

# Submission to the Closing the Gap Refresh 'The Next Phase' Public Discussion Paper

May, 2018

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## 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 [Closing the Gap Refresh](#) (the **Refresh**) process.

NATSILS understands that the Refresh is an opportunity for the development of a national, holistic, whole-of-government response to addressing substantive equality for Aboriginal and Torres Strait Islander people in respect of health, education, employment and, we argue, justice outcomes. NATSILS, along with the Change the Record Coalition as well as numerous reports and inquiries, have consistently emphasised how health, wellbeing and justice outcomes are inextricably linked and must be addressed holistically.

Our NATSILS submission seeks to provide a response to a number of questions raised in [The Next Phase Public Discussion Paper](#) (the **Discussion Paper**).

NATSILS understands that the Council of Australian Governments (**COAG**) has agreed to a strength-based approach to the next phase of Closing the Gap and that the Refresh will include both national and state targets.

NATSILS also understands that the Australian Government is using a 'Theory of Change' methodology in the development of targets and indicators and that the Australian Government plans to map out, systematically and based on evidence, their understanding of what drives change in a particular area and what the key intervention points are for moving outcomes in the direction they want to see.

Whilst NATSILS welcomes the decision of the COAG to undertake the Refresh process we are disappointed by a government designed and implemented consultation process that has excluded many communities and their representative peak Aboriginal and Torres Strait Islander organisations from participating due to a lack of co-design of the activities and processes.

Further, the timeframe for conducting the Refresh was too short to facilitate meaningful consultation with affected communities and peak bodies.

This approach does not reflect the government's commitments to working with us, rather than doing things to us. Instead, a co-design process is required to reflect this commitment. Australian governments have acknowledged that they need to work differently with Aboriginal and Torres Strait Islander peoples and that this includes genuine partnership with Indigenous leaders, organisations and communities to identify the priorities that will inform better programs and services, to close the gap. Despite this, we have been excluded from a number of key activities and have not been provided with the relevant information to participate meaningfully in what should be a respectful and participative process to developing this important policy.

NATSILS and many of the peak organisations that make up the Redfern Statement Alliance were excluded from the Special Gathering of prominent Indigenous Australians on 7-8 February 2018 in Canberra. The process whereby state and territory governments nominated Aboriginal & Torres Strait Islander representatives to attend this 'Special Gathering' (the **Gathering**), without consultation with Aboriginal and Torres Strait Islander community-controlled organisations, does not reflect self-determination or respectful, meaningful engagement. Only after the fact were a number of our members informed via email that the Gathering had taken place and was a historic opportunity for participants to provide independent advice to First Ministers in relation to the Closing the Gap Refresh and priorities for the next decade.<sup>1</sup>

Despite providing oral and written feedback as individuals, as community-controlled organisations and as community members, through a number of forums including the Redfern Statement Alliance, Change the Record Coalition and more, about the necessity to include us as partners in the Refresh process and all future activities, many peaks have now been excluded from a two day design workshop in Sydney on 14-15 May 2018 organised by the Closing the Gap Refresh Taskforce. The Taskforce has cited 'venue constraints' as the reason for limited invitations.

It is evident that successive governments have failed in the collaborative design and implementation of the Closing the Gap framework. However, with three of the seven targets on track in 2018, we are now seeing the most promising results since 2011. Whilst it may have taken a time for evidence of the Closing the Gap investments to emerge, this delay is not a reason to abandon a whole-of-government and cross portfolio approach to reducing disadvantage and inequality.

NATSILS calls on all Australian governments for a renewed federal approach to the Closing the Gap framework, building on the existing targets with additional targets on Closing the Gap on imprisonment and violence, disability, child protection and housing. The framework should recognise the importance of national leadership and accountability, but also the role of states and territories in achieving the Closing the Gap targets.

The new approach to Closing the Gap must have human rights self-determination at its core, with principles of co-design embedded throughout to ensure a true and collaborative partnership. This includes implementing the United Nations Declaration on the Rights of Indigenous Peoples as well as incorporating the Redfern Statement principles and recommendations. A critical part of this is governments funding and supporting Aboriginal and Torres Strait Islander representative peak bodies to do this important collaborative work.

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<sup>1</sup> Email received from Ian Anderson, Deputy Secretary, Prime Minister & Cabinet dated 28 February 2018.

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.

In addition, NATSILS sees culturally competent and safe services and programs as central to success in Closing the Gap, and calls on the Australian Government to better prioritise funding and support for our community-controlled organisations to provide these services and supports.

### 1.3. Recommendations to Australian governments

Recommendation 1: The Closing the Gap framework must be led by Aboriginal and Torres Strait Islander people and underpinned by the principles of self-determination and human rights.

Recommendation 2: The refreshed Closing the Gap framework, strategy, implementation and evaluation plans must be co-designed by Aboriginal and Torres Strait Islander people and underpinned by the Redfern Statement principles and recommendations.

Recommendation 3: Closing the Gap must be a national whole-of-government framework and strategy, including nation-wide reforms on justice to end the over-incarceration of Aboriginal and Torres Strait Islander people.

Recommendation 4: Maintain the current Closing the Gap targets, with the addition of further targets on justice, family violence, child protection, housing and disability.

Recommendation 5: Establish national justice targets to close the gap on the rates of imprisonment and rates of violence against Aboriginal and Torres Strait Islander people.

Recommendation 6: Establish measurable justice sub-targets, co-designed by Aboriginal and Torres Strait Islander community-controlled organisations, including on providing adequate resourcing to Aboriginal and Torres Strait Islander community-controlled organisations.

Recommendation 7: Establish a national target to close the gap on the rates of children in out-of-home care, supported by a strategy that prioritises community-controlled family support and prevention programs.

Recommendation 8: Establish a national target for the health and wellbeing of Aboriginal and Torres Strait Islander people with disability, including equitable access to the National Disability Insurance Scheme.

Recommendation 9: Jointly establish, or task, an independent central agency with Aboriginal and Torres Strait Islander oversight to co-ordinate a comprehensive, current and consistent national approach to data collection and policy development.

Recommendation 10: Establish an independent, national justice reinvestment body.

Recommendation 11: Work with Aboriginal and Torres Strait Islander organisations to identify unmet need, including legal need, and develop culturally appropriate community-based responses to that need.

Recommendation 12: Closing the Gap targets should be accompanied by an accountability mechanism such as a National Agreement with annual reporting.

Recommendation 13: Developing a strength-based approach to the Closing the Gap must include establishing an independent Aboriginal and Torres Strait Islander community controlled evidence intermediary.

Recommendation 14: Aboriginal and Torres Strait Islander community-controlled organisations are funded and supported to provide culturally appropriate and culturally safe services and supports for Closing the Gap.

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## **2. A national approach to Closing the Gap founded in self-determination, human rights and justice for Aboriginal and Torres Strait Islander people**

**Discussion paper question:** How can governments, Aboriginal and Torres Strait Islander Peoples, and businesses work more effectively together? What is needed to change the relationship between government and community?

Over the decade since the introduction of the Closing the Gap strategy, Aboriginal and Torres Strait Islander people have been subject to a revolving door of government policy decision-makers. The result of this has been a constantly shifting platform of initiatives, funding cuts, machinery of government and service provision, all of which have conspired to thwart any genuine attempts to close the gap in inequality experienced by Aboriginal and Torres Strait Islander peoples.

It is clear that the approach to Closing the Gap to date has not worked. To be successful, NATSILS considers that the refreshed Closing the Gap framework must be underpinned by self-determination, human rights and justice for Aboriginal and Torres Strait Islander people.

### **2.1. To build a national approach to Closing the Gap, founded in self-determination, human rights and justice for Aboriginal and Torres Strait Islander people, NATSILS makes the following recommendations:**

Recommendation 1: The Closing the Gap Framework must be led by Aboriginal and Torres Strait Islander people and underpinned by the principles of self-determination and human rights.

Recommendation 2: The refreshed Closing the Gap framework, strategy, implementation and evaluation plans must be co-designed by Aboriginal and Torres Strait Islander people and underpinned by the Redfern Statement principles and recommendations.

Recommendation 3: Closing the Gap must be a national whole-of-government framework and strategy, including nation-wide reforms on justice to end the over-incarceration of Aboriginal and Torres Strait Islander people.

### **2.2. Recommendation 1: The Closing the Gap Strategy must be led by Aboriginal and Torres Strait Islander people and underpinned by the principles of self-determination and human rights.**

Australia has recently consolidated its commitment to human rights by becoming a member of the United Nations Human Rights Council. The international community now has an expectation that Australia will not only uphold but be a global leader on human rights.

The refreshed Closing the Gap framework is an opportunity to put this into practice. The Closing the Gap framework is ultimately about undoing the generational impacts of colonisation on Aboriginal and Torres Strait Islander people. These policies including stealing land, children and wages, have led to the structural disadvantage experienced by Aboriginal and Torres Strait Islander communities across Australia, and make a Closing the Gap framework necessary.

NATSILS submits that the target areas in the Closing the Gap framework are human rights issues, and as such, must be underpinned by a human-rights based approach. Fundamentally, Closing the Gap is about ensuring basic human rights and needs of Aboriginal and Torres Strait Islander people, including access to services across health, education and employment. Closing

the Gap, at its core, is about righting historical wrongs and reversing social injustices. The ‘gap’ in social and economic outcomes experienced by Aboriginal and Torres Strait Islander people is reflective of the failures of successive Australian Governments to protect and advance the rights of our peoples.

The various social injustices and human rights issues experienced by Aboriginal and Torres Strait Islander people are inextricably intertwined, which is why Closing the Gap must take a holistic approach. NATSILS takes the position that a refreshed Closing the Gap framework must include the rights of women, children, people living with disability, the elimination of violence and all forms of discrimination, as well as economic and social rights including the right to housing.

NATSILS has repeatedly called on the Australian Government to establish a framework for the implementation of the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**) in consultation with Aboriginal and Torres Strait Islander communities, their organisations and representative bodies. A refreshed Closing the Gap strategy must embody and give effect to Australia’s obligations under the UNDRIP.

In particular, Australia has an obligation to ensure the right to self-determination for Aboriginal and Torres Strait Islander people in accordance with UNDRIP; the International Covenant on Civil and Political Rights (**ICCPR**) and the International Covenant on Economic, Social and Cultural Rights (**ICESCR**).

Self-determination includes:

- the right to freely determine our political status and freely pursue our economic, social and cultural development.<sup>2</sup>
- the right to autonomy or self-government in matters relating to our internal and local affairs, as well as ways and means for financing our autonomous functions.<sup>3</sup>
- the right to maintain and strengthen our distinct political, legal, economic, social and cultural institutions, while retaining our right to participate fully, if we so choose, in the political, economic, social and cultural life of the State.<sup>4</sup>

Last year, the United Nations Special Rapporteur on Indigenous Peoples Rights reported that Australia’s “failure to respect [Aboriginal and Torres Strait Islander peoples] rights to self-determination and to full and effective participation is alarming.”<sup>5</sup> The Special Rapporteur found that this failure has contributed to the failure to deliver on the Closing the Gap targets and “has contributed to aggravating the escalating incarceration and child removal rates of Aboriginal and Torres Strait Islanders.”<sup>6</sup>

The Australian government must adhere to its commitment to uphold articles in the UNDRIP, which require that Aboriginal and Torres Strait Islander peoples be provided the opportunity to take control of their own affairs on the fundamental principle of self-determination.

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<sup>2</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, UN Doc A/RES/61/295 (13 September 2007) (‘UN Declaration on the Rights of Indigenous Peoples’) art 3.

<sup>3</sup> *Ibid*, art 4.

<sup>4</sup> *Ibid*, art 5.

<sup>5</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) para 36.

<sup>6</sup> *Ibid*.



On a practical level for Closing the Gap, this requires governments to:

- respect the expertise of Aboriginal and Torres Strait Islander peak bodies, service-delivery organisations, leaders and communities for knowledge on “what works” for our people;
- include Aboriginal and Torres Strait Islander peak bodies, leaders, community members and organisations in co-designing and delivering services under the Closing the Gap framework and strategy;
- real and ongoing community consultation could occur, underpinned by national, regional and local leadership of Aboriginal and Torres Strait Islander representatives;
- provide long-term funding to Aboriginal and Torres Strait Islander peak bodies and service-delivery organisations to be able to effectively participate in this work and undertake these roles;
- support community-control for health, employment, education, disability, housing, family support and justice services;
- ensure Aboriginal and Torres Strait Islander service providers have data sovereignty;
- a long-term framework and strategy which is protected and pursued regardless of election cycles and changes to government.

NATSILS is of the view that this Closing the Gap refresh process has not adequately upheld the principles of self-determination. We hope that this will be rectified going forward as it is critical to the success of this refreshed framework and strategy.

Ensuring self-determination will also make sure that program and policy responses will be culturally based and community led, a fundamental principle for determining the success of any framework. The Aboriginal and Torres Strait Islander Suicide Prevention Evaluation Report, demonstrates the success of Aboriginal and Torres Strait Islander community-controlled services:

“A common success factor in community-based interventions or responses to Indigenous suicide is their development and implementation through Indigenous leadership and in partnership with Indigenous communities. This is not only because responses need to address cultural and ‘lived experience’ elements, but also because of the right of Indigenous people to be involved in service design and delivery as mental health consumers.”<sup>7</sup>

NATSILS considers there should be a continuing focus on the importance of Aboriginal and Torres Strait Islander individual, family and community strengths. The prioritisation of self-determination and community-led strategies will ultimately ensure the development of culturally safe and effective responses to addressing complexities underlying social and political disadvantages suffered by Aboriginal and Torres Strait Islander people.

However, the majority of funding earmarked for Aboriginal and Torres Strait Islander programs continues to be provided to non-Indigenous services. In 2016, a Senate Inquiry found that more than half of all of the Indigenous Advancement Strategy funding was allocated to non-

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<sup>7</sup> Professor Pat Dudgeon, Professor Jill Milroy AM, Professor Tom Calma AO, Dr Yvonne Luxford, Professor Ian Ring, Associate Professor Roz Walker, Adele Cox, Gerry Georgatos and Christopher Holland, *Solutions that Work: What the Evidence and the People Tell Us, Aboriginal and Torres Strait Islander Suicide Prevention Evaluation Report* (2016), University of Western Australia, 2, <[http://www.atsispep.sis.uwa.edu.au/data/assets/pdf\\_file/0006/2947299/ATSISPEP-Report-Final-Web.pdf](http://www.atsispep.sis.uwa.edu.au/data/assets/pdf_file/0006/2947299/ATSISPEP-Report-Final-Web.pdf)> (accessed 27 April 2018).

Indigenous agencies, with around half going to pre-existing programs.<sup>8</sup> The Productivity Commission's 2017 Indigenous Expenditure report confirms that in 2015-2016, of total direct expenditure on Aboriginal and Torres Strait Islander people (\$33.4b), \$6b was "Indigenous specific expenditure" (services and programs that are provided to the Aboriginal and Torres Strait Islander community specifically) compared with \$27.4b mainstream expenditure.<sup>9</sup> NATSILS understands that as at January 2018, only around half of the funding under the Indigenous Advancement Strategy was provided to Aboriginal and Torres Strait Islander controlled organisations.

This means that not only is the capacity for Aboriginal and Torres Strait Islander peoples to manage our own affairs in the principles of self-determination being undermined, but new and innovative community led, culturally based initiatives are being ignored.

Instead, Governments must commit to obtaining the free, prior and informed consent of Aboriginal and Torres Strait Islander peoples in the development of policy that affects our lives. The refreshed Closing the Gap framework should include processes for self-determination, outlining consultation protocols and timeframes to allow for meaningful input, roles and responsibilities and strategies for increasing Aboriginal and Torres Strait Islander participation in all institutions of democratic governance.

### **2.3. Recommendation 2: The refreshed Closing the Gap framework, strategy, implementation and evaluation plans must be co-designed by Aboriginal and Torres Strait Islander people and underpinned by the Redfern Statement principles and recommendations.**

NATSILS is of the strong view that government engagement for Closing the Gap must be founded on the principle of working *with* Aboriginal and Torres Strait Islander peoples rather than making policies *for* us.

It is important to consider the meaningful involvement of Aboriginal and Torres Strait Islander people in calling for the Closing the Gap policy. The Closing the Gap Statement of Intent in 2008 was a result of grass-roots campaigns led by Aboriginal and Torres Strait Islander leaders strongly connected to family and community, including the 2005 Social Justice Report from then Social Justice Commissioner Tom Calma and the Aboriginal and Torres Strait Islander-led 'Close the Gap' campaign. This began in 2006 and grew to include more than 40 health and human rights organisations.

Yet the meaningful involvement of Aboriginal and Torres Strait Islander people in the Closing the Gap Refresh has been far from adequate and is evident by select Aboriginal and Torres Strait Islander people receiving invitations and information, such as the *Final Special Gathering Discussion Guide*.

In co-designing the Closing the Gap framework, governments must recognise Aboriginal and Torres Strait Islander people as equal partners. Aboriginal and Torres Strait Islander people, including for example those working in a diverse range of community controlled organisations and government departments, combine lived experience and professional expertise and can

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<sup>8</sup> Senate Finance and Public Administration References Committee (Cth), *Commonwealth Indigenous Advancement Strategy tendering processes*, 17 March 2016, para 2.50.

<sup>9</sup> Steering Committee for the Review of Government Service Provision, *2017 Indigenous Expenditure Report (2017)* 6, <<https://www.pc.gov.au/research/ongoing/indigenous-expenditure-report/2017/ier-2017-indigenous-expenditure-report.pdf>> (accessed 27 April 2018).

identify shared aspirations for their families and their communities which must underpin the Closing the Gap framework. NATSILS considers that following co-design principles must be utilised throughout the refresh process:<sup>10</sup>

**Inclusive** – The process includes representatives from critical stakeholder groups who are involved in the co-design project from framing the issue to developing and testing solutions. It utilises feedback, advice and decisions from people with lived or work experience, and the knowledge, experience and skills of experts in the field.

**Respectful** – All participants are seen as experts and their input is valued and has equal standing. Strategies are used to remove potential or perceived inequality. Partners manage their own and others' feelings in the interest of the process. Co-design requires everyone to negotiate personal and practical understandings at the expense of differences.

**Participative** – The process itself is open, empathetic and responsive. Co-design uses a series of conversations and activities where dialogue and engagement generate new, shared meanings based on expert knowledge and lived experience. Major themes can be extracted and used as the basis for co-designed solutions. All participants are responsible for the effectiveness of the process.

**Iterative** – Ideas and solutions are continually tested and evaluated with the participants. Changes and adaptations are a natural part of the process, trialling possibilities and insights as they emerge, taking risks and allowing for failure. This process is also used to fine-tune potential outcomes or solutions as it reaches fruition and can later be used to evaluate its effectiveness.

**Outcomes focused** – The process can be used to create, redesign or evaluate services, systems or products. It is designed to achieve an outcome or series of outcomes, where the potential solutions can be rapidly tested, effectiveness measured and where the spreading or scaling of these solutions can be developed with stakeholders and in context.

People must have access to data and there must be shared principles which are co-developed by participants. Co-design is more than people participating in the conversation but also equipping people to have those conversations in a meaningful way. We must set up a process for the Closing the Gap Refresh that enables people to have the content, including data, that Government has and the context that Aboriginal and Torres Strait Islander people have in order to genuinely shape a framework and an implementation plan. Following this we must formulate a space to test that plan and develop evaluation models.

NATSILS agrees with the failures of governments - including on consultation and engagement with Aboriginal and Torres Strait Islander people - identified in the Close the Gap Campaign Steering Committee's 10 Year Review of the Closing the Gap framework, and with its recommendations for the Refresh. There are real opportunities for the Closing the Gap to reflect the strength and determination of Aboriginal and Torres Strait Islander people.

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<sup>10</sup> NSW Council of Social Service, *Principles of Co-Design* <<https://www.ncoss.org.au/news-and-events/community-sector-news/new-ncoss-resource-co-design-principles>> (accessed 27 April 2018).

The Redfern Statement Alliance has made it clear to the Prime Minister that Aboriginal and Torres Strait Islander peoples have the solutions and called for Australian governments to listen to and genuinely engage with Australia's First Peoples.

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.

NATSILS calls for the refreshed Closing the Gap Strategy to be underpinned by the following Redfern Statement principles and recommendations:<sup>11</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.

NATSILS also understands that the Australian Government is using a 'Theory of Change' methodology in the development of targets and indicators and that the Australian Government plans to map out, systematically and based on evidence, their understanding of what drives change in a particular area and what the key intervention points are for moving outcomes in the direction they want to see.<sup>12</sup> NATSILS acknowledges the importance of a theory of change to underpin the Refresh, noting that for the revised framework to succeed, this should be complemented by a long-term, cross-portfolio strategy with annual objectives and milestones to keep progress on track.

However, we emphasise that the theory of change must be co-designed *with us*; not be developed by governments and presented to Aboriginal and Torres Strait Islander people for feedback.

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<sup>11</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).

<sup>12</sup> Commonwealth, *Special Gathering Discussion Guide: Closing the Gap Refresh, Building pathways for future prosperity* (2018), 10.

#### **2.4. Recommendation 3: Closing the Gap must be a long-term, federal whole-of-government framework and strategy, including nation-wide reforms on justice.**

NATSILS fully supports the national focus and aims of the Closing the Gap framework. Having national targets, driven by a national campaign and funded by the Australian Government, ensures that a solid foundation and unified direction can be adhered to.

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 to reach the Closing the Gap targets, national leadership from the Australian Government is essential to drive nation-wide, whole-of-government reform.

Further, national leadership will ensure Australia's compliance with international human rights obligations through its continued progress of the Closing the Gap targets. The Australian Government has monitoring and reporting responsibility for Australia's compliance with international human rights obligations, such as those obligations articulated under the CERD, the UNDRIP, ICCPR, Convention on the Rights of Persons with a Disability and the Optional Protocol to the Convention Against Torture (**OPCAT**). Reconceiving the Closing the Gap framework with a human-rights based approach, it is clear that 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.

##### *Complementary state, territory and local council place-based targets*

In addition to national headline targets, and acknowledging the role of state and territory governments in achieving the Closing the Gap framework, NATSILS is of the view that targets included in the Closing the Gap framework could be further enhanced by setting jurisdictional objectives, responsibilities and accountability measures.

State and territory based targets should be negotiated directly with the relevant national or state level Aboriginal Controlled Community Organisations (**ACCOs**), and leadership and community groups, and be designed to meet the national headline targets.

This will also ensure that state-based programs are working to achieve the targets, and also is a sensible and quantifiable approach to elements of the Closing the Gap strategy that are primarily or at least equally a state and territory jurisdictional responsibility.

Further to this, NATSILS would strongly suggest that local councils and electorates can also play a part in achieving Closing the Gap targets.

While local councils may not be responsible for overall health, education and employment strategies and policies, local councils are often interacting with local Aboriginal and Torres Strait Islander peoples with community based programs that do correspond with the aspirations of the Closing the Gap.

Local councils – as well as state and territory governments – also have the capacity to interact with local Aboriginal and Torres Strait Islander communities, and therefore provide and promote programs that are relevant and culturally meaningful to those communities, and respect the diversity found within Aboriginal and Torres Strait Islander communities across the country.



NATSILS calls for an entire, whole-of-government commitment to the refreshed Closing the Gap framework, which includes national, state, territory and local council commitments to actively promote and contribute to achieving quantifiable outcomes.

*Embracing a cross-portfolio, long-term approach*

The ‘gap’ in social and economic outcomes experienced by Aboriginal and Torres Strait Islander people cannot be closed by considering issues in isolation by government departments. Health, education, employment, poverty, housing, disability, violence and justice are all deeply interconnected. Progress will be achieved when a more holistic approach is adopted.

The recent AIHW report, ‘Closing the Gap targets: 2017 analysis of progress and key drivers of change’, identified addressing the social determinants of disadvantage as “critical” for Closing the Gap, as they directly affect target outcomes.<sup>13</sup> AIHW highlighted how social determinants lead to imprisonment for Aboriginal and Torres Strait Islander people, as well as the flow on impacts of imprisonment affecting an individual’s social determinants.<sup>14</sup> NATSILS also points to Change the Record’s Blueprint for Change and PwC Indigenous Consulting’s ‘Unlock the Facts’ report, which outlines in detail the drivers of imprisonment of Aboriginal and Torres Strait Islander people, many which cross-over with Closing the Gap targets such as education, health, disability and employment.<sup>15</sup> AIHW also identified the interconnectedness between current Closing the Gap targets, for example how positive policy changes in housing can lead to outcomes in education, health and justice.<sup>16</sup>

Disadvantage can be further compounded by intersectionality for Aboriginal and Torres Strait Islander people, for example where gender, race, disability, sexual or gender diversity overlap.

The result of this is that any refreshed Closing the Gap framework must be focused at the whole-of-government level (both state and national) with cross-portfolio commitments and coordination. NATSILS agrees with the assessment of the Close the Gap Campaign Steering Committee:

“Addressing the underlying causes (the social determinants) requires a high degree of cross-portfolio purpose and collaboration, as these factors are both mutually supporting and interdependent. The lack of progress against targets raises questions about whether there has been sufficient cross-portfolio commitment to Closing the Gap. The imperative of portfolio-based ministerial responsibility, accountability and budget rules may present not only a complex coordination task but serves to work against agendas that require cross-cutting, whole-of- government approaches and commitment.”<sup>17</sup>

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<sup>13</sup> Australian Institute of Health and Welfare, *Closing the Gap targets: 2017 analysis of progress and key drivers of change* (2018) 10, <<https://www.aihw.gov.au/getmedia/e48ac649-2fdd-490d-91cf-4881ab5ef5c2/aihw-ihw-193.pdf.aspx?inline=true>> (accessed 27 April 2018).

<sup>14</sup> *Ibid*, 11,

<sup>15</sup> See Change the Record Coalition, *Blueprint for change* (2015) <<https://drive.google.com/file/d/0B3OI0caEQuaFU3BNc3Zrbl9wa0U/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) 6 <<https://www.pwc.com.au/indigenous-consulting/assets/indigenous-incarceration-may17.pdf>> (accessed 27 April 2018).

<sup>16</sup> *Ibid*, 14.

<sup>17</sup> Close the Gap Campaign Steering Committee, *A ten-year review: the Closing the Gap Strategy and Recommendations for Reset* (2018) 20 <[https://www.humanrights.gov.au/sites/default/files/document/publication/CTG%202018\\_FINAL-WEB.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/CTG%202018_FINAL-WEB.pdf)> (accessed 27 April 2018).

This is why Closing the Gap must be a national, whole-of-government framework and strategy.

*A federal, whole-of-government approach that includes national justice reforms*

For the same reasons, the refreshed Closing the Gap framework must include national leadership on reforms to end the over-incarceration of Aboriginal and Torres Strait Islander people. The soaring rates of Aboriginal and Torres Strait Islander people imprisonment are one of Australia's greatest human rights injustices.

Aboriginal and Torres Strait Islander adults comprise 2 per cent of the population but 27 per cent of the prison population.<sup>18</sup> Aboriginal and Torres Strait Islander people are 13 times more likely to be imprisoned than non-Indigenous people. This is worse, and increasing, for Aboriginal and Torres Strait Islander women, who are imprisoned at 21 times the rate of non-Indigenous women.<sup>19</sup> Aboriginal and Torres Strait Islander children, who are 6 per cent of the Australian youth population, make up 55 per cent of children and young people in prison are 25 times more likely to be imprisoned.<sup>20</sup>

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>21</sup>

Ms Tauli-Corpuz found that the current claim of the Australian Government that it is solely a state and territory responsibility "is untenable... and worsens the impact" of the "national detention crisis". The Special Rapporteur also found that:

"[A]s long as the issue of overrepresentation of Indigenous peoples in custody is not addressed in practice and continuously monitored, there will only be limited progress in closing the gap in the areas of health, education and employment."<sup>22</sup>

Similarly, the interconnected nature of justice outcomes with current Closing the Gap outcomes has been extensively proven, and was most recently noted by AIHW, which highlighted how justice has direct impacts on achieving the Year 12 Attainment target and the Employment target.<sup>23</sup>

The Change the Record Coalition, led by Aboriginal and Torres Strait Islander peak bodies, has continually called for national leadership for national justice reforms.<sup>24</sup> The Australian

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<sup>18</sup> Australian Bureau of Statistics, *Prisoners in Australia, 2017* (2017), Table 2 'Prisoners, selected characteristics 2007-2017'; Table 17 'Imprisonment rate, selected characteristics by state/territory'.

<sup>19</sup> The rate for Aboriginal and Torres Strait Islander women was 471.2 per 100,000 people, while for non-Indigenous women it was 23.1 per 100,000 as at 30 June 2017: *Ibid*, Table 21 'Prisoners, Indigenous status, sex and age by state/territory'.

<sup>20</sup> Australian Institute of Health and Welfare, *Youth justice in Australia 2015-16* (2017), Table S75a: 'Young people in detention on an average day(a) by sex and Indigenous status, states and territories, 2015-16'; Table S144: 'Population of young people aged 10-17, by age, sex and Indigenous status'; Table S77a: 'Young people aged 10-17 in detention on an average day by sex and Indigenous status, states and territories, 2015-16 (rate)'.

<sup>21</sup> Victoria Tauli-Corpuz, above n 4, paras 66-86, para 74.

<sup>22</sup> *Ibid*, para 85.

<sup>23</sup> Australian Institute of Health and Welfare, above n 12, 169, 188, 213, 218.

<sup>24</sup> See Change the Record Coalition, above n 14; 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),

<https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/59378aa91e5b6cbaaa281d22/149681223419>

Government is in a good position to lead these reforms with the recommendations and findings of the Australian Law Reform Commission report, 'Inquiry into the Incarceration rates of Aboriginal and Torres Strait Islander peoples'.

The inclusion of justice targets is critical to the overall success of the Closing the Gap framework, as outlined in Part 3 of this submission.

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### 3. Renew and develop key targets and commitments

#### Discussion paper questions:

What do you think are the key targets or commitments that should be measured in a refreshed Closing the Gap agenda?

What indicators should governments focus on to best support the needs and aspirations of Aboriginal and Torres Strait Islander Peoples? Should governments focus on indicators such as prosperity, wellbeing or other areas?

#### 3.1. In relation to Key Targets and Commitments, NATSILS recommends the following:

Recommendation 4: Maintain the current Closing the Gap targets, with the addition of further targets on justice, family violence, child protection, housing and disability.

Recommendation 5: Establish national justice targets to close the gap on the rates of imprisonment and rates of violence against Aboriginal and Torres Strait Islander people.

Recommendation 6: Establish measurable justice sub-targets, co-designed by Aboriginal and Torres Strait Islander community-controlled organisations, including on providing adequate resourcing to Aboriginal and Torres Strait Islander community-controlled organisations.

Recommendation 7: Establish a national target to close the gap on the rates of children in out-of-home care, supported by a strategy that prioritises community-controlled family support and prevention programs.

Recommendation 8: Establish a national target for the health and wellbeing of Aboriginal and Torres Strait Islander people with disability, including equitable access to the National Disability Insurance Scheme.

#### 3.2. Recommendation 4: Maintain the current Closing the Gap targets, with the addition of further targets on justice, family violence, child protection, housing and disability.

NATSILS believes that the existing Closing the Gap targets should remain, with the addition of new targets. Whilst it is evident that successive governments have failed in the collaborative design and *implementation* of the Closing the Gap framework, with three of the seven targets on track in 2018 we are now seeing the most promising results since 2011. Whilst it may have taken a time for evidence of the Closing the Gap investments to emerge, this delay is not a

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[6/OverRepresented\\_online.pdf](#) (accessed 27 April 2018); Change the Record, *Free to be kids: National Plan of Action* (2018) <<https://drive.google.com/file/d/1RUnxUyjmrBjUdMs91n7RKohTSHnzD7hQi/view>> (accessed 27 April 2018).



reason to abandon a whole of government and cross portfolio approach to reducing inequality and disadvantage.

As discussed earlier, NATSILS is of the view that the reason for the lack of success of the Closing the Gap framework to date has not been the ambitious and aspirational targets themselves, but of a failure of consecutive governments to:

- 1) meaningfully give effect to self-determination by:
  - a) consulting and co-design strategies with Aboriginal and Torres Strait Islander people;
  - b) providing long-term funding to Aboriginal and Torres Strait Islander peak bodies to fully participate in decision making and co-design processes;
  - c) prioritising long-term funding and support for Aboriginal and Torres Strait Islander community-controlled organisations to deliver services needed under the framework.
- 2) take a human-rights based approach to Closing the Gap;
- 3) include justice and other social determinants to ensure a holistic, effective approach to Closing the Gap that recognises the inter-relationship between each of the targets; and
- 4) take a long-term, intergenerational approach to Closing the Gap.

NATSILS reiterates the findings of the Close the Gap Steering Committee in its 10 Year Review of the framework with regard to Government failures in adhering to and implementing the Closing the Gap framework.<sup>25</sup>

To this end, NATSILS calls for a renewed commitment to current targets, with the addition of new targets to reflect a holistic, cross-portfolio approach.

Parts 3.3 - 3.6 of this submission outline NATSILS position on the need for new targets on justice, family violence, child protection and disability.

In addition, we refer to the Change the Record Coalition's submission, of which NATSILS is a member, on the need for additional targets on housing.

### **3.3. Recommendation 5: Establish national justice targets to close the gap on the rates of imprisonment and rates of violence against Aboriginal and Torres Strait Islander people.**

NATSILS believes it is imperative that justice is included in the refreshed Closing the Gap framework and calls on the Australian Government to establish national justice targets, including specific targets to close the gap on the rates of imprisonment of and rates of violence against Aboriginal and Torres Strait Islander people. This recommendation echoes the Australian Law Reform Commission's Recommendation 16-1 from its recent 'Pathways to Justice' Inquiry into the Incarceration of Aboriginal and Torres Strait Islander Peoples.<sup>26</sup>

As discussed in Part 2 above, justice outcomes are deeply linked with the other Closing the Gap targets, and governments cannot achieve success in one without the other. The correlation between health, education, employment and other factors such as child protection and housing,

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<sup>25</sup> See Australian Institute of Health and Welfare, above n 12, 4, 5, 8, 26.

<sup>26</sup> Australian Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Report No 133 (2018), 41-45, <[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).

and the high rates of incarceration of Aboriginal and Torres Strait Islander people has been documented extensively, from the Royal Commission into Aboriginal Deaths in Custody report in 1991, and most recently, in the Australian Law Reform Commission's 'Pathways to Justice' inquiry.<sup>27</sup>

The overrepresentation of our men, women and children in prison is abundantly clear and the Closing the Gap framework has contributed to the broader acknowledgement of these inequalities by non-Aboriginal and Torres Strait Islander people. With nine in ten (90 per cent or 10,199 prisoners) Aboriginal and Torres Strait Islander prisoners being male<sup>28</sup> and younger Aboriginal men having the highest rate of suicide in the world,<sup>29</sup> governments cannot ignore that the holistic rights and needs of Aboriginal and Torres Strait Islander people are not being met.

Similarly, violence has a devastating impact on our communities, and particularly Aboriginal and Torres Strait Islander women and children. In 2015 Aboriginal and Torres Strait Islander women were 32 times more likely to be hospitalised as a result of injuries caused by family violence.<sup>30</sup> Homicide deaths of Aboriginal and Torres Strait Islander women were 15 times the rate for non-Indigenous women across 5 jurisdictions from 2008-2012.<sup>31</sup> The reality may in fact be much worse, with official statistics under-representing the level of violence by many Aboriginal and Torres Strait Islander women, men and children. It is estimated that up to 90 per cent of violence may not be disclosed.<sup>32</sup> Aboriginal and Torres Strait Islander children are at greater risk of being exposed to family violence than other children.<sup>33</sup>

Family violence is a leading contributor to Aboriginal and Torres Strait Islander women's homelessness, poverty, imprisonment, disability, physical injury and illness, social and emotional ill health, and loss of children through child protection intervention and forced removal.<sup>34</sup> For example, one study indicated that of the Aboriginal and Torres Strait Islander women in Victoria's prisons, over 87 per cent were victims of sexual physical or emotional abuse.<sup>35</sup> While men are less likely to experience family violence as adults, their experiences as

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<sup>27</sup> Commonwealth, Royal Commission into Aboriginal Deaths in Custody, 1991; Australian Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Report No 133 (2018), 41-45, <[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).

<sup>28</sup> Australian Bureau of Statistics, *Prisoners in Australia, 2017* (2017), Table 21 'Prisoners, Indigenous status, sex and age by state/territory'.

<sup>29</sup> Commonwealth, *Australian Youth Development Index: A Jurisdictional Overview of Youth Development* (2016), 22, <[https://d3n8a8pro7vhmx.cloudfront.net/youthaction/pages/244/attachments/original/1473751041/Australian\\_YDI16\\_web\\_v6.pdf?1473751041](https://d3n8a8pro7vhmx.cloudfront.net/youthaction/pages/244/attachments/original/1473751041/Australian_YDI16_web_v6.pdf?1473751041)> (accessed 27 April 2018).

<sup>30</sup> Australian Productivity Commission, *Overcoming Indigenous Disadvantage - Key Indicators 2016* (2016), 4.98, table 4A.12.13 <<http://www.pc.gov.au/research/ongoing/overcoming-indigenous-disadvantage/2016/report-documents/oid-2016-overcoming-indigenous-disadvantage-key-indicators-2016-report.pdf>> (accessed at 27 April 2018).

<sup>31</sup> Steering Committee for Review of Government Service Provision, *Overcoming Indigenous Disadvantage Key Indicators Report 2014, COAG Targets & Headline Indicators* (2014), Table 4A.11.31.

<sup>32</sup> M Willis, *Non-disclosure of violence in Australian Indigenous communities* (2011) Australian Institute of Criminology.

<sup>33</sup> K Cripps, CM Bennett, LC Gurrin and DM Studdert, 'Victims of violence among Indigenous mothers living with dependent children' (2009) MJA 191(9) 481-485; J Mouzos and T Makkai, *Women's experiences of male violence : findings from the Australian component of the International Violence Against Women Survey (IVAWS)* (2004) Australian Institute of Criminology.

<sup>34</sup> SNAICC – National Voice for our Children, National Family Violence Prevention Legal Services Forum and National Aboriginal and Torres Strait Islander Legal Services, *Strong Families, Safe Kids: Family violence response and prevention for Aboriginal and Torres Strait Islander children and families* (2017) 8

<[http://www.natsils.org.au/portals/natsils/Strong\\_Families\\_Safe\\_Kids-Sep\\_2017.pdf?ver=2017-10-18-111427-643](http://www.natsils.org.au/portals/natsils/Strong_Families_Safe_Kids-Sep_2017.pdf?ver=2017-10-18-111427-643)> (accessed 27 April 2018).

<sup>35</sup> Holly Johnson, *Drugs and Crime: A Study of Incarcerated Female Offenders* (2004), Australian Institute of Criminology, Research and public policy series No 63, xiv.

victims must be considered in the delivery of support services, as recognised in 2015 by the Senate Finance and Public Administration References Committee.<sup>36</sup>

Despite this, the [proposed Closing the Gap Refresh model of 'Prosperity'](#) fails to consider and include the very real impacts of the justice system which affect the lives and wellbeing of Aboriginal and Torres Strait Islander people. Justice sits within every one of the four quadrants of the 'Prosperity' model. For example: a criminal history impacts ability to obtain employment or a new rental lease; disrupted education while in prison having impacts on later employment and income; being subject to child protection increases likelihood of youth detention; removal from family and country while in prison leading to trauma; not being able to practice culture while in prison leading to trauma and mental health issues; trauma experienced in the justice system having impacts on family violence, social inclusion and substance abuse.

This 'Prosperity' model does not reflect what it means to 'thrive' for Aboriginal and Torres Strait Islander people. To 'thrive' means having control of our destiny and communities, being connected to country, our culture and our languages, keeping our families and communities strong, healthy and together, out of prisons and free from racism and trauma.

In contrast, the proposed 'Prosperity' framework seems to be based in Western concepts such as personal economic wealth and Western education structures. If an Aboriginal person is successfully employed, but is disconnected from country and culture, this may not meet our community's definition of 'thriving' or 'prosperity'. This definition will not be the same for everyone. This model doesn't recognise systemic issues and roadblocks to closing the gap. For example, governments must end the poverty faced by Aboriginal and Torres Strait Islander people, but this is a systemic issue rather than an individual issue, and workplaces and hiring practices must change to become culturally safe to allow for more Indigenous employment.

Calls for national justice targets have been continuously made by a broad range of Aboriginal and Torres Strait Islander leaders and organisations since the beginning of the Closing the Gap Strategy. For example, in 2009, the then Social Justice Commissioner Tom Calma called for justice targets:

“...you will not be able to meet these targets if you continue to have such a high proportion of the Indigenous population caught up in the criminal justice system because imprisonment compounds individual and community disadvantage. Over time we would hope that the Closing the Gap targets will lead to an improvement in life chances and therefore a reduction in imprisonment but this could take a generation at the very least. For this reason, specific justice targets are needed now.”<sup>37</sup>

These calls have been repeated by every Social Justice Commissioner since, as well as Aboriginal and Torres Strait Islander peak bodies, the Change the Record Coalition, the UN Special Rapporteur on Indigenous Peoples Rights as well as many NGOs including the Law

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<sup>36</sup> Senate Finance and Public Administration References Committee (Cth), *Domestic Violence in Australia*, 20 August 2015, 2-3

<[https://www.apf.gov.au/Parliamentary\\_Business/Committees/Senate/Finance\\_and\\_Public\\_Administration/Domestic\\_Violence/Report](https://www.apf.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Domestic_Violence/Report)> (accessed 27 April 2018).

<sup>37</sup> Tom Calma, *Social Justice Report 2009* (2009) 54

<[https://www.humanrights.gov.au/sites/default/files/content/social\\_justice/sj\\_report/sjreport09/pdf/sjr\\_2009\\_web.pdf](https://www.humanrights.gov.au/sites/default/files/content/social_justice/sj_report/sjreport09/pdf/sjr_2009_web.pdf)> (accessed 27 April 2018).

Council, Federation of Community Legal Centres, Amnesty International, Human Rights Law Centre, ANTaR and Oxfam, and most recently the Australian Law Reform Commission.<sup>38</sup>

Yet the Australian Government has continued to ignore these calls for the inclusion of national justice targets. Whilst responsibility can be devolved and shared, it must not be divested. Prime Minister and Cabinet has policy responsibility for Indigenous community safety at a Commonwealth level, including crime prevention, diversion and rehabilitation. The ‘Safer Communities’ Building Block of the Council of Australian Governments (COAG) ‘Close the Gap’ framework is the only area of the Closing the Gap that is not accompanied by specific targets. NATSILS believes this is a clear gap, and illustrates the failure to acknowledge the root causes of disproportionate incarceration and victimisation of Aboriginal and Torres Strait Islander people.

The Safer Communities Building Block must be accompanied by justice targets which focus on victimisation and incarceration, both about improving community safety. By including justice targets in the Closing the Gap framework we have an opportunity to holistically address the extent to which agency and structure are at play when it comes to driving imprisonment and victimisation. A concerted and long term commitment to include justice targets in the Closing the Gap framework can help drive targeted investment and the creation of a re-structured space that allows Aboriginal and Torres Strait Islander people to take advantage of their own circumstances and their own cultural authority. Headline targets must be accompanied by sub targets which take a deficit and strength-based approach - see recommendation 6.

Any strategy that is developed to tackle the high rates of incarceration must be culturally based and include community led programs underpinned by the principle of self-determination. Such programs must also be based on principles of justice reinvestment and restorative justice, with an emphasis on prevention, diversion, rehabilitation and holistic support.

NATSILS recommends that the Australian Government establishes two headline just targets, to be co-designed by Aboriginal and Torres Strait Islander people and our community controlled organisations, including peak representative bodies. NATSILS suggests the following wording as a starting point for consultation and co-design:

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<sup>38</sup> See 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) para 86; Australian Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Report No 133 (2018), rec 16-1, <[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); Mick Gooda, *Social Justice and Native Title Report 2014* (2014) 117; Change the Record Coalition, *Blueprint for change* (2015) <<https://drive.google.com/file/d/0B3OI0caEOuaFU3BNc3ZrbI9wa0U/view>> (accessed 27 April 2018); Media release, June Oscar, ‘Pathways to Justice ALRC report welcomed by Commissioner June Oscar AO’, 28 March 2018 <<https://www.humanrights.gov.au/news/media-releases/pathways-justice-alrc-report-welcomed-commissioner-june-oscar-ao>> (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/1RUnxUyjmrUdMs91n7RKohTSHnzD7hQi/view>> (accessed 27 April 2018).

<b>Headline target</b>	Close the gap in the rates of imprisonment of Aboriginal and Torres Strait Islander people by 2040.
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<b>Headline target</b>	Close the gap in the rates of violence against/victimisation of Aboriginal and Torres Strait Islander people by 2040.
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NATSILS is hopeful that the Australian Government will take this opportunity to act on the community's continued calls for justice targets.

**3.4. Recommendation 6: Establish measurable justice sub-targets and indicators, co-designed by Aboriginal and Torres Strait Islander community-controlled organisations, including on providing adequate resourcing to Aboriginal and Torres Strait Islander community-controlled organisations.**

Justice targets will be far more achievable with complimentary sub-targets and indicators. In accordance with self-determination principles, these must be co-designed and developed in partnership with Aboriginal and Torres Strait Islander community-controlled organisations and peak representative bodies.

Sub-targets will provide more clarity to the different strategies needed to achieve the headline target. They can also set interim goals to be met along the way to achieving the headline target.

Indicators can provide a baseline from which to measure progress, which assists with monitoring, reporting and accountability. NATSILS notes the monitoring and reporting work on justice-related indicators by the Productivity Commission in its Overcoming Indigenous Disadvantage framework.<sup>39</sup>

The development of appropriate sub-targets and indicators will also give greater and much-needed attention to the root causes and the consequences of the over-imprisonment of Aboriginal and Torres Strait Islander people.

NATSILS strongly believes that to be reflective of a human rights based approach, the Closing the Gap framework needs to go beyond a whole of population based approach in order to assist the most marginalised people in our communities. Accordingly, there should be sub-targets for the over-incarceration of children, women and men. Each of these groups have differing needs, issues, underlying causes and solutions, and therefore require their own strategies. Each strategy must take into account the multiple levels of structural disadvantage of individuals, families and communities. This will make the overarching targets much more achievable.

For example, for Aboriginal and Torres Strait Islander children, NATSILS takes the position that a sub-target should include ending the imprisonment of children under 14 years by 2020. NATSILS is a member of the Change the Record Coalition, which has called for the age of criminal responsibility to be raised to 14 years. The Change the Record Coalition, which is Indigenous-led, has also detailed a number of strategies to end the over-incarceration of Aboriginal and Torres Strait Islander children in its report 'Free to be kids: a National Plan of

<sup>39</sup> Australian Productivity Commission, above n 30.



Action'.<sup>40</sup> A National Plan of Action should form the basis of the strategy to achieve the sub-target for children.

The sub-targets need to be supported by appropriately targeted investment, monitoring and accountability to ensure continued progress. A key aspect of this is allocating funding for Aboriginal and Torres Strait Islander led solutions, including early intervention and diversion programs, as well as culturally appropriate services including health and legal services. These programs should be developed by communities, for communities, addressing trauma and healing, self-esteem, anger management, resilience, life skills, family relationships and parenting issues.

As part of the commitment to include Justice Targets in the Closing the Gap framework, it is essential that there is a nation-wide commitment to comprehensively measure the unmet legal needs of Aboriginal and Torres Strait Islander people and to develop in partnership a shared measurement and evaluation framework to measure the impact that ATSILS have in their communities. This is discussed further in Recommendation 11 of Part 4 below.

Governments have a responsibility to ensure access and availability of culturally safe, holistic, effective family support services for vulnerable Aboriginal and Torres Strait Islander families. This must include investing to ensure strong referral pathways to identify and intervene as early as possible on issues impacting family functioning to ensure adequate, culturally safe, wrap-around service supports for Aboriginal and Torres Strait Islander families.

For the purpose of further co-design and consultation, NATSILS suggests the following justice targets, sub-targets and indicators. NATSILS further endorses the submission of the National Family Violence Legal Prevention Services in relation to the second headline target.

<b>Headline target</b>	<b>Close the gap in the rates of imprisonment of Aboriginal and Torres Strait Islander people by 2040.</b>
<b>Sub-targets</b>	<p>[Sub-targets to be designed by or in genuine partnership with Aboriginal and Torres Strait Islander people and community controlled organisations]</p> <ul style="list-style-type: none"> <li>● Halve the gap in the rates of imprisonment of Aboriginal and Torres Strait Islander children by 2030, including ending the imprisonment of 10-13 year old children by 2020.</li> <li>● Halve the gap in the rates of imprisonment of Aboriginal and Torres Strait Islander women by 2030.</li> <li>● Halve the gap in the rates of imprisonment of Aboriginal and Torres Strait Islander men by 2030.</li> <li>● Identify numbers of Aboriginal and Torres Strait Islander people with disability and who identify as LGBTIQ+ in prison by 2020.</li> <li>● All Aboriginal and Torres Strait Islander people have access to family support, prevention, diversion and rehabilitation programs designed and managed by Aboriginal and Torres Strait Islander</li> </ul>

<sup>40</sup> See Change the Record, *Free to be kids: National Plan of Action* (2018) <<https://drive.google.com/file/d/1RUxUyjmrUdMs91n7RKohTSHnzD7hQi/view>> (accessed 27 April 2018).

	<p>community controlled organisations by 2020.</p> <ul style="list-style-type: none"> <li>● All Indigenous Advancement Strategy grants to be provided to community controlled organisations by 2020.</li> </ul>
<p><b>Indicators</b></p>	<p>Possible indicators of success:</p> <ul style="list-style-type: none"> <li>● increased police and court diversion</li> <li>● increased bail accommodation facilities</li> <li>● increased funding and support for Indigenous-specific legal services</li> <li>● increases in culturally competent family support, prevention, diversion and rehabilitation programs</li> <li>● increased number of justice reinvestment projects across Australia</li> <li>● increased and adequate funding for Aboriginal and Torres Strait Islander community controlled organisations and their programs and services</li> <li>● increased investment in Aboriginal and Torres Strait Islander community controlled services for prevention, diversion and rehabilitation is proportionally greater than the investment in detention services</li> <li>● increased compliance rates for community-based orders</li> <li>● increased numbers of prisoners released on parole</li> <li>● increased data availability of Aboriginal and Torres Strait Islander people in the justice system, including identifying people with disability and LGBTIQ+ people</li> <li>● reduced arrest rates</li> <li>● reduced recidivism rates</li> <li>● reduced numbers of people on remand</li> <li>● reduced number of prisoners who are victims of violence</li> <li>● reduced human rights abuses in prisons</li> <li>● number of racial discrimination and racism complaints from Aboriginal and Torres Strait Islander legal services and oversight bodies</li> </ul> <p>Current indicators from Productivity Commission's Overcoming Indigenous Disadvantage reporting framework:</p> <ul style="list-style-type: none"> <li>● imprisonment rates, age standardised, by jurisdiction</li> <li>● crude imprisonment rates, by sex and jurisdiction</li> <li>● sentenced prisoners by most serious offence and expected time to serve</li> <li>● imprisonment rates by age group</li> <li>● prisoners by legal status</li> <li>● juvenile detention rates, people aged 10-17 years, by sex, age group and jurisdiction</li> <li>● juvenile detention rates by legal status.</li> <li>● juvenile diversions as a proportion of all juvenile offenders</li> <li>● repeat offending.</li> </ul>

<b>Headline target</b>	<b>Close the gap in the rates of violence against Aboriginal and Torres Strait Islander people by 2040.</b>
<b>Sub-targets</b>	[Sub-targets to be designed by or in genuine partnership with Aboriginal and Torres Strait Islander people and community controlled organisations]
<b>Indicators</b>	<ul style="list-style-type: none"> <li>● Hospitalisation rates;</li> <li>● Referrals to family violence services, including specialist Aboriginal and Torres Strait Islander Community Controlled Organisations;</li> <li>● The number of police call outs;</li> <li>● The number of domestic violence orders;</li> <li>● The number of perpetrators convicted for family violence related offences;</li> <li>● Homicide rates;</li> <li>● Rates of family violence related housing issues and homelessness;</li> <li>● Rates of working days lost due to family violence related leave;</li> <li>● The number of child protection notifications where family violence is identified;</li> <li>● Changes in community attitudes (as measured by mechanisms such as the National Community Attitudes to Violence Against Women (‘NCAS’) Survey that now includes specific questions on Aboriginal and Torres Strait Islander peoples)</li> </ul>

**3.5. Recommendation 7: Establish a national target to close the gap on the rates of children in out-of-home care, supported by a strategy that prioritises community-controlled family support and prevention programs.**

Aboriginal and Torres Strait Islander children are over-represented at every point in the child protection system. Aboriginal and Torres Strait Islander children are 7 times more likely to be the subject of substantiated reports to child protection services than non-Indigenous children and 10 times more likely to be placed in out-of-home care (OOHC).<sup>41</sup> Currently representing 36.3 per cent of all children in OOHC,<sup>42</sup> the number of Aboriginal and Torres Strait Islander children removed by child protection services is projected to triple by 2035.<sup>43</sup>

The ATSILS are currently drastically underfunded to deliver legal services in child protection matters. The Productivity Commission has recognised that Aboriginal and Torres Strait Islander people face vast unmet legal need. The Productivity Commission also found that the “inevitable consequence of these unmet legal needs is a further cementing of the longstanding over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system”.<sup>44</sup>

<sup>41</sup> Australian Institute of Health and Welfare, *Child protection Australia 2016-2017* (2018) 26, 40 <<https://www.aihw.gov.au/getmedia/66c7c364-592a-458c-9ab0-f90022e25368/aihw-cws-63.pdf.aspx?inline=true>> (accessed 27 April 2018).

<sup>42</sup> Australian Institute of Health and Welfare, above n 41.

<sup>43</sup> SNAICC – National Voice for our Children, *The Family Matters Report: Measuring trends to turn the tide on Aboriginal and Torres Strait Islander child safety and removal* (2016) 23 <[http://www.familymatters.org.au/wp-content/uploads/2016/12/Family\\_Matters\\_Report\\_2016.pdf](http://www.familymatters.org.au/wp-content/uploads/2016/12/Family_Matters_Report_2016.pdf)> (accessed 27 April 2018).

<sup>44</sup> Productivity Commission, *Access to Justice Arrangements* (2014) Inquiry report, Volume 2, No 72, 784 <<https://www.pc.gov.au/inquiries/completed/access-justice/report>> (accessed 27 April 2018).



Sufficient funding must be provided to the ATSILS who retain the expertise in delivering culturally responsive legal advice in family and child protection matters.

NATSILS also raise concern in relation to the direct and identified links between the child protection and the youth justice system.<sup>45</sup> Recent studies have identified that young people placed in OOHC are 16 times more likely than the equivalent general population to be under youth justice supervision in the same year.<sup>46</sup> For young people in OOHC, there is also a recognised increased risk of involvement with the criminal justice system after leaving OOHC.<sup>47</sup> For example, in Victoria, 37 per cent of young people in youth justice centres have been subject to a child protection order and 18 per cent of young people in custody are currently clients of child protection and youth justice services.<sup>48</sup>

The risk of entering the juvenile justice system for children in OOHC increases significantly when the child or young person is Aboriginal or Torres Strait Islander.<sup>49</sup> Aboriginal and Torres Strait Islander children, who are 6 per cent of the Australian youth population, make up 55 per cent of children and young people in prison are 25 times more likely to be imprisoned.<sup>50</sup> Involvement with the youth justice system is a strong predictor of incarceration as an adult, with the Public Health Association of Australia recognising that:

“86% of Aboriginal and Torres Strait Islander juvenile offenders enter the adult correctional system, compared with 75% of non-Aboriginal and Torres Strait Islander juvenile offenders, with 65% serving prison terms compared with 41% of non-Aboriginal and Torres Strait Islander juveniles. Further, 91% of juvenile offenders who had been subject to care and protection orders progressed to the adult prison system.”<sup>51</sup>

NATSILS calls for the urgent implementation of a national target to reduce child removal incidence and a national strategy to eliminate over-representation that prioritises community-led early intervention and family support programs in order to prevent Aboriginal and Torres Strait Islander children coming into contact with the child protection system in the first place. This has been identified as an urgent reform by United Nations Special Rapporteur on the Rights of Indigenous Peoples.<sup>52</sup>

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<sup>45</sup> S Wise and S Egger, *The Looking After Children Outcomes Data Project: Final Report*, Australian Institute of Family Studies (2007) 15; Katherine McFarlane, *Care-criminalisation: The involvement of children in out-of-home care in the NSW criminal justice system* (2015), UNSW.

<sup>46</sup> Australian Institute of Health and Welfare, *Young People in Child Protection and under Youth Justice Supervision 2014–15* (2016).

<sup>47</sup> Raman, S., Inder, B. and Forbes, C., *Investing for Success: The economics of supporting young people leaving care* (2005), Centre for Excellence in Child and Family Welfare, Melbourne; McDowall, J., *Report Card: Transitioning from Care* (2008), CREATE Foundation, Sydney; McDowall, J., *Report Card: Transitioning from Care: Tracking Progress* (2009), CREATE Foundation, Sydney.

<sup>48</sup> Victorian Government, *Youth Parole Board Annual Report 2016-2017* (2017), 30.

<sup>49</sup> Catia G Malvaso, Paul H Delfabbro and Andrew Day, ‘The Child Protection and Juvenile Justice Nexus in Australia: A Longitudinal Examination of the Relationship between Maltreatment and Offending’ (2017) 64 *Child Abuse & Neglect* 32.

<sup>50</sup> Australian Institute of Health and Welfare, *Youth justice in Australia 2015–16* (2017), Table S75a: ‘Young people in detention on an average day(a) by sex and Indigenous status, states and territories, 2015–16’; Table S144: ‘Population of young people aged 10–17, by age, sex and Indigenous status’; Table S77a: ‘Young people aged 10–17 in detention on an average day by sex and Indigenous status, states and territories, 2015–16 (rate)’.

<sup>51</sup> Justice Health Special Interest Group (JHSIG) (2016). *Incarceration of Aboriginal and Torres Strait Islander people policy*. Public Health Association of Australia (PHAA), Policy at a Glance, [www.phaa.net.au/documents/item/1704](http://www.phaa.net.au/documents/item/1704). Accessed January 2017.

<sup>52</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).

A key success measure for this target should be compliance with the Aboriginal and Torres Strait Islander Child Placement Principle (**ATSICPP**). ATSICPP ensures that Aboriginal and Torres Strait Islander children remain connected to family, community, culture and country. As described by SNAICC:

“The Child Placement Principle recognises the destructive and ongoing impact of policies and practices of assimilation and the separation and removal of Aboriginal and Torres Strait Islander children from their parents and communities. It recognises that Aboriginal and Torres Strait Islander people have the knowledge of each child staying connected to their family, community, culture and country. It promotes a partnership between government and Aboriginal and Torres Strait Islander communities in decision making about children’s welfare, in order to ensure that the connections are understood and maintained.”<sup>53</sup>

However, in 2016-2017, only 68 per cent of Aboriginal and Torres Strait Islander children in Australia were placed with family, kin or other Aboriginal and Torres Strait Islander carers.<sup>54</sup> This number does not measure the government’s efforts to investigate options for a placement compliant with ATSICPP or the requirement to consult with Aboriginal and Torres Strait Islander people through that process. The narrow conceptualisation and poor implementation of the ATSICPP must be urgently addressed through the refreshed Closing the Gap framework.

Further, this target should include sub-targets for funding and supporting Aboriginal and Torres Strait Islander community controlled organisations (**ACCOS**). 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**) 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.

NATSILS further endorses the SNAICC Closing the Gap submission for further detail on the requirements of this new target, its sub-targets and indicators.

### **3.6. Recommendation 8: Establish a national target for the health and wellbeing of Aboriginal and Torres Strait Islander people with disability, including equitable access to the National Disability Insurance Scheme.**

In 2012-2013, almost half of Aboriginal and Torres Strait Islander people aged 18 years and over had a disability or a long-term health condition.<sup>55</sup> For this reason, the refreshed Closing the Gap framework must more thoroughly include and respond to the needs and human rights of people with disability.

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<sup>53</sup> SNAICC, *Aboriginal and Torres Strait Islander Child Placement Principle: Aims and Core Elements* (June 2013) 3.

<sup>54</sup> Australian Institute of Health and Welfare, above n 41, 48.

<sup>55</sup> Australian Institute of Health and Welfare, *Aboriginal and Torres Strait Islander Health Performance Framework 2014 Report* (2015) 3, <[https://www.pmc.gov.au/sites/default/files/publications/Aboriginal\\_and\\_Torres\\_Strait\\_Islander\\_HPF\\_2014%20-%20edited%2016%20June2015.pdf](https://www.pmc.gov.au/sites/default/files/publications/Aboriginal_and_Torres_Strait_Islander_HPF_2014%20-%20edited%2016%20June2015.pdf)> (accessed 27 April 2018).

The interaction of people with cognitive and mental health disability and the justice system has been identified by the Australian Government as an issue of national concern. The lack of available supports and services for Aboriginal and Torres Strait Islander people with disability, including FASD, is placing an increasing over-reliance on the criminal justice system.

Additional services are especially required to support Aboriginal and Torres Strait Islander persons living with a disability or cognitive impairments. Persons with cognitive and psychiatric impairments may have a history of offending related to their disability, and are less likely to live in secure accommodation. Accordingly, they are at a greater risk of being refused bail. It can also be difficult for a person with these types of impairment to understand and comply with increasingly onerous bail conditions, particularly where bail conditions are imposed without the provision of additional support. This increases the chance that the person will breach the conditions of their bail. State and territory governments should work with Aboriginal and Torres Strait Islander organisations to develop stronger bail support and diversion options for such persons.

Despite the high prevalence rates of disability for Aboriginal and Torres Strait Islander people, detailed earlier, there has been little investment in policy work, research and data to meet their needs. This presents a hurdle for the success of the NDIS in Aboriginal and Torres Strait Islander communities.

Government must invest in a strong evidence-base to support the development of culturally appropriate and community-based responses to the needs of Aboriginal and Torres Strait Islander people with disability.

The unique nature of the needs of people with disability in the justice system is just one example of the inequalities that people with disability experience, which exist across all of the Closing the Gap targets.

NATSILS supports the recommendation of the First Peoples Disability Network for a new Closing the Gap target for closing the gap on the health and wellbeing of Aboriginal and Torres Strait Islander people with disability. Equal access to the National Disability Insurance Scheme is a necessary step in closing the gap for Aboriginal and Torres Strait Islander people with a disability, and this should be included as part of this target and framework.

#### 4. Measuring Outcomes and ensuring accountability for real progress

**Discussion paper question:** How could the Closing the Gap targets better measure what is working and what is not?

##### 4.1. In relation to measuring outcomes and ensuring accountability for real progress, NATSILS recommends the following:

Recommendation 9: Jointly establish, or task, an independent central agency with Aboriginal and Torres Strait Islander oversight to co-ordinate a comprehensive, current and consistent national approach to data collection and policy development.

Recommendation 10: Establish an independent, national justice reinvestment body.

Recommendation 11: Work with Aboriginal and Torres Strait Islander organisations to identify unmet need, including legal need and the needs of people with disability, and develop culturally appropriate community based responses to that need.

Recommendation 12: Closing the Gap targets should be accompanied by an accountability mechanism such as a National Agreement with annual reporting.

##### 4.2. Recommendation 9: Jointly establish, or task, an independent central agency with Aboriginal and Torres Strait Islander oversight to co-ordinate a comprehensive, current and consistent national approach to data collection and policy development.

Accurate and up-to-date data is critical to developing effective policies to close the gap.

The gaps in data are many and varied across issues, and there is a lack of consistency in how states and territories collect and report data on Aboriginal and Torres Strait Islander people. AIHW recently set out a number of data limitations relating to the current Closing the Gap framework and called for a data development strategy.

**Table 1.5: Closing the Gap targets, data sources and limitations**

COAG Target	COAG agreed data sources	Data limitations
Child mortality	ABS Death registrations	Quality of Indigenous identification; small numbers create variability in time-series.
Early childhood education	ABS National Early Childhood Education and Care Collection	The current methodology results in ECE enrolment rates for some jurisdictions exceeding 100%.
School attendance	ACARA National Student Attendance Collection	Data on the underlying days attended are not available publicly.
Literacy and numeracy	ACARA National Assessment Program— Literacy and Numeracy	A focus on the NMS is only one point in distribution of scores; Indigenous NMS % fluctuates across years.
Year 12 attainment	Main: ABS Census; Supplementary: ABS NATSISS/AATSIHS (Indigenous) and ABS SEW (non-Indigenous)	Infrequent collection as well as non-response for Census data; survey data affected by small sample in 20–24 age group.
Employment	Main: ABS NATSISS/AATSIHS (Indigenous) and ABS SEW (non-Indigenous); Supplementary: ABS Census	Infrequent collection of existing data; baseline affected by CDEP; inclusion of young ages (15–20) can affect the employment rate through changes in continuing education.
Life expectancy	ABS experimental Aboriginal and Torres Strait Islander and non-Indigenous life tables	Quality of Indigenous identification; small numbers prevent regular time series.

NATSILS has repeatedly highlighted the deficits in data for the justice system, including across policing, discrimination, family violence and the effectiveness of diversion and support programs. Currently most metrics in the justice system are deficit based. However, as well as identifying service delivery gaps in the justice system, there must be an emphasis on acquiring data that details and identifies positive outcomes and trends in our communities.

It is evident that the lack of sufficient data is intricately linked to the failure of policy and services responses for Aboriginal and Torres Strait Islander peoples – including the inadequate resourcing of successful Aboriginal and Torres Strait Islander-led programs to conduct comprehensive monitoring and evaluation. Securing investment in the necessary best practice preventative supports for Aboriginal and Torres Strait Islander women, children and men such as cultural healing programs, requires investing in the evaluation of programs.

NATSILS reiterates the recommendation of the Redfern Statement Joint Communique – Preventing Violence and Justice Workshop to create an intergovernmental agency to direct (among other things) the collection and publication of data on all thematic areas of the Redfern Statement including, for example, in relation to health and wellbeing, law enforcement, prison and corrective services.

The Central Agency should focus on the acquisition of qualitative as well as quantitative data from all states and territories to ensure that the unique and complex trends affecting Aboriginal and Torres Strait Islander people across the Closing the Gap target areas are captured.

There are few examples of Aboriginal and Torres Strait Islander community designed outcomes frameworks and evaluation methods. Evaluations of Aboriginal and Torres Strait Islander initiatives are often conducted by Government-appointed consultants that do not understand the unique holistic methods and cultural protocols of service delivery designed and delivered by Aboriginal and Torres Strait Islander community controlled organisations.

While there is evidence to support the achievement of positive outcomes within Aboriginal and Torres Strait Islander communities, it too often fails to influence smarter policy and commission



decisions, which in turn prevents a number of Aboriginal and Torres Strait Islander organisations being able to deliver effective programs and service delivery on the ground.

We must have a resourced network to share insights and evidence of what works in our communities. Aboriginal and Torres Strait Islander organisations must be provided the opportunity to articulate the effective measures of elements such as cultural immersion and cultural strengthening.

#### **4.3. Recommendation 10: Establish an independent, national justice reinvestment body.**

NATSILS agrees with the Australian Law Reform Commission's recommendation to establish an independent justice reinvestment body.

Recommendation 14-1 from the 'Pathways to Justice' calls for:

The purpose of the body should be to promote the reinvestment of resources from the criminal justice system to community-led, place-based initiatives that address the drivers of crime and incarceration, and to provide expertise on the implementation of justice reinvestment. Its functions should include:

- providing technical expertise in relation to justice reinvestment;
- assisting in developing justice reinvestment plans in local sites; and
- maintaining a database of evidence-based justice reinvestment strategies.

The justice reinvestment body should be overseen by a board with Aboriginal and Torres Strait Islander leadership.

NATSILS has previously made similar recommendations, for example in our submission to the Senate Legal and Constitutional Affairs Inquiry into Justice Reinvestment in Australia.<sup>56</sup>

NATSILS continues to support the creation of a central coordinating agency for justice reinvestment and considers that this is critical to ensuring that justice reinvestment initiatives are effective in genuinely addressing the underlying causes of criminal conduct in Aboriginal and Torres Strait Islander communities (and the Australian community more generally) in the long term.

The key focus of that agency should be to build the evidence base that informs justice reinvestment initiatives, to assist in identifying locations for justice reinvestment initiatives and to inform modelling as to fiscal benefits that can be realised by any state and territory governments that have not yet signed on to justice reinvestment initiatives. Establishing a reliable evidence base will be critical to ensuring the long-term success of justice reinvestment initiatives and ensuring uptake by all state and territory governments.

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<sup>56</sup> NATSILS, 'Submission to the Senate Legal and Constitutional Affairs Committee: Inquiry into Justice Reinvestment in Australia' (March 2013) <<http://www.natsils.org.au/portals/natsils/NATSILS%20Submission%20to%20Senate%20Justice%20Reinvestment%20Inquiry%20March%202013.pdf>> (accessed 27 April 2018).

NATSILS recommends that, in doing so:

- any existing evidence should be collated and made publicly available. NATSILS emphasises that accurate and rigorous data collection should be a key component of justice reinvestment strategies; and
- where possible, data should be disaggregated by regions and communities to allow for the development of targeted responses to needs in specific areas. Governments should implement comprehensive data collection policies in consultation with local service providers.

Any central coordinating agency and any subsequent justice reinvestment initiatives in Aboriginal and Torres Strait Islander communities must have, and insist on, cultural expertise throughout the process of designing and implementing justice reinvestment initiatives. This involvement is key to ensuring programs are culturally safe, and is also consistent with the principles of community control, prior and informed consent, and self-determination. Local and peak Aboriginal and Torres Strait Islander organisations can play a role in supporting this work.

#### **4.4. Recommendation 11: Work with Aboriginal and Torres Strait Islander organisations to comprehensively map unmet need, including legal need, and develop culturally appropriate community based responses to that need.**

In order to close the gap, there is an urgent need for governments to work with Aboriginal and Torres Strait Islander organisations to identify unmet need, particularly legal need.

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>57</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 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:

“In measuring legal need in Indigenous communities it is necessary to consider not just the regularity with which specific legal issues are experienced, but also the way in which different types of legal problems run alongside each other and, at certain points, come together or coincide, causing legal need to intensify. The ILNP has referred to this as a ‘snowballing’ of legal problems. It has identified numerous instances of Aboriginal and Torres Strait Islander people being affected by multiple legal problems simultaneously, with often one or all of these problems set aside and left unaddressed, for a range of reasons, until perhaps they reach a crisis point such as eviction from a tenancy or escalation to a criminal law matter. This has implications for service delivery, including requiring that legal services expend additional resources on working with Indigenous clients to effectively address need. They must, for instance, spend time ‘unpacking’ the

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<sup>57</sup> For more on this issue see the publications of the Indigenous Legal Needs Project: <https://www.jcu.edu.au/indigenous-legal-needs-project>

complexity of the issues in question, they should approach this need holistically and should ensure greater access to legal help as soon as possible after issues arise.”<sup>58</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>59</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 and police complaints;
- child protection and family law services; and
- representation to defendants of Domestic Violence Orders, which the ATSILS are not currently funded to provide except for in very limited circumstances.

The eight 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 legal aid option for Aboriginal and Torres Strait Islander peoples.<sup>60</sup> ATSILS provide a unique legal service that recognises and responds to cultural factors that may influence and/or affect Aboriginal and Torres Strait Islander people. As noted in NATSILS’ submission to the Senate Inquiry into Access to Legal Assistance in 2015:

“It is important to note that 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 competency is essential for effective engagement, communication, delivery of services and the attainment of successful outcomes.”<sup>61</sup>

The growing demand for ATSILS services in each of these areas has been identified previously in several of NATSILS’ previous submissions.

NATSILS are significantly under resourced to meet the criminal legal needs of many Aboriginal and Torres Strait Islander people. 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.

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<sup>58</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>59</sup> Ibid 7 [3.5.5], quoting Productivity Commission, ‘Access to Justice Arrangements, Inquiry Report Overview’ (September 2014) 24.

<sup>60</sup> NATSILS, Submission No 13 to the Australian Senate Legal and Constitutional Affairs Committee, *Senate Inquiry into Access to Legal Assistance Services*, April 2015, para 2.2, citing Australian National Audit Office, ‘Administration of the Indigenous Legal Assistance Programme’ (17 February 2015) 16.

<sup>61</sup> Ibid 6–7, paras 3.5.1, 3.5.3.



However, Aboriginal and Torres Strait Islander people need more than legal assistance from the ATSILS. Indeed there is a need for ATSILS providers to give assistance in communities beyond individual case work in order to achieve more systemic change. The Indigenous Legal Needs Project submitted in 2015 that:

“...Aboriginal legal services need to be adequately resourced to undertake work for their respective communities that includes but also moves beyond individual casework. These services should be given sufficient funds to enable them to develop as strategic an approach as possible to the extensive need in the community – one that is not just reactive to the individual clients that walk through their door and seek help and advice.”<sup>62</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 prisoner Through Care programmes which support prisoners, pre, during and following their imprisonment. Such services are critical given that 77 per cent of Aboriginal and Torres Strait Islander offenders in prison have served a previous sentence. Yet currently, the ATSILS are not funded or are underfunded to deliver such services.<sup>63</sup>

Secondly, 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>64</sup> It has been noted that an increasing proportion of services delivered by ATSILS relate to civil and family matters.<sup>65</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>66</sup>

Thirdly, 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>67</sup> In relation to family violence, 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 by the ATSILS. There are situations where ATSILS may be required to choose between representing alleged victims of family violence or the accused person. This is especially problematic, where

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<sup>62</sup> F Allison, C Cunneen and M Schwartz, Indigenous Legal Needs Project, Submission No 19 to the Australian Senate Legal and Constitutional Affairs Committee, *Senate Inquiry into Access to Legal Assistance Services*, 2015, 8.

<sup>63</sup> NATSILS, above n 61, paras 3.3.1–3.3.2.

<sup>64</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>65</sup> See NATSILS, above n 61, 4, which noted that “[c]urrently 13% of the ATSILS legal assistances are civil needs and 9% are family law matters”.

<sup>66</sup> NATSILS, Submission No 3 to the Productivity Commission, *Inquiry into Access to Justice Arrangements*, November 2013, 5 <<http://www.natsils.org.au/portals/natsils/submission/NATSILS%20Submission%20-%20Productivity%20Commission%20Inquiry%20into%20Access%20to%20Justice%20Arrangements%208-11-13.pdf>> (accessed 27 April 2018), 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>67</sup> C Cunneen and M Schwartz, 'The Family and Civil Law Needs of Aboriginal People in NSW' (2008) 61, 63.

in practice it is common for the alleged perpetrator of family violence to make contact with an ATSILS before the alleged victim.<sup>68</sup>

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.

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>69</sup>

To support the development and inclusion of justice targets in the Closing the Gap framework, the Australian Government must urgently work with the NATSILS to develop a national plan to identify and map the unmet legal needs of Aboriginal and Torres Strait Islander people. The Australian Government funded Indigenous Legal Assistance Programme does not currently identify the unmet legal needs of Aboriginal and Torres Strait Islander people, nor provide resources to address the unmet legal need.

#### **4.5. Recommendation 12: Closing the Gap targets should be accompanied by an accountability mechanism such as a National Agreement with annual reporting**

NATSILS wishes to highlight the importance of national, state and territory government accountability in relation to Closing the Gap. Government accountability is an important facet of the Closing the Gap refresh given the failure of successive governments to deliver on the targets to date.

Previously NATSILS has recommended that this is undertaken via a National Agreement with an annual reporting mechanism.

This function might be undertaken by the independent agency with Aboriginal and Torres Strait Islander oversight described in Recommendation 9.

In addition, state and territory governments should recognise the value of Aboriginal Justice Agreements (AJAs). The renewal or development of Aboriginal Justice Agreements will significantly assist state and territory governments to establish and implement justice targets aimed at promoting community safety and reducing the rates at which Aboriginal and Torres Strait Islander peoples come into contact with the criminal justice system. The ALRC's 'Pathways to Justice' report recommended that AJAs, particularly to support justice targets, but also to strengthen working in partnership:

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<sup>68</sup> NATSILS, above n 61, paras 5.3–5.4.

<sup>69</sup> Ibid para 3.2.7, citing Productivity Commission, 'Access to Justice Arrangements, Inquiry Report Overview' (September 2014) 24.

The success of many of the recommendations made in this Report relies on the development of collaborative relationships between government and Aboriginal and Torres Strait Islander organisations. Aboriginal Justice Agreements can provide a foundation on which to facilitate, build, and solidify these relationships.<sup>70</sup>

However, NATSILS notes from the experience in Victoria that this model can still be improved, including with better governance and reporting to actively drive outcomes, as well as the need to strengthen targets, measurements and monitoring.

Accountability can also be achieved through funding Aboriginal and Torres Strait Islander peak bodies, who provide independent oversight to the government's work in this space. Similarly, funding independent Commissioners with reporting responsibilities, such as Children's Commissioners or the Australian Human Rights Commission's Social Justice Commissioner, may also fulfil these functions.

Regardless of the mechanism, transparency and accountability with regular reporting is critical to ensuring the success of the Closing the Gap framework.

#### **4.6. Recommendation 13: Developing a strength-based approach to the Closing the Gap must include establishing an independent Aboriginal and Torres Strait Islander community controlled evidence intermediary**

There are few examples of Aboriginal and Torres Strait Islander community designed outcomes frameworks and evaluation methods. Evaluations of Aboriginal and Torres Strait Islander initiatives are often conducted by Government-appointed consultants that do not understand the unique holistic methods and cultural protocols of service delivery designed and delivered by Aboriginal and Torres Strait Islander community controlled organisations.

While there is evidence to support the achievement of positive outcomes within Aboriginal and Torres Strait Islander communities, it too often fails to influence smarter policy and commission decisions, which in turn prevents a number of Aboriginal and Torres Strait Islander organisations being able to deliver effective programs and service delivery on the ground.

As outlined at the Redfern Statement Justice and Preventing Family Violence workshop jointly hosted by NATSILS and NFVPLS, Aboriginal and Torres Strait Islander communities must have a resourced network to share insights and evidence of what works in our communities. Aboriginal and Torres Strait Islander organisations must be provided the opportunity to articulate the effective measures of elements such as cultural immersion and cultural strengthening without interference from Governments.

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<sup>70</sup> Australian Law Reform Commission, above n 25, 34, rec 16-2.

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## 5. A Strength-Based Approach to Culture Built on Recognition and Respect

### Discussion paper questions:

Should Aboriginal and Torres Strait Islander culture be incorporated in the Closing the Gap framework? How?

### 5.1. In relation to A Strength-Based Approach to Culture Built on Recognition and Respect, NATSILS recommends the following:

Recommendation 14: Aboriginal and Torres Strait Islander community-controlled organisations are funded and supported to provide culturally appropriate and culturally safe services and supports for Closing the Gap
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### 5.2. Recommendation 13: Aboriginal and Torres Strait Islander community-controlled organisations are funded and supported to provide culturally appropriate and culturally safe services and supports for Closing the Gap

Aboriginal and Torres Strait Islander people are the custodians and protectors of our culture. Our culture, including our languages and traditions, is diverse across our many communities, peoples and lands. Culture is deeply personal and powerful.

To the extent that the Government seeks to underpin underpin the refreshed Closing the Gap framework with our culture, this must be respected: our culture belongs only to Aboriginal and Torres Strait Islander people to define and practice. The Government has obligations under UNDRIP to ensure and protect Aboriginal and Torres Strait Islander peoples right to practice and revitalize our cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of our cultures.<sup>71</sup>

There are many reasons for incorporating culture into the Closing the Gap framework. Culture has been consistently identified as an important protective factor in the context of rehabilitation and reintegration for justice matters, as well as for children, and for health and wellbeing generally. A justice system that is not culturally appropriate compounds the intergenerational effects of colonisation and impedes the principles of justice.

Currently, Australian governments are failing to understand culture, and the systems that underpin the Closing the Gap framework - justice, health, education, employment, housing, welfare, family supports, child protection - are not culturally appropriate or safe. Rather, systemic racism exists across these systems which must be addressed in order to close the gap of disadvantage.

The Australian justice system fails to genuinely take into account the nature and dynamic of culture within its programs, policies, ways and structures, and this impedes the principles of justice. This is because the systems in which they operate are often not culturally appropriate, laws do not allow for cultural considerations, and community-led organisations are not supported to deliver services.

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<sup>71</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, UN Doc A/RES/61/295 (13 September 2007) art 11.

The best way to incorporate culture into Closing the Gap is to fund and support Aboriginal and Torres Strait Islander community-controlled organisations to provide culturally appropriate and culturally safe services, programs and supports.

For example, our Aboriginal and Torres Strait Islander Legal Services reflect cultural competency because of the cultural authority of our boards, the composition of key and senior roles from the top to management (and not just frontline services), and because of our brand and understanding in community developed over decades across Australia. Our work seeks to convey Aboriginal and Torres Strait Islander viewpoints of justice.