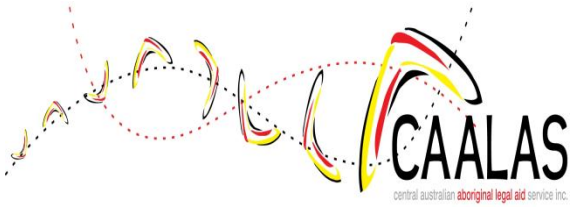
NATSILS Submission on Australia's Fifth Report under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

November 2011

Victorian Aboriginal Legal Service Co-operative Ltd

Aboriginal Legal Service of Western Australia

Aboriginal Legal Rights Movement Inc



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1. About the NATSILS

The National Aboriginal and Torres Strait Islander Legal Services Forum (NATSILS) is the peak national body for Aboriginal and Torres Strait Islander justice issues in Australia. The NATSILS have almost 40 years' experience in the provision of legal advice, assistance, representation, community legal education, advocacy, law reform activities and prisoner through-care to Aboriginal and Torres Strait Islander peoples in contact with the justice system. The NATSILS are the experts on justice issues affecting and concerning Aboriginal and Torres Strait Islander peoples.

The NATSILS represent the following Aboriginal and Torres Strait Islander Legal Services:

- Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd (ATSILS Qld);
- Aboriginal Legal Rights Movement Inc. (ALRM);
- Aboriginal Legal Service (NSW/ACT) (ALS NSW/ACT);
- Aboriginal Legal Service of Western Australia (Inc.) (ALSWA);
- Central Australian Aboriginal Legal Aid Service (CAALAS);
- North Australian Aboriginal Justice Agency (NAAJA);
- Victorian Aboriginal Legal Service Co-operative Limited (VALS);

2. Introduction

The NATSILS make this submission to the Australian Government to assist in the development of its Fifth Periodic Report (the Report) to the Committee Against Torture (the Committee). Our submission is intended to provide the Government with information gathered from the on-the-ground experiences of the various Aboriginal and Torres Strait Islander Legal Services (ATSILS) so that it can accurately report to the Committee what progress has been made and areas requiring further work. It must be pointed out that our submission has been compiled and structured in response to the list provided by the Committee relating to specific issues that it would like the Government to respond to in its report.[1]

The NATSILS seek commitment from the Government in its Report to work with State and Territory governments to review the justice system and places of detention with regard to its obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[2] (the Convention) as well as its other international human rights obligations. The NATSILS urge the Government to further demonstrate its commitment to improving the justice system by ratifying and implementing the Optional Protocol Against Torture by 2012.

3. Article 2: prevention through legislative, administrative, judicial or other measures

3.1 A Human Rights Act

Since the Government rejected the development of a Human Rights Act in response to the National Human Rights Consultation in 2009, little progress has been made towards implementing a Human Rights Act despite ongoing calls for such action both domestically and from the international community.

[1] Committee Against Torture, *List of Issues Prior to the Submission of the fifth Periodic Report of Australia,* forty-fifth sess, CAT/C/AUS/4 (2010).

[2] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, I-24841, (entered into force 26 June 1987).

Rather than committing to the implementation of a Human Rights Act, the Government has chosen to pursue human rights protections through non-legally binding mechanisms. The current National Human Rights Framework (the Framework) falls far short of legally enforceable human rights protections for Australians, which in light of ongoing human rights violations, are critically needed to prevent and address human rights abuses. See further information about our concerns with the Framework below.

The NATSILS call on the Government to explain to the Committee why a National Human Rights Act is still yet to be implemented in Australia and commit to implementing such by an agreed deadline.

3.2 Constitutional Recognition and Protection of Aboriginal and Torres Strait Islander Peoples' Rights

The current process of constitutional recognition that is being undertaken by the Government is largely symbolic and is unlikely to adequately recognise or protect the human rights of Aboriginal and Torres Strait Islander peoples. Adequate recognition can occur if there is Government commitment to go beyond preambular recognition and include substantive, rights protections in the body of the Constitution, such as a non-discrimination clause specifically directed to race and a right for Aboriginal and Torres Strait Islander peoples to maintain and practise their cultures languages and identities.

In order to recognise and protect the rights of Aboriginal and Torres Strait Islander peoples the Government needs to commit to enshrining the rights contained in the Declaration on the Rights of Indigenous Peoples (the Declaration) within domestic law. This must be done in consultation, collaboration and partnership with Aboriginal and Torres Strait Islander peoples, organisations and communities to reflect the spirit of cooperation promoted in the Declaration.

The NATSILS have submitted information to the Government regarding our proposed strategy for the implementation of the Declaration, and we call on the Government to act on this strategy.[3]

The NATSILS call on the Government to commit to working with Aboriginal and Torres Strait Islander peoples and organisations in developing a strategy to enshrine the rights contained within the Declaration on the Rights of Indigenous Peoples in domestic legislation.

3.3 The Australian Government's Human Rights Framework and the Prevention of Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment

The ability of the Framework to prevent torture and other forms of cruel, inhuman and degrading treatment or punishment is yet to be seen. The NATSILS are concerned that lack

[3] See *Joint ATSILS Submission to the Australian Government on Its Response to UPR Recommendations* (2011) submitted to the Commonwealth Attorney-General on 1 April 2011.

of legislative reform will mean that rights are not enforceable. A large focus of the Framework is on human rights education and training, yet it is difficult to see how education and training of school students, select communities and Commonwealth public service employees[4] will serve to prevent human rights abuses in institutions that are State or Territory administered or are a result of State and Territory laws and policies.

Another central focus of the Framework is the development of a National Human Rights Action Plan (Action Plan). The Action Plan has the potential to enhance prevention of torture and other cruel, inhuman or degrading treatment or punishment but this remains to be seen as it is still being developed. Disappointingly, from the Government's consultation draft of the National Human Rights Action Plan Baseline Study, it seems that issues related to the rights contained within the Convention are not considered relevant and are given inadequate attention.

The Framework also establishes a Parliamentary Joint Committee on Human Rights to scrutinise Bills and legislative instruments for human rights compliance and require compatibility statements for all new Bills introduced into Parliament. However, given the limited jurisdiction of Commonwealth laws when it comes to law enforcement and corrections (police, courts, detention centres and prisons), which are matters for States and Territories, it is difficult to see how these measures will effectively act as prevention mechanisms in these areas. The Framework also provides for the Government to review existing legislation, policies and practices in respect to compliance with the UN human rights treaties to which Australia is a party. Again, this approach is unlikely to influence State/Territory legislation, policy and practices and will therefore fail to deal with current human rights breaches.

The Government can play an important role in working with State and Territory governments on human rights issues such as this, by incorporating justice and human rights issues onto the Council of Australian Governments (COAG) agenda. The Government can request State and Federal governments to consider introducing state Human Rights Acts, relevant frameworks and Action Plans.

3.4 The Australian Human Rights Commission

The NATSILS recommend that the powers of the Australian Human Rights Commission (AHRC) be expanded in order for it to fulfil its role as Australia's leading human rights institution and watchdog. The NATSILS share the concerns recently submitted by the Human Rights Law Centre to the Committee on the Elimination of Racial Discrimination[5] which stated that:

> The AHRC's powers and function are still limited by the scope of its constitutive act. For example:
>
> - The AHRC does not have the power to independently initiate complaints. Therefore individuals themselves are responsible for asserting their rights and ensuring that the RDA is complied with. This reactive, complaints based approach is not adequately effective in identifying and addressing race discrimination, particularly discrimination that is systemic or structural in nature.
>
> - In relation to complaints of human rights breaches, the AHRC cannot provide affected persons

[4] See *Australia's Human Rights Framework April 2010*.

[5] Human Rights Law Centre, *Comments on Australian Government Response to Concluding Observations of the UN Committee on the Elimination of Racial Discrimination* (2011) 2.

with effective or enforceable remedies.[6]

- The AHRC produces reports that indicate when Australia is not meeting its international human rights obligations under the treaties that it has ratified. However, these reports are not binding on Government. The National Human Rights Consultation report recommended that the Australian Government table a response to any AHRC report on complaints within six months of receiving the report.[7] This has not been done. In many respects, therefore, the AHRC is only as effective as the government of the day allows it to be.[8]

Further ways in which the AHRC could be strengthened are also discussed in the Government's *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper*.[9] The NATSILS welcome this discussion and in particular, discussion around the idea of including the rights contained within the Convention in the definition of human rights as defined by the *Australian Human Rights Commission Act 1986* (Cth) and the expansion of the inquiry powers of the AHRC to cover State and Territory acts and practices.

The NATSILS call on the Government to further empower the AHRC by:

a) Enshrining the rights contained within the Convention within the definition of human rights as set out in the *Australian Human Rights Commission Act 1986* (Cth);

b) Expanding the AHRC's inquiry powers to cover State and Territory acts and practices;

c) Empowering the AHRC to provide more effective remedies;

d) Empowering the AHRC to investigate breaches without a complaint having to be made first; and

e) Requiring governments to officially respond to AHRC reports on Australia's compliance with its human rights obligations within 6 months of receipt.

3.5 Ratification of the Optional Protocol and the Establishment of a National Preventative Mechanism

While the NATSILS understand that the Government is undertaking consultations with State and Territory governments in relation to how best to implement a National Preventative Mechanism (NPM), the NATSILS are disappointed with the pace and lack of transparency of progress thus far. Research on how Australia could implement an NPM has been going on for many years and the Government still has not engaged with experts and civil society, including the NATSILS, about how such research could be put into practice.

[6] Elizabeth Evatt, *Meeting Universal Human Rights Standards: The Australian Experience*, Speech delivered at Department of the Senate Occasional Lecture Series, Parliament House, Canberra, 22 May 1998, 7.

[7] National Human Rights Consultation Committee, *Report of the National Human Rights Consultation* (2009), Recommendation 13.

[8] Julie Debeljak, *Human Rights and Institutional Dialogue: Lessons for Australia from Canada and the United Kingdom* (2004) 12-14.

[9] Australian Government Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper* (2011).

The NATSILS call on the Government to commit to implementing, within a defined timeline, a National Preventative Mechanism to prevent torture and other forms of cruel, inhuman and degrading treatment or punishment that has the power to inspect all places of detention, in accordance with the Optional Protocol… .

3.6 Limits on Detention and Recording of Questioning of Suspects

3.6.1 Limits on Detention

The NATSILS have serious concerns about the lack of regulation around maximum limits on time that people can be detained for questioning before being brought before a court and for which people can remanded in custody. Some jurisdictions do not set out maximum periods for which a person can be held for investigation purposes before being brought before a court. For example, in the Northern Territory and Western Australia a person can be detained for questioning for a 'reasonable' time and must be brought before a judge 'as soon as practicable'. There have been cases where juveniles have been detained for 14 hours by police for questioning/investigation purposes before being brought before a magistrate or being released without charge.

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

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

In relation to supervision orders, in many cases in the Northern Territory supervision orders involve custodial supervision. That is, incarceration in the same correctional centres as all other prisoners. Supervision orders in the Northern Territory have no expiry date. The only way for an order to cease is if the Court accepts expert evidence that the person subject to the order is no longer at serious risk of harm to the community or themselves. The result is that once people are put on supervision orders, there is a real risk of being held indefinitely. CAALAS and NAAJA both have clients who have been detained on supervision orders for years beyond the likely length of sentence they would have received if they were fit or not mentally impaired at the time of offending.

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

A further concern is that in some jurisdictions, people charged with murder are given a non-parole period but not given a full term date meaning that their release from custody is entirely at the discretion of the Parole Board. If the person is successful in obtaining parole, they are forever subject to parole conditions and are always at risk of being returned to custody if they breach their conditions.

The NATSILS call on the Government to:

a) Commit to working with State and Territory governments to enshrine in legislation a minimum length of custody before someone must be brought before a court, and where such protections already exist, ensure full compliance with them;

b) Commit to working with State and Territory governments to set limits on the maximum period of time juveniles and adults can spend on remand before they are either bailed or brought to trial. Such limits should reflect the principle that a person is innocent until proven guilty;

c) Commit to working with State and Territory governments to ensure that persons unfit to plead are placed within community treatment facilities or forensic hospitals as opposed to prisons or detention centres, and that their cases are reviewed at least annually, with a court or tribunal carrying out the review and the individual legally represented and independently psychiatrically assessed; and

d) Commit to working with State and Territory governments to enshrine in legislation the requirement that people found unfit to plead are not detained under criminal legislation for longer than the maximum length of sentence they would have received if convicted.

3.6.2 Recording of Questioning of Suspects

Many police prosecutions involving Aboriginal and Torres Strait Islander people are underpinned by admissions made by the accused in police interviews. In many instances, the only evidence of guilt comes from a confession made in a police interview. This is concerning given the communication difficulties experienced by many Aboriginal and Torres Strait Islander peoples.[10] Common law tradition and legislation provide that an arrested suspect is entitled to a reasonable opportunity to communicate or attempt to communicate with a legal practitioner.

In some jurisdictions, automatic notification systems exist whereby the relevant ATSILS is contacted whenever an Aboriginal and/or Torres Strait Islander person is arrested. Furthermore, some States, such as Victoria, have additional programs that provide independent support people to young people to ensure that their rights whilst in police

[10] See NATSILS Submission, *The Right to a Fair Trial: A Submission to the Commonwealth Attorney-General Regarding the Expansion of Aboriginal and Torres Strait Islander Interpreter Services* (2011), submitted to the Commonwealth Attorney-General on 3 March 2011.

custody are protected.[11] Such protections do not exist in every State and Territory however, and Aboriginal and Torres Strait Islander young people and adults suffer the consequences.

In most instances when a young person contacts an ATSILS lawyer or field officer, advice is given that the young person should exercise their right to silence and not participate in an interview with police. If the young person chooses to exercise that right to silence and instructs their lawyer of that decision it is essential that the lawyer or field officer be in a position to communicate those instructions to police. The NATSILS have concerns in relation to police practices whereby police insist on conducting a video recorded interview with a young person as "a matter of fairness" so as to "put the allegations to the young person", or refuse to speak with the ATSILS lawyer such that the instructions of the young person cannot be communicated to police. If police proceed to commence an interview with the intention of recording a refusal to participate, it is then a short step for police to place subtle pressures on vulnerable young people to answer questions and for the police to elicit information from the young person against their interest. Once a refusal is communicated by the lawyer to the police, a young person should not be taken into the interview room to formally decline the record of interview. Communication of instructions by the lawyer should be sufficient.

The following case study is provided by way of illustration.

> An 11 year old boy from Broome was arrested by police. Broome police advised an ALSWA lawyer that the boy was in police custody as a suspect and that police wished to interview him. Ten minutes later, an ALSWA lawyer telephoned and spoke to a police officer at Broome Police Station.
>
> The ALSWA lawyer then spoke to both the boy and his grandmother. The boy supplied instructions that he wished to exercise his right to silence and declined to be interviewed. The ALSWA lawyer conveyed those instructions to the police officer. The police officer responded in terms that he intended to conduct a video record of interview with the boy nonetheless, so as to put the allegations to him and obtain a recorded refusal from the boy. The ALSWA lawyer made it clear to the police officer that this was unnecessary and improper, that the boy was a juvenile declining to be interviewed through legal counsel, and that there was no need to conduct a video record of interview to properly record those matters. The police officer refused to alter his position, an interview was conducted, admissions were made by the boy and he was further charged.

The NATSILS call on the Government to:

a) Create statutory protections for accused persons to ensure procedural fairness and enable them to exercise their right to silence by enabling instructions regarding a decision not to participate in a record of interview to be conveyed to police through legal counsel for vulnerable accused persons (such as young people) and prevent police from subsequently conducting a record of interview;; and

b) Commit to working with State and Territory governments to amend laws to make it mandatory for police to contact an Aboriginal and Torres Strait Islander Legal Service in every circumstance where an Aboriginal and Torres Strait Islander person is taken into

[11] Youth Referral and Independent Person Project (YRIPP).

police custody, and that adequate funding is provided to ATSILS to enable them to provide this additional service.

3.7 Provision of Health Services in Places of Detention

Legislation in all States and Territories, except South Australia and Queensland, protects the right to reasonable medical care for those in detention, usually through a visiting medical officer/service that has arrangements with the institution in question.[12] While legislation in South Australia and Queensland refers to the presence of medical professionals it does not explicitly mention a right to medical care.[13] Furthermore, only legislation in Queensland, Western Australia and Victoria protect a prisoner's right to access an independent medical practitioner of their choice.[14] However this rarely happens in practice as prisoners are unaware of their rights and do not have the resources to cover the costs of independent medical attention.

In civilian life involuntary medical treatment is usually limited to psychiatric treatment. In prison, it occurs in a number of States in connection with medical testing and treatment. For example, mandatory medical treatment and the power to use force to implement such is provided for in legislation in New South Wales, South Australia, the Northern Territory, Queensland and Western Australia.[15]

Legislation to establish a specific independent monitoring and accountability mechanism, so as to ensure the provision of health services in detention, has not been enacted widely in Australia. Only Western Australia has an independent oversight mechanism in the Office of the Inspector of Custodial Services. However, the powers of this mechanism do not extend to police custody facilities and many findings and recommendations of the Inspector are ignored by the Western Australian Government.

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

For example, recently in Grafton jail in New South Wales a man, who was incarcerated for traffic offences, was assaulted in his cell and died from his injuries after a 3 hour delay in receiving medical attention.[16] After pressing an emergency help button and repeatedly asking for assistance, prison guards failed to properly investigate the extent of the man's injuries, despite his head and face being covered in blood, a large amount of blood in his cell and his inability to stand or walk unaided. The man was made to crawl across the space to another cell where he was left alone by guards for an extended period of time before a nurse arrived to examine him. Following this examination, the man was taken to hospital, located mere metres from the jail, where he passed away. There was a 3 hour delay from

[12] *Corrections Act 1997* (Tas) s 29 (1)(f); *Prisons Act 1981* (WA) s 95A (1); *Corrections Act 1986* (Vic) s 47 (f); *Prisons (Correctional Services) Act* (ACT) s 71; *Correctional Centres Act 1952* (NSW) s 16 (1).

[13] *Correctional Services Act 1982* (SA) sec 37AA; *Corrective Services Act 2006* (Qld) s 21.

[14] *Corrective Services Act 2006* (Qld) s 22; *Prisons Act 1981* (WA) s 95A (2); and *Corrections Act 1986* (Vic) s 47 (f).

[15] *Correctional Centres Act 1952 (NSW)*, s 16(2), *Prisons (Correctional Services) Act (NT)* s 75, *Corrective Services Act 2006 (Qld),* s 21; *Prisons Act 1981 (WA),* s 95D; and *Correctional Services Regulations 2001* (SA) s 38.

[16] See http://www.abc.net.au/news/2011-10-19/death-of-traffic-offender-in-custody-at-grafton/3580058 .

the time the man pushed the emergency alert and was first found by the guards until he was finally taken to hospital for medical attention.

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

In its Report, the Government should also acknowledge that significant debate continues to surround the question of access to the Medicare system for those in detention.

The NATSILS are also a concerned about the availability of culturally appropriate medical services in prisons. In our combined experience, Aboriginal language interpreters are not available and utilised in many cases in which they should be and medical practitioners are often not appropriately trained in cross-cultural communication. This can lead to misdiagnosis and misunderstanding of treatment and also impairs the capacity of Aboriginal prisoners to provide informed consent to undertake medical examinations and treatment.

It is important to note that in addition to improved provision of health services in places of detention, it is also imperative that the Government work with State and Territory governments to ensure that there are appropriate community based treatment options for persons with persons unfit to plea or who were suffering from a mental impairment at the time of offending, as discussed above at 3.6.1 above.

The NATSILS call on the Government to:

a) Commit to working with the South Australian and Queensland governments to ensure that the right to adequate medical care whilst in detention is explicitly enshrined in legislation;

b) Commit to working with States and Territories to ensure that the right to an independent medical professional of one's choice is enshrined in all legislation;

c) Commit to working with States and Territories to ensure that the right to refuse testing and treatment is enshrined in all legislation;

d) Commit to giving people in detention access to the medicare system; and

e) Commit to working with States and Territories to ensure that culturally appropriate medical treatment and advice is provided to Aboriginal and Torres Strait Islander inmates, including through the use of Aboriginal language interpreters.

3.8 Violence Against Women

There are significant barriers faced by Aboriginal and Torres Strait Islander women experiencing violence in accessing appropriate services. These barriers exist in metropolitan, regional and remote areas of Australia. There is a distinct lack of culturally appropriate crisis

accommodation services, counselling services and legal assistance services available to Aboriginal and Torres Strait Islander women who are victims of violence. In many regional and remote areas these services just do not exist, and in locations where they do exist, including in metropolitan areas, a lack of cultural competency can result in many women not being able to access them.

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

The Australian Law Reform Commission has recently been investigating the impact of Income Management (IM) on victims of domestic violence and has raised concerns that IM may be detrimental to the safety of these victims. By restricting the products and services on which money can be spent, IM may restrict the ability of victims of domestic violence to escape dangerous residential or personal situations to improve the safety of themselves and their children. IM imposes further control over peoples lives, adding to the existing disempowerment.

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

The NATSILS call on the Government to:

a) Work with Aboriginal and Torres Strait Islander communities and organisations to expand the availability of culturally appropriate crisis care accommodation and counselling services in metropolitan, regional and remote areas;

b) Commit to funding FVPLS in metropolitan areas;

c) Commit to reforming IM in response to the Australian Law Reform Commission's findings on its impacts on victims of domestic violence; and

d) Commit to working with Aboriginal and Torres Strait Islander peoples and organisations to develop a more targeted strategy to address the high rates of violence experienced by Aboriginal and Torres Strait Islander women that compels governments to act.

3.9 Criminalisation of Poverty and Homelessness

In recent times, Australian governments have increasingly widened the scope of criminalised behaviours relating to the use and regulation of public space. The increasing criminalisation

of public space offences, including begging and public drunkenness/consumption of alcohol, effectively criminalises poverty and homelessness. Australia's superior courts have recognised that the criminalisation of public space offences should not be used as a 'punishment for poverty'.[17] However, according to the United Nations' Special Rapporteur on Adequate Housing, Miloon Kothari (Special Rapporteur):

> In every urban centre in Australia, laws now exist which either criminalize essential human activities, such as sleeping, or create 'move on' powers that authorize policing authorities to continuously displace people who occupy and live in public spaces. Enforcement of public space laws criminalizes the homeless and may violate civil rights, including the right to be free from inhuman or degrading treatment or punishment. These regulations do not provide people living in public places and who are threatened with eviction the procedural or substantive rights recognized under international laws regarding forced evictions, and therefore may also violate the right to adequate housing.[18]

The Special Rapporteur's comments reiterate that begging and other public space offences can, and do, act to criminalise poverty and homelessness. Given the high levels of poverty, overcrowded housing and homelessness experienced by Aboriginal and Torres Strait Islander peoples,[19] the NATSILS are concerned that such policies disproportionately affect Aboriginal and Torres Strait Islander peoples.

One reason cited for retaining the offence of begging is the annoyance that those who beg reportedly cause to members of the general public.[20] However, the relevant legal question is whether the kind of 'harm' occasioned by individual members of society is severe or sufficient enough to attract the attention of the criminal law.[21] The NATSILS believe that there is no justification for criminalising annoying or so-called 'antisocial' behaviour. The most appropriate way to remedy the situation is clearly to meet the needs of the person begging in order to eliminate their need to beg in the first place. In a society which tolerates poverty, visible evidence of it must also be tolerated.[22]

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

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

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

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

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

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

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

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

And

In *R v Mills* (Unreported, Magistrates' Court (Melbourne), 14 December 2001) the Victorian Magistrate's Court dismissed fines for public space offences imposed on an elderly homeless man who suffered from an acquired brain injury. The Court imposed a condition that the defendant comply with a case management plan which would enable the defendant to obtain stable accommodation and aged care support. In sentencing, the Court stated that 'there is great force to the argument that the community should accept responsibility for people in the offender's position'.[24]

The NATSILS call on the Government to commit to working with States and Territories to remove the criminal offence of begging.

4. Article 10: Education and information regarding the prohibition against torture be fully included in the training of law enforcement personnel, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

4.1 Human Rights Training for Those Involved with Detainees

Information is not widely available about the level of human rights training provided to those involved with detainees such as police, detention centre and corrections staff. However, the continued occurrence of human rights violations in places of detention would seem to suggest that sufficient training is not provided or that where training is provided, it is not effective in preventing torture or cruel, inhuman or degrading treatment or punishment. The example given above under paragraph 3.7 is a tragic example of how a lack of training around the rights of detainees and duties of staff can lead to the worst of consequences.

The NATSILS call on the Government to work with State and Territory governments and human rights organisations and experts to increase the level and effectiveness of human rights training provided to those involved with detainees. Such training material should be reviewed by any future National Preventative Mechanism.

[23] PILCH, *We Want Change! Calling for the abolition of the criminal offence of begging* (2010) 10.
[24] Ibid.

5. Article 11: Keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

5.1 Aboriginal and Torres Strait Islander Incarceration

Aboriginal and Torres Strait Islander peoples continue to be over-represented in the criminal justice system. In its Report the Government needs to provide significant detail and insight into the human rights concerns that lead to Aboriginal and Torres Strait Islander people coming into contact with the criminal justice system at such a disproportionate rate, including:

- denial of rights to standards of living, housing, education and health;
- continuing effects of past government policies that violated Aboriginal and Torres Strait Islander peoples' human rights;
- disproportionate rate of alcohol and substance abuse;
- high rates of mental health issues and people spending unnecessarily long periods on remand awaiting a mental health assessment;
- inadequate access to essential services, particularly in remote communities, such as mental health care and public transport;
- high rate of unemployment and homelessness;
- over-representation in the child protection system;
- high levels of family dysfunction;
- loss of connection to language, community and culture;
- conflicting practices under customary law and Australian law;
- discriminatory legislative requirements in some jurisdictions that issues of Aboriginal cultural significance and customary law cannot be considered by criminal courts;
- lack and underutilisation of community dispute resolution mechanisms;
- inadequate inclusion of Aboriginal hierarchies and respected persons within political, governmental, court and legal systems;
- discriminatory laws such as those relating to bail;
- a lack of crisis care accommodation, bail hostels and rehabilitation programs;
- over-policing and poor utilisation of diversionary schemes by police;
- improved resourcing and numbers of police, particularly in remote Northern Territory communities, without a concurrent increase in access to licensing, registration, rehabilitation and community based sentencing services.
- the punitive approach taken by police against Aboriginal and Torres Strait Islander young people;
- limited access to legal advice;
- mandatory sentencing;
- denial of natural justice in parole decision making processes; and
- the availability and application of non-custodial sentencing options, especially in regional and remote areas;

There are numerous reports in existence which should be drawn on to provide the insight needed in the Report in relation to the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system including the Royal Commission into

Aboriginal Deaths in Custody (RCIADIC),[25] Doing Time – Time for Doing[26] the NILJF,[27] and numerous Australian Institute of Criminology reports.

In discussing the Government's strategy to address over-incarceration, the Report will no doubt look to the Closing the Gap initiative[28] and the Safe Communities Building Block in particular. In discussing the Safe Communities Building Block the Report should highlight the fact that there is no target relating to reform in the justice system to address the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system. It should also highlight the fact that unlike all the other Building Blocks under Closing the Gap, the Safe Communities Building Block lacks a National Partnership Agreement (NPA) to facilitate implementation. In doing so the Report must acknowledge that while such action has been touted in recent times, in particular by the Standing Committee of Attorneys-General (SCAG), little actual progress has in fact been made.

In their recent report, Doing Time – Time for Doing, the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs stated that they do not accept the view that investment in education, health, housing and employment initiatives are sufficient to close the gap in Aboriginal and Torres Strait Islander justice outcomes.[29] They further stated that the most effective means of focusing activity on the Safe Communities Building Block and for supporting activity under the other building blocks is through the development of a NPA dedicated to improving Aboriginal and Torres Strait Islander justice and community safety outcomes.[30]

The Report should also specify that the National Indigenous Law and Justice Framework (NILJF),[31] as the key piece of policy directed at addressing the disproportionate level of contact between Aboriginal and Torres Strait Islander peoples and the criminal justice system, does not have any resources attached to it and does not require Australian governments to take any specific actions. The Report needs to clarify that while the NILJF could be very useful, until it becomes binding and resources are allocated to its implementation it is unlikely to make any inroads in addressing Aboriginal and Torres Strait Islander law and justice issues. Again, the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs recorded their concern in relation to the weaknesses of the NILJF in their Doing Time – Time for Doing report and stated that despite suggestions from COAG, the Safe Communities Building Block is not being well served by the NILJF.[32]

The NATSILS call on the Government to:

a) In consultation with Aboriginal and Torres Strait Islander peoples and organisations commit to incorporating targets to reduce the high involvement of Aboriginal and

[25] Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *Final Report* (1991).
[26] Standing Committee on Aboriginal and Torres Strait Islander Affairs, House of Representatives, *Doing Time - Time for Doing, Indigenous Youth in the Criminal Justice System* (2011).
[27] Standing Committee of Attorneys-General, *National Indigenous Law and Justice Framework 2009 – 2015* (2009).
[28] See http://www.fahcsia.gov.au/sa/indigenous/progserv/ctg/Pages/default.aspx.
[29] Standing Committee on Aboriginal and Torres Strait Islander Affairs, above n 26, 39.
[30] Ibid.
[31] Ibid 25.
[32] Ibid 39.

Torres Strait Islander peoples in contact with the criminal justice system into the Closing the Gap agenda and implement the NILJF through an NPA under the Safe Communities Building Block;

b) Implement justice reinvestment strategies in each State and Territory;

c) Implement 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); and

e) In coordination with State and Territory governments, commit the necessary resources to prevent Aboriginal and Torres Strait Islander peoples coming into contact with the criminal justice system in terms of investing in education, housing, rehabilitation services, bail hostels, support services, community dispute resolution mechanisms, employment and training and recreational activities under a justice reinvestment framework.

5.2 Reducing Overcrowding in Prisons, Detention Centres and Police Lock Ups

Poor or inappropriate accommodation has been identified as a major catalyst for critical incidents such as riots, self-harm, suicide and other non-compliant behaviours among prisoner populations and contributes to a variety of low outcomes for prison communities and prisoners. The relationship between prison accommodation standards and negative behavioural outcomes in prisoners has been shown to be strong and it is in the best interests of the prisoner and prison administration that prison environments adhere to an appropriate standard. Many Australian prisons are reported to be overcrowded and aspects of prison environments have been termed 'unsafe'[33] and appear to fall below the level articulated in international and national standards and guidelines.[34]

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

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

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

has become so chronic that it has been reported that up to 6 prisoners have been sleeping in a single cell and on mattresses on the floor next to toilets. The practice of 'double-bunking' in particular has shown to increase the risk to prisoners of rape and assault,[35] contracting a communicable disease[36] and other negative health outcomes such as increased exposure to passive smoking.[37]

In 24 coronial inquests held between 1994 and 2008 concerning 26 deaths in South Australian prisons, recommendations were made by the Coroner's Court in relation to various aspects of prison accommodation. In each inquest, the Court held that aspects of the prison environment played a part in the unnatural death of prisoners. Prisons with high social densities have been shown to produce higher death rates including from natural deaths amongst elderly prisoners, violent deaths and suicides.[38] Sustained crowding in prisons has also shown to produce higher levels of violence and other on-compliant behaviour and increased psychiatric commitment rates.[39] Standards such as these clearly violate the Revised Standard Guidelines for corrections in Australia which states that "all necessary measures should be taken to ensure that no prisoner injuries or unnatural deaths occur".[40]

Furthermore, some corrections departments have now resorted to housing prisoners outside of prisons in spaces not designed for such a purpose. Since 2007 in South Australia for example, 40 cells at the City Watch House have been allocated for corrective services ongoing use.[41] In addition, cells at other police stations and court holding cells are also used periodically for prisoner accommodation[42] and some adult offenders are being held in juvenile detention facilities.[43]

Rather than continuously building more prisons at considerable expense to lessen the extent of over-crowding, the best way to sustainably reduce overcrowding is to reduce the rates of imprisonment. Central to this task will be reducing the over-incarceration of Aboriginal and Torres Strait Islander peoples. Please see the relevant sections elsewhere in this submission for information about how this can be achieved.

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

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

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

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

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

[40] *Standard Guidelines for Corrections in Australia*, above n 34.

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

[42] Australian Broadcasting Commission, 'Claims of overcrowding in SA Prisons', 10th March 2008 at http://www.abc.net.au/news/stories/2008/03/10/2185116.htm;
Australian Broadcasting Commission, 'Police Station Holds Overflow', 6th November 2008 at http://www.abc.net.au/news/stories/2008/11/06/2411750.htm?site=adelaide.

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

The NATSILS call on the Government to reject the punitive law and order campaigns currently adopted by State and Territory governments and commit to working with them to reinvest funding away from building further prisons and towards policies and programs that will reduce offending and incarceration rates, in particular for Aboriginal and Torres Strait Islander peoples.

5.3 Mandatory Sentencing

One reason why Aboriginal and Torres Strait Islander peoples are imprisoned more often than non-Aboriginal and Torres Strait Islander peoples is that they are disproportionately affected by an increasingly rigid approach to offending. A recent study examined the substantial rise in the Aboriginal imprisonment rate between 2001 and 2008 and noted that there had not been a corresponding rise in the conviction rate for Aboriginal and Torres Strait Islander peoples over this period.[44] As a result, it concluded that "the substantial increase in the number of Indigenous people in prison is mainly due to changes in the criminal justice system's response to offending rather than changes in offending itself."[45]

The Northern Territory and Western Australia have had mandatory sentencing laws for some years and Victoria has recently announced plans to introduce statutory minimum sentencing laws for adults and young people aged 16-17 and adults who commit the yet to be defined offence of "gross violence". Northern Territory legislation mandates that people convicted of sexual offences, certain violent offences and aggravated property offences must serve a term of actual imprisonment.[46] Additionally, adults and young people convicted of a second or subsequent breach of a Domestic Violence Order that involves harm to the protected person are required by legislation to serve at least seven days imprisonment or detention unless the court is satisfied it is inappropriate.[47]

Western Australia has two types of mandatory sentencing laws. Adults and young people convicted of a home burglary must be sentenced to a minimum of 12 months imprisonment or detention if they have been convicted of two or more previous home burglaries.[48] Additionally, adults, and young people between the ages of 16 and 18 years, who are convicted of an assault on police or other public officers, causing either bodily harm or grievous bodily harm, must be sentenced to a mandatory term of imprisonment or detention ranging from 3 to 12 months.[49] Furthermore, Western Australia has recently announced a proposed extension to its mandatory sentencing laws by introducing legislation requiring a mandatory term of imprisonment for adults and young people who breach a Violence Restraining Order for a third time.[50]

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[44] Fitzgerald, J, 'Why are Indigenous Imprisonment Rates Rising?' (2009) *NSW Bureau of Crime Statistics and Research Crime and Justice Statistics Issue Paper no. 41*, 6.
[45] Ibid.
[46] *Sentencing Act* (NT) ss 78B, 78BA and 78BB.
[47] *Domestic and Family Violence Act* (NT) ss 121, 122.
[48] *Criminal Code 1913* (WA) s 401(4).
[49] *Criminal Code 1913* (WA) s 297, s 318.
[50] See http://au.news.yahoo.com/thewest/a/-/breaking/9669122/warning-on-restraint-order-changes/.

Mandatory sentencing laws are arbitrary, often disproportionate to the crime and do not allow regard for the circumstances of the particular offence or offender.[51] Furthermore, mandatory sentencing has been shown to be costly, ineffective in deterring criminal activity, increase the likelihood of reoffending and breach Australia's human rights obligations. The NATSILS consider it essential to an effective criminal justice system that a decision maker be allowed to take into account an offender's unique circumstances, and have the full host of sentencing options available when applying sentencing principles of general and specific deterrence and rehabilitation, and subsequently, when making a decision as to sentence.

Furthermore, as a result of the elevated contact of Aboriginal and Torres Strait Islander peoples with the criminal justice system, mandatory sentencing disproportionately affects Aboriginal and Torres Strait Islander peoples, resulting in greater Aboriginal and Torres Strait Islander incarceration rates. Importantly, mandatory sentencing laws breach Australia's obligations under international law.[52]

The Government has constitutional power to override mandatory sentencing laws but has explicitly chosen not to do so.[53]

The NATSILS call on the Government to:

a) Explain what steps are being taken by the Government to guarantee appropriate sentencing options are afforded and tailored to individual Aboriginal and Torres Strait Islander peoples in contact with the justice system, in particular those affected by mandatory sentencing laws currently in operation; and

b) Commit to working with State and Territory governments to repeal mandatory and minimum sentencing laws by a defined deadline.

5.4 Mental Illness and Incarceration

The relationship between mental illness and incarceration has been briefly discussed above with particular focus on how deficiencies in legislation lead to those declared unfit to plead or mentally impaired at the time of offending being incarcerated for undefined periods of time. Another concern for the NATSILS is the failure of police to deal with mental illnesses and/or cognitive/intellectual disabilities of a person who has come into contact with the criminal justice system, for relatively minor offending, without resorting to judicial proceedings and detention. Remand is increasingly being used by police in order to manage people with mental health concerns and cognitive disabilities. This can either be because the mental illness or intellectual/cognitive disability goes unidentified or there is a chronic lack of support and treatment facilities. The NATSILS recommend that in situations like these, a person's health concerns should be addressed as a priority over detention in the criminal justice system.

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

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

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

The trend in the United States and other overseas jurisdictions is toward a therapeutic jurisprudence approach (for example, Mental Health Courts) where the causes of the offending behaviour are identified and addressed through treatment and support services, while the person is monitored by the court. Reliance is upon external services to support clients.

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

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

In relation to access to mental health services within prisons, there is still a significant shortage in resource allocated to diagnosis, treatment and prevention of mental illnesses. The Special Rapporteur on the Right to Health has observed that current mental health services are insufficient to treat the number of inmates who suffer from mental illness and that individuals with mental illness are significantly over-represented in prison.[54]

The Government's Draft Baseline Study for the National Human Rights Action Plan noted that

> The Australian Institute of Health and Welfare has found that 37% of prison entrants reported having a mental health disorder at some time.[55] The Report found that 12% of all managed health problems in prisons concerned mental health issues.[56] The Australian Bureau of Statistics has reported that 41% of people who have been in prison had experienced mental illness, which is twice the prevalence of people who had not been in prison.[57]

And that

> In NSW, a 2011 report[58] found that the majority (87%) of young people in custody were found to have a psychological disorder. Possible intellectual disability was also common, with 20% of

[54] Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,* Anand Grover, Un Doc A/HRC/14/20/Add.4 (3 June 2010) at [69].
[55] Australian Institute of Health and Welfare, *The Health of Australia's Prisoners 2009*, 2009, p x.
[56] Ibid, p 85.
[57] Australian Bureau of Statistics, *National Survey of Mental Health and Wellbeing 2007*, 2007.
[58] D Indig et al, *2009 NSW Young People in Custody Health Survey: Full Report,* Justice Health and Juvenile Justice, 2011.

> Aboriginal and Torres Strait Islander young people in custody assessed as having a possible intellectual disability and 7% of the non-Indigenous cohort. A 2008 study[59] examining over 2700 people who have been in prison[60] found that 28% of prisoners experienced a mental health disorder (defined as having any anxiety, affective or psychiatric problem in the past 12 months), 34% had a cognitive impairment and 38% had a borderline cognitive impairment.

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

> Dr O'Brien gave a vivid description of the mental health presence in country prisons in South Australia. According to Dr O'Brien, in non-metropolitan prisons, there are no psychologists, social workers who have mental health experience, or dedicated mental health nurses available to handle mentally ill prisoners. Whilst this multidisciplinary mental health team structure exists in the community, it is not available in country prisons. Medical practitioners and nurses are not employees of the DCS and may only offer their services to prisoners who are entitled to refuse if they wish.
>
> Dr O'Brien emphasised that the present situation whereby mentally ill prisoners are seen once a month is completely inadequate. He states that there are simply too many prisoners to be seen in a short period of time during those clinics. Despite previously bringing the problem to the attention of government ministers and his superiors, he claims that there has been no improvement over 25 years in the numbers of people he must see in a short period of time. His colleagues in private practise may spend 45 minutes to an hour with every patient they see, whereas Dr O'Brien has an average of about 7–10 minutes with each prisoner he sees in his clinics. According to Dr O'Brien, this is partly the reason why it is so impossible to get psychiatrists to work in prison health service or to attend prisons.
>
> Dr O'Brien expressed his views as follows:
>
> 'I think it is scandalous that there aren't an adequate number of funded mental health nursing positions in South Australian gaols, and it is scandalous that most gaols do not have a psychologist and there is nothing resembling an adequate mental health service in our prisons.'
>
> As to the role played by visiting general practitioners, Dr O'Brien said that his experience of general practitioners in country towns is that they may have little or no interest in mental health. The level of knowledge and competency varies amongst general practitioners providing services to country prisoners.[61]

Given the over-representation of Aboriginal and Torres Strait Islander peoples in prison and the high rates of mental health concerns amongst prisoners access to culturally appropriate mental health services within prisons are a significant concern for the NATSILS. The NATSILS are aware of the significant injection of funding into the reform of the mental sector within the 2011-2012 budget, but are unsure as to how this will impact upon the services provided within prisons. Furthermore, the NATSILS are similarly unsure of the details of the NPA that is being developed under the mental health sector reform process yet encourage all

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

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

[61] See www.courts.sa.gov.au/coroner/findings/2006/walker.

governments involved to consider how such an agreement could relate to services available within prions and to the successful rehabilitation of offenders.

The NATSILS are also concerned about reports of solitary confinement being used as punishment and the placement of people with mental health issues and who are mentally impaired within solitary confinement, regardless of the stress and anxiety that such an environment can cause. The NATSILS endorse the recent statements made by the Special Rapporteur on Torture, Juan E. Mendez, that

> "solitary confinement should be banned by states as a punishment or extortion technique…solitary confinement is a harsh measure which is contrary to rehabilitation…it can amount to torture or cruel, inhuman or degrading treatment or punishment when used as a punishment, during pre-trial detention, indefinitely or for a prolonged period, for persons with mental disabilities or juveniles".[62]

The Special rapporteur called on states to ban the solitary confinement of prisoners except in very exceptional circumstances and for as short a time as possible.[63] He also called for an absolute prohibition in the case of juveniles and people with mental disabilities and in relation to solitary confinement that lasts over 15 days as research has shown that some lasting mental damage is caused after a few days of social isolation.[64]

The NATSILS call on the Government to:

a) Commit to working with State and Territory governments to implement stronger measures that require police and courts to deal with people with mental health concerns and/or intellectual/cognitive disabilities who are in conflict with the law without resorting to judicial proceedings and detention, which includes the introduction of mental health and intellectual/cognitive disability assessments being readily available through permanent staff located at adult and children's court facilities to make on the spot appropriate assessments;

b) Commit to working with State and Territory governments to Increase the provision of culturally appropriate support and treatment facilities for people with mental illness and/or intellectual/cognitive disability in metropolitan, regional and remote areas;

c) Commit to ensuring that recent injections of funding into mental health services connect with the need for increased availability of services within prisons, including culturally appropriate services for Aboriginal and Torres Strait Islander peoples;

d) Commit to ensuring that an NPA on mental health service provision includes a focus on the need for increased service provision within prisons with a mind to successful rehabilitation of offenders and improved community safety; and

e) Commit to banning the solitary confinement of prisoners except in very exceptional circumstances and for as short a time as possible but no more than 15 days, and

[62] UN News Centre, *Solitary confinement should be banned in most cases, UN expert says* (2011) United Nations (http://www.un.org/apps/news/story.asp?NewsID=40097&Cr=torture&Cr1) 18 October 2011.
[63] Ibid.
[64] Ibid.

implement an absolute prohibition of solitary confinement in the case of juveniles and people with mental disabilities, for use of punishment or extortion of information.

5.5 Transportation of Detainees

Transportation of detainees is an issue of central concern to the NATSILS 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.

On 27 January 2008, a respected Ngaanyatjarra Aboriginal Elder named Mr Ward (whose first name cannot be used for cultural reasons), was placed in the back of a prison transport van for up to four and half hours while temperatures outside exceeded 40 degrees Celsius. Mr Ward was being transferred from Laverton to Kalgoorlie in remote Western Australia to face a charge of driving under the influence. Mr Ward was found unconscious in the back of the van, having suffered heat stroke and sustained serious burns to his body. He subsequently died in hospital. The van's air-conditioning system was faulty. A coronial inquest into Mr Ward's death revealed systemic failings which contributed to the death. These included over policing, denial of bail, inhumane prisoner transport, lack of training of justices of the peace, police and private contractor staff, lack of governmental supervision of contractual duties and inadequate funding. Findings were delivered in June 2009, where the WA Coroner found that articles 7 and 10 of the International Covenant on Civil and Political Rights had been breached.

The NATSILS call on the Government to:

a) Outline what progress has been made in implementing all of the recommendations from the inquiry into Mr Ward's death; and

b) Outline what measures are in place, in each State and Territory, to ensure that the right to life is protected during the transportation of detained persons through the provision of adequate medical care and living conditions.

6. Articles 12, 13 and 14: Prompt and impartial investigation of complaint and access to redress and compensation.

6.1 Independent Investigations of Complaints Concerning Ill-Treatment or Excessive Use of Force

There is a need in Australia for independent investigations of complaints against police, police misconduct and deaths in custody and the implementation of all of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) recommendations.[65] The

[65] Committee Against Torture, *Concluding Observations*, 40th sess, [13,23,27] UN Doc CAT/C/AUS/CO/3 (2008); Committee on the Elimination of Racial Discrimination, *Concluding* Observations, 66th sess, [21], UN Doc CERD/C/AUS/CO/14 (2005); James Anaya The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *The Situation of Indigenous Peoples in Australia*, Human Rights

Government must acknowledge that for investigative and regulatory bodies to be effective and for the public to have confidence in the process, regulatory bodies must be completely separate from police forces. Recent failures in this area such as the inquests into the deaths of Doomadgee in Queensland and Mr Ward in Western Australia, have highlighted the urgency for reform.

The Study also needs to detail the measures in place in each jurisdiction regarding the requirements for governments to respond to and implement coronial recommendations.

The NATSILS call on the Government to:

a) Commit to working with States and Territories to establish independent bodies in each State and Territory to independently investigate and determine police and custodial complaints and deaths in custody;[66]

b) Commit to working with States and Territories to implement in full outstanding RCIADIC recommendations; and

c) Commit to work with State and Territory governments to ensure that legislation is passed in all jurisdictions that require governments to respond to and implement coronial recommendations.

6.2 Funding for ATSILS and Interpreter Services

A core issue affecting the provision of legal assistance to Aboriginal and Torres Strait Islander peoples is the chronic underfunding of the ATSILS, FVPLS and Aboriginal and Torres Strait Islander interpreter services. Without adequate funding, and access to trained interpreters, the capacity of the ATSILS and FVPLS to provide quality legal assistance services to Aboriginal and Torres Strait Islander peoples in metropolitan, regional and remote communities is severely restricted. Despite recent increases in funding, the ATSILS still remain well below parity with mainstream legal aid services and are being forced to close some of their offices. The particular issue of funding for FVPLS in metropolitan areas has been discussed above at 3.8.

The NATSILS call on the Government:

a) To increase the ATSILS' funding so as to achieve parity with mainstream legal aid services;

Council, 15th sess, [51, 103], UN Doc A/HRC/15/ (2010); Human Rights Committee, *Concluding* Observations, 95th sess [21] UN Doc CCPR/C/AUS/CO/5 (2009); Committee on the Elimination of Racial Discrimination, *Concluding* Observations, 77th sess, [20] UN Doc CERD/C/AUS/CO/15-17 (2010); Human Rights Council, *Draft Report of the Working Group on the Universal Periodic Review Australia,* 10th sess, [86.91], UN Doc A/HRC/WG.6/10/L.8 (2011); National Police Accountability Network of the National Association of Community Legal Centres recent letter to the Commonwealth Attorney-General on 9th August 2011 at http://www.communitylaw.org.au/flemingtonkensington/cb_pages/files/RCIADIC%20letter%209%20August%202011.pdf).

[66] See Sansbury Inquest (2007) 20.2 at http://www.courts.sa.gov.au/courts/coroner/findings/index.html .

b) To fund FVPLS to provide services in metropolitan areas; and

c) To provide increased funding for the expansion of Aboriginal and Torres Strait Islander interpreter services so as to create a coordinated national Aboriginal and Torres Strait Islander interpreter service that covers all metropolitan, regional and remote areas.

7. Article 15: Evidence obtained unlawfully

7.1 Use of Evidence Obtained Unlawfully

Please see the information provided above at paragraph 3.6.2 regarding our concerns in relation to evidence obtained through violations of a person's right to silence.

A further concern for the NATSILS is the breach of RCIADIC recommendations in the gathering of evidence from suspects and witnesses. For example, in *Robinett v Police* (2000) 116 A Crim R 492 police had tape recorded threats to police made by Mr Robinett while he was in police cells and suffering from the effects of capsicum spray. On appeal it was found that such evidence was obtained illegally, and in contradiction to the RCIADIC findings and recommendations, as it had been taken whilst police were actively ignoring Mr Robinett's requests for medical assistance. Such action was contrary to their duty of care and contrary to the RCIADIC. As a result, the taped evidence of alleged threats was excluded from evidence and Mr Robinett was acquitted.

8. Article 16: Prevention of other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture

8.1 Use of Force

The increasing use of force by police as opposed to utilising de-escalation techniques, and the increasing use of Tasers and capsicum spray/foam as compliance tools, especially on people who are already in custody, and the inappropriate use of Tasers on children, women, the mentally ill and other vulnerable people is of serious concern to the NATSILS.[67]

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

The NATSILS call on the Government to implement a human rights based approach to the guidelines that regulate use force and enshrine such standards in legislation.[68]

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

[68] See Human Rights Law Centre, *Upholding Our Rights: Police Use of Force Research Project Consultation Paper* (2011).

8.2 The Rights of Children

8.2.1 Raising Minimum Age of Criminal Responsibility

The NATSILS call on the Government to commit to working with State and Territory governments to raise the minimum age of criminal responsibility from 10 years of age to a more acceptable level that is in line with international jurisprudence by an agreed upon deadline.

8.2.2 Reverse the Increase in Number and Length of Stay of Children and Young People in Detention (Both Sentenced and on Remand) and Protection of the Right to Detention as a Last Resort

Aboriginal and Torres Strait Islander young people are over-represented in the criminal justice system. In the recent report 'Doing Time – Time for Doing' the over-representation of Aboriginal and Torres Strait Islander young people in the criminal justice system was linked to the broader social and economic disadvantage faced by many Aboriginal and Torres Strait Islander peoples, including:

- poor education outcomes;
- high rates of unemployment;
- high levels of drug and alcohol abuse;
- over-crowded housing and high rates of homelessness;
- over-representation in the child protection system;[69]
- high levels of family dysfunction; and
- a loss of connection to community and culture.[70]

Through their experience on the ground the NATSILS have also identified the following as factors from within the criminal justice system that critically contribute to the over-representation of Aboriginal and Torres Strait Islander young people in the criminal justice system:

- Discriminatory laws;
- The over-policing of Aboriginal and Torres Strait Islander young people, especially in relation to their occupation of public space, and poor utilisation of diversionary schemes by police;
- An absence of crisis care accommodation, bail hostels and rehabilitation programs;
- Limited access to legal advice;
- Aboriginal and Torres Strait Islander young people being remanded in custody at higher rates than non-Aboriginal and Torres Strait Islander young people;
- Lack of access to non-custodial sentencing options in regional and remote areas; and
- Mandatory sentencing and other punitive laws.

[69] Stewart, A, *Transitions and Turning Points: Examining the Links Between Child Maltreatment and Juvenile Offending* (2005) at <www.ocsar.sa.gov.au/docs/other_publications/papers/AS.pdf>. Stewart found that in Queensland 54 per cent of Aboriginal and Torres Strait Islander males, and 29 per cent of Aboriginal and Torres Strait Islander females, involved in the child protection system go on to criminally offend.

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

Due to their public presence, it is generally accepted that young people are over-policed particularly if they have mental health issues, are homeless or are dark-skinned.[71] There are a number of laws within Australia which discriminate against Aboriginal and Torres Strait Islander young people. For example, a range of public space 'move on' laws across Australia are discriminatory as they disproportionately affect Aboriginal and Torres Strait Islander young people due to their high visibility in public space. Historically, Aboriginal and Torres Strait Islander peoples use public space as cultural space and for congregation and socialisation as well as living space due to high levels of homelessness and low levels of property ownership. Also, these laws are implemented by police at disproportionate rates against young people and against Aboriginal and Torres Strait Islander young people in particular.[72] A survey of young people conducted in Queensland following the expansion of move on powers highlighted poor police practices such as a failure to inform young people of the nature or details of their move on notice (including its duration and what constitutes a breach) and disproportionate use of the powers against Aboriginal and Torres Strait Islander young people.[73]

There has been a substantial increase in the proportion of juveniles in detention on remand. Given the over-representation of Aboriginal and Torres Strait Islander young people in the criminal justice system, this increase in the use of remand severely impacts upon the detention rates of these young people. For example, the proportion of Aboriginal and Torres Strait Islander young people in detention on remand increased from 32.9 per cent in 1994 to 55.1 per cent in 2008.[74]

The widespread and increasing use of remand is inconsistent with article 37 (b) of the CRC and the right to detention as a last resort.[75] It is also not proportional to the level of offending as only a small proportion of remand episodes result in the young person being convicted and sentenced to a custodial order.[76] The increasing proportion of Aboriginal and Torres Strait Islander young people in detention on remand is the result of a number of factors, including:

- Police choosing to caution and divert Aboriginal and Torres Strait Islander young people at a lower rate than non-Aboriginal and Torres Strait Islander young people;[77]
- The punitive approach being taken by some police in opposing bail unnecessarily;
- Remand being used to "manage" people with mental illness or intellectual deficiency because mental illness or intellectual deficiency often goes unidentified and there is a chronic lack of support and treatment facilities;

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[71] National Crime Prevention Attorney General's Department, *Hanging out: Negotiating Young People's Use of Public Space* (1999) at http://www.ag.gov.au/agd/www/rwpattach.nsf/viewasattachmentPersonal/(E24C1D4325451B61DE7F4F2B1E155715)~no7_summary.pdf/$file/no7_summary.pdf; Grosman, M and Sharples, J, *Don't Go There: Young People's Perspectives on Safety and Community Policing* (2010) at http://www.vu.edu.au/sites/default/files/mcd/pdfs/dont-go-there-study-may-2010.pdf.

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

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

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

[75] Ibid 5.

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

[77] Richards, above n 74, 6.

- Remand being supported by child protection departments as an alternate housing option for young people in care;
- Considerations relevant to bail having a discriminatory effect on Aboriginal and Torres Strait Islander young people as high rates of social and economic disadvantage mean that many do not have appropriate homes to be bailed to or because of family dysfunction there is no appropriate adult to whom they can be bailed. This means that many cannot satisfy bail conditions and are thus, remanded in custody. A lack of youth bail hostels compounds this issue;
- The imposition of onerous bail conditions that many Aboriginal and Torres Strait Islander young people are unable to satisfy due to social and economic disadvantage and family dysfunction;
- Inadequate recognition of cultural contexts and obligations that may impact on the ability of an Aboriginal and Torres Strait Islander young person to comply with bail conditions. For example, a young person may have to vacate their house and travel to participate in sorry business if there is a death in the family thereby leaving the address to which they are bailed and breaching their residential condition. These breaches of bail result in future periods on remand for non-compliance with bail; and
- The over-policing of Aboriginal and Torres Strait Islander young people on bail.

In addition to the increasing use of remand, the protection of the right to detention as a last resort is an issue that extends across the entire criminal justice system. Additional ways in which the right to detention as a last resort is being violated in Australia include:

- A lack of non-custodial sentencing options in regional and remote areas. For example, there is an overwhelming scarcity of community based sentencing options for Aboriginal and Torres Strait Islander young people in many parts of Australia. More specifically, there is a lack of community based projects available and high levels of disadvantage can often rule out detention as an option for many Aboriginal and Torres Strait Islander young peoples. The remoteness of some communities can also reduce eligibility for, and the effectiveness of, supervision orders and has led some to say that this results in "justice by geography". In Western Australia, Chief Justice Martin has observed that

> The judges and magistrates sentencing Aboriginal offenders in regional Western Australia commonly have no practical alternative to a custodial sentence because of the unavailability of non-custodial programmes, and limited availability of non-custodial supervision. Imprisoning offenders because of a lack of non-custodial options is expensive and counter-productive. It discriminates between regional and metropolitan residents, and has the consequence that the former are more likely to go to prison.[78]

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

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

> I mentioned before that I am going to Borroloola next week. Last time I was out there, a month ago, there were no community projects. That is the case across many, many communities. Community work is not available. Home detention is not a viable option, sometimes because of overcrowding in the house or the sort of conduct that is being engaged in by other people who are living in the house. There are no surveillance officers available to go and check on people who have been ordered to serve home detention. So the sentencing dispositions are very limited. [79]

- Victoria has recently passed legislation to remove suspended sentences for both young people and adults convicted of serious offences with the intention to incrementally remove suspended sentences for all criminal offences. Furthermore, the Victorian Government is also legislating to remove home detention as a sentencing option. Such actions impede upon the discretion and expertise of the judiciary to consider the circumstances and merits of each case and make an appropriate judgement and sentence accordingly. By removing non-detention and tailored sentencing options from the discretion of the Victorian judiciary, the risk of young people ending up in arbitrary detention is dramatically increased. The existence and planned introduction of mandatory sentencing laws in Western Australia and Victoria, as outlined above, further increases this risk.

Well-functioning and effective children/youth justice systems that are specialised in dealing with young people and offending in a way that is appropriate and focused on diverting individuals from further contact with the criminal justice system is a key component in reducing the amount of young people in detention. There are separate specialist children/youth courts in every State and Territory in Australia except the Northern Territory. While every other State or Territory has a separate children/youth court with specially trained magistrates and workers, in the Northern Territory the Youth Justice Court sits as a subsidiary of the adult Magistrate's Court with magistrates acting in both jurisdictions, and simply putting on their youth justice hat when the Youth Justice Court sits. The outcome of this is that young people are denied access to a specialist court service which is geared towards acknowledging and addressing the specific circumstances and issues experienced by young people.

In addition to specialist children/youth courts, Victoria and Queensland also have specialist sentencing courts for Aboriginal and Torres Strait Islander young people who plead guilty. In these courts Elders and other respected persons from Aboriginal and Torres Strait Islander communities are involved in the sentencing process and restorative justice principles are utilised. ATSILS (Qld) however, has noted that in practice Aboriginal and Torres Strait Islander young people are not often referred to this court. These courts need to be established in all jurisdictions in Australia.

The NATSILS call on the Government to:

a) Review all legislation for its impact upon Aboriginal and Torres Strait Islander peoples, including young people specifically, and that all future bills introduced into Australian parliaments include a statement of impact in relation to Aboriginal and Torres Strait Islander peoples, including young people specifically;

[79] See the transcript of proceedings from the Darwin hearings at ATSIA 49: http://www.aph.gov.au/hansard/reps/commttee/R12981.pdf (last viewed 4 June 2010).

b) Commit to working with States and Territories to amend legislation, where it is identified as having a discriminatory impact upon Aboriginal and Torres Strait Islander young people, so as to make it non-discriminatory, or put implementation and support measures in place to assist young people coming into contact with the legislation to achieve an equitable outcome;

c) Commit to working with State and Territory governments to expand the availability of youth bail hostels so that young people without access to appropriate accommodation or a responsible adult are not inappropriately remanded in custody;

d) Commit to working with State and Territories to amend legislation in each jurisdiction dictating bail considerations to create a presumption in favour of bail for young people and to ensure that bail conditions take account of social and cultural factors and can be reasonably met by Aboriginal and Torres Strait Islander young people;

e) Take immediate action with States and Territories to dramatically reduce the numbers of Aboriginal and Torres Strait Islander young people on remand;

f) Commit to working with States and Territories to introduce legislation that requires the police to lodge a written document with the court upon the commencement of criminal proceedings against a young person outlining why all diversionary processes were inappropriate in the circumstances;

g) Commit to working with States and Territories and police to increase the rate at which Aboriginal and Torres Strait Islander young people are diverted from the formal justice system;

h) Commit to requiring the recording of statistics by police and courts in regards to diversions and the stated offence/s;

i) Commit to working with States and Territories to develop and expand specific justice systems for young people which are adequately funded, respond effectively to the causal factors of offending and over-representation by diverting young people from contact with the criminal justice system and judicial proceedings and referring them to appropriate support and rehabilitative services wherever possible, and which work towards the implementation of culturally appropriate restorative justice initiatives. We further consider it imperative that all youth justice systems be framed in youth friendly terms so that young people understand the court system and experience it as meaningful and restorative, rather than alienating;

j) Commit to funding the provision of training for all services involved in the cross-border legislation system so as to ensure a working understanding of the legislation in each jurisdiction;

k) Commit to working with Aboriginal and Torres Strait Islander communities and Elders in the development and dispensation of youth justice;

l) Increase the provision of culturally appropriate support and treatment facilities for young people with drug and alcohol abuse issues in metropolitan, regional and remote areas;

m) Require that in cases where bail is difficult due to an inability to locate a responsible adult and where remand is highly inappropriate, an out-of-court caution or referral to a Juvenile Justice Team or equivalent be recognised as the most suitable outcome;

n) Commit to working with States and Territories to introduce legislation to ensure that a judicial officer review all police decisions in relation to bail as soon as reasonably possible after charging to ensure that only appropriate bail conditions are set and to minimise the numbers of young people detained in custody;

o) Implement stronger measures that require police and courts to deal with young people with mental health concerns and or/intellectual deficiencies who are in conflict with the law without resorting to judicial proceedings and detention;

p) Increase the provision of culturally appropriate support and treatment facilities for young people with mental health concerns in metropolitan, regional and remote areas;

q) Commit to working with States and Territories to maintain separation of powers and ensure that they do not intrude upon the independence and expertise of courts by introducing legislation that restricts the sentencing options available to courts (such as suspended sentences);

r) Commit to working with States and Territories to extend the availability of community based sentencing options in regional and remote areas so that justice is not determined by geography and young people from these areas are not placed in detention unnecessarily; and

s) Commit to working with States and Territories to ensure that they repeal mandatory and minimum sentencing laws that apply to young people.

8.2.3 The Age a Person can be Charged as an Adult in Queensland

Numerous UN human rights treaty bodies have previously voiced their concerns in relation to the minimum age at which a person can be tried as an adult in Queensland.[80] Despite repeated calls for action, the minimum age that a person in Queensland can be tried as an adult remains at 17 years of age.

The NATSILS call on the Government to:

a) Outline what progress has been made to bring the minimum age at which a person can be tried as an adult in Queensland up to a more acceptable level that is in line with other States and Territories in Australia and international human rights jurisprudence;

b) Commit to raising the age for adult criminal responsibility from 17 to 18 years old in Queensland; and

[80] Committee on the Rights of the Child, *Concluding Observations: Australia*, 40th sess, [73 (c), 74 (g)] UN Doc CRC/C/15/Add.268 (2005).

c) Make a time specific commitment to transfer 17 year olds in Queensland from adult prisons to youth detention centres and that all young people under the age of 18 years fall within the jurisdiction of the *Youth Justice Act* 1992 (Qld) and have access to the Charter of Youth Justice Principles.

8.2.4 Separation from Adults in Detention

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

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

In May 2011 a 12 year old Aboriginal boy spent over a week in the Kununurra adult police lock-up after breaching bail conditions for two burglary offences. ALSWA report that Kununurra is over-policed and young people are regularly picked up for breaching bail conditions such as curfews.

He was remanded in custody on three separate occasions by both a Justice of the Peace and a Magistrate because no responsible parent could be found to meet the bail requirements and there are no youth bail facilities in Kununurra.

After a week in the adult lock-up the 12 year old boy was flown to a youth detention facility in Perth (a five hour flight away) where he spent several more days until he was sentenced via video link for the burglaries in Kununurra.

The NATSILS are particularly concerned by recent developments in the Northern Territory where by a minimum security cottages complex within the Alice Springs Correctional Centre, an adult custodial facility, has been made into the Alice Springs Juvenile Detention Centre (ASJDC). The ASJDC is a youth facility incorporated within an adult prison with minimal effective mechanisms existing to separate young detainees from adult prisoners.

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

The NATSILS call on the Government to:

a) Outline what measures they are taking to ensure that adequate youth detention facilities are available so that when a young person must be placed in detention they are not inappropriately placed in adult detention facilities;

b) Work with States and Territories to expand the availability of bail hostels and appropriate youth detention centres to regional and remote areas; and

c) Withdraw its reservation to art 37 (c) of the Convention on the Rights of the Child and art 10 (2)(b) of the International Convention on Civil and Political Rights relating to the separation of young people from adults in detention.

8.2.5 The Right not to be Subjected to Torture or Other Cruel, Inhumane or Degrading Treatment or Punishment

The NATSILS hold significant concerns in relation to the state of some of Australia's youth detention facilities. These concerns relate in particular to issues of over-crowding, personal safety, hygiene, appropriate heating and air-conditioning given the extreme climates in Australia and the mixing of remanded detainees with sentenced offenders. The case study below highlights some of these concerns.

Case Study: Melbourne Youth Justice Precinct

Early in 2010, the Victorian Ombudsman released a report[81] in response to allegations from a whistleblower regarding serious misconduct of staff at a Melbourne youth detention centre. The allegations related to staff at the Melbourne Youth Justice Precinct:

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

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

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

Investigation also identified the following concerns:

a) Overcrowding has resulted in mattresses being placed in isolation rooms with young people having to go to the toilet in buckets;

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

b) The number of beds in the Precinct is not sufficient for the number of remanded or sentenced detainees that the Precinct is required to accommodate. As a result, undesirable mixing of detainees of widely varying ages and different legal status occurs; and

c) Remanded detainees are being placed in units with sentenced offenders which has presented a significant problem. Mixing of remanded and sentenced detainees of varying ages occurs despite section 22(2) and 23(1) of *the Victorian Charter of Human Rights and Responsibilities 2006* and section 482(1)(c) of the *Children, Youth and Families Act*. Both the Charter of Human Rights and the Act discuss the separation of persons accused of an offence from persons convicted of an offence.

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

The NATSILS reiterate the importance of the recommendation made at paragraph 3.3 above and strongly urge the Government to commit to a deadline for the implementation of an NPM.

The NATSILS call on the Government to outline what action it and State and Territory governments are taking to improve standards in juvenile detention centres to ensure that they are in line with Australia's international obligations.