyst for critical incidents such as riots, self-harm, suicide and other non-compliant behaviours among prisoner populations and contributes to a variety of low outcomes for prison communities and prisoners. The relationship between prison accommodation standards and negative behavioural outcomes in prisoners has been shown to be strong and it is in the best interests of the prisoner and prison administration that prison environments adhere to an appropriate standard. Many Australian prisons are reported to be overcrowded and aspects of prison environments have been termed 'unsafe'⁶⁰ and appear to fall below the level articulated in international and national standards and guidelines.⁶¹

Overcrowding is a direct result of the punitive approach to 'law and order' that has been adopted by Australian governments. Many prisons in Australia are operating well above capacity and have refitted single cells so as to allow 'double-bunking'. In some prisons in Western Australia, such as Broome, Roebourne, Greenough and the Eastern Goldfields (Kalgoorlie) there has been a history of serious overcrowding, especially with the dramatic decline in the numbers of prisoners being released to parole in recent years. Overcrowding has become so chronic that it has been

⁶⁰Northern Territory Prison Guard Association Phil Tilbrook has stated "We have prisoners housed in accommodation that has third world conditions" in relation to the Berrimah Prison in Darwin; J Bardon and J Gibson, "Cost of new prison blows out to \$495 million", ABC Darwin, 7 October 2011, available at <http://www.abc.net.au/news/2011-10-07/20111007-new-prison-costs-deal/3340908/?site=darwin&source=rss>.

⁶¹See *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, I-14668, (entry into force 23 March 1976); *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, I-24841, (entry into force 26 June 1987); First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Standard Minimum Rules for the Treatment of Prisoners*, Res 663 C (XXIV) and 2076 (LXII), (1957, 1977); *Standard Guidelines for Corrections in Australia 2004*.

reported that up to 6 prisoners have been sleeping in a single cell and on mattresses on the floor next to toilets. The practice of 'double-bunking' in particular has shown to increase the risk to prisoners of rape and assault,⁶² contracting a communicable disease⁶³ and other negative health outcomes such as increased exposure to passive smoking.⁶⁴

In 24 coronial inquests held between 1994 and 2008 concerning 26 deaths in South Australian prisons, recommendations were made by the Coroner's Court in relation to various aspects of prison accommodation. In each inquest, the Court held that aspects of the prison environment played a part in the unnatural death of prisoners. Prisons with high social densities have been shown to produce higher death rates including from natural deaths amongst elderly prisoners, violent deaths and suicides.⁶⁵ Sustained crowding in prisons has also shown to produce higher levels of violence and other on-compliant behaviour and increased psychiatric commitment rates.⁶⁶ Standards such as these clearly violate the Revised Standard Guidelines for corrections in Australia which states that "all necessary measures should be taken to ensure that no prisoner injuries or unnatural deaths occur".⁶⁷

Furthermore, some corrections departments have now resorted to housing prisoners outside of prisons in spaces not designed for such a purpose. Since 2007 in South Australia for example, 40 cells at the City Watch House have been allocated for corrective services ongoing use.⁶⁸ In addition, cells at other police stations and court holding cells are also used periodically for prisoner accommodation⁶⁹ and some adult offenders are being held in juvenile detention facilities.⁷⁰

Rather than continuously building more prisons at considerable expense to lessen the extent of over-crowding, the best way to sustainably reduce overcrowding is to reduce the rates of imprisonment. Central to this task will be reducing the over-incarceration of Aboriginal and Torres Strait Islander peoples.

⁶²D Heilpern, *Fear or Favour - sexual assault of young prisoners* (1998).

⁶³ Charles, C, 'The Coroners Act 2003 (SA) and the partial implementation of RCIADIC: Consequences for Prison Reform' (2008) Vol. 12 *Australian Indigenous Law Review*, 75-89.

⁶⁴ Grant, E. & P. Memmott, 'The Case for Single Cells and Alternative Ways of Viewing Custodial Accommodation for Australian Aboriginal Peoples' (2008) Vol. 10 *Flinders Journal of Law Reform*, 631 – 645.

⁶⁵Paulus, P, McCain, G & Cox, V, 'Death rates, psychiatric commitments, blood pressure and perceived crowding as a function of institutional crowding.' (1978) Vol. 3 *Environmental Psychology and Nonverbal Behaviour*, 107 - 116.

⁶⁶McCain, G, Cox, V & Paulus, P, *The Effect of Prison Crowding on Inmate Behaviour*. US Department of Justice, National Institute of Justice (1980).

⁶⁷*Standard Guidelines for Corrections in Australia*, above n 34.

⁶⁸Department for Correctional Services (South Australia), *Report on actions taken following the Coronial Inquiry into the Death in Custody of Robert Allen Johnson* (2008).

⁶⁹ Australian Broadcasting Commission, 'Claims of overcrowding in SA Prisons', 10th March 2008 at

<http://www.abc.net.au/news/stories/2008/03/10/2185116.htm>;

Australian Broadcasting Commission, 'Police Station Holds Overflow', 6th November 2008 at <http://www.abc.net.au/news/stories/2008/11/06/2411750.htm?site=adelaide>.

⁷⁰ Kenton, G., 'Overcrowding pressures prisons', *The Advertiser*, 17th February 2008 at <http://www.news.com.au/adelaidenow/story/0,22606,23228823-2682,00.html>.

6.2.2 Provision of health services in places of detention

There is significant concern surrounding access to medical services within prisons and police lock ups in Australia and the need for better training for police officers and prison guards, who can often be the first port of call for detainees and prisoners in need of medical attention.

For example, recently in Grafton jail in New South Wales a man, who was incarcerated for traffic offences, was assaulted in his cell and died from his injuries after a 3 hour delay in receiving medical attention.⁷¹ After pressing an emergency help button and repeatedly asking for assistance, prison guards failed to properly investigate the extent of the man's injuries, despite his head and face being covered in blood, a large amount of blood in his cell and his inability to stand or walk unaided. The man was made to crawl across the space to another cell where he was left alone by guards for an extended period of time before a nurse arrived to examine him. Following this examination, the man was taken to hospital, located mere metres from the jail, where he passed away. There was a 3 hour delay from the time the man pushed the emergency alert and was first found by the guards until he was finally taken to hospital for medical attention.

Situations such as these are tragic and unacceptable. Greater and quicker access to medical services is needed in Australian prisons and police lock ups and prison guards and police officers need to be better trained to recognise when someone is in need of emergency medical assistance. Similar training is also needed for police as avoidable deaths in police custody have also occurred because police officers have failed to respond appropriately to seriously ill, injured, mentally ill and cognitively impaired people.

Access to mental health services with prisons are a particular area of concern in Australia. In a 2006 inquest, the South Australian Coroner, Ms Sheppard, gave a summary of the inadequacy of mental health services in South Australian prisons quoting Dr Kenneth O'Brien, Director of Forensic Mental Health Services. She stated:

Dr O'Brien gave a vivid description of the mental health presence in country prisons in South Australia. According to Dr O'Brien, in non-metropolitan prisons, there are no psychologists, social workers who have mental health experience, or dedicated mental health nurses available to handle mentally ill prisoners. Whilst this multidisciplinary mental health team structure exists in the community, it is not available in country prisons. Medical practitioners and nurses are not employees of the DCS and may only offer their services to prisoners who are entitled to refuse if they wish.

Dr O'Brien emphasised that the present situation whereby mentally ill prisoners are seen once a month is completely inadequate. He states that there are simply too many prisoners to be seen in a short period of time during those clinics. Despite previously bringing the problem to the attention of government ministers and his superiors, he claims that there has been no improvement over 25 years in the numbers of people he must see in a short period of time. His colleagues in private practise may spend 45

⁷¹ See <http://www.abc.net.au/news/2011-10-19/death-of-traffic-offender-in-custody-at-grafton/3580058> .

minutes to an hour with every patient they see, whereas Dr O'Brien has an average of about 7–10 minutes with each prisoner he sees in his clinics. According to Dr O'Brien, this is partly the reason why it is so impossible to get psychiatrists to work in prison health service or to attend prisons.

Dr O'Brien expressed his views as follows:

'I think it is scandalous that there aren't an adequate number of funded mental health nursing positions in South Australian gaols, and it is scandalous that most gaols do not have a psychologist and there is nothing resembling an adequate mental health service in our prisons.'

As to the role played by visiting general practitioners, Dr O'Brien said that his experience of general practitioners in country towns is that they may have little or no interest in mental health. The level of knowledge and competency varies amongst general practitioners providing services to country prisoners.⁷²

In regards to Aboriginal and Torres Strait Islander peoples there is yet another layer to the problem in that there is also significant concern regarding access to *culturally appropriate* medical services in prisons. In our combined experience, Aboriginal language interpreters are not available and utilised in many cases in which they should be and medical practitioners are often not appropriately trained in cross-cultural communication. This can lead to misdiagnosis and misunderstanding of treatment and also impairs the capacity of Aboriginal prisoners to provide informed consent to undertake medical examinations and treatment.

6.2.3 Australia's youth detention centres

There is serious concern in relation to the state of some of Australia's youth detention facilities and the right not to be subjected to torture or other cruel, inhumane or degrading treatment or punishment. These concerns relate in particular to issues of over-crowding, personal safety, hygiene, appropriate heating and air-conditioning given the extreme climates in Australia and the mixing of remanded detainees with sentenced offenders. The case study below highlights some of these concerns.

Case Study: Melbourne Youth Justice Precinct

Early in 2010, the Victorian Ombudsman released a report⁷³ in response to allegations from a whistleblower regarding serious misconduct of staff at a Melbourne youth detention centre. The allegations related to staff at the Melbourne Youth Justice Precinct:

⁷² See www.courts.sa.gov.au/coroner/findings/2006/walker.

⁷³ Ombudsman G E Brouwer, *Whistleblowers Protection Act 2001: Investigation into conditions at the Melbourne Youth Justice Precinct* (2010) at http://www.ombudsman.vic.gov.au/resources/documents/Investigation_into_conditions_at_the_Melbourne_Youth_Justice_Precinct_Oct_20101.pdf.

- a) inciting assaults between detainees;
- b) assaulting detainees;
- c) restraining detainees with unnecessary force;
- d) supplying contraband to detainees, including tobacco, marijuana and lighters; and
- e) stealing goods and consumables.

The disclosure also included allegations relating to general mismanagement of the Precinct, overcrowding, poor adherence to operational procedures and an organisational culture that fostered unethical conduct. During site visits, the Ombudsman officers observed many design features within the Precinct that did not appear suitable for a custodial environment for young people, including hanging points throughout the Centre and land-fill which contained pieces of glass rising to the surface. Some of the safety and health concerns identified by the Ombudsman included:

- a) mouldy and dirty conditions;
- b) a high prevalence of communicable infections such as scabies, Staphylococcus - Aureus and school sores;
- c) electrical hazards; and
- d) unhygienic conditions in food preparation areas.

Investigation also identified the following concerns:

- a) Overcrowding has resulted in mattresses being placed in isolation rooms with young people having to go to the toilet in buckets;
- b) The number of beds in the Precinct is not sufficient for the number of remanded or sentenced detainees that the Precinct is required to accommodate. As a result, undesirable mixing of detainees of widely varying ages and different legal status occurs; and
- c) Remanded detainees are being placed in units with sentenced offenders which has presented a significant problem. Mixing of remanded and sentenced detainees of varying ages occurs despite section 22(2) and 23(1) of *the Victorian Charter of Human Rights and Responsibilities 2006* and section 482(1)(c) of the *Children, Youth and Families Act*. Both the Charter of Human Rights and the Act discuss the separation of persons accused of an offence from persons convicted of an offence.

In the Ombudsman's view, the conditions of the Youth Justice Precinct in Victoria reflect little regard for human rights principles for young people in custody.

In addition, the following are examples of reported cases of abuse and maltreatment of Aboriginal and Torres Strait Islander young people during their arrest and detention.

Case Studies: Abuse and Maltreatment

In December 2009 a slightly built 15 year old Aboriginal boy was arrested in Geraldton. He was charged with a burglary, possession of stolen property and stealing. The boy instructed ALSWA that when his pockets were being emptied during his arrest, a police officer put a knee in his neck. He also said that when he was being questioned an officer slapped him. He was arrested again the following Saturday for a burglary and granted bail. The boy instructed ALSWA that at the time of his arrest he initially ran from police towards his home. Upon arrival, he found the door locked and surrendered himself to police by standing facing them with his hands up. He instructs he was then taken to the ground by police with his arms twisted behind his back. He instructs that he said "my arms" and may have wriggled slightly. He instructs that a different officer took his legs and that officer kneed him in the back of the head. The boy hit his face against the concrete causing his front tooth to break in half. He instructs that when he saw the blood he moved more and was thrown into a paddy wagon. He further instructs that at some point he was also punched from behind to his left cheek. He says there were four male officers involved. His sister (the responsible adult) advised that she arrived when the boy was at the back of the paddy wagon. She objected to the police treatment of her brother. The police replied something along to the effect of, "well, he shouldn't do burglaries then".

A 13 year old boy from Mullewa was arrested in October 2010 for various serious burglary offences. He was remanded in custody due to having breached bail by committing fresh offences. Juvenile Justice contacted ALSWA on the morning of his court appearance and relayed concerns about the welfare and health of the boy. Youth and Family Services had conducted a welfare check on the boy while he was in police custody and described him as distraught, having been goaded by police, and referred to suicidal ideations. They advised the boy had a history of self-harm. The boy had a wound on his leg about which Youth and Family Services were concerned and asked the police to take him for medical treatment. The police were initially reluctant as it would "tie up an officer", but eventually agreed. The boy told ALSWA that he did not receive medical attention as the police came to him at 12.00am, which he described as "too late". He said that he had not been placed in the cell with the television, that police kept "annoying" him and that police swore at him. He was given toast and a burger, but no fruit or vegetables to eat. The boy's responsible adult was his mother who Juvenile Justice described as "not in a good way". The boy is an open case with DCP. A DCP officer attended at court but only contributed words to the effect of "we've just found out about him being in custody, and suggest it's up to justice to work on some strategies". The boy was granted bail to be assisted by Youth Bail Services.

Australia is yet to ratify the *Optional Protocol to the Convention Against Torture and Other Forms of Cruel, Inhuman and Degrading treatment or Punishment* and implement a National Preventative Mechanism. Doing such would go a long way towards ensuring that appropriate prevention and oversight mechanisms are in place in relation to youth detention centres.

6.2.4 The Right to be Separated from Adults whilst in Detention

As outlined earlier, there is a distinct lack of youth bail and detention facilities in Australia, especially in regional, rural and remote Aboriginal and Torres Strait Islander communities. As a result, young people are inappropriately placed in adult detention facilities and lock-ups where they are not protected from adult detainees and offenders and are vulnerable to abuse.

The following case studies explain:

12 Year Old Boy Endures a Week in Adult Lock-Up

In May 2011 a 12 year old Aboriginal boy spent over a week in the Kununurra adult police lock-up after breaching bail conditions for two burglary offences. Kununurra is over-policed and young people are regularly picked up for breaching bail conditions such as curfews. The boy was remanded in custody on three separate occasions by both a Justice of the Peace and a Magistrate because no responsible parent could be found to meet the bail requirements and there are no youth bail facilities in Kununurra. After a week in the adult lock-up the 12 year old boy was flown to a youth detention facility in Perth (a five hour flight away) where he spent several more days until he was sentenced via video link for the burglaries in Kununurra.

A Youth Detention Centre within an Adult Prison

Recently minimum security cottages within the Alice Springs Correctional Centre, an adult custodial facility, have been made into the Alice Springs Juvenile Detention Centre (ASJDC). The ASJDC is a youth facility incorporated within an adult prison with minimal meaningful efforts having been made to separate young detainees from adult prisoners.

Young people detained in the ASJDC have continued aural and visual exposure to minimum security adult prisoners incarcerated within the Alice Springs Correctional Centre given that they are only separated from the adult facility by a mesh fence. Despite the fact that detainees can both see and hear adult prisoners and hear the Correctional Centre loudspeaker announcements, rules within the ASJDC preclude young detainees from communicating with adult prisoners. When a detainee was caught by guards speaking through the detention centre fence with an adult prisoner in early 2011, the detainee was disciplined through a period of isolation.

Whilst children and young people are in the care of the state, their safety must be guaranteed and in the context of detention, this must include separation from adult offenders and prisoners.

7. Conclusion

Access to justice is of central importance to NATSILS and it is at the heart of the services we provide to Aboriginal and Torres Strait Islander peoples in Australia. We hope that the above information assists the Expert Mechanism in undertaking its much welcomed study. We eagerly await its report.