

Aboriginal and Torres Strait Islander Legal Services (ATSILS)

Custody Notification Service

An analysis of the operation of this service
by each Aboriginal and Torres Strait Islander Legal Service (ATSILS)

Explanatory Note

This table outlining the Custody Notification Services operated by the different Aboriginal and Torres Strait Islander Legal Services (ATSILS) was developed by the Law Reform and Policy Legal Officers of each participating ATSILS. All ATSILS were invited to participate and the majority provided the relevant information.

The ATSILS recognise that different Services and jurisdictions have different needs and practices and this table does not propose a preferred model of notification.

However, ATSILS submit that an effective Custody Notification Service, implementing Recommendation 224 of the Royal Commission into Aboriginal Deaths in Custody (see Background and Rationale, p1) requires:

- a) adequate resourcing made possible by appropriate funding;
- b) a constructive relationship with the relevant Police Service to promote co-operation and compliance; and
- c) underpinning by statutory provisions (legislation and/or regulation) to ensure compliance.

Aboriginal and Torres Strait Islander Legal Services (ATSILS) Custody Notification Service

An analysis of the operation of this service by each Aboriginal and Torres Strait Islander Legal Service (ATSILS)

- Central Australian Aboriginal Legal Aid Service Incorporated
- North Australian Aboriginal Justice Agency Ltd
- Aboriginal Legal Service (NSW/ACT) Limited
- Victorian Aboriginal Legal Service Co-operative Limited
- Aboriginal and Torres Strait Islander Legal Services (Qld) Ltd
- Aboriginal Legal Rights Movement Incorporated
- Aboriginal Legal Service of WA Ltd
- Tasmanian Aboriginal Community Legal Service

Background and Rationale

Recommendation 224 of the 1991 Royal Commission into Aboriginal Deaths in Custody (RCIADIC) states:

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

This recommendation was made in response to two principal concerns. First, it was felt that permitting Aboriginal people to speak with a person highly trained in the criminal law and in representing Aboriginal people would serve to calm an otherwise distressed Aboriginal accused and prevent self-harm or suicide. Secondly, it was believed that custody notification would permit Aboriginal people to receive legal advice delivered in a culturally sensitive manner at the earliest possible opportunity in order to prevent them from acquiescing to police demands in a manner which could jeopardise subsequent court proceedings.

Description of Service

A State or Territory -wide 24 hour/ 7 day custody notification service that enables an Aboriginal or Torres Strait Islander person who is arrested or detained by the police to access a solicitor employed by the relevant Aboriginal and Torres Strait Islander Legal Service (ATSILS) immediately upon their detention at a police station.

Purpose of Service

To ensure that any Aboriginal person who is arrested or detained is able to speak to a solicitor trained in the criminal law and experienced in representing Aboriginal people. That solicitor will provide the Aboriginal accused with legal advice specific to their circumstances and will also inquire as to their health, so as to ensure that they are not at risk of self-harm or suicide or, if they are at such risk, that appropriate medical assistance is provided.

Benefits

In addition to addressing the above concerns, such a service, complemented by relevant Legislation and Regulations, Departmental Guidelines or Memorandum of Understanding would promote:

- Prompt legal advice to an Aboriginal or Torres Strait Islander person detained or arrested, together with a check as to their physical and mental well-being, by an ATSILS
- Culturally appropriate justice
- Increased community satisfaction
- Improved use of public resources.

Table of information attached addressing:

- Current practice and operations by each ATSILS
- Relevant Legislation/Regulation/Departmental Policy or Guidelines/ Memorandum of Understanding underpinning practice and Remedies
- Impact on Resourcing
- Effectiveness of notification service

in relation to each ATSILS

Cases studies from certain ATSILS are included.

CUSTODY NOTIFICATION SERVICE

CURRENT PRACTICE and OPERATIONS

<p>Northern Territory (NAAJA) North Australian Aboriginal Justice Agency Ltd</p>	<ul style="list-style-type: none">• Free call NAAJA office numbers for each of the 3 offices (number given to police)• After hours mobile phone number for each of the 3 offices (number given to police commands for the North Australian area)• Solicitors are given after hours mobile phone on a weekly roster. No time in lieu for solicitors but paid \$80 per week for having after hours telephone.• NAAJA Criminal Solicitors available 24hrs/7days to speak with an individual who is in custody
<p>Northern Territory (CAALAS) Central Australian Aboriginal Legal Aid Service Incorporated</p>	<ul style="list-style-type: none">• Free call CAALAS office number (number given to police)• After hours mobile phone number (number given to police commands for the Central Australian area)• CAALAS Criminal Solicitors available 24hrs/7days to speak with an individual who is in custody• CAALAS Criminal Solicitors take the duty phone on a weekly roster and receive two days in lieu
<p>NSW/ACT Aboriginal Legal Service (NSW/ACT) Limited</p>	<ul style="list-style-type: none">• Dedicated telephone line (number given to all NSW police commands)• Legislative requirement to contact ALS (NSW/ACT)• Service operated 24 hours/7 days• Experienced ALS Criminal Solicitors and court officers work shifts (and taken off other duties during relevant period). The phone line is staffed on an availability basis, such that if there is no staff member available, the service cannot be provided.

<p style="text-align: center;">Victoria</p> <p style="text-align: center;">Victorian Aboriginal Legal Service Co-operative Limited</p>	<ul style="list-style-type: none"> ▪ In accordance with Victoria Police Manual Victoria Police contact VALS within 1 hour of person of Aboriginal or Torres Strait Islander descent being taken into custody ▪ VALS Service operated 24 hours/7 days ▪ Police send an email to VALS and VicPol Records Services Branch who then follow up with a telephone call to VALS ▪ After hours (5.00pm-9.00am) call is taken by On- Call Client Service Officer who uses their discretion to involve the On-Call Solicitor. ▪ CEO monitors and follows up on late notifications
<p style="text-align: center;">Queensland</p> <p style="text-align: center;">Aboriginal and Torres Strait Islander Legal Services (Qld) Ltd</p>	<ul style="list-style-type: none"> • 24 hour, 7 days a week, 365/6 days a year free call number (1800 012 255) • Each evening a field officer and a lawyer are allocated the duty of taking these calls • Phone advice may be enough or they go to police station • Give out information on our service through radio 'bites', interviews & legal education • Issue "THESE ARE MY RIGHTS" cards listing what to do if arrested
<p style="text-align: center;">Torres Strait Islands</p> <p style="text-align: center;">Torres Strait Islander & Aboriginal Community Legal Services (NQ)</p>	<ul style="list-style-type: none"> • Notification by phone from Thursday Island, Horn Island and Bamaga (Northern Peninsular area) police. Solicitor on call 24 hours /7 days • Notifications to mobile or office during working hours and solicitor mobile otherwise. Calls diverted to field officer phone if solicitor unavailable. If arrested person on Thursday Island, attendance at police station occasionally requested

<p style="text-align: center;">South Australia</p> <p style="text-align: center;">Aboriginal Legal Rights Movement Incorporated</p>	<ul style="list-style-type: none"> • ALRM Inc & Aboriginal Visitors Scheme (AVS) Telephone line (number given to all SAPOL stations) • Service Delivery operated 24 hours/7 days (all year including public holidays) • Criminal field officers are on call 24/7 statewide • Written Notification Record as follows-: <ul style="list-style-type: none"> -After hours call out sheet (see attached form) -Data Entry Client Attendance Monitored by Field Operations Manager each day
<p style="text-align: center;">Western Australia</p> <p style="text-align: center;">Aboriginal Legal Service of WA Ltd</p>	<ul style="list-style-type: none"> • ALSWA is notified by fax that an Aboriginal person is detained in custody if the person wishes a Court Officer to be notified of their details • An ALS Court Officer can be contacted after hours on the after hours number (number given to all Western Australian police commands).
<p style="text-align: center;">Tasmania</p> <p style="text-align: center;">Tasmanian Aboriginal Community Legal Service (TACLS)</p>	<ul style="list-style-type: none"> • The Tasmanian police provide a 24 hour 7 day a week notification service to the Tasmanian Aboriginal Community Legal Service (TACLS) when an Aboriginal person is brought into custody. During business hours this notification is made directly to the TACLS. After hours notifications go through to the Victorian Aboriginal Legal Service (VALS). • Police notify whenever an Aboriginal person is brought into custody, regardless of whether or not they are to be remanded, charged and bailed, released pending summons or released unconditionally. • Police give the persons full details, including name, address, date of birth and charges unless the person does not want those details disclosed. • Each month police send a list of all Aboriginal people taken into

	<p>custody. Where that person has stated they do not want their details disclosed, police provide gender and post code only.</p> <ul style="list-style-type: none">• When a notification is made a wellbeing check is conducted, with community service officer or office admin confirming that the person brought into custody is safe and well. TACLS also offers pre-interview advice and legal services, or offer to make contact with family or the person's lawyer if they already have one. Where the person has been charged and released and have provided contact details, community service officers follow up with a phone call or letter inviting the person to seek TACLS legal assistance.• Notifications made after hours come through to TACLS from VALS via email and these are acted in accordingly. If a person has been remanded our duty lawyer attends the custody centre to offer legal assistance on a bail application.
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CUSTODY NOTIFICATION SERVICE

LEGISLATION / REGULATION / DEPARTMENTAL POLICY/MEMORANDUM of UNDERSTANDING

<p>Northern Territory (NAAJA) North Australian Aboriginal Justice Agency Ltd</p> <p>and</p> <p>Northern Territory (CAALAS) Central Australian Aboriginal Legal Aid Service Incorporated</p>	<ul style="list-style-type: none">• Before being questioned, a person must be informed that that they “may communicate with or attempt to communicate with a friend or relative to inform the friend or relative of the person's whereabouts”; <i>Police Administration Act</i> (NT) s 140(b)• There are no positive obligations on police to inform an individual of their right to speak with to legal counsel. However, if a suspect asks to access legal advice police are required to facilitate that contact: Police General Order Q1 4.7• Before questioning a youth, police officer must, unless impracticable, inform the youth of his or her right to access legal advice and representation: see s15(2) of the <i>Youth Justice Act</i>• ATSILS are concerned that while the right to legal counsel is commonly known in the wider community, many Aboriginal people are unaware that they can request to speak to a lawyer. As such, they are unable to access the benefits of legal advice to the same extent as the broader community• In Central Australia, the NT Police immediately contact the relevant legal aid service when a juvenile is taken into custody as a matter of protocol
<p>NSW/ACT Aboriginal Legal Service (NSW/ACT) Limited</p>	<ul style="list-style-type: none">• <i>Law Enforcement (Powers and Responsibilities) Act 2002</i> (NSW) s 131• <i>Law Enforcement (Powers and Responsibilities) Regulation 2005</i> (NSW) cl 18-20, cl 24, cl 33, Sch 2, Part 2• <i>Crimes (Forensic Procedures) Act 2000</i> (NSW), s 3• <i>Crimes (Forensic Procedures) Regulation 2008</i> (NSW), cl 4

<p style="text-align: center;">NSW/ACT</p> <p style="text-align: center;">Aboriginal Legal Service (NSW/ACT) Limited (cont-d)</p>	<ul style="list-style-type: none"> • The Supreme Court of NSW has set aside convictions based on evidence of records of interviews with Aboriginal accused persons when notification of their arrest was not given to the ALS, as the evidence was obtained in breach of <i>Law Enforcement (Powers and Responsibilities) Regulation 2005</i> (NSW) cl 33 and should not have been admitted - <i>Campbell & 4 Ors v DPP (NSW)</i> [2008] NSWSC 1284
<p style="text-align: center;">Victoria</p> <p style="text-align: center;">Victorian Aboriginal Legal Service Co-operative Limited</p>	<ul style="list-style-type: none"> • Victoria Police Manual - VPM Instruction 113-1 – Taking a person into custody, Paragraph 4.3.5 ‘Indigenous Australians and Torres Strait Islanders’
<p style="text-align: center;">Queensland</p> <p style="text-align: center;">Aboriginal and Torres Strait Islander Legal Services (Qld) Ltd</p>	<ul style="list-style-type: none"> • M O U with Police - our office to be notified when a person who identifies as Aborigine or Torres Strait Islander is taken into custody and for our officers to be accorded due respect and access to clients
<p style="text-align: center;">South Australia</p> <p style="text-align: center;">Aboriginal Legal Rights Movement Incorporated</p>	<ul style="list-style-type: none"> • South Australia does not have specific legislation regarding the detention of Aboriginal people and Torres Strait Islanders. • South Australia has implemented administrative directions known as –SAPOL GENERAL ORDERS. • The GENERAL Orders make provision with respect to the notification of ALRM inc when an Aboriginal person is taken into custody (Police General Order 3015 para 13), the questioning of Aboriginal people and access by field officers of ALRM inc to the people in custody(Police General Order 3015 para 11& 12) • In SA all persons in custody on suspicion of committing an offence

	<p>have rights under section 79A (1)(b) Summary Offences Act (i) to have a solicitor relative or friend present during interrogation (ii) if English is not their language to have an interpreter present to assist them in interrogation (iii) the right to refrain from answering questions during interrogation. There are also special rules for youths in custody section 79A(1a)- these cover a guarantee of presence of a social worker or other person if the youth does not have a relative friend or solicitor .There is a general right for all persons in custody to make a phone call to a nominated relative or friend section 79A(1)(a)</p>
<p style="text-align: center;">Western Australia</p> <p>Aboriginal Legal Service of WA Ltd</p>	<ul style="list-style-type: none"> • Western Australian Police Service Lockup Manual – LP 2.1, 2.2 ‘Aboriginal Legal Service – Detainee Advice
<p style="text-align: center;">Tasmania</p> <p>Tasmanian Aboriginal Community Legal Service (TACLS)</p>	<ul style="list-style-type: none"> • The Department of Police, Fire and Emergency Management 2014-2022 Aboriginal Strategic Plan has a Safe in Custody policy to reduce the number of Aboriginal people who are detained in custody and specifies admitting Aboriginal people to bail where practicable and as set out by legislation. It specifies that the Aboriginal Legal Service is to be notified in every case where an Aboriginal person is taken into custody and that an effort is to be made to a relative or a friend. It also requires details regarding the notification to be recorded on the on line charging system. • The Tasmanian Police Manual stipulates under clause 7.10.2 that the Aboriginal Legal Service is to be notified when Aboriginal persons are detained, a relevant officer ‘is responsible for making every effort’ to notify a relative or friend, as well as the ALS. The manual also states that police should not hesitate to seek the advice or assistance of the ALS. The ALS can be expected to respond positively and helpfully. Contact telephone numbers should be displayed in all stations, Charge Rooms and Watch-Houses (7.10.2).

CUSTODY NOTIFICATION SERVICE

IMPACT on RESOURCING/RESOURCING ISSUES

<p style="text-align: center;">Northern Territory (NAAJA)</p> <p>North Australian Aboriginal Justice Agency</p>	<ul style="list-style-type: none"> • No dedicated funding
<p style="text-align: center;">Northern Territory (CAALAS)</p> <p>Central Australian Aboriginal Legal Aid Service Incorporated</p>	<ul style="list-style-type: none"> • No dedicated funding
<p style="text-align: center;">NSW/ACT</p> <p>Aboriginal Legal Service (NSW/ACT) Limited</p>	<p><u>24 Hours/7 days</u></p> <ul style="list-style-type: none"> • 6 Intermediate Criminal Law Solicitors' positions to staff (on rostered shifts) dedicated telephone line (salaries plus on-costs required) <p><u>Office Hours</u></p> <ul style="list-style-type: none"> • 0.5 Administrative Officer's position to distribute notification and log and follow-up information (salary plus on-costs required) <p><u>Other costs</u></p> <ul style="list-style-type: none"> • Mobile telephone costs • Contribution to office rent <p><u>Funds for above resourcing</u></p> <ul style="list-style-type: none"> • One-off special project funding from Cth Attorney-General's Department for 12 months: June 2008 until June 2009

<p style="text-align: center;">Victoria</p> <p style="text-align: center;">Victorian Aboriginal Legal Service Co-operative Limited</p>	<p><u>Office Hours</u></p> <ul style="list-style-type: none"> • Receptionist and CSOs take telephone calls regarding notifications • Monitor notifications and follow up late notifications <p><u>After hours</u></p> <ul style="list-style-type: none"> • On-call CSO and On-call Solicitor after hours (ie 5.00pm-9.00am), weekends and Public Holidays • This part of the operation is funded through existing budget sources
<p style="text-align: center;">Queensland</p> <p style="text-align: center;">Aboriginal and Torres Strait Islander Legal Services (Qld) Ltd</p>	
<p style="text-align: center;">South Australia</p> <p style="text-align: center;">Aboriginal Legal Rights Movement Incorporated</p>	<ul style="list-style-type: none"> • Subject to Federal Funding only
<p style="text-align: center;">Western Australia</p> <p style="text-align: center;">Aboriginal Legal Service of WA Ltd</p>	
<p style="text-align: center;">Tasmania</p> <p style="text-align: center;">Tasmanian Aboriginal Community Legal Service (TACLS)</p>	<ul style="list-style-type: none"> • The impact on resourcing TACLS CNS is limited as TACLS relies heavily upon VALS to provide services after hours. During business hours CNS comes through existing administration. However, CNS does take up a significant portion of TACLS CSOs duties through liaising with people taken into custody and their families or lawyers. TACLS CSOs also keep a database of notifications to compare against the police record at the end of each month.

	<ul style="list-style-type: none">• TACLS does not receive any state funding for providing a CNS.
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CUSTODY NOTIFICATION SERVICE

CURRENT EFFECTIVENESS of SERVICE

<p style="text-align: center;">Northern Territory (NAAJA) North Australian Aboriginal Justice Agency</p> <p style="text-align: center;">&</p> <p style="text-align: center;">Northern Territory (CAALAS) Central Australian Aboriginal Legal Aid Service Incorporated</p>	<p>Despite being available on a 24 hour basis, we have difficulties for three main reasons: (i) notification requirements are not enshrined in legislation but only in NT Police General Orders which do not mandate compliance, (ii) police compliance with arrest notification is ad hoc, and (iii) because the General Orders do not impose a positive obligation on police to notify ATSILS when Aboriginal people are arrested, and because many Aboriginal people are unaware that they can request to speak to a lawyer, ATSILS receive only a small number of calls on their after hours numbers.</p> <p>The practical position is a little better for youths. In Central Australia, the NT Police usually contacts CAALAS when an Aboriginal youth is taken into custody. This does not occur as a matter of course in the Top End of the Northern Territory.</p>
<p style="text-align: center;">Victoria</p> <p style="text-align: center;">Victorian Aboriginal Legal Service Co-operative Limited</p>	<p>The effectiveness in terms of compliance is ad hoc. Issues that prevent effectiveness are delays in notifications and failure to notify. Having said this, in the majority of cases compliance is effective</p>
<p style="text-align: center;">Queensland</p> <p style="text-align: center;">Aboriginal and Torres Strait Islander Legal Services (Qld) Ltd</p>	<p>Despite being available on a 24 hour basis as well as having an MOU with the Police Service on the subject – police compliance with arrest notification requirements remains problematical. Legislative reform is required in order to make such notifications <i>mandatory</i> in <i>all</i> instances (as opposed to reliance upon non legally binding Police Operational Procedures)</p>

<p style="text-align: center;">South Australia</p> <p style="text-align: center;">Aboriginal Legal Rights Movement Incorporated</p>	<p>The present arrangement between ALRM and SAPOL is that police may call ALRM, with notification of an arrest, at different and varying times during the arrest process. There is no set or fixed time during the process when notification is required to be made.</p> <p>ALRM is notified of arrests of aboriginal people in SA pursuant to existing and long standing practice, under SAPOL General Orders. Compliance is pretty good and the system is adequate. Nevertheless it would be desirable for the obligation to notify to be put into statute law. A specific time in the arrest process should be mandated as the point for notification and a failsafe system should be set up to ensure that all arrests are notified.</p> <p>Police call ALRM at the office number during office hours; after hours an answering service notifies the on call Field Officer by phone. This system works well for arrests after hours, provided that ALRM has sufficient resources to enable a Field Officer to be on call to take after hour's calls. The Commonwealth Crimes Act, sections 23H and J imposes a very detailed obligation upon Commonwealth officers to notify ATSILS of the arrest of an Aboriginal person.</p> <p>The Crimes Act provisions should be a template for revised State and Territory laws.</p>
<p style="text-align: center;">Western Australia</p> <p style="text-align: center;">Aboriginal Legal Service of WA Ltd</p>	<p>The current arrangement of notifying ALSWA offices by fax of persons in police custody is of limited utility, especially when the notification takes place either after hours or on weekends. Legislative reform is necessary, along with appropriate funding to employ additional staff, to make it mandatory for police to telephone ALSWA to advise of Aboriginal persons in custody.</p>
<p style="text-align: center;">Tasmania</p> <p style="text-align: center;">Tasmanian Aboriginal Community Legal Service</p>	<p>TACLS holds regular meetings with the Tasmanian Police Aboriginal Liaison officer to compare CNS records. These figures regularly conflict. However, the Tasmanian Police attitude toward CNS is very positive and police appear to encourage remandees and interviewees to speak with TACLS. Recently some of our own clients have been taken into custody and we have not received a notification.</p>

	<p>TACLS sees a significant number of Aboriginal people brought into custody stating that they do not want to speak to TACLS. However, this could be due to the fact that TACLS is new to the legal assistance landscape in Tasmania and many people still will not know who we are and that they can receive a service from us.</p>
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APPENDIX 1
VICTORIAN ABORIGINAL LEGAL SERVICE CO-OPERATIVE LIMITED
POLICE NOTIFICATION PROCEDURES

Background:

The Victorian Aboriginal Legal Service Co-operative Limited [VALS] employs four [4] Client Service Officers [CSOs] at its head office in the Melbourne suburb of Fitzroy. VALS also employs CSOs in regional centres in the State, namely:

1. Morwell;
2. Bairnsdale;
3. Shepparton;
4. Swan Hill;
5. Mildura;
6. Ballarat; and
7. Heywood.

As part of their duties, these CSOs are required to participate in the “On-call Roster” which operates from 1700 to 0900 and on a twenty-four [24] basis on the weekends and Public Holidays. At 1700, Monday to Friday, the main telephone line is diverted to the On-call CSO’s mobile phone and all incoming calls are responded to by the CSO.

The Notification System:

When a person is taken into custody, for any reason and at any police station in the State of Victoria, at the Attendance Register stage and after completing all the personal details of the person, the police officers are required to ask that person the compulsory ethnicity question – “Are you of Aboriginal or Torres Strait Islander descent?”

If the person identifies as an Aboriginal or Torres Strait Islander, the police officer making the entry on the Attendance Register then ticks a box which will then automatically generate two emails, which are known as the E*Justice Notification:

1. One is sent to VALS; and
2. The other is sent to VicPol’s Records Services Branch.

The email to VALS is received at three [3] points:

1. CEO’s Office;
2. Metropolitan CSO’s Office; and
3. Filing Clerk’s office.

Each and every email is checked in order to ascertain whether the requirements of the Victoria Police Manual have been complied with. The Victoria Police Manual at VPM Instruction, 113-1: Taking a person into custody, states at 4.3.5:

4.3.5 *Aboriginals and Torres Strait Islanders*

Where a person who identifies as being of Aboriginal or Torres Strait Islander descent is taken into custody for any reason the police member responsible must:

- *complete the Attendance Module as required. This should be done within 60 minutes of arrival at a police station. This will create a notification to the Victorian Aboriginal Legal Service (VALS).*

*In certain circumstances where you do not return to the Police Station with the suspect or where exceptional circumstances delay the creation of the E*Justice Record and a VALS notification is required, contact Record Services Branch who will advise VALS.*

- *notify the local Aboriginal Community Justice Panel (ACJP). The ACJP roles is to:*
 - *advise on any known medical or behavioural background that may be relevant to the person's health, safety or well-being while in custody*
 - *take custody of persons for minor offences, before and after arrest where appropriate*
 - *speak with the person and assist in welfare matters, such as arranging bail and providing with relevant information*
 - *arrange legal assistance, if necessary*
 - *notify relatives and friends*
 - *liaise with police regarding problems existing within or confronting the Aboriginal or Torres Strait Islander community*
- *notify the local Sobering Up centre if arrested for drunk*
- *provide assistance to VALS or ACJP as necessary.*

The E*Justice Notification records, *inter alia*, the following information:

1. Date and time taken into custody
2. Date and time of arrival at the police station
3. Date and time of creation of the computer record

If the time between the arrival at the police station and the creation of the computer record is greater than sixty [60] minutes, as provided for the 113-1 of the VPM, an email is forwarded to the Aboriginal Advisory Unit at the Victoria Police Centre and the officers in the AAU conduct a follow-up regarding the delay and advise the VALS' CEO accordingly.

Irrespective of the time of the day or night, the staff of the RSD will follow up with a telephone call to VALS and the call will be taken by either the Receptionist, CSO on day duty or the On-call CSO. The CSOs will then follow up with a phone call to the respective police station to check on the person's welfare and provide basic advice in respect to the right to a "no comment" interview. The CSO will also ascertain from the Informant whether the person will be:

1. Remanded in custody;
2. Released on bail;
3. Released on summons;
4. Released without charge; or
5. Released pending further inquiries.

The CSO will also ascertain if there is a Court date and which particular Court. All of the person's particulars and other information are recorded by the CSO on what is known as a D24 Form, a copy of which is provided herewith.

If the person has been arrested for a serious matter or remanded in custody, the CSO will then contact the On-call Solicitor and advise him/her of the matter. The Solicitor will have carriage of the matter from that point onwards.

VALS' Solicitors in the criminal law section participate in the On-call Roster system from Friday to Friday. They are on-call for a week and on the Friday afternoon, take delivery of the on-call solicitor's mobile phone which they then divert to their mobile phone. The solicitors are on-call one [1] week in eight [8].

In some instances, an Aboriginal or Torres Strait Islander person taken into custody at a non-metropolitan police station will request the attendance a CSO. If a CSO is stationed in that particular region, the metropolitan CSO will phone the CSO and request his or her attendance. However, it is not always possible to have the CSO in attendance and the metropolitan CSO will speak to the person in custody by phone.

In the case of remands in the non-metropolitan centres, solicitor agents or the local office of Victoria Legal Aid¹ [VLA] are contacted to do the bail application. The majority of remands in the metropolitan area are attended to by VALS' solicitors but if a solicitor is not available the, VLA Duty Solicitor or solicitor agent attends to the matter on VALS' behalf.

Some regional centres in the State have an Aboriginal Community Justice Panel [ACJP] operating. The ACJPs are manned by volunteers from the Aboriginal Community and attend the Police Station when an Aboriginal or Torres Strait Islander person is taken into custody. In some instances, the ACJPs operate in centres where the VALS' CSOs are stationed and the CSO will more often than not, be a member of the ACJP. This will involve participation in the 'call out' system and attending the police station after-hours.

¹ VALS and VLA have a Memorandum of Understanding

APPENDIX 2
ABORIGINAL LEGAL SERVICE (NSW/ACT) LIMITED
CUSTODY NOTIFICATION LINE PROCEDURES

General

The Aboriginal Legal Service (NSW/ACT) Limited (ALS (NSW/ACT)) operates a NSW State-wide,² 24 hour / 7 day³ custody notification line to protect the rights and welfare of Aboriginal or Torres Strait Islander people arrested or detained anywhere in NSW.

The service is provided through a dedicated telephone line staffed by experienced criminal law solicitors, who are trained in working with Aboriginal and Torres Strait Islander people. These solicitors are taken off their other duties during each roster.

The telephone number to this line is circulated to all custody managers/police commands and police stations in NSW, with detailed information on the operation of the service, so that irrespective of where the person is taken into custody in the State, the ALS(NSW/ACT) will be immediately notified by telephone.

Notification to the ALS (NSW/ACT)

In NSW, if a person is taken into custody, the relevant custody manager is required to open a custody record.⁴ The information required for this record is prescribed by legislation and regulations.⁵ As a part of the procedures to be followed, the custody manager is required to ask the detained person whether he or she is of Aboriginal or Torres Strait Islander background.⁶

If a person identifies as being Aboriginal or Torres Strait Islander, the custody manager is required to 'immediately' inform the person that the ALS (NSW/ACT) will be notified of their detention and the place of their detention, and then notify the (ALS (NSW/ACT)).⁷

² Through an arrangement with the Legal Aid Commission of the ACT, a private legal service provides telephone advice and a check on the detained person's well-being for Legal Aid and ALS clients who are arrested in the ACT.

³ The service also operates on all public holidays.

⁴ *Law Enforcement (Powers and Responsibilities) Act 2002*, s 131.

⁵ *Law Enforcement (Powers and Responsibilities) Act 2002*, s 131 and *Law Enforcement (Powers and Responsibilities) Regulation 2005* cl 18 - 20, Schedule 2, Part 2.

⁶ *Law Enforcement (Powers and Responsibilities) Act 2002*, s 131 and *Law Enforcement (Powers and Responsibilities) Regulation 2005* cl 24. Clause 24 and Schedule 2, Part 2 of the Regulation make special provision for the treatment in custody of vulnerable persons, including Aboriginal and Torres Strait Islander persons.

Telephone contact with Aboriginal client

On contact by the custody manager with the custody notification line, the ALS (NSW/ACT) solicitor has the opportunity to speak with the client, both to give legal advice and to check on their welfare and ascertain if they are at risk of self-harm.

In some circumstances, it may also be appropriate for the ALS solicitor to confirm with the custody manager the advice given together with further information or particulars relating to the client and their safety.⁸

If the Aboriginal or Torres Strait Islander detained person does not wish to speak to an ALS solicitor, the custody manager is still required to notify the ALS (NSW/ACT) of their detention.

Charges and next court date

The ALS solicitor will also confirm with the custody manager and the client details of the charge(s) and whether the person is to be:

- released without charge
- granted bail and their future court date, together with details of the charge(s)
- refused bail and to appear next day

to ensure representation of that person by the ALS (NSW/ACT) at the relevant court.

If the Aboriginal or Torres Strait Islander person is a young person, the ALS (NSW/ACT) solicitor will also confirm with the custody manager the allegation(s) and whether a recommendation may be made in respect of a warning, caution, or referral to a youth justice conference⁹, so that when speaking with that young person, the solicitor can assess whether an admission may be made.

Follow-up

Following the notification and contact with the detained person, the ALS (NSW/ACT) solicitor will complete a log entry with details of the call, the advice given, the information obtained regarding the person's welfare, the charges and the next court date and any other relevant information.

In some cases, the information entered may be extensive and will be supported by a detailed file note.

This log entry and any additional information will be faxed and emailed to a central administrative officer who will in turn notify the relevant ALS (NSW/ACT) office to ensure that an ALS (NSW/ACT) solicitor is present at the client's next court date and any other matters are actioned.

⁷ *Law Enforcement (Powers and Responsibilities) Regulation 2005*, cl 33. The *Crimes (Forensic Procedures) Regulation 2008*, cl 4, defines the ALS (NSW/ACT) Limited as a prescribed Aboriginal legal aid organisation). No other legal aid service is prescribed.

⁸ See note 6 above.

⁹ Further to the *Young Offenders Act 1997* (NSW).

Use of the Notification Service

Over 2007/2008, the ALS (NSW/ACT) Custody Notification Line has been receiving between 200-300 calls each week. (As outlined above, these calls are placed by NSW Police custody managers when an Aboriginal person is taken into custody. The telephone number for this line is not advertised to members of the public as a general advice line.)

The notification log is distributed to all ALS (NSW/ACT) solicitors and monitored by a Principal Legal Officer. If the procedure is not followed by the police, both the client and the ALS (NSW/ACT) can bring a complaint. In any such cases, the ALS (NSW/ACT) will write a letter of complaint to the local area commander and the ALS solicitor will challenge the admissibility of any admissions made or other evidence obtained in cases where the ALS (NSW/ACT) has not received notification of the detention of an Aboriginal person.

The Supreme Court of NSW has indicated its willingness to exclude from evidence a record of interview with an Aboriginal accused who was not given the opportunity to contact the ALS (NSW/ACT).¹⁰

¹⁰ In *Campbell & 4 Ors v DPP (NSW)* [2008] NSWSC 1284, Hidden J set aside the conviction(s) in circumstances where the police custody manager did not notify the Aboriginal Legal Service that Aboriginal persons had been detained.

APPENDIX 3
NORTH AUSTRALIAN ABORIGINAL JUSTICE AGENCY (NAAJA) and CENTRAL AUSTRALIAN ABORIGINAL LEGAL AID
SERVICE INCORPORATED (CAALAS)

CUSTODY NOTIFICATION PROCEDURES

The Commissioned OIC and OIC of a police station “are to make efforts to establish protocols at local level with Aboriginal Legal Aid” which among other things, “should address questions of notification of Aboriginal Legal Aid when Aboriginal people are arrested or detained”; *Northern Territory Police Custody Manual Standard Operating Procedures Appendix A 24.1*. Only NAAJA’s Nhulunbuy office has a current informal protocol with a local police station. In recent memory, no other police station has contacted either NAAJA’s Darwin or Katherine offices seeking to institute such a protocol.

An Aboriginal person taken into police custody is to be asked on arrival at the Police Station, whether he/she wishes Aboriginal Legal Aid informed; *Northern Territory Police General Order A7 28.1*. However, where a person is being arrested and detained for questioning and investigation under s 137 of the *Police Administration Act* (NT), Aboriginal Legal Aid is to be notified only after the investigation is complete; *General Order A7 28.5*. People are commonly detained for questioning under s 137. In NAAJA’s experience, only one station contacts the NAAJA Nhulunbuy office when an Aboriginal person is taken into custody (without the Aboriginal person specifically requesting this), however this appears to depend on the particular police officers involved.

Before being questioned, a person must be informed that that they “may communicate with or attempt to communicate with a friend or relative to inform the friend or relative of the person's whereabouts”; *Police Administration Act* (NT) s 140(b).

There are no positive obligations on police to inform an individual that they can seek legal advice before answering any questions.

However, if a person being questioned “requests a consultation with a legal representative, the person should be given every reasonable opportunity to do so. If the person states that he/she does not wish to make a statement or answer any questions until after consulting with a legal representative, the interview shall be deferred for a period as is reasonably necessary to enable the person to obtain legal advice”; *NT Police General Order Q1 4.7*.

Where an Aboriginal person in custody requests legal assistance, the police are to contact the nearest Aboriginal Legal Aid Service “as soon as practicable”: *General Order A7 28.3*. However prior to contacting an Aboriginal Legal Aid Organization, “members must obtain the permission of the person in custody. All attempts to contact Aboriginal Legal Aid, and the

permission of the person in custody to do so, are to be recorded on IJIS”; *Northern Territory Police Custody Manual Standard Operating Procedures Appendix A 24.1*.

ATSILS are concerned that many Aboriginal people are unaware that they can request to speak to a lawyer, although this is commonly understood in the broader community. As such, many Aboriginal people are unable to access the benefits of legal advice to the same extent as the broader community.

Therefore, despite the thousands of Aboriginal people taken into custody every year in the Northern Territory, ATSILS receive only a small number of calls on their after hours numbers.

Police also are to contact the nearest Aboriginal Legal Aid service where an Aboriginal Person is unable “for whatever reason” to make a decision; *General Order A7 28.3*. In ATSILS experience, this provision is rarely used.

The member in charge is to notify Aboriginal Legal Aid when an Aboriginal youth is taken into custody, however where the youth is being arrested and detained for questioning and investigation under s 137 of the *Police Administration Act* (NT), Aboriginal Legal Aid is to be notified only after the investigation is complete; *General Order A7 28.3* and *28.5*.

In Central Australia, the NT Police immediately contact the relevant legal aid service when a youth is taken into custody. This does not occur as a matter of course in the Top End of the Northern Territory. In NAAJA’s experience, we are generally only contacted to sit in on an interview as a ‘support person’ where police cannot locate a parent, family member, or the local youth worker.

APPENDIX 4

CUSTODY NOTIFICATIONS TO ATSILS IN RELATION TO PERSONS TAKEN INTO CUSTODY UNDER COMMONWEALTH CRIMES ACT 1914

Royal Commission into Aboriginal Deaths in Custody Recommendation 224. 'That pending the negotiation of protocols referred to in Recommendation 223, in jurisdictions where legislation, standing orders or instructions do not already so provide, appropriate steps be taken to make it mandatory for Aboriginal Legal Services to be notified upon the arrest or detention of any Aboriginal person other than such arrests or detentions for which it is agreed between the Aboriginal Legal Services and the Police Services that notification is not required. (4:111)'

Crimes Act 1914 (Cth)

23H Aboriginal persons and Torres Strait Islanders

- (1) Subject to section 23L, if the investigating official in charge of investigating a Commonwealth offence believes on reasonable grounds that a person who is under arrest, or who is a protected suspect, and whom it is intended to question about the offence is an Aboriginal person or a Torres Strait Islander, then, unless the official is aware that the person has arranged for a legal practitioner to be present during the questioning, the official must:
 - (a) immediately inform the person that a representative of an Aboriginal legal aid organisation will be notified that the person is under arrest or a protected suspect (as the case requires); and
 - (b) notify such a representative accordingly.
- (2) Subject to subsection (7) and section 23L, if an investigating official:
 - (a) interviews a person as a suspect (whether under arrest or not) for a Commonwealth offence, and believes on reasonable grounds that the person is an Aboriginal person or a Torres Strait Islander; or
 - (b) believes on reasonable grounds that a person who is under arrest or a protected suspect is an Aboriginal person or a Torres Strait Islander;the official must not question the person unless:
 - (c) an interview friend is present while the person is being questioned and, before the start of the questioning, the official has allowed the person to communicate with the interview friend in circumstances in which, as far as practicable, the communication will not be overheard; or
 - (d) the person has expressly and voluntarily waived his or her right to have such a person present.
- (2A) The person suspected, or under arrest, may choose his or her own interview friend unless:
 - (a) he or she expressly and voluntarily waives this right; or

- (b) he or she fails to exercise this right within a reasonable period; or
 - (c) the interview friend chosen does not arrive within 2 hours of the person's first opportunity to contact an interview friend.
- (2B) If an interview friend is not chosen under subsection (2A), the investigating official must choose one of the following to be the person's interview friend:
- (a) a representative of an Aboriginal legal aid organisation;
 - (b) a person whose name is included in the relevant list maintained under subsection 23J(1).
- (3) An interview friend may be excluded from the questioning if he or she unreasonably interferes with it.
- (4) In any proceedings, the burden lies on the prosecution to prove that an Aboriginal person or Torres Strait Islander has waived the right referred to in subsection (2) or (2A), and the burden is not discharged unless the court is satisfied that the person voluntarily waived that right, and did so with full knowledge and understanding of what he or she was doing.
- (5) In any proceedings, the burden lies on the prosecution to prove that, at the relevant time, a person who is under arrest or a protected suspect had, to the knowledge of the investigating official concerned, made an arrangement of the kind referred to in subsection (1).
- (6) The rights conferred by this section are in addition to those conferred by section 23G but, to the extent (if any) that compliance with this section results in compliance with section 23G, the requirements of section 23G are satisfied.
- (7) If the person is under 18, subsection (2) does not apply and section 23K applies.
- (8) An investigating official is not required to comply with subsection (1), (2) or (2B) in respect of a person if the official believes on reasonable grounds that, having regard to the person's level of education and understanding, the person is not at a disadvantage in respect of the questioning referred to in that subsection in comparison with members of the Australian community generally.
- (9) In this section:
- interview friend***, in relation to a person to whom subsection (2) applies, means:
- (a) a relative or other person chosen by the person; or
 - (b) a legal practitioner acting for the person; or
 - (c) a representative of an Aboriginal legal aid organisation; or
 - (d) a person whose name is included in the relevant list maintained under subsection 23J(1).

23J Lists of interview friends and interpreters

- (1) The Minister must, so far as is reasonably practicable, establish and update at such intervals as the Minister thinks appropriate, a list, in relation to a region where there are likely to be persons under arrest and under investigation for Commonwealth offences, of the names of persons (not being constables) who:

- (a) are suitable to help Aboriginal persons or Torres Strait Islanders under arrest and under investigation for Commonwealth offences; and
 - (b) are willing to give such help in that region.
- (2) In establishing and maintaining a list in relation to a region, the Minister or his or her delegate must, from time to time, consult with any Aboriginal legal aid organisation providing legal assistance to Aboriginal persons or Torres Strait Islanders in that region.
- (3) The Minister must, so far as is reasonably practicable, establish and update at such intervals as the Minister thinks appropriate, a list, in relation to such a region, of the names of persons who are able and willing to act as interpreters for Aboriginal persons or Torres Strait Islanders who:
- (a) because of inadequate knowledge of the English language, or a physical disability, are unable to communicate orally with reasonable fluency in that language; and
 - (b) are under arrest and under investigation in that region for Commonwealth offences.
- (4) The list of names referred to in subsection (3) must, so far as is reasonably practicable, specify the languages that each person on the list is able to understand and converse in.
- (5) The Minister may, in writing, delegate to an officer of the Department all or any of the powers of the Minister under this section.

23K Persons under 18

- (1) Subject to section 23L, if an investigating official:
- (a) interviews a person as a suspect (whether under arrest or not) for a Commonwealth offence, and believes on reasonable grounds that the person is under 18; or
 - (b) believes on reasonable grounds that a person who is under arrest or a protected suspect is under 18;
- the official must not question the person unless an interview friend is present while the person is being questioned and, before the start of the questioning, the official has allowed the person to communicate with the interview friend in circumstances in which, as far as practicable, the communication will not be overheard.
- (2) An interview friend may be excluded from the questioning if he or she unreasonably interferes with it.
- (3) In this section:
- interview friend***, in relation to a person to whom subsection (1) applies, means:
- (a) a parent or guardian of the person or a legal practitioner acting for the person; or
 - (b) if none of the previously mentioned persons is available—a relative or friend of the person who is acceptable to the person; or

- (c) if the person is an Aboriginal person or a Torres Strait Islander and none of the previously mentioned persons is available—a person whose name is included in the relevant list maintained under subsection 23J(1); or
 - (d) if no person covered by paragraph (a), (b) or (c) is available—an independent person.
- (4) The rights conferred by this section are in addition to those conferred by section 23G but, so far as compliance with this section results in compliance with section 23G, the requirements of section 23G are satisfied.

23L Exceptions

- (1) Subject to subsections (2) and (4), if a requirement imposed on an investigating official by this Part is expressed as being subject to this section, the requirement does not apply if, and for so long as, the official believes on reasonable grounds that:
- (a) compliance with the requirement is likely to result in:
 - (i) an accomplice of the person taking steps to avoid apprehension; or
 - (ii) the concealment, fabrication or destruction of evidence or the intimidation of a witness; or
 - (b) if the requirement relates to the deferral of questioning—the questioning is so urgent, having regard to the safety of other people, that it should not be delayed by compliance with that requirement.
- (2) If the requirement relates to things done by or in relation to a legal practitioner, subsection (1) only applies:
- (a) in exceptional circumstances; and
 - (b) if:
 - (i) an officer of a police force of the rank of Superintendent or higher; or
 - (ii) the holder of an office prescribed for the purposes of this section, other than an office in a police force; has authorised the application of subsection (1) and has made a record of the investigating official's grounds for belief.
- (3) If the application of subsection (1) is so authorised:
- (a) the record of the investigating official's grounds for belief must be made as soon as practicable; and
 - (b) the investigating official must comply with the requirement as soon as possible after subsection (1) ceases to apply.
- (4) If the application of subsection (1) results in:
- (a) preventing or delaying the person from communicating with a legal practitioner of his or her choice; or
 - (b) preventing or delaying a legal practitioner of the person's choice from attending at any questioning;
- the investigating official must offer the services of another legal practitioner and, if the person accepts, make the necessary arrangements.

Commentary .

Section 23H *Crimes Act 1914* (Cth) represents a high point in current Australian practice for notifications of ATSILS of the arrest and detention of Aboriginal and Torres Strait Islander persons, because it imposes a statutory obligation to notify ATSILS of an arrest .

1. It imposes on the investigating official a reasonable suspicion test in relation to the question Aboriginal identity. This is a well known test and in order to satisfy it, the official has to advert their mind to the question of ATSI identity and make due inquiry in order to inform him or herself. The onus is on the official to do so. Section 23H(1)
2. Upon satisfying the test, the official is under an immediate obligation to inform the person that they are notifying the nearest ATSILS of the arrest and to actually notify that ATSILS. Section 23H(1)(a)&(b)
3. This is subject to a proviso where the person has already retained independent legal advisors. For the purposes of RCIADIC 224 ATSILS could not and do not object to that proviso, and they agree that it is appropriate. ATSILS do not expect to be notified of an arrest if another legal practitioner has already been retained by the ATSI suspect.
4. Section 23H(2) operates to require that if an investigating official interviews a person, reasonably suspected of being an ATSI person , the official MUST NOT question the person unless
 - a. an interview friend is present and there are various provisions as to assistance to the friend
 - b. there has been an express and voluntary waiver of rights.
5. Subsection 23H(2A) gives provisos and circumstances in which a prisoners friend may not be chosen by the suspect but Subsection (2B) provides that in those circumstances the investigating official must choose one . Subsection (4) provides that the onus is on the prosecution to prove that a waiver was voluntary.
6. Section 23H Subsection (8) specifies that the investigating official is not obliged to comply with Section 23H Subsection (1),(2) or (2B) if the investigating official does not believe that, having regard to the Aboriginal or Torres Strait person's level of education and understanding , that the suspect is disadvantaged in comparison with members of the Australian community generally.
7. Section 23H Subsection (8) is contrary to RCIADIC 224; it should not matter whether the ATSI person is well educated, that their arrest is notified to the ATSILS. It is the fact of an ATSI person's arrest that is the gravamen of the RCIADIC recommendation, not the arrestee's education status and ability to withstand questioning. It is the view of ATSILS that subsection (8) should be repealed. The right to be advised by police of the availability of a prisoner's friend, or the right to have a solicitor present at interview is now regarded as a universal right for arrested or suspect persons, and it does not depend upon the relative disadvantage of the Aboriginal or Torres Strait Islander person or their level of education and understanding.
See for example section 79A *Summary Offences Act* (SA).