



NATSILS

National Aboriginal and
Torres Strait Islander Legal Services

TRUE JUSTICE FOR OUR PEOPLE

Submission to the Commonwealth Parliament's Senate Select Committee on COVID-19

28 May 2020

TRUE JUSTICE FOR OUR PEOPLE

Table of Contents

Executive Summary	2
Summary of Recommendations	3
Introduction	5
Recommendations.....	6
A strong social safety net will make us more resilient now and into the future	7
Providing adequate healthcare everywhere.....	7
Income support	8
Safe and accessible housing.....	12
Recommendations.....	16
ATSILS and Family Violence Prevention Legal Services will require more support	17
Courts.....	18
Family law	19
PPE in prisons	22
Recommendations:.....	23
The Commonwealth Government’s response so far	24
Policing.....	26
Recommendations:.....	31
Protecting the community by protecting imprisoned people	32
Preventing Aboriginal deaths in custody during COVID-19	37
Recommendations:.....	39
Conclusion	40

Executive Summary

We are all, without exception, affected by COVID-19. However, there will be people who suffer more than others, particularly our Aboriginal and Torres Strait Islander communities. The ongoing impacts of colonisation, land dispossession and family separation mean that our people are already experiencing the worst impacts of inequitable health.

We are no strangers to dealing with infectious diseases to which we have no immunity.¹ Aboriginal and Torres Strait Islander communities, organisations and our peak bodies mobilised our COVID-19 responses early and effectively. In particular remote communities that organised big 'return to country' repatriation efforts to keep their people well on country.²

Aboriginal Health Services and Aboriginal Language Centres also produced numerous videos, pamphlets, posters, and other health promotion material in Aboriginal languages to keep our communities safe and healthy.³

Our people will be hit hardest because our health, legal assistance services and income support services were already under strain before the pandemic. The virus has revealed chronic problems in our social safety net and our economic systems.

However, we can choose to use the pandemic as an opportunity for all Aboriginal and Torres Strait Islander people and communities to emerge on the other side of COVID-19 with stronger health, welfare, community infrastructure, and economic systems that are grounded in the strength of Aboriginal and Torres Strait Islander cultures and in Indigenous self-determination.

To care for everyone, we must all ensure that our communities are connected and strong. To do this, all governments need to prioritise:

- Ending homelessness and overcrowding in Australia by 2030 by prioritising the urgent build, repair and maintenance of safe, accessible, and secure public and social housing.
- Keeping the Coronavirus Supplement to income support payments.
- Removing mutual obligations for income support, including the Community Development Program and the Basics Card, and replacing these with culturally safe social support programs for people and their families.
- The immediate release of imprisoned Aboriginal and Torres Strait Islander people at risk to stop the spread of COVID-19 and prevent a second wave in custodial settings and in the community.
- Testing and treatment for imprisoned people that cannot be released.
- An independent analysis of police stop data during the pandemic, including a review of all COVID-19 infringements and/or Biosecurity Orders issued around the country by police services or the Australian Defence Force.
- Funding Aboriginal and Torres Strait Islander Legal Services, Family Violence Prevention Legal Services, and their peak bodies.

¹ Aileen Marwung Walsh, Laura Rademaker, *Why self-determination is vital for Indigenous communities to beat coronavirus*, (Website, 6 May 2020) <<https://theconversation.com/why-self-determination-is-vital-for-indigenous-communities-to-beat-coronavirus-137611>>


² June Oscar AO, *Coronavirus means traditional homelands may be safest for Indigenous people but it comes with unexpected lessons*, Australian Broadcasting Corporation, (Website, 17 May 2020) <<https://www.abc.net.au/news/2020-05-17/coronavirus-indigenous-health-safe-homeland-june-oscar/12245728>>

³ *Ibid.*

Summary of Recommendations

NATSILS makes the following recommendations to the Senate Select Committee:

1. The Australian Government needs to implement United Nations Declaration on the Rights of Indigenous People into domestic law, across all Australian jurisdictions as a matter of priority.
2. The National Cabinet needs to prioritise commissioning culturally safe research on how Aboriginal and Torres Strait Islander people are accessing mainstream health services and, on their experiences, and outcomes after accessing these services. Aboriginal and Torres Strait Islander people, including the Aboriginal Community Controlled Organisations that advocate with us, must be meaningfully involved in all aspects of research design, execution, and data interpretation and data ownership
3. The National Cabinet needs to permanently maintain the Coronavirus Supplement to JobSeeker, Youth Allowance, and the other income support payments that it applies to, to reduce poverty for millions of Australians.
4. The Australian Government needs to permanently end the Community Development Program permanently as well as end all other mutual obligations/ Work for the Dole requirements for income support permanently. These requirements are ineffective and in some instances are causing community harm.
5. The Australian Government needs to end the Basics Card Program and income management programs and instead prioritise the provision of culturally safe social, health, welfare, and economic support for Aboriginal and Torres Strait Islander people that is strong on Indigenous culture and centred on Indigenous self-determination.
6. The Australian Government needs to commission an exploratory study on the availability, affordability, and accessibility of food, particularly fresh food and vegetables, in regional, remote, and very remote communities.
7. The National Cabinet needs to prioritise the urgent building of public and social housing, prioritising the building, maintenance, and/or repair of good quality, adequate and secure homes for Aboriginal and Torres Strait Islander people with a view to eliminating all homelessness and home-overcrowding in Australia by 2030 as part of a national post COVID-19 recovery plan.
8. The National Cabinet needs to ensure that ATSILS, Family Violence Prevention Legal Services, their peak organisations, and the Aboriginal and Torres Strait Islander communities that we represent are urgently prioritised in the final funding allocation of legal assistance COVID-19 funding so we can best respond to the increased legal needs of our people during and after the COVID-19 pandemic.
9. The National Cabinet, in partnership with ATSILS and Aboriginal and Torres Strait Islander people, needs to also focus on alternatives to imprisonment, like culturally safe diversionary programs and on providing our communities the support that we need to survive this pandemic now and into the future.

- 
10. The National Cabinet needs to commit to establishing or tasking independent oversight bodies, committees or taskforces with appropriate powers and resources to undertake a comprehensive review of COVID-19 police responses, deployment and enforcement decisions in all states and territories. This independent body could be the state's human rights commission, Ombudsman, police oversight authority or crime statistics agency. The committee, taskforce or body needs to have strong Aboriginal and Torres Strait Islander representation, including from the legal assistance services and the health sectors.
 11. The National Cabinet needs to prioritise an independent analysis of police stop data during the pandemic. An independent analysis of stop data is a critical part of this independent review process to determine whether COVID-19 related policing impacted upon certain demographics or communities disproportionately.
 12. The National Cabinet needs to ensure that state and territory police and infringement departments review all COVID-19 related infringements, fines, directions, orders, and any other similar instruments issued by all police services and/or the ADF to ensure that they are reasonable, proportionate, and in accordance with our international and domestic human rights obligations. All findings from these review processes need to be made publicly available at the earliest opportunity.
 13. The Commonwealth Health Minister needs to use his powers under the *Biosecurity Act 2015* (Cth) to issue strong directions and/or determinations for the immediate release of Aboriginal and Torres Strait Islander adults and young people who are:
 - most at risk, with pre-existing health issues, including elderly people, people with chronic health conditions, disability, and/or mental health conditions
 - on remand, including by fast-tracking bail applications
 - imprisoned for a term of six months or less, and those who have six months or less left to serve, with expedited parole processes.
 14. The National Cabinet needs to ensure that there is immediate and appropriate medical treatment, including testing and hospitalisation, for all imprisoned Aboriginal and/or Torres Strait Islander people who develop COVID-19 symptoms in any state/territory or Commonwealth custodial facility. Their families and the ATSILS' Custody Notification Services must also be immediately notified
 15. The National Cabinet needs to ensure that even during a COVID-19 outbreak, independent inspection bodies and organisations that monitor the treatment of imprisoned people have access to all places of detention, including to anyone who may be in isolation to ensure that imprisoned people's human rights are being upheld and respected.
 16. All States and Territories need to implement the Optional Protocol on the Convention Against Torture by immediately establishing effective National Preventative Mechanisms that comply with the NPM Criteria (as specified by the Sub-committee on the prevention of torture) and include Aboriginal and Torres Strait Islander organisations, such as ATSILS and NATSILS, to ensure that the conditions and treatment of Aboriginal and Torres Strait Islander people with disability is adequately monitored.

Introduction

Aboriginal and Torres Strait Islander people are no strangers to dealing with infectious diseases to which we have no immunity.⁴ Since European colonisation, Aboriginal and Torres Strait Islander people have reckoned with the double threat that epidemics pose to the wellbeing of our communities: first the threat to our health and second a threat to our self-determination.⁵

At the beginning of European colonisation, Aboriginal and Torres Strait Islander communities dealt with devastating epidemics of smallpox, leprosy, influenza, tuberculosis, measles, whooping cough, and others.⁶ Historically, concerns about infection have been used to control the lives of Aboriginal and Torres Strait Islander people through restrictions and regulations on movement, marriages, relationships, and by forced exiles or internments- particularly for people with leprosy.⁷ The last 'leprosarium' for Aboriginal and Torres Strait Islander people closed in 1986, well after an effective treatment for leprosy was readily available.⁸

Because punitive restrictions on movement and forced family separations were used to justify infection controls in the past, faced with the threat of COVID-19, Aboriginal and Torres Strait Islander communities mobilised early.⁹ The Anangu Pitjantjara Yankunytjatjara (APY) Traditional Owners restricted access to their country in early March.

The Mapoon Aboriginal Shire implemented its own travel bans- well before the Australian government implemented its own international travel bans.¹⁰ The Combined Aboriginal Organisations of Alice Springs demanded a special control area be put in place on their country to limit people's movement and therefore their community's exposure to COVID-19.

The Tangentyre Council and the Larrakia Nation implemented 'Return to Country' programs that covered the cost of Aboriginal and Torres Strait Islander people returning to their country.¹¹ Kimberley Aboriginal Medical Services, Danila Dilba Health Service and others have also organised a huge peacetime effort to repatriate thousands of people to relative safety on country.¹²

In the absence of available and accessible educational material in Aboriginal languages, the Northern Land Council released videos in a number of central and northern languages: Warlpiri, Murrinh-Pantha, Alywarr, Anmatyerr, Pintupi-Luritja, Yolngu Matha, Kriol, Pitjanjatjara, Kunwinjuku, Central Arrernte and many

⁴ Aileen Marwung Walsh, Laura Rademaker, *Why self-determination is vital for Indigenous communities to beat coronavirus*, (Website, 6 May 2020) <<https://theconversation.com/why-self-determination-is-vital-for-indigenous-communities-to-beat-coronavirus-137611>>

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² June Oscar AO, *Coronavirus means traditional homelands may be safest for Indigenous people but it comes with unexpected lessons*, Australian Broadcasting Corporation, (Website, 17 May 2020) <<https://www.abc.net.au/news/2020-05-17/coronavirus-indigenous-health-safe-homeland-june-oscar/12245728>>

others.¹³ Aboriginal Language Centres also released COVID-19 information in Kunwinjku, Anindilyakwa and many others while the National Aboriginal Community Controlled Health Organisation and the Aboriginal Medical Services have released their own, culturally appropriate resources like bulletins, pamphlets, and posters.¹⁴

With funding support from the Arnhem Land Progress Association and utilising existing resources and capacity, NATSILS member, the North Australian Aboriginal Justice Agency developed a suite of videos informing the community about COVID-19 and the law.¹⁵

The quick, efficient, and adaptive responses by our people, our organisations, and our peak bodies has demonstrated the incredible effectiveness, resilience, and capacity of our communities, particularly in a time of crisis.

Despite quick and decisive action by our communities to contain the spread of COVID-19, the pandemic has highlighted the drastic under-resourcing of health, education, legal, and social services, safe and secure homes, and community infrastructure for Aboriginal and Torres Strait Islander communities, particularly for those in rural and remote areas.

As a signatory to the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**), Australia has an obligation at international law to provide all Aboriginal and Torres Strait Islander people equal right to the enjoyment of the highest attainable standard of physical and mental health, regardless of where they live. At international law, Australia has an obligation to take all necessary to achieving the full realisation of this right for our people.¹⁶ However, the UNDRIP largely remains uncodified in Australian domestic law.

As we have seen with the Aboriginal and Torres Strait Islander led responses to the pandemic, our communities are strong, resilient, highly capable, and highly able to create our own solutions within systems that have not been designed to meet our needs.¹⁷

The pandemic provides an opportunity for all Aboriginal and Torres Strait Islander people and communities to emerge on the other side of COVID-19 with stronger health, welfare, infrastructure, and economic systems that are grounded in the strengths of Aboriginal and Torres Strait Islander cultures and in Indigenous self-determination.

Recommendations

1. The Australian Government needs to implement UNDRIP into domestic law, across all Australian jurisdictions as a matter of priority.

¹³ Northern Land Council, *Northern Land Council YouTube Channel*, (Website, last accessed 22 May 2020) <https://www.youtube.com/user/NorthernLandCouncil/videos?view_as=subscriber>

¹⁴ Kimberley Aboriginal Medical Services Ltd, *Coronavirus (COVID-19) Resources*, (Website, Last accessed 22 May 2020) <<http://kams.org.au/covid19-resources/>>

¹⁵ The North Australian Aboriginal Justice Agency, *NAAJA*, (Website, last accessed 27 May 2020) <<http://www.naaja.org.au/>>

¹⁶ The United Nations, *61/295. United Nations Declaration on the Rights of Indigenous Peoples*, Adopted at 107th plenary meeting 13 September 2007, Art 23

¹⁷ June Oscar AO, (2020) *Op.Cit.* at 10

A strong social safety net will make us more resilient now and into the future

Governments need to ensure that our communities have easy access to income support, appropriate healthcare, as well as accessible and safe social and public housing now and into the future. These, among many others, are factors or conditions referred to by the World Health organisation (**WHO**) as the social determinants of health.¹⁸

The social determinants of health are the conditions in which people are born, grow, live, work, and age. These circumstances are shaped by the distribution of public funding and resources and the distribution of power and decision making.¹⁹ According to the WHO, the social determinants of health are mostly responsible for the unfair and avoidable differences in the health status of people within countries and between them.²⁰ These differences are referred to as health inequities and health inequalities.²¹ A health inequality is the difference in health status between groups of people. Health inequities are differences in the health status between groups of people that are caused by society's systemic and unequal distribution of resources. Health inequities are both avoidable and unfair.²²

Improving the social determinants of health for everyone will improve our resilience to global crises in the future and create stronger communities. Systemic injustices mean that our people are, broadly speaking, already pushed into experiencing the worst of preventable health inequities in Australia.²³ However, Our people that have access to a strong social safety net report feeling safe or very safe at home, and higher social, economic and cultural advantages.

They also reported very good or excellent overall health, less substance use and were more likely to report eating nutritious food compared to those without well-paying jobs.²⁴ Showing that improving the conditions in which our people are born into, grow up in, and age in as well as valuing and respecting our cultures, knowledge and languages will lead to better health outcomes for us, our families, and our communities.

Providing adequate healthcare everywhere

Access to culturally safe and appropriate health services is critical for the health and wellbeing of our people, more so during a pandemic. Measuring our access to health care is complicated as access means more than just the mere availability of a health service. As per the Australian Institute of Health and Welfare (**AIHW**), a

¹⁸ World Health Organisation, *Social determinants of health*, (Website, last accessed 18 May 2020) <https://www.who.int/social_determinants/sdh_definition/en/>

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ Victorian Government Health Promotion Foundation VicHealth, *Health equity: health inequalities & health inequities*, (website, last accessed 18 May 2020)

²² *Ibid.*

²³ Australian Government Australian Institute of Health and Welfare, *Indigenous Australia*, (website, 29 January 2020) v4.0 <<https://www.aihw.gov.au/reports-data/population-groups/indigenous-australians/overview>>

²⁴ Australian Government Australian Institute of Health and Welfare, *Australia's health 2018, 6.6 Social determinants and Indigenous health Australia's health series no. 16. AUS 221. C*, (Report, 2018) Chapter 6, 1

health service would need to also be affordable, capable, and culturally safe for it to be deemed acceptable to the user.²⁵

The AIHW has identified forty areas around the country with very limited access (within an hour's drive) to either an Indigenous specific primary health care services²⁶ (ISPHCS) or a general practitioner, including services provided by the Royal Flying Doctor Service.²⁷

Ten of these areas identified by the AIHW had significant Aboriginal and Torres Strait Islander populations (of at least 600), four of these areas without easy access to healthcare had Aboriginal and Torres Strait Islander populations of more than 1,200 people- including all of the Torres Strait Islands.²⁸ The AIHW found that the remaining service gap areas have Aboriginal and Torres Strait Islander populations ranging from fewer than 50 people to almost 600.²⁹ From all the areas surveyed by the AIHW, 62% had high rates of preventable hospitalisations.³⁰

ISPHCS' are critical in delivering healthcare to Aboriginal and Torres Strait Islander people, particularly those in very remote areas and under-serviced areas. One third of all ISPHCS' are in very remote areas, 23% are in outer regional areas and 21% in inner regional areas. Smaller proportions are in remote areas (13%) and 10% in major cities.³¹

No data currently exists on how our people are accessing mainstream health services and, on their experiences, and outcomes after accessing those services. Complete data also do not exist on where health services are located around the country or how often people access or use those that are available. This makes it difficult to determine how and where our people are accessing health services, what their experiences have been and what their outcomes were.

The need for culturally safe and appropriate health services, regardless of where someone lives, works or studies is critical to ensure the health and safety of Aboriginal and Torres Strait Islander people everywhere now and into the future.

Income support

On 12 March 2020, the Australian Government announced the first economic stimulus package in response to the pandemic. On 22 March 2020, the Government announced the second package of measures, namely payments to support households, income support, regulatory protections, and financial support for businesses.³²

²⁵ Australian Government Australian Institute of Health and Welfare, *Australia's health 2016, Australia's health series no. 15. Cat. no. AUS 199. C* (report, 2016)

²⁶ Australian Government Australian Institute of Health and Welfare, *Spatial variation in Aboriginal and Torres Strait Islander people's access to primary health care*, (Report, 21 July 2015) Summary of Findings,

²⁷ In 2015-16, ISPHCS were delivered by 204 organisations from 368 locations. Most of these (136) were Aboriginal Community Controlled Health Organisations (ACCHOs) with the remainder being state and/or territory organisations and other NGOs.

²⁸ Australian Government Australian Institute of Health and Welfare, (2015) *Op. Cit.*

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ Australian Government Australian Institute of Health and Welfare, *Australia's health 2018, Australia's health series no. 16. AUS 221* (Report, 2018)

³² Parliament of Australia, *COVID-19 Economic response—social security measures part 2: \$750 lump sum payments*, (Website, 23 March 2020, updated on 24 March 2020)

As part of the first package, the Government announced a one-off payment of \$750 to some income support recipients, including JobSeeker recipients, as well as recipients for family assistance payments and veterans' payments.³³ Around 6.6 million people will receive the first \$750 payment. A second \$750 one-off, lump sum payment was later announced as part of the second package for some recipients of JobSeeker³⁴, Youth Allowance, ABSTUDY and other income support types. Around 5 million people will receive the second \$750 payment.³⁵

This is not the first time that lump sum payments have been made available to sections of the population. As a response to the Global Financial Crisis, in December 2008 one off payments were made to pensioners, seniors, and veterans. In early 2009, one off payments of \$900 to single income families and \$950 to families with school aged children, students and some farmers were made available. In the first half of 2009, a bonus of up to \$900 was made available to people with a tax liability and annual income below \$100,000.³⁶

Research on the stimulus payments of 2008 and 2009 found that most (40.5%) of the people who received these payments spent them, the remainder either saved the payment (24.0%) or used it to pay down debt (35.5%).³⁷ The United Nations Children's Emergency Fund found that the payments targeted at families were more effective than tax incentives provided to the broader population in boosting spending and reducing poverty.³⁸

The second economic stimulus package also provided a \$550 per fortnight Coronavirus supplement for new and existing recipients of JobSeeker, Parenting Payment, Youth Allowance, Farm Household Allowance, and Special Benefit income support payments.³⁹ Under this announcement, eligibility criteria for JobSeeker and Youth Allowance was amended, some assets tests and some waiting periods were also waived.⁴⁰ The Coronavirus Supplement will be paid for an initial six month period beginning 27 April 2020.⁴¹

By implementing these measures, the maximum rate of income support for a single person on JobSeeker with no children will be \$1,124.50, this equating to about 76 per cent of the minimum wage for a full-time worker.⁴²

<[https://www.aph.gov.au/About Parliament/Parliamentary Departments/Parliamentary Library/FlagPost/2020/March/Coronavirus lump-sum payments](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2020/March/Coronavirus_lump-sum_payments)>

³³ *Ibid.*

³⁴ JobSeeker is the new name for the NewStart income support payment provided through Services Australia.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ Bruno Martorano, *Lessons from the recent economic crisis: The Australian Household Stimulus Package*, UNICEF Office of Research (Report, June 2013) WP-2013-09

³⁹ Parliament of Australia, *COVID-19 Economic response—social security measures part 1 temporary supplement and improved access to income support*, (Website, 23 March 2020, updated on 24 March 2020)

<[https://www.aph.gov.au/About Parliament/Parliamentary Departments/Parliamentary Library/FlagPost/2020/March/New coronavirus supplement](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2020/March/New_coronavirus_supplement)>

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

We welcome the increase to the JobSeeker payment and Youth Allowance as a vital measure to support people during the pandemic. However, we are concerned that because this extra support is temporary, the rates of income support will drop again to pre-COVID levels.

Policy experts, social services, and business groups have called for a permanent increase in the rate of JobSeeker and Youth Allowance as the pre-COVID rates were already too low to properly support someone who relies on income support as their main source of income.⁴³

Both JobSeeker and Youth Allowance have been falling behind pensions and wages for years.⁴⁴ The Coronavirus Supplement is and will continue to reduce poverty among our people, albeit for only a short amount of time.⁴⁵ The coronavirus supplement is the biggest boost to Aboriginal and Torres Strait Islander people who rely on income support in about fifty years.⁴⁶

Income support for our people has previously failed to alleviate poverty, particularly for people who live in remote and very remote areas. About 54% of Aboriginal and Torres Strait Islander people living in remote areas report living in poverty. With the median personal income for Aboriginal and Torres Strait Islander people living in remote areas is only \$310.⁴⁷

As mentioned above, the Coronavirus Supplement is the most substantial increase in aggregate incomes for Aboriginal and Torres Strait Islander people since their right to equal wages in 1969.⁴⁸ In very remote areas, total community incomes are likely to increase by 25% because of the Supplement.⁴⁹ This increase is so significant for Aboriginal and Torres Strait Islander people that the Minister for Indigenous Australians, the Hon Ken Wyatt MP, expressed concern that stores may actually run out of food as incomes start to provide for people's everyday needs.⁵⁰

A study commissioned by the Australian Council of Social Service (**ACOSS**) found that increasing the rate of JobSeeker and other income support payments by just even \$75 a week would result in \$3.3 billion of extra spending and create 12,000 new jobs.⁵¹ The ACOSS study also found that people with low incomes would be the overwhelming beneficiaries of the increased income support rates, particularly those living in regional areas.⁵²

⁴³ *Ibid.*

⁴⁴ Parliament of Australia, *The adequacy of jobseeker payments*, (Website, accessed 18 May 2020) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook46p/JobseekerPayments>

⁴⁵ Francis Markham, *the coronavirus supplement is the biggest boost to Indigenous incomes since Whitlam. It should be made permanent*, (Website, 20 April 2020) <<https://theconversation.com/the-coronavirus-supplement-is-the-biggest-boost-to-indigenous-incomes-since-whitlam-it-should-be-made-permanent-135936>>

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ Deloitte Access Economics, *Analysis of the impact of raising the rates of Newstart and other allowances*, (2018) <https://www.acoss.org.au/media-releases/?media_release=raising-newstart-and-youth-allowance-would-boost-jobs-wages-and-inject-millions-into-local-communities>

⁵² *Ibid.*

Mutual obligation arrangements (Work for the Dole) have also changed during the pandemic, with obligations lifted until 1 June 2020.⁵³ The fact that mutual obligation requirements have been suspended several times during the pandemic indicates that they are more based on ideology than an actual necessity or a fundamental requirement for the delivery of the program. These types of obligations have arisen due to successive governments choosing to view income support as a benefit that people need to earn and not as the right owed to a citizen.⁵⁴

Research has found that these mutual obligation requirements or Work for the Dole programs are not effective as labour market programs because they do not provide enough opportunity for skill development to make a difference to employment prospects.⁵⁵ Research has also found that the purported work experience gained by participants is not linked to eventual paid work or further education/training.⁵⁶

The Australian Government's remote employment obligation program for people on income support, the Community Development Program (CDP)⁵⁷ has also suspended or changed requirements during COVID-19.

Tina

Tina* is a 42-year-old proud Aboriginal woman living in a remote community in the Northern Territory. She was helped by NATSILS member, NAAJA several years ago. She is an insulin dependent diabetic as well as having other chronic health conditions like kidney issues, high blood pressure and chronic back pain.

Because of her health condition, Tina has chronic pain, low energy and has problems regulating her body temperature and because of this she is not able to participate in some strenuous CDP activities. Tina has previously attended CDP activities like sorting recycling and picking up rubbish, however these were causing her health issues to deteriorate.

Tina informed her CDP provider of her issues and that she was having trouble doing her allocated activities because of her health. She had previously provided Centrelink with health reports evidencing her health problems. She also notified the social worker employed by her CDP provider that she was struggling to pick up rubbish. She stopped attending her CDP activities because of her health.

Tina has tried to be placed on the Disability Support Pension due to her health, but Centrelink keep on requesting more information for her application and Tina has become exasperated and confused.

Her Centrelink payments were suspended for eight weeks without warning for not attending CDP activities.

*Not her real name. Source: NAAJA, *The appropriateness and effectiveness of the objectives, design, implementation, and evaluation of the Community Development Program (CDP)*, (Submission to the Senate Finance and Public Administration Committee), 2017.

⁵³ Australian Government Department of Education Skills and Employment, *Explainer: COVID-19 mutual obligation arrangements*, (Website, 14 May 2020) <<https://www.employment.gov.au/newsroom/explainer-covid-19-mutual-obligation-arrangements>>

⁵⁴ Matthew Campbell, *Income management doesn't work, so let's look at what does*, (Website 18 December 2014) <<https://theconversation.com/income-management-doesnt-work-so-lets-look-at-what-does-34792>>

⁵⁵ Parliament of Australia, *Work for the Dole program to stay*, (Website, 12 April 2017) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2017/April/Work_for_the_Dole_program_to_stay>

⁵⁶ *Ibid.*

⁵⁷ There are about 35,000 CDP participants in Australia, but the overwhelming number of them (83%) are Aboriginal and Torres Strait Islander. See: <https://www.niaa.gov.au/sites/default/files/publications/cdp-evaluation-first-2-years.pdf>

Requirements for CDP have been changed to prevent travel within or between communities. The National Indigenous Australians Agency has instructed CDP providers to: ‘not apply compliance actions while the biosecurity arrangements announced by the Prime Minister on 20 March 202 are in place.’⁵⁸

The CDP was recently reviewed by the Australian government, with most (36%) interviewed participants reporting that their communities report being worse off under the scheme.⁵⁹ The CDP review found that social problems in remote communities had increased due to the CDP, like an increase in theft of food by children and young people was reported as well as an increase in domestic and family violence, more financial coercion and family fighting and an increase in mental health problems and feelings of shame.⁶⁰

The review found that Aboriginal and Torres Strait Islander CDP participants were three times more likely to be penalised for non-compliance as well as being penalised more often.⁶¹

Income management is also another restriction on the provision of income support that should be considered when reviewing the income support safety net going forward. Income management withholds 50% of a person’s income support payment which is available through Services Australia’s Basics Card (**Basics Card**).^{62 63}

The Basics Card is intended to be used to pay for essentials like food, rent and utilities. However, research has found that income management does not change problems like our people running out of food or of our people eating more nutritious food.

Research also shows that our people do not manage their income differently and that there is no evidence of less drinking or higher school attendance.⁶⁴ Aboriginal researchers at the Tangentyere Research Hub as well as people on the Basics Card report that the better way to create a better future for our communities is to instead provide better culturally safe social and support services to families who need it, like counselling, financial counselling, and other personal supports. Researchers report that the program does provide some benefits to some people but is overall not effective at achieving its aims of having income support payments be used for the near exclusive purchase of food, utilities and the payment of rent.⁶⁵

Safe and accessible housing

Access to appropriate, affordable, adequate, and secure housing is fundamental to achieving and maintaining optimal health. Access to safe, accessible, properly maintained, and secure housing also limits people being socially excluded, of being overcrowded and contributes to better physical and mental health.⁶⁶

⁵⁸ Australian Government Department of the Prime Minister and Cabinet, *Community Development Programme* (Website, 22 March 2020) <<https://ministers.pmc.gov.au/wyatt/2020/community-development-programme>>

⁵⁹ Australian Government National Indigenous Australians Agency, *An evaluation of the first two years of the Community Development Programme*, (Website, 5 February 2019) <<https://www.niaa.gov.au/resource-centre/indigenous-affairs/evaluation-first-two-years-community-development-programme-summary>>

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² Matthew Campbell, (2014) *Op. Cit.* at 49

⁶³ Services Australia, *Basics Card*, (Website, last accessed 26 May 2020) <https://www.servicesaustralia.gov.au/individuals/services/centrelink/basicscard>

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ Australian Government Australian Institute of Health and Welfare, (2018) *Op. Cit.* at 27, Chapter 4, 3

Our people, young people, people with chronic health conditions and/or people with disability are some of the people most likely to be living in poor quality housing in Australia.⁶⁷

It is estimated that 50 people per 10,000 are homeless, and over 195,000 households are on a social housing waiting list with almost half having waited more than 2 years.⁶⁸

Overcrowding is a significant problem for our people, with overcrowding increasing from 3.4% in 2011 to 3.8% in 2016. Rates of crowded households are much higher in remote communities (34%) than in urban and communities (8%).⁶⁹ Crowded households place incredible pressure on what academics call “health hardware”, the facilities and infrastructure in homes that allow people to wash their clothes and their bodies as well as practice good hygiene.⁷⁰

The lack of health hardware increases the risk of infectious diseases like skin infections, respiratory infections, ear, nose, and throat infections and of course, COVID-19.⁷¹ Aboriginal and Torres Strait Islander communities need more good quality homes but also timely maintenance to existing homes so that the health hardware they rely on can keep them well and healthy in the future.

Nangala

Nangala is a 75-year-old proud Aboriginal woman from Tennant Creek. She has kidney disease and was waiting to go on dialysis before the pandemic. In Tennant Creek there are 16 dialysis beds available. Nangala was sleeping in a Windbreak at North Eastern Town Camp, her local Aboriginal Health Service helped her to move to a tin shed in South East Camp.

As this accommodation is not suitable, she is moved into Wangkana-kari Aboriginal Hostel but soon falls into arrears and she moves back to a tin shed in North Eastern Camp while she pays off her arrears. Soon after she moves into the local Hospital for Respiratory Sickness and then is discharged to the Wangkana-kari Aboriginal Hostel again.

Nangala faces a wait of up to seven years for an affordable house or unit to be available.

Source: Nina Hall et al, 'Pilyii Papulu Purrukaj-ji (Good housing to prevent sickness):A study of housing, crowding and hygiene-related infectious diseases in the Barkly Region, Northern Territory', commissioned from the University of Queensland for Anyinginyi Health Aboriginal Corporation, Tennant Creek, Northern Territory, (Report) 2020

Aboriginal and Torres Strait Islander housing programs have had successes in overcoming crowding and poor housing quality.⁷² The National Partnership Agreement on Remote Indigenous Housing aimed to improve new housing as well as improving the condition of existing homes across Australia. A review of the program

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ Nina Hall et al, 'Pilyii Papulu Purrukaj-ji (Good housing to prevent sickness):A study of housing, crowding and hygiene-related infectious diseases in the Barkly Region, Northern Territory', commissioned from the University of Queensland for Anyinginyi Health Aboriginal Corporation, Tennant Creek, Northern Territory, (Report, 2020) , 5

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² Nina Hall et al, *Fix housing and you'll reduce risks of coronavirus and other disease in remote Indigenous communities*, (Website, 15 April 2020) <<https://theconversation.com/fix-housing-and-youll-reduce-risks-of-coronavirus-and-other-disease-in-remote-indigenous-communities-136049>>

found that it had made some good progress.⁷³ However, the end of the Agreement caused the politicisation of the rights of Aboriginal and Torres Strait Islander people to live on their homelands and traditional country, with the Commonwealth Government moving to transition the ongoing responsibility of funding remote Indigenous housing to the states and territories, and governments in Western Australia and South Australia threatening to close remote Indigenous communities and retracting services from these communities during funding negotiations for the Agreement.⁷⁴

In the lead up to the expiration of the Agreement in June 2018, these negotiations had broken down to the point that the governments of WA, SA and Qld did not have arrangements in place to continue the program and their funding was effectively cut.⁷⁵ Since then, one-off funding agreements in WA, SA and Qld have been made as well as a new five-year NPA on Remote Housing in the Northern Territory.⁷⁶ The long-term funding uncertainty has and will continue to have huge implications and uncertainty for our people living remotely.

Housing is also a justice issue. The link between someone's living situation and their involvement in offending behaviour has long been acknowledged.⁷⁷ Experiencing homelessness significantly increases the risk of getting caught in the quicksand of the criminal legal system, and child protection as well as being a protective factor from family violence.⁷⁸

Kayla

Kayla* is a proud Aboriginal woman who left imprisonment a few years ago.

Several years before imprisonment, she had left her public housing home because of domestic violence and was pushed into homeless. Kayla applied for public housing through the Department of Housing, indicating that she left her previous tenancy because of the domestic violence she experienced. Despite this, her application was refused because of a debt she owed to the Department.

Kayla was not advised of her right to appeal this refusal.

Kayla was given 28 days of emergency housing. She was subsequently pushed further into homeless for six years and lost access to her children. She was physically and sexually assaulted during this time.

Eventually, she was convicted of criminal offences and incarcerated

* Not her real name. Source: Australian Law Reform Commission, *Pathways to Justice- Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133) (Report) 2018

⁷³ Australian Government, *Remote Housing Review: A review of the National Partnership Agreement on Remote Indigenous Housing and the Remote Housing Strategy (2008-2018)*, (Report, 2017), Executive Summary

⁷⁴ NATSILS, *Submission to the Review of the Indigenous Legal Assistance Programme* (Submission, 2018)

⁷⁵ *Ibid.*

⁷⁶ Australian Government, National indigenous Australians Agency, *'National Partnership for Remote Housing Northern Territory (2018-23)*, (Website, last accessed 26 May 2020)

⁷⁷ Jason Payne et al, 'Homelessness and housing stress among police detainees: Results from the DUMA program', *Trends and Issues in Crime and Criminal Justice*, 492, February 2015 (2015) 1

⁷⁸ Sophie Russell, *How we can put a stop to the revolving door between homelessness and imprisonment*, (Website, 20 February 2018) <<https://theconversation.com/how-we-can-put-a-stop-to-the-revolving-door-between-homelessness-and-imprisonment-91394>>

The AIHW has found that our people continue to be overrepresented in the national homeless population and as users of specialist homelessness services.⁷⁹ Research from the AIHW and the New South Wales Justice Health Survey has found that people experiencing homelessness are overrepresented in prisons and that there are few accommodation services for them on their release.⁸⁰ Furthermore, the absence of a secure home is an impediment to being granted bail and may also contribute to someone being imprisoned for longer than they would have otherwise.⁸¹

Having a safe and stable home is not just critical for health but it also contributes to breaking entrenched cycles of poverty. People who do not have a stable home after imprisonment are more likely to reoffend and be imprisoned again.⁸²

The provision of more safe, affordable, secure public and community housing must be considered as both a critical health intervention and a way out of the quicksand of the criminal legal system.

⁷⁹ Australian Government Australian Institute of Health and Welfare, *Specialist homelessness services annual report 2016–17*, (Report, 12 February 2018) Cat.no: WEB 127, *Indigenous Clients*

⁸⁰ Sophie Russell, *How we can put a stop to the revolving door between homelessness and imprisonment*, (Website, 20 February 2018) <<https://theconversation.com/how-we-can-put-a-stop-to-the-revolving-door-between-homelessness-and-imprisonment-91394>>

⁸¹ Case study: Australian Law Reform Commission, *Pathways to Justice- Inquiry Into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples (ALRC Report 133)* (Report, 2018) <<https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/3-incidence/over-representation/>>: Legal Aid NSW, Submission 101.

⁸² *Ibid.*

Recommendations

2. The National Cabinet needs to permanently maintain the Coronavirus Supplement to JobSeeker, Youth Allowance, and the other income support payments that it applies to, to reduce poverty for millions of Australians.
3. The Australian Government needs to permanently end the Community Development Program permanently as well as end all other mutual obligations/ Work for the Dole requirements for income support permanently. These requirements are ineffective and in some instances are causing community harm.
4. The Australian Government needs to end the Community Development Program permanently as well as end all other mutual obligations/ Work for the Dole requirements for income support permanently. These requirements are ineffective and in some instances are causing community harm.
5. The Australian Government needs to end the Basics Card Program and income management programs and instead prioritise the provision of culturally safe social, health, welfare, and economic support for Aboriginal and Torres Strait Islander people that is strong on Indigenous culture and centred on Indigenous self-determination.
6. The Australian Government needs to commission an exploratory study on the availability, affordability, and accessibility of food, particularly fresh food, and vegetables, in regional, remote, and very remote communities.
7. The National Cabinet needs to prioritise the urgent building of public and social housing, prioritising the building, maintenance, and/or repair of good quality, adequate and secure homes for Aboriginal and Torres Strait Islander people with a view to eliminating all homelessness and home-overcrowding in Australia by 2030 as part of a national post COVID-19 recovery plan.

ATSILS and Family Violence Prevention Legal Services will require more support

NATSILS welcomes the National Cabinet's recent funding announcement of \$63.3 million for the legal assistance sector.⁸³ The \$63.3 million in extra public funding will be distributed between ATSILS and other legal assistance services.⁸⁴

At the time of writing, the \$63.3 million will be divided as follows: \$20 million will be used to assist with domestic violence matters, \$29.8 million for other COVID-19 issues, such as tenancy and industrial relations, and \$13.5 million to support the IT capabilities of legal assistance services.⁸⁵

NATSILS welcomes the additional funding, and its focus on family violence, but it's imperative that state and territory governments prioritise allocating these resources towards our already under-resourced Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Services (**FVPLS**).

With increased public funding and resourcing ATSILS and FVPLS' will be able to better respond to meet the increased legal needs of our people during and after the pandemic. During the pandemic we have seen an increased demand for our services, with impacts for child protection, family law, tenancy, bail, and criminal matters (including those related to biosecurity offences.)

Claire

Claire* is an Aboriginal mother living in lutruwita/Tasmania. Her child is currently living in out-of-home care during the pandemic.

There is a reunification plan in place for Claire and her child to be reunified within 6 months (in approximately October/November this year). A key step in that plan was an increase to overnight time.

Due to Covid-19, Claire has been denied all face to face visits with her child and contact has been reduced to one phone call a week. Claire's lawyers, the Tasmanian Aboriginal Legal Service, have sought clarification from Child Services as to the reasons for these restrictions and potential long-term impacts, they may have on the reunification plan.

Claire has been told that her situation is "under review" but she does not know what that means.

* Not her real name. Source: Tasmanian Aboriginal Community Legal Service, 2020

⁸³ Australian Government, Attorney General for Australia and Minister for Industrial Relations, the Hon Christian Porter MP, *Funding boost to ensure struggling Australians can get legal assistance*, (Media Release, 6 May 2020) <<https://www.attorneygeneral.gov.au/media/media-releases/funding-boost-ensure-struggling-australians-can-get-legal-assistance-6-may-2020>>

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

Julia

NATSILS member, the Tasmanian Aboriginal Community Legal Service reports that Child Safety will not facilitate face to face contact with children in out of home care and their Aboriginal parent during the pandemic.

Julia* had been having multiple face to face visits with her child every week. Due to Covid-19 Julia's contact with her daughter has been reduced to one phone/video call a week.

Legal services in Tasmania report that this is an issue for young people who are unable to speak on the phone. When children cannot engage in this mode of communication, for some parents contact with their children has stopped all together.

Anecdotally lawyers report that this impact is worse for children in departmental placements compared to kinship placements and long-term placements where parents have a good relationship with the carer and can contact them directly.

* Not her real name. Source: the Tasmanian Aboriginal Community Legal Service, 2020

Courts

All our ATSILS members are working through the risks and modifying their service deliver to ensure that Aboriginal and Torres Strait Islander people are receiving high quality services. ATSILS, like other services, have had to change their service delivery model because of COVID-19, either because of government restrictions or by restrictions imposed by stakeholders.

For example, in New South Wales, the Aboriginal Legal Service of NSW/ACT (**ALS NSW/ACT**) has seen a huge surge in requests for bail through their Supreme Court Bails Practice. This practice ordinarily operates with one full-time solicitor, one full-time administration team member and relies heavily on student volunteers to make up the shortfall. However, given the public health orders, the ALS NSW/ACT cannot rely on student volunteers and cannot enable them to work from home due to privacy concerns, which has placed an incredible pressure on Bails Practice.

COVID-19 is impacting the ability for ATSILS to deliver culturally safe, face-to-face engagement with and for our communities. We expect that in the future, this will create a greater demand on our already tight resources and risk poorer justice outcomes for our people. This is because they risk increased contact with the legal system in the absence of being able to access early, culturally appropriate legal assistance.

In the Australian Capital Territory, the ALS NSW/ACT is reporting that their workload has significantly increased since COVID-19 restrictions began. ALS NSW/ACT staff are still required to do in person court appearances as well as appearances over the telephone and through audio-visual link (**AVL**).

As a result, ALS NSW/ACT staff are spending a significant period waiting in virtual court lists coupled with the additional administrative burdens of preparing written submissions for court appearances and organising phone or AVL conferences to obtain instructions from clients.

When the courts resume full operations, NATSILS expect that our ATSILS members will experience a surge of demand beyond their capacity to be able to meet, as many matters have been delayed during the pandemic.

For example, nearly all hearings in the ACT Magistrates Court, ACT Children's court and to a large extent the Supreme Court of the ACT have been adjourned into the future with dates to be set for hearing or trial post July. In addition, all summons matters and matters for people on bail have been adjourned until post July.

This means that over time, all the matters currently being delayed will compound and we will see a significant increase in ATSILS' workload. Not only will ATSILS be dealing with new matters but also those that

have been vacated and adjourned during the pandemic. This situation is not exclusive to the ACT, with all NATSILS members reporting similar situations in all jurisdictions and in all court types, including Bush Courts.

At the current staffing levels and with increased demand, ATSILS, like the ALS NSW/ACT, will need to brief a significant number of matters to private solicitors or barristers. This will mean less access for Aboriginal and Torres Strait Islander people to their ATSILS and therefore less access to culturally appropriate legal representation, assistance, and advice.

Additional funding for ATSILS would mean that they can reduce the number of matters they would otherwise need to refer to other lawyers and be able to support our people themselves. Despite this, briefing other lawyers will still be necessary and ATSILS do not have sufficient public funding to brief at the expected level having regard to the upcoming backlog of matters which will be listed for hearing or trial.

Courts will rightfully expect all ATSILS to appear and represent our people as well as expect that they will be able to have the ability to brief matters when required, as other legal assistance services do.

More public funding to ease the expected capacity on ATSILS and for services like brief-outs will be a necessity given the number of courts our ATSILS members need to cover, the demand for community legal education during and post COVID, and the quantity of work expected after July.

John

John* is imprisoned and was taken to correctional centre where he spends 2 weeks in quarantine, before eventually being moved to another centre.

He has serious asthma and has notified staff on several occasions that he requires an inhaler but has yet to be provided one. He and his family have said his asthma attacks are often induced by stress.

John suffers from depression, anxiety, and PTSD. In the community he was being treated with medication but has not been able to access this while imprisoned.

John has described all of his symptoms as being exacerbated by this being his first time in custody, and the appalling conditions in the facility (of most concern being seeing faeces and blood on the ground) and the cramped conditions of the correctional facility.

* Not his real name. Source: The Aboriginal Legal Service of New South Wales and the Australian Capital Territory, 2020

Family law

Consistent with other family violence services and Legal Aid Commissions, ATSILS are reporting a significant increase in requests for telephone advice since COVID-19 social isolation policies and laws have been enacted. For example, the ALS NSW/ACT received over 60 requests for urgent family advice in a one-week period.⁸⁶

The calls to the ALS NSW/ACT were typically from Aboriginal women (45%) or from carer grandparents (30%) who have children that have been retained by an un-safe parent due to the COVID-19 restrictions, or they have concerns about the children as they are no longer able to monitor their wellbeing through access.⁸⁷

These concerns are heightened where the normal protective factors of school, childcare and/or visits by support workers, have ceased due to COVID-19 restrictions and self-isolation. Of the 60 requests received

⁸⁶ Aboriginal Legal Service of New South Wales and the Australian Capital Territory, *Service Data*, 2020.

⁸⁷ *Ibid.*

by ALS NSW/ACT in a single week, all callers reported previous experience or contact with child protection services and/or family and domestic violence issues⁸⁸.

All ATSILS will require additional public funding support to meet this high demand.

There is heightened vulnerability of Aboriginal and Torres Strait Islander people to multiple and complex legal problems.⁸⁹ In addition, there is the historical context of past policies as well as Aboriginal and Torres Strait Islander children under 15 years old being more likely than other Australian children to live with one parent.⁹⁰

This results in family law assistance for Aboriginal and Torres Strait Islander clients through advice and early intervention being a fundamental service in the prevention of family violence.

Some ATSILS are reporting that Aboriginal and Torres Strait Islander families are experiencing increased involvement of child protection services and child removal. If ATSILS are resourced to meet this demand and provide culturally safe and appropriate family law legal services, this escalation may be avoided.

Dwayne

Dwayne is a proud Yorta Yorta and Mutti Mutti man with an acquired brain injury. Dwayne was recently charged with theft. Because of emergency restrictions and courts requiring social distancing measures, Dwayne was not required to be at court for his hearing on 2 April 2020.

The prosecutors asked for a warrant for his arrest and the Melbourne Magistrates Court granted it, even though Dwayne was not required to attend court.

Dwayne was arrested near his home the day after under the warrant and was fined \$1,652 by Victoria Police for being outside of his home during COVID related restrictions. Victoria Police reported in court documents that: "His lack of regard for remembering court dates, as well as flouting the current Health laws surrounding COVID-19, are deeply concerning to police."

Dwayne was imprisoned on remand for two weeks and was denied bail twice before his lawyers sought an emergency hearing in the Victorian Supreme Court for his immediate release. In granting Dwayne's release, Justice Kaye described the way he was treated as a "string of errors".

The way Dwayne was treated by the criminal legal system has deeply distressed his family, particularly as they are still reeling from the death in custody of Dwayne's sister, Ms Veronica Nelson.

Source: Emilia Terzon for the Australian Broadcasting Corporation: <https://www.abc.net.au/news/2020-04-22/vulnerable-indigenous-man-jailed-over-police-errors-coronavirus/12165342>, 2020

⁸⁸ *Ibid.*

⁸⁹ The Law and Justice Foundation of New South Wales, *Legal Australia-Wide Survey, Legal Need in Australia* (Report, 2012) Executive Summary.

⁹⁰ Australian Government Australian Institute of Family Studies, *Child protection and Aboriginal and Torres Strait Islander children*, (Website, January 2020) < <https://aifs.gov.au/cfca/publications/child-protection-and-aboriginal-and-torres-strait-islander-children>>

Helen

NATSILS member, the Aboriginal Legal Service of NSW/ACT, represents a young mother, Helen*, in care and protection proceedings currently before the Children's Court. Helen's newborn twins were removed from her care in January 2020, primarily due to drug use, domestic violence, mental health issues and a substantial child protection and trauma history. Since January, Helen has worked incredibly hard to engage with several services to address the child protection issues identified by the Department of Communities and Justice, with the goal of having her twins restored to her care.

Helen has been engaging with drug and alcohol counselling, domestic violence counselling and trauma counselling on a weekly basis for the last four months. There has been a notable shift in Helen's insight, and she reports to be feeling clearer and safer.

Helen's counsellors, because of government directives related to COVID-19, no longer operate face to face counselling services – instead, counselling is being offered through Telehealth. Helen does not have a mobile telephone with video capabilities but has been diligent in continuing her appointments by telephone. Helen misses the therapeutic benefits of face to face counselling and has advised that the reception at her house can be very unreliable. This has led to Helen feeling distressed, anxious, and vulnerable.

Helen has also been engaging with an in-home family support service, who have been providing in home practical support three times a week. This service was also assisting Helen with locating a more suitable property for her and her babies to reside in. Due to COVID-19, the service is no longer attending the home, instead telephoning Helen once a week. The service has also informed Helen that the search for properties is on hold temporarily due to COVID19.

As a result of the Department's COVID policy, all face to face contact visits have been suspended. This has resulted in Helen's contact with her twin babies being reduced from 4 times a week, to weekly facetime. This is incredibly distressing for Helen and will have extremely detrimental effects on bonding and attachment. Helen is fearful that her babies' attachment to their current carers will solidify over the coming months and that this argument will be used by the Department to not restore the babies to her care.

This concern is valid, given the Court's primary concern is what is in the best interests of the child- and arguments of bonding and attachment are given significant weight.

The Aboriginal Legal Service of NSW/ACT will of course continue to advocate for the restoration of the child, highlighting to the Court that the above circumstances are not within the mother's control.

They will also continue to liaise with the Department of Communities and Justice to develop, wherever possible, creative (and safe ways) for parents and children to maintain an attachment and for parents, children and families to continue to be supported by therapeutic services wherever possible. The impact of COVID-19 is constantly evolving and completely unprecedented.

The Aboriginal Legal Service of NSW/ACT will continue to provide robust representation, and will support parents, children, and families in navigating through this crisis.

* Not her real name. Source: The Aboriginal Legal Service of New South Wales and the Australian Capital Territory, 2020

PPE in prisons

With over-incarceration and over-representation in child protection and family violence at increasing rates for our people, the consequences of under-resourced ATSILS during this time could be devastating for our communities, particularly remote communities.

Furthermore, the Prime Minister, the Hon Scott Morrison MP announced that the National Cabinet agreed that the supply of personal protection equipment (PPE) to corrections facilities. The Prime Minister noted that corrections facilities should be considered a priority in the context of the national supply of PPE as additional supplies become available and if COVID-19 cases are confirmed in child and adult prisons and immigration detention facilities.⁹¹

The Prime Minister also announced that the Australian Government will, in partnership with states and territories, develop 'Safe Travel Plans' for newly released Aboriginal and Torres Strait Islander people including access to self-isolation accommodation and secure transport to their communities as needed.⁹²

NATSILS welcomes the announcement to plan for COVID-19 prison outbreaks, to supply PPE to corrections facilities, as well as the creation of the 'Safe Travel Plans' for our newly released people from prison. However, we believe that governments must focus on the early release of our imprisoned people as a more effective preventative and protective measure for our communities to contain the spread and potentially fatal consequences of COVID-19.

Youth Koori Court

NATSILS member, the Aboriginal Legal Service of NSW/ACT reports that the Youth Koori Court is not taking any new referrals until Elders are able to sit in person. Effectively, this means that Aboriginal and Torres Strait Islander children and young people are missing out on diversionary and/or referral programs because of COVID-19.

Source: The Aboriginal Legal Service of New South Wales and the Australian Capital Territory, 2020

As this crisis is demonstrating, the systems put in place to govern our lives can be quickly changed for our collective good if we centre the health and wellbeing of our people and make decisions accordingly. We ask our governments to work in partnership with us to keep our people safe now and into the future.

The virus has revealed chronic problems in our legal system, our social safety net, and our economy. We must focus on building a more caring legal system for our people that is based on healing, cultural strength, and connection before another crisis happens.

Our people will be hit hardest by another global crisis as our health, legal assistance services and income support services were already under strain. Successive governments have made long-term cuts to social security over many years.

If we make ourselves more resilient by looking after our people and our planet now, then we will be able to better cope with any global challenges in future.

⁹¹ *Ibid.*

⁹² Prime Minister of Australia, *Update on Coronavirus Measures, Media Statement 6 May 2020* (Media Release, 6 May 2020) <<https://www.pm.gov.au/media/update-coronavirus-measures-050520>>

Recommendations:

8. The National Cabinet needs to ensure that ATSILS, Family Violence Prevention Legal Services, their peak organisations, and the Aboriginal and Torres Strait Islander communities that we represent are urgently prioritised in the final funding allocation of legal assistance COVID-19 funding so we can best respond to the increased legal needs of our people during and after the COVID-19 pandemic.
9. The National Cabinet, in partnership with ATSILS and Aboriginal and Torres Strait Islander people, needs to also focus on alternatives to imprisonment, like culturally safe diversionary programs and on providing our communities the support that we need to survive this pandemic now and into the future.



The Commonwealth Government's response so far

The COVID-19 disease has, and will continue, disrupt the everyday lives of all Australians. The Australian Government's response to the COVID-19 pandemic has been unprecedented, at least during peacetime.⁹³

On 21 January 2020 the Commonwealth Department of Health added 'Human coronavirus with pandemic potential' as a Listed Disease under the *Biosecurity Act 2015* (Cth) and in so doing started the use of enhanced biosecurity measures, including providing public health advice and information to the public on the developing situation.⁹⁴

On 5 March 2020, the Aboriginal and Torres Strait Islander Advisory Group on COVID-19 was established to develop and deliver a plan to implement the response plan for COVID-19 for Aboriginal and Torres Strait Islander people. In doing so, the Commonwealth recognised that Aboriginal and Torres Strait Islander people are at higher risk of COVID-19.⁹⁵

On 13 March, the Council of Australian Governments agreed to establish a National Cabinet composed of the state and territory premiers and chief ministers and chaired by the Prime Minister.⁹⁶ The National Cabinet is constituted as a Cabinet office Policy Committee and operates according to Cabinet government conventions.⁹⁷

Throughout March, April and May, the Commonwealth announced numerous support packages to support Australians affected by the pandemic. On 5 May, the Commonwealth announced \$63.3 million for frontline legal assistance services.⁹⁸

On 18 March 2020, the Governor-General declared that a human biosecurity emergency exists.⁹⁹ The declaration was made under the *Biosecurity Act 2015* (Cth).¹⁰⁰ The declaration is in force for three months from 18 March 2020, this period is called the 'human biosecurity emergency period'.¹⁰¹

A human biosecurity emergency is declared by the Governor-General on advice from the Commonwealth Minister for Health (**the Health Minister**) is satisfied that a listed human disease is posing a severe and immediate threat, or is causing harm, to human health on a nationally significant scale; and the declaration is necessary to prevent or control the entry of the listed human disease into Australia or the emergence, establishment or spread of the disease in Australia¹⁰².

During this period, the Health Minister is given very broad powers to control COVID-19. The Health Minister may issue any direction to any person as well as determine any requirement. This is provided that the Health Minister considers it necessary to prevent or control the entry, emergence, establishment, or spread of

⁹³ Australian Government, Department of the Prime Minister and Cabinet, *Submission 3 to the Senate Select Committee on COVID-19 Whole-of-Government Submission*, Parliament of Australia Senate Select Committee Inquiry on Covid-19 (12 May 2020) 3.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020*

¹⁰⁰ s 475

¹⁰¹ *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020* s 7

¹⁰² *Biosecurity Act 2015* (Cth) s 475(1)(a),(b).

COVID-19 in Australia¹⁰³ or to implement a World Health Organisation (**WHO**) recommendation under the *International Health Regulations*.¹⁰⁴

When issuing any direction or determining any requirement, the Health Minister must be satisfied that the direction or requirement is likely to be effective in, or contribute to, achieving its purpose and that it is also appropriate and adapted to achieve it. The Health Minister must also be satisfied that the direction or determination is no more restrictive or intrusive than is required in the circumstances and/or that it is in place for only as long as needed.¹⁰⁵

The requirements issued by the Minister for Health are non-disallowable legislative instruments that must be filed on the Federal Register of Legislation. However, Directions do not need to be made public. Noting also that any requirement or directions given by the Health Minister can be given despite any provision of any other Australian law.¹⁰⁶

Compared to other countries around the world, Australia was among the most well-prepared and well-equipped, due in part to the strong architecture underpinning our health, social, and economic responses and a flexible and adaptable Australian Public Service.¹⁰⁷ Despite the relative stability of new infections in Australia¹⁰⁸, However, at the time of writing, the social, economic, and health impacts of COVID-19 continue to be felt across Australia.

All Australian governments have issued health directions that, among other things: enforce social distancing guidelines, limit the number of people that can attend gatherings like funerals or weddings, the mandatory closure of non-essential businesses and services, closure of state borders, regional travel restrictions, the closure of schools, and lockdowns of remote communities.¹⁰⁹

States and territories have also passed emergency omnibus bills that modify, among other things: certain types of leases, court processes and procedures, bail processes and procedures, enhanced police powers, criminal procedures, child protection, juries at trials, guardianship, modifying statutory time limits, and residential tenancies, to name a few.¹¹⁰ Many of these changes were made with little or no public consultation.

¹⁰³ *Biosecurity Act 2015* (Cth) ss 477, 478

¹⁰⁴ The *International Health Regulations (2005)* are an international legal instrument binding on 196 countries, including all WHO member states. The Regulations are designed to prevent the international spread of infectious diseases. They were adopted by consensus, including by Australia, on 23 May 2005 and entered into force generally and for Australia on 15 June 2007: Australian Treaty Series [2007] ATS, National Interest Analysis Reference: [2006] ATNIA 27: *International Health Regulations (2005)*.

¹⁰⁵ Parliament of Australia, *COVID-19 Legislative response—Human Biosecurity Emergency Declaration Explainer* (Web Page, 27 March 2020) <https://www.aph.gov.au/About_Parliamnet/Parliamentary_Departments/Parliamentary_Library/FlagPost/2020/March/COVID-19_Biosecurity_Emergency_Declaration>

¹⁰⁶ *Ibid.*

¹⁰⁷ Australian Government, Department of the Prime Minister and Cabinet, (2020), *Op. Cit.* at 78

¹⁰⁸ Australian Government Department of Health, *Coronavirus (COVID-19) current situation and case numbers*, (Website, date accessed 15 May 2020) <<https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/coronavirus-covid-19-current-situation-and-case-numbers>>

¹⁰⁹ Australian Government, *Coronavirus (COVID-19) Essential information, State and Territory Government Information*, (Website, 15 May 2020) <<https://www.australia.gov.au/>>

¹¹⁰ See: *COVID-19 Emergency Response Act 2020* (ACT), *COVID-19 Emergency Response Act 2020* (Qld), *COVID-19 Emergency Response Act 2020* (SA), *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* (NSW), *COVID-*

The pandemic response is changing rapidly, laws and regulations were implemented and/or changed quickly causing confusion as to what was and was not allowed across the different states and territories.¹¹¹

Police services of all states and territories and the Australian Defence Force (**ADF**) were given extraordinary discretionary powers to enforce social distancing requirements, biosecurity orders, and/or travel restrictions, breaches of which attracted significant fines.¹¹²

Policing

The Royal Commission into Aboriginal Deaths in Custody identified that police culture contributes to the over-policing of our people.¹¹³ The over-policing of our people continues¹¹⁴ despite some efforts to improve police service culture across the country.¹¹⁵ Our women in particular are held in police custody at much higher rates than almost any other group.¹¹⁶

While restrictions on movement and gatherings are critical measures to contain the spread of COVID-19, it is important that these restrictions are fairly enforced, proportionate and consistent with our international and domestic human rights obligations.

It is widely acknowledged that the collection and transparent and independent analysis of police stop and enforcement data is the most reliable way of determining if a policing strategy is being applied in a non-discriminatory and therefore lawful way.¹¹⁷ At the time of writing, thousands of people had been fined for breaching COVID-19 related health orders¹¹⁸, but only the New South Wales Police Service has been releasing detailed information on the people being fined for breaching COVID-19 related orders.¹¹⁹ Publicly available datasets from other jurisdictions, including strong guidelines and protection for their use, are

¹¹² 19 Omnibus (Emergency Measures) Act 2020 (Vic), COVID-19 Disease Emergency (Miscellaneous Provisions) Act (Tas), Pay-roll Tax Relief (COVID-19 Response) Act 2020 (WA), Residential Tenancies (COVID-19 Response) Act 2020 (WA)

¹¹¹ The Conversation, *Can I visit my boyfriend? My parents? Can I go fishing or bushwalking? Coronavirus rules in NSW, Queensland and Victoria explained*, (Website, 1 April 2020) <<https://theconversation.com/can-i-visit-my-boyfriend-my-parents-can-i-go-fishing-or-bushwalking-coronavirus-rules-in-nsw-queensland-and-victoria-explained-135308>>

¹¹² Darren Palmer, *Pandemic policing needs to be done with the public's trust, not confusion*, (Website, 8 April 2020) <<https://theconversation.com/pandemic-policing-needs-to-be-done-with-the-publics-trust-not-confusion-135716>>

¹¹³ Australian Government, Australian Law Reform Commission, *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report, 11 January 2018) ALRC Report 133, Chapter 14, *Police Accountability*, Recommendations

¹¹⁴ Ruth McCausland, *Aboriginal people with disabilities get caught in a spiral of over-policing*, (Website, 4 November 2015) <<https://theconversation.com/aboriginal-people-with-disabilities-get-caught-in-a-spiral-of-over-policing-49294>>

¹¹⁵ Australian Government, Australian Law Reform Commission, (2018), *Op. Cit.* 98

¹¹⁶ Australian Government Australian Institute of Criminology, *Data on policing and arrests*, (Website, 3 November 2017) <<https://aic.gov.au/publications/rpp/rpp107/data-policing-and-arrests>>

¹¹⁷ See: NAACP National Criminal Justice Program, *Born Suspect: Stop-and-Frisk Abuses & the Continued Fight to End Racial Profiling in America* (2014); Frank Baumgartner, Derek Epp and Kelsey Shoub, *Suspect Citizens, What 20 Million Traffic Stops Tell Us about Policing and Race* (Cambridge University Press, 2018); Ontario Human Rights Commission, *Policy on Eliminating Racial Profiling In Law Enforcement* (Ontario Human Rights Commission, 20 June 2019); Rebekah Delsol, *Addressing Ethnic Profiling by Police: A Report on the Strategies for Effective Police Stop and Search Project* (Open Society Justice Initiative, 2009); Hopkins (n 1).

¹¹⁸ Matthew Doran, 'Coronavirus fines vary across the country, prompting calls for clearer guidelines', *Australian Broadcasting Corporation*, 17 April 2020, <<https://www.abc.net.au/news/2020-04-17/how-coronavirus-fines-are-hitting-australia/12155274>>

¹¹⁹ Osman Faruqi, 'Compliance fines under the microscope', *The Saturday Paper*, April 18-24, 2020, ed 297

necessary to obtain a clear and full picture of COVID-19 related policing around the country. Each state and territory police service needs to make available de-identified datasets on the locations and circumstances of COVID-19 related stops, fines and enforcement measures taken, in order for the data to be appropriately analysed and cross-referenced with demographic data by an appropriately qualified independent body.

An appropriate memorandum of understanding needs to govern this data transfer that will permit the public reporting of the analysis of this data. A range of data analysis methods will also be needed, including comparing stop and enforcement rates against resident populations, analysing the outcomes or 'hit rate' of COVID-19 related stops in conjunction with an analysis of the presence of 'reasonable grounds' before a person is stopped/ warned or fined.

Analysis of the data provided by the New South Wales Police service reveals that police issued fines are concentrated in low income suburbs with high migrant populations and in the towns with high Aboriginal and Torres Strait Islander populations.¹²⁰ Compared to more affluent areas of Sydney like Woollahra, the Northern Beaches, and Waverley - which includes Bondi Beach has only recorded 1.8% of all COVID-19 police issued fines despite recording 15 percent of all COVID-19 infections in New South Wales.¹²¹

In the Northern Territory, members of the ADF have been deployed to assist with COVID-19 related border restrictions and enforcement of the *Biosecurity Act*.

A liquor shop owner in Tennant Creek has reported that the ADF as well as Northern Territory Police have been stationed at his premises to restrict patrons from purchasing alcohol.¹²² The owner of the shop in Tennant Creek told the Australian Broadcasting Corporation: "*In particular, I feel the Aboriginal clientele were particularly targeted, extensively questioned and the majority being denied service.*"¹²³ The Northern Territory Police have since admitted that it was a mistake to have the ADF undertake liquor officer duties in Tennant Creek.¹²⁴

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² Samantha Jonscher and Stewart Brash, 'NT Police says Defence Force presence at bottle shop a 'mistake'', Australian Broadcasting Corporation, 21 April 2020, updated 22 April 2020 <<https://www.abc.net.au/news/2020-04-21/police-say-defence-force-presence-at-bottle-shop-a-mistake/12168892>>

¹²³ *Ibid.*

¹²⁴ *Ibid.* and: Amnesty International, *Policing During COVID-19*, (Website, Last accessed 27 May 2020) <<https://www.amnesty.org.au/policing-during-covid-19/>>

Tennant Creek

Aboriginal and Torres Strait Islander residents in Tennant Creek have reported that police have recently attended houses known to them as overcrowded and used Covid-19 regulations to order people to disperse. When household members failed to disperse, because they had nowhere else to go, they were issued fines.

Rodney Dillon, Amnesty International Indigenous Advisor said that this was “one of the only times in my career that I have had families too scared to speak up. I think it’s one of the first times I’ve seen people scared that if they complain they will face repercussions.”

Amnesty has also received reports that members of the community have been abandoning their houses and hiding from police because they are scared of being issued with fines for breaching gathering rules as a result of living in overcrowded housing or staying with family.

Source: Change the Record, Critical Condition The impact of COVID-19 policies, policing, and prisons on First Nations communities, (Report) 2020

Our people that live in Tennant Creek have lodged complaints to Amnesty International, alleging bullying and intimidating policing.¹²⁵ One complainant to Amnesty reported that the NT police service and the ADF raided a property and forced all residents outside for a headcount.

Another complainant alleges that police stormed her house to pour out the resident’s alcohol while taking note of who was at the residence.¹²⁶

Tennant Creek accounts for 1 percent of the population of the Northern Territory but accounts for a disproportionate amount of all of the infringements issued for breaching social distancing orders.¹²⁷ A Traditional Owner of Tennant Creek, Mr Jimmy Frank told the Australian Broadcasting Corporation: *‘It just brings back the intervention, the Stolen Generations, the massacres, the colonisation, it’s still raw for us people here... Suddenly there’s all these officers on your front yard ... and it’s just intimidating.’*¹²⁸

Perth

Several Noongar people had recently gathered in a public place in Perth. They were all homeless and had nowhere to spend the night.

Police approached the group and issued a 15 minute ‘move on’ order citing Covid-19 public health regulations. Despite explanations that they had nowhere to go, police issued members of the group with fines because of their failure to comply with a police direction.

Source: Change the Record, Critical Condition The impact of COVID-19 policies, policing, and prisons on First Nations communities, (Report) 2020

¹²⁵ Isabella Higgins and Penny Timms, Tensions in Tennant Creek test Indigenous community's relations with police during coronavirus crisis, *Australian Broadcasting Corporation*, 14 May 2020, <<https://www.abc.net.au/news/2020-05-14/tennant-creek-coronavirus-nt-police-defence-force-adf-afp/12241766>>

¹²⁶ COVID Policing, *Covid-19 Policing in Australia*, (Website, Last accessed 22 May 2020) <<https://covidpolicing.org.au/summary/2020-05-20/covidpolicing-weekly-roundup-6/>>

¹²⁷ Isabella Higgins and Penny Timms, (2020), *Op. Cit.* at 110

¹²⁸ *Ibid.*

Due to structural and systemic inequities, like under resourcing and over policing, our people living in Tennant Creek are forced into crowded, unsuitable housing that makes social distancing impossible. In some instances, up to 20 people per home.¹²⁹ The heavy-handed enforcement of social distancing orders in communities forced to live in overcrowded conditions amounts to the effective criminalisation of poverty.¹³⁰

In Victoria, Deputy Commissioner for Police, Shane Patton, has urged the Victorian police service to issue fines for only the most blatant and deliberate breaches of the state's lockdown regulations as, in his view, the lack of discretion and the lack of consideration for the public interest is significantly impacting on how the community views Victoria Police.¹³¹ Victoria Police has issued the most infringements of any police service in the country, having conducted over 48,000 'compliance checks' and issuing over 5,600 infringements.¹³²

The Deputy Commissioner of Victoria Police also stated that: "*I am concerned that there continues to be an inconsistent approach from our members when enforcing the directives of the Chief Health Officer*".¹³³ This directive was issued after the media reported that Victoria police had issued fines to a learner driver, a man washing his car and a couple who had posted travel pictures from a trip they had taken a year earlier.¹³⁴ After a new directive established by Victoria Police requiring officers to obtain supervisor approval before issuing an infringement was implemented, only two fines were issued during a 24 hour period.¹³⁵

Central Desert

First Nations communities in the Central Desert region, NT, report that they have been given conflicting messages from government agencies. On the one hand, Aboriginal and Torres Strait Islander people were encouraged to return to homelands and to self-isolate to decrease the risk of Covid-19 transmission.

At the same time, community members reported being told to physically attend their Community Development Programme training to receive income support. This would often require travelling over 100km and then staying with family and friends in town to complete the program.

In turn, this attracted the attention of police who were monitoring travel restrictions and restrictions on gatherings in private dwellings.

Source: Change the Record, Critical Condition The impact of COVID-19 policies, policing, and prisons on First Nations communities, (Report) 2020

To maintain the public's confidence and as Australia's pandemic response continues to evolve in the coming weeks and months it is critical that independent oversight bodies and mechanisms are put in place. This is to

¹²⁹ Nina Hall et al, (2020), *Op. Cit.* at 63

¹³⁰ Perth, Central Desert, and Tennant Creek Case Studies from: Change the Record, *Critical Condition The impact of COVID-19 policies, policing, and prisons on First Nations communities*, (Report, 2020)

¹³¹ Tammy Mills, COVID-19 lockdown fines 'eroding public confidence', top cop warns, *The Age*, April 13 2020, <<https://www.theage.com.au/national/victoria/covid-19-lockdown-fines-eroding-public-confidence-top-cop-warns-20200413-p54jfk.html>>

¹³² COVID Policing, (2020) *Op. Cit.* at 111

¹³³ Tammy Mills, (2020) *Op. Cit.* at 115

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

ensure that all government decisions, declarations, orders, requirements, and infringements be appropriately publicised and monitored. Particularly as the response has been changing quickly and often causing community confusion.

In one instance the Chief Commissioner of Victoria Police called on Victorians to exercise ‘common sense’ when he was asked to clarify what was or wasn’t allowed in Victoria.¹³⁶ Pleas for ‘common sense’ are not an appropriate safeguard against police failing to use their discretion appropriately during a health crisis and it does not engender public confidence in the law and the legal system.¹³⁷

To ensure public confidence in the legal system, it is critical that policing practices generate trust in the community so that the community can be confident that all people are treated fairly, and that police discretion is used appropriately.¹³⁸

This is particularly important when police have been given new powers that are too broad, too vague, lacking clear lines of reasoning or a clear demarcation between what is and what is not allowed.

NATSILS is a member of the COVID-19 Policing Collaborative Project, in partnership with the Police Accountability Project, Liberty Victoria, The Grata Fund, the Melbourne Activist Legal Support Group, Amnesty International, Community Legal Centres Australia, and others.¹³⁹

¹³⁶ Darren Palmer, *Pandemic policing needs to be done with the public’s trust, not confusion*, (Website, 8 April 2020) <<https://theconversation.com/pandemic-policing-needs-to-be-done-with-the-publics-trust-not-confusion-135716>>

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ See: covidpolicing.org.au

Recommendations:

10. The National Cabinet needs to commit to establishing or tasking independent oversight bodies, committees or taskforces with appropriate powers and resources to undertake a comprehensive review of COVID-19 police responses, deployment and enforcement decisions in all states and territories. This independent body could be the state's human rights commission, Ombudsman, police oversight authority or crime statistics agency. The committee, taskforce or body needs to have strong Aboriginal and Torres Strait Islander representation, including from the legal assistance services and the health sectors.
11. The National Cabinet needs to prioritise an independent analysis of police stop data during the pandemic. An independent analysis of stop data is a critical part of this independent review process to determine whether COVID-19 related policing impacted upon certain demographics or communities disproportionately.
12. The National Cabinet needs to ensure that state and territory police and infringement departments review all COVID-19 related infringements, fines, directions, orders, and any other similar instruments issued by all police services and/or the ADF to ensure that they are reasonable, proportionate, and in accordance with our international and domestic human rights obligations.

All findings from these review processes need to be made publicly available at the earliest opportunity.

Protecting the community by protecting imprisoned people

Prisons are epicentres for infectious diseases, because imprisoned people have high health needs while also being forced to be in close contact with each other in sometimes poorly ventilated and unhygienic facilities.¹⁴⁰ Prisons concentrate people who are already susceptible to infection and at a higher risk of complications.¹⁴¹

Our people are significantly overrepresented in the criminal legal system. Despite being approximately 2% of the Australian adult population, our people make up 28% of the national adult population.¹⁴²

Daniel

Daniel* is being held in remand in Lutruwita/Tasmania He has a hearing in court very soon.

The Friday before his hearing Daniel's lawyers, the Tasmanian Aboriginal Community Legal Service, was provided with body worn footage, police statements and interviews by the prosecution. Daniel's lawyer is in court with other matters on Friday and so is only able to speak to Daniel on Monday.

Because of Covid-19 restrictions he is unable to see him in person and is only able to speak to him over the phone. The phone is in a yard with other people and so Daniel is denied the confidential legal appointment that he is entitled to.

Daniel's lawyers cannot see him in person, nor can they get the paperwork to him to look at because all paperwork entering the prison must be quarantined for 3 days. They are unable to access any audio-visual equipment and so Daniel's lawyer cannot show him any of the footage.

The telephone call cuts out at one point and Daniel's lawyer was told that he would have to wait to speak to Daniel again because another legal call had to be put through to another inmate.

It appears there was only one phone for people on remand to access.

On Tuesday Daniel's lawyers were forced to apply for an adjournment because they were unable to prepare a defence due to the circumstances. The adjournment was granted but Daniel was denied bail and remained imprisoned on remand.

Source: Tasmanian Aboriginal Community Legal Service, 2020

As noted above, the ongoing impacts of colonisation, land dispossession and family separation also mean that our people are already experiencing the worst impacts of inequitable health, this vulnerability is compounded during their imprisonment. Due to their over imprisonment, our people are also at a higher risk of dying in custody and of not receiving adequate medical care.¹⁴³

¹⁴⁰ Stuart Kinner, et al, 'Prisons and custodial settings are part of a comprehensive response to COVID-19' (2020) 5 *The Lancet* [https://doi.org/10.1016/S2468-2667\(20\)30058](https://doi.org/10.1016/S2468-2667(20)30058), e188

¹⁴¹ *Ibid.*

¹⁴² Australian Bureau of Statistics, *Prisoners in Australia, 2019* (2019) 4517.0, Aboriginal and Torres Strait Islander Prisoner Characteristics

¹⁴³ The Guardian, *Deaths inside, every Indigenous death in custody since 2008 tracked*, The Guardian, (Website, last accessed 19 May 2020) <<https://www.theguardian.com/australia-news/ng-interactive/2018/aug/28/deaths-inside-indigenous-australian-deaths-in-custody>>

Because infections can easily be transmitted between imprisoned people, prison officers, prison staff, and visitors, adult and youth prisons and other custodial settings need to be part of our responses to COVID-19.¹⁴⁴ The WHO recommends a whole-of-society approach to managing and preventing COVID-19 in adult and children's prisons and other custodial settings. These settings act as a source of amplification and spread of diseases beyond prisons and into the community.¹⁴⁵

Even one outbreak in one prison could have devastating consequences on the broader community by overwhelming the public health system. For example, the Australian Bureau of Statistics (ABS) reported that in the financial year ending 30 June 2019, in the Northern Territory there were 1,731 imprisoned people¹⁴⁶ but only 22 available ICU beds in the whole of the Territory.¹⁴⁷

The health of imprisoned people is critical to ensuring public health. To protect the health of imprisoned people, mitigate the effects on all hospitals and health services while also preventing the deaths of incredibly vulnerable people, all custodial settings must be embedded within the broader public health response.¹⁴⁸ According to the WHO, failing to provide strong infection prevention and control, adequate testing, treatment and care in prisons will undermine our broader public health measures.¹⁴⁹

The Minister for Health has the power under the *Biosecurity Act 2015* (Cth) to issue strong directions and/or determinations for the care of imprisoned people to prevent COVID-19 in prisons and in the community. Powers that the Minister has used to, for example, prevent international cruise ships from entering Australian ports to contain and prevent COVID-19.¹⁵⁰

In the absence of a strong and centralised decision making to protect imprisoned people and the broader community from an outbreak of COVID-19, the states and territories have instead relied on their respective courts and parole boards to make decisions ad hoc.¹⁵¹ This is in contravention of the effective international practice of releasing imprisoned people early and despite calls from human rights organisations for the early release of imprisoned people to prevent human rights abuses in prisons during the pandemic as well as preventing COVID-19 infections.¹⁵²

¹⁴⁴ World Health Organisation Regional Office for Europe, *Prevention and control of COVID-19 in prisons and other places of detention* (Web Page, accessed 14 May 2020) <<http://www.euro.who.int/en/health-topics/health-determinants/prisons-and-health/focus-areas/prevention-and-control-of-covid-19-in-prisons-and-other-places-of-detention>>

¹⁴⁵ World Health Organisation Regional Office for Europe, *Preparedness, prevention, and control of COVID-19 in prisons and other places of detention* (Interim Guidance, 15 March 2020) 1

¹⁴⁶ Australian Bureau of Statistics, 4517.0 - Prisoners in Australia, 2019, 4517.0

¹⁴⁷ The Australian and New Zealand Intensive Care Society, *Centre for Outcome and Resource Evaluation* (Report, 2018) 22

¹⁴⁸ Stuart Kinner, et al, (2020) *Op. Cit.* at 123

¹⁴⁹ World Health Organisation Regional Office for Europe, *Preparedness, prevention and control of COVID-19 in prisons and other places of detention* (Interim Guidance, 15 March 2020) 1

¹⁵⁰ *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements) Determination 2020*

¹⁵¹ Australian Broadcasting Corporation, Prison outbreak: Prisoners released to protect them from COVID-19, *Background Briefing*, (Website, 15 May 2020) <<https://www.abc.net.au/radionational/programs/backgroundbriefing/prisoner-covid-corona-release-health/12245052>>

¹⁵² Human Rights Watch, *Coronavirus is a Ticking Time Bomb for Australia's Prisons*, (Website, 16 April 2020) <<https://www.hrw.org/news/2020/04/16/coronavirus-ticking-time-bomb-australias-prisons>>

There are genuine fears that the human rights protections of imprisoned people are also at risk, particularly through lockdowns, ending visitation rights and the use of solitary isolation and confinement as a preventative measure against COVID-19.¹⁵³

Prisons in Victoria have had quarantine units implemented across five prisons, with all imprisoned people required to spend 14 days in the protective quarantine unit.¹⁵⁴ In Queensland, Woolston Correctional Centre was placed in State 4 Restrictions to allow contact tracing to take place following an officer testing positive for COVID-19 on 25 March 2020.¹⁵⁵ In Tasmania, concerns were raised that imprisoned people did not have access to hygiene equipment.¹⁵⁶

Even before the pandemic, Australia's adult and children's prisons have concerning track records with the use of solitary confinement, particularly for imprisoned children and young people and people with disability.

Before the pandemic some imprisoned people, particularly those with psychosocial or cognitive disability, were often forced into solitary confinement for 22 hours a day or more. Many are denied meeting their basic needs like toileting, showers, and exercise.¹⁵⁷ This is harmful for any person, but particularly harmful and traumatic for imprisoned children and young people.¹⁵⁸

Across Australia multiple terms are used to describe certain detention practices that amount to solitary confinement, including isolation, segregation, seclusion, and separation¹⁵⁹. As there is no single definition of solitary confinement across the country, it is difficult to know with certainty how many people are affected and how long they have been in solitary confinement.

For example, in Western Australia, two young people were held in solitary confinement at the Banksia Hill Detention Centre for 10 days in 2017. An independent investigation by the Western Australian Office of Custodial Services found that their solitary confinement did not satisfy the protections that are given to imprisoned young people in The *Young Offenders Act 1994* (WA) because the provisions in the Act did not protect young people in solitary confinement if they were in solitary confinement subject to a 'Personal Support Plan'¹⁶⁰.

In another instance a teenager was held in solitary confinement for 328 days at Banksia Hill in a cell no bigger than a car parking space. He alleges to also have been subjected to degrading treatment, the refusal

¹⁵³ *Ibid.*

¹⁵⁴ COVID-19 Prison Watch SOURCE: https://covid19prisonwatch.net.au/whats-happening-in-prisons-in-australia/#Vic_update

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

¹⁵⁷ Human Rights Watch, *I Needed Help, Instead I was Punished, Abuse and Neglect of Prisoners With Disabilities in Australia*, 2017 (Report) <<https://www.hrw.org/report/2018/02/06/i-needed-help-instead-i-was-punished/abuse-and-neglect-prisoners-disabilities>> v

¹⁵⁸ Human Rights Law Centre, *Explainer: Solitary Confinement*, 2018, <<https://www.hrlc.org.au/news/2018/2/7/explainer-solitary-confinement>>

¹⁵⁹ Australian Children's Commissioners and Guardians, *Human rights standards in youth detention facilities in Australia: the use of restraint, disciplinary regimes and other specified practices*, (Report, 2016) Executive Summary

¹⁶⁰ Office of Custodial Services Western Australia, *Directed Review of Allegations made by Amnesty International Australia about ill-treatment at Banksia Hill Detention Centre*, (Report, June 2018)

of basic hygiene, of having to 'earn' bedding materials and having to kneel for his food or being fed through a grill in the door.¹⁶¹

Human Rights Watch reported on the case of an imprisoned woman with a psychosocial disability who was put in solitary confinement for 28 days.¹⁶² International human rights law limits the use of solitary confinement generally and prohibits solitary confinement on people with disability when their condition would be made worse by its use.¹⁶³

The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (**The Royal Commission**) issued a statement of concern for the wellbeing of imprisoned people with disability. In its statement, the Royal Commission noted that the 'lockdown' of facilities and reducing or restricting outside visits could also reduce both formal oversight mechanisms as well as informal oversight provided by family, friends, supporters, and advocates of imprisoned people.

The Royal Commission highlighted that with decreased oversight comes an increase in the risk of violence, abuse, neglect, and exploitation of imprisoned people with disability.¹⁶⁴

The use of solitary confinement as a COVID-19 containment measure is flawed, and in some circumstances may breach our international human rights obligations. The use of solitary confinement also does not remedy the fact that Australia's prisons are already overcrowded, and it ignores the reality of numerous staff movements in and out of prisons.¹⁶⁵

Australia must instead focus on the orderly release of imprisoned people while also making sure that those who cannot be released are cared for. The WHO has issued a checklist to cover actions for effective preparedness, prevention, and control of COVID-19 in prisons and other custodial settings.

The checklist encompasses essential elements that need to be considered by decision makers, like:¹⁶⁶

- Ensuring human rights are upheld and maintained in all principles and practices in managing imprisoned people and prisons.
- Ensuring prisons are properly stocked with medication, cleaning equipment, and equipment to ensure the hygiene of imprisoned people, staff, and visitors.
- Strong risk assessment and management is in place to prevent COVID-19 from spreading in prisons, including strong case management procedures.

¹⁶¹ Amnesty International Australia, *Teenager in Banksia Hill Asking to go to Adult Prison After 328 Days in Isolation*, (Web Page, 20 March 2018) <<https://www.amnesty.org.au/teenager-in-banksia-hill-asking-to-go-to-adult-prison-after-328-days-in-isolation/>>

¹⁶² Human Rights Watch, (2017) *Op. Cit.* at 137

¹⁶³ Human Rights Law Centre, *Solitary confinement must not be used as a response to COVID-19: Royal Commission told*, (Website, 31 March 2020) <<https://www.hrlc.org.au/news/2020/3/31/solitary-confinement-must-not-be-used-as-response-to-covid-19-royal-commission-told>>

¹⁶⁴ Royal Commission into Violence, Abuse, Neglect, and Exploitation of People with Disability, *Statement of concern: The response to the COVID-19 pandemic for people with disability*, (Website, last accessed 19 May 2020) <<https://disability.royalcommission.gov.au/system/files/2020-03/COVID-19%20Statement%20of%20concern.pdf>>

¹⁶⁵ Human Rights Law Centre, (2020) *Op. Cit.* at 143

¹⁶⁶ World Health Organisation Regional Office for Europe, (2020) *Op. Cit.* at 132

- Strong referral processes and clinical management for imprisoned people with COVID-19.
- Thorough contingency planning as well as staff training in dealing with COVID-19.
- Environmental cleaning guidelines for prisons following a suspected case of COVID-19.



Preventing Aboriginal deaths in custody during COVID-19

As noted above, because of the ongoing impacts of colonisation, land dispossession and family separation our people are the most imprisoned people on earth.¹⁶⁷ The Commonwealth's Chief Medical Officer and the Australian Government has identified our people as being more vulnerable to contracting COVID-19 and to suffer more severe illness and deaths because of it.¹⁶⁸

In Victoria, three imprisoned people were tested for COVID-19, with the Victorian Hopkins Correctional Centre going into lockdown while their results were determined causing incredible amounts of stress and anxiety among imprisoned people.¹⁶⁹ Sadly, there have been four deaths in custody during the pandemic, three in Queensland and one in the Northern Territory.¹⁷⁰

The United Nations High Commissioner for Human Rights, Her Excellency Michele Bachelet, has called on governments to take urgent action to protect the health and safety of imprisoned people and people in closed facilities like forensic hospitals, residential care homes, and immigration detention centres.¹⁷¹ The High Commissioner urged governments, including Australia's, to work quickly to reduce the number of imprisoned people, particularly those who are more vulnerable to COVID-19¹⁷², like all Aboriginal and Torres Strait Islander people.

The United Nations Expert Mechanism on the Rights of Indigenous Peoples (**EMRIP**) has also urged governments to be guided by UNDRIP to protect the health and lives of Indigenous peoples. The EMRIP has urged governments to work in true partnership with Indigenous people while also providing culturally safe services, whenever and wherever they are needed, grounded in Indigenous rights to self-determination.¹⁷³

The International Committee of the Red Cross (**ICRC**) has also recommended reducing the number of people in prison as a COVID-19 risk mitigation measure and to protect the health of surrounding communities.¹⁷⁴ The ICRC has recommended governments and courts instead rely on alternatives to imprisonment.¹⁷⁵

¹⁶⁷ Thalia Anthony, Eileen Baldry, *FactCheck Q&A: are Indigenous Australians the most incarcerated people on Earth?*, *The Conversation*, 6 June 2017, <<https://theconversation.com/factcheck-ganda-are-indigenous-australians-the-most-incarcerated-people-on-earth-78528>>

¹⁶⁸ The Chief Medical Officer of the Commonwealth of Australia, *Letter to doctors from the Chief Medical Officer about the response to COVID-19*, 09 March 2020, and, Australian Government Department of Health, *Management Plan for Aboriginal and Torres Strait Islander Populations*, 30 March 2020.

¹⁶⁹ Bianca Hall, 'COVID-19 testing rolled out to prisoners and prison staff', *The Age* (Newspaper Report, 11 May 2020)

¹⁷⁰ Queensland Government, *Queensland Corrective Services* (Website, Last accessed 26 May 2020) <<https://corrections.qld.gov.au/death-in-custody/>>

¹⁷¹ United Nations Human Rights Officer of the High Commissioner, *Urgent action needed to prevent COVID-19 "rampaging through places of detention"* – Bachelet, (Press Release, 25 March 2020) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25745&LangID=E>>

¹⁷² *Ibid.*

¹⁷³ UN Expert Mechanism on the Rights of Indigenous Peoples, *COVID-19 yet another challenge for indigenous peoples*, (Website, 6 April 2020) <<https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2020/04/EMPRIP-English.pdf>>

¹⁷⁴ International Committee of the Red Cross, *COVID-19: Authorities must protect health of detainees, staff and ultimately surrounding communities*, (Press Release, 7 April 2020) <<https://www.icrc.org/en/document/covid-19-places-detention-must-protect-health-detainees-staff-and-ultimately-surrounding>>

¹⁷⁵ *Ibid.*

To that end, strong and decisive action, and leadership in line with our international human rights obligations is necessary to protect the health of imprisoned people while also mitigating a potential second

Inadequate treatment for imprisoned people

NATSILS member, the Aboriginal Legal Service of NSW/ ACT reports that one of the imprisoned Aboriginal people they have been working with needed a tooth extraction during the pandemic. However, no dentists were able to attend in person, so he was provided with copious amounts of painkillers. This was something he was trying to avoid as he had a history of previous substance addiction.

Another person has reported that he is not getting the medication he needs for his Hepatitis C. Instead, he has advised that he has been let out of his cell for only two hours since later March 2020. He is currently in solitary confinement.

Source: Aboriginal Legal Service of New South Wales and the Australian Capital Territory, 2020

wave of COVID-19 in the community. Around the world countries like the United States of America¹⁷⁶, the Republic of Ireland¹⁷⁷, Indonesia¹⁷⁸, Iran¹⁷⁹, Turkey¹⁸⁰, and the United Kingdom¹⁸¹ have released thousands of imprisoned people as an effective response to contain COVID-19.

In the absence of a systematic, central directive to protect imprisoned people from COVID-19, advocacy has been led by civil society and grassroots campaigns. Families of Aboriginal and Torres Strait Islander people who had died in custody or had imprisoned people that they were worried about released an open letter to all Australian governments to release our people from prisons to prevent deaths in custody. The families also called for care and protection for imprisoned people as well as support and services to support our people back into the community.¹⁸²

NATSILS has endorsed or supported this and other civil society calls for the protection of vulnerable people from COVID-19. Like, the open letter to the National Cabinet for *the Immediate Actions Required for Australians with Disability in response to COVID-19*, an open letter to the Prime Minister to *Fund Aboriginal Responses to Covid-19*, a public call for *Parliamentary Scrutiny of COVID-19 Responses*, an two open letters

¹⁷⁶ British Broadcasting Corporation, US jails begin releasing prisoners to stem Covid-19 infections, *BBC News*, (Website, 19 March 2020) <<https://www.bbc.com/news/world-us-canada-51947802>>

¹⁷⁷ Conor Lally, Coronavirus: Nearly 300 extra prisoners released since start of outbreak, *The Irish Time*, (Website, 31 March 2020) <<https://www.irishtimes.com/news/ireland/irish-news/coronavirus-nearly-300-extra-prisoners-released-since-start-of-outbreak-1.4216867>>

¹⁷⁸ Leopold Sudaryono, *Releasing prisoners is not enough to prevent the spread of COVID-19 in Indonesia's overcrowded cells*, (Website, 7 April 2020) <<https://theconversation.com/releasing-prisoners-is-not-enough-to-prevent-the-spread-of-covid-19-in-indonesias-overcrowded-cells-135217>>

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid*

¹⁸¹ Francis Pakes, Coronavirus: why swathes of prisoners are being released in the world's most punitive states, *The Conversation*, (Website, 20 April 2020) <<https://theconversation.com/coronavirus-why-swathes-of-prisoners-are-being-released-in-the-worlds-most-punitive-states-136563>>

¹⁸² Aboriginal Legal Service of New South Wales and ACT, *Open letter from First Nations families left behind #CleanOutPrisons*, (Website, 29 April 2020) <https://www.alsnswact.org.au/open_letter_from_families_clean_out_prisons>

calling on Australian governments to reduce the risk of COVID-19 in prisons and youth detention centres by releasing imprisoned people.¹⁸³

Australia needs to begin a program of releasing imprisoned people with priority given to our people most at risk, like those with pre-existing health issues, including elderly people, people with chronic health conditions, disability, and mental health conditions.

Priority should also be given to our people who have six months or less left to serve or who are imprisoned for a term of six months or less.

Adults, children, and young people on remand need to also be released, including by fast-tracking bail applications. Our people on remand must also be allowed to return home to their country and communities, after a period of isolation if necessary.

Recommendations:

13. The Health Minister needs to use his powers under the *Biosecurity Act 2015* (Cth) to issue strong directions and/or determinations for the immediate release of Aboriginal and Torres Strait Islander adults and young people who are:
 - most at risk, with pre-existing health issues, including elderly people, people with chronic health conditions, disability, and/or mental health conditions.
 - on remand, including by fast-tracking bail applications.
 - imprisoned for a term of six months or less, and those who have six months or less left to serve, with expedited parole processes.
14. The National Cabinet needs to ensure that there is immediate and appropriate medical treatment, including testing and hospitalisation, for all imprisoned Aboriginal and/or Torres Strait Islander people who develop COVID-19 symptoms in any state/territory or Commonwealth custodial facility. Their families and the ATSILS' Custody Notification Services must also be immediately notified
15. The National Cabinet needs to ensure that even during a COVID-19 outbreak, independent inspection bodies and organisations that monitor the treatment of imprisoned people have access to all places of detention, including to anyone who may be in isolation to ensure that imprisoned people's human rights are being upheld and respected.
16. All States and Territories need to implement the Optional Protocol on the Convention Against Torture by immediately establishing effective National Preventative Mechanisms that comply with the NPM Criteria (as specified by the Sub-committee on the prevention of torture) and include Aboriginal and Torres Strait Islander organisations, such as ATSILS and NATSILS, to ensure that the conditions and treatment of Aboriginal and Torres Strait Islander people with disability is adequately monitored.

¹⁸³ See:

<https://www.greenslist.com.au/assets/papers/Second%20open%20letter%20to%20Australian%20governments%20re%20prisons%20and%20COVID-19%20-%20with%20signatures.pdf> and <https://croakey.org/hundreds-of-experts-push-for-early-release-and-other-actions-to-protect-prisoners-from-covid-19/> and https://www.gratafund.org.au/parliamentary_scrutiny_covid19 and <https://www.firstnations-covid19-letter.org/>

Conclusion

NATSILS is pleased to commend this submission to the Senate Select Committee for consideration.

We are well placed to use the pandemic as an opportunity for all Aboriginal and Torres Strait Islander people and communities to emerge on the other side of COVID-19 with stronger health, welfare, community infrastructure, and economic systems that are grounded in the strengths of Aboriginal and Torres Strait Islander cultures and in Indigenous self-determination.

If this crisis has shown us anything, it is that the systems put in place to govern our lives can be quickly changed for our collective good if we centre the experiences of those who rely on them.

We ask all governments to work in partnership with our people to ensure that we can all emerge from the pandemic stronger and more connected.

