

# **Submission to the Consultation Draft of Australian Labor Party's National Policy Platform**

31 May 2018



**NATSILS**

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

## 1. Introduction

### 1.1. About NATSILS

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

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



### 1.2. Introductory comments

NATSILS welcomes this opportunity to make a submission to the consultation draft of the Australian Labor Party's Consultation Draft of the National Platform (the **Platform**).

NATSILS welcomes the inclusion in the Platform of support for Closing the Gap including new targets on disability and child protection, support for housing and a holistic approach to health, children's rights and the rights of Aboriginal and Torres Strait Islander people. NATSILS welcomes the Platform positions on justice: supporting justice targets, a national summit on youth justice, the recommendations of the Royal Commission into Aboriginal Deaths in Custody, the custody notification service and justice reinvestment, and the opposition to mandatory sentencing.

However, NATSILS hopes that the Platform can be strengthened by:

- Support and fund Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Services including their peak bodies, NATSILS & NFVLPS;
- Support and fund self-determination via Aboriginal and Torres Strait Islander organisations and peak bodies, and the Redfern Statement;
- Strengthen support for new Closing the Gap Targets; and
- Lead national reform of the justice system with a preventative, holistic, placed-based and community-led approach.

NATSILS submission provides suggestions on how the ALP can strengthen their commitment to ending the overrepresentation of Aboriginal and Torres Strait Islander people in the justice system, and ensure equal access to justice. Further rationale justifying each of the proposed amendments is attached in Appendix A.

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## **2. Support & fund Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Services including their peak bodies**

### **The issue:**

NATSILS is concerned that Aboriginal and Torres Strait Islander Legal Services are not mentioned or identified in the Platform. The higher levels at which Aboriginal and Torres Strait Islander peoples experience legal issues across all areas of the justice system is well documented.<sup>1</sup> From significantly higher rates of imprisonment and involvement with child protection systems, to vast unmet need for civil and family law services, access to justice directly impacts upon Aboriginal and Torres Strait Islander people's physical, emotional and social wellbeing.

The ATSILS were set up in line with the principle of self-determination, with an understanding of the unique impact a lack of access to culturally responsive legal assistance services has upon Aboriginal and Torres Strait Islander people and communities.

ATSILS are the preferred and in many instances the only option for Aboriginal and Torres Strait Islander peoples to get legal help.<sup>2</sup> ATSILS provide a unique legal help that recognises and responds to cultural factors that may influence and/or effect Aboriginal and Torres Strait Islander people. Aboriginal and Torres Strait Islander people don't just need access to more legal services; they need greater access to culturally appropriate legal services. Cultural safety and competency is essential for effective engagement, communication, delivery of services and the attainment of successful outcomes.

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<sup>1</sup> For more on this issue see the publications of the Indigenous Legal Needs Project: <https://www.jcu.edu.au/indigenous-legal-needs-project>

<sup>2</sup> NATSILS, 'Submission to the Senate Legal and Constitutional Affairs Committee: Inquiry into Access to Legal Assistance Services' (April 2015) 2 para 2.2, citing Australian National Audit Office, 'Administration of the Indigenous Legal Assistance Programme' (17 February 2015) 16.

Overall, despite the critical need and rising demand for ATSILS services, the amount of real funding provided to the ATSILS has been declining since 2013, while the cost of providing services has risen.

Labor's commitment to ensuring access to justice is welcomed. However to make this a reality, Labor must commit to fund the ATSILS to meet the civil and family needs of Aboriginal and Torres Strait Islander people, and to work with NATSILS to identify and map the unmet legal needs of Aboriginal and Torres Strait Islander people.

### **Suggested amendments:**

NATSILS recommends the following amendments to the Platform to reflect Labor's support for community-controlled Aboriginal and Torres Strait Islander Legal Services and family violence legal prevention services, as well as a commitment to map the unmet legal needs of Aboriginal and Torres Strait Islander people.

#### **Ch 9 Pt 174**

... Labor will:

Support victims and survivors of family violence going through court by resourcing community legal assistance including [community-controlled Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Services](#), and other culturally-appropriate support for Aboriginal and Torres Strait Islander people;

...

#### **Ch 9 Pt 216**

Labor is committed to ensuring our justice system is fair, simple, affordable and accessible, and based on principles of early intervention to help people resolve problems before they escalate and lead to entrenched disadvantage. [This includes a commitment to fair and equitable funding of community-controlled Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Services, who provide services from early intervention to post-release support for men, women and children.](#)

#### **Ch 9 Pt 224**

Labor will provide national leadership to resource our system of legal aid in partnership with the states and territories. Labor will support general and specialist community-based legal services, [including community-controlled Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Services](#), clinical legal education schemes and pro bono clearing house services.

#### **Ch 9 Pt 230**

[Add:](#)

[Comprehensive mapping of unmet legal needs for Aboriginal and Torres Strait Islander people across the country;](#)  
[Community-controlled Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Services and their representative bodies;](#)

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### 3. Support and fund self-determination via Aboriginal and Torres Strait Islander organisations and peak bodies, and the Redfern Statement

#### The issue:

NATSILS welcomes that the Platform acknowledges the right to self-determination. NATSILS also welcomes Labor's support for Aboriginal Medical Services and support for community-controlled service delivery organisations.

However, the Platform does not mention the Redfern Statement, commitment to implementing the Redfern Statement priorities, or support or funding for national representative Aboriginal and Torres Strait Islander organisations and peak bodies, apart from The National Congress of Australia's First Peoples.

Aboriginal and Torres Strait Islander community-controlled organisations and representative peak bodies are critical for amplifying Aboriginal and Torres Strait Islander people's voices and ensuring that laws and policies are informed by the diverse needs, stories and lived experiences of Aboriginal and Torres Strait Islander people.

National peak bodies including NATSILS are frequently called upon to contribute to policy reform and participate in design processes but are not funded or supported sufficiently to do this work. For example, NATSILS is only funded for two full time positions.

NATSILS calls for the Platform to include a commitment to self-determination via support for national representative Aboriginal and Torres Strait Islander organisations and peak bodies and the Redfern Statement.

#### The suggested amendments:

NATSILS recommends the following amendments to the Platform:

##### Ch 9 Pt 58

The National Congress of Australia's First Peoples is the national peak representative body of [Aboriginal and Torres Strait Islander people](#). Labor will support the National Congress of Australia's First Peoples, which gives First Nations peoples a forum to express their views and aspirations, and will work with other existing institutions and bodies at the national, state, and regional level.

[In addition, Labor recognises the important role of the many specialist Aboriginal and Torres Strait Islander national and peak representative bodies, many of which contribute to Congress, and commits to funding and supporting those organisations to have a coordinated approach to service delivery and to be innovative and evolving representative bodies that can maximise impact of operations.](#)

##### Ch 9 Pt 59

Community control and direct involvement of First Nations peoples [and their representative peak bodies](#) in the planning and delivery of [policy, laws](#), programs and services is important. [Labor supports the the Redfern Statement and commits to funding and working with Aboriginal and Torres Strait Islander representative organisations and peak bodies to meet these demands.](#) Labor will invest in high performance community-controlled Indigenous organisations to deliver the services First Nations peoples want and need.

**Ch 9 Pt 174**

Add:

Whole of government reform to ensure that cultural healing – driven by Aboriginal and Torres Strait Islander community-controlled organisations, built on trauma-informed practice and responsive to the diverse needs in different community contexts – is embedded in all elements of family violence response and prevention for Aboriginal and Torres Strait Islander peoples.

**Ch 9 Pt 183**

Add:

Prioritise funding and support for Aboriginal and Torres Strait Islander organisations providing family support, early intervention and prevention services, legal help, care and through-care services;

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**4. Strengthen support for new Closing the Gap Targets****The issue:**

NATSILS welcomes Labor's commitment to additional Closing the Gap targets in education, justice, disability and child protection. However, NATSILS calls on Labor to commit to justice targets that include closing the gap in the over-imprisonment of Aboriginal and Torres Strait Islander people but also the rates of violence, particularly family violence, experienced by Aboriginal and Torres Strait Islander people. NATSILS also calls for an additional target on housing to be added into the Platform.

For many years, NATSILS and other representative Aboriginal and Torres Strait Islander peak bodies including the National Family Violence Legal Prevention Forum have called for dual-justice targets. This includes the Change The Record Coalition.

The rationale behind these amendments has been frequently highlighted by NATSILS and the Change the Record Coalition, and most recently articulated in [NATSILS' submission to the Closing the Gap Refresh](#).

**Suggested amendments:**

NATSILS suggests the following amendments:

**Ch 9 Pt 61**

Closing the gap in life expectancy, employment, health, **justice** and education outcomes between First Nations peoples and other Australians is a national priority. Closing the Gap requires enduring commitment from all levels of government and the corporate and non-government sector, and in partnership with Indigenous peoples, to deliver the change they seek.

**Ch 9 Pt 72**

Australia needs to address First Nations peoples' interaction with the justice system including reducing rates of offending and victimisation and better community safety. Labor supports justice reinvestment and the development of **justice targets** under the Closing the Gap

framework to ensure coordinated action, accountability and progress to reduce the disproportionate incarceration and violence/victimisation rates of First Nations people. Suspicious deaths in custody should also be treated in a manner that maintains public confidence in the justice system. Labor recognises the link between family violence, child removal and other social determinants with the over-imprisonment of First Nations people.

#### Ch 9 Pt 64

Labor supports developing ~~three~~ additional Closing the Gap targets in partnership with First Nations peoples and organisations:

To increase participation in higher and further education, by ensuring greater opportunity for Indigenous students to continue their learning in the fields of their choice;

To improve access to services for First Nations people with disability, by ensuring 90 per cent of eligible Individuals will receive funded support under the National Disability Insurance Scheme by 2020; and

To address the high rates of over-imprisonment of First Nations people, particularly young people, ~~in the criminal justice system~~, as well as the unacceptably high rates of Indigenous children in out of home care, and the high rates of family violence/victimisation and homelessness of Aboriginal and Torres Strait Islander people.

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### 5. Lead national reform of the justice system with a preventative, holistic, placed-based and community-led approach

#### The issue:

NATSILS supports the Platform positions on justice reform. However, NATSILS believes that this needs to be backed by a firm commitment to a leadership role on setting standards and coordinating national justice reform. The Council of Australian Governments is an avenue to do this.

NATSILS and many other organisations, including the Change The Record Coalition, have continuously called for a holistic approach to justice that has a focus on prevention and dealing with the underlying causes of contact with the justice system.

National leadership will ensure Australia's compliance with international human rights obligations. The Australian Government has monitoring and reporting responsibility for Australia's compliance with international human rights obligations, such as those obligations articulated under the Convention on the Rights of the Child, the Convention on the Elimination of all forms of Racial Discrimination, the United Nations Declaration on the Rights of Indigenous Peoples, the International Covenant on Civil and Political Rights, Convention on the Rights of Persons with a Disability and the Optional Protocol to the Convention Against Torture (OPCAT), among others. It is the Australian Government who is and should be held accountable to ensure the protection and advancement of human rights for Aboriginal and Torres Strait Islander people.

Further, the Australian Government is responsible for Aboriginal and Torres Strait Islander people having access to justice. The over-representation of Aboriginal and Torres Strait Islander people in the justice system is worsening, and we cannot allow this to continue. National leadership is required now, before another generation is locked behind bars.

The amendments to Ch 9 Pt 230 are recommendations which have been extensively and comprehensively researched and set out in numerous submissions, reports and inquiries, from



NATSILS and other peak bodies, from coalitions such as Redfern Statement Alliance and Change the Record, as well as the Royal Commission into Aboriginal Deaths in Custody, the Royal Commission into the Protection and Detention of Children in the Northern Territory, the Australian Law Reform Commission's 'Pathways to Justice' inquiry, Amnesty International and Human Rights Law Centre Research, among others.<sup>3</sup>

### Suggested amendments:

NATSILS suggests the following amendments:

#### Ch 9 Pt 230

##### In Government Labor will focus on:

Efforts to reduce the unacceptably high rates of incarceration of Aboriginal and Torres Strait Islander Australians and in particular, young Aboriginal and Torres Strait Islander people;  
 Preventive and smart justice, by addressing the social, economic, environmental and cultural determinants of the imprisonment of Aboriginal and Torres Strait Islander people;  
 Engaging Aboriginal and Torres Strait Islander leadership and representative peak bodies in policy and legal reform;  
 Leading system-wide changes that embed cultural safety and responsiveness across the justice system and remove racism and other structural barriers to justice access and outcomes;  
 Funding and supporting prevention, diversion, bail support and through-care programs designed and run by Aboriginal and Torres Strait Islander community-controlled organisations and legal services;  
 Special attention to prevent deaths in custody, particularly among Aboriginal and Torres Strait Islander people, including the establishment and maintenance of a nationally funded Custody Notification Scheme run by Aboriginal and Torres Strait Islander Legal Services;  
 Training police and prison officers to understand Aboriginal and Torres Strait Islander peoples' culture and the Aboriginal and Torres Strait Islander peoples' social context;  
 Comprehensively mapping of unmet legal need for Aboriginal and Torres Strait Islander people across the country;  
 Funding and supporting community-controlled Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Services and their representative bodies;  
 Efficient, culturally appropriate legal aid services for Aboriginal and Torres Strait Islander people that recognise the over-representation of Aboriginal and Torres Strait Islander people within the criminal justice system;  
 A National Plan of Action to end the abuse and over-imprisonment of Aboriginal and Torres Strait Islander children including raising the minimum age of criminal responsibility to 14 years;  
 Jointly establish, or task, an independent central agency with Aboriginal and Torres Strait

<sup>3</sup> See Redfern Statement, *Joint Communiqué – Family Violence and Justice Workshop*, 27 June 2017 <<http://www.natsils.org.au/portals/natsils/Redfern%20Statement%20Family%20Violence%20and%20Justice%20Workshop%20Communique%20FINAL%2015%20Aug%202017.pdf?ver=2017-10-05-155011-357>> (accessed 27 April 2018); Change the Record Coalition, *Blueprint for change* (2015) <<https://drive.google.com/file/d/0B3OI0caEOuaFU3BNc3Zrbl9wa0U/view>> (accessed 27 April 2018); PwC and PwC's Indigenous Consulting, Change the Record, the Korin Gamadji Institute and Richmond Football Club, *Indigenous incarceration: Unlock the facts* (2017) 9 <<https://www.pwc.com.au/indigenous-consulting/assets/indigenous-incarceration-may17.pdf>> (accessed 27 April 2018); Human Rights Law Centre and Change the Record, *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment* (2017), rec 6 <[https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/59378aa91e5b6cbaaa281d22/1496812234196/OverRepresented\\_online.pdf](https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/59378aa91e5b6cbaaa281d22/1496812234196/OverRepresented_online.pdf)> (accessed 27 April 2018); Change the Record, *Free to be kids: National Plan of Action* (2018), rec 6 <<https://drive.google.com/file/d/1RUUnxUyjmrBUdMs91n7RKohTSHnzD7hQi/view>> (accessed 27 April 2018); Australian Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Report No 133 (2018), <[https://www.alrc.gov.au/sites/default/files/pdfs/publications/final\\_report\\_133\\_amended1.pdf](https://www.alrc.gov.au/sites/default/files/pdfs/publications/final_report_133_amended1.pdf)> (accessed 27 April 2018); Commonwealth, *Royal Commission into Aboriginal Deaths in Custody*, 1991.



Islander oversight to co-ordinate a comprehensive, current and consistent national approach to data collection and policy development;  
Addressing the specific needs of Aboriginal and Torres Strait Islander people who suffer multiple intersectional discrimination in the justice system including women, people with disability, people who identify as LGBTQI+, people with mental health needs;  
Establish an independent, national justice reinvestment body;  
Building Aboriginal and Torres Strait Islander-led research, evidence, translation, evaluation and monitoring capability for stronger impact;  
Ensuring police accountability and independent oversight for racism, discrimination and mistreatment;  
Cultural safety within the justice workforce at all levels of the system, including increasing the number of Aboriginal and Torres Strait Islander justice professionals; and  
Improving coordination between public, private and non-government justice providers, including mainstream and Aboriginal and Torres Strait Islander community controlled legal services;  
International treaties allowing the repatriation of Australians in overseas prisons;  
Consistency in sentencing with a sufficient degree of appropriate discretion so as to enable sentences to be tailored to the circumstances of each individual case; and  
Programs consistent with victims' rights, based upon restorative justice. Restorative justice to encourage community spirit and responsibility in the offender and to restore the victim and the community to their pre-offence state of security.

#### **Ch 9 Pt 229**

Labor opposes mandatory sentencing and detention regimes; they are often discriminatory in practice, conflict with the role of the judiciary as an independent arm of government, and have not proved effective in reducing crime or criminality. [Labor will lead national reform to repeal mandatory sentencing and detention laws.](#)

#### **Ch 10 Pt 61**

Labor will use the Council of Australian Governments process to modernise our Federation and improve the delivery of important services in areas like health, [justice](#), education, transport, water, emergency services and equality for Aboriginal and Torres Strait Islander peoples.

#### **Ch 9 Pt 227**

Sentencing should achieve deterrence, punishment, retribution and rehabilitation. Labor supports the just and humane treatment of accused people in custody and offenders in prison. Labor will conform to Australia's international human rights obligations and strive for world's best practice in its treatment of prisoners [including establishing independent oversight, monitoring and reporting of places of detention through the implementation of the Optional Protocol on the Convention against Torture.](#)

#### **Ch 9 Pt 228**

Prison is a last resort. Labor supports the appropriate use of non custodial sentencing options for all offenders. This principle is particularly important for young people, and all effort should be made to divert children from long-term involvement in the criminal justice system. How the criminal justice system treats juvenile offenders greatly influences whether they will re-offend. [For this reason, Labor commits to raising the minimum age of criminal responsibility to 14 years of age.](#) Labor will take all reasonable steps to ensure minors are not incarcerated in adult prisons.

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## Appendix A: Further Rationale for Amendments

### Section 2

#### Further rationale for amendments:

The ability for Aboriginal and Torres Strait Islander people to access to legal assistance services is far from adequate, given the extent of legal need in Aboriginal and Torres Strait Islander communities. Whilst this is undoubtedly the case in a criminal law context, the Indigenous Legal Needs Project has also found that civil and family law problems are experienced with considerable frequency in Indigenous communities and often in conjunction with a number of legal matters at one time.<sup>4</sup>

This need for greater access to culturally appropriate legal services has been recognised by the Productivity Commission, which emphasised that funding for separate Aboriginal and Torres Strait Islander Legal Services should be maintained.<sup>5</sup>

The demand for ATSILS services continues to grow, with particularly high demand for:

- criminal services, including casework and advice matters;
- civil services, especially in the areas of tenancy/housing, discrimination and police complaints;
- child protection and family law services; and
- representation for applicants and defendants of Domestic Violence Orders, which the ATSILS are not currently funded to provide except for in very limited circumstances.

NATSILS are significantly under resourced to meet the criminal legal needs of many Aboriginal and Torres Strait Islander people despite significant overrepresentation of adults and children throughout the criminal justice system. In this regard, it should be noted that ATSILS are funded at a lower level than other mainstream legal aid providers, despite the fact that many Aboriginal and Torres Strait Islander people accessing ATSILS are subjected to multiple layers of structural racism and disadvantage and often have complex high level needs such as low literacy and cognitive impairments. This discrepancy in funding discriminates against Aboriginal and Torres Strait Islander peoples and denies equal access to justice, as well as a significant reduced ability to deliver on many of the current Closing the Gap targets.

However, Aboriginal and Torres Strait Islander people need more than legal help from the ATSILS who need support to deliver holistic community based wrap around assistance. Indeed there is a need for ATSILS providers to give assistance in communities beyond individual case work in order to achieve more systemic change.<sup>6</sup>

The ATSILS are also underfunded in terms of providing relevant support services and programmes that could assist their clients in achieving better outcomes in the criminal justice system. Such services include ALSWA's Youth Engagement Program and prisoner Through Care programmes which support prisoners, pre, during and following their imprisonment. Such services are critical given that 77% of Aboriginal and Torres Strait Islander offenders in prison have served a previous sentence. Yet currently, only two of the ATSILS are funded and all are

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<sup>4</sup> Indigenous Legal Needs Project submission to the Senate Inquiry into Access to Legal Assistance Services, [https://www.jcu.edu.au/\\_\\_data/assets/pdf\\_file/0008/119843/jcu\\_147272.pdf](https://www.jcu.edu.au/__data/assets/pdf_file/0008/119843/jcu_147272.pdf)

<sup>5</sup> Ibid 7 [3.5.5], quoting Productivity Commission, 'Access to Justice Arrangements, Inquiry Report Overview' (September 2014) 24.

<sup>6</sup> Indigenous Legal Needs Project, *Submission to the Senate Inquiry into Access to Legal Assistance Services* (2015)

underfunded to deliver such services.<sup>7</sup> Long term funding and expansion of these programs is needed.

With respect to civil and family law services, a number of reports have highlighted the levels of unmet needs for civil and family law in Aboriginal and Torres Strait Islander communities.<sup>8</sup> It has been noted that an increasing proportion of services delivered by ATSILS relate to civil and family matters.<sup>9</sup> In particular, of the civil law issues experienced, a high number relate to housing and tenancy issues, and the rate at which Aboriginal and Torres Strait Islander people seek legal assistance for such issues is low.<sup>10</sup>

Child protection and representing defendants of Domestic Violence Orders are specific issues which could be greatly assisted through increased funding. In relation to child protection, there is a common perception amongst Aboriginal and Torres Strait Islander people that there is a lack of legal advice or representation for parents in cases where their children are being removed by child protection agencies.<sup>11</sup> Further, there are many barriers to ATSILS representing children in these matters which could be greatly improved by adequate funding.

In relation to family violence, there are conflict of interest situations where ATSILS may be prevented from representing either alleged victims of family violence or the accused person in a particular case. This is a serious access to justice issue. NATSILS submits that in addition to the increased focus of the ATSILS' work in the area of family law more generally, it is important that there is a separate Aboriginal and Torres Strait Islander-specific service for *victims* of family violence because of the nature of the provision of legal representation.

In the 2017-18 Federal Budget the Government restored funding cuts to ATSILS of \$16.7 million over the forward estimates. However, after 2020, ATSILS will be subject to funding cuts as a result of the Government's 2013 ongoing savings measure. These cuts will have a major impact on highly vulnerable Aboriginal and Torres Strait Islander people and impact upon the ability of ATSILS to deliver services that ensure Aboriginal and Torres Strait Islander people are equal before the law and have access to a fair trial.

In light of this, NATSILS reiterates previous calls to fund the ATSILS to meet the civil and family needs of Aboriginal and Torres Strait Islander people. In particular, that governments implement the finding of the Productivity Commission that an additional \$200 million to the legal assistance sector is required to begin meeting this unmet need.<sup>12</sup>

The Australian Government funded Indigenous Legal Assistance Programme (ILAP) does not currently identify the unmet legal needs of Aboriginal and Torres Strait Islander people, nor provide resources to address that need. Further, the ILAP review being conducted in 2018 is proposed to be undertaken without any research or audit of need and we believe that this

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<sup>7</sup> Ibid 5, paras 3.3.1–3.3.2.

<sup>8</sup> F Allison, M Schwartz and C Cunneen, 'The Civil and Family Law Needs of Indigenous People in WA (A report of the Australian Indigenous Legal Needs Project)' (2014); C Cunneen, F Allison and M Schwartz, 'Access to Justice for Aboriginal People in the Northern Territory' (2014) 49(2) *Australian Journal of Social Issues* 219.

<sup>9</sup> See NATSILS, 'Submission to the Senate Legal and Constitutional Affairs Committee: Inquiry into Access to Legal Assistance Services' (April 2015) 4, which noted that "[c]urrently 13% of the ATSILS legal assistances are civil needs and 9% are family law matters".

<sup>10</sup> NATSILS, 'Submission to the Productivity Commission: Inquiry into Access to Justice Arrangements' (November, 2013) 5 (accessed on 30 August 2017 at <http://www.natsils.org.au/portals/natsils/submission/NATSILS%20Submission%20-%20Productivity%20Commission%20Inquiry%20into%20Access%20to%20Justice%20Arrangements%208-11-13.pdf>), citing C Cunneen and M Schwartz, 'The Family and Civil Law Needs of Aboriginal People in NSW' (2008) 69; Fiona Allison et al, 'Indigenous Legal Needs Project: NT Report' (2012) 133.

<sup>11</sup> C Cunneen and M Schwartz, 'The Family and Civil Law Needs of Aboriginal People in NSW' (2008) 61, 63.

<sup>12</sup> Ibid 5 [3.2.7], citing Productivity Commission, 'Access to Justice Arrangements, Inquiry Report Overview' (September 2014) 24.

compromises the result. It is difficult to see how a review and a reviewer can make any assessment of effectiveness and efficiency of services delivered (for instance) without knowing the extent of the frontline service delivery need for services. There is some attempt to ameliorate the effects of this omission by allowing the reviews to consider whether there is any progress towards objectives and existing research but this will not resolve the problem.

### **Section 3**

#### **Further rationale for amendments:**

There is ample evidence of how culturally safe, community-controlled services are preferred and more effective for Aboriginal and Torres Strait Islander people. For example in child protection, ACCOs must be utilised not only for the provision of early family support, prevention services and OOHC services, but also for receiving expert advice about the placement of Aboriginal and Torres Strait Islander children.

An example of this is the Barreng Moorop program in Melbourne, run by the Victorian Aboriginal Child Care Agency (**VACCA**) is in partnership with Jesuit Social Services and VALS, for Aboriginal children aged 10 to 14 years old and their families. One of the key ingredients to the success of Barreng Moorop is its understanding that trauma reaches across generations. As such, working effectively with vulnerable and at risk Aboriginal children requires an aligned service delivery approach that focuses not only on the young person but their family.

Launched on 9 June 2016, the [Redfern Statement](#) comprehensively sets out Aboriginal and Torres Strait Islander expectations and priorities for engagement and progress by Australian Governments. The Redfern Statement is an Aboriginal and Torres Strait Islander blueprint to address the disadvantage and inequality still besetting their communities today. The statement contains sections on meaningful engagement, health, justice, preventing violence, early childhood and disability.

The Redfern Statement principles include:<sup>13</sup>

- Aboriginal and Torres Strait Islander communities, their organisations and representative bodies must be directly involved in decision-making about matters that affect Aboriginal and Torres Strait Islander peoples;
- Aboriginal and Torres Strait Islander community-controlled organisations are the preferred provider of culturally safe services and supports that understand and are, therefore, responsive to the particular needs and requirements of Aboriginal and Torres Strait Islander peoples;
- Aboriginal and Torres Strait Islander community controlled organisations, including legal services, must receive adequate levels of funding to have the capacity to respond to community needs and demand;
- More flexible funding models should be established to enable Aboriginal and Torres Strait Islander community controlled organisations to deliver holistic wrap around services that are responsive to community needs and to ensure the collaboration of unique expertise across sectors; and
- Governments must shift away from punitive and law enforcement focused approaches, and towards approaches that prioritise prevention, early intervention and diversion from the criminal justice system.

### **Section 5**

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<sup>13</sup> Redfern Statement, *Joint Communique – Family Violence and Justice Workshop*, 27 June 2017 <<http://www.natsils.org.au/portals/natsils/Redfern%20Statement%20Family%20Violence%20and%20Justice%20Workshop%20Communique%20FINAL%2015%20Aug%202017.pdf?ver=2017-10-05-155011-357>> (accessed 27 April 2018).

## Further rationale for amendments:

In response to the Northern Territory Royal Commission into the Protection and Detention of Children, Opposition Leader Bill Shorten stated that the “protection and detention of Australian young people is a national issue and a national responsibility – and it deserves Commonwealth leadership.” NATSILS agrees with this statement and asks Labor to commit to this in its Platform.

The 1967 Referendum provided the Australian Government with a broad responsibility for the rights and wellbeing of Aboriginal and Torres Strait Islander people, to be shared with the states and territories. While states and territories can make immediate legislative change on justice issues, national leadership from the Australian Government is essential to drive nation-wide, whole-of-government reform.

Australia faced international scrutiny for justice as a human rights failure last year after Australia’s review from the United Nations Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz. In her report, the Special Rapporteur said “the routine detention of young Indigenous children” was “the most distressing aspect of her visit” to Australia.<sup>14</sup> NATSILS is a member of the Change The Record Coalition, which called for a National Plan of Action on youth justice in 2017, including to raise the age of criminal responsibility to 14 years of age.<sup>15</sup>

### *Raising the minimum age of criminal responsibility*

The International Committee on the Rights of the Child has urged States Parties to adopt at least 14 years as the minimum age of criminal responsibility:

“A higher MACR [minimum age of criminal responsibility], for instance 14 or 16 years of age, contributes to a juvenile justice system which, in accordance with article 40 (3) (b) of CRC, deals with children in conflict with the law without resorting to judicial proceedings, providing that the child’s human rights and legal safeguards are fully respected.”<sup>16</sup>

The median age of criminal responsibility around the world is 14 years. The Children’s Rights Commissioner found in 2016:

The minimum age of criminal responsibility in Australia is comparatively low compared with other countries. For example, the minimum age is 12 years in Canada and the Netherlands; 13 years in France; 14 years in Austria, Germany, Italy, and many Eastern European countries; 15 years in Denmark, Finland, Iceland, Norway and Sweden; 16 years in Portugal, and 18 years in Belgium and Luxembourg. An international study of 90 countries revealed that 68 per cent had a minimum criminal responsibility age of 12 years or higher, with the most common minimum age of criminal responsibility being 14 years.<sup>17</sup>

As noted by Cunneen, international comparisons “clearly demonstrate the feasibility of raising the age, and doing so without adverse effects on crime rates.” Cunneen identified that countries

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<sup>14</sup> Victoria Tauli-Corpuz, Special Rapporteur, *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia*, UN Doc A/HRC/36/46/Add.2 (8 August 2017) paras 66-86.

<sup>15</sup> See Change the Record, *Free to be kids: National Plan of Action* (2018) <<https://drive.google.com/file/d/1RUnxUyjmrUdMs91n7RKohTSHnzD7hQi/view>> (accessed 27 April 2018).

<sup>16</sup> Committee on the Rights of the Child, *General Comment No 10: Children’s Rights in juvenile justice* (2007), 44th sess, UN Doc No CRC/C/GC/10, para 33.

<sup>17</sup> Megan Mitchell, *Children’s Commissioner Report 2016* (2016) 187.



that have raised the age, such as Germany and Norway, have low incarceration rates for older young people in the youth justice system “suggesting the absence of a younger cohort of children who would otherwise have come entrenched in the system through re-offending.”<sup>18</sup>

Despite having ratified the Convention on the Rights of the Child, and becoming a member of the Human Rights Council, Australia continues to imprison many very young children each year; mostly Aboriginal and Torres Strait Islander children.

The current age of criminal responsibility in all Australian jurisdictions is 10 years with a common law rebuttable presumption (*doli incapax*) that applies to children aged between 10 and 14 years. However, the presumption is not sufficient to protect the rights of children under 14 years, demonstrated by the significant numbers of children under 14 who continue to be imprisoned:

- In 2016-2017, there were 5,256 children aged 10-14 years with finalised criminal court charges in Australian children’s courts.<sup>19</sup>
- In 2015-2016 there were 599 children aged 10-13 years in youth detention and 66% were Aboriginal and Torres Strait Islander children (noting that NT did not provide data).<sup>20</sup>
- The overrepresentation is worse for younger children, with Aboriginal and Torres Strait Islander children comprising 79% of 10 and 11 year olds in youth detention 2015-16 (noting that NT did not provide data).<sup>21</sup>

There are a number of developmental arguments for raising the age, including neurobiological evidence that adolescent brains are not fully developed until the early twenties, contributing to impulse control and judgments around risk taking, in addition to hormonal changes and the effect of peer pressure on decision making.<sup>22</sup> Further, developing cognitive capacity occurs at different times for different children. Delmage has found that raising the age to 14 is more consistent with current developmental research.<sup>23</sup>

Relevant to this are the high rates of cognitive impairment of children in the justice system. The Telethon Institute recently found that of children in Banksia Hill Youth Detention Centre, 89% had at least one form of severe neurodevelopmental impairment, while 36% were found to have Fetal Alcohol Spectrum Disorder.

Further to this, raising the age of criminal responsibility to 14 years or higher has the “potential to reduce life-course interaction with the criminal justice system”.<sup>24</sup> Studies show that early contact with the justice system, leads to a higher likelihood of imprisonment as an adult, as well as having flow on implications for education and employment.<sup>25</sup> AIHW found that in 2014-2015,

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<sup>18</sup> Prof C Cunneen, *Arguments For Raising The Minimum Age of Criminal Responsibility* (2017), 3.

<sup>19</sup> Australian Bureau of Statistics, *Criminal Courts, Australia, 2016-2017*, Table 3.

<sup>20</sup> Australian Institute of Health and Welfare, *Youth Justice in Australia 2015-2016*, Table S74b.

<sup>21</sup> Australian Institute of Health and Welfare, *Youth Justice in Australia 2015-2016*, Table S78b.

<sup>22</sup> Cunneen, above n 18, 7, citing Sentencing Advisory Council of Victoria, *Sentencing Children and Young People in Victoria*, 2012.

<sup>23</sup> Cunneen, above n 18, 8, citing E Delmage, ‘The Minimum Age of Criminal Responsibility: A Medico-Legal Perspective’, *Youth Justice* 13(2) 102–110.

<sup>24</sup> Cunneen, above n 18, 12.

<sup>25</sup> Australian Institute of Health and Welfare, 2016. Young people returning to sentenced youth justice supervision 2014–15. For those whose first supervised sentence was community-based, 90% of those aged 10-12 at the start of this sentence returned to sentenced supervision, compared with 23% of those aged 16 and just 3% of those aged 17. More staggering were those sentenced to detention as their first supervised sentence, all (100%) those aged 10-12 at the start of this sentence returned to some type of sentenced supervision before they turned 18. This rate of return decreased with age, to around 80% of those 14 and 15, 56% of those 16 and 17% of those 17.



off young people released from sentenced detention, 48% returned to sentenced supervision within 6 months, and 74% returned within 12 months.<sup>26</sup>

Given the Australian Government's responsibility for compliance with international human rights law, and Australia now being a member of the Human Rights Council, NATSILS urges Labor to include in the Platform a commitment to ensuring Australia's compliance with children's rights and increasing the minimum age of criminal responsibility to 14 years across Australia.

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<sup>26</sup> Australian Institute of Health and Welfare, *Young people returning to sentenced youth justice supervision 2015–16* (2017).