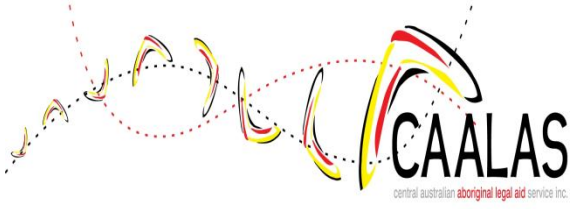
NATSILS Submission on the National Human Rights Action Plan Exposure Draft

March 2012

Victorian Aboriginal Legal Service Co-operative Ltd

Aboriginal Legal Service of Western Australia

Aboriginal Legal Rights Movement Inc



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1. About the NATSILS

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

The NATSILS are comprised of the following Aboriginal and Torres Strait Islander Legal Services (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

This submission is in response to the National Human Rights Action Plan Exposure Draft (Action Plan) released in December 2011. The NATSILS welcome the Australian Government's commitment to developing a road map towards better protection of human rights in Australia and value the opportunity to provide specialist advice in this aim.

In order for the Action Plan to be a useful tool in planning for and measuring progress, it needs to encapsulate an honest acknowledgement of current human rights issues, outline precise and specific actions to be taken to address these, and clearly detail performance indicators and timelines so that progress can be accurately measured.

While the Action Plan in its current form serves as a good starting point, with some additional information and a reformation of the Performance Indicators, it could truly serve as an effective road map for greater protection of human rights across Australia. The NATSILS offer the following analysis to assist in achieving such.

3. Roadmap for the Future

The NATSILS are concerned that the Action Plan is insufficiently comprehensive and fails to acknowledge key human rights issues in Australia. Many of these issues, and actions that could be taken to address them, were previously detailed in the NATSILS submission on the Draft Baseline Study (see attached). However, it appears that many of the issues and actions recommended for inclusion in the Baseline Study by the NATSILS were not accepted and

thus, do not appear in the final Baseline Study. This is of significant concern to the NATSILS as these deficiencies in the Baseline Study detract from the Action Plan, as evidenced by substantial gaps in the Action Plan. As such, many of the actions proposed in the NATSILS submission on the Draft Baseline Study have been repeated here and the NATSILS strongly urge the Australian Government to reconsider adopting them.

The NASTILS are also concerned that many of the currently drafted Action Points under the Action Plan only refer to laws, programs and initiatives already in existence. Relying on the current situation as the means by which existing gaps in human rights protection will be addressed, is significantly flawed. Rather than being a roadmap to increased human rights protection, this approach will simply maintain the status quo. Government should utilise the Action Plan as a means to outline its future commitments to taking greater steps towards full compliance with Australia's international human rights obligations.

The NATSILS are further concerned by the heavy reliance placed on a few jurisdictions. Many of the actions relate to matters limited to the Commonwealth's jurisdiction, or point to a single State or Territory government, most often Victoria. There are many significant human rights issues that relate to matters currently under State or Territory jurisdiction that have been overlooked in the Action Plan. The NATSILS reminds the Australian Government that its international human rights obligations are not mitigated by internal political systems such as federalism. As such, the Action Plan should address all human rights concerns including those which require State and Territory solutions. The NATSILS recommend that when an Action Point is attributed to a single State or Territory, an additional point must be inserted that similar provisions be established in *all* States and Territories so as to create consistency in human rights protection and promotion across the country.

4. Performance Indicators and Timelines

Many of the Performance Indicators and Timelines as currently drafted do not provide enough detail or clarity to enable the effective measurement of progress over the life span of the Action Plan. Performance Indicators that do not include defined targets and Timelines but are simply described as 'ongoing' will not provide sufficient guidance to determine whether Australian governments are on track in achieving the goals of the Action Plan.

The NATSILS endorse the approach recommended by the National Association of Community Legal Centres (NACLC) in that Performance Indicators should be broken down into structural, process and outcome indicators for each Action. Each Action should also have a defined Timeline, rather than simply being listed as 'ongoing'.

The NACLC has described each of these types of Performance Indicators as follows:

1. *Structural indicators* assess legislative/institutional/policy/treaty-based actions to determine the extent to which Australia is complying with its international human rights obligations under ratified human rights instruments. They indicate the Australian Government's intention to abide by international human rights law through effective commitments. Structural indicators will operate as important benchmarks for the NHRAP as they are generally the easiest indicators to assess.

2. *Process indicators* assess the way NHRAP actions comply with a rights-based approach. If structural indicators set out the institutional "what", process indicators are interested in the "how". The key question is whether the activities undertaken by the Australian Government are good faith efforts to improve human rights. Process indicators take into consideration issues of limited resources and the need for the progressive realisation of civil and political, as well as economic, social and cultural rights.

3. *Outcome indicators* assess the practical results/outcomes from NHRAP actions. Outcome indicators are concerned with the question of to what extent the NHRAP has worked in improving the enjoyment of human rights for all Australians. This means that outcome indicators are not measured against human rights treaties but against empirical data which evaluates change on a real, practical level.[1]

5. Protection and Promotion of Human Rights in Australia

5.1 Australia's International Human Rights Commitments

Action Point 2

The Performance Indicators for this Action Point need to include more detail and a corresponding Timeline must be inserted. The NATSILS recommend the following be added to the Action Point:

Lead Agency: Commonwealth Attorney-General's Department (AGD)

Structural Indicator: Ratification of the OPCAT and incorporation into domestic law.

Process Indicator: The Australian Government to work with State and Territory governments, with public consultation, to develop draft legislation and implement a National Preventative Mechanism, similar to, but expanding on the Office of the Inspector of Custodial Services in Western Australia, that has the power to inspect all places of detention including youth detention centres and police lock up facilities.

Outcome Indicator: Decreased incidences of torture and cruel, inhuman or degrading treatment and punishment in places of detention and improved oversight mechanisms to ensure accountability where incidences do occur.

Timeline: Ratification of OPCAT by 2013.

[1] National Association of Community Legal Centres, *Submission to the Exposure Draft of the National Human Rights Action Plan* (2010), 2-3.

Action Point to be Inserted

While the Action Plan sets out progress to be made in regards to many international human rights treaties, it fails to mention the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Australia is not a party. Hence, the NATSILS recommend the insertion of the following Action Point:

The Australian Government will take all necessary steps towards ratification of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights including:

- Developing model legislation for consideration;
- Seeking endorsement of Australia ratifying the Optional Protocol from the Parliamentary Joint Standing Committee on Treaties; and
- Lodging the instrument of ratification with the United Nations (UN).

Lead Agency: AGD

Structural Indicator: Ratification of the Optional Protocol and incorporation into domestic law.

Process Indicator: The Australian Government will work with State and Territory governments, with public consultation, to develop draft legislation.

Outcome Indicator: Increased remedies provided to those individuals who have their economic, social and cultural rights breached.

Timeline: Ratification of the Optional Protocol by June 2013.

Action Point to be Inserted

The Action Plan also fails to set out a road map for the implementation of the Declaration on the Rights of Indigenous Peoples. Thus, the NATSILS recommend the insertion of the following Action point:

The Australian Government will further its commitment to the Declaration on the Rights of Indigenous Peoples by developing a framework to implement and raise awareness about the rights contained therein, in consultation with Aboriginal and Torres Strait Islander peoples[2] and organisations.

[2] The Action Plan needs to employ consistent terminology as the current draft uses a multitude of different terms to refer to Australia's first peoples, including Aboriginal and Torres Strait Islander peoples, Indigenous peoples and Indigenous Australians. The NATSILS recommend that the term Aboriginal and Torres Strait Islander peoples be used throughout the Action Plan.

Lead Agency: AGD

Structural Indicator: Compliance with Australia's obligations under the Declaration on the Rights of Indigenous Peoples and the existence of an agreed Implementation Framework.

Process Indicator: The Australian Government will work with State and Territory governments and Aboriginal and Torres Strait Islander peoples and organisations, in equal partnership, to develop the Implementation Framework.

Outcome Indicator: Australia will have a clear road map against which progress in implementing the full protection of all rights protected within the Declaration can be measured.

Timeline: Development of Implementation Plan completed by end of 2013.

5.2 Legal Protections

Action Point 17

As recently submitted by the NATSILS in our submission on the consolidation of Commonwealth anti-discrimination laws,[3] the promotion of equality and prevention of discrimination would be benefitted by an increase in the powers afforded to the Australian Human Rights Commission (AHRC). The NATSILS argue that Action Point 17 could be strengthened to achieve such and therefore recommend that the Action Point be redrafted to state:

The Australian Government will ensure that the AHRC is able to effectively promote equality, prevent discrimination and resolve complaints in an accessible and equitable manner by:

- Amending the definition of human rights in the *Australian Human Rights Commission Act 1986* (Cth) to include the Convention on the Elimination of Racial Discrimination (CERD), the Convention Against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the ICESCR and the Declaration on the Rights of Indigenous Peoples;

- Empowering the AHRC to inquire into State and Territory laws and practices;

- Empowering the AHRC to institute proceedings in its own name when issues of fact or law affect a number of people;

- Empowering the AHRC to have 'naming and shaming' powers and to issue compliance notices post investigations;

[3] NATSILS, *NATSILS Submission on the Consolidation of Commonwealth Anti-Discrimination Laws* (2012).

- Empowering the AHRC to enter into enforceable agreements with duty holders and seek enforcement of such through the Administrative Appeals Tribunal;

- Assigning each protected attribute its own Commissioner who has a statutory obligation to produce an annual report on progress towards equality to which the Government be required to formally respond within 6 months;

- Enshrining the amicus curiae and intervention powers of the AHRC as a right so that leave from the court is not required and the extension of these powers to appeals; and

- Adequately funding the AHRC to undertake these additional functions.

Lead Agency: AGD

Structural Indicator: Inclusion within the draft consolidated Act regarding Commonwealth anti-discrimination laws of increased powers for the AHRC to promote equality and prevent discrimination.

Process Indicator: Under the current process of consolidation of Commonwealth anti-discrimination laws the AGD will include the additional powers listed within the draft consolidated Act that is currently being put together.

Outcome Indicator: Consistency in rights and obligations across the country and stronger oversight mechanisms to achieve greater compliance.

Timeline: Additional powers are to be included in the draft consolidated Act to be released in first half of 2012.

Action Point to be Inserted

In acknowledgment of the significant degree of support evident in the 2009 Human Rights Consultation for a national Human Rights Act, the Action Plan must provide for the reconsideration of this issue. Thus, the NATSILS recommend the insertion of the following Action Point:

The Australian Government will work with State and Territory governments, NGOs and relevant stakeholders to develop a Draft Human Rights Act (the Draft) that is compliant with Australia's international human rights obligations. The Draft will then be released for public consultation and subject to majority endorsement, introduced into Parliament.

Lead Agency: AGD

Structural Indicator: Full compliance with Australia's international human rights obligations in domestic law.

Process Indicator: The Australian Government will work with State and Territory governments, NGOs and relevant stakeholders in equal partnership, to draft a Human Rights Act that is compliant with Australia's international human rights obligations. The draft will then be released to the public for consultation in preparation for introduction into Parliament.

Outcome Indicator: Comprehensive and consistent domestic protection of human rights.

Timeline: Drafting process to commence by June 2012 for completion by December 2012. Released for 3 month public consultation period from January 2013. If receives majority endorsement, introduced into Parliament in May 2013.

5.3 Australia's Human Rights Framework

Action Point to be Inserted

Given the Government's focus on its Human Rights Framework as the key vehicle for promoting and protecting human rights in Australia, it is important that the rights of Aboriginal and Torres Strait Islander peoples, as Australia's first peoples, be included within the scope of the Framework. Hence, the NATSILS suggest the insertion of the following Action Point:

The Declaration on the Rights of Indigenous Peoples will be added to the list of core UN human rights treaties that new legislation will be scrutinised against by the Parliamentary Joint Committee on Human Rights established under the *Human Rights (Parliamentary Scrutiny) Bills 2011*.

Lead Agency: AGD

Structural Indicator: Amendment of the *Human Rights (Parliamentary Scrutiny) Bill* or Act to include the Declaration on the Rights of Indigenous Peoples in the list of core UN human rights treaties that new legislation must be scrutinised against by the Parliamentary Joint Committee on Human Rights.

Process Indicator: AGD will amend the Bill before Royal Assent or the Act after Royal Assent to reflect this addition.

Outcome Indicator: The identification and prevention of legislation that negatively impacts upon the rights of Aboriginal and Torres Strait Islander peoples.

Timeline: Immediately (before Royal Assent) or within 12 months of Royal Assent.

6. The Human Rights Concerns of the General Community

6.1 Access to Justice

Action Point to be Inserted

Of central importance to access to justice for Aboriginal and Torres Strait Islander peoples is access to quality legal assistance services that are also culturally competent. ATSILS provide not only culturally competent legal advice and representation, but also provide broader support throughout the entire formal justice process which can be a very culturally foreign system to many Aboriginal and Torres Strait Islander peoples. The ATSILS assist their clients in being empowered to understand and utilise the process available to the fullest extent.

The critical underfunding of the ATSILS, as the preferred legal assistance service providers to Aboriginal and Torres Strait Islander peoples, has been well-documented by UN treaty bodies,[4] the Universal Periodic Review,[5] the Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous People,[6] and the Doing Time – Time for Doing Report.[7] Similarly well recognised is the underfunding of Family Violence Prevention Legal Services (FVPLS) and Aboriginal and Torres Strait Islander interpreter services.[8] These issues must be addressed in any Action Plan that aims to improve access to justice.

The NATSILS recommend the insertion of the following Action Point:

The Australian Government will increase Aboriginal and Torres Strait Islander peoples' access to justice and address identified gaps in legal assistance delivery by:

- Ensuring that the funding of the ATSILS and FVPLS is proportionally increased to achieve parity with mainstream legal aid services and departments of public prosecutions;

- Providing the ATSILS and the FVPLS with long term funding agreements, rather than three year agreements;

- Providing funding for FVPLS to provide services in metropolitan areas;

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[4] Human Rights Committee, *Concluding* Observations, 95th sess [25] UN Doc CCPR/C/AUS/CO/5 (2009); Committee on the Elimination of Racial Discrimination, *Concluding* Observations, 77th sess, [19] UN Doc CERD/C/AUS/CO/15-17 (2010);

[5] Human Rights Council, *Draft Report of the Working Group on the Universal Periodic Review Australia,* 10th sess, [86.92], UN Doc A/HRC/WG.6/10/L.8 (2011);

[6] James Anaya The Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *The Situation of Indigenous Peoples in Australia*, Human Rights Council, 15th sess, [50, 104], UN Doc A/HRC/15/ (2010).

[7] Standing Committee on Aboriginal and Torres Strait Islander Affairs, House of Representatives, *Doing Time - Time for Doing, Indigenous Youth in the Criminal Justice System* (2011), 214.

[8] Human Rights Committee, above n 4, [25]; James Anaya, above n 6, [50, 104].

- Providing increased funding for the expansion of Aboriginal and Torres Strait Islander interpreter services so as to create a coordinated national Aboriginal and Torres Strait Islander interpreter service that covers all metropolitan, regional and remote areas;[9] and

- Amending laws to make it mandatory for police to contact an Aboriginal and Torres Strait Islander Legal Service in every circumstance where an Aboriginal and Torres Strait Islander person is taken into police custody, on the proviso that sufficient funding is provided to support this additional service.

Lead Agency: AGD, FaHCSIA

Structural Indicator: The Australian Government will be compliant with its international human rights obligations,[10] repeated UN treaty body recommendations,[11] and the findings of the Doing Time – Time for Doing Report[12] in regards to access to justice for Aboriginal and Torres Strait Islander peoples.

Process Indicator: The Australian Government will work in equal partnership with ATSILS, FVPLS and Aboriginal and Torres Strait Islander interpreter services to develop increased and longer term funding agreements and the expansion of Aboriginal and Torres Strait Islander interpreter services.

Outcome Indicator: All Aboriginal and Torres Strait Islander peoples in contact with the justice system will have access to quality and culturally competent legal assistance and interpreter services regardless of their location.

Timeline: Provision of increased funding in 2012-2013 Commonwealth budget, longer term agreements to be negotiated before the end of current agreements, and development of interpreter framework to commence March 2012.

Action Point to be Inserted

In Australia, once a person has been convicted and has had an unsuccessful appeal, there is no legal right to any further consideration of their case no matter how compelling the evidence which may emerge may be of a wrongful conviction. This is because appellate

[9] See NATSILS, *NATILS Submission to the Commonwealth Attorney-General on the Expansion of Aboriginal and Torres Strait Islander Interpreter Services* (2011).

[10] *The Universal Declaration of Human Rights*, adopted 10th December 1948, arts 7, 10; *International Convention on the Elimination of all Forms of Racial Discrimination*, opened for signature 21 December 1965, 1249 UNTS 13, arts 5, 6 (entered into force 4 January 1969); *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171, arts 2, 9 (2), 14, 26 (entered into force 23 March 1976).

[11] Human Rights Committee, above n 4, [25]; Committee on the Elimination of Racial Discrimination, above n 4, [19].

[12] Standing Committee on Aboriginal and Torres Strait Islander Affairs, above n 7, 214.

courts are unable to re-open appeals and the High Court of Australia is unable to hear fresh evidence.[13] The only option left in such cases is to petition under the statutory procedure for the case to be referred back to the relevant appellate court. This process however, does not provide any legal right to an applicant either to a referral to the court or even to a fair reading of the petition. It is subject to the arbitrary and non-reviewable discretion of the Attorney-General.

This situation has been confirmed as a breach of Australia's constitutional obligations regarding the maintenance of judicial independence[14] and its obligations under the International Covenant on Civil and Political Rights (ICCPR) regarding the rights to a fair trial and effective remedies when one's rights have been violated.[15] It is also a serious denial of due process and principles of natural justice.

This is not however, the situation in comparable overseas jurisdictions. In Britain for example, a Criminal Cases Review Commission (CCRC) has been established which has led to the overturning of more than 300 convictions in its first 10 years. Decisions of the CCRC are also supported by written reasons and are judicially reviewable.

The NATSILS recommend the insertion of the following Action Point:

The Australian Government, in cooperation with State and Territory Governments, will establish a CCRC.

Lead Agency: AGD, State and Territory counterparts

Structural Indicator: Compliance with Australia's Constitution and the ICCPR in regards to the maintenance of judicial independence and the rights to a fair trial and effective remedies when one's rights have been violated.

Process Indicator: The AGD and its State and Territory counterparts will develop and establish, in consultation with relevant stakeholders, a CCRC that can be accessed by all jurisdictions in Australia. In developing the model for a CCRC, the AGD and its State and Territory counterparts will consider comparable models from overseas, such as that which exists in Britain.

Outcome Indicator: The establishment of a CCRC.

Timeframe: End of 2013.

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[13] Bibi Sangha and Bob Moles, *Australia's criminal appeal procedures - in breach of international human rights obligations - and unconstitutional,* Australian Institute of Judicial Administration Conference, Sydney NSW 7-9 September 2011.

[14] Ibid; *South Australia v Totani 2010* HCA 39 [1]. Australian Human Rights Commission, *Inquiry into the Criminal Cases Review Commission Bill 2010* (2011).

[15] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171, arts 9,2 (entered into force 23 March 1976).

6.2 Use of Force by Police

Action Point 38

The NATSILS propose that this Action Point be strengthened through clarification of the meaning of independence in regards to independent investigations of police use of force and deaths in custody and the inclusion of additional oversight mechanisms. The NATSILS therefore recommend that the Action Point be redrafted to state:

All Australian governments will ensure that complaints regarding police use of force and all deaths in police care or custody are investigated by authorities that are hierarchically, institutionally and practically independent of the police force being investigated[16] and that:

- Such independent authorities are adequately empowered and resourced to conduct the primary investigation of deaths in police care or custody or allegations of excessive use of force by police. More specifically, that investigations of deaths in police care or custody will be placed in the hands of the independent authority as soon as practicable, ideally within one hour of the death;

- Investigations are to be conducted in a timely manner, with legislated timeframes for investigating and reporting to ensure accountability;

- Procedural safeguards are in place, such as separating police officers (either witnesses or suspects) until they are interviewed by the independent authority;

- Police officers involved in the relevant event are required to cooperate with the investigation and provide all relevant accounts and documents regarding the event. It is important that police officers (either witnesses or suspects) are interviewed as soon as practicable, preferably within 24 hours after the incident, unless there are exceptional and justifiable circumstances. Interviews should be recorded electronically;

- Independent review mechanisms are established to permit public scrutiny of investigations and their results;

- Legislation is introduced in every jurisdiction that requires governments to act on coronial recommendations;

- Mandatory police recording of use of force is established in every jurisdiction;

[16] Such authorities may include police officers from other jurisdictions if they meet the standard of being hierarchically, institutionally and practically independent of the police force being investigated and comply with the additional requirements set out for investigative authorities in this recommendation. Such an approach has been employed in overseas jurisdictions and has been recommended by the SA Coroner in the inquest of Colin Sansbury 2007, [19.3, 20.2].

- Data is collected as to the people force is used against, disaggregated by sex, age, gender, race, ethnicity, disability and vulnerability (including whether the person was affected by mental illness/crisis, drugs or alcohol), the circumstances in which force is used and who is using force, disaggregated by police rank, geographic region, police service areas, police stations and police departments; and

- Data is collected and analysed in relation to successful operations and scenarios where conflict has been successfully resolved without resort to force in order to assist police in learning from and developing improved techniques for de-escalation and minimising the use of force.[17]

Lead Agency: Australian, State and Territory governments

Structural Indicator: Compliance with Australia's human rights obligations[18] and recommendations made by the Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous People.[19]

Process Indicator: Governments will progressively implement such and report publicly on progress to ensure accountability.

Outcome Indicator: Greater public confidence in the investigation of complaints and deaths in police care and custody and greater accountability placed on guilty parties. An associated reduction in the incidence of inappropriate use of force and deaths in police care and custody.

Timeline: Implementation to commence immediately and progress reports to be released publicly on an annual basis.

Action Point 40

While monitoring is useful in identifying trends and measuring progress, it does not employ any proactive actions to reduce deaths in custody. As such, a further commitment needs to be made that states that Australian governments will implement in full all Royal Commission into Aboriginal Deaths in Custody (RCIADIC) recommendations. The NATSILS recommend that this Action Point be redrafted to state:

The Australian and State and Territory governments will reduce deaths in custody by:

- Continuing the deaths in custody monitoring program under the Australian Institute of Criminology; and

[17] See Human Rights Law Centre, *Upholding Our Rights: Towards Better Practice in Police Use of Force* (2011), 28-29.
[18] Committee Against Torture, *Concluding Observations*, 40th sess, [13,23,27] UN Doc CAT/C/AUS/CO/3 (2008); Committee on the Elimination of Racial Discrimination, above n 4, [21]; Human Rights Committee, above n 4, [21]; Committee on the Elimination of Racial Discrimination, above n 4, [20]; Human Rights Council, above n 5, [86.91].
[19] James Anaya, above n 6, [51] [103].

- Implementing in full all RCIADIC recommendations.

Lead Agency: Australian, State and Territory governments

Structural Indicator: Full compliance with all RCIADIC recommendations.

Process Indicator: In consultation with relevant stakeholders, governments will conduct a review to identify current gaps in RCIADIC recommendation implementation[20] and introduce legislation and policy to address these.

Outcome Indicator: Measurable reduction in Aboriginal and Torres Strait Islander deaths in custody as well as total deaths in custody.

Timeline: Review to be completed by the end of 2012 and implementation of outstanding recommendations to be completed by 2015.

Action Point 41

Recent research has shown that police are increasingly utilising force as opposed to de-escalation techniques and that TASERS and capsicum spray in particular are increasingly being used as compliance tools, including on those already in custody.[21] The inappropriate use of TASERS on children, women, Aboriginal and Torres Strait Islander peoples, the mentally ill and other vulnerable people is also concerning.[22] In order to better frame use of force guidelines in a way that will better protect the human rights of all involved, the NATSILS recommend that this Action Point be redrafted to state:

The Australia and New Zealand Police Advisory Agency (ANZPAA) will undertake a national review of police use of force/operational safety guidelines that includes consideration of use of TASERS, and adopts a human rights based approach.[23]

Lead Agency: ANZPAA

Structural Indicator: Development of police use of force/operational safety guidelines which are compliant with Australia's international human rights obligations.

[20] ALS NSW/ACT are currently conducting a review of RCIADIC implementation in each jurisdiction that could assist in this process.

[21] Corruption and Crime Commission, *The Use of Taser Weapons by Western Australia Police* (2010), [12]; Michael Williams (Victoria Police), *Meeting Operational Safety and Tactics Training and Critical Incident Management Training Standards* (2009), 7.

[22] Ibid; Tamar Hopkins, *An Effective System for Investigating Complaints Against Police* (2009), 14.

[23] See Human Rights Law Centre, *Upholding Our Rights: Towards Better Practice in Police Use of Force* (2011) as an example of how guidelines can adopt a human rights based approach.

Process Indicator: ANZPAA will undertake review and seek public input into recommended changes to the guidelines.

Outcome Indicator: An identifiable pattern in the reduction in the incidence of excessive use of force by police and of deaths in police care or custody.

Timeline: Review commenced in 2011 and implementation of review outcomes within 12 months of final report.

7. The Human Rights Experiences of Aboriginal and Torres Strait Islander Peoples

7.1 Self-Determination and Consultation

Action Point to be Inserted

It is troubling that throughout this section there is no mention of the actual right to self-determination or the international human rights treaties which protect it.[24] The establishment of the National Congress of Australia's First Peoples, while a positive step, does not on its own fulfil the Australian Government's obligations to respect Aboriginal and Torres Strait Islander peoples' right to self-determination. In order to better plan for the fulfilment of the right to self-determination, the NATSILS recommend the following Action Point be inserted into the Action Plan:

All Australian governments will develop and implement, in equal partnership with Aboriginal and Torres Strait Islander peoples, procedures and laws that respect the right to self-determination, including but not limited to:

- Developing frameworks with Aboriginal and Torres Strait Islander peoples for their participation in decision-making which outline consultation protocols, roles and responsibilities and strategies for increasing Aboriginal and Torres Strait Islander participation in all institutions of democratic governance;[25]

- Convening a series of comprehensive national roundtables with Aboriginal and Torres Strait Islander peoples in metropolitan, regional and remote areas to develop a road map for implementing the right of self-determination;

- Ensuring compliance with the principle of obtaining the free, prior and informed consent of Aboriginal and Torres Strait Islander peoples in any matters that will affect them; and

[24] *United Nations Declaration on the Rights of Indigenous Peoples*, adopted 13 September 2007, arts 3, 18, 19; *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171, art 1 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, I-14531, art 1 (entered into force 3 January 1976).

[25] See Australian Human Rights Commission Native Title Report 2009 section on Principles for Effective Consultation and Engagement.

- Conducting a review into potential models for the inclusion of dedicated Aboriginal and Torres Strait Islander seats in Australian parliaments.

Lead Agency: Australian and State and Territory governments

Structural Indicator: Compliance with Australia's obligations to protect Aboriginal and Torres Strait Islander peoples' right to self-determination as contained in the Declaration on the Rights of Indigenous Peoples,[26] the ICCPR,[27] and the ICESCR.[28]

Process Indicator: Governments will work in equal partnership with Aboriginal and Torres Strait Islander peoples and peak organisations to develop a framework for participation in decision-making and conduct national roundtables on self-determination; free, prior and informed consent will be obtained in ways that reflect Aboriginal and Torres Strait Islander decision-making structures and methods and are compliant with UN standards;[29] and governments will take an evidenced-based approach to reviewing how dedicated seats in parliament have worked in other comparable jurisdictions.

Outcome Indicator: Aboriginal and Torres Strait Islander peoples will have self-determination in relation to their own affairs.

Timeline: Review into dedicated seats in parliaments to begin in June 2012 and final report to be completed by December 2012. Remaining actions to be completed by December 2013.

7.2 Stolen Generations and Stolen Wages

Action Points to be Inserted

The Action Points under this section need to be revised as they currently do not engage with the relevant human rights issues. There is no recognition of the well-recognised obligation on Australian governments to implement a national compensation scheme for victims of the

[26] *United Nations Declaration on the Rights of Indigenous Peoples*, adopted 13 September 2007, arts 3, 18, 19.
[27] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171, art 1 (entered into force 23 March 1976).
[28] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, I-14531, art 1 (entered into force 3 January 1976).
[29] Department of Economic and Social Affairs, *Free, Prior and Informed Consent and Beyond* (2005) ; *General Recommendation No. 23: Indigenous Peoples*, Committee on the Elimination of Racial Discrimination, 51st sess, [4] (d), UN Doc A/52/18, annex V (1997); *General Recommendation No. 32*, Committee on the Elimination of Racial Discrimination, 75th sess, [18], UN Doc CERD/C/GC/32 (2009). *United Nations Declaration on the Rights of Indigenous Peoples*, adopted 13 September 2007, arts 18, 19.

Stolen Generations and a national scheme for the return of all Stolen Wages.[30] By not doing so, the Australian Government is in breach of numerous rights enshrined under the ICCPR including, the rights to liberty and security of person, enjoyment of culture, family life, children to a measure of protection, equality before the law, access to a fair and public hearing and the provision of effective remedies when any of these rights are breached.[31] Also, despite indications in the heading, the section makes no mention of Stolen Wages at all.

In order to rectify this oversight the NATSILS recommend the insertion of the following Action Point:

The Australian Government will work with State and Territory governments to establish nationally comprehensive schemes for the payment of compensation to victims of the Stolen Generations and repayment to victims of Stolen Wages, and, where they are deceased, their descendants.

Lead Agency:	Australian, State and Territory governments
Structural Indicator:	Compliance with Australia's obligation under the CERD,[32] the ICCPR,[33] and relevant recommendations made by the Special Rapporteur on the Rights and Fundamental Freedoms of Indigenous People[34] and UN treaty bodies.[35]
Process Indicator:	Governments will work together to develop and fund the two national schemes and report publicly on progress towards such. The Stolen Wages scheme will provide compensation in equivalent terms to present day incomes, including interest, as well as additional compensation for the wrong of taking the income and the inconvenience that it caused. Both schemes will be ongoing and will not have an expiry date for the lodgement of claims.
Outcome Indicator:	Access to adequate compensation for victims of the Stolen Generations and repayment of Stolen Wages.

[30] Human Rights Council, above n 5, [86.97]; Human Rights Committee, above n 4, 10, 15; Committee on the Elimination of Racial Discrimination, above n 4, 26.

[31] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171, arts 2, 9, 14, 23, 24, 26, 27 (entered into force 23 March 1976). It is arguable that the refusal of legal aid to victims of the Stolen Generations is a breach of the right to equality before the law and access to a fair and public hearing with respect to rights and obligations in a suit at law.

[32] *International Convention on the Elimination of all Forms of Racial Discrimination*, opened for signature 21 December 1965, 1249 UNTS 13, art 6 (entered into force 4 January 1969).

[33] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171, arts 2, 9, 14, 23, 24, 26, 27 (entered into force 23 March 1976).

[34] James Anaya, above n 6, 19, 83.

[35] Committee on the Elimination of Racial Discrimination, above n 4, 26; Human Rights Committee, above n 4, 15.

Timeline: Development to start immediately and reporting on progress to be on a six monthly basis.

7.3 Freedom from Discrimination

Action Point 82

The NATSILS hold concerns regarding Action Point 82 given that many Aboriginal and Torres Strait Islander communities and organisations have voiced opposition to the Stronger Futures legislation package. Two of Australia's most senior jurists have also voiced serious concerns, stating that the legislation contains "an element of racism"[36] and are "bad laws" that "impose…solutions on Aboriginal communities without their involvement or approval".[37] In particular, the NATSILS are concerned about the expansion of the income management scheme despite the absence of any evidence to show how it will improve outcomes for families and children and the continuation of discriminatory practices such as the prohibition on considerations of customary law and practice during bail sentencing and alcohol restrictions.

The NATSILS are also concerned that the views of Aboriginal and Torres Strait Islander communities which the legislation will directly affect have not adequately been taken into account.[38] Several UN treaty bodies and the Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous People have voiced strong concerns about the numerous human rights violations resulting from measures implemented under the Northern Territory Emergency Response (NTER), which are set to continue under the Stronger Futures legislation.[39] The NATSILS do not support the implementation of the Stronger Futures legislation package in its current form and do not support the inclusion of this Action Point.

The NATSILS recommend the removal of Action Point 82 and its replacement with the following:

The Australian Government will ensure that any future legislation introduced to replace the NTER will comply with all Australia's international human rights obligations, including the right to self-determination, the principle of free, prior and informed consent, freedom from discrimination, and equality before the law. Furthermore, such legislation will not be passed until a comprehensive review, independent of the Government, has been conducted that

[36] Frank Vincent, former Victorian Supreme and Appeals court judge, "Senior Judges Slam Closing the Gap Plan" at http://www.abc.net.au/news/2012-02-16/senior-jurists-slam-nt-intervention-proposal/3832950.
[37] Alastair Nicholson, former Family Court chief justice, "Senior Judges Slam Closing the Gap Plan" at http://www.abc.net.au/news/2012-02-16/senior-jurists-slam-nt-intervention-proposal/3832950.
[38] http://news.smh.com.au/breaking-news-national/nt-intervention-wont-work-exjustice-20120215-1t5co.html
[39] Committee on Economic, Social and Cultural Rights, *Concluding* Observations, 42nd sess, [15, 20] UN Doc E/C.12/AUS/CO/4 (2009); Human Rights Committee, above n 4, 14; James Anaya, above n 6, 47; James Anaya, Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous Peoples, *Observations on the Northern Territory Emergency response in Australia* (2010), 4, 9, 11, 13, 15, 16, 18, 20, 21, 25, 26, 27, 28, 29, 34, 41, 63, 64; Committee on the Elimination of Racal Discrimination, above n 4, 16.

assesses both the quantitative and qualitative outcomes of the NTER measures that the Government proposes to continue.

Lead Agency: FaHCSIA, AGD, Northern Territory Government

Structural Indicator: A plan for future action in the Northern Territory that is compliant with Australia's human rights obligations.

Process Indicator: Governments will work with affected Aboriginal and Torres Strait Islander communities to ensure their free, prior and informed consent to any proposed measures.[40] Governments will also fund, but not oversee or pre-determine the terms of reference of, a full review of the outcomes of NTER measures that it plans to continue that is based on qualitative, quantitative and accurate data and evidence.

Outcome Indicator: A Plan for future action that has the free, prior and informed consent of the Aboriginal and Torres Strait Islander communities affected, is human rights compliant and is evidenced-based.

Timeline: Passage of Stronger Futures and related Bills into legislation to be stopped and review of measures to commence immediately.

7.4 Community Safety and the Justice System

Action Point 83

If this Action Point is to focus on how the Australian Government will address the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system then its scope needs to be significantly widened. The Performance Indicators and Timelines are also insufficient as, for example, the tabling of a report is not an adequate Performance Indicator or Timeline against which progress can be measured.

The NATSILS recommend that Action Point 83 be redrafted to state:

The Australian Government, with the cooperation of State and Territory governments, will work to address the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system by:

- Establishing a National Partnership Agreement (NPA) relating to justice under the Safe Communities Building Block of COAG's Closing the Gap agenda that incorporates the aims and actions of the National Indigenous Law and Justice Framework (NILJF), specific targets to reduce the high involvement of Aboriginal and

[40] As set out in: United Nations Department of Economic and Social Affairs, *Free, Prior and Informed Consent and Beyond* (2005); *General Recommendation No. 23: Indigenous Peoples*, Committee on the Elimination of Racial Discrimination, 51st sess, [4] (d), UN Doc A/52/18, annex V (1997); *General Recommendation No. 32*, Committee on the Elimination of Racial Discrimination, 75th sess, [18], UN Doc CERD/C/GC/32 (2009); *United Nations Declaration on the Rights of Indigenous Peoples*, adopted 13 September 2007, arts 18, 19.

Torres Strait Islander peoples in contact with the criminal justice system, and identified and binding responsibilities and benchmarks that all governments must meet. Relevant stakeholders, such as ATSILS and FVPLS will be involved in the drafting of the NPA;

- Implementing all the recommendations of the *Doing Time – Time for Doing* Report;

- Implementing justice reinvestment strategies in each State and Territory;

- Implementing increased therapeutic jurisprudence approaches, such as the expansion of specialised courts and community courts, and the increased use of restorative justice processes that promote community empowerment and the role of Aboriginal and Torres Strait Islander Elders in the criminal justice system;

- Increasing the use of non-custodial sentencing options (such as community based orders, community work orders, diversionary programs, cautioning and home detention);

- Decriminalising public drunkenness and establishing public health responses to alcohol abuse;

- Abolishing mandatory sentencing policies;

- Ensuring natural justice principles are protected in parole proceedings to encourage supported monitored release and the rehabilitation and reintegration of offenders;

- Creating a holistic youth justice system that responds effectively to the causal factors of offending and over-representation by diverting young people from contact with the criminal justice system and judicial proceedings and referring them to appropriate support and rehabilitative services wherever possible; and

- Making available the necessary resources to prevent and reduce young people's contact with the criminal justice system in terms of investing in education, housing, rehabilitation services, youth bail hostels, support services, employment and training and recreational activities under a justice reinvestment framework.

Lead Agency: AGD, FaHCSIA, COAG, State and Territory governments

Structural Indicator: A justice system which is compliant with Australia's human rights obligations and numerous UN treaty body recommendations.[41]

[41] Committee Against Torture, above n 18, 23; Committee on the Elimination of Racial Discrimination, above n 4, 20, 21; Committee on the Rights of the Child, *Concluding Observations: Australia*, 40th sess, [72-74] UN Doc CRC/C/15/Add.268 (2005); *International Convention on the Elimination of all Forms of Racial Discrimination*, opened for signature 21 December 1965, 1249 UNTS 13, arts 5, 6 (entered into force 4 January 1969).

Process Indicator: Governments will work in equal partnership with Aboriginal and Torres Strait Islander peoples, communities, and peak bodies, in an open and transparent manner, in implementing the above recommendations and will report annually on progress in implementation.

Outcome Indicator: A 10% decrease in the rate of Aboriginal and Torres Strait Islander peoples in contact with the criminal justice system and in detention.

Timeline: Annual reporting and a 10% decrease achieved by 2017.

Action Point 85

This Action Point is the same as Action Point 40 which the NATSILS have provided comment on above at 6.2. The NATSILS recommend that this Action Point be removed or redrafted in the same manner as that recommended for Action Point 40.

Action Point 86

There is insufficient detail provided in this Action Point to enable adequate measurement of progress. Given that the NATSILS recommend above at Action Point 83 that the NILJF be incorporated into an NPA under the Safe Communities Building Block, if that recommendation is accepted then Action Point 86 should be removed. However, if that recommendation is not accepted then the NATSILS recommend that Action Point 86 be redrafted to state:

While continuing to implement the NILJF the Australian Government will ensure that all parties to the NILJF comply with their annual progress reporting obligations[42] and will rejuvenate talks with State and Territory governments to plan for full implementation.

Lead Agency: AGD

Structural Indicator: Compliance with, and full implementation of, the NILJF.

Process Indicator: Governments will submit annual reports detailing their progress in implementing the NILJF with the inclusion of explanations relating to failures to do so in any action area. These reports will then be made available to the public in order to encourage openness, accountability and discussions as to how further progress can be achieved.

Outcome Indicator: Annual reports submitted and released to the public.

Timeline: Annually.

[42] Standing Committee on Aboriginal and Torres Strait Islander Affairs, above n 7, [2.78]. The Report found that no review of progress was conducted in 2010.

Action Point 87

This Action Point does not address well-recognised issues affecting Aboriginal and Torres Strait Islander legal assistance services, such as ATSILS, FVPLS and Aboriginal and Torres Strait Islander interpreter services. The current issues affecting these services, and recommendations for actions and indicators to address them, have previously been detailed above at 6.1. Therefore, the NATSILS recommend that this Action Point make reference to those issues, actions and indicators recommended at 6.1 above.

Action Point 88

It is surprising to the NATSILS that this Action Point makes no reference to the national framework of Aboriginal and Torres Strait Islander interpreter services that the Australian and State and Territory governments have committed themselves to developing under the NPA on Remote Service Delivery.[43] Substantial funding has been committed by all governments party to the NPA and the NATSILS received indication from FaHCSIA, as the lead department in charge of the project, that work on developing the national framework would begin in the second half of 2011. However, the NATSILS have heard no further word as to the progress of development. This Action Point should reconfirm the commitments made under the NPA on Remote Service Delivery and provide detail as to the implementation of the national framework.

Therefore, the NATSILS recommend that the Action Point be redrafted to state:

The Australian and State and Territory governments will implement, in partnership with relevant service providers and stakeholders, the national framework for Aboriginal and Torres Strait Islander interpreter services, as committed to under the NPA on Remote Service Delivery, to ensure the provision of trained and professional Aboriginal and Torres Strait Islander interpreters in all metropolitan, rural and remote areas of Australia.

Lead Agency: FaHCSIA, State and Territory counterparts

Structural Indicator: Compliance with an individual's right to equality before the law and a fair trial[44] and implementation of the NPA on Remote Service Delivery.

[43] Council of Australian Governments, *National Partnership Agreement on Remote Service Delivery* (2009).

[44] *The Universal Declaration of Human Rights*, adopted 10th December 1948, arts 7, 10; *International Convention on the Elimination of all Forms of Racial Discrimination*, opened for signature 21 December 1965, 1249 UNTS 13, art 5(a) (entered into force 4 January 1969); *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171, arts 9 (2), 14 (3) (b)(f), 26 (entered into force 23 March 1976); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, arts 2 (1), 9 (2), 12, 40 (b)(vi) (entered into force 2 September 1990); *United Nations Declaration on the Rights of Indigenous Peoples*, adopted 13 September 2007, art 13; *General Comment No. 32*, UN Human Rights Committee, 90th sess, [13], UN Doc CCPR/C/GC/32 (2007); Human Rights Committee, above n 4, [13, 25, 32]; James Anaya, above n 6, [50, 104]; *Racial Discrimination Act 1975* (Cth), s 10; Commonwealth, Royal Commission into Aboriginal Deaths in Custody*, Final Report* (1991), recs 99, 100.

Process Indicator: The Australian and State and Territory governments will develop, in consultation with the NATSILS and existing Aboriginal and Torres Strait Islander interpreter services, a model for a national framework of Aboriginal and Torres Strait Islander interpreter services.[45]

Outcome Indicator: All Aboriginal and Torres Strait Islander peoples will have access to a trained and qualified interpreter regardless of their location.

Timeline: Commence development of national framework model in May 2012, for completion by September 2012. Implementation of national framework to commence in October 2012.

8. Women

Issues relating to the underfunding and location of FVPLS have already been addressed elsewhere in this submission, and will not be repeated here. However, there are further specific commitments that could be made to better address the high rates at which Aboriginal and Torres Strait Islander women experience family and domestic violence. For example, criticisms have been made as to the broad focus of the National Plan to Reduce Violence Against Women and Their Children and the fact that more targeted action is needed to address family and domestic violence within Aboriginal and Torres Strait Islander communities. The NATSILS therefore, recommend the insertion of the following Action Point:

The Australian Government will support Aboriginal and Torres Strait Islander organisations and communities to develop and implement local level initiatives to reduce the high incidence of family and domestic violence within Aboriginal and Torres Strait Islander communities.

Lead Agency: AGD, FaHCSIA

Structural Indicator: Compliance with Australia's obligations under the ICCPR,[46] the Convention on the Elimination of All Forms of Discrimination Against Women[47] and relevant UN treaty body recommendations.[48]

Process Indicator: The Australian Government will work with Aboriginal and Torres Strait Islander communities and organisations at the local level to support the development of community lead initiatives to combat family and domestic violence.

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[45] See NATSILS, *NATSILS Submission on the Expansion of Aboriginal and Torres Strait Islander Interpreter Services* (2011).

[46] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171, arts 2, 3, 7, 26 (entered into force 23 March 1976).

[47] *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, I-20378, arts 3, 4 (entered into force 3 September 1981).

[48] Committee on the Elimination of Discrimination Against Women, *Concluding Observations*, 46th sess, [40, 41], UN Doc CEDAW/C/AUS/CO/7 (2010); Human Rights Committee, above n 4, [17].

Outcome Indicator: 10% reduction in the number of recorded Aboriginal and Torres Strait Islander women who are victims of family and domestic violence by 2015.

Timeline: Immediate commencement of support for initiative development with support to be ongoing.

9. Children and Young People

Action Point 121

This Action Point provides insufficient instruction and detail as to exactly what action is required and by when. The NATSILS recommend that the Action Point be redrafted to state:

The Australian Government will review options for establishing a new National Children's Commissioner, in preparation for implementation by mid-2013.

Lead Agency: FaHCSIA, AGD

Structural Indicator: Introduction of legislation to establish a National Children's Commissioner.

Process Indicator: The Australian Government will work with the AHRC and relevant stakeholders to conduct a review, and identify the most favourable options for the establishment of a National Children's Commissioner that takes into account the AHRC's 2010 Discussion Paper and the responses to FaHCSIA's consultations in 2009, 2010 and 2011.

Outcome Indicator: Identification of most favourable option by end of 2012, for implementation in 2013.

Timeline: 2012-2013.

Action Point to be Inserted

Action Point 126 does not go far enough to address the specific issue of the over-representation of Aboriginal and Torres Strait Islander children in out of home care. The National Framework for Protecting Australia's Children mentioned in Action Point 126 is not specific to the needs to Aboriginal and Torres Strait Islander children and families which can be unique and complex.[49] A more targeted approach is needed.

The NATSILS recommend an additional Action Point be inserted which states:

[49] See NATSILS, NATSILS Submission on the National Human Rights Action Plan Draft Baseline Study (2011).

The Australian Government, with the cooperation of State and Territory governments, will work to address the over-representation of Aboriginal and Torres Strait Islander children in out of home care and ensure a continued connection with community, culture and identity for those in care by:

- Implementing a holistic approach to child protection that incorporates a public health and prevention model to reduce the over-representation of Aboriginal and Torres Strait Islander children in the system and address the underlying causes of child abuse and neglect;

- Adhering to the Indigenous Child Placement Principle at all levels of government and providing clarification in relation to the definitions for compliance;

- Developing a policy and practice framework, in consultation with Aboriginal and Torres Strait Islander peoples and organisations, in relation to the Indigenous Child Placement Principle to aid its implementation;

- Strengthening current efforts to address the living conditions of Aboriginal and Torres Strait Islander peoples so that fewer Aboriginal and Torres Strait Islander children are taken into alternative care by:

    - committing to improving evidence gathering mechanisms through the incorporation of Aboriginal and Torres Strait Islander methodologies in relation to standards of living of Aboriginal and Torres Strait Islander young people;

    - implementing independent reviews, with the involvement of Aboriginal and Torres Strait Islander peoples, of the success of the Closing the Gap campaign and the NTER and committing to amend these initiatives in light of the reviews' results; and

    - developing a system in consultation, partnership and collaboration with Aboriginal and Torres Strait Islander peoples for increased early and therapeutic family interventions and parental support which focuses on increasing the chances of young people remaining within their families.

- Reviewing the screening processes of Aboriginal and Torres Strait Islander carers, in particular, kinship carers, and allocating resources to support and increase the number of potential carers;

- Ensuring that Cultural Support Plans are developed and updated at least every 6 months for each Aboriginal and Torres Strait Islander child in care in consultation with the child's family and community;

- Developing wellbeing indicators, in consultation with Aboriginal and Torres Strait Islander peoples and peak bodies, to assess and enhance the wellbeing of Aboriginal and Torres Strait Islander children;

- Ensuring that, when in the best interest of the child, the child protection system focuses on family reunification as a priority and that until reunification is achieved Cultural Support Plans are strictly followed so as to maintain the child's connection to community and culture; and

- Ensuring that the child protection system educates its staff on the importance of maintaining relations between Aboriginal and Torres Strait Islander children in alternative care and their incarcerated parent/s and that such contact is designated as a priority area within their case work obligations.

Lead Agency: AGD, FaHCSIA, State and Territory governments

Structural Indicator: Compliance both in legislation and practice with Australia's obligations under the Convention on the Rights of the Child (CRC),[50] the Declaration on the Rights of Indigenous Peoples[51] and relevant UN treaty body recommendations.[52]

Process Indicator: Governments will work with Aboriginal and Torres Strait Islander peoples, communities and peak bodies, in an open and transparent manner, to implement the above measures and ensure that they address the needs of, and reflect solutions approved by, Aboriginal and Torres Strait Islander children and families.

Outcome Indicator: 10% reduction in the amount of Aboriginal and Torres Strait Islander children in out of home care and every Aboriginal and Torres Strait Islander child in out of home care has a comprehensive, high quality and evolving Cultural Support Plan by 2014.

Timeline: Progressive implementation of all measures to be completed by 2014.

Action Points 128 and 129

As these two Action Points appear to say the same thing, the NATSILS recommend that one be removed. The NATSILS also recommend that ATSILS be included in the remaining Action Point along with Community Legal Centres, and that the recommendations at 6.1 above also be included.

Action Point to be Inserted

The current Action Points associated with juvenile justice do not identify the over-representation of Aboriginal and Torres Strait Islander young people in the juvenile justice

[50] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, arts 2, 4, 8, 9, 10, 19, 20, 27 (entered into force 2 September 1990).
[51] *United Nations Declaration on the Rights of Indigenous Peoples*, adopted 13 September 2007, arts 8, 2, 9, 11, 12, 13, 25, 31.
[52] Committee on the Rights of the Child, *Concluding Observations: Australia*, 40th sess, [17, 18, 24, 31, 32, 37, 38, 39, 40, 41] UN Doc CRC/C/15/Add.268 (2005).

system as a specific and serious human rights issue in Australia. Such over-representation has been identified as a "national crisis"[53] and it is therefore seriously concerning that is has been left without mention within the Action Plan. This over-representation is the result of a complex matrix of factors and an effective road map to address such will need to have comprehensive coverage. The NATSILS recommend inserting the following Action Point into the Action Plan which will work in partnership with the actions recommended above in relation to Action Point 83 regarding the general over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system:

The Australian Government, with the cooperation of State and Territory governments, will address the over-representation of Aboriginal and Torres Strait Islander young people in the juvenile justice system by:

- Reviewing all legislation for its impact upon Aboriginal and Torres Strait Islander peoples, including young people specifically, and including a "statement of impact" in relation to Aboriginal and Torres Strait Islander peoples, including young people specifically, within all future Bills introduced into Australian parliaments;

- Amending legislation where it is identified as having a discriminatory impact upon Aboriginal and Torres Strait Islander young people, so as to render it non-discriminatory, or implementing support measures to assist young people coming into contact with the legislation to achieve an equitable outcome;

- Decriminalising public drunkenness and establishing a youth-specific public health response to juvenile alcohol and other substance abuse;

- Raising the age for adult criminal responsibility from 17 years old to 18 years old in Queensland;

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

- Developing and expanding a specific justice system for young people which is adequately funded, coordinated and dynamic and which works towards the implementation of culturally appropriate restorative justice initiatives (such as the Victorian Children's Koori Court and the Queensland Youth Murri Court). Such a youth justice system will be framed in youth friendly terms so that young people understand the court system and experience it as meaningful and restorative rather than alienating;

- Working with Aboriginal and Torres Strait Islander communities and Elders in the development and dispensation of youth justice;

[53] Standing Committee on Aboriginal and Torres Strait Islander Affairs, above n 7, 7.

- Working with police to increase the rate at which Aboriginal and Torres Strait Islander young people are diverted from the formal justice system;

- Introducing legislation requiring police to lodge a written "failure to caution" document with the court upon the commencement of criminal proceedings against a young person outlining why all diversionary processes were inappropriate in the circumstances;

- The recording of statistics by police and courts in regards to diversions and the stated offence/s;

- Implementing stronger measures that require police and courts to deal with young people with mental health concerns and or/intellectual and cognitive disabilities who are in conflict with the law without resorting to judicial proceedings and detention;

- Specifying in each jurisdiction a consistent maximum period for which police can detain a young person without a remand warrant;

- Taking immediate action to dramatically reduce the numbers of Aboriginal and Torres Strait Islander young people on remand by:

    - Amending bail legislation in each jurisdiction to create a presumption in favour of bail for young people and to ensure that bail conditions take account of social and cultural factors and can be reasonably met by Aboriginal and Torres Strait Islander young people;

    - Expanding the availability of youth bail hostels so that young people without access to appropriate accommodation or a responsible adult are not inappropriately remanded in custody;

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

    - Introducing legislation to ensure that a judicial officer review all police decisions in relation to bail as soon as reasonably possible after charging to ensure that only appropriate bail conditions are set and to minimise the numbers of young people detained in custody;

- Increasing the provision of culturally appropriate support and treatment facilities for young people with mental illness or cognitive disability in metropolitan, regional and remote areas;

- Increasing the provision of culturally appropriate alcohol, drug and substance abuse rehabilitation facilities in metropolitan, regional and remote areas;

- Maintaining the separation of powers and ensuring the independence and expertise of courts by repealing legislation that restricts the sentencing options available to courts (such as mandatory and minimum sentencing laws);

- Extending the availability of community based sentencing options in regional and remote areas so that justice is not determined by geography and young people from these areas are not placed in detention unnecessarily;

- Expanding the availability of appropriate youth detention centres to regional and remote areas; and

- Ensuring procedural fairness and natural justice mechanisms are established in youth parole proceedings to ensure supported release and increased rehabilitation and reintegration.

Lead Agency: AGD, State and Territory governments

Structural Indicator: Australian and State and Territory governments will have created a juvenile justice system which is compliant with Australia's obligations under the CRC, CAT, ICCPR and implements relevant recommendations made by UN treaty bodies.[54]

Process Indicator: Governments will work in equal partnership with Aboriginal and Torres Strait Islander peoples, communities, and peak bodies, in an open and transparent manner, in implementing the above recommendations to ensure that they reflect the needs of Aboriginal and Torres Strait Islander young people at risk of entering the criminal justice system.

Outcome Indicator: 10% reduction in the number of Aboriginal and Torres Strait Islander young people facing charges in court and in juvenile detention by 2015.

Timeline: Progressive implementation of changes with full implementation by 2015.

[54] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, (entered into force 2 September 1990); *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, I-24841,(entry into force 26 June 1987); *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171, (entered into force 23 March 1976); Committee on the Rights of the Child, *above n 52,* [7, 72, 73, 74]; Committee Against Torture, above n 18, [23,27]; Human Rights Committee, above n 4, [24, 25]; Committee on the Elimination of Racial Discrimination, above n 4, [20].

10. People in Prisons

Action Point 179

There are several relevant stakeholders, including the NATSILS, who have valuable on the ground experience to contribute and should be included in this Action Point along with the National Justice CEOs Working Group. The NATSILS recommend that the Action Point be redrafted to state:

All Australian governments will support a National Justice CEOs Working Group on Mental Illness and Cognitive Disability. It will examine mechanisms employed within the criminal justice system to address the needs of people with a mental illness and/or cognitive disability (including intellectual disability and acquired brain injury) and investigate the role that the justice system can play in supporting diversionary outcomes for these groups. This project will have a strong focus on the needs of Aboriginal and Torres Strait Islander peoples and will consult with relevant stakeholders and Aboriginal and Torres Strait Islander peoples and organisations accordingly.

Lead Agency: National Justice CEOs Working group on Mental Illness and Cognitive Disability

Structural Indicator: Compliance with Australia's international human rights obligations governing the rights of those in detention,[55] and recommendations by UN treaty bodies and the Special Rapporteur on the Right to Health.[56]

Process Indicator: The Working Group will have considered the particular situation of how the criminal justice system deals with people with mental illness and/or cognitive disability (including intellectual disability and acquired brain injury) through accurate research and consultation with offenders with mental illness and/or cognitive disability, and in particular Aboriginal and Torres Strait Islander offenders with mental illness and/or cognitive disability, to fully understand the effect of existing criminal justice systems and the adequacy of diversionary outcomes.

Outcome Indicator: Report back to National Justice CEOS Group.

Timeline: June 2012.

[55] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, I-24841,(entry into force 26 June 1987); First United Nations Congress on the Prevention of Crime and the Treatment of Offenders , *Standard Minimum Rules for the Treatment of Prisoners*, Res 663 C (XXIV) and 2076 (LXII), (1957, 1977); General Assembly, *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment* UN Doc A/RES/43/173 (1988).

[56] Committee on Economic, Cultural and Social Rights, above n 34, [29, 30]; Anand Grover, Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, *Preliminary Observations and Recommendations* (2009), [100].

Action Point 181

There are several relevant stakeholders, such as the NATSILS, who have valuable on the ground experience to contribute to this Action Point and should be included along with State and Territory governments in a review of the Australian Standard Guidelines for Corrections. Also, in order to give the Guidelines additional weight and provide prisoners with greater recourse, the NATSILS recommend that they be enshrined in legislation.

Hence, the NATSILS recommend that the Action Point be redrafted to state:

The Australian and State and Territory governments will complete, in partnership with relevant stakeholders, a review of the Australian Standard Guidelines for Corrections that employs a human rights framework, in preparation for enshrining these in legislation.

Lead Agency:	AGD, State and Territory governments
Structural Indicator:	The development of Guidelines that protect the human rights of all those under the care of corrections departments, including those rights protected under the CAT, OPCAT, and the UN Standard Minimum Rules for the Treatment of Prisoners and the elevation of these protections to legislative status.
Process Indicator:	The review will be based on independent, accurate, empirical data which takes into account the effectiveness of the Australian Standard Guidelines for Corrections. Governments will actively consult with relevant stakeholders, including human rights experts and those with on the ground experience of corrections facilities, throughout the review and legislative drafting process.
Outcome Indicator:	Review completed by August 2012 and legislative drafting process to commence September 2012. Once legislation is introduced, there should be a visible improvement in treatment and conditions within corrections facilities and reduction in the number of complaints against corrections departments regarding the violation of prisoners' human rights.
Timeline:	August 2012/September 2012.

Action Point to be Inserted

While Action Points 184 and 185 identify the issue of how deaths in custody occur and how they are investigated, there is no Action Point that plans for the prevention of deaths in detention. Hence, the NATSILS recommend that the following Action Point be inserted:

In combination with Action Points 2 and 40,[57] all Australian governments will work to prevent deaths in detention by ensuring that adequate medical care and living conditions are guaranteed for all people in detention, including during transport of detained persons.

Lead Agency:	AGD, State and Territory governments
Structural Indicator:	Compliance with Australia's international human rights obligations and the protection of such rights for individuals in detention,[58] including the right to life,[59] health[60] and freedom from torture and other cruel, inhuman or degrading treatment or punishment.[61]
Process Indicator:	Governments will provide funding for the upgrade and expansion of medical services to sub-standard corrections facilities and will ensure that all staff receive training in their responsibilities under the CAT, CERD and ICCPR in relation to the treatment of prisoners. By implementing those measures detailed above under 7.4 (Action Points 83 and 86) and 7.6 (Action Point to be Inserted) Governments will also prevent the over-crowding of correctional facilities.
Outcome Indicator:	Decrease in the number of Aboriginal and Torres Strait Islander deaths in custody and the total number of deaths in custody.
Timeline:	June 2013.

[57] See NATSILS recommendations for amendments to Action Point 2 at 5.1 and Action Point 40 at 6.2 above.

[58] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, I-24841,(entry into force 26 June 1987); First United Nations Congress on the Prevention of Crime and the Treatment of Offenders , *Standard Minimum Rules for the Treatment of Prisoners*, Res 663 C (XXIV) and 2076 (LXII), (1957, 1977); General Assembly, *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment* UN Doc A/RES/43/173 (1988).

[59] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171, art 6 (entered into force 23 March 1976).

[60] *International Convention on the Elimination of all Forms of Racial Discrimination*, opened for signature 21 December 1965, 1249 UNTS 13, art 5 (entered into force 4 January 1969); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, I-14531, art 12 (entered into force 3 January 1976).

[61] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, I-24841, art 2 (entry into force 26 June 1987); *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171, art 7 (entered into force 23 March 1976).

Appendix 1

NATIONAL ABORIGINAL AND TORRES STRAIT ISLANDER LEGAL SERVICES (NATSILS)

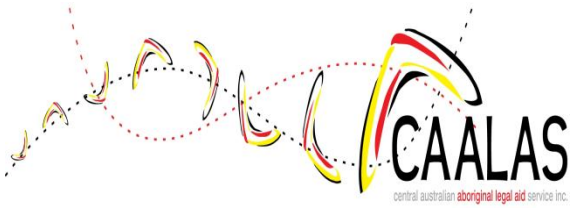
SUBMISSION ON THE NATIONAL HUMAN RIGHTS ACTION PLAN BASELINE STUDY CONSULTATION DRAFT

August 2011

Victorian Aboriginal Legal Service Co-operative Ltd

Aboriginal Legal Service of Western Australia

Aboriginal Legal Rights Movement Inc



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8. About the NATSILS

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

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

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

9. Introduction

The NATSILS welcome the development of the National Human Rights Action Plan (NHRAP) and congratulate the Government on taking steps to map the human rights situation in Australia, implement action to address identified concerns, and track progress. Once completed, the NHRAP should accurately and comprehensively detail existing human rights concerns in Australia and set out ways to address them that are measurable and accountable. The NHRAP will not be able to achieve this aim if the Baseline Study (the Study) is not of a high quality. The Study needs to be thoroughly comprehensive and capture significant detail about what human rights concerns exist in Australia and the causal factors that lead to such concerns. If the Study fails to provide a clear and thorough picture of the current human rights situation in Australia then the credibility and effectiveness of the NHRAP will be jeopardised before it is even in place.

The NATSILS welcome the opportunity to contribute to the quality of the Study and congratulate the Government on consulting with the Australian public on its development. The NATSILS would like to provide the following information for inclusion in the Study.

3. Overall Structure and Format of the Baseline Study

There are a number of structural and formatting issues within the Study that need to be addressed. These include:

a) The term 'Aboriginal and Torres Strait Islander peoples' should be used consistently throughout the Study rather than the term 'Indigenous'. In the current draft, both terms are sometimes used in the same sentence which is confusing, and may cause

particular confusion amongst people living in Australia who are Indigenous peoples from other countries.

b) There is a lack of consistent structure amongst the different sections of the Study. For example, some sections start by referring to concerns and recommendations previously raised by United Nations (UN) treaty bodies, Special Rapporteurs and the Human Rights Council during Australia's Universal Periodic Review (UPR) while others lack this kind of information. The NATSILS recommend that each section begin with a catalogue of relevant concerns and recommendations that have been made to Australia by the above bodies. By doing so, the Study would bring all current UN human rights concerns and recommendations together in one place, enabling greater visibility and tracking of progress.

c) While the NATSILS welcome the implementation of Government accepted UPR recommendations through the NHRAP, we urge the Government to also include UPR recommendations that were rejected. If Government believes that they are unable to address certain human rights issues at this point in time, this does not mean that these issues should be left out of the human rights conversation for the next five to ten years over the duration of the NHRAP. For example, National Compensation Schemes for victims of the Stolen Generations and Stolen Wages is an issue that has been at the forefront of human rights concerns affecting Aboriginal and Torres Strait Islander peoples for decades and as such it would be remiss to exclude these issues from the Study.

d) Overall the Study needs to provide a much higher level of detail so that progress can be measured accurately. The NATSILS would like to see not only more qualitative detail but also a higher degree of quantitative data included where available.

e) Given the significant number of issues that need to be discussed in the Study, the NATSILS recommend that the sections entitled 'Issues that a National Action Plan Could Address" should be further broken down. For example, the section on Aboriginal and Torres Strait Islander peoples has many sub-sections and identifies a large number of human rights concerns. It may therefore provide more clarity if there were an "Issues That a National Action Plan could address" section placed after each sub-section rather than a single one at the end that attempts to cover everything.

f) The Study fails to draw on significant authoritative reports regarding ongoing human rights concerns such as the Royal Commission into Aboriginal Deaths in Custody (RCIADIC),[62] Bringing Them Home,[63] Little Children are Sacred[64] and Doing Time –

[62] Commonwealth, Royal Commission into Aboriginal Deaths in Custody*, Final Report* (1991).
[63] Australian Human Rights Commission, *Bringing Them Home National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (1997).
[64] Rex Wild and Pat Anderson, *Ampe Akelyernemane Meke Mekarle Little Children are Sacred,* Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (2007).

Time for Doing.[65] These reports should have been the starting point for the drafting of any Baseline Study, yet fail to even be mentioned. The NATSILS recommend that each of these reports, including all their recommendations, be fully incorporated into the Study and future Action Plan.

g) The NATSILS fully endorse the recent comments on the Draft Baseline Study submitted by the Regional Office for the Pacific of the United Nations Office of the High Commissioner for Human Rights and call for all the recommendations therein to be fully incorporated into the Study.

4. Protection and Promotion of Human Rights in Australia

4.1 Australia's Democratic Institutions (Paragraph 1.3)

a) The Study needs to more critically analyse the powers of the Australian Human Rights Commission (AHRC). The NATSILS recommend the inclusion of information recently submitted by the Human Rights Law Centre to the Committee on the Elimination of Racial Discrimination[66] which stated that:

> The AHRC's powers and function are still limited by the scope of its constitutive act. For example:
>
> - The AHRC does not have the power to independently initiate complaints. Therefore individuals themselves are responsible for asserting their rights and ensuring that the RDA is complied with. This reactive, complaints based approach is not adequately effective in identifying and addressing race discrimination, particularly discrimination that is systemic or structural in nature.
>
> - In relation to complaints of human rights breaches, the AHRC cannot provide affected persons with effective or enforceable remedies.[67]
>
> - The AHRC produces reports that indicate when Australia is not meeting its international human rights obligations under the treaties that it has ratified. However, these reports are not binding on Government. The National Human Rights Consultation report recommended that the Australian Government table a response to any AHRC report on complaints within six months of receiving the report.[68] This has not been done. In many respects, therefore, the AHRC is only as effective as the government of the day allows it to be.[69]

4.2 Legal Protections (Paragraph 1.4)

a) The Study states that a comprehensive anti-discrimination and equal opportunity framework exists in each State and Territory in Australia. However, in the NATSILS'

[65] Standing Committee on Aboriginal and Torres Strait Islander Affairs, House of Representatives, *Doing Time - Time for Doing, Indigenous Youth in the Criminal Justice System* (2011).
[66] Human Rights Law Centre, *Comments on Australian Government Response to Concluding Observations of the UN Committee on the Elimination of Racial Discrimination* (2011) 2.
[67] Elizabeth Evatt, *Meeting Universal Human Rights Standards: The Australian Experience*, Speech delivered at Department of the Senate Occasional Lecture Series, Parliament House, Canberra, 22 May 1998, 7.
[68] National Human Rights Consultation Committee, *Report of the National Human Rights Consultation* (2009), Recommendation 13.
[69] Julie Debeljak, *Human Rights and Institutional Dialogue: Lessons for Australia from Canada and the United Kingdom* (2004) 12-14.

view it is a misrepresentation to use the word comprehensive as in some States and Territories legislation only refers to discrete areas of life such as employment, education and provision of goods and services rather than every facet of human life.

4.3 Australia's Human Rights Framework (Paragraph 1.5)

a) The Study must acknowledge that while the majority of respondents to the 2009 National Human Rights Consultation asked for the enactment of a Human Rights Act, the Government rejected this and responded with the Human Rights Framework instead.

4.4 Enhanced Scrutiny (Paragraph 1.5.1)

a) The Study should state that the Declaration on the Rights of Indigenous Peoples must to be added to the list of human rights treaties that new legislation must be scrutinised against under the Human Rights Framework.

4.5 Consolidation of Anti-Discrimination Legislation (Paragraph 1.5.3)

a) The Study should include reference to the repeated calls for the creation of substantive protections for the rights to equality before the law and freedom from discrimination that have been made throughout the consolidation of anti-discrimination legislation process thus far.

4.6 Issues That a National Action Plan Could Address

a) Expansion of the function and powers of the AHRC so that it meets the standards of proper performance under the Paris Principles[70] by giving it the power to:

- consider (on its own motion) and report on the human rights implications of any existing or proposed federal, state or territory legislation;
- initiate investigations of its own motion and conduct those investigations appropriately, including using powers to enter and search premises and to compel the production of information and evidence where necessary;
- on its own motion, seek to enforce conciliation agreements;
- make binding codes of conduct or guidelines setting out the process for the resolution of complaints; and
- intervene in all proceedings where significant human rights issues arise.[71]

[70] *Principles relating to the Status of National Institutions (The Paris Principles)*, GA Res 48/134, UN GAOR, 48th sess, 85th plenary meeting, UN Doc A/RES/48/134 (1993).
[71] Human Rights Law Centre, above n 5, 3.

b) A commitment by the Government to table in Federal Parliament reports of the AHRC, including reports prepared by the Commission after the conduct of inquiries and the annual Social Justice Report and Native Title Report, and that the Government substantively respond to any such report within six months.

c) The development of a framework to implement and raise awareness about the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in consultation with Aboriginal and Torres Strait Islander peoples;

d) Through the constitutional reform process, work to recognise and better protect the rights of Aboriginal and Torres Strait Islander peoples, including freedom from discrimination and substantive equality before the law;

e) The withdrawal of Australia's reservations to article 4(a) of the Convention on the Elimination of Racial Discrimination (CERD) and article 20 of the International Covenant on Civil and Political Rights (ICCPR); and

f) The ratification of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR).

5. Human Rights Concerns of the General Community

5.1 Legal Assistance (Paragraph 2.1.1)

a) The Study must detail previous recommendations made by numerous UN treaty bodies, the Special Rapporteur on the Rights and Fundamental Freedoms of Indigenous Peoples and numerous domestic NGOs and legal bodies regarding substantially increasing funding to the ATSILS.[72]

b) The Study must clarify that despite recent increases in funding the ATSILS are still chronically underfunded compared to mainstream legal aid services and Crown prosecution services and are being forced to close some offices and restrict servicing to some courts. This will result in Aboriginal and Torres Strait Islander peoples being unrepresented in court, violations of people's right to a fair trial and legal assistance and ultimately, an increase in the imprisonment rates of Aboriginal and Torres Strait Islander peoples..

[72] Human Rights Committee, *Concluding* Observations, 95th sess [25] UN Doc CCPR/C/AUS/CO/5 (2009); James Anaya The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *The Situation of Indigenous Peoples in Australia*, Human Rights Council, 15th sess, [50, 104], UN Doc A/HRC/15/ (2010); Human Rights Council, *Draft Report of the Working Group on the Universal Periodic Review Australia,* 10th sess, [86.92], UN Doc A/HRC/WG.6/10/L.8 (2011); Committee on the Elimination of Racial Discrimination, *Concluding* Observations, 77th sess, [19] UN Doc CERD/C/AUS/CO/15-17 (2010); Standing Committee on Aboriginal and Torres Strait Islander Affairs, above n 4, Rec 26; and Schwartz, M and Cunneen, C, 'Working Cheaper, Working Harder: Inequity in Funding for Aboriginal and Torres Strait Islander Legal Services' (2009) vol. 7, no. 10, *Indigenous Law Bulletin*, 19.

c) In detailing the underfunding of the ATSILS, the Study needs to acknowledge the extra costs associated with providing legal assistance services to Aboriginal and Torres Strait Islander peoples, especially in remote and very remote areas and where language complications exist.

d) The Study should also recognise the significantly higher workloads placed on ATSILS' solicitors and how this can affect recruitment, retention and ultimately quality of service delivery.[73]

e) This section of the Study should also detail the similar underfunding of Family Violence Prevention Legal Services (FVPLS) and the fact that they are not funded to provide services in metropolitan areas despite the majority of the Aboriginal and Torres Strait Islander population living in such areas.

f) As a concern frequently commented on by both domestic and international mechanisms,[74] this section must also provide detailed information in regards to the lack of access that Aboriginal and Torres Strait Islander peoples have to interpreters and how this affects people's right to a fair trial. See NATSILS Submission to the Commonwealth Attorney-General on the Expansion of Aboriginal and Torres Strait Islander Interpreter Services for further detail that should be included (Appendix A).

5.2 Issues That a National Action Plan Could Address

a) Ensuring that the funding of the ATSILS and FVPLS is proportionally increased to equal that of mainstream legal aid services and departments of public prosecutions;

b) Providing the ATSILS and the FVPLS with long term funding agreements, rather than three year agreements;

c) Funding for FVPLS to provide services in metropolitan areas;

d) The provision of increased funding for the expansion of Aboriginal and Torres Strait Islander interpreter services so as to create a coordinated national Aboriginal and Torres Strait Islander interpreter service that covers all metropolitan, regional and remote areas;[75] and

e) The amendment of laws to make it mandatory for police to contact an Aboriginal and Torres Strait Islander Legal Service in every circumstance where an Aboriginal

[73] Australian Government, Department of Finance and Deregulation Office of Evaluation and Audit (Indigenous Programs), *Evaluation of the Legal Aid for Indigenous Australians Program* (2007) 4.

[74] Human Rights Committee, above n 11, [25]; James Anaya, above n 11, [50, 104];Australian Government, above n 12, 33; Council of Australian Governments, National Partnership Agreement on Remote Service Delivery (2008) 7-8; Commonwealth Royal Commission into Aboriginal Deaths in Custody, above n 1, recs 99, 100, 249.

[75] See NATSILS Submission to the Commonwealth Attorney-General on the Expansion of Aboriginal and Torres Strait Islander Interpreter Services.

and Torres Strait Islander young person is taken into police custody, and the provision of sufficient funding to support this additional service.

5.3 Use of Force by Police (Paragraph 2.3)

a) The numbering of sub-sections in this section needs to be corrected.

b) This section needs to include detail of previous concerns and recommendations made during Australia's UPR and by UN treaty bodies and domestic NGOs regarding the need for independent investigations of complaints against police, police misconduct and deaths in custody and the implementation of all of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) recommendations.[76] The Study must acknowledge that for regulatory bodies to be effective and for the public to have confidence in the process, regulatory bodies must be completely separate from police forces.

c) The fact that this section focuses solely on the use of Tasers is unacceptable. The Study needs to acknowledge all types of force used by police including, unaided physical force, batons, capsicum spray/foam and guns. The increasing use of force by police as opposed to utilising de-escalation techniques, and the increasing use of Tasers and capsicum spray/foam as compliance tools, especially on people who are already in custody, must also be discussed.[77]

d) The Study should also discuss the inappropriate use of Tasers on children, women, the mentally ill and other vulnerable people.

e) The Study must acknowledge calls for greater training to be provided to police in de-escalation techniques and recognising and appropriately dealing with people who are in mental crisis to avoid resorting to the use of force.

f) The fact that this section does not provide information on deaths in police custody is unacceptable and must be rectified. Discussion of the implementation of relevant RCIADIC recommendations must be included here.

g) This section needs to include significantly more detail about how investigations of complaints against police, police misconduct and deaths in custody are undertaken in every Australian jurisdiction. Simply including a two sentence reference to the system in Western Australia is not satisfactory. Furthermore, through ALSWA's experience the NATSILS dispute the assertion that the use of force by Western Australian

[76] Committee Against Torture, *Concluding Observations*, 40th sess, [13,23,27] UN Doc CAT/C/AUS/CO/3 (2008); Committee on the Elimination of Racial Discrimination, *Concluding* Observations, 66th sess, [21], UN Doc CERD/C/AUS/CO/14 (2005); Anaya, above n 11, [51, 103]; Human Rights Committee, above n 11, [21]; CERD, above n 11, [20]; Human Rights Council, above n 11, [86.91]; National Police Accountability Network of the National Association of Community Legal Centres recent letter to the Commonwealth Attorney-General on 9th August 2011 at http://www.communitylaw.org.au/flemingtonkensington/cb_pages/files/RCIADIC%20letter%209%20August%202011.pdf).

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

police is reviewed by the Corruption and Crime Commission, save for the excessive tasering of Mr Spratt which was an exceptional case.

h) In detailing the effectiveness of current systems of investigation into deaths in police custody, the Study should highlight recent failures in this area such as the inquests into the deaths of Doomadgee in Queensland and Mr Ward in Western Australia.

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

j) The Study should discuss the idea that national guidelines on police incident management, conflict resolution and use of force should be enshrined in legislation.

5.4 Issues That a National Action Plan Could Address

a) The establishment of independent bodies in each State and Territory to independently investigate and determine police complaints; and

b) The full implementation of outstanding RCIADIC recommendations.

c) The implementation of a human rights based approach to the guidelines that regulate use force.[78]

6. The Human Rights Experience of Specific Groups in Australia

6.1 Aboriginal and Torres Strait Islander Peoples (Paragraph 3.1)

a) It is deficient that this section does not mention the Declaration on the Rights of Indigenous Peoples in relation to discussing the human rights of Aboriginal and Torres Strait Islander peoples.

b) Rather than saying that Aboriginal and Torres Strait Islander peoples 'experience unacceptable levels of disadvantage in living standards, life expectancy, education, health and employment' the terminology should be changed to 'experience the denial of their fundamental human rights in a number of areas such as living standards, life expectancy, education, health and employment'. This change in terminology to specify that Aboriginal and Torres Strait Islander peoples' fundamental human rights are being denied should be employed throughout the entire Study.

c) In discussing the six targets of the Council of Australian Governments' (COAG) Closing the Gap initiative,[79] the Study should highlight the fact that there is no target

[78] See Human Rights Law Centre, *Upholding Our Rights: Police Use of Force Research Project Consultation Paper* (2011).
[79] See http://www.fahcsia.gov.au/sa/indigenous/progserv/ctg/Pages/default.aspx.

relating to reform in the justice system to address the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system. It should also highlight the fact that unlike all the other Building Blocks under Closing the Gap, the Safe Communities Building Block lacks a National Partnership Agreement (NPA) to facilitate implementation. In doing so the Study must acknowledge that while such action has been touted in recent times, in particular by the Standing Committee of Attorneys-General (SCAG), little actual progress has in fact been made.

In their recent report, Doing Time – Time for Doing, the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs stated that they do not accept the view that investment in education, health, housing and employment initiatives are sufficient to close the gap in Aboriginal and Torres Strait Islander justice outcomes.[80] They further stated that the most effective means of focusing activity on the Safe Communities Building Block and for supporting activity under the other building blocks is through the development of a NPA dedicated to improving Aboriginal and Torres Strait Islander justice and community safety outcomes.[81]

6.2 Issues That a National Action Plan Could Address

a) The development and implementation of justice targets and a NPA for the Safe Communities Building Block under COAG's Closing the Gap initiative.

6.3 Right to Self-Determination and Consultation (Paragraph 3.1.1)

a) The Study should acknowledge that a certain level of debate exists as to the meaning of the right to self-determination and that broad national discussion, with all Aboriginal and Torres Strait Islander peoples, needs to take place to develop an action plan towards the full implementation of this right.

b) The Study should also note the difference between consultation and collaboration. Past efforts at consultation by the Government have in effect implied that all that needs to be done is for Aboriginal and Torres Strait Islander peoples to be consulted in regards to plans that may already be pre-formulated whereas collaboration would mean that the views of Aboriginal and Torres Strait Islander peoples would have to be integrated *into* any future plans *before* they are decided upon.

c) The Study must also note that when working with Aboriginal and Torres Strait Islander peoples the Government must understand and acknowledge that different cultures have different governance structures for decision making. And Furthermore, that as is the case with western society, it is unreasonable to expect unanimity in respect to difficult and complex issues, but that this is not a reason for the Government to take over and dictate structures.

[80] Standing Committee on Aboriginal and Torres Strait Islander Affairs, above n 4, 39.
[81] Standing Committee on Aboriginal and Torres Strait Islander Affairs, above n 4, 39.

6.4 Issues That a National Action Plan Could Address

a) Commitment by Australian governments to commit to obtaining the free, prior and informed consent of Aboriginal and Torres Strait Islander peoples in the development of policy that directly affects their communities, and to genuine collaboration by developing and implementing a framework for self-determination, outlining consultation protocols, roles and responsibilities and strategies for increasing Aboriginal and Torres Strait Islander participation in all institutions of democratic governance.

b) Commitment by the Government to undertake a series of comprehensive national roundtables with all Aboriginal and Torres Strait Islander peoples, in urban, regional and remote areas of Australia to develop a road map to implementing the right of self-determination for Aboriginal and Torres Strait Islander peoples.

6.5 Freedom from Discrimination (Paragraph 3.1.5)

a) This section of the Study should discuss Australia's most recent review under the Convention on the Elimination of All Forms of Racial Discrimination (CERD) and should detail the main concerns relating to Aboriginal and Torres Strait Islander peoples that came out of that review, many of which are missing from the Study.

b) The Northern Territory Emergency Response (NTER) was introduced to address reported child abuse in the Northern Territory (NT), yet actively discriminates against Aboriginal and Torres Strait Islander peoples and involved the suspension of the *Racial Discrimination Act 1975* (Cth). The discriminatory nature of the NTER was recognised by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people.[82] The NTER vilifies and stigmatises Aboriginal and Torres Strait Islander peoples as being incapable of managing their money and looking after their families. The Study must acknowledge that despite recent amendments to widen the application of compulsory welfare quarantining to non-Aboriginal and Torres Strait Islander communities in the NT, the NTER still disproportionately affects Aboriginal and Torres Strait Islander peoples due to the high population of Aboriginal peoples in the NT and high incidence of welfare dependence. The discrimination evident in the NTER forms part of a wider framework of systemic racism against Aboriginal and Torres Strait Islander peoples. An independent review of consultations regarding the NTER found that:

> [t]he NTER is constituted by a comprehensive suite of measures of extraordinary scope and gravity that impact on almost every aspect of the lives of Aboriginal and Torres Strait Islander peoples in the Northern Territory. The measures range from those that impact on Aboriginal and Torres Strait Islander peoples individually, including income quarantining, liquor restrictions and interaction with the criminal justice system, to control of Aboriginal and Torres Strait Islander organisations, assets

[82] James Anaya The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *The Situation of Indigenous Peoples in Australia*, Human Rights Council, 15th sess, UN Doc A/HRC/15/ (2010).

and land by Government employees, and the undermining of land rights and the rights of traditional owners (Alastair Nicholson, Larissa Behrendt, Alison Vivian, Nicole Watson and Michele Harris, *Will they be heard – A response to the NTER Consultations June to August 2009* (2009) 12).

The NTER is a clear example of racial discrimination, and the Study must acknowledge that it violates the rights of Aboriginal and Torres Strait Islander peoples to be free from racial discrimination, collective self-determination, social security, freedom, dignity, individual autonomy in regards to family and other matters, privacy, due process, land tenure and property, and cultural integrity which are fundamental human rights guaranteed in numerous international human rights instruments to which Australia is a party.

While the NATSILS welcomed the partial reinstatement of the *Racial Discrimination Act 1975* (Cth) in early 2010, significant aspects of the NTER remain discriminatory and fail to respect the human rights of those subject to it. Those aspects include the compulsory five-year leases acquired under the NTER legislation, income management measures which impact disproportionately and unreasonably on Indigenous people, alcohol restrictions, law enforcement powers and prohibited materials provisions.

c) The Study must address the confusion around Special Measures under the *Racial Discrimination Act 1975* (Cth) and clearly explain what is required to give rise to the need for Special Measures. See the information provided by the AHRC in its 'Draft Guidelines for Ensuring Income Management Measures are Compliant with the *Racial Discrimination Act*'.[83]

d) As mentioned above, although numerous international and domestic recommendations relating to the establishment of a national compensation scheme for victims of the Stolen Generations and Stolen Wages have been rejected by the Government, they should still be recorded in the Study as an ongoing human rights concern.

6.6 Issues That a National Action Plan Could Address

a) The abolishment of compulsory welfare quarantining, or where quarantining continues, that it be available on a voluntary basis, or employed only as a measure of last resort, applied on an evidence-based, case-by-case basis, that maintains full recourse to administrative and judicial review;

b) A review of all policies and legislation in order to identify and eliminate structural discrimination against Aboriginal and Torres Strait Islander peoples and develop a national action plan to target systemic racism, including in the media and online;

c) Through the process of harmonising existing anti-discrimination legislation, grant the NATSILS and other representative bodies the standing to commence legal

[83] Australian Human Rights Commission, *Draft Guidelines for Ensuring Income Management Measures are Compliant with the Racial Discrimination Act* (2009).

proceedings on behalf of aggrieved Aboriginal and Torres Strait Islander peoples collectively;

d) The establishment of a national compensation scheme for victims of the Stolen Generations and, where they are deceased, their descendants; and

e) The establishment of a national scheme for the return of all Stolen Wages to living victims and, where they are deceased, their descendants.

6.7 Community Safety and Interaction with the Justice System (Paragraph 3.1.6)

a) The Study states that Aboriginal and Torres Strait Islander peoples are over-represented in the criminal justice system but does not go on to discuss any factors that contribute to such over-representation. The Study must provide greater detail and insight into the human rights concerns that lead to Aboriginal and Torres Strait Islander people coming into contact with the criminal justice system at such a disproportionate rate, including:

- denial of rights to standards of living, housing, education and health;
- continuing effects of past government policies that violated Aboriginal and Torres Strait Islander peoples' human rights;
- disproportionate rate of alcohol and substance abuse;
- high rates of mental health issues and people spending unnecessarily long periods on remand while waiting for a mental health assessment;
- inadequate access to essential services, particularly in remote communities, such as mental health care and public transport;
- high rate of unemployment and homelessness;
- over-representation in the child protection system;
- high levels of family dysfunction;
- loss of connection to community and culture;
- discriminatory laws such as those relating to bail;
- a lack of crisis care accommodation, bail hostels and rehabilitation programs;
- over-policing and poor utilisation of diversionary schemes by police;
- the punitive approach taken by police against Aboriginal and Torres Strait Islander young people;
- limited access to legal advice;
- mandatory sentencing; and
- the availability and application of non-custodial sentencing options, especially in regional and remote areas;

There are numerous reports in existence which should be drawn on to increase the level of insight provided by the Study in relation to the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system including. These include, the RCIADIC,[84] Doing Time – Time for Doing[85] the NILJF,[86] and

[84] Commonwealth, Royal Commission into Aboriginal Deaths in Custody, above n 1.
[85] Standing Committee on Aboriginal and Torres Strait Islander Affairs, above n 4.

numerous Australian Institute of Criminology reports should also be drawn on in this section to provide significantly more detail. Also, see sections 4 and 5 of NATSILS Shadow Report to the Committee on the Rights of the Child for more detail that should be included in the Study (Appendix B).

b) Additional detail needs to be included to more clearly articulate how lack of access to interpreters contributes to the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system. The Study should also clearly note that denial of access to an interpreter to a person involved in legal proceedings is a human rights violation under the Universal Declaration on Human Rights,[87] the International Covenant on Civil and Political Rights,[88] the CERD,[89] the Convention on the Rights of the Child[90] and the Declaration on the Rights of Indigenous Peoples.[91] See sections 4 and 6 of the NATSILS Submission to the Commonwealth Attorney-General on the Expansion of Aboriginal and Torres Strait Islander Interpreter Services.

c) In discussing the need for interpreters, the Study should also discuss the high rate of hearing loss or impairment evident within Aboriginal and Torres Strait Islander communities and how this can significantly affect Aboriginal and Torres Strait Islander peoples' contact with the criminal justice system. See section 4.2 of the NATSILS Submission to the Commonwealth Attorney-General on the Expansion of Aboriginal and Torres Strait Islander Interpreter Services and the 2011 report of the Investigation into Hearing Impairment Among Indigenous Prisoners within the Northern Territory Correctional Services which concluded that more than 90 per cent of Aboriginal and Torres Strait Islander inmates had a significant hearing loss.[92]

d) Special attention needs to be paid to the discussion of concerns over the application of the right to detention as a last resort and how the failure to uphold this right is resulting in Aboriginal and Torres Strait Islander peoples' detention rates consistently increasing. See sections 6.13 (c) and (d) further on in this submission and section 5.1 of the NATSILS Shadow Report to the Committee on the Rights of the Child for further explanation.

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[86] Standing Committee of Attorneys-General, *National Indigenous Law and Justice Framework 2009 – 2015* (2009).

[87] *The Universal Declaration of Human Rights*, adopted 10th December 1948, arts 7, 10.

[88] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171, arts 9 (2), 14 (3) (b)(f), 26 (entered into force 23 March 1976).

[89] *International Convention on the Elimination of all Forms of Racial Discrimination*, opened for signature 21 December 1965, 1249 UNTS 13, art 5(a) (entered into force 4 January 1969).

[90] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, arts 2 (1), 9 (2), 12, 40 (b)(vi) (entered into force 2 September 1990); and *General Comment No. 32*, UN Human Rights Committee, 90th sess, [13], UN Doc CCPR/C/GC/32 (2007).

[91] *United Nations Declaration on the Rights of Indigenous Peoples*, adopted 13 September 2007, art 13.

[92] Troy Vanderpoll and Dr Damien Howard, *Investigation into Hearing Impairment Among Indigenous Prisoners within the Northern Territory Correctional Services Report* (2011) 3.

e) The Study needs to clarify that the National Indigenous Law and Justice Framework (NILJF),[93] as the key piece of policy directed at addressing the disproportionate level of contact between Aboriginal and Torres Strait Islander peoples and the criminal justice system, does not have any resources attached to it and does not require Australian governments to take any specific actions. The Study needs to clarify that while the NILJF could be very useful, until it becomes binding and resources are allocated to its implementation it is unlikely make any inroads in addressing Aboriginal and Torres Strait Islander law and justice issues. The House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs recorded their concern in relation to the weaknesses of the NILF in their Doing Time – Time for Doing report and stated that despite suggestions from COAG, the Safe Communities Building Block is not being well served by the NILJF.[94]

6.8 Issues That a National Action Plan Could Address

a) The incorporation of targets to reduce the high involvement of Aboriginal and Torres Strait Islander peoples in contact with the criminal justice system into the Closing the Gap agenda;

b) The implementation of justice reinvestment strategies in each State and Territory;

c) The implementation of therapeutic jurisprudence approaches, such as the expansion of specialised courts and community courts, and the increased use of restorative justice processes that promote community empowerment and the role of Aboriginal and Torres Strait Islander Elders in the criminal justice system;

d) The increased use of non-custodial sentencing options (such as community based orders, community work orders, diversionary programs, cautioning and home detention);

e) The abolishment of mandatory sentencing policies;

f) That the Government work with State and Territory Governments to create a holistic youth justice system that responds effectively to the causal factors of offending and over-representation by diverting young people from contact with the criminal justice system and judicial proceedings and referring them to appropriate support and rehabilitative services wherever possible; and

g) That the necessary resources be made available by Commonwealth, State and Territory Governments to prevent young people coming into contact with the criminal justice system in terms of investing in education, housing, rehabilitation services, youth bail hostels, support services, employment and training and recreational activities under a justice reinvestment framework.

[93] Standing Committee of Attorneys-General, above n 25.
[94] Standing Committee on Aboriginal and Torres Strait Islander Affairs, above n 4, 39.

6.9 Women and Freedom from Violence (Paragraph 3.2.1)

a) The Study should provide more detail about the legal service support options that are provided to women experiencing family violence. More specifically, the Study should discuss the lack of funding provided by the Commonwealth and State and Territory governments to FVPLS and the fact that they are not funded to provide services in metropolitan areas despite the Study itself noting that the majority of Aboriginal and Torres Strait Islander peoples live in urban and regional areas. FVPLS play a critical role in supporting Aboriginal and Torres Strait Islander families, especially since legal obligations to avoid conflicts of interest often preclude Aboriginal and Torres Strait Islander women from accessing the NATSILS' services.

6.10 Issues That a National Action Plan Could Address

a) The implementation of initiatives, in consultation with Aboriginal and Torres Strait Islander communities, to reduce the high incidence of family violence.

6.11 Rights of Children in Care of the State (Paragraph 3.3.2)

a) The Study states that Aboriginal and Torres Strait Islander children are over-represented in the child protection system but then fails to discuss any of the factors that contribute to this situation. Neglect is the most common form of maltreatment experienced by Aboriginal and Torres Strait Islander young people.[95] However, past government policies that continue to affect the ability of some adults to care for their children and the over-representation of Aboriginal and Torres Strait Islander adults in the criminal justice system also contribute to the disproportionate rate of Aboriginal and Torres Strait Islander young people in the Child Protection System. It should be acknowledged in the Study that there is a close link between neglect and the broader issues of poverty, in all indicators of which Aboriginal and Torres Strait Islander peoples rate as the most disadvantaged group in Australia. The ongoing living standards of Aboriginal and Torres Strait Islander children and families remain inconsistent with Australia's obligation under article 27 of the Convention on the Rights of the Child (CRC) to protect the right of every child to an adequate standard of living and consequentially, its obligations under article 19 to protect children from abuse and neglect.[96] See the NATSILS Shadow Report to the Committee on the Rights of the Child for more detail that should be included in the Study.

b) The Study makes no mention of the Indigenous Child Placement Principle, its implementation or its effectiveness in protecting a child's right to preservation of identity.[97] The Study needs to explain that there is a lack of consistency in the implementation of the Indigenous Child Placement Principle and that there is no

[95] Berlyn, C, Bromfield, L and Lamont, A, 'Child Protection and Aboriginal and Torres Strait Islander Children' (2011) *National Child Protection Clearinghouse Resource Sheet April*, 2.
[96] *Convention on the Rights of the Child*, opened for signature 20 November 1989, I-127531, arts 27, 19 (entry into force 2 September 1990).
[97] *Convention on the Rights of the Child*, opened for signature 20 November 1989, I-127531, arts 20 (3)(8) (entry into force 2 September 1990).

policy or practice framework to aid its implementation nationally. The Study should also mention that due to a shortage of Aboriginal and Torres Strait Islander carers, Aboriginal and Torres Strait Islander children who are removed from their families are often placed in different communities, with non-Aboriginal and Torres Strait Islander carers where they lose connections with family and community. Furthermore, Cultural Plans, which are designed to preserve a child's identity and connection to culture, are not uniformly utilised with data recording that only 20 per cent of Aboriginal and Torres Strait Islander children considered to require a Cultural Plan actually have one developed.[98] See NATSILS Shadow Report to the Committee on the Rights of the Child for further detail that should be reflected in the Study.

c) The Study must acknowledge that child protection legislation and related agencies are focused on removal of children rather than supporting and assisting families to stay together.

d) As stated in the Study, Aboriginal and Torres Strait Islander adults are disproportionately over-represented in the criminal justice system. As a result of such incarceration rates, separation from parents due to detention or imprisonment is a core issue affecting Aboriginal and Torres Strait Islander young people, and has been recognised as such by relevant UN human rights mechanisms.[99] The management of this issue and ensuring that Aboriginal and Torres Strait Islander young people maintain personal relations and direct contact with a detained or imprisoned parent/s on a regular basis, where it is in the young person's best interest, is far from consistent and is regularly unsatisfactory. This needs to be outlined in the Study and the NATSILS suggest the inclusion of the case study contained in section 3.5. of our Shadow Report to the Committee on the Rights of the Child be included by way of explanation.

e) The Study needs to acknowledge the link between a child's involvement with the child protection system and the increased likelihood that they will go on to criminally offend in the future.[100]

6.12 Issues That a National Action Plan Could Address

[98] Brouwer G E, *Own motion investigation into the Department of Human Services Child Protection Program,* Victorian Ombudsman's report presented to Parliament 25 November 2009 (2009), 77.

[99] Committee on the Rights of the Child, *Concluding Observations: Australia*, 40th sess, CRC/C/15/Add.268, [40] 2005.

[100] Brenda Bailey, Special Commission of Inquiry into Child Protection Services in NSW (2008) 2-3; Anna Stewart, Transitions and Turning Points: Examining the Links Between Child Maltreatment and Juvenile Offending (2005) Office of Crime Statistics and Research <www.ocsar.sa.gov.au/docs/other_publications/papers/AS.pdf> at 24 May 2010. Stewart found that in Queensland 54 per cent of Aboriginal and Torres Strait Islander males, and 29 per cent of Aboriginal and Torres Strait Islander females, involved in the child protection system go on to criminally offend; Schwartz, M, and Cunneen, C, 'From Crisis to Crime: the escalation of civil and family law issues to criminal matters in Aboriginal communities in NSW' (2009) vol. 7, no 15, *Indigenous Law Bulletin*, 18-21.

a) The implementation of a holistic approach to child protection that incorporates a public health and prevention model to reduce the over-representation of Aboriginal and Torres Strait Islander children in the system and address the underlying causes of child abuse and neglect;

b) Adherence to the Indigenous Child Placement Principles at all levels of government and provision of clarification in relation to the definitions for compliance;

c) That the Government strengthen its current efforts to address the living conditions of Aboriginal and Torres Strait Islander peoples so that fewer Aboriginal and Torres Strait Islander young people are taken into alternative care by:

- committing to improving evidence gathering mechanisms through the incorporation of Aboriginal and Torres Strait Islander methodologies in relation to standards of living of Aboriginal and Torres Strait Islander young people;
- implementing independent reviews with the involvement of Aboriginal and Torres Strait Islander peoples of the success of the Closing the Gap campaign and the Northern Territory Intervention and committing to amend these initiatives in light of the reviews' results; and
- developing a system in consultation, partnership and collaboration with Aboriginal and Torres Strait Islander peoples for increased early and therapeutic family interventions and parental support which focuses on increasing the chances of young people remaining within their families.

d) The development of a policy and practice framework in consultation with Aboriginal and Torres Strait Islander peoples and organisations in relation to the Indigenous Child Placement Principle to aid its implementation;

e) A review of the screening processes of Aboriginal and Torres Strait Islander carers, in particular, kinship carers, and that resources be allocated to support and increase the number of potential carers;

f) That Cultural Plans be developed and updated at least every 6 months for each Aboriginal and Torres Strait Islander young person in care in consultation with the young person's family and community;

g) That development of wellbeing indicators in consultation with Aboriginal and Torres Strait Islander peoples and Aboriginal and Torres Strait Islander Peak Bodies to assess and enhance the wellbeing of Aboriginal and Torres Strait Islander young people;

h) That, when in the best interest of the young person, the child protection system focus on family reunification as a priority and that until reunification is achieved Cultural Plans (see 6.12 (f)) be strictly followed so as to maintain the young person's connection to community and culture; and

i) That the child protection system educate its staff on the importance of maintaining relations between Aboriginal and Torres Strait Islander young people in alternative care and their incarcerated parent/s and ensure that such contact is designated as a priority area within their case work obligations.

6.13 The Rights of Children in the Criminal Justice System (Paragraph 3.3.3)

a) The Study records that Aboriginal and Torres Strait Islander young people are over-represented in the criminal justice system but then fails to identify any of the causes contributing to this. In the recent Senate Committee report 'Doing Time – Time for Doing' the over-representation of Aboriginal and Torres Strait Islander young people in the criminal justice system has been linked to the broader social and economic disadvantage faced by many Aboriginal and Torres Strait Islander peoples, including:

- poor education outcomes;
- high rates of unemployment;
- high levels of drug and alcohol abuse;
- over-crowded housing and high rates of homelessness;
- over-representation in the child protection system;[101]
- high levels of family dysfunction; and
- a loss of connection to community and culture.[102]

In addition to these, a recent study examined the substantial rise in the Aboriginal imprisonment rate between 2001 and 2008 and noted that there had not been a corresponding rise in the conviction rate for Aboriginal and Torres Strait Islander peoples over this period.[103] As a result, the study 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."[104] Through their experience on the ground the NATSILS have also identified the following as factors from within the criminal justice system that critically contribute to the over-representation of Aboriginal and Torres Strait Islander young people in the criminal justice system:

- Discriminatory laws;

[101] Stewart, A, *Transitions and Turning Points: Examining the Links Between Child Maltreatment and Juvenile Offending* (2005) at <www.ocsar.sa.gov.au/docs/other_publications/papers/AS.pdf>. Stewart found that in Queensland 54 per cent of Aboriginal and Torres Strait Islander males, and 29 per cent of Aboriginal and Torres Strait Islander females, involved in the child protection system go on to criminally offend.
[102] Standing Committee on Aboriginal and Torres Strait Islander Affairs, above n 4, 12-13.
[103] 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.
[104] Ibid.

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

The Study needs to include the above information so that the causes of over-representation of Aboriginal and Torres Strait Islander young people in the criminal justice system can be accurately understood and therefore, accurately addressed in the associated National Human Rights Action Plan.

b) Due to their public presence, it is generally accepted that young people are over-policed particularly if they have mental health issues, are homeless or are dark-skinned.[105] There are a number of laws within Australia which discriminate against Aboriginal and Torres Strait Islander young people. For example, a range of public space 'move on' laws across Australia are discriminatory as they disproportionately affect Aboriginal and Torres Strait Islander young people due to their high visibility in public space. Historically, Aboriginal and Torres Strait Islander peoples use public space as cultural space and for congregation and socialisation as well as living space due to high levels of homelessness and low levels of property ownership. Also, these laws are implemented by police at disproportionate rates against young people and against Aboriginal and Torres Strait Islander young people in particular.[106] A survey of young people conducted in Queensland following the expansion of move on powers highlighted poor police practices such as a failure to inform young people of the nature or details of their move on notice (including its duration and what constitutes a breach) and disproportionate use of the powers against Aboriginal and Torres Strait Islander young people.[107]

The Committee on the Rights of the Child has raised concerns about these laws in the past and despite ongoing domestic lobbying efforts, they continue to remain in

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

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

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

place.[108] As an important ongoing human rights issue, these laws, and there effect on Aboriginal and Torres Strait Islander young people must be discussed in the Study.

c) The Study notes that there has been a substantial increase in the proportion of juveniles in detention on remand yet fails to outline why this is so. Given the over-representation of Aboriginal and Torres Strait Islander young people in the criminal justice system, this increase in the use of remand severely impacts upon the detention rates of these young people. For example, the proportion of Aboriginal and Torres Strait Islander young people in detention on remand increased from 32.9 per cent in 1994 to 55.1 per cent in 2008.[109]

The widespread and increasing use of remand is inconsistent with article 37 (b) of the CRC and the right to detention as a last resort.[110] It is also not proportional to the level of offending as only a small proportion of remand episodes result in the young person being convicted and sentenced to a custodial order.[111] The increasing proportion of Aboriginal and Torres Strait Islander young people in detention on remand is the result of a number of factors, including:

- Police choosing to caution and divert Aboriginal and Torres Strait Islander young people at a lower rate than non-Aboriginal and Torres Strait Islander young people;[112]
- The punitive approach being taken by some police in opposing bail unnecessarily;
- Remand being used to "manage" people with mental illness or intellectual deficiency because mental illness or intellectual deficiency often goes unidentified and there is a chronic lack of support and treatment facilities;
- Considerations relevant to bail having a discriminatory effect on Aboriginal and Torres Strait Islander young people as high rates of social and economic disadvantage mean that many do not have appropriate homes to be bailed to or because of family dysfunction there is no appropriate adult to whom they can be bailed. This means that many cannot satisfy bail conditions and are thus, remanded in custody. A lack of youth bail hostels compounds this issue;
- The imposition of onerous bail conditions that many Aboriginal and Torres Strait Islander young people are unable to satisfy due to social and economic disadvantage and family dysfunction;
- Inadequate recognition of cultural contexts and obligations that may impact on the ability of an Aboriginal and Torres Strait Islander young person to comply with bail conditions. For example, a young person may have to vacate

[108] Committee on the Rights of the Child, above n 38 , [73 (e), 74 (h)].
[109] Richards, K, 'Trends in Juvenile Detention in Australia' (2011) *Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice no.416, 4.*
[110] Ibid 5.
[111] Mazerolle, P and Sanderson, J*,* 'Understanding Remand in the Juvenile Justice System in Queensland' (2008) *Griffith University*, 10.
[112] Richards, K, 'Trends in Juvenile Detention in Australia' (2011) *Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice no.416, 6.*

their house and travel to participate in sorry business if there is a death in the family thereby leaving the address to which they are bailed and breaching their residential condition. These breaches of bail result in future periods on remand for non-compliance with bail; and

- The over-policing of Aboriginal and Torres Strait Islander young people on bail.

See NATSILS Shadow Report to the Committee on the Rights of the Child for case studies and further detail.

d) In addition to the issue of the increasing use of remand, the Study also needs to include a broader discussion of the protection of the right to detention as a last resort across the entire criminal justice system. Additional ways in which the right to detention as a last resort is being violated in Australia include:

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

> The judges and magistrates sentencing Aboriginal offenders in regional Western Australia commonly have no practical alternative to a custodial sentence because of the unavailability of non-custodial programmes, and limited availability of non-custodial supervision. Imprisoning offenders because of a lack of non-custodial options is expensive and counter-productive. It discriminates between regional and metropolitan residents, and has the consequence that the former are more likely to go to prison.[113]

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

> I mentioned before that I am going to Borroloola next week. Last time I was out there, a month ago, there were no community projects. That is the case across many, many communities. Community work is not available. Home detention is not a viable option, sometimes because of overcrowding in the house or the sort of conduct that is being engaged in by other people who are living in the house. There are no surveillance officers

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

available to go and check on people who have been ordered to serve home detention. So the sentencing dispositions are very limited. [114]

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

- Western Australia has had mandatory sentencing laws for some years and Victoria has recently announced plans to introduce statutory minimum sentencing laws for young people aged 16-17 (and adults) who commit the yet to be defined offence of "gross violence". The Victorian proposal removes any discretion that the judiciary have in certain cases to consider wider circumstances when sentencing and address factors leading to the offending.

See NATSILS Shadow Report to the Committee on the Rights of the Child for case studies and further detail.

e) The Study needs to explain that there is a distinct lack of youth bail and detention facilities in Australia, especially in regional, rural and remote Aboriginal and Torres Strait Islander communities. As a result, young people are inappropriately placed in adult detention facilities and lock-ups where they are not protected from adult detainees and offenders and are vulnerable to abuse. The Study should also acknowledge Australia's reservation to article 37 (c) of the CRC regarding the separation of adults and children in detention and that this is a source of frustration between the Committee on the Rights of the Child and Australia.[115] See section 5.4 of the NATSILS Shadow Report to the Committee on the Rights of the Child for further detail and case studies that should be included in the Study.

f) There needs to be more discussion within the Study of specialised courts within the juvenile justice system. There are separate specialist children/youth courts in every State and Territory in Australia except the Northern Territory. While every other State or Territory has a separate children/youth court with specially trained magistrates and workers, in the Northern Territory the Youth Justice Court sits as a subsidiary of the adult Magistrate's Court with magistrates acting in both jurisdictions, and simply putting on their youth justice hat when the Youth Justice Court sits. The outcome of this is that young people are denied access to a specialist

[114] See the transcript of proceedings from the Darwin hearings at ATSIA 49: http://www.aph.gov.au/hansard/reps/commttee/R12981.pdf (last viewed 4 June 2010).
[115] *Convention on the Rights of the Child*, opened for signature 20 November 1989, I-127531, art 37 (c) (entry into force 2 September 1990).

court service which is geared towards acknowledging and addressing the specific circumstances and issues experienced by young people.

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

g) Western Australia has recently introduced laws that involve the naming and shaming of offenders who commit anti-social offences. The *Prohibitive Behaviour Orders Act 2010 (WA)* ('PBO Act') enables courts to issue a Prohibitive Behaviour Order (PBO) to a person, aged 16 or above, who has been convicted of an anti-social offence, if he or she has committed an anti-social offence more than once in three years and the person is likely to commit a further relevant offence unless constrained from certain otherwise lawful activities.[116] The PBO Act broadly defines anti-social behaviour as "behaviour that causes or is likely to cause ... harassment, alarm, fear or intimidation to one or more persons; or ... damage to property".[117] The orders are imposed in addition to any penalty imposed for a criminal offence.

   Of particular concern is that the PBO Act provides for the publication of the order, including the name of the young person and their residential address and photograph, and permits anyone to republish that information. The Study needs to explain that this is a complete departure from current laws protecting the privacy and identity of young people so as to best aid their rehabilitation, may lead to government sanctioned vigilantism and furthermore, is likely to have a demoralising effect on Aboriginal and Torres Strait Islander young people.

h) The Study needs to make specific mention of the fact that 17 year olds are still tried as adults in Queensland which is inconsistent with other States and Territories in Australia and international human rights jurisprudence.

i) The Study needs to outline concerns that have been raised about the state of youth detention facilities in Australia and associated potential human rights violations. For example, the Study should discuss the human rights concerns raised by the Victorian Ombudsman in his report on the Melbourne Youth Justice Precinct.[118] See section 5.5 of the NATSILS Shadow Report to the Committee on the Rights of the Child for further detail that should be included in the Study.

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[116] *Prohibitive Behaviour Order Act, 2010* (WA) s 8.
[117] *Prohibitive Behaviour Order Act 2010* (WA) s 3.
[118] Victorian Ombudsman G E Brouwer, *Whistleblowers Protection Act 2001: Investigation into conditions at the Melbourne Youth Justice Precinct* (2010) *at* http://www.ombudsman.vic.gov.au/resources/documents/Investigation_into_conditions_at_the_Melbourne_Youth_Justice_Precinct_Oct_20101.pdf .

6.14 Issues That a National Action Plan Could Address

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

b) That where legislation is identified as having a discriminatory impact upon Aboriginal and Torres Strait Islander young people, such legislation be amended so as to not be discriminatory, or implementation and support measures be put in place to assist young people coming into contact with the legislation to achieve an equitable outcome;

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

d) The amendment of legislation in each jurisdiction dictating bail considerations and presumptions be amended to create a presumption in favour of bail for young people and to ensure that bail conditions take account of social and cultural factors and can be reasonably met by Aboriginal and Torres Strait Islander young people;

e) That immediate action be taken to dramatically reduce the numbers of Aboriginal and Torres Strait Islander young people on remand;

f) That the Australian Government work with State and Territory governments to introduce legislation that requires the police to lodge a written document with the court upon the commencement of criminal proceedings against a young person outlining why all diversionary processes were inappropriate in the circumstances;

g) Commitment from Commonwealth, State and Territory governments to work with police to increase the rate at which Aboriginal and Torres Strait Islander young people are diverted from the formal justice system;

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

i) The development and expansion of a specific justice system for young people which is adequately funded, coordinated and dynamic and which works towards the implementation of culturally appropriate restorative justice initiatives (such as the Victorian Children's Koori Court and the Queensland Youth Murri Court). We further consider it imperative that any youth justice system be framed in youth friendly terms so that young people understand the court system and experience it as meaningful and restorative rather than alienating;

j) Commitment from the Commonwealth, State and Territory governments to work with Aboriginal and Torres Strait Islander communities and Elders in the development and dispensation of youth justice;

k) Increased provision of culturally appropriate support and treatment facilities for young people with mental health and drug and alcohol abuse issues in metropolitan, regional and remote areas;

l) Amendment by the Western Australian Government of legislation to prevent the publication of personal information and photographs of young offenders subject to Prohibitive Behaviour Orders to ensure their privacy is protected;

m) Raising the age for adult criminal responsibility from 17 years old to 18 years old in Queensland;

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

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

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

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

r) Increased provision of culturally appropriate support and treatment facilities for young people with mental illness in metropolitan, regional and remote areas;

s) That State and Territory governments maintain separation of powers and do not intrude upon the independence and expertise of courts by introducing legislation that restricts the sentencing options available to courts (such as suspended sentences);

t) That the Government work with State and Territory governments to extend the availability of community based sentencing options in regional and remote areas so that justice is not determined by geography and young people from these areas are not placed in detention unnecessarily;

u) That the Government work with State and Territory Governments to achieve the provision of culturally appropriate alcohol, drug and substance abuse rehabilitation facilities in regional and remote areas;

v) That State and Territory governments repeal mandatory and minimum sentencing laws;

w) That the Government work with State and Territory Governments to expand the availability of bail hostels and appropriate youth detention centres to regional and remote areas; and

x) Removal of the Government's reservations to art 37 (c) of the CRC and art 10 (2)(b) of the International Convention on Civil and Political Rights relating to the separation of young people from adults in detention.

6.15 People in Prisons (Paragraph 3.9)

a) The Study needs to provide more information about concerns that have been raised about the state of detention and custodial facilities in Australia. The NATSILS raised these concerns during Australia's UPR and also in our recent Shadow Report to the Committee on the Rights of the Child. Numerous UN human rights mechanisms have also raised such concerns with Australia.[119] Please see the case studies in section 5.5 of the NATSILS Shadow Report to the Committee on the Rights of the Child for examples that should be included in the Study.

b) Poor or inappropriate accommodation has been identified as a major catalyst for critical incidents such as riots, self-harm, suicide and other non-compliant behaviours among prisoner populations and contributes to a variety of low outcomes for prison communities and prisoners. The relationship between prison accommodation standards and negative behavioural outcomes in prisoners has been shown to be strong and it is in the best interests of the prisoner and prison administrations that prison environments adhere to an appropriate standard. Many Australian prisons are reported to be overcrowded and aspects of prison environments have been termed 'unsafe' and appear to fall below the level articulated in international and national standards and guidelines.[120]

Overcrowding is a direct result of the punitive approach to 'law and order' that has been adopted by Australian governments. Many prisons in Australia are operating

[119] Committee on Economic, Social and Cultural Rights, *Concluding* Observations, 42nd sess, [29, 30] UN Doc E/C.12/AUS/CO/4 (2009); Human Rights Committee, above n 11, [24]; Committee Against Torture, above n 15, [23, 24, 34]; Committee on the Rights of the Child, *Concluding Observations: Australia*, 40th sess, [7, 8, 74] UN Doc CRC/C/15/Add.268 (2005).

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

well above capacity and have refitted single cells so as to allow 'double-bunking'. In some prisons in Western Australia, such as Broome, Roebourne, Greenough and the Eastern Goldfields (Kalgoorlie) there has been a history of serious overcrowding, especially with the dramatic decline in the numbers of prisoners being released to parole in recent years. Overcrowding has become so chronic that it has been reported that up to 6 prisoners have been sleeping in a single cell and on mattresses on the floor next to toilets. The practice of 'double-bunking' in particular has shown to increase the risk to prisoners of rape and assault,[121] contracting a communicable disease[122] and other negative health incomes such as increased exposure to passive smoking.[123]

In 24 coronial inquests held between 1994 and 2008 concerning 26 deaths in South Australian prisons, recommendations were made by the Coroner's Court in relation to various aspects of prison accommodation. In each inquest, the Court held that aspects of the prison environment played a part in the unnatural death of prisoners. Prisons with high social densities have been shown to produce higher death rates including from natural deaths amongst elderly prisoners, violent deaths and suicides.[124] Sustained crowding in prisons has also shown to produce higher levels of violence and other on-compliant behaviour and increased psychiatric commitment rates.[125] Standards such as these clearly violate the Revised Standard Guidelines for corrections in Australia which states that "all necessary measures should be taken to ensure that no prisoner injuries or unnatural deaths occur".[126]

c) Furthermore, some corrections departments have now resorted to housing prisoners outside of prisons in spaces not designed for such a purpose. Since 2007 in South Australia for example, 40 cells at the City Watch House have been allocated for corrective services ongoing use.[127] In addition, cells at other police stations and court holding cells are also used periodically for prisoner accommodation[128] and some adult offenders are being held in juvenile detention facilities.[129]

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

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

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

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

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

[126] *Standard Guidelines for Corrections in Australia*, above n 58.

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

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

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

6.16 Prisons and Oversight Mechanisms for Systemic Human Rights Concerns (Paragraph 3.9.3)

a) This section needs to include more critical examination of the practical effectiveness of some of the oversight mechanisms listed in the Study. Despite their existence, in practice, they often do not provide effective remedy for those wishing to complain about human rights abuses within prisons. If existing oversight mechanisms such as Official Visitors and Inspectors, Ombudsman Offices and the relevant Correctional Services Councils were working effectively then we would not see successive State and Territory Coroners having to repeat previous recommendations regarding the upgrading of correctional environments to minimise the risk of deaths in custody. The Study must emphasise that every jurisdiction in Australia needs an independent oversight mechanism similar too, but expanding upon the Office of the Inspector of Custodial Services in Western Australia. Australia needs to ratify the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and implement a national preventative mechanism.

b) The Study should acknowledge that past complaints to the UN Human Rights Committee in regards to breaches of rights under the ICCPR, in particular relating to the right to an effective remedy, have been upheld.[130]

6.17 Issues That a National Action Plan Could Address

a) Reduction of the overall number of people in detention and implementation of measures to address the disproportionate number of Aboriginal and Torres Strait Islander peoples in detention by implementing recommendations above at 6.8 and 6.14;

b) Ensuring that adequate medical care and living conditions are guaranteed for all people in detention, including during transport of detained persons;

c) The withdrawal of Australia's reservations to article 10(2) and (3) of the ICCPR, and article 37(c) of the Convention on the Rights of the Child (CRC);

d) Reformation of death in custody investigations so they are carried out by an independent body;

e) Introduction of legislation that requires governments to act on Coronial recommendations;

f) Ratification of the Optional Protocol to the Convention Against Torture, and implementation of a national preventative mechanism, similar to but expanding on the Office of the Inspector of Custodial Services in Western Australia, that has the power to inspect youth detention centres and police lock up facilities; and

[130] *Brough v Australia*, UN Doc CCPR/C/86/D/1184/2003 (2006) [8.5 – 8.12].

g) Implementation of training for all police officers on their obligations under the CRC in relation to the rights and treatment of young people.