

Access to Legal Assistance Services

April, 2015



NATSILS

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

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1. About NATSILS

1.1. 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 of experience in the provision of legal advice, assistance, representation, community legal education, advocacy, law reform activities and prisoner through-care to Aboriginal and Torres Strait Islander peoples in contact with the justice system. The ATSILS are the experts on the delivery of effective and culturally competent legal assistance services to 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 (Inc.) (ALSWA);
- Central Australian Aboriginal Legal Aid Service (CAALAS);
- North Australian Aboriginal Justice Agency (NAAJA); and
- Victorian Aboriginal Legal Service Co-operative Limited (VALS).

2. Introduction

2.1. NATSILS' submission to this Senate Inquiry has arisen from seriously held concerns about the lack of legal access in Aboriginal and Torres Strait Islander communities. This issue has been highlighted in a number of government reports and persists as a critical issue that demands to be addressed.

2.2. The ATSILS are the forefront provider of legal services to Aboriginal and Torres Strait Islander people, providing approximately 200, 000 legal assistances to Aboriginal and Torres Strait Islanders annually.¹ Consequently, NATSILS as the peak body holds a wealth of experience about legal access for Aboriginal and Torres Strait Islander people and is uniquely placed to provide input to this Senate Inquiry.

2.3. This submission will address each of the key terms of reference for the Senate Inquiry in turn. Some matters we address quite briefly as these have been well covered in other reports to which we refer.

¹ Australian National Audit Office, *Administration of the Indigenous Legal Assistance Programme* (17 Feb 2015) at 16.

3. Access to Legal Assistance

The extent to which Aboriginal and Torres Strait Islander Australians have access to legal assistance:

3.1. Remoteness:

3.1.1. The physical remoteness of the areas in which many Aboriginal and Torres Strait Islander people live is the critical context in which access to legal services must be understood. The Productivity Commission's *Overcoming Indigenous Disadvantage* reported that 21.3 per cent of Aboriginal and Torres Strait Islander people in Australia live in remote or very remote communities, compared to just 1.7 per cent of the non-indigenous population.² This geographical isolation presents a major obstacle to Aboriginal and Torres Strait Islander peoples' access to legal services.

3.1.2. NATSILS is gravely concerned about the lack of access to legal services in remote areas. In this regard it is noted that in remote communities, access to justice has been described as "so inadequate that remote Indigenous people cannot be said to have full civil rights".³

3.1.3. The Family Law Council's report *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* found that:

It is clear that many Aboriginal and Torres Strait Islander peoples have no or limited access to legal, relationship support, family dispute resolution and court services. Consultations and submissions indicated that this is particularly acute in the more remote parts of Queensland, the Torres Strait, Western Australia, New South Wales, Northern Territory and South Australia, where there is no federal family law courts circuit and the publicly funded legal services that service those areas have limited capacity to provide family law support.⁴

3.1.4. Furthermore, it is important to note that in many areas ATSIILS are the only legal service provider. However, the ability of ATSIILS to provide services in these areas is limited by rising costs and stagnant funding. Unless increased funding is provided to the ATSIILS there will be a greater divide between the services that are accessible to Aboriginal and Torres Strait Islander people in rural and remote areas and those in metropolitan areas. This will come at a substantial socio-economic cost for these communities.

² Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators*, (2014) (figure A3.2).

³ C. Cunneen and M. Schwartz, *The Family and Civil Law Needs of Aboriginal People in NSW* (2008) 31.

⁴ The Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (February, 2012) at 46.

3.2. Civil and Family Legal Need:

- 3.2.1. A number of reports have highlighted the levels of unmet needs for civil and family law in Aboriginal and Torres Strait Islander communities. In this regard, the leading study is the Indigenous Legal Needs Project which highlighted various priority areas of civil and family law needs.⁵ Particular needs identified in this project included housing, disputes with neighbours, discrimination, credit/debt, stolen wages, stolen generations, consumer law issues, child protection, education, social security/Centrelink and wills.⁶
- 3.2.2. It is important to emphasise that a conclusion reached through this research is that unresolved civil and family law issues can result in criminal law issues (e.g., housing eviction leading to homelessness or overcrowding and resulting criminal behaviour).⁷ In other words, the provision of adequate and accessible legal services for Aboriginal people in the areas of civil and family law will assist in reducing the rate of offending behaviour and, in turn, the level of overrepresentation in the justice system.
- 3.2.3. The potential of civil matters escalating into criminal matters was also noted in the Productivity Commission Report which stated that:
- If left unresolved, civil problems can have a big impact on the lives of the most disadvantaged. The Commission was given many examples of simple problems spirally into complex problems when legal assistance was not provided. Unmet civil problems can also escalate into criminal matters.⁸
- 3.2.4. Due to the rising demand for these services and the critical needs that they address, an increasing proportion of ATSILS services relates to civil and family matters.⁹ However, as will be noted further at point 4, due to funding constraints the ATSILS are unable to ensure that Aboriginal and Torres Strait Islander people have access to legal services to meet their civil and family needs.
- 3.2.5. As the Productivity Commission noted:
- [Services are] vastly under-resourced in terms of capacity to address legal need in Aboriginal communities. Additional funding is urgently required for civil/family law work, with priority to be given to Indigenous legal services as primary providers of legal assistance to Indigenous people.¹⁰

⁵ 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.

⁶ For a fuller analysis of these findings see: NATSILS Submission 'Productivity Commission Inquiry into Access to Justice Arrangements (November, 2013). Accessible at: <http://www.natsils.org.au/PolicyAdvocacy.aspx>

⁷ *Ibid.* See also: C Cunneen and M Schwartz, 'Civil and Family Law Needs of Indigenous people in New South Wales: the Priority Areas' (2009) 32(3) *University of New South Wales Law Journal*, 725; M Schwartz and C Cunneen, 'From Crisis to Crime: the escalation of civil and family law issues to criminal matters in Aboriginal communities in NSW' (2009) 7(15) *Indigenous Law Bulletin*, 18

⁸ Productivity Commission, *Access to Justice Arrangements, Inquiry Report Overview* (September 2014) at 24

⁹ Currently 13% of the ATSILS legal assistances are civil needs and 9% are family law matters.

¹⁰ Productivity Commission, *Access to Justice Arrangements, Inquiry Report Overview* (September 2014) at 24.

The Commonwealth Attorney-General's Department has also stated that:

The availability of culturally appropriate legal assistance services for Indigenous people with family and civil law problems is limited and this compromises the ability of Indigenous Australians to realise their full legal entitlements. It also introduces a danger that civil or family law issues can escalate to criminal acts resulting in charges and a perpetuation of the cycle of over-representation in the criminal justice system.¹¹

And

The Commonwealth should consider options for improving access to culturally appropriate legal assistance services for family and civil law matters for Indigenous Australians.¹²

- 3.2.6. NATSILS calls upon the government to implement these recommendations and adequately fund the ATSILS to meet the civil and family needs of Aboriginal and Torres Strait Islander people.
- 3.2.7. NATSILS recommends the government implement the finding of the Productivity Commission that an additional \$200m to the legal assistance sector is required to meet this unmet need.¹³

3.3. Criminal Legal Need:

- 3.3.1. 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 of ATSILS clients are particularly challenging in terms of having complex high level needs such as low literacy and cognitive impairments.¹⁴ This discrepancy in funding discriminates against Aboriginal and Torres Strait Islander peoples and denies equal access to justice.
- 3.3.2. 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% of Aboriginal and Torres Strait Islander offenders in prison have served a previous sentence.¹⁵ Yet currently, the ATSILS are not funded or are underfunded to deliver such services.
- 3.3.3. As noted further at 7 the crisis levels of Aboriginal and Torres Strait Islander contact with the criminal justice system, requires urgent funding both for legal services and

¹¹ Access to Justice Taskforce Commonwealth Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009) 143.

¹² *Ibid*, 144.

¹³ Productivity Commission, *Access to Justice Arrangements, Inquiry Report Overview* (September 2014) at 24.

¹⁴ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing* (2011) at 7.78-7.79.

¹⁵ Australian Bureau of Statistics (2014) *Prisoners in Australia 2014*, Cat. no. 4517.0. Canberra

supporting programmes that could help reduce Aboriginal and Torres Strait Islander peoples contact with the criminal justice system.¹⁶

3.4. Lack of awareness and understanding of legal issues:

- 3.4.1. In NATSILS experience there is a significant lack of awareness and understanding amongst Aboriginal and Torres Strait Islander communities in relation to their legal rights and the avenues that are available to realise them.¹⁷ This means that there is not only a high level of unmet need but also a high level of unidentified need.
- 3.4.2. The effects of such a lack of understanding about the civil and family law system among Aboriginal and Torres Strait Islander peoples is also exacerbated by resistance to engagement with, and even fear of, civil and family law system services. In the context of the past history of forced removal of Aboriginal and Torres Strait Islander children and the contemporary extent of non-voluntary engagement with the criminal justice and child protection systems among Aboriginal and Torres Strait Islander peoples, there is significant resistance to voluntary engagement with government and justice system services.
- 3.4.3. There is a critical need for development of community legal education and outreach programs that are developed at the regional level, in response to identified local issues and targeted to the needs of Aboriginal and Torres Strait Islander peoples. Such education would reduce the number of civil, family and criminal legal issues in these communities.

3.5. Need for Aboriginal and Torres Strait Islander Specific Services

- 3.5.1. 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.
- 3.5.2. In this regard, NATSILS notes the submission by Victoria Legal Aid to the Productivity Commission, *Access to Legal Justice* in which they stated that:

the consistent findings [are] that indigenous people experience a greater and more successful engagement with indigenous specific services provided by indigenous people..¹⁸
- 3.5.3. The critical aspect of NATSILS service delivery that sets them apart from other legal assistance services is their focus on, and ability to, provide culturally competent services to Aboriginal and Torres Strait Islander peoples. Cultural competency is essential for effective engagement, communication, delivery of services and the

¹⁶ M Schwartz and C Cunneen, Working cheaper, working harder: Inequity in Funding for Aboriginal and Torres Strait Islander Legal Services' (2009) 7(10) *Indigenous Law Bulletin* 19; C Cunneen and M Schwartz, 'Funding Aboriginal and Torres Strait Islander Legal Services: Issues of Equity and Access', (Feb 2008) 32(1) *Criminal Law Journal*, 38.

¹⁷ F Allison et al, Indigenous Legal Needs Project: NT Report (2012) 125.

¹⁸ Victoria Legal Aid, 'Response to the House of Representatives' Inquiry into the levels of involvement of juveniles and young adults in the criminal justice system' (18 Jan 2010) at

attainment of successful outcomes. Cultural competency is more than just cultural awareness. Cultural competency focuses on the capacity to improve outcomes by integrating culture into the delivery of services and requires a commitment to a 'whole of organisation' approach.

3.5.4. The ATSILS are not only needed because their culturally competent service model is more effective, they also occupy an important space within Aboriginal and Torres Strait Islander communities. Given the history between Aboriginal and Torres Strait Islander peoples and Australia's legal system it is vitally important that Aboriginal and Torres Strait Islander peoples have their own distinct voice in the justice space which the ATSILS serve to provide.

3.5.5. The need for great access to culturally appropriate legal services was recognised by the Productivity Commission when they noted that funding should be increased, "with priority to be given to Indigenous legal services as primary providers of legal assistance to Indigenous people."¹⁹

3.6. Aboriginal and Torres Strait Islander Interpreter Services

3.6.1. Central to effective engagement and provision of quality services to Aboriginal and Torres Strait Islander peoples is effective communication. For a proportion of Aboriginal and Torres Strait Islander peoples, this will be unachievable without the assistance of an interpreter. However, there is a shortage of Aboriginal and Torres Strait Islander interpreter services around Australia to meet this need.

3.6.2. NATSILS has previously undertaken research in relation to this issue, which we will not seek to reproduce in full here. Rather our previous report entitled *The Right to a Fair Trial: the expansion of Aboriginal and Torres Strait Islander interpreter services* is available at <http://www.natsils.org.au/PolicyAdvocacy.aspx> for further reference.

3.6.3. Our main findings were:

- There is a massive unmet need for more and more highly trained interpreters in numerous Aboriginal and Torres Strait Islander languages;
- In addition to interpreters in traditional Aboriginal and Torres Strait Islander languages, there is also a need for interpreters of Aboriginal English. While more traditional Aboriginal and Torres Strait Islander languages may be easily identified, many people are not aware that Aboriginal English exists and often mistake it for proficiency in Standard Australian English (for a guide to Aboriginal English see Appendix A from NATSILS submission *The Right to a Fair Trial: the expansion of Aboriginal and Torres Strait Islander interpreter services*);
- Language difficulties often exist in conjunction with even greater cultural differences which can further muddy the waters of effective and accurate communication;

¹⁹ Productivity Commission, *Access to Justice Arrangements, Inquiry Report Overview* (September 2014) at 24.

- There is also a need for greater awareness of the need for interpreters for hearing impaired Aboriginal and Torres Strait Islander peoples. Hearing loss can result in the same communication barriers as those produced by language difficulties and cross-cultural differences. Given the high rate at which Aboriginal and Torres Strait Islander peoples suffer from hearing loss this is an issue that must be addressed;
- Only a handful of Aboriginal and Torres Strait Islander interpreter services exist and those that do exist are insufficiently resourced to operate beyond limited geographical areas or provide interpreters in all necessary situations. This is an unacceptable situation given that in comparison the Commonwealth Government provides twenty four hour seven days a week interpreter services for hundreds of foreign languages and dialects through the Translating and Interpreting Service;
- There is a critical need for the increased development of professional level accreditation testing for Aboriginal and Torres Strait Islander languages to ensure that interpreters are qualified to work in the legal arena; and
- Greater awareness needs to be created amongst service providers in the justice system of how to identify when an Aboriginal and Torres Strait Islander person needs an interpreter as well as how to engage and work with an interpreter.

3.6.4. NATSILS **recommends** that strategies are implemented to attract, recruit and accredit more Aboriginal and Torres Strait Islander interpreters and that adequate training and funding be provided to relevant service providers and agencies involved in the justice system to promote and accommodate the use of interpreters.

3.7. Culturally competent alternative dispute resolution services

- 3.7.1. NATSILS has previously undertaken research in relation to this issue, which we will not seek to reproduce in full here. Rather our previous report entitled *Joint ATSILS Proposal to the Commonwealth Attorney - General for the Establishment of a National Aboriginal and Torres Strait Islander Dispute Management Service* is available at <http://www.natsils.org.au/PolicyAdvocacy.aspx> for further reference.
- 3.7.2. This report was in response to the need for increased provision of culturally appropriate alternative dispute management services to Aboriginal and Torres Strait Islander peoples in order to achieve equal access to justice for members of these communities. The report examined how mainstream Western styles of dispute resolution and conflict management can be culturally alienating and inaccessible to Aboriginal and Torres Strait Islander peoples, the need for the establishment of a national network of locally developed Aboriginal and Torres Strait Islander dispute management services and how such a network should be developed.
- 3.7.3. Evaluations of mainstream dispute resolution and conflict management services have shown that Aboriginal and Torres Strait Islander peoples avoid such services,

especially when they do not have Aboriginal or Torres Strait Islander peoples on staff.²⁰

3.7.4. This lack of engagement can be explained by the numerous barriers faced by Aboriginal and Torres Strait Islander peoples in accessing mainstream dispute resolution and conflict management services. These include, but are not limited to:

- The cultural differences and lack of experience that Aboriginal and Torres Strait Islander peoples have had with dispute resolution processes means that such concepts may not make sense to members of these communities.²¹ Furthermore, there is often a lack of understanding amongst Aboriginal and Torres Strait Islander peoples that a mediator is neutral, and they are left feeling that they are in a pseudo-judicial system where the “judge” is on the side of the other party;
- Communication barriers relating not only to difficulties with speaking, reading and understanding Standard Australian English, but also in regards to correspondence.²²
- Financial constraints experienced by many Aboriginal and Torres Strait Islander peoples;
- Many Aboriginal and Torres Strait Islander peoples are reliant on public transport to get to dispute management services. Sometimes, without other arrangements for travel it may seem too overwhelming and people will not show up for their appointment;
- Time and place issues. Different understandings of time may cause confusion and difficulty in regards to the setting and keeping of appointments. Physical spaces may be intimidating, and due to the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system, certain environments may remind individuals of previously negative experiences with the formal justice system;
- The complexity of Aboriginal and Torres Strait Islander disputes means that mainstream services may not be equipped to deal with such characteristics and mainstream processes may not fit.²³

²⁰ B White, *Evaluation of the Alice Springs Counselling Service and Reengagement of Aboriginal Family Consultants in Alice Springs and Darwin* (1998) cited in National Alternative Dispute Resolution Advisory Council, above n 2, 9.

²¹ *Ibid.*

²² *Ibid.*

²³ Aboriginal and Torres Strait Islander disputes often involve many parties and numerous overlapping issues, evolve over a longer period of time and involve the process of ‘healing’ relationships rather than just settling the definitive dispute at hand. Aboriginal and Torres Strait Islander peoples are also far more likely to live in multi-family households and family relationships may also include people who are not biologically related. See: Social Justice Commissioner, *Statistical Overview of Aboriginal and Torres Strait Islander People in Australia* (2004) Australian Human Rights and Equal Opportunity Commission.

- Services may not be readily available due to the fact that a large number of Aboriginal and Torres Strait Islander peoples live in remote or very remote areas of Australia; and
- The traditional principles which inform mainstream mediation such as, the neutrality of the mediator, confidentiality and voluntary attendance can be inconsistent with Aboriginal and Torres Strait Islander customs and values.²⁴

3.7.5. It is clear that mainstream dispute resolution services are not being utilised by Aboriginal and Torres Strait Islander peoples. The reason for this is not that Aboriginal and Torres Strait Islander peoples reject alternative dispute resolution as a means to deal with conflict, but rather, that purely Western models of dispute resolution often clash with, and do not meet the needs of, contemporary Aboriginal and Torres Strait Islander peoples.²⁵

3.7.6. NATSILS **recommends** that the Commonwealth and State and Territory Governments establish nationally networked Aboriginal and Torres Strait Islander dispute resolution and conflict management services throughout urban, rural and remote areas of Australia.

4. Adequacy of Resources:

Adequacy of Resources provided to Aboriginal Legal Assistance Services by State, Territory and Commonwealth Governments.

4.1. Firstly, NATSILS welcomes the Federal Government's announcement that proposed funding cuts to ATSILS will be reversed and current funding levels guaranteed until June 2017.

4.2. However, it currently appears that NATSILS as the peak body for the ATSILS will be defunded. As a national peak body, NATSILS plays a critical role in supporting its members to increase organisational capacity, create strong governance structures, identify, share and implement best practice within service delivery and provide greater strategic direction. NATSILS ensures that individual services benefit from the support and learnings of the other ATSILS. NATSILS also has a proven record of working with Governments to address the underlying causes of Aboriginal and Torres Strait Islander disproportionate representation in the justice system. If NATSILS is defunded there is simply no one else to fulfil this role. NATSILS submits that the funding provided to NATSILS (currently \$295, 000 p.a.) is a small

²⁴ M Suavé, 'Mediation: Towards an Aboriginal Conceptualisation' (1996) 3(81) *Aboriginal Law Bulletin*, 10-12, 10.

²⁵ Evaluations have shown that the presence of Aboriginal and Torres Strait Islander mediators and staff has led to usage by Aboriginal and Torres Strait Islander peoples of services which they had previously avoided. Mandala Consulting, *Review of the Dispute Settlement Centre of Victoria Koori Programme* (2002) Australian Institute of Aboriginal and Torres Strait Islander Studies. See also: National Alternative Dispute Resolution Advisory Council, *Indigenous Dispute Resolution and Conflict Management* (2006) at 3.

investment for the government to make in an organisation that provides such critical advice and services. NATSILS **recommends** that its funding be restored.

4.3. Furthermore, despite the reversal of funding cuts the funding of ATSILS remains grossly inadequate. For example, the *Doing Time - Time for Doing* Report highlighted that:

[f]unding for ATSILS has remained constant – becoming reduced in real terms – for more than ten years while funding for mainstream legal services has more than doubled during the same period....At the same time the number of court cases involving Indigenous people has grown. As a consequence, access by Indigenous Australians to ATSILS is diminished.²⁶

4.4. This report and others have highlighted that the lack of funding is a significant strain on the ATSILS in that that they often provide services to meet rising need, but without funding. Despite the fact that the ATSILS continuously provide more with less, there are still enormous legal needs that the ATSILS are simply unable to meet on current funding levels.

4.5. The convergence of chronic underfunding and a high level of unmet legal need amongst Aboriginal and Torres Strait Islander communities places ATSILS in an untenable position whereby funding for services in different areas of law compete for priority and where difficult compromises which ultimately affect people's access to justice have to be made. A further increase in the level of ATSILS civil and family law service delivery without additional funding for such would necessarily come at the expense of criminal law service delivery, and given that the demand in this area is only growing and the serious consequences that cut backs in this area would have, such is not an option for ATSILS. Additional funding must be provided in order to put a stop to this inherent competition which causes detriment to both the community and the justice system as a whole. Further funding is also required to fund supporting services such as prisoner through care services and community legal education.

4.6. Recommendations for further funding of the ATSILS have been made in a number of reports. For example, the *Doing Time* Report stated that:

The Committee is of the opinion that Indigenous Australians have the right to enjoy the same legal representation as non-Indigenous Australians and that the Commonwealth Government must demonstrate its commitment to this principle through the *provision of adequate and equitable funding* for legal aid services, including those dedicated to Indigenous Australians.

The Committee supports the Law Council of Australia's *recommendation that ATSILS funding be increased at least to that of Legal Aid Commission funding*. The Committee further reiterates the Senate Legal and Constitutional Affairs Committee's recommendation for the 2009 Access to Justice report that funding for Indigenous legal services be increased to a sufficient level that 'meets the needs of Indigenous peoples, including appropriate loadings for extra service delivery'.²⁷

4.7. NATSILS calls for the **implementation** of this recommendation. NATSILS also reiterates the Productivity Commission's recommendation that an estimated \$200 million a year of

²⁶ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing* (2011) at 7.70.

²⁷ Citations in quote omitted. House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing* (2011) at 7.78-7.79.

additional funding is required for the legal assistance sector. In the absence of properly funded services the gap between Aboriginal and Torres Strait Islander people and non-Indigenous people will widen.

- 4.8. NATSILS holds the view that state and territory governments should contribute to funding, especially in circumstances where it introduces new laws and/or policies that are clearly likely to impact on Aboriginal and Torres Strait Islander people.²⁸ This position was supported by the Productivity Commission when it stated that:

State and territory governments should also contribute to the funding of services provided by ATSILS and FVPLS.²⁹

5. Family Violence Prevention Legal Services:

The Benefits Provided to Aboriginal and Torres Strait Islander Communities by Family Violence Prevention Legal Services

- 5.1. There are very high rates of family violence in Aboriginal and Torres Strait Islander communities. The crisis that this represents for Aboriginal and Torres Strait Islander communities is evidenced by the fact that between 2012 and 2013 Aboriginal and Torres Strait Islander hospitalisations for non-fatal family violence-related assaults for females is 34.2 times the rate for non-Indigenous females.³⁰
- 5.2. Due to the crisis of family violence and the myriad of family law issues that exist in Aboriginal and Torres Strait Islander communities an increasing focus of the ATSILS work has been in the area of family law. Currently, 9% of the ATSILS service provision is in the area of family law, representing 18,000 legal assistances annually.³¹
- 5.3. However, it is very important that there is a separate Indigenous-specific service for victims of family violence because of the nature of the provision of legal representation by the ATSILS. The ATSILS represent victims of family violence (e.g., in relation to applications for violence restraining orders and in family law matters). However, if the alleged perpetrator of family violence seeks representation/ or advice from an ATSILS this cannot be refused simply on the basis of an ideological preference for representing alleged victims. If an accused person who has been charged with a family-violence related offence appears in court or is in police custody and seeks assistance from an ATSILS this assistance must be provided subject to general guidelines for criminal matters.

²⁸ For example, as explored further at 6 mandatory sentencing is a policy adopted by some states and territories that has clear ramifications in terms of Aboriginal and Torres Strait Islander imprisonment

²⁹ Productivity Commission, *Access to Justice Arrangements*, Inquiry Report Overview (September 2014) at 29.

³⁰ Productivity Commission *Overcoming Indigenous Disadvantage Report 2014*.

³¹ Australian National Audit Office, *Administration of the Indigenous Legal Assistance Programme* (17 Feb 2015) at 16.

- 5.4. In practice, it is common for the alleged perpetrator as a result of being charged to make contact with an ATSILS before the alleged victim seeks legal assistance. In such circumstances, the ATSILS would have a conflict of interest and would not be able act for the alleged victim. The existence of FVPLS therefore fills an important gap and ensures that Aboriginal and Torres Strait Islander victims of family violence are able to access the legal assistance they need within a culturally safe setting. The ATSILS and NATSILS continue to work closely with FVPLS and its peak body NVPLS, to address the increasingly urgent crisis of family violence.
- 5.5. NATSILS remains concerned about the level of funding provided to the FVPLS under the Indigenous Advancement Strategy (IAS). While FVPLS received funding, it was only at the level of previous funding, despite the worsening of the crisis of family violence. Furthermore, many of the FVPLS have only been funded for a further 12 months. This maintains the stress of funding uncertainty for these organisations and their staff and limits their capacity to develop in long term programme development and strategic planning. Of most concern, it creates uncertainty for Aboriginal and Torres Strait Islander communities and victims of family violence about whether they will have continued access to critical legal services which they are dependent on for their wellbeing. NATSILS submits that this poor funding of the FVPLS brings into question the stated commitment of the government to addressing the crisis of family violence.
- 5.6. NATSILS recommends that the government increases the funding provided to FVPLS as well as the funding periods on which it is provided. Funding to the ATSILS also needs to be increased in recognition of the key family law services that the ATSILS deliver.

6. Mandatory Sentencing:

The consequences of mandatory sentencing regimes on Aboriginal and Torres Strait Islander incarceration rates

- 6.1. NATSILS is strongly opposed to mandatory sentencing for a number of reasons.
- 6.2. Firstly, mandatory sentencing eliminates the judiciary's ability to consider appropriate mitigating factors so as to arrive at the most appropriate sentencing outcome. It is also an arbitrary contravention of the principles of proportionality and necessity. The result can be serious miscarriages of justice, and a hindrance on the Court's ability to bring justice.³²
- 6.3. The Law Council in its analysis of mandatory sentencing noted the following examples in which mandatory sentencing has lead to unjust outcomes:

³² See: Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (May 2014); Human Rights and Freedom Commissioner Tim Wilson, *Queensland Law Society Mandatory Sentencing Policy Paper Launch*, 4 April 2014.

- A 16 year-old with one prior conviction received a 28 day prison sentence for stealing one bottle of spring water.
- A 17 year old first time offender received a 14 day prison sentence for stealing orange juice and Minties.
- A 15-year old Aboriginal boy received a 20-day mandatory sentence for stealing pencils and stationery. He died while in custody; and
- An Aboriginal woman and first time offender who received a 14 day prison sentence for stealing a can of beer.³³

6.4. Secondly, in places in Australia where mandatory sentencing schemes are applied there is a lack of evidence as to whether they actually achieve the desired deterrent effects.³⁴ In general however, there is little evidence that longer prison sentences are effective in deterring would-be criminals, especially disadvantaged and vulnerable persons, because higher penalties are highly unlikely to influence persons with mental impairment, alcohol and/or drug dependency or those who are socially and economically disadvantaged.³⁵ As stated by former Western Australia Supreme Court Judge Christine Wheeler QC:

We assume it (prison) deters people from crimes - that is, that people think, 'I better not commit this crime because I might get three years...

Deterrence works for people like you and me, who think about consequences and would not commit the offences anyway. It doesn't work for drug addicts, it doesn't work for alcoholics, it doesn't work for people who are mentally ill.³⁶

6.5. Thirdly, mandatory sentencing also contributes to higher recidivism rates because imprisonment is unsuccessful in rehabilitating offenders.³⁷ Finally, NATSILS is concerned that mandatory sentencing has a discriminatory effect on Aboriginal and Torres Strait Islander offenders. For example, a report on the 'three strikes' home burglary laws in Western Australia found that according to the Department of Justice review of the three-strikes laws over 81% of juveniles sentenced under the laws were Aboriginal.³⁸ The Law Reform Commission of Western Australia found that according to the Department of Corrective Services from 2000 to 2005 approximately 87% of all children sentenced under the mandatory sentencing laws were Aboriginal.³⁹

³³ Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (May 2014) at p 11, para 20. See also: K Warner 'Mandatory Sentencing and the Role of the Academic' (2007) 18(3-4) *Criminal Law Forum* 344.

³⁴ Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (May 2014) at 31.

³⁵ Australian National Council on Drugs, Deloitte, *An economic analysis for Aboriginal and Torres Strait Islander offenders: prison vs residential treatment* (ANC Research Paper, August 2012); Andrew Trotter and Harry Hobbs 'The Great leap Backward: Criminal Law Reform with the Hon Jarrod Bleijie' (2014) 36(1) *Sydney Law Review*.

³⁶ Quoted in S Rubinsztein-Dunlop, 'Former Judge backs Prisoner's View on Overcrowding' *ABC*, 3 July 2014.

³⁷ Currently, 77 per cent of Aboriginal and Torres Strait Islanders in prison have already served a previous sentence. Australian Bureau of Statistics (2014) *Prisoners in Australia 2014*, Cat. no. 4517.0. Canberra.

³⁸ N Morgan, H Blagg and V Williams, *Mandatory Sentencing in Western Australia and the Impact on Aboriginal Youth* (2001).

³⁹ The Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture, Final Report* (2006).

6.6. NATSILS is further concerned that mandatory sentencing may have particularly negative consequences in terms of sentencing for people with cognitive impairments and mental illnesses. Given the high incidence of Aboriginal and Torres Strait Islander people with these issues, this may further compound the negative experiences of Aboriginal and Torres Strait Islander people with the criminal justice system.⁴⁰

6.7. In particular, NATSILS deplores the recent introduction of the *Criminal Law Amendment (Home Burglary and Other Offences) Bill 2014 (WA)* which has been passed by the Legislative Assembly and is now being debated in the Legislative Council.⁴¹

6.8. This Bill seeks to:

- extend the mandatory sentencing provisions by introducing mandatory minimum terms of imprisonment/detention for offenders (aged 16 years and over) who commit serious violent and sexual offences during the course of an aggravated home burglary;
- increase the mandatory minimum term of imprisonment for ‘third-strike’ adult offenders from 12 months’ imprisonment to two years’ imprisonment;
- amend the counting rules for determining repeat offender status for adult and juvenile offenders aged over 16 years, with the intention that multiple offences dealt with in court on one day are no longer counted as a single ‘strike’.

6.9. It has been stated by the Western Australian Corrective Services Commissioner that as a consequence of these amendments it is anticipated that an extra 60 juveniles and 208 adults over three years will be imprisoned or detained at a cost of \$93 million dollars.⁴² NATSILS is gravely concerned that the vast majority of these will be Aboriginal and Torres Strait Islander people and that the extension of mandatory sentencing laws will only serve to increase the already unacceptable level of overrepresentation of Aboriginal and Torres Strait Islander peoples in custody in Western Australia.⁴³ NATSILS also argues that expenditure of \$93 million dollars of taxpayer monies could be better allocated to addressing the root causes of crime through a justice reinvestment approach. This argument is explored further at 9.

7. Over-representation in Prisons:

The reasons for the high incarceration rates for Aboriginal and Torres Strait Islander men, women and juveniles;

7.1. Aboriginal and Torres Strait Islander peoples are chronically over-represented in the criminal justice system. Aboriginal and Torres Strait Islander peoples make up only 2% of

⁴⁰ M Rowley, ‘Invisible clients: People with cognitive impairments in the Northern Territory Court of Summary Jurisdiction’ (2014) 2 *NTLJ* 383.

⁴¹ For an analysis of the operation of mandatory sentencing in the different states and territories see: Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (May 2014) Attachment one.

⁴² C Wahlquist, ‘New burglary laws will jail more Aboriginal people in WA, experts fear’ *The Guardian*, 24 February 2015.

⁴³ *Ibid.*

the Australian population, yet 27% of the prison population.⁴⁴ Furthermore, the rate of imprisonment has increased rapidly with an 88% increase in the number of Aboriginal and Torres Strait Islander people imprisoned between 2004 and 2014.⁴⁵ Aboriginal and Torres Strait Islander children are 22 times more likely to be in detention than non-Aboriginal and Torres Strait Islander children,⁴⁶ a situation which has been deemed a 'national crisis' by the Australian House of Representatives' Inquiry into Aboriginal and Torres Strait Islander youth and the criminal justice system.⁴⁷

7.2. The reasons for the high incarceration rates for Aboriginal and Torres Strait Islander adults and children are well documented and have been directly linked to the broader issues of social and economic disadvantage which Aboriginal and Torres Strait Islander peoples experience at a disproportionate rate.⁴⁸ These issues include high levels of poverty, poor education outcomes, high rates of unemployment, high levels of drug and alcohol abuse, high rates of mental illness, over-crowded housing and high rates of homelessness, over-representation in the child protection system,⁴⁹ high levels of family dysfunction, and a loss of connection to community and culture.

7.3. Aside from the socio-economic causes for Aboriginal and Torres Strait Islander peoples contact with the criminal system, there are a number of structural biases or discriminatory practices within the justice system.

7.4. In this regard, it is important to highlight two issues:

- a) Crime statistics (e.g., rates of arrest and rates of imprisonment) do not measure the prevalence of crimes or who are responsible for committing those crimes. Instead crime statistics measure the rate and/or demographics of those people who are caught and punished for criminal behaviour.
- b) If higher rates of offending among Aboriginal and Torres Strait Islander people were the sole cause of higher incarceration rates then there should be no difference in the rate of overrepresentation between different states and territories. In this regard, it has been stated that:

⁴⁴ Australian Bureau of Statistics (2014) *Corrective Services, Australia*, December Quarter 2014, Cat. no. 4512.0. Canberra.

⁴⁵ Australian Bureau of Statistics (2014) *Prisoners in Australia 2014*, Cat. no. 4517.0. Canberra; Australian Bureau of Statistics (2014) *Corrective Services, Australia*, December Quarter 2014, Cat. no. 4512.0. Canberra.

⁴⁶ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing* (2011), 2.4.

⁴⁷ *Ibid*, at 2.4

⁴⁸ *The Royal Commission into Aboriginal Deaths in Custody* (1991); Law Reform Commission of Western Australia, *Aboriginal Customary Laws, Discussion Paper* (2005) (in particular, see pp 97–99); House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing* (2011).

⁴⁹ See: A Stewart et al, 'Transitions and Turning Points: Examining the Links Between Child Maltreatment and Juvenile Offending Child Abuse & Neglect (2008) Vol. 31(1), *Child Abuse & Neglect*, 51.

Unless one espouses the absurd notion that Aboriginal Western Australians are many times more evil than their inter-state colleagues, this cannot explain why Western Australia's imprisonment rate is so much higher than the rest of the country.⁵⁰

7.5. A recent study examined the substantial rise in the Aboriginal and Torres Strait Islander imprisonment rate between 2001 and 2008 and noted that there had not been a corresponding rise in the conviction rate for Aboriginal and Torres Strait Islander peoples over this period. As a result, it concluded that "the substantial increase in the number of Indigenous people in prison is mainly due to changes in the criminal justice system's response to offending rather than changes in offending itself."⁵¹

Structural Biases

7.6. There are a number of structural biases in the justice system including:

- a) Mandatory sentencing. See discussion above at 6, particularly para 6.5.
- b) Lack of Aboriginal and Torres Strait Islander specific programs and services within the justice system, in particular in regional and remote areas.⁵² In this regard, it should be noted that it has been found that Aboriginal and Torres Strait Islander controlled and specific services have better outcomes in these communities.⁵³
- c) Lack of availability and use of Aboriginal and Torres Strait Islander interpreters within the system (from time of arrest and interview to court attendance as well as within the prison and correction system). See 3.6.
- d) Over-policing of Aboriginal and Torres Strait Islander people. For example, police targeting of Aboriginal and Torres Strait Islander people for behaviour in public spaces and/or minor offending.⁵⁴ In this regard, it is noted that many of ATSILS clients occupy public spaces in a more visible way than non-Indigenous people, due to high rates of homelessness and overcrowding. As a result laws that are aimed at persons occupying public places inevitably unfairly target Aboriginal and Torres Strait Islander persons.⁵⁵
- e) Lower funding of ATSILS in comparison to Legal Aid. See discussion above at 3 to 4.

⁵⁰ Morgan and Motteram as quoted in The Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture, Final Report* (2006) at 83.

⁵¹ Fitzgerald, J, 'Why are Indigenous Imprisonment Rates Rising?' (2009) *NSW Bureau of Crime Statistics and Research Crime and Justice Statistics Issue Paper* no. 41, 6.

⁵² In this regard, NATSILS notes with concern the funding situation for many Aboriginal and Torres Strait Islander organisations under the Indigenous Advancement Strategy. For an analysis of these issues see NATSILS submission to the Senate Inquiry on the Indigenous Advancement Strategy.

⁵³ J Dwyer et al, *The Overburden Report: Contracting for Indigenous Health Services* (Flinders University and Cooperative Research Centre for Aboriginal Health, 2009); A Forrest, *Forrest Review: Creating Parity* (Commonwealth Government, Canberra, 2014) at 201.

⁵⁴ See examples provided to House of Representatives, Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing report* (2011) at 201.

⁵⁵ For example, in Queensland the number one offence that Aboriginal and Torres Strait Islander peoples are charged with is Public Order Offences, which makes up 31.9% of all offences that Aboriginal and Torres Strait Islander people are charged with. The rate for non-Indigenous peoples is 16.2%. Australian Bureau of Statistics, *Recorded Crime - Offenders, 2013-14*, 4519.0, February 2015.

- f) Lack of Aboriginal and Torres Strait Islander people working within the criminal justice system in comparison to the rate of involvement of Aboriginal people in the system.
- g) The system of fines enforcement in Western Australia which is skewed against persons who are disadvantaged and vulnerable.⁵⁶
- h) An increasingly rigid approach to bail which has had a particularly discriminatory effect on Aboriginal and Torres Strait Islander young people, causing an increase in the number of Aboriginal and Torres Strait Islander young people on remand⁵⁷;
- i) The unnecessary imprisonment of Aboriginal and Torres Strait Islander peoples in regional and remote areas due to a lack of access to non-custodial sentencing options in these areas.
- j) The unnecessary imprisonment of Aboriginal and Torres Strait Islander peoples in regional and remote areas due to a lack of appropriate bail addresses. NATSILS is particularly concerned about this issue in relation to juveniles.⁵⁸

8. Statistical Information:

The adequacy of statistical and other information currently collected and made available by state, territory and Commonwealth governments regarding issues in Aboriginal and Torres Strait Islander justice.

8.1. NATSILS' experience is that available data relating to Aboriginal and Torres Strait Islander people in the justice system is frequently inadequate.

8.2. For example, NATSILS is concerned about the poor identification and records of the numbers of Aboriginal and Torres Strait Islander people charged with an offence. It is noted that a number of states' and territories data in this regard is of insufficient quality to be included in national data. This makes obtaining an accurate national picture difficult, and an accurate picture in these states impossible. In particular, the data of Western Australia, Victoria, Tasmania and the Australian Capital Territory is frequently heavily compromised or non-existent and therefore not included in data provided by the Australian Bureau of Statistics.

8.3. NATSILS notes with concern that Victoria still records the ethnicity of offenders and victims by "racial appearance" which means the ethnic identification of a person in the subjective opinion of the attending police officer. In the offending statistics provided by Victoria, by far the greatest number of recorded ethnicities is 'unspecified'. For example, in 2013/2014 the total number of assaults proceeded against 'Aboriginal and Torres Strait Islander people' was 1,599.⁵⁹ The total number of assaults proceeded against by people of 'unspecified'

⁵⁶ A preferable alternative would be the approach taken in NSW where the Work and Development Order scheme offers fine defaulters who are vulnerable and disadvantaged the opportunity to participate in treatment programs to pay off unpaid fines.

⁵⁷ K Richards and L Renshaw, *Bail and remand for young people in Australia: A national research project* Australia Criminology Institute, Research and Public Policy Series 125 (2013)

⁵⁸ House of Representatives, Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing* (2011) 212-213.

⁵⁹ Australian Bureau of Statistics, *Recorded Crime - Offenders, 2013-14*, 4519.0, Canberra.

racial ethnicity was 6,732.⁶⁰ It is submitted that this is likely to indicate that police find categorising people based on perceived ethnicity problematic, which indeed it is for very obvious reasons. It also means that Victoria's statistics are invalid in this regard.

8.4. NATSILS is also concerned about the paucity of data of people with mental illnesses, disabilities and cognitive impairments in the justice system.⁶¹ Despite the high prevalence of disability it remains an untold story not only in justice, but in all other areas that determine social outcomes for Aboriginal and Torres Strait Islander people such as education, employment and housing.⁶² The absence of available data makes evaluation and policy on this very crucial issue difficult.

8.5. NATSILS is generally concerned about the lack of available data in relation to issues affecting Aboriginal and Torres Strait Islander people. For example, the poor monitoring of the number of Aboriginal and Torres Strait Islander children in out of home care and causes of death.

8.6. NATSILS **recommends** that Western Australia, Victoria, Tasmania and Australian Capital Territory record more consistent and detailed data relating to Aboriginal and Torres Strait Islander people. This will help to inform measured, evidenced based policy on criminal justice issues.

9. Alternatives to Imprisonment:

The cost availability and effectiveness of alternatives to imprisonment for Aboriginal and Torres Strait Islander Australians, including prevention, early intervention, diversionary and rehabilitation measures:

9.1. Costs of Imprisonment:

9.1.1. It is clear that imprisonment comes at a major economic cost. Currently there are over 33,000 Australians in prison at a cost of almost \$3 billion annually.⁶³ However, associated costs to the community through the disintegration of families and victim trauma means that the real cost both financially and socially is much

⁶⁰ *Ibid.*

⁶¹ See M Rowley, 'Invisible clients: People with cognitive impairments in the Northern Territory Court of Summary Jurisdiction' (2014) 2 *NTLJ* 383.

⁶² For further refer to the First Peoples Disability Network website: <http://fpdn.org.au/>

⁶³ Australian Bureau of Statistics (2014) Corrective Services, Australia, December Quarter 2014, Cat. no. 4512.0. Canberra; Australian National Council on Drugs, Deloitte, *An economic analysis for Aboriginal and Torres Strait Islander offenders: prison vs residential treatment* (ANC Research Paper, August 2012);

higher.⁶⁴ For example, in 2009 a report by KPMG, estimated that violence against women and their children cost the Australian economy \$13.6 billion.⁶⁵

9.1.2. Imprisonment has serious repercussions for the individual, their families and communities. People who have been incarcerated are also subjected to increased marginalisation and have substantially fewer employment opportunities.

9.1.3. Of particular concern is the impact that imprisonment has on the children of prisoners. In 2005 Quilty calculated that each year approximately 20% of Aboriginal and Torres Strait Islander children had at least one parent incarcerated.⁶⁶ As noted, earlier given the drastic increase in Aboriginal and Torres Strait Islander incarceration since 2005 the figure today is likely to be much higher. Having a parent in prison has been shown to have a major impact on a child's emotional health and wellbeing and drastically increases the likelihood that the child will have interaction with the criminal justice system.⁶⁷

9.2. Effectiveness of Imprisonment:

9.2.1. Yet despite the enormous cost of imprisonment both economically and socially the evidence suggests that increasing penalties does not have a positive impact on crime rates. For example, the Victorian Sentencing Advisory Council has argued that "the research suggests imprisonment has a negative but generally insignificant effect upon the crime rate, representing a small positive deterrent effect ..." however, "increases in the severity of punishment ... have no corresponding increased deterrent effect upon offending".⁶⁸ In other words, the general threat of imprisonment has a very small deterrent effect, but increasing prison terms has no deterrent value. Furthermore, a comprehensive statistical analysis undertaken by the NSW Bureau of Crime Statistics in 2012 found that increasing incarceration sentences does not appear to impact on the crime rate.⁶⁹

⁶⁴ For further analysis see: Senate Legal and Constitutional Affairs References Committee, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (2013) Chapter 3-The economic and social costs of imprisonment

⁶⁵ KPMG Management Consulting, *The cost of violence against women and their children* (Canberra, Australian Government, 2009). See also: A Morgan and H Chadwick, *Key issues in domestic violence* (Canberra, Australian Institute of Criminology, December 2009).

⁶⁶ S Quilty, 'The magnitude of experience of parental incarceration in Australia' (2005) *Psychiatry, Psychology and Law*, 12(1), 256-257

⁶⁷ See: R Woodward, 'Families of prisoners: Literature review on issues and difficulties' FaHCSIA Occasional Paper No. 10. (2002) Australian Government Department of Family and Community Services: Canberra; Tomaino, J., Ryan, S., Markotić, S., & Gladwell, J. (2005). Children of Prisoners Project. Steering Committee's Report to the Justice Cabinet Committee. South Australia: Attorney General's Department.

⁶⁸ Sentencing Advisory Council, *Does Imprisonment Deter? A Review of the Evidence* (2011) 17.

⁶⁹ Wai-Yin Wan et al, 'The effect of arrest and imprisonment on crime' (Feb 2012) 158 *Contemporary Issues in Crime and Justice* 1 at 1.

9.2.2. Meanwhile, it is clear that imprisonment is highly ineffective in terms of reducing reoffending particularly for Aboriginal and Torres Strait Islander people. The most recent statistics released by the Australian Bureau of Statistics shows that 77% of Aboriginal and Torres Strait Islander people in prison have served a previous sentence (compared to 52% for non- Indigenous offenders).⁷⁰

9.3. Justice Reinvestment:

9.3.1. Justice reinvestment is a response to the spiralling costs associated with the criminal justice system and the need for public safety. NATSILS view is that to achieve long-term sustainably safer communities, government reform needs to address the underlying causes of criminal behaviour through justice reinvestment measures. Justice reinvestment is about investing in education, housing, healthcare and jobs, rather than correctional facilities. At this point in time there is growing support for justice reinvestment This was noted by the Senate Inquiry Committee that explored the value of justice reinvestment when they noted that, “[t]he overwhelming majority of submitters supported the implementation of a justice reinvestment approach in Australia.”⁷¹

9.3.2. There are a number of overseas examples and studies that support a justice reinvestment approach. In particular, a number of states in the US have adopted justice reinvestment out of concern about escalating prison costs and the need for a more fiscally sound approach.

9.3.3. Texas for example in 2007 opted to adopt a justice reinvestment approach when they were confronted with an immediate cost of \$500 million to build the three prisons needed to meet increasing prison populations numbers.⁷² However, instead of building more prisons, Texas opted to invest a portion of the money on alternative strategies such as strengthening drug and mental health treatment and investing in people on parole. Since 2007 Texas has actually managed to close prisons, dropping their imprisonment rates by 10 % while reducing crime by 18%.⁷³

9.3.4. Furthermore, a recent analysis of 17 states in the US that have passed comprehensive justice investment reforms found that they expect to prevent as much as \$4.6 billion in corrections spending over the next several years.⁷⁴ This analysis also showed that while there had been an overall decrease in crime across

⁷⁰ Australian Bureau of Statistics (2014) *Prisoners in Australia 2014*, Cat. no. 4517.0. Canberra

⁷¹ Senate Legal and Constitutional Affairs References Committee, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (2013) at 6.8.

⁷² Council of State Governments, Justice Centre Justice Reinvestment State Brief: Texas (New York, 2007).

⁷³ Pew Trust, *Most States Cut Imprisonment and Crime* (13 January 2015);

⁷⁴ Pew Trust, *Growth in Federal Prison System Exceeds States' Federal imprisonment rate, taxpayer costs soar as states curtail expansion, protect public safety* (22 January 2015).

most states (including those with rising imprisonment), the states with the greatest reduction in crime had reduced their prison numbers.⁷⁵

9.3.5. In Australia there has also been success in types of justice reinvestment. For example, the Koori Courts is an initiative which is showing promising signs in terms of effectiveness in reducing re-offending.⁷⁶ Meanwhile the NSW Drug Courts has been shown to effectively treat offenders with alcohol and drug abuse issues, while at the same time being substantially more cost effective than the prison system.⁷⁷

9.3.6. As well as investing in measures such as health, education and rehabilitation, justice reinvestment is also about appropriate laws and sentencing policies which ensure that prison is used truly as a matter of last resort. This is because when there are high crime rates and a high proportion of community members in prison at any one time, a 'tipping point' is reached where communities are weakened, creating the conditions for further crime. Professor Cunneen observed:

The argument in relation to justice reinvestment is that you can pour as much money as you like into health or education but, while you are pulling out of that community large numbers of men and women, the destructive effect of imprisonment undermines any other positive aspects that may be achieved through the funding of health or education services. So that is a very strong argument that has been put underpinning justice reinvestment—that the large numbers of imprisonment from relatively small communities is actually highly destructive of those communities.⁷⁸

9.3.7. A report researched by Deloitte has made clear the savings that can be made through reducing imprisonment numbers. This report made the following findings in relation to diverting nonviolent Indigenous offenders from prison to community residential rehabilitation services:

- It is \$111,458.00 cheaper to therapeutically treat an offender in a community residential rehabilitation service rather than incarcerate the offender.⁷⁹
- The offender's health and mortality improves from receiving therapeutic treatment in a community residential rehabilitation service rather than incarceration.⁸⁰

⁷⁵ Pew Trust, *Most States Cut Imprisonment and Crime* (13 January 2015); Pew Trust, *US Imprisonment Rate Continues to Drop Amid Falling Crime Rates* (14 March 2014).

⁷⁶ See for example, Z Dawkins, *County Koori Court: Final Evaluation Report* (Melbourne, County Court of Victoria and the Victorian Department of Justice. 2011).

⁷⁷ Australian National Council on Drugs, Deloitte, *An economic analysis for Aboriginal and Torres Strait Islander offenders: prison vs residential treatment* (ANC Research Paper, August 2012) at 3-4.

⁷⁸ C Cunneen, Chief Investigator, *Australian Justice Reinvestment Project*, Committee Hansard, 1 May 2013, at 61.

⁷⁹ Australian National Council on Drugs, Deloitte, *An economic analysis for Aboriginal and Torres Strait Islander offenders: prison vs residential treatment* (ANC Research Paper, August 2012) xi

⁸⁰ *Ibid*, xii. See also J Grace et al, *Review of Indigenous offender health* (updated) (2013).

9.3.8. It should further be noted that these figures do not take into consideration the indirect benefits that would flow to Aboriginal and Torres Strait Islander people and communities from having fewer people incarcerated.

9.3.9. In this regard, NATSILS shares a conclusion reached by the Senate Inquiry into the Value of Justice Reinvestment that:

The committee considers that the time is right for governments to consider more effective solutions to tackling crime: solutions that not only provide a significant economic advantage in the short term but perhaps also an even greater economic advantage in the long term. The committee considers that justice reinvestment provides economic benefits in the long term through shifting resources away from incarceration towards prevention, early intervention and rehabilitation.....

While there will be economic benefits to government, the committee considers that the benefits through a justice reinvestment for individuals and communities will be more important. By addressing the social determinants of crime – unemployment, homelessness, health and education issues – justice reinvestment has the potential to improve the life outcomes of individuals and build strong, safe and cohesive communities.⁸¹

9.3.10. NATSILS **recommends** that all levels of government work in partnership with Aboriginal and Torres Strait Islander people, communities, services and their representatives, to develop and implement justice reinvestment solutions to address negative imprisonment rates.

10. Justice Targets:

The Benefits of, and Challenges to, Implementing a System of Justice Targets:

10.1. NATSILS has continuously advocated for the introduction of justice targets into the COAG Closing the Gap Strategy as a matter of priority.⁸² NATSILS believes that the crisis levels of Aboriginal and Torres Strait Islander peoples' imprisonment demands critical federal government leadership which should include a commitment to justice targets. It is noted, that the safer communities 'building block' of the COAG Closing the Gap Strategy is the only area that does not incorporate specific targets and this is where clear targets on lowering imprisonment and violence against Aboriginal and Torres Strait Islander people should be incorporated. It is argued that the lack of specific targets for justice is a glaring omission which undermines the government's attempts to tackle key priorities such as education and health due to the interrelated nature of these issues.

10.2. In order for justice targets to be meaningful they will need broad-based buy in from key Aboriginal and Torres Strait Islander organisations. This should be accompanied by a detailed plan as to how such targets will be achieved. As noted above at 9, NATSILS

⁸¹ Senate Legal and Constitutional Affairs References Committee, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (2013) pp 33–41

⁸² See for example, NATSILS media release, 'NATSILS calls for Federal Government commitment to Justice Targets on Close the Gap Day' 19 March 2015.

believes that this plan should embrace the principles and initiatives of justice reinvestment. This approach should entail partnering closely with Aboriginal and Torres Strait Islander organisations (such as NATSILS), in order to incorporate Aboriginal and Torres Strait Islander people as part of the solution to their negative contact with the justice system.