



NATSILS Submission for Australia's Universal Periodic Review

March 2015

Organisation Summary:

This is a submission from the peak body for Aboriginal and Torres Strait Islander Legal Services (ATSILS) in Australia, the National Aboriginal and Torres Strait Islander Legal Services (NATSILS). ATSILS were established in every State and Territory over 40 years ago to provide culturally competent legal assistance services to Aboriginal and Torres Strait Islander peoples. ATSILS are Aboriginal and Torres Strait Islander community controlled not-for-profit organisations which, through funding from the Australian Commonwealth Attorney-General's Department, provide legal assistance services in the areas of criminal, family and civil law in addition to undertaking community legal education, prisoner through-care and law reform and advocacy activities.

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FRAMEWORK FOR THE PROMOTION AND PROTECTION OF THE HUMAN RIGHTS:

1. Previously NATSILS endorsed recommendations in regards to Australia adopting a more comprehensive framework for the promotion and protection of human rights. However, it would appear from the Progress Report provided by the ACHRA that the development and adoption of a more comprehensive framework has a significant way to go.
2. In particular, NATSILS recommends the Government:
 - (a) develop a framework to implement and raise awareness about the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in consultation with Aboriginal and Torres Strait Islander peoples. While it is noted that some consultation has occurred, it appears that progress has stalled and this needs to be addressed as a matter of priority;
 - (b) continue the process towards constitutional reform to recognise and better protect the rights of Aboriginal and Torres Strait Islander peoples, including freedom from discrimination and equality before the law. It is noted that the *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013 (Cth)* is due to sunset in March 2015. In light of the fact that neither a model for Constitutional recognition nor a timeframe in which to hold a referendum have been settled and announced, the sunset clause should be extended for a further 12 months;
 - (c) withdraw its reservations to article 4(a) of the *Convention on the Elimination of Racial Discrimination (CERD)* and article 20 of the *International Covenant on Civil and Political Rights (ICCPR)*;
 - (d) ratify the Optional Protocol to the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*; and
 - (e) ratify the optional protocol to the *Convention Against Torture (CAT)* and implement a national preventative mechanism to inspect all places of detention in Australia.

HUMAN RIGHTS IN PRACTICE: KEY ISSUES AND INITIATIVES FOR IMPLEMENTATION:

Issue One: Over-representation of Aboriginal and Torres Strait Islander peoples in the Criminal Justice System and High Incarceration Rates

3. Aboriginal and Torres Strait Islander peoples in Australia are substantially over-represented in the criminal justice system. While Aboriginal and Torres Strait Islanders comprise only 2.3% of the adult population in Australia they make up over a quarter (27.4%) of the adult prison population.ⁱ At 30 June 2013 the rate of imprisonment for Aboriginal and Torres Strait Islander adults was 13 times higher than the rate for non-Aboriginal and Torres Strait Islander adults.ⁱⁱ Aboriginal and Torres Strait Islander juveniles are also significantly overrepresented in the criminal justice system currently being detained at a rate 24 times higher than that of non-Aboriginal and Torres Strait Islander youth and comprising 52% of all juveniles in detention.ⁱⁱⁱ
4. The over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system is caused by a number of complex factors including dispossession of land, structural disadvantage, systemic racism, intergenerational poverty, over-policing and tough-on-crime policies. These factors are further exacerbated by a lack of accountability in the handling of

police complaints and the absence of effective remedies to address the systemic failure of service provision for Aboriginal and Torres Strait Islander peoples.

5. In order to create substantive change Australia needs to adopt a new evidence based approach which recognises the complexity of the problem and focuses on holistically addressing the socio-economic drivers of crime. Imprisonment is often ineffective in rehabilitating offenders and making communities safer. Furthermore, imprisonment is also expensive and at the rate that imprisonment is increasing in Australia, the cost is becoming unsustainable. Australia needs to invest in intervention and prevention strategies which address the root causes of crime to break the cycle of imprisonment in Aboriginal and Torres Strait Islander communities.
6. Justice Reinvestment^{iv} is a proven framework to draw upon. It not only has fiscal rationality at its core, but works to address the causes of offending to prevent crime, while also more effectively rehabilitating those who do offend. Any new approach must be grounded in respect for the principle of community control and self-determination, and involve the active participation of Aboriginal and Torres Strait Islander communities in developing and implementing policies and programs for change.
7. NATSILS recommends the Government:
 - (a) incorporate targets to reduce the high rates of Aboriginal and Torres Strait Islander peoples in contact with the criminal justice system into the Closing the Gap agenda;
 - (b) implement Justice Reinvestment strategies in line with the above targets;
 - (c) increase the use of therapeutic jurisprudence approaches, such as the expansion of specialised courts and community courts, and the increased use of restorative justice processes that promote community empowerment and the role of Aboriginal and Torres Strait Islander Elders in the criminal justice system;
 - (d) increase the use of non-custodial sentencing options, such as community based orders, community work orders, diversionary programs, cautioning and home detention;
 - (e) abolish mandatory sentencing policies^v or where it is a State or Territory regime, seek their abolition; and
 - (f) establish independent bodies in each State and Territory to investigate and determine police complaints.

Issue two: State of Prisons and Juvenile Detention Centres

8. Many Australian detention facilities, particularly in regional and remote areas, are unhygienic, overcrowded and lack air-conditioning. Additionally, many facilities do not provide Aboriginal and Torres Strait Islander peoples in custody with access to culturally appropriate healing and/or rehabilitation programs, and place juveniles at risk of abuse by failing to always separate them from adults whilst in custody. Furthermore, in detention individuals often receive inadequate medical and mental health care, which contributes to the ongoing incidence of deaths in custody.^{vi vii}
9. Prisoner transportation is also concerning because of the geographical expanse of Australia and remoteness of many Aboriginal and Torres Strait Islander communities. Detained persons are

transported over hundreds of kilometres, amidst high temperatures in vehicles that are not appropriately air-conditioned or monitored. Only New South Wales (NSW) and Western Australia (WA) have an Inspector of Custodial Services to provide an independent, expert and fair inspection service that gives up-to-date reports and advice about custodial facilities and services.

In 2014 the United Nations Committee against Torture (UN CAT) conducted a periodic review of Australia which echoed the above concerns regarding the state of detention facilities. The UN CAT noted that:

The State party should strengthen its efforts to bring the conditions of detention in all places of deprivation of liberty in line with relevant international norms and standards...in particular by: a) continuing to reduce overcrowding, particularly through the wider application of non-custodial measures as an alternative to imprisonment... and b) ensuring that adequate somatic and mental health care is provided for all persons deprived of their liberty.

It should also increase its efforts to prevent deaths in custody and further strengthen its efforts to ensure that all incidents of death in custody are promptly, effectively and impartially investigated and, on a finding of criminal responsibility, lead to a penalty proportional to the gravity of the offence.^{viii}

10. Of express concern to NATSILS is the state of juvenile detention centres throughout the nation, but in particular in the Northern Territory, Western Australia and Queensland. Currently in Darwin children are being detained in a facility which was deemed inappropriate for adult prisoners and which has been condemned by a number of human rights and justice organisations.^{ix} The use of the facility raises serious health and well being concerns for the children detained. Furthermore, the number of relocations for juveniles in Darwin since August 2014 appears to have led to an increase in serious incidents and disturbances, including a riot where a number of children were tear-gassed.^x
11. In Queensland, a draft government report found that the number of youth in detention has reached a critical point where juvenile detention centres are considered permanently over capacity, raising serious risks to the youth, staff and community.^{xi} The same report found that 75% of children presenting in juvenile detention centres in Queensland had mental health and behavioural problems. The report concluded that the time is now to “build further permanent capacity in the system” and that additional facilities must be equipped to address complex mental and behavioural problems.^{xii}
12. In Western Australia the condition of juvenile and female detention centres is also alarming. Numerous reports by the Western Australia Inspector of Custodial Services have condemned the female detention centre Bandyup for being overcrowded and lacking in facilities, with a recent report reissuing the finding that the facility is in “crisis”.^{xiii} Meanwhile, the juvenile detention centre, Banksia experienced severe riots in 2013, which have been linked to poor management and overcrowding.^{xiv} Following the riots 73 youth were placed in an adult jail, where there was a lack of appropriate services and activities and long periods of lockdowns.^{xv}
13. NATSILS recommends the Government:

- (a) take steps to address the disproportionate number of Aboriginal and Torres Strait Islander peoples in detention by implementing recommendations above at 8;
- (b) ensure adequate medical care and living conditions for all people in detention, including during the transportation of detained persons;
- (c) implement the Optional Protocol to the Convention Against Torture (OPCAT) into domestic law and establish National Preventative Mechanisms in consultation with the NSW and WA Inspectors of Custodial Services ;
- (d) withdraw its reservations to article 10(2) and (3) of the ICCPR, and article 37(c) of the Convention on the Rights of the Child (UNCRC);
- (e) Ensure that youth are not placed in adult prisons as required by the UNCRC;
- (f) reform death in custody investigations so they are carried out by an independent body;
- (g) introduce legislation that requires governments to act on Coronial recommendations; and
- (h) inspect and report on systemic issues in prisons and juvenile detention centres.

Issue Three: Access to Justice

14. ATSILS are the preferred and in many instances the only legal aid option for Aboriginal and Torres Strait Islander peoples. Many Aboriginal people who access our services experience language and cultural barriers, low levels of numeracy and literacy and distrust of the justice system. The demand for ATSILS services continues to grow, with particularly high demand in the areas of:
- criminal services, including casework and advice matters;
 - civil services, especially in the areas of tenancy and police complaints;
 - child protection and family law services; and
 - representation to defendants of Domestic Violence Orders, which the ATSILS are not currently funded to provide except for in very limited circumstances.^{xvi}
15. Despite the critical need and rising demand for ATSILS services, the amount of real funding provided to the ATSILS has been declining since 2003, while the cost of providing services has risen. NAAJA is quoted as an example of where demand outstrips supply “...the failure of our funding to keep up with increases in our workload...not only limits our ability to provide a full range of services...but also limits our ability to implement best-practice strategies, including early intervention and prevention initiatives.” Thus despite recent one-off budgetary increases, and in contrast to increases in funding for mainstream legal aid services and departments of public prosecutions, ATSILS have not received any meaningful increase in funding since 2003.
16. In 2013, the Federal Attorney-General’s Department announced a cut of \$13.34 million from the Indigenous Legal Aid and Policy Reform Program between the 2014-15 and 2016-17 financial years. This combination of chronic underfunding and a high level of unmet legal need amongst Aboriginal and Torres Strait Islander communities, places the ATSILS, and access to justice for Aboriginal and Torres Strait Islander peoples, in an extremely vulnerable position. A recent

Government commissioned review by the Productivity Commission, argued against the funding cuts, and instead called for an annual injection of \$200m to the legal assistance sector.^{xvii}

17. Under the announced funding cuts, the ATSILS representative body, NATSILS will be defunded. The remaining funding cuts will be spread across individual ATSILS. The detail of how these funding cuts will be divided amongst the ATSILS and the process of implementation currently remains unclear. The Government has stated that the funding cuts are aimed at directly targeting NATSILS and individual ATSILS ability to undertake law reform and advocacy work. This impairs our ability to work with Governments to address the underlying causes of Aboriginal and Torres Strait Islander disproportionate representation in the justice system. There is simply no one else to fulfil this role. Additionally, the impacts of the funding cuts will go well beyond law reform and advocacy activities and will force individual ATSILS to significantly withdraw from critical service delivery areas such as criminal, civil and family law, assistance to Parole Boards and the provision of community legal education.

18. The current funding uncertainty is already having an impact on frontline services, as in ATSILS are being forced to make the difficult decision of closing offices and withdrawing services in preparation for the planned cuts that will come into effect from 1 July 2015. For example, NAAJA recently made the decision to close their Nhulunbuy office, while the ATSILS Queensland Branch has closed five of its offices.^{xviii} In addition to the inadequate level of funding provided to the ATSILS, short funding cycles of between one to three years continue to impact on service delivery as they prevent long term strategic planning and on-going program development.

19. The recent funding cuts and chronic gross-underfunding of ATSILS compared to mainstream legal aid service providers and departments of public prosecutions^{xix} discriminates against Aboriginal and Torres Strait Islander peoples and denies equal access to justice. Ultimately the Government's decision to cut funding from NATSILS and the ATSILS is a short-sighted false economy which will only serve to increase costs to the justice system. A reduction in service delivery will mean that more Aboriginal and Torres Strait Islander people will end up in contact with the justice system due to a lack of access to culturally competent legal services. It is in the Government's best interest to understand that the relatively small investment in NATSILS and its members, provides a far greater return in terms of savings to the justice system overall.

20. NATSILS recommends the Government:
 - (a) reverse funding cuts to ATSILS and ensure that ATSILS funding is proportionally increased to ensure it is equal to that of mainstream legal aid services and departments of public prosecutions;^{xx}
 - (b) provide ATSILS with long term funding agreements of at least five years to allow for long-term planning and stability of services;
 - (c) implement initiatives, in consultation with Aboriginal and Torres Strait Islander communities, to reduce the high incidence of family violence; and;
 - (d) remove recently introduced prohibitions on ATSILS in relation to undertaking law reform research and policy work and provide funding to enable such.

Appendix

ⁱ Productivity Commission, Commonwealth Government, *Overcoming Indigenous Disadvantage Report* (2014) 4.100.

ⁱⁱ *Ibid*, 4.104.

ⁱⁱⁱ Australian Institute of Health and Welfare, Commonwealth Government, *Youth Detention Population in Australia* (2014) vii.

^{iv} It has been five years since Tom Calma, former Aboriginal and Torres Strait Islander Social Justice Commissioner, called for a Justice Reinvestment approach for Aboriginal and Torres Strait Islander communities. Tom Calma explained justice reinvestment as:

[a] localised criminal justice policy approach that diverts a portion of the funds for imprisonment to local communities where there is a high concentration of offenders. The money that would have been spent on imprisonment is reinvested in programs and services in communities where these issues are most acute in order to address the underlying causes of crime in those communities.

Justice reinvestment still retains prison as a measure for dangerous and serious offenders but actively shifts the culture away from imprisonment and starts providing community wide services that prevent offending. Justice reinvestment is not just about reforming the criminal justice system but trying to prevent people from getting there in the first place.

Justice reinvestment is a model that has as much in common with economics as social policy. Justice reinvestment asks the question: is imprisonment good value for money? The simple answer is that it is not. We are spending ever increasing amounts on imprisonment while at the same time, prisoners are not being rehabilitated, recidivism rates are high and return to prison rates are creating overcrowded prisons.

Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2009* (2009) 9.

Five years on Aboriginal and Torres Strait Islander Social Justice Commission Mick Gooda recently defined justice reinvestment as:

[a] powerful crime prevention strategy that can help create safer communities by investing in evidence based prevention and treatment programs. Justice reinvestment looks beyond offenders to the needs of victims and communities.

Justice reinvestment diverts a portion of the funds for imprisonment to local communities where there is a high concentration of offenders. The money that would have been spent on imprisonment is reinvested into services that address the underlying causes of crime in these communities.

Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2014* (2014) 102.

^v The abolition of mandatory sentencing regimes is supported by the Law Council of Australia, who have stated that:

In the Law Council's view, mandatory sentencing laws are arbitrary and limit an individual's right to a fair trial by preventing judges from imposing an appropriate penalty based on the unique circumstances of each offence and offender. Mandatory sentencing disproportionately impacts upon particular groups within society, including Indigenous peoples, juveniles, persons with a mental illness or cognitive impairment, or the impoverished. Such regimes are costly and there is a lack of evidence as to their effectiveness as a deterrent or their ability to reduce crime.

Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing May 2014* (2014) 5.

^{vi} These issues are of particular importance given that incarcerated peoples' liberties have been taken away and thus the standard of care provided to them must increase. This principle applies to everyone in prison.

^{vii} On the 4th August 2014, Ms Dhu, an Aboriginal woman aged 22 years, died in police custody in Western Australia (WA). She was locked up as part of the government's policy of paying outstanding fines through prison time. She was in jail for four days for failing to pay a \$1000 fine. She died after complaining about severe pain, vomiting and partial paralysis. Whilst in custody Ms Dhu was twice taken to a local hospital but on both occasions was declared well enough to be sent back to prison despite reportedly not being seen by a doctor. The Western Australian coronial investigation is still ongoing.

^{viii} UN Committee Against Torture, *Concluding Observations on the combined fourth and fifth periodic reports of Australia*, sess. 1284 and 1285, UN Doc CAT/C/AUS 4-5, (26 November 2014) 3-4.

^{ix} In fact, the Northern Territory Corrections Commissioner has stated that the 30 year old prison is "only fit for a bulldozer". The use of the facility has been condemned by a number of leading Aboriginal and Torres Strait Islander organisations as well as other core justice organisations, including Amnesty International, the Human Rights Law Centre, the Secretariat of National Aboriginal and Islander Child Care (SNAICC), the North Australian Aboriginal Justice Agency (NAAJA) and Central Australian Aboriginal Legal Aid Service (CAALAS). See Human Rights Law Commission, 'Joint Statement: Berrimah Prison is not good enough for Territory's most vulnerable kids' (Media Release, 5 October 2014) http://hrlc.org.au/joint-statement-berrimah-prison-is-not-good-enough-for-territorys-most-vulnerable-kids/#_ftn1.

^x Helen Davidson, 'NT young offenders kept in maximum security jail as new facility is ruled out' *The Guardian*, (online) 28 January 2015

<http://www.theguardian.com/australia-news/2015/jan/28/nt-young-offenders-kept-in-maximum-security-jail-as-new-facility-is-ruled-out>.

^{xi} Matt Wordsworth, 'Qld youth detention centres operating 'permanently over safe capacity' and system in crisis, draft report says' *ABC News*,(online) 17 September 2014

<http://www.abc.net.au/news/2014-09-17/crime-boom-overwhelms-youth-detention-centres-in-queensland/5751540>.

^{xii} Department of Justice and Attorney General Department, Queensland, *Draft Youth Detention Demand Management Strategy 2013-2023* (2014) 4.

^{xiii} Office of the Inspector of Custodial Services (OICS), Government of Western Australia, *Report of an Announced Inspection of Bandyup Women's Prison*, Report No. 93 (October 2014) iv. See also Office of the Inspector of Custodial Services (OICS), Government of Western Australia, *Female Prisons in Western Australia and the Greenough Women's Precinct*, Report No. 91 (July 2014).

^{xiv} Office of the Inspector of Custodial Services (OICS), Government of Western Australia, *Directed Review into an Incident at Banksia Hill Detention Centre, 20 January 2013*, Report No 85 (July 2013).

^{xv} Commissioner for Children and Young People, Government of Western Australia, 'Action on youth justice urgently required' (Media Release) 7 August 2013

<http://www.cryp.wa.gov.au/files/resource/Media%20Statement%20-%20Action%20on%20youth%20justice%20urgently%20required%20-%207%20August%202013.pdf>.

^{xvi} Except for in very limited circumstances, ATSILS are not funded to provide legal advice and representation to defendants of Domestic Violence Orders or Apprehended Violence orders. Where there is some correlation to present criminal matter/s, or where the breach of an order has resulted in criminal charges, ATSILS can provide some advice and assistance to Aboriginal and Torres Strait Islander defendants. However, while ATSILS' criminal sections can assist Aboriginal and Torres Strait Islander defendants in relation to criminal charges stemming from the breach of an order, they are largely unable to provide services in relation to defending orders at the initial point of application, or as a general rule, in relation to applications for variations of orders. Domestic Violence Order and Apprehended Violence Order matters can be quite complicated, especially when they involve issues of property, children, leases and the like in addition to the language, cultural and educational barriers faced by Aboriginal and Torres Strait Islander peoples. Providing an adequate service to Aboriginal and Torres Strait Islander defendants would require the provision of significant additional resources to ATSILS. In urban areas it would require both an advice and duty service, and in remote areas it would require dedicated lawyers, support staff and a sufficient budget so as to enable travel to all remote courts.

^{xvii} Productivity Commission, Commonwealth Government *Access to Justice Arrangements* (2014) 30.

^{xviii} The Warwick, Cunnamulla, Chinchilla, Dalby and Cooktown offices have been closed thus far.

^{xix} In 2003 the gap between existing funding and the funding needed for ATSILS to keep their services at the same level of mainstream services was in the vicinity of 23 million dollars (ATSIC Office of Evaluation & Audit, *Evaluation of the Legal and Preventative Services Program* (2003)). In 2008, the Aboriginal Legal Rights Movement (ALRM) lodged a formal complaint to the United Nations about the treatment of Aboriginal and Torres Strait Islander peoples. At this time, ALRM Chairperson Frank Lampard reported that “Aboriginal Legal Aid has been static for more than a decade, meaning it has fallen by about 40 % in real terms” and that this shortfall constitutes “discrimination because mainstream legal aid has increased by 120 % in the same time.”

ABC News, ‘Indigenous rights complaint lodged with UN’ *ABC News* (online) 15 September 2008 <www.abc.net.au/news/stories/2008/09/16/2366190.htm?section=australia>

The formal complaint concluded:

It is our submission that the Special Rapporteur should make the Australian Government aware of its obligations to Indigenous Australians. Repeated requests to the Government for additional funding to support our programs for the benefit of the Aboriginal people over at least the last 8 years have been denied, and all avenues for our complaints have been exhausted within Australia. We wish for the Government to be made to respond formally to our complaint, and thus to be held accountable for its lack of spending on Aboriginal legal aid to Aboriginal people.

Aboriginal Legal Rights Movement letter to the Special Rapporteur on the Human Rights of Indigenous Peoples re Complaint Regarding the Discriminatory Underfunding of the Aboriginal Legal Rights Movement in Australia, 20 June 2008.