

**Submission for the National Children's
Commissioner examination of children
affected by family and domestic violence:**

June, 2015



NATSILS

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

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1. About NATSILS

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

- Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd (ATSILS Qld);
- Aboriginal Legal Rights Movement Inc. (ALRM);
- Aboriginal Legal Service (NSW/ACT) (ALS NSW/ACT);
- Aboriginal Legal Service of Western Australia (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

2.1. NATSILS submission to the National Children's Commissioner examination of the effects on children of family and domestic violence has arisen from seriously held concerns about this issue for Aboriginal and Torres Strait Islander peoples, which NATSILS member organisations encounter on a routine basis. Our submission will respond to each of the terms of reference provided in turn.

2.2. Bearing in mind NATSILS area of expertise, this submission only discusses family and domestic violence and its impact on children in relation to Aboriginal and Torres Strait Islander peoples. NATSILS acknowledges that family and domestic violence is an issue that affects all communities in Australia, however, as will be highlighted this issue is particularly severe in Aboriginal and Torres Strait Islander communities.

3. Definitional Issues Relating to Family and Domestic Violence Affecting Children:

3.1. The definitional issues relating to family and domestic violence affecting children differs between states and territories. Indeed as commentary has noted, there are potentially eight coexisting statutory schemes that touch on family and domestic violence in Australia, and so far there has been no attempt by the Commonwealth to consolidate them.¹ The following section will explore some of the issues as it relates to the Northern Territory and Western Australia and will end by making a number of brief comments about reform based on these examples.

Northern Territory:

Care and Protection of Children Act 2007 (NT)

3.2. In the Northern Territory, section 20 of the *Care and Protection of Children Act 2007 (NT)* provides the basis for when a child is considered in need of protection. Section 20 (a) specifically provides that a child is in need of protection if “the child has suffered or is likely to suffer harm or exploitation because of an act or omission of a parent of the child.” Section 15 of the Act defines ‘harm to a child’ to include “exposure of the child to physical violence.” The Act further clarifies the intention that a child’s exposure to family and domestic violence is a basis for child protection by providing an example which states, “A child witnessing violence between the child's parents at home.”

3.3. *Domestic and Family Violence Act 2007 (NT)*

The Northern Territory *Domestic and Family Violence Act 2007 (NT)* seeks to protect persons, including children, from domestic violence. Section 1 states that its objects are:

- (a) to ensure the safety and protection of all persons, including children, who experience or are exposed to domestic violence; and
- (b) to ensure people who commit domestic violence accept responsibility for their conduct; and
- (c) to reduce and prevent domestic violence.

Domestic violence is defined broadly in section 5:

Domestic violence is any of the following conduct committed by a person against someone with whom the person is in a domestic relationship:

- (a) conduct causing harm;

Example of harm for paragraph (a)

Sexual or other assault.

- (b) damaging property, including the injury or death of an animal;

¹ R Alexander, O Jessep and A Dickey QC, *Domestic or family violence is not just physical abuse but includes a range of violent and abusive behaviours perpetrated by one person against another*, *The Laws of Australia* (Thomson Reuters, 2015), [17.5.10]; FAHCSIA, *The National Council to Reduce Violence against Women and their Children* (Commonwealth of Australia, 2008).

- (c) intimidation;
- (d) stalking;
- (e) economic abuse;
- (f) attempting or threatening to commit conduct mentioned in paragraphs (a) to (e).

3.4. The Second Reading Speech of the Act commented on the definition of domestic violence, stating:

‘In one of the key aspects of the bill, domestic violence is defined by reference to a set of behaviours not currently covered by the existing act such as economic abuse, sexual assault, stalking, intimidation, damage to animals and acts which, if repeated, indicate a continuing pattern of abuse. These are in addition to the commonly known domestic violence behaviours such as assault, threats and damage. The inclusion of economic abuse and intimidation in the definition of domestic violence recognises that socially isolating the victim from their normal channels of support and economically depriving them behaviour that is about shaming and undermining the victim’s capacity to take independent action.’²

3.5. Domestic relationship is defined in s 9 of the Act and clearly includes children whether or not they are natural, adopted, step or other. The definition states:

A person is in a ***domestic relationship*** with another person if the person:

- (a) is or has been in a family relationship with the other person; or
- (b) has or had the custody or guardianship of, or right of access to, the other person; or
- (c) is or has been subject to the custody or guardianship of the other person or the other person has or has had a right of access to the person; or
- (d) ordinarily or regularly lives, or has lived, with:
 - (i) the other person; or
 - (ii) someone else who is in a family relationship with the other person; or
- (e) is or has been in a family relationship with a child of the other person; or
- (f) is or has been in an intimate personal relationship with the other person; or
- (g) is or has been in a carers relationship with the other person.

Western Australia:

3.6. Child protection legislation

It is well understood that family and domestic violence is a major cause of intervention by child protection authorities. In Western Australia s 28(2) of the *Children and Community Services Act 2004* (WA) provides the basis for when a child is considered to be in need of protection. A child is in need of protection if, among other things, the child has suffered, or is likely to suffer, harm as a result of any one or more of the following: physical abuse, sexual abuse, emotional abuse, psychological abuse and neglect. Harm is defined in s 28(1) as ‘any detrimental effect of a significant nature on the child’s wellbeing’.

² Northern Territory Second Reading Speeches, Domestic and Family Violence Bill 2007.

3.7. The Children and Community Services Legislation (Amendment and Repeal) Bill 2014 (WA) proposes to amend s 28 by removing the separate category of 'psychological abuse' and by defining 'emotional abuse' to include:

- Psychological abuse; and
- **Being exposed to an act of family and domestic violence**

The definition of harm is also amended so that harm is defined to mean 'any detrimental effect of a significant nature of the children's wellbeing, whether caused by

- A single act, omission or circumstance; or
- A serious of combination of acts, omissions or circumstances'.

The phrase 'exposed, in relation to an act of family and domestic violence includes the following—

- To see or hear the act of family and domestic violence
- To witness the physical injuries resulting from the act of family and domestic violence

3.8. Restraining orders legislation

Under s 11A of the *Restraining Orders Act 1997* (WA) a person may apply for a violence restraining order if the respondent has committed an act of abuse against the person seeking to be protected and is likely to again commit such an act or the person seeking to be protected (or a person applying on their behalf) reasonably fears that the respondent will commit an act of abuse against the person. This enables a child who has been directly subject to family and domestic violence to apply for a violence restraining order (or for someone to apply on his or her behalf).

Section 11B of the *Restraining Orders Act 1997* (WA) provides additional grounds for when a violence restraining order can be made for the benefit of a child (i.e., over and above the grounds set out above). These are that:

- the child has been *exposed* to an act of family and domestic violence by a person with whom the child is in family and domestic relationship and the child is likely to again be exposed to such an act; and
- the applicant or the child reasonably fears that the child will be *exposed* to an act of family and domestic violence committed by a person with whom the child is in the family and domestic relationship.

3.9. This provision was inserted in 2004 in recognition of the serious impact of children's exposure to family and domestic violence. The term 'exposed' is defined in s 3 of the Act to include seeing or hearing the act of abuse.

3.10. In 2013–2014 the Law Reform Commission of Western Australia (LRCWA) undertook a reference on family and domestic violence. In its Discussion Paper the LRCWA commented that

during its consultations lawyers who represent victims of family and domestic violence 'expressed the view that in their experience, when there is evidence of a child having been exposed to family and domestic violence, violence restraining orders are only made in favour of the child in approximately 20% of cases'.³

3.11. Further, it was contended that violence restraining orders are typically only made in favour of a child where the child has been directly assaulted or is in very close proximity to the victim (e.g. where the victim is holding the child at the time of an assault). The apparent reluctance to impose orders for the protection of children was ascribed to the perceived preference on the part of magistrates for the Family Court of Western Australia to deal with children's issues as well as a lack of understanding about the impact of exposure to family and domestic violence for child.⁴

3.12. In its final report, the LRCWA made a number of recommendations that are relevant to children's exposure to family and domestic violence:

- Recommendation 3 – legislative recognition of the key features of family and domestic violence to include, among other things, that: children who are exposed to the effects of family and domestic violence are particularly vulnerable and exposure to family and domestic violence may⁵ have a serious impact on children's current and future physical, psychological and emotional wellbeing
- Recommendation 5 - definition of family and domestic violence to include committing family and domestic violence against another person to which the child is exposed (i.e. exposure falling directly within the definition rather than as a separate ground).
- Recommendation 5 – child is exposed to family and domestic violence if the child sees or hears or is otherwise exposed to any of the effects of that behaviour (e.g., observing injuries or distress, observing police attend, assisting with cleaning up site).

3.13. On 8 March 2015, the Western Australian Attorney General announced that the government will 'overhaul' the *Restraining Orders Act 1997* (WA) in response to the LRCWA's recommendations although the details of the reforms are yet to be announced. It is considered that the abovementioned recommendations should enhance the protection of children affected by family and domestic violence because there will be clear legislative recognition that children's exposure to family and domestic violence is equally a ground for obtaining a violence restraining order and that exposure does not have to be limited to solely seeing and hearing the violence.

³ Law Reform Commission of Western Australia, *Enhancing Laws Concerning Family and Domestic Violence*, Discussion Paper, Project No 104 (2013) 69.

⁴ *Ibid*, 69.

⁵ *Ibid*, 32–33. The Commission altered its recommendation from its initial proposal by inserting the word 'may' in acknowledgment that some children who are exposed to family and domestic violence may be very resilient and as submitted by the Commissioner for Children and Young People 'some children from violent homes do not exhibit any signs of traumatisation'.

Summary:

3.14. Legislation relating to family and domestic violence in the Northern Territory and Western Australia has been amended, or is proposed for amendment, so as to recognise that family and domestic violence has a significant impact on children. This includes specific provision in the Northern Territory and the proposed amendment in Western Australia that exposure to family and domestic violence is a ground for a child being taken into protection. While it is positive that the detrimental impact of exposure to family and domestic violence is being recognised, it should equally be highlighted that interventions and subsequent removal of Aboriginal and Torres Strait Islander children from families as a consequence of the existence of family and domestic violence is a complex issue that requires a cautious and effective response. Efforts to provide appropriate support to the adult victim and the child should be the priority to enable the child to remain with the non-abusive parent. As discussed further below, in NATSILS experience this is not always the case.

3.15. In the Northern Territory the wide definition of domestic relationships, that takes into account of Aboriginal and Torres Strait Islander traditions and the cultural meaning of family and relationship is important and can be learnt from by other states and territories. NATSILS also supports the Northern Territory's expanded definition of domestic violence that recognises that economic abuse and intimidation when repeated constitute a form of domestic violence. As noted further at 8, common definitions are the key to improved data collection, and it is argued that there needs to be greater consistency on this between states and territories.

4. Prevalence and Incidence of Family and Domestic Violence Affecting Children:

4.1. Aboriginal and Torres Strait Islander women and children are disproportionately impacted by family and domestic violence. While available data is limited, it is known that Aboriginal and Torres Strait Islander women are 31.4 times more likely to be hospitalised as a result of injuries caused by assault than non-Aboriginal and Torres Strait Islander women. It is estimated that 1 in 5 Aboriginal and Torres Strait Islander women has been a victim of violence in the last year.⁶

4.2. The high rates of family and domestic violence within Aboriginal and Torres Strait Islander communities can only be understood in the context of colonisation, dispossession, disadvantage and oppression.⁷ Gordon et al. have argued that colonisation has resulted in “unresolved grief that is associated with multiple layers of trauma spanning many generations”.⁸ Some of these

⁶ Australian Productivity Commission, *Overcoming Indigenous Disadvantage - Key Indicators 2011* (2011).

⁷ J Oberin 'Domestic and family violence: the latest research. In: Out of the fire—domestic violence and homelessness' (2001) 14(2) *Parity* 25.

⁸ Gordon et al cited in Al-Yaman F et al, *Family Violence Among Aboriginal and Torres Strait Islander Peoples* (Canberra: Australian Institute of Health and Welfare, 2006) at 3. See also: P Memmott et al, *Violence in Indigenous communities* (Canberra, Commonwealth Attorney-General's Department, 2001); J Atkinson,

'layers of trauma' include: colonial aggression; genocide; racism; alienation from tribal lands; breakdown of social structure; loss of spirituality and languages; removal of rights and responsibilities; labour exploitation; and large-scale removal of Aboriginal children from their families ('stolen generations').⁹ The high incidence of family and domestic violence in Aboriginal and Torres Strait Islander communities can also be linked to the fracturing and misinterpretation of Aboriginality and gender roles which has resulted since colonisation, in particular with regards to the undervaluing of the role of women.¹⁰

4.3. These and other factors have contributed to the erosion of social structures and traditional values, creating a range of social problems in Aboriginal and Torres Strait Islander communities today including high levels of family and domestic violence.¹¹ Thus family and domestic violence within Aboriginal and Torres Strait Islander communities must be understood as a "multi-dimensional problem that manifests itself in a range of health and related social outcomes."¹² An understanding of family and domestic violence in Aboriginal and Torres Strait Islander communities in this way has clear implications in terms of how it is best addressed as will be explored further below.

4.4. In regards to children's exposure to family and domestic violence, there are particular issues with ascertaining an accurate picture of its prevalence. As noted by Richards, distinguishing between children who suffer abuse in the home from those who are 'only' exposed to family and domestic violence presents a considerable methodological and conceptual challenge, as these two phenomena are rarely discrete.¹³ Research indicates that the rate of co-occurrence of Australian children experiencing physical abuse and being exposed to family and domestic violence, and experiencing sexual abuse and being exposed to family and domestic violence have been estimated at 55 percent and 40 percent respectively.¹⁴

Trauma trails, recreating song lines: The transgenerational effects of trauma in Indigenous Australia (North Melbourne, Spinifex Press, 2002).

⁹ *Ibid*, at 3.

¹⁰ As Professor Behrendt has noted, the Western male perception misinterpreted Aboriginal and Torres Strait Islander women's status, believing that their communities underestimated and diminished them. In addition, actual mistreatment and exploitation became the norm within the first settlers and their descendants. L Behrendt, 'Aboriginal women and the criminal justice system' (July 2002) 14 (6) *Judicial Officers Bulletin*, 41-44. See also: R Akbar, P Dudgeon and D Gilchrist, 'Gender in Aboriginal culture' in Dudgeon P, Garvey D, Pickett H, (eds.) *Working with Indigenous Australians: a handbook for psychologists* (Perth, Gunada Press, 2002) 143-154.

¹¹ P Memmott et al, *Violence in Indigenous communities* (Canberra, Commonwealth Attorney-General's Department, 2001).

¹² *Ibid*.

¹³ K Richards, *Children's Exposure to Domestic Violence in Australia* (AIC, Trends and Issues in Crime and Criminal Justice No 419 (2011)); T Herrenkohl et al, 'Intersection of child abuse and children's exposure to domestic violence' (2008) 9(2) *Trauma, Violence & Abuse*, 84-99; Jouriles E, McDonald R, Smith A, Heyman R & Garrido E 2008. Child abuse in the context of domestic violence: Prevalence, explanations, and practice implications. *Violence and Victims* 23(2): 221-235.

¹⁴ G Bedi and C Goddard, 'Intimate partner violence: What are the impacts on children?' (2007) 42(1) *Australian Psychologist* 66-77.

- 4.5. In Australia, the Australian Bureau of Statistics' (2005) Personal Safety Survey found that of all women who had experienced partner violence since the age of 15 years and had children in their care during the relationship, 59 percent reported that the violence had been witnessed by children, 37 percent that the violence had not been witnessed by children and four percent that they did not know whether the violence had been witnessed by children in their care.¹⁵ The Australian component of the International Violence Against Women Survey found that of women who had experienced partner violence and had children living with them at the time, 36 percent reported that their children had witnessed a family violence incident.¹⁶
- 4.6. A Secretariat of National Aboriginal and Islander Child Care study found that Aboriginal and Torres Strait Islander children were significantly more likely to have witnessed physical violence against their mother or stepmother than other child respondents (forty-two percent compared with 23 percent).¹⁷
- 4.7. Despite these studies, it is argued that the true prevalence of family and domestic violence and its impact on children (particularly Aboriginal and Torres Strait Islander children) is currently not accurately known. This is because there are a number of issues with current data and a number of obstacles to reporting family and domestic violence particularly in Aboriginal and Torres Strait Islander communities. The Gordon Inquiry into family violence concluded: "The true prevalence of Aboriginal family violence is unknown. What is known is that the violence is endemic and presents an extremely troubling picture of the situation in many Aboriginal communities."¹⁸
- 4.8. As discussed below at 8 in order to gain a more accurate picture of the prevalence of family and domestic violence and its impact on children better data is required, which will need to be predicated on common understandings or definitions of family and domestic violence and related terms (as noted at 1).

5. Impacts on Children of Family and Domestic Violence:

- 5.1. Children's exposure¹⁹ to family and domestic violence may involve a wider range of incidents than those that are stereotypically conceived, including the child:

¹⁵ Cited in K Richards, *Children's Exposure to Domestic Violence in Australia* (AIC, Trends and Issues in Crime and Criminal Justice No 419 (2011) at 2.

¹⁶ J Mouzos and T Makkai, *Women's experiences of male violence: Findings from the Australian component of the International Violence Against Women Survey (IVAWS)* (Research and public policy series no. 56, Canberra, Australian Institute of Criminology, 2004).

¹⁷ Cited in K Richards, *Children's Exposure to Domestic Violence in Australia* (AIC, Trends and Issues in Crime and Criminal Justice No 419 (2011) at 2.

¹⁸ S Gordon et al, *Putting the Picture Together: Inquiry into response by government agencies to complaints of family violence and child abuse in Aboriginal communities* (July 2002) 48.

¹⁹ Richards notes that, 'describing this range of violent experiences as "witnessing" fails to capture the extent to which children may become embroiled in domestic violence'. In recent years, a range of terms, including 'being exposed to violence', 'living with violence' and 'being affected by violence' have emerged to describe

- hearing the violence;
- being used as a physical weapon;
- being forced to watch or participate in assaults;
- being forced to spy on a parent;
- being informed that they are to blame for the violence because of their behaviour;
- being used as a hostage;
- defending a parent against the violence; and/or
- intervening to stop the violence.²⁰

5.2. Richards observes that the research literature shows that in the aftermath of a violent incident, children's exposure to family and domestic violence can involve:

- having to telephone for emergency assistance;
- seeing a parent's injuries after the violence and having to assist in 'patching up' a parent;
- having their own injuries and/or trauma to cope with;
- dealing with a parent who alternates between violence and a caring role;
- seeing the parents being arrested; and
- having to leave home with a parent and/or dislocation from family, friends and school.²¹

5.3. Exposure to such violence and/or its aftermath can have a range of significant and lost-lasting impacts on children.²² These impacts will be discussed in terms of psychological and behavioural impacts, physical impacts and socio economic impacts.

5.4. Psychological and behavioural impacts

It is well documented that children's exposure to family and domestic violence can have detrimental effects on children's psychology and behaviour, including: depression, anxiety, trauma symptoms, increased aggression, antisocial behaviour, lower social competence, temperament problems, low self-esteem, the presence of pervasive fear, mood problems, loneliness, school difficulties, peer conflict, impaired cognitive functioning and/or increased likelihood of substance abuse.²³ The development of such psychological and behavioural issues can lead to socio-economic issues, such as poor school achievement and/or attendance, increased likelihood of being involved in the justice system, drug and alcohol abuse, and

the experiences of children from violent homes. K Richards, *Children's Exposure to Domestic Violence in Australia* (AIC, Trends and Issues in Crime and Criminal Justice No 419 (2011) at 1.

²⁰ *Ibid* at 1.

²¹ K Richards, *Children's Exposure to Domestic Violence in Australia* (AIC, Trends and Issues in Crime and Criminal Justice No 419 (2011) at 1-2.

²² See: D Brown and Z Endekov, *Childhood abused: The pandemic nature and effects of abuse and domestic violence on children in Australia* (South Melbourne, The Alannah and Madeline Foundation, 2005).

²³ J Spilsbury et al. 2008. Profiles of behavioural problems in children who witness domestic violence (2008) 23(1) *Violence and Victims* 3; J Fantuzzo and R Fusco, 'Children's direct exposure to types of domestic violence crime: A population-based investigation' (2007) 22 *Journal of Family Violence* 543.; D Bagshaw, and D Chung (2001) 'The Needs of Children Who Witness Domestic Violence: A South Australian Study' (2001) 26(3) *Children Australia*, 9-17.

increased likelihood of self-harm and/ or suicide.²⁴ These issues are particularly grave in Aboriginal and Torres Strait islander communities.²⁵

5.5. Physical Impacts:

The physical impacts of exposure to family and domestic violence on children have rarely been documented, due to the difficulty of differentiating children exposed to family and domestic violence from victims of other forms of child abuse.²⁶ However, a research study found, that children from violent homes had significantly higher heart rates than other children, even after direct child abuse was controlled for.²⁷ A study by UNICEF found that living in a violent home could be a significant contributing factor to a range of serious health conditions, including alcohol and drug abuse and depression, and even early death.²⁸

5.6. Socio-economic Impacts:

Family and domestic violence has a number of ongoing harmful socio-economic effects that can often be linked to, as well as further entrench, the cycle of harm and disadvantage in Aboriginal and Torres Strait Islander communities. This includes, but is not limited to:

i) *Homelessness:*

There is a clear link between family and domestic violence and homelessness with research showing that women and children escaping family and domestic violence are the prevailing face of homelessness in Australia.²⁹ A study conducted in 2003–04, showed that children of women escaping family and domestic violence comprised two-thirds of child clients of Supported Accommodation Assistance Program services.³⁰

ii) *Child Protection Interventions:*

A particular concern is that family and domestic violence often leads to child protection interventions, which can lead to children being taken into the care of the state.³¹ Nationally,

²⁴ Tom Calma, *Ending family violence and abuse In Aboriginal and Torres Strait Islander communities: key issues – an overview paper of research and findings by the Human Rights and Equal Opportunity Commission, 2001-2006.*

²⁵ Alcohol and drug abuse and self-harm in Aboriginal and Torres Strait Islander communities is well documented, as is there over-representation in the justice system. See for example: Australian Bureau of Statistics, *Prisoners in Australia 2014* (Cat. no. 4517.0., Canberra, 2014); Productivity Commission, *Overcoming Indigenous Disadvantage Report 2014* (Canberra, 2014).

²⁶ G Bedi and C Goddard, 'Intimate partner violence: What are the impacts on children?' (2007) 42(1) *Australian Psychologist*, 66–77.

²⁷ Cited in K Richards, *Children's Exposure to Domestic Violence in Australia* (AIC, Trends and Issues in Crime and Criminal Justice No 419 (2011) at 3.

²⁸ *Ibid* at 3. See: P Pinheiro, *World report on violence against children* (New York, UNICEF, 2006).

²⁹ A Macdonald, 'Women and children experiencing family violence are the face of homelessness' (2007) 20(5) *Parity* 21. See also: H Aldemir, 'Rethinking the place of children in the nexus between domestic violence and homelessness' (2009) 22(10) *Parity* 48. G Johnson, H Gronda and S Coutts, *On the outside: pathways in and out of homelessness* (Melbourne, Australian Scholarly Publishing, 2008).

³⁰ *Ibid.*

³¹ C Berlyn et al, *Child protection and Aboriginal and Torres Strait Islander children* (National Child Protection Clearinghouse, 2011).

Aboriginal and Torres Strait Islander children are ten times more likely to be on care and protection orders and almost eleven times more likely to be in out-of-home care than non-Aboriginal children.³² This over-representation cannot be separated from past policies of forced removals and intergenerational trauma.³³

5.7. The interaction between child protection interventions and family and domestic violence is extremely complex because of the risk to both the child and the non-abusive parent/carer. It appears that this is recognised in the relevant policies in some jurisdictions (e.g., in Western Australia the Department of Child Protection and Family Support acknowledges the need to assess the risk to both the non-abusive parent and the child and to view them as a 'common unit').³⁴ However, in NATSILS view there is a divergence between policy and practice. In numerous cases where child protection intervention takes place (including removal of the child from his or her parents) it is because an alleged adult victim of family and domestic violence has failed to protect their child from family and domestic violence or from exposure to family and domestic violence.

5.8. NATSILS submits that government departments and relevant agencies should provide practical solutions to reduce the risk to the both the child and the adult victim. For example, in the absence of alternative safe accommodation, the fear of retribution may strongly discourage the adult victim from seeking a protection order or contacting the police. In the experience of NATSILS a lack of suitable accommodation for people experiencing family and domestic violence is a major issue and further funding needs to be provided to ensure the provision of sufficient accommodation options for Aboriginal and Torres Strait Islander women and children who are victims of family and domestic violence.³⁵ Conversely, however, where the risk is not so high, it may be more appropriate for the intervention to assist the family in remaining together and to live without violence. NATSILS highlights the detrimental impact of removing a child from one or both of their parents, including loss of connection to culture, family and community and a strong possibility of future involvement in the justice system.

5.9. Family and domestic violence is also a contributing factor to the disproportionate, and increasing, rate at which Aboriginal and Torres Strait Islander women are incarcerated.³⁶ A high proportion of Aboriginal and Torres Strait Islander women in prison have been victims of physical and sexual assault, and their experiences of family and domestic violence are often

³² Australian Institute of Health and Welfare, *Child Protection Australia 2012-3*, (Canberra, 2013) 43 and 55.

³³ Human Rights and Equal Opportunity Commission, *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Canberra, 1997).

³⁴ Department for Child Protection and Family Support, *Family and Domestic Violence Background Paper* (2012) at 4.

³⁵ See for example, B Hall, 'Housing Costs trapping women in domestic violence' *The Age, Victoria* (22 May, 2015).

³⁶ Aboriginal and Torres Strait Islander women make up approximately 2% of the population, but 34% of the prison population. Australian Bureau of Statistics, *Prisoners of Australia 2012*, (CAT no 45170, Canberra, 2012).

linked to their offending.³⁷ The imprisonment of a parent can be highly detrimental to a child in terms of development and greatly increases the likelihood that the child will become involved in the criminal justice system themselves.³⁸ Furthermore, violence is a major barrier to Aboriginal and Torres Strait Islander women achieving leadership roles and women's equality.³⁹ This has clear intergenerational ramifications for Aboriginal and Torres Strait Islander communities.

5.10. Finally, family and domestic violence and its impact on children, also comes at a significant and long-term economic cost to the Australian community as a result of reduced productivity, welfare receipt, medical costs, unemployment and a range of other factors.⁴⁰ As former Chief Justice of Western Australia, David Malcolm AC, observed: "domestic violence erodes valuable medical, legal, judicial and social resources, both human and financial, in a way that is not comparable to any other crime."⁴¹ A report by KPMG, estimated that violence against women and their children costs the Australian economy \$13.6 billion annually.⁴²

6. Outcomes for Children – Support and Services:

6.1. There is a dire need for services that support Aboriginal and Torres Strait Islander people who experience family and domestic violence. In particular, access to legal assistance services is a critical part of providing the necessary support to enabling individuals and their children to escape family and domestic violence. ATSILS and Family Violence Prevention Legal Services (FVPLS) provide culturally competent legal assistance services to Aboriginal and Torres Strait Islander peoples, including those impacted by family and domestic violence.

6.2. In this regard, ATSILS and FVPLS staff are highly skilled in working with Aboriginal and Torres Strait Islander people, with particular attention paid to cross-cultural communication, use of interpreters, and ensuring clients are able to understand and meaningfully participate in court processes. Given the disproportionate rates of family and domestic violence in Aboriginal and Torres Strait Islander communities it is essential that Aboriginal and Torres Strait Islander peoples can access culturally competent legal assistance services such as ATSILS and FVPLS. As

³⁷ Tom Calma, 'Ending family violence and abuse In Aboriginal And Torres Strait Islander communities: key issues – an overview paper of research and findings by the Human Rights and Equal Opportunity Commission, 2001-2006.

³⁸ See: R Woodward, 'Families of prisoners: Literature review on issues and difficulties' FaHCSIA Occasional Paper No. 10. (Australian Government Department of Family and Community Services, Canberra, 2002); J Tomaino et al, *Children of Prisoners Project*. Steering Committee's Report to the Justice Cabinet Committee (Attorney General's Department, South Australia, 2005).

³⁹ Tom Calma, 'Ending family violence and abuse In Aboriginal And Torres Strait Islander communities: key issues – an overview paper of research and findings by the Human Rights and Equal Opportunity Commission, 2001-2006.

⁴⁰ A Morgan and H Chadwick, *Key issues in domestic violence* (Canberra, Australian Institute of Criminology, December 2009).

⁴¹ D Malcolm, *Speech delivered to the 10th Anniversary Celebration of the Armadale Domestic Violence Intervention Project* (Perth, 28 May 2003).

⁴² KPMG Management Consulting, *The cost of violence against women and their children* (Canberra, Australian Government, 2009).

well as the provision of legal assistances, ATSILS and FVPLS play a role in community education to help prevent the occurrence of family and domestic violence.

6.3. Despite the indisputable need for these services in the community, ATSILS and FVPLS continue to be limited in terms of the services they can provide in this area. A lack of adequate resourcing in comparison to the identified need for legal services restricts the level of assistance that both ATSILS and FVPLS can provide.

6.4. NATSILS **recommends** that further funding be provided to the ATSILS and FVPLS to enable Aboriginal and Torres Strait Islander peoples experiencing family and domestic violence to access the legal services they need.

6.5. Further funding and resourcing is also needed for support services.⁴³ Failure to provide appropriate services and responses to family and domestic violence and attendant issues such as drug and alcohol dependence, increase the likelihood that family and domestic violence and its underlying issues will go unaddressed which has clear ramifications for children. For example, the failure to provide appropriate accommodation means that victims of family and domestic violence are less likely to leave their situations of abuse, or may become homeless as a result of leaving. In either situation, any children of the victim are at further risk of exposure/ abuse or being taken into protective custody. The provision of appropriate services is therefore critical to the welfare of the child. In addition, services also need to be funded to address any particular issues that a child may have developed as a result of their exposure to family and domestic violence, for example counselling or anger management. Such services will need to be tailored to the specific needs of children generally, and Aboriginal and Torres Strait Islander children in particular.

6.6. Further funding needs to be provided to services, including:

- appropriate accommodation;⁴⁴
- community education which promotes the legal rights of women and children supportive relationships;
- counselling, including the provision of men's counselling and treatment;
- drug and alcohol rehabilitation; and
- mental health and cognitive impairment treatment and support.

6.7. In this regard, it is important to note that research has identified that Aboriginal and Torres Strait Islander women experience additional difficulties in accessing appropriate supports,

⁴³ Broken Hill and Menindee Rural Crisis Intervention Projects, Australia et al, '*Community solutions to Aboriginal family violence : final report and model of best practice 1999-2000*'; Broken Hill and Menindee Rural Crisis Intervention Projects' (2001).

⁴⁴ S Wendt and J Baker, 'Aboriginal women's perceptions and experiences of a family violence transitional accommodation service' (2013) 66(4) *Australian Social Work*, 511.

compared to their non-Indigenous counterparts.⁴⁵ These difficulties arise for a number of reasons, including remoteness and inability to physically access services, distrust of government and non-government agencies delivering social services and communication barriers. These obstacles need to be addressed in order to increase the opportunity for Aboriginal and Torres Strait Islander peoples to access help and this means tailoring services appropriately.

6.8. Research has also shown that services for Aboriginal and Torres Strait Islander people are most effective when they are community-based and community-owned and have a commitment to Aboriginal and Torres Strait Islander trained staff. Services must also take into account complexities within Aboriginal families and communities.⁴⁶ This should include supporting and building on processes and networks that have already been developed, including Aboriginal Community Controlled Health Sector and the Aboriginal and Islander Child Care Services.⁴⁷ Funding for additional services should also be accompanied by ongoing evaluation and monitoring.⁴⁸

7. Outcomes for Children of Public Policy Approaches and Educational Campaigns Targeting Family Violence:

7.1. As noted by the National Children Commissioner in her background to this examination there are two significant national policy measures in Australia to protect children and reduce violence, the National Framework for Protecting Australia's Children 2009-2020 (the National Framework) and the National Plan to Reduce Violence against Women and their Children 2010-2022 (the National Plan).

7.2. The National Plan specifically references and acknowledges that issues of family and domestic violence are particularly severe in Aboriginal and Torres Strait Islander communities and that targeted measures are required.⁴⁹ Under the first 3 years of the National Plan, Outcome 3, is that "Indigenous communities are strengthened."⁵⁰ The plan provides that in order to meet this objective, "Governments will support communities to develop and implement local solutions

⁴⁵ M Willis, *Non-disclosure of violence in Indigenous communities* Trends & Issues in Crime and Criminal Justice no. 405. (Canberra, Australian Institute of Criminology, 2011).

⁴⁶ I Kowanko, I et al, 'An Aboriginal family and community healing program in metropolitan Adelaide: description and evaluation' (Oct – Dec 2009) 9(4) *Australian Indigenous Health Bulletin*, 1; R Lawrie, W Matthews, 'Holistic community justice: a proposed response to family violence in Aboriginal communities' (July 2002) 8(1) *University of New South Wales Law Journal* 16-18; P Memmott, 'Community-based strategies for combating Indigenous violence (July 2002) 8(1) *University of New South Wales Law Journal* 11.

⁴⁷ Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending violence in Indigenous communities Forum* (Parliament House Canberra, 19 June 2006).

⁴⁸ *Ibid.*

⁴⁹ Council of Australian Governments, *National Plan to Reduce Violence against Women and Their Children: including the first three-year Action Plan* (Commonwealth of Australia, 2011) at 20.

⁵⁰ *Ibid.*, at 20. The Plan also notes that, "Indigenous women and their children must be considered in all elements of the National Plan." at 20.

across all areas of the National plan” and that access to appropriate services will be improved⁵¹. The plan also states that an immediate national initiative will be to, “fund initiatives to Close the Gap...and develop new targets to hold Governments to account.”⁵²

7.3. The National Plan has now moved into stage two which sets different priorities for implementation and which has a particular focus on understanding how family and domestic violence is best addressed in Aboriginal and Torres Strait Islander and other diverse communities.⁵³ As will be noted below NATSILS is of the view that justice reinvestment is an effective tool for understanding and addressing issues of family and domestic violence.

7.4. Similarly, the Framework acknowledges particular issues relating to children and abuse in Aboriginal and Torres Strait Islander communities. Outcome 5 is that “Indigenous children are supported and safe in their families and communities.”⁵⁴ In order to meet this outcome the plan states that access to Indigenous and mainstream services for families and children will be expanded, the development of safe and strong Indigenous communities will be promoted and Indigenous children will receive culturally appropriate protection services and care.⁵⁵

7.5. While these plans are significant, to date this has not been accompanied by meaningful action, including adequate funding. Indeed, in NATSILS view the key issue with the government response to family and domestic violence is the lack of appropriate services for Aboriginal and Torres Strait Islander people which has not improved since the release of these plans - and which may significantly worsen as a result of funding under the Indigenous Advancement Strategy.⁵⁶

7.6. For example, as noted above at 6 the lack of funding provided to ATSILS and FVPLS places the commitment of the government to addressing family and domestic violence into some doubt as legal assistance is an absolutely bare-bone necessity to addressing family and domestic violence. NATSILS argues that an effective strategy for addressing family and domestic violence must include greater investment in prevention and early intervention, more appropriate targeting, increased collaboration and cooperation across agencies and a strategic national response to critical challenges and pressures, including those affecting the legal sector.

7.7. In the absence of a united commitment to achieving the outcomes stated in this Plan and Framework, a reduction in family and domestic violence can not be expected. As Tom Calma has noted,

⁵¹ *Ibid*, at 20-22. Note that National Outcome 4 is, “Services meet the needs of women and children experiencing violence.” at 23.

⁵² *Ibid*, at 21.

⁵³ National Priority Two: Understanding diverse experiences of Violence’ Department of Social Services, *Second Action Plan, Moving Ahead – of the National Plan to Reduce Violence against Women and their Children 2010-2022*.

⁵⁴ Council of Australian Governments, *Protecting Children is Everyone’s Business: National Framework for Protecting Australia’s Children 2009-2020* (Commonwealth of Australia, 2009) at 28.

⁵⁵ *Ibid*, at 29-30.

⁵⁶ See NATSILS *Submission to the Senate Inquiry on Indigenous Advancement Strategy Funding* (30 April 2015).

Aboriginal and Torres Strait Islanders can no longer accept governments making commitments without effecting processes and programs to achieve them. They can also no longer accept the failure of government to commit to urgent plans of action accompanied by adequate funding. There must be adequate measures within set timeframes.⁵⁷

7.8. In order to ensure that these outcomes are met NATSILS recommends that the federal government act upon the commitment in the Plan noted above to implement, “new targets to hold Governments to account”.⁵⁸ This should be achieved by putting justice targets into the COAG, Closing of the Gap Strategy under the safer communities ‘building block’. Currently, this is the only area that does not incorporate specific targets and this is where clear targets on lowering imprisonment and family and domestic violence in Aboriginal and Torres Strait Islander communities should be incorporated.⁵⁹

7.9. These targets should be developed in conjunction with relevant individuals and organisations to ensure that its strategies are effective and culturally appropriate. In this regard, it is noted that is difficult and often counter-productive to transport projects and strategies designed for non-Indigenous communities to Aboriginal and Torres Strait Islander communities as they often fail to be responsive to different cultural needs. Accordingly, such a strategy would need to take into account factors that are unique or of increased importance in Aboriginal and Torres Strait Islander communities, such as the uneven spread of human and capital infrastructure in rural and remote areas and the specific dynamics of Aboriginal and Torres Strait Islander family and kinship structures. A holistic approach to family and domestic violence is needed as the issue cannot be treated singularly as law and order, legal compliance or a health matter.⁶⁰ Strategies and models therefore need to recognise and address the connections between culture, separation from family, poverty, spiritual needs, drug use, alcohol use, violence, boredom, health, housing, race discrimination and gender discrimination.⁶¹

8. Data Gaps/Needs in Relation to Children Affected by Family and Domestic Violence:

8.1. There are a number of data gaps in regards to children and family and domestic violence, particularly as it relates to Aboriginal and Torres Strait Islander peoples. However, accurate and

⁵⁷ Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending violence in Indigenous communities Forum* (Parliament House Canberra, 19 June 2006).

⁵⁸ Council of Australian Governments, *National Plan to Reduce Violence against Women and Their Children: including the first three-year Action Plan* (Commonwealth of Australia, 2011) at 20

⁵⁹ NATSILS, ‘NATSILS calls for Federal Government commitment to Justice Targets on Close the Gap Day’ *Media Release*, 19 March 2013.

⁶⁰ See: I Gentle and J Taylor, ‘A community taking control of family violence’ (Sept/ Oct) 26(5) *Aboriginal and Islander Health Worker Journal*, 4.

⁶¹ Tom Calma, ‘Ending family violence and abuse In Aboriginal And Torres Strait Islander communities : key issues – an overview paper of research and findings by the Human Rights and Equal Opportunity Commission, 2001-2006.

complete identification of Aboriginal and Torres Strait Islander people in data sets relevant to violence is critical for assessing the extent of family and domestic violence among Aboriginal and Torres Strait Islander peoples which in turn would lead to more effective identification of potential interventions. The importance of data collection on family and domestic violence was noted by the World Health Organization in their report on violence and health when it was stated that increased “national capacity to collect and analyse data on violence is necessary in order to set priorities, guide program design and to monitor progress.”⁶² Currently, there are a number of issues and obstacles to the collection of such data on family and domestic violence, particularly for Aboriginal and Torres Strait Islander peoples.

8.2. Firstly, and most obviously, a major obstacle to obtaining an accurate picture of family and domestic violence is under-reporting by victims of violence, and the lack of appropriate screening by service providers. In general, it is very difficult to measure the true extent of violence against women as most incidences of family and domestic violence go unreported. In 2005, the Australian Bureau of Statistics (ABS) Personal Safety Survey estimated that only 36 per cent of female victims of physical assault and 19 per cent of female victims of sexual assault in Australia reported the incident to police.⁶³ As noted above at para 6.6 there are a number of additional obstacles that make Aboriginal and Torres Strait Islander women less likely than the general population to report family and domestic violence. These obstacles need to be addressed in order to increase the opportunity for Aboriginal and Torres Strait Islanders to access help and to gain a more accurate picture of the extent of family and domestic violence in these communities.

8.3. Secondly, as noted at 1 there are definitional issues relating to family and domestic violence, which in turn creates issues in terms of reliable data and reporting. Standardised national definitions for family and domestic violence, and national standard definitions for the relevant variables, are needed for meaningful reporting on these issues.⁶⁴ Dal Grande et al. have argued that the need for a national and international standardised definition of family and domestic violence is crucial in order to produce more accurate comparisons over time and between different population groups.⁶⁵ In terms of setting a national definition of family and domestic violence and related terms, careful attention will need to be made to Aboriginal and Torres Strait Islander definitions of family as this has implications for distinguishing between family and domestic violence and general violence. In the absence of such a definition the meaning and use of the term ‘family’ may affect the comparability of data between Aboriginal and Torres Strait Islander and non-Indigenous populations for family and domestic violence.

⁶² World Health Organization, *The Way Forward: Recommendations for Action 247*.

⁶³ Cited in Liesl Mitchell, *Domestic violence in Australia—an overview of the issues*, (Parliament of Australia, 22 November 2011). See also A Gewirtz and A Medhanie 2008. Proximity and risk in children’s witnessing of intimate partner violence. (2008) 8 (1/2) *Journal of Emotional Abuse*, 67.

⁶⁴ Al-Yaman F et al, *Family Violence Among Aboriginal and Torres Strait Islander Peoples* (Canberra: Australian Institute of Health and Welfare, 2006) at 14.

⁶⁵ *Ibid*, at 15.

8.4. Thirdly, there is a vast divergence in the way that ethnicity of offenders and victims is recorded between states and territories. It is noted that a number of states' and territories data in this regard is of insufficient quality to be included in national data. This makes obtaining an accurate national picture of how these issues relate to Aboriginal and Torres Strait Islander peoples as a distinct sub-set of the population difficult, and an accurate picture in these states impossible. In this respect, the data of Western Australia, Victoria, Tasmania and the Australian Capital Territory is heavily compromised or non-existent and therefore not included in data provided by the Australian Bureau of Statistics.

8.5. In particular, NATSILS notes with concern that Victoria still records the ethnicity of offenders and victims by "racial appearance" which means the ethnic identification of a person in the subjective opinion of the attending police officer. This is unacceptable. NATSILS recommends that all states and territories adopt the standard developed by ABS for identifying Aboriginal and Torres Strait Islander people in data collections.⁶⁶ Its recommended question allows for a person to identify as being of Aboriginal origin; Torres Strait Islander origin; both Aboriginal and Torres Strait Islander origin; or neither.

8.6. To improve the availability of comparable information about family and domestic violence, a high level of commitment is required within a range of areas, including health, community services, policing and criminal justice. The use of consistent definitions, national data standards and standard questions across data collections in these areas would greatly improve the ability to report on and assess the level of family and domestic violence in the Australian population in general and among Aboriginal and Torres Strait Islander Australians in particular.⁶⁷

8.7. Additional data in relation specifically to children is needed. In this regard, NATSILS recommends in all states and territories data be recorded and made publicly available on the proportion of family and domestic violence related incidents that are recorded/reported, where a child was present at the time the police attended (this is commonly referred to as an example of 'exposure to family and domestic violence') and/or whether a child was present at the time of the alleged family and domestic violence incident.⁶⁸ In addition, police data in relation to family and domestic violence incidents and family and domestic violence related offences should include a breakdown of the proportion of alleged victims that are children (i.e. direct victims of family and domestic violence).

9. Concluding Comments:

9.1. Underpinning all of these issues is the fact that not enough is done to prevent family and domestic violence arising. As noted throughout this submission family and domestic violence

⁶⁶ Australian Bureau of Statistics, *Indigenous Status Standard* (Version 1.5, 2014, 1200.0.55.008)

⁶⁷ Al-Yaman F et al, *Family Violence among Aboriginal and Torres Strait Islander Peoples* (Canberra: Australian Institute of Health and Welfare, 2006) at 19.

⁶⁸ As noted by Gerwitz and Medhanie, this information is rarely collected by police and as a result there is a dearth of information. A Gerwitz and A Medhanie, 'Proximity and risk in children's witnessing of intimate partner violence. (2008) 8 (1/2) *Journal of Emotional Abuse*, 67.

and its effect on children in Aboriginal and Torres Strait Islander communities can't be separated from the context of colonisation and the enduring legacy of the stolen generations. The result has been the fracturing of individuals, families and communities which manifests in numerous negative ways including high rates of family and domestic violence.

9.2. Viewing family and domestic violence in Aboriginal and Torres Strait Islander communities within this context means that rebuilding and empowering Aboriginal and Torres Strait Islander communities is the obvious answer. As Tom Calma, the former Aboriginal and Torres Strait Islander Social Justice Commissioner has noted, "I am a firm believer that the answer to Indigenous problems can be found in Indigenous communities."⁶⁹ NATSILS echoes this sentiment. In this respect NATSILS welcomes the commitment to strengthening Aboriginal and Torres Strait Islander communities in the National Framework and Plan, whilst noting that not enough has been done to implement this commitment.

9.3. In NATSILS view, justice reinvestment is an effective tool to addressing the negative experiences of Aboriginal and Torres Strait Islander people in relation to family and domestic violence and more broadly their negative association with the criminal justice system.⁷⁰ A justice reinvestment approach holds that in order to achieve long-term sustainably safer communities, government policy and investment needs to address the underlying causes of criminal behaviour (including family and domestic violence) through investment in education, housing, healthcare and jobs. As concluded by the Senate Inquiry into Justice Reinvestment, "By addressing the social determinants of crime – unemployment, homelessness, health and education issues – justice reinvestment has the potential to improve the life outcomes of individuals and build strong, safe and cohesive communities."⁷¹

9.4. In this regard, it should be noted that family and domestic violence comes at a considerable economic and social cost, with one studying finding that it costs the Australian economy over \$13 billion annually.⁷² This figure does not calculate the social costs for individuals, their families or the wider community, or the inter-generational effects. NATSILS calls upon all levels of government to work in partnership with Aboriginal and Torres Strait Islander people, communities, services and their representatives and make the needed investment into services and communities to break the cycle of family violence. This is an investment we can't afford not to make for the sake of current and future generations.

⁶⁹ Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007* (Human Rights Commission, 2007)

⁷⁰ C Cunneen, Chief Investigator, *Australian Justice Reinvestment Project*, Committee Hansard, 1 May 2013, at 61.

⁷¹ Senate Legal and Constitutional Affairs References Committee, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (2013) pp 33–41

⁷² KPMG Management Consulting, *The cost of violence against women and their children* (Canberra, Australian Government, 2009). See also: A Morgan and H Chadwick, *Key issues in domestic violence* (Canberra, Australian Institute of Criminology, December 2009).