

**Submission to the Senate Inquiry into the  
indefinite detention of people with  
cognitive and psychiatric impairment in  
Australia**

April, 2016



**NATSILS**

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



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## 1. About NATSILS

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

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

## 2. Introduction

2.1. NATSILS wishes to thank the Senate for the opportunity to provide input into this inquiry. As a result of NATSILS area of expertise, this submission only discusses the terms of reference in relation to Aboriginal and Torres Strait Islander peoples. NATSILS acknowledges that the topic of this inquiry affects many communities in Australia, particularly those who are socio-economically marginalised, however, as will be highlighted the issues discussed are particularly severe in Aboriginal and Torres Strait Islander communities.

2.2. The terms of reference for the inquiry are very broad so this submission focusses on areas in which NATSILS specialises given that other organisations are better positioned to give an informed view on all the different and complex needs of individuals with various types of cognitive and psychiatric impairments. In this regard, we refer to the submission made by First Peoples Disability Network (FPDN) which brings together a wealth of expertise in this area.

2.3. NATSILS submission has arisen from seriously held concerns about the number of Aboriginal and Torres Strait Islander peoples with cognitive and psychiatric impairments who are caught in the criminal justice system. As has been well documented, Aboriginal and Torres Strait Islander people are more likely to have cognitive and psychiatric impairments as well as a host of other complex needs, including other forms of disability, drug and alcohol abuse, poor health and literacy and language issues. It is important to state at the outset that the over-representation

of Aboriginal and Torres Strait Islander peoples in these areas can only be understood in the context of colonisation, dispossession, disadvantage and oppression.<sup>1</sup>

- 2.4. In our experience, the key barriers to justice for people with cognitive and psychiatric impairments relate to under-diagnosis, lack of access to appropriate services, lack of awareness of issues relating to disability amongst professionals working within the criminal justice system, inflexible and inappropriate legislative regimes, and a lack of effective diversion options. Overcoming these barriers will require a shift away from a law and order approach, and a commitment to a therapeutic approach to offending behaviour related to a person's disability. The appropriate response to offending behaviour related to a person's disability is a health and community response wherever possible.<sup>2</sup>
- 2.5. In order to move towards a therapeutic approach for offenders with disabilities, NATSILS makes a number of specific recommendations which are discussed in further depth throughout the submission. NATSILS **recommends**:
- Review of legislation for mentally impaired accused in the states and territories to ensure they are compliant with Australia's human rights obligations and the minimum standards that NATSILS has identified below;
  - Improved access to screening and assessment services, particularly in remote communities. This should include access to psychiatric reports in a timely fashion;
  - Increased funding for a range of community-based support services, including health, welfare and supported accommodation;
  - Training for lawyers, police officers, court and judicial officers in identifying and appropriately dealing with people with cognitive and psychiatric impairments;
  - Targeted funding to ensure that once identified, offenders with a cognitive and psychiatric impairment have access to diversionary therapeutic options that meet their specific needs;
  - Reform of bail laws to ensure decision-makers take account of the impact of bail and bail conditions on a person with special needs, such as cognitive or psychiatric impairments;
  - The repeal of mandatory sentencing legislation;
  - Significant increase in funding for support services and programmes within prisons that meet the needs of people with cognitive and psychiatric impairments;
  - Further funding for interpreter services to ensure that Aboriginal and Torres Strait Islander people, including those with cognitive and psychiatric impairments, are able to understand legal processes;

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<sup>1</sup> Gordon et al. have argued that colonisation has resulted in "unresolved grief that is associated with multiple layers of trauma spanning many generations". Gordon et al cited in Al-Yaman F et al, Family Violence Among Aboriginal and Torres Strait Islander Peoples (Canberra: Australian Institute of Health and Welfare, 2006) at 3. See also: P Memmott et al, Violence in Indigenous communities (Canberra, Commonwealth Attorney-General's Department, 2001); J Atkinson, Trauma trails, recreating song lines: The transgenerational effects of trauma in Indigenous Australia (North Melbourne, Spinifex Press, 2002).

<sup>2</sup> CAALAS, Submission to the Australian Human Rights Commission Consultation on access to justice in the criminal justice system for people with disability (2013).

- Immediate reversal of planned funding cuts to the ATSILS and the provision of further funding to the ATSILS to ensure that Aboriginal and Torres Strait Islander peoples with disabilities are able to access culturally competent legal services.

2.6. We would like to endorse the submission of our member organisation Aboriginal Legal Service of Western Australia (ALSWA). We recommend that the ALSWA submission be read in conjunction with this submission because, although the following provides an overview of issues nationally, the submission from ALSWA provides a detailed local focus, in particular in regard to the major problems with the Western Australian legislative regime. In addition, it should be noted that the NATSILS submission has been informed by an earlier submission of our member organisation Central Australian Aboriginal Legal Aid Service (CAALAS) to the Australian Human Rights Commission on access to justice in the criminal justice system for people with disability.<sup>3</sup>

### 3. Prevalence of imprisonment and indefinite detention of individuals with cognitive and psychiatric impairment

3.1. The question of the prevalence of imprisonment and indefinite detention of individuals with cognitive and psychiatric impairments is difficult to answer due to limitations of available data and research. We note that the Aboriginal Disability Justice Campaign report, *No End in Sight*, published in September 2012 cited a number of figures about the prevalence of imprisonment and indefinite detention for individuals with cognitive and psychiatric impairments.<sup>4</sup> The report stated that:

- In Western Australia, 11 out of the 33 people under the Mental Impaired Accused Review Board were Aboriginal and Torres Strait Islander people.<sup>5</sup>
- In Queensland, it was estimated from research that there were over 100 people with cognitive impairment currently detained indefinitely in psychiatric hospitals, however there was no specific data in terms of Aboriginality.<sup>6</sup>
- In the Northern Territory, all of the 9 people on supervision orders were Aboriginal and Torres Strait Islander people.<sup>7</sup>

3.2. It is important to state at the outset, however, that the number of people that are indefinitely detained reflect only a small fraction of people with cognitive and psychiatric impairments caught in the criminal justice system. Indeed, while very few people may get to the point of being indefinitely detained, it is NATSILS experience that a number of our most disadvantaged clients with cognitive and psychiatric impairments will continuously cycle in and out of the

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<sup>3</sup> CAALAS, Submission to the Australian Human Rights Commission Consultation on access to justice in the criminal justice system for people with disability (2013).

<sup>4</sup> Aboriginal Disability Justice Campaign, *No End in Sight: The imprisonment, and indefinite detention of Indigenous Australians with A Cognitive Impairment* (2013)

<sup>5</sup> Ibid at 24.

<sup>6</sup> Ibid at 24.

<sup>7</sup> Ibid at 24

criminal justice system. Given this reality, it is important to discuss the issue of individuals with cognitive and psychiatric impairments in contact with the criminal justice system more broadly.

- 3.3. In this regard, it should be noted there is a lack of accurate data on the rate of Aboriginal and Torres Strait Islander peoples with cognitive and psychiatric impairments, a lack of accurate data on the rate of Aboriginal and Torres Strait Islander people in prison and a lack of research showing a nexus between the two. It is therefore worthwhile briefly tracing the available data on both Aboriginal and Torres Strait Islander disability and imprisonment rates, before turning to explore some of the emerging research on the prevalence of people with cognitive and psychiatric impairments that are caught in the justice system. This discussion will show that while the available data has significant limitations, the partial picture that we have of this issue for Aboriginal and Torres Strait Islander peoples is a disturbing one.
- 3.4. As noted by the Productivity Commission in their 2011 report on disability care and support, it is very difficult to provide an accurate depiction of disability within the Aboriginal and Torres Strait Islander community.<sup>8</sup> Prior to the 2002 National Aboriginal and Torres Strait Islander Social Survey (NATSISS), there were no national surveys of Aboriginal and Torres Strait Islander disability. While data collections have occurred since this time, including the 2006 Census and the 2008 and 2014 NATSISS, there is reason to suggest that these surveys understate the extent of disability amongst Aboriginal and Torres Strait Islander communities. This is for a number of reasons including under-diagnosis, that surveys of Aboriginal and Torres Strait Islander people are affected by higher rates of non-response<sup>9</sup> and that some Aboriginal and Torres Strait Islander people find the concept of disability hard to understand or irrelevant, reducing the likelihood that the surveys accurately record disability.<sup>10</sup>
- 3.5. Notwithstanding these limitations, available data makes clear that Aboriginal and Torres Strait Islander peoples are significantly more likely to have a disability than non-Indigenous Australians. ABS statistics from 2012 show that 23.4% of Aboriginal and Torres Strait Islander people have a disability<sup>11</sup> and are 1.7 times as likely as non-Indigenous people to be living with disability.<sup>12</sup> In particular, Aboriginal and Torres Strait Islander people in younger age groups are significantly more likely to have a disability than their non-Indigenous peers. Aboriginal and Torres Strait Islander children aged 0–14 years were more than twice as likely to have a

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<sup>8</sup> Productivity Commission, *Disability Care and Support* (Report no. 54, Canberra, 2011) Vol II, at 532

<sup>9</sup> Ibid at 532-3.

<sup>10</sup> Ibid, at 532-3.

<sup>11</sup> Australian Bureau of Statistics, *Aboriginal and Torres Strait Islander People with a Disability*, 2012 (CAT no. 4433.0.55.055)

<sup>12</sup> Australian Bureau of Statistics, *Aboriginal and Torres Strait Islander People with a Disability*, 2012 (CAT no. 4433.0.55.055). See also: Australian Bureau of Statistics, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples, October 2010* (CAT no. 4704.0, February 2011); Australian Bureau of Statistics, *Australian Aboriginal and Torres Strait Islander Health Survey: First Results, 2012-13*, (CAT. no. 4727.0.55.001).

disability, while Aboriginal and Torres Strait Islander people aged 35-54 years were 2.7 times as likely as their non-Indigenous peers to have a disability.<sup>13</sup>

- 3.6. Cognitive and psychiatric impairments are common disabilities for Aboriginal and Torres Strait Islander peoples including mental illness, acquired brain injuries, cognitive impairment, foetal alcohol spectrum disorder (FASD), and the impact of trauma and neglect on children's brains. For example, Australian Bureau of Statistics data for 2006 shows that Aboriginal and Torres Strait Islander peoples are nearly four times as likely to have an intellectual disability as non-Indigenous Australians.<sup>14</sup>
- 3.7. Here it is important to note that FASD is a significant issue, particularly in Aboriginal and Torres Strait Islander communities. A Commonwealth Inquiry into FASD found that the incidence of FASD amongst Aboriginal and Torres Strait Islander peoples is estimated to be between 2.76 and 4.7 per 1,000 births compared to between 0.06 and 0.68 for the rest of the Australian population.<sup>15</sup> Other experts consider this to be a significant underestimation.<sup>16</sup>
- 3.8. Unfortunately exact data on the incidence of each of these types of disability amongst Aboriginal and Torres Strait Islander communities does not exist. Furthermore, it is recognised that a significant number of Aboriginal and Torres Strait Islander peoples with these types of disabilities are undiagnosed or undetected which makes it difficult to get an accurate picture of the extent of the issue. This is particularly true for people with these types of disabilities who come into contact with the criminal justice system. For example, CAALAS has noted that:
- It is relatively rare for our criminal lawyers to meet a client with a formal diagnosis of a cognitive impairment, despite our concern that the number of people with a cognitive impairment involved in the criminal justice system is very high. Sometimes a psychiatric or cognitive assessment organised by a lawyer for the purpose of criminal proceedings will be the first time an assessment has been carried out for a client.<sup>17</sup>
- 3.9. As noted in the introduction to this submission, the high incidence of disability in Aboriginal and Torres Strait Islander communities can only be understood within the context of disadvantage and colonialism. The First People's Disability Network 10-point plan emphasises that:<sup>18</sup>

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<sup>13</sup> Australian Bureau of Statistics, *Aboriginal and Torres Strait Islander People with a Disability, 2012* (CAT no. 4433.0.55.055).

<sup>14</sup> Australian Bureau of Statistics, *Australian Social Trends, 2006* (4102.0, Canberra, 2006). Furthermore, as 2011 data shows more than one-third of Aboriginal and Torres Strait Islander users of specialist disability services had intellectual disability as their primary reason for activity limitations. Australian Institute of Health and Welfare *The health and welfare of Australia's Aboriginal and Torres Strait Islander people, an overview 2011*. (Cat. no. IHW 42. Canberra: AIHW, 2011).

<sup>15</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, *FASD: The Hidden Harm Inquiry into the prevention, diagnosis and management of Foetal Alcohol Spectrum Disorders* (2012), 2.94

<sup>16</sup> Howard Bath, 'Vulnerability, risk and justice for children and young people in the Northern Territory', (Presentation delivered at the Fourteenth Annual Biennial conference of the Criminal Lawyers Association NT, Bali, June 27, 2013) 5.

<sup>17</sup> CAALAS, Submission to the Australian Human Rights Commission Consultation on access to justice in the criminal justice system for people with disability (2013) 6.

<sup>18</sup> See First People's Disability Network Australia, 10-point plan for implementing NDIS in Aboriginal Communities. Available at: <http://fpdn.org.au/10-point-plan-ndis>



The high prevalence of disability, approximately twice that of the non-indigenous population occurs in Aboriginal and Torres Strait Islander communities for a range of social reasons, including poor health care, poor nutrition, exposure to violence and psychological trauma (eg arising from removal from family and community) and substance abuse, as well as the breakdown of traditional community structures in some areas.

- 3.10. While there are significant limitations of existing data<sup>19</sup> it is also well known that Aboriginal and Torres Strait Islander people are vastly overrepresented in the criminal justice system. Australian Bureau of Statistics (ABS) data shows that Aboriginal and Torres Strait Islander people make up only 2% of the adult population, but 27% of the prison population.<sup>20</sup> Most concerning is how drastically Aboriginal and Torres Strait Islander people imprisonment rates have risen. ABS statistics reveal that there was a 95% increase in the rate of Aboriginal and Torres Strait Islander imprisonment rates between 2004 -2015, while the non-Indigenous rate rose by 27% over the same period.<sup>21</sup> The situation has been described as a crisis by Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda.<sup>22</sup>
- 3.11. However, as has been alluded to, there is a lack of evidence showing the nexus between the high numbers of Aboriginal and Torres Strait Islander living with a disability and the overrepresentation of Aboriginal and Torres Strait Islander people in the criminal justice system. Nonetheless, a number of important recent studies have begun to provide linkages between the two.
- a) A Queensland based study conducted by Heffernan *et al* found that 73% of male and 86% of female Aboriginal and Torres Strait people in custody in high security prisons suffered a mental disorder.<sup>23</sup> The researchers concluded that “the prevalence of mental disorder among Indigenous adults in Queensland custody is very high compared with community estimates” and “there remains an urgent need to develop and resource culturally capable mental health services for Indigenous Australians in custody.”<sup>24</sup>
  - b) In NSW, a 2011 report found that the majority (87%) of young people in custody were found to have a psychological disorder. Possible intellectual disability was also common, with 20% of Aboriginal and Torres Strait Islander young people in custody assessed as having a possible intellectual disability compared with 7% of the non-Indigenous cohort.<sup>25</sup>

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<sup>19</sup> See for example, A Avery and S Kinner, ‘A robust estimate of the number and characteristics of persons released from prison in Australia’ (August 2015) 39(4) *Australian and New Zealand Journal of Public Health* 315.

<sup>20</sup> Australian Bureau of Statistics (2014) *Corrective Services, Australia, December Quarter 2014*, Cat. no. 4512.0. Canberra.

<sup>21</sup> Australian Bureau of Statistics (2015) *Prisoners in Australia, 2015*, Cat. no. 4517.0., Canberra; Australian Bureau of Statistics (2004) *Prisoners in Australia, 2004*, Cat. no. 4517.0., Canberra.

<sup>22</sup> Sarah Taillier, ‘Aboriginal incarceration rates at crisis point, says social justice commissioner Mick Gooda’ *ABC News*, 15 April 2015.

<sup>23</sup> E B Heffernan et al, ‘Prevalence of mental illness among Aboriginal and Torres Strait Islander people in Queensland Prisons (2012) 197(10) *Medical Journal Australia* 37-41.

<sup>24</sup> *Ibid.*

<sup>25</sup> D Indig et al, 2009 NSW Young People in Custody Health Survey: Full Report, Justice Health and Juvenile Justice, 2011.

- c) A 2008 study examining over 2, 700 people who have been in prison found that 28% of prisoners experienced a mental health disorder (defined as having any anxiety, affective or psychiatric problem in the past 12 months), 34% had a cognitive impairment and 38% had a borderline cognitive impairment.<sup>26</sup>

#### 4. The experiences of individuals with cognitive and psychiatric impairment who are imprisoned or detained indefinitely;

- 4.1. Information from our members shows that the experiences of Aboriginal and Torres Strait Islander people with cognitive and psychiatric impairments who come into contact with the criminal justice system are overwhelming negative. Legal processes are not well adapted for people with these types of impairments, while the experience of being in prison or detained can be traumatic and stressful for people who are already highly vulnerable and have poor coping mechanisms. Here it is worth considering the significant barriers that Aboriginal and Torres Strait Islander people with cognitive and psychiatric impairments have in navigating the legal system. The following from a former staff member of Central Australian Aboriginal Legal Aid Services describes these significant difficulties:

##### Case Study One:

Every Monday morning Aboriginal Legal Aid lawyers in Alice Springs descend into the cells beneath the courts to take instructions from prospective clients who have been locked up overnight and over the weekend. More often than not, the first time lawyers meet clients is in the cells. It can be a tense experience. The volume of matters is daunting and lawyers are aware of the time constraints. It is not unusual to speak to a client about the charges he or she is facing only to be met with stony cold silence. Communication is very often difficult. More difficult still can be determining the source of the communication barrier. Language, hearing, shyness, embarrassment, cultural reticence, obstinacies, substance withdrawal, illness or any combination of these factors can all contribute. Frequently communication is hampered by mental health issues, a cognitive impairment, or both. The lawyer's job is to find a way to get instructions, to work out which issue or issues, if any, are contributing to the communication barrier, and to decide what it all means for the client's case. In a court cell in Alice Springs, this can be very challenging.<sup>27</sup>

- 4.2. As noted in the above description there are substantive barriers which Aboriginal and Torres Strait Islander peoples with cognitive and psychiatric impairments face upon coming into contact with the criminal justice system. These barriers are difficult to identify as is providing the necessary support. The following case studies are provided to illustrate the extreme and often inappropriate interactions that individuals with cognitive and psychiatric impairments can have with the criminal justice system.

##### Case Study Two:

'Sam' a 10 year old Aboriginal boy from Broome with foetal alcohol syndrome and other behaviour issues, spent five days in police custody in August 2010. Whilst in custody he was

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<sup>26</sup> E Baldry et al, *A critical perspective on Mental Health Disorders and Cognitive Disability in the Criminal Justice System*, 2008.

<sup>27</sup> Madeleine Rowley, 'The Invisible Client: People with cognitive impairments in the Northern Territory's Court of Summary Jurisdiction' (paper delivered at the 14th CLANT Conference, Bali, 25 June 2013) at 1.

allegedly mistreated by police who threatened to withhold food and take away his blanket. Sam was in custody for breaching bail conditions arising from a stealing charge. Sam had been trying to run away at night from the remote community where he was located. There was no responsible adult available for him. Sam was in custody after being refused bail by a Justice of the Peace on a Saturday in Broome due to the absence of a responsible adult. His family attended Broome shortly afterwards but the Justice of the Peace refused to re-list the matter and Sam remanded in custody until Monday. On that Monday, he was granted bail to reside at Mt Barnett Station but was to remain in custody until a responsible adult could transport him. As no responsible adult appeared and the road to Mt Barnett was flooded, Sam was driven by police to Mr Barnett after five days in police custody, after the floods had subsided.<sup>28</sup>

Case Study Three:

‘Ronald’ is an Aboriginal man who required criminal law assistance from CAALAS. Ronald was subject to an adult guardianship order. Despite being subject to an adult guardianship order, Ronald was not receiving enough support or resources from the Department of Health and this prompted his guardian to raise the issue of fitness to plead at Ronald’s court hearing. Ronald was assessed as unfit to plead. As a result, Ronald was in custody at the Alice Springs Correctional Centre from August 2007 – July 2013, and at the time of writing remains in the Secure Care facility. Ronald’s period of detention was initially set at a nominal term of 12 months, however when this nominal term has been reviewed, Ronald’s period of detention has been further extended due to a lack of community supports and alternatives. CAALAS estimates that if Ronald had been found guilty of the criminal charges, he would have received a sentence of imprisonment of approximately 4 months. In contrast, he has now been in custody for almost 9 years and it is unclear when he will be released.

Case Study Four:

‘Mary’ is a CAALAS client who suffers from a cognitive disability. Mary is from Central Australia, but was found unfit to plead in WA and detained there indefinitely. By agreement between the WA and NT Governments, Mary was released from detention in WA and returned to Central Australia where public housing accommodation had been arranged. Unfortunately Mary was taken back into police custody following the commission of further offences. CAALAS was able to take instructions from Mary in relation to these offences, and the matter resolved to a plea with Mary receiving a term of imprisonment. In CAALAS’ observation, being detained indefinitely due to a question of fitness to plead was far more distressing and traumatic for Mary than receiving a finite term of imprisonment. Whilst indefinitely detained, Mary was extremely frustrated and upset and would frequently ask her lawyer when she was getting out, and when she was going home. CAALAS observed the lack of certainty to be utterly tortuous for her.

- 4.3. These case studies demonstrate how clients may be in restrictive custodial settings due to a lack of appropriate facilities and support. In the case of Sam, who was only 10 years old, he was needlessly detained due to a lack of supporting accommodation options. Here the obvious disadvantage that he faced by virtue of his disability and a lack of family support

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<sup>28</sup> NATSILS, *Submission to the Expert Mechanism on the Rights of Indigenous Peoples: Access to Justice for Aboriginal and Torres Strait Islander peoples in Australia* (February, 2013) at 12.

meant that he was inappropriately held in prison facilities because there was seen to be no other option. The case of Ronald is an illustration of how individuals with impairments can be detained for a period far longer than they would have done had the criminal matters proceeded along the usual course.

## 5. Impact of relevant Commonwealth, state and territory legislative and regulatory frameworks, including legislation enabling the detention of individuals who have been declared mentally-impaired or unfit to plead

- 5.1. This section of the submission briefly highlights a number of issues with legislation relating to accused who are found not guilty by reason of mental impairment or found unfit to stand trial. NATSILS recommends that minimum standards be introduced in legislation in all states and territories. Currently, there are significant differences in the legislative frameworks between jurisdictions and consequently we are unable to provide a thorough analysis of jurisdictional differences and specific needed reforms. However, we have provided examples from particular jurisdictions in order to demonstrate the need for recommended minimum standards. For analysis of jurisdictional specific issues, NATSILS notes that there are a number of significant reports including those produced by the Victorian Law Reform Commission<sup>29</sup>, the New South Wales Law Reform Commission<sup>30</sup> and the Government of Western Australia's discussion paper on the *Criminal Law (Mentally Impaired Accused) Act 1996*.
- 5.2. It should be stressed that in making these recommendations, we note the important role that the COAG's Standing Council on Health could play. As argued in the Australian Law Reform Commission (ALRC) report on disabilities, the COAG's Standing Council on Health has long overseen developments in mental health laws, and may be able to advance the review and amendment of legislation in this area.<sup>31</sup>

### **Minimum Standards**

- 5.3. Based on NATSILS' analysis and the first hand experiences of our members, the following have been identified as minimum standards that all legislation for mentally impaired accused should adhere to. At a minimum legislation should provide for:
  - Judicial discretion;
  - Special hearings to test evidence;
  - Procedural fairness;

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<sup>29</sup> Victorian Law Reform Commission, Consultation paper on the Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997

<sup>30</sup> New South Wales Law Reform Commission, People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion (May 2012); New South Wales Law Reform Commission, People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences (June 2013).

<sup>31</sup> Australian Law Reform Commission, *Discussion Paper: Equality, Capacity and Disability in Commonwealth Laws* (May 2013, Canberra) at 233.

- Finite terms for custody orders (and release orders); and
- Rights of review.

These are explored below.

### **Judicial discretion**

*Recommendation: There should be judicial discretion to impose an appropriate order depending on the circumstances of the case and, as such, there should be no provision for mandatory custody orders for mentally impaired accused.*

- 5.4. A critical issue with legislation in this area is the lack of judicial discretion to make appropriate orders. For example, in Western Australia, under the *Criminal Law (Mentally Impaired Accused) Act 1996 (WA)* ('the CLMIA Act (WA)') a court dealing with a person who has been found to be unfit to stand trial has one of two options: indefinite custody or unconditional release.<sup>32</sup> In contrast, a mentally impaired accused who is acquitted on account of unsoundness of mind may be placed on a community-based order, conditional release order or an intensive supervision order.<sup>33</sup> However, the court must impose an indefinite custody order for a mentally impaired accused, who has been acquitted on account of unsoundness of mind, if the offence committed is listed in Schedule 1 of the CLMIA Act (WA). While Schedule 1 includes offences such as murder, manslaughter and sexual penetration, it also includes offences such as assault occasioning bodily harm and criminal damage. This lack of judicial discretion is a major obstacle to the courts making appropriate orders, as appropriate resolutions will seldom be reached by either of the extreme options of unconditional release or indefinite detention. This can be compared with legislation in Victoria where there are no mandatory orders for mentally impaired accused under criminal legislation. Instead, treatment, custodial and judicial monitoring orders are at the court's discretion. Likewise, in South Australia, the courts have wide discretionary powers to make appropriate orders.<sup>34</sup>

### **Special hearings to test evidence**

*Recommendation: there should be special hearings to test the evidence against a mentally impaired accused who is unfit to stand trial. This should entail a procedure for determining whether, on the evidence available, the accused committed the objective elements of the offence so that if it cannot be proven that the accused committed the objective elements of the offence, the accused is discharged.*

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<sup>32</sup> *Criminal Law (Mentally Impaired Accused) Act 1996 (WA)* ("CLMIA Act (WA)"), ss 16(5) and 19(4).

<sup>33</sup> CLMIA Act (WA), ss 21(b) and 22(b). These orders are only applicable if the offence committed is not listed in Schedule 1 of the CLMIA Act (WA).

<sup>34</sup> For example, in South Australia, under Division 4, Section 269O(1) of the Criminal Law Consolidation Act 1935 (SA) "CLC Act (SA)", the court by which the person is declared to be liable to supervision has three discretionary powers:

1. 269O(1)(a): to release the defendant unconditionally
2. 269O(1)(b)(i): to make a supervision order committing the defendant to detention
3. 269O (1)(b)(ii): to make a supervision order releasing the defendant on license, subject to certain conditions.

- 5.5. A serious issue in Western Australia is that orders can be made against accused under the CLMIA Act even though evidence against the accused may be substantively lacking. In Western Australia the court must not impose a custody order unless satisfied that it is appropriate to do so having regard to the strength of the evidence against the accused; the nature of the alleged offence and the alleged circumstances of its commission; the accused's character, antecedents, age, health and mental condition; and the public interest.<sup>35</sup> However, the assessment of the strength of evidence against the accused is only undertaken by reference to the written brief of evidence – no witnesses are called to give evidence, nor can they be cross-examined.
- 5.6. This can be compared with the Northern Territory<sup>36</sup> and Victoria<sup>37</sup> where there are special hearings before a jury to determine whether the person is not guilty of the offence, not guilty because of mental impairment, or committed the offence charged.<sup>38</sup> A finding of "not guilty" and "not guilty because of mental impairment" are to be taken for all purposes as if they were findings made at a criminal trial.<sup>39</sup> Findings that the accused "committed the offence charged" must be proven to the criminal standard of beyond reasonable doubt.<sup>40</sup> This finding is subject to appeal in the same manner as if the accused had been convicted of the offence in a criminal trial.<sup>41</sup> In NSW, if a Mental Health Review Tribunal makes a finding that a person will not become fit to be tried within 12 months, the court must hold a special hearing to test the evidence against the accused as soon as practicable unless DPP advises no further proceedings will be taken.<sup>42</sup> In these hearings the prosecution must prove beyond reasonable doubt that the accused committed the offences(s) charged.<sup>43</sup> However, evidence may be limited in various ways including accused may be unable to give evidence or accused may be unable to adequately instruct their lawyer.

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<sup>35</sup> CLMIA Act (WA), ss 16(6) and 19(5).

<sup>36</sup> In the Northern Territory, the regime for dealing with questions of fitness to be tried is found under Part IIA of the Criminal Code Act (NT) ("**Criminal Code (NT)**"). In both the Northern Territory and Victoria, the matter must go before a special hearing within 3 months. (CMI Act (Vic) s 12(5); Criminal Code (NT) s 43R(3)).

<sup>37</sup> See *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ("**CMI Act (Vic)**"), ss12, 15 and 18(1),(2).

<sup>38</sup> CMI Act (Vic), s 15; Criminal Code (NT), ss 43G(2)(c),(d),(e). In Victoria and the Northern Territory, where a jury at a special hearing finds that the accused person is not guilty of the offence due to mental impairment, or that the person committed the offence, the court must make a custodial supervision order, a non-custodial supervision order or release the accused person unconditionally: Criminal Code (NT), ss 43X(2)(a), 43X(3) and 43ZA; CMI Act (Vic), ss 18(4), 23(a) and 26(2).

<sup>39</sup> CMI Act (Vic) ss 18(1), (2); Criminal Code (NT), ss 43X(1), (2)).

<sup>40</sup> CMI Act (Vic), s 17(2); Criminal Code (NT), s 43V(2)). Such a finding is not the same as a verdict of guilty, but a qualified finding of guilt, and does not constitute a conviction in law (CMI Act (Vic) s 18(3)(a); Criminal Code (NT) s 43X(3)(a)).

<sup>41</sup> CMI Act (Vic), ss 18(3)(b), (c); Criminal Code (NT), s 43X(3)(c).

<sup>42</sup> S 19(1).

<sup>43</sup> S19(2). Verdicts available are not guilty, not guilty by reason of mental illness, or on the limited evidence available, the accused committed the offence or an alternative offence (s 22(1))



- 5.7. Similarly, in Tasmania, there are special hearings before a court, and in some instances a jury, to determine whether the accused is not guilty of the offence.<sup>44</sup> A finding of “not guilty” is taken to have been found not guilty at an ordinary trial of criminal proceedings.<sup>45</sup> As in the Northern Territory and Victoria, the onus of proof and standard of proof are the same as in a trial of criminal proceedings,<sup>46</sup> however in Tasmania the finding is not subject to appeal.
- 5.8. In South Australia the law provides a division between objective elements and subjective elements of an offence. Under the objective elements of the offence the court hears evidence and representations by the prosecution and the defence on whether the court should find that the objective elements of the offence are established.<sup>47</sup> If the court is satisfied beyond reasonable doubt that the objective elements of the offence are established, the court must record a finding to that effect, but otherwise the court must find the defendant not guilty of the offence and discharge the accused.<sup>48</sup>

### **Procedural fairness**

*Recommendation: legislation should ensure minimum procedural fairness requirements such as a right to appear, right of review, right to written reasons for decision and right to information.*

- 5.9. In Western Australia, there is no statutory right for a mentally impaired accused or his or her advocate/representative to appear before the Mentally Impaired Accused Review Board and/or to provide written submissions to the Mentally Impaired Accused Review Board. In addition to making recommendations for the release of mentally impaired accused,<sup>49</sup> the Mentally Impaired Accused Review Board also makes recommendations as to whether it should be granted the power to make a leave of absence order.<sup>50</sup> Furthermore, apart from the requirement to provide a copy of a written report of the Mentally Impaired Accused Review Board (such report either recommending or not recommending the release of the mentally impaired accused) there is no further statutory right to the provision of information.
- 5.10. This can be compared with legislation in NSW legislation which provides important safeguards to ensure procedural fairness, including provisions that a person must be legally represented at any matter before the Mental Health Review Tribunal (MHRT)<sup>51</sup> and that anyone deemed unfit to stand trial must be legally represented at a special hearing. Legislative provisions that

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<sup>44</sup> Criminal Justice (Mental Impairment) Act 1999 (Tas) (“**CJ Act (Tas)**”), s 15(2), (3). If the court finds that the accused is not guilty on the grounds of insanity, or if a finding cannot be made that the accused is not guilty of the offence, the court must make a restriction order, a non-custodial supervision order, a treatment order, release the accused person on conditions or release the accused unconditionally: CJ Act (Tas), s 18(2). Only Supreme Court can make a restriction order or supervision order: CJ Act (Tas), s 18(3).

<sup>45</sup> CJ Act (Tas), s 18(1).

<sup>46</sup> CJ Act (Tas), s 16(1).

<sup>47</sup> CLC Act (SA), s 269NA(1).

<sup>48</sup> CLC Act (SA), s 269NA(2).

<sup>49</sup> CLMIA Act (WA), ss 33(2), (3).

<sup>50</sup> CLMIA Act (WA), s 27(1).

<sup>51</sup> Unless over the age of 16 and does not want to be represented (s 154 MHA).

an accused must have legal representation at a special hearing also exists in the Australian Capital Territory (ACT).<sup>52</sup>

- 5.11. Furthermore, in NSW all matters in the MHRT are to be recorded<sup>53</sup> and any person with a matter before the MHRT, or their representative, is entitled to inspect and have access to any medical records relating to the person.<sup>54</sup> In NSW there are also rights to appeal to the Supreme Court against a determination of the Tribunal or the failure or refusal of the Tribunal to make a determination.<sup>55</sup>

#### **Finite terms for custody orders (and release orders)**

*Recommendation: the duration of the order should be no longer than the duration of the sentence that would have been imposed if the accused had been convicted of the offence.*<sup>56</sup>

- 5.12. A major issue is that in some states and territories, there are no finite terms for orders made for people with mental impairments. For example, custody orders in Western Australia are indefinite and a mentally impaired accused can only be released from a custody order by an order of the Governor.<sup>57</sup> The effect of a custody order is that the mentally impaired accused must be detained in an authorised hospital, declared place, prison or detention centre.<sup>58</sup>
- 5.13. As a consequence there have been a number of high profile cases of mentally impaired accused being detained in prison for many years and far longer than they would have spent in custody had they been convicted of the offence. As noted by the Western Australian Chief Justice, Wayne Martin, the effect is that:

“lawyers do not invoke the legislation even in cases in which it would be appropriate because of the concern that their client, might end up in detention, in custody, in prison, for a lot longer period than they would if they simply plead guilty to the charge brought before the court.”<sup>59</sup>

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<sup>52</sup> S 316(6) MHA (NSW).

<sup>53</sup> S 159 MHA (NSW).

<sup>54</sup> S156 MHA (NSW).

<sup>55</sup> S 163 MH (NSW).

<sup>56</sup> This recommendation has also been made by the ALRC: Proposal 7–3: “State and territory laws governing the consequences of a determination that a person is unfit to stand trial should provide for limits on the period of detention (for example, by reference to the maximum period of imprisonment that could have been imposed if the person had been convicted) and for regular periodic review of detention orders.”

[https://www.alrc.gov.au/sites/default/files/pdfs/publications/dp817\\_chapter\\_7\\_access\\_to\\_justice.pdf](https://www.alrc.gov.au/sites/default/files/pdfs/publications/dp817_chapter_7_access_to_justice.pdf) at 167.

<sup>57</sup> If the Governor makes an order for the release of a mentally impaired accused from a custody order, the Governor may release the person unconditionally or make a release order with conditions. See CLMIA Act (WA), s 35.

<sup>58</sup> CLMIA Act (WA), s 24. Until recently there was no ‘declared place’ in Western Australia to provide an alternative to prison for people with intellectual disability or cognitive impairment who are found unfit to plead to criminal charges and have been deemed to be ‘mentally impaired accused’ because of their disability. In August 2015 the first declared place the Bennett Brook Disability Justice Centre opened.

<sup>59</sup> Bronwyn Herbert, ‘Urgent reform needed in how justice system treats people with mental impairment, says Chief Justice’ *ABC News*, 10 July 2015.



- 5.14. In Victoria, there are finite terms for court secure treatment orders where an accused has been found guilty through ordinary trial procedures.<sup>60</sup> However, for an accused found unfit to stand trial or found not-guilty by reason mental impairment, there are no finite terms for the supervision orders to which they may be subject. This includes custodial supervision orders.<sup>61</sup> The paradoxical result is that there are rightfully limits on the time spent in custody for those convicted of crimes, including those who are mentally impaired, whilst the current legislation allows for indefinite detention, of those mentally impaired accused who are not convicted in law of any crime.
- 5.15. In the Northern Territory, custodial supervision orders have no expiry date.<sup>62</sup> The only way for an order to cease is if the Court accepts expert evidence that the person subject to the order is no longer a serious risk of harm to the community or themselves.<sup>63</sup> The result is that once people are put on custodial supervision orders, there is a real risk of being held indefinitely.<sup>64</sup> Our member organisation Central Australian Aboriginal Legal Aid Service (CAALAS) and North Australian Aboriginal Justice Agency (NAAJA) both have clients who have been detained on supervision orders for years beyond the likely length of sentence they would have received if they were fit or not mentally impaired at the time of offending.
- 5.16. Legislative provision for indefinite detention has a disproportionate effect on Aboriginal and Torres Strait Islander people. As Neil Morgan, WA Inspector of Custodial Services has stated,

“The vast majority of people who've been caught under the Act and held under a custody order by reason of a cognitive impairment are in fact Aboriginal people, and a large number of them are Aboriginal men and women from remote and regional Western Australia.”<sup>65</sup>

This can be compared with legislation in South Australia which expressly provides that the term of court orders cannot exceed that which would have been imposed if the accused had been found guilty and sentenced for the offence. In particular, the legislation provides that in order to make a supervision order,<sup>66</sup> the court has to set a “limiting term” which is “equivalent to the period of imprisonment or supervision (or the aggregate period of imprisonment or supervision) that would, in the court’s opinion, have been appropriate if the defendant had

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<sup>60</sup> Detention pursuant to a court secure treatment order can only be imposed where, but for the person having a mental illness, a court would have sentenced the person to a term of imprisonment: *Sentencing Act 1991 (Vic)*, s 94B(1)(a). A court secure treatment order is for a fixed term, and its duration must be no longer than the period of imprisonment that would have been imposed had the order not been made: *Sentencing Act 1991 (Vic)*, s 94C(3).

<sup>61</sup> See CIM Act (Vic), s 27. The court has the power to vary a supervision order, including the power to direct that the matter be brought back before the court (CIM Act (Vic), ss 32(1), 32(5), 33(1) and 33(5)) more than once (CIM Act (Vic), ss 32(6) and 33(3)). Since there is no limit to the number of times a matter may be brought back before the court, there is no limit to the effective length of a supervision order.

<sup>62</sup> Criminal Code (NT), s 43ZC.

<sup>63</sup> Criminal Code (NT), ss 43ZN(1)-(2), 43ZJ and 43ZK.

<sup>64</sup> See Mindy Sotiri, Patrick McGee and Eileen Baldry, ‘No End in Sight: The Imprisonment, and indefinite detention of Indigenous Australians with a Cognitive Impairment’ (September 2012), p 66.

<sup>65</sup> John Stewart, ‘Aboriginal woman’s jailing highlights plight of intellectually impaired Aboriginal offenders’ *ABC News*, 13 March 2014.

<sup>66</sup> Pursuant to s 269O(1)(b)(ii) or 269O(b)(iii) of the CLC Act (SA), as discussed in footnote 8.

been convicted of the offence of which the objective elements have been established.”<sup>67</sup> After the limiting term, the supervision process lapses<sup>68</sup> and the person is released into the community unless there is a supervening guardianship or mental health order. The law in the ACT also provides that the Supreme Court must not order that an accused be detained for a period greater than the nominated term.<sup>69</sup>

### **Rights of review**

*Recommendation: Determinations about release of mentally impaired accused from custody or community release orders should be made by the relevant board with an annual right of review before the Supreme Court.*

- 5.17. Another issue is the lack of review available for custody or supervision orders. In Western Australia where decisions for release from custody orders are made by the Mentally Impaired Accused Review Board or in the alternative the Governor-General, there is no right of review or appeal about the merit of decisions.<sup>70</sup> In Victoria there are some rights of review under the current legislation which allows a new application for the variation of an order within three years or a lesser period at the court’s discretion. However, three years is too far too long for a periodic review process.
- 5.18. This can be compared with the Northern Territory where there is a right of appeal with the review process being undertaken by the Supreme Court and where accused are legally represented. The first major review is determined according to the nominal sentence, but there is scope for annual review. In NSW there are also rights to appeal to the Supreme Court against a determination of the Tribunal or the failure or refusal of the Tribunal to make a determination.<sup>71</sup> In South Australia persons subject to detention have annual reviews by psychiatrists and there are provided to the judge who set the limiting term.

### **Related Legislative Issues**

- 5.19. Aside from legislation relating specifically to accused with cognitive and psychiatric impairments, it is important to note that particular laws have a disproportionately negative impact on Aboriginal and Torres Strait Islander peoples with cognitive and psychiatric impairments. A key example is ‘move on’ laws which enable police to move people on from an area. In Western Australia a breach of a move-on law is punishable by jail. In Western Australia there is also what is called the Prohibited Behaviour Orders Act, which came into operation in 2011. This allows courts to ban people from engaging in otherwise lawful activity

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<sup>67</sup> CLC Act (SA), s 269O (2).

<sup>68</sup> CLC Act (SA), s 260O(3).

<sup>69</sup> Crimes Act 1900 (ACT) s 301 and 302.

<sup>70</sup> For support of this position see comments by the Chief Justice of Western Australia, Wayne Martin. ABC News, ‘Urgent need’ for law change as mentally-impaired accused detained indefinitely, WA Chief Justice Wayne Martin says’ 10 July 2015.

<sup>71</sup> S 163 MHA.

such as entering a certain area, associating with certain individuals or drinking alcohol.<sup>72</sup> A breach of a Prohibited Behaviour Order (PBO) is also punishable by jail. These laws have an enormous impact on vulnerable Aboriginal and Torres Strait Islander people in Western Australia many of which have cognitive and psychiatric impairments and/or are homeless and have acute alcohol and drug problems. The following case study is provided to illustrate the practical issues and detrimental effects of the operation of these laws for people with cognitive and psychiatric impairments and other complex needs.

Case Study Five:

In 2013 our member Aboriginal Legal Service of Western Australia (ALSWA) acted for a man who had been homeless for 16 years. He had severe cognitive impairments due to his chronic alcoholism, solvent, paint, glue and petrol sniffing on a daily basis for 20 years. He was wholly reliant on the services provided by organisations that assist homeless people to live. The PBO was made against him and it proposed that he be banned from entering the Perth CBD and Northbridge areas. At the time of the application for the PBO, he had been issued with 463 move-on notices since 1 January 2006. When the ALSWA lawyer told him that the PBO would, if granted, ban him from entering Northbridge, his answer was, 'But that's where I live.' He fell asleep in court and snored loudly during the proceedings for the PBO. He had earlier been unable to complete an affidavit that ALSWA wanted to compile on his behalf because he could not stay awake for long enough to complete it.<sup>73</sup>

- 5.20. In NATSILS view that this is an area where the Courts need to be proactive in the way they apply laws which have a disproportionate effect on homeless people many of whom have cognitive and psychiatric impairments. For example, in *R v Mills* (Unreported, Magistrates' Court (Melbourne), 14 December 2001) the Victorian Magistrate's Court dismissed fines for public space offences imposed on an elderly homeless man who suffered from an acquired brain injury.<sup>74</sup> The Court imposed a condition that the defendant comply with a case management plan which would enable the defendant to obtain stable accommodation and aged care support. In sentencing, the Court stated that 'there is great force to the argument that the community should accept responsibility for people in the offender's position'.<sup>75</sup> NATSILS agrees with this approach which seeks to address the underlying causes of offending, rather than pushing already marginalised people into further disadvantage.
- 5.21. Another critical issue is that obtaining bail, a non-custodial court order or parole, has become increasingly difficult, particularly in circumstances where a client is viewed as a risk to the community and cannot access appropriate support services. In relation to people with cognitive and psychiatric impairments there are a number of additional related challenges.

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<sup>72</sup> Evidence of Peter Collins, Finance and Public Administration References Committee, 'Aboriginal and Torres Strait Islander experience of law enforcement and justice services' 4 August 2015.

<sup>73</sup> Ibid.

<sup>74</sup> *R v Mills* (Unreported, Magistrates' Court (Melbourne), 14 December 2001). Cited in NATSILS, *Submission to the Expert Mechanism on the Rights of Indigenous Peoples: Access to Justice for Aboriginal and Torres Strait Islander peoples in Australia* (February, 2013) at 7-8.

<sup>75</sup> Ibid.

Firstly, people with cognitive and psychiatric impairments may have a history of offending related to their disability, therefore making it more difficult to obtain bail.<sup>76</sup> Secondly, people with cognitive and psychiatric impairments are less likely to live in secure accommodation and are accordingly at a greater risk of being refused bail.<sup>77</sup> Thirdly, it can be difficult for a person these types of impairment to understand and comply with increasingly onerous bail conditions, particularly where bail conditions are imposed without the provision of additional support. This increases the chance that the person will breach the conditions of their bail. Finally, where a person is remanded, either because bail is refused or because bail is revoked, the period in custody may have a more adverse effect of a person with a cognitive or psychiatric impairment because “prisons are unable adequately to meet their needs and to ensure that their welfare is not harmed by incarceration”.<sup>78</sup>

- 5.22. Mandatory sentencing laws is a further area that limits judicial discretion and which has a disproportionately negatively impact on people with cognitive and psychiatric impairments, particularly Aboriginal and Torres Strait Islander peoples with these impairments.<sup>79</sup> This is because it takes away the court’s ability to take into account a person’s disability in determining an appropriate sentence. For example, for relevant offences, the court can no longer take account of a symptom of disability (such as poor impulse control) as a contributing factor in offending; nor can the court consider the particular impact of imprisonment on a person with a disability.<sup>80</sup> As the Law Council of Australia has argued, “mandatory sentencing laws are arbitrary and limit an individual’s right to a fair trial by preventing judges from imposing an appropriate penalty based on the unique circumstances of each offence and offender.”<sup>81</sup> Furthermore, as periods of imprisonment imposed under minimum mandatory sentencing laws are usually relatively short, prisoners sentenced under mandatory sentencing laws are unlikely to receive the supports they need in prison, and will be separated from the supports they may have received in the community.<sup>82</sup>

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<sup>76</sup> See generally Australian Human Rights Commission, *Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues* (2008). This was also noted as a significant issue in New South Wales Law Reform Commission, *Bail* (Report 133, April 2012) at p 179.

<sup>77</sup> NSW Law Reform Commission, ‘People with Cognitive and Mental Impairments in the Criminal Justice System,’ Report 135, p 31.

<sup>78</sup> *Ibid*, 178-179.

<sup>79</sup> The disproportionate impact of mandatory sentencing laws on Aboriginal and Torres Strait Islander peoples has been noted in a number of studies. See for example: N Morgan, H Blagg and V Williams, *Mandatory Sentencing in Western Australia and the Impact on Aboriginal Youth* (2001); The Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report (2006).

<sup>80</sup> Central Australian Aboriginal Legal Aid Service, Submission to the Australian Human Rights Commission Consultation on access to justice in the criminal justice system for people with disability (August 2013) at 12.

<sup>81</sup> Law Council of Australia, ‘Policy Discussion Paper on Mandatory Sentencing (May 2014) at 5.

<sup>82</sup> Central Australian Aboriginal Legal Aid Service, Submission to the Australian Human Rights Commission Consultation on access to justice in the criminal justice system for people with disability (August 2013) at 12.

## 6. Compliance with Australia's human rights obligations

- 6.1. NATSILS is concerned that Australia's practices and policies towards people with cognitive and psychiatric impairments in contact with the justice system falls short of international standards and Australia's human rights obligations in a number of core respects.
- 6.2. The Convention on the Rights of Persons with Disabilities (CRPD) to which Australia is a signatory provides a number of important guarantees to people with disabilities. Under Article 12, the Convention affirms that persons with disabilities have the right to equal recognition before the law and that state parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.<sup>83</sup> Critically, the article provides that safeguards to protect people with disabilities before the law should include measures to ensure states actions are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body.<sup>84</sup> As discussed above at the current legislative framework fails these international rights in a number of ways.
- 6.3. Article 13 relates to access to justice under which states parties shall ensure effective access to justice for persons with disabilities on an equal basis with others and facilitate their effective participation in legal proceedings. It also provides that states parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.<sup>85</sup>
- 6.4. Article 14 is particularly crucial in relation to the intersection of peoples with cognitive and psychiatric impairments and the criminal justice system. It provides that people with disabilities should not be "deprived of their liberty unlawfully or arbitrarily", and that the "existence of a disability shall in no case justify a deprivation of liberty."<sup>86</sup> Article 14 goes onto state that if persons with disabilities are deprived of their liberty it must be on a basis of equality and in accordance with international rights.<sup>87</sup> The Convention also provides special recognition of the fact that women and children are subject to multiple forms of discrimination and that particular efforts need to be made to ensure that they may exercise their human rights and fundamental freedoms.<sup>88</sup>
- 6.5. There are a number of other relevant international conventions to this issue, in particular:
  - International Covenant on Economic, Social and Cultural Rights (IESCR);
  - International Covenant on Civil and Political Rights (ICCPR);
  - International Convention on the Elimination of All Forms of Racial Discrimination (CERD);
  - Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),
  - Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), and;
  - Convention on the Rights of the Child (CRC).<sup>89</sup>

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<sup>83</sup> CRPD article 12 (1-2).

<sup>84</sup> CRPD article 12.

<sup>85</sup> CRPD article 13(2).

<sup>86</sup> CRPD article 14(1)(b).

<sup>87</sup> CRPD article 14(2).

<sup>88</sup> CRPD article 6 and 7.

<sup>89</sup> These Conventions are expressly affirmed in the preamble to the Convention on the Rights of Persons with Disabilities.

- 6.6. The UNCAT and CRC are pertinent to the state of prisons in which a number of people with cognitive and psychiatric impairments are imprisoned. Issues with Australia's performance in this area has already been raised by the United Nations Committee against Torture (UN CAT) in their 2014 periodic review of Australia. There it was recommended that:

The State party [Australia] should strengthen its efforts to bring the conditions of detention in all places of deprivation of liberty in line with relevant international norms and standards...in particular by: a) continuing to reduce overcrowding, particularly through the wider application of non-custodial measures as an alternative to imprisonment... and b) ensuring that adequate somatic and mental health care is provided for all persons deprived of their liberty...<sup>90</sup>

.... The State party [Australia] should increase its efforts to address the overrepresentation of Indigenous people in prisons, in particular its underlying cause. It should also review mandatory sentencing laws with a view to abolishing them, giving judges the necessary discretion to determine relevant individual circumstances.<sup>91</sup>

- 6.7. NATSILS recommends that the implications of Australia's human right obligations be fully considered in this inquiry so that the necessary steps to bring the Australian government's actions into accordance with international standards can be taken. In particular, as recommended above, there are a number of minimum standards that legislation in each state and territory should adhere to in order to fulfil Australia's human rights obligations. As noted earlier, NATSILS recommends that COAG take a leading role in encouraging states and territories to reform their legislation in order to be compliant with core human rights.

## 7. Capacity of various commonwealth, state and territory systems, including assessment and early intervention, appropriate accommodation, treatment evaluation, training and personnel and specialist support and programs

- 7.1. NATSILS holds serious concerns about the capacity of various commonwealth, state and territory systems to appropriately respond to accused with cognitive and psychiatric impairments. It is NATSILS experience that the criminal justice system is increasingly and inappropriately being used to "deal with" people with cognitive and psychiatric impairments because of a lack of resources within public health and welfare systems.<sup>92</sup> Without access to services and early interventions, people with cognitive and psychiatric impairments will not have their complex needs meet which increases the likelihood of intersection with the criminal justice system.
- 7.2. Of great concern to NATSILS is the reported increases in incidences of Apprehended Violence Orders being used to control behavioural issues by schools, care workers and parents, rather than referring people displaying difficult behaviours to appropriate health and welfare support services because such are unavailable. As a consequence, behavioural issues

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<sup>90</sup> UN Committee Against Torture, Concluding Observations on the combined fourth and fifth periodic reports of Australia, sess. 1284 and 1285, UN Doc CAT/C/AUS 4-5, (26 November 2014) 3-4.

<sup>91</sup> Ibid.

<sup>92</sup> For a full analysis of how vulnerable Aboriginal and Torres Strait Islander peoples are 'managed' by the criminal justice system see Eileen Baldry et al, *A predictable and preventable path: IAMHDCD Report* (2 November 2015).

associated with disabilities are diverted to the criminal justice system rather than being appropriately dealt with as health, care and welfare issues. The criminal justice system is not an appropriate vehicle for addressing a person's needs stemming from disability or mental illness. The following case study illustrates how the justice system may be used to 'manage' people with cognitive and psychiatric impairments in the absence of suitable services and assistance.

Case Study Six:<sup>93</sup>

A 16 year old Aboriginal girl with no criminal record was kept in custody for an unreasonable period in order to address her mental health needs. The girl was charged with two disorderly conduct offences that allegedly occurred on a Saturday in August 2009 in Geraldton. The allegations related to behaviour she exhibited at the hospital when taken by her family for a mental health assessment. According to the Statement of Material Facts, when police arrived they offered to restrain her while she was assessed but the hospital refused to assess her.

She was taken into custody at about 6.00pm and appeared in court on the following Monday. The girl was very agitated and exhibited worrying behaviour in Court. She was granted bail but her family who were present indicated they would not take responsibility for her until her mental health was assessed. The girl was remanded in custody for the purpose of being observed and assessed and she was held in the police lockup in Geraldton.

Upon arriving at the police lockup, ALSWA was informed the girl was naked in her cell. ALSWA queried why she was not being assessed and treated at the hospital and was informed by police that there was nothing else to demonstrate she had a mental health problem. A female officer persuaded the girl to put on clothes and ALSWA spoke to her. The girl was behaving erratically. She had shredded a polystyrene cup and scattered it like confetti over the mattress. She alternated between appearing willing to speak to ALSWA and being aggressive. She made a number of seemingly random statements and claimed that her name was something else. Her biggest preoccupation throughout the day was that someone had "killed" her babies.

The girl was taken to Perth on Tuesday morning. She was admitted to the Bentley Adolescent Mental Health ward prior to her Court appearance on Friday and there was a report confirming her unfitness to plead. The prosecution, on invitation by the Magistrate, withdrew the charges effectively explaining that they were only "holder charges" intended to get the girl some treatment.

- 7.3. In order to ensure that disabilities are not inappropriately managed as law and order issues, further funding is required for a range of services including:
- appropriate accommodation;
  - education;
  - counselling;
  - drug and alcohol rehabilitation; and
  - mental health and cognitive impairment treatment and support.

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<sup>93</sup>Example cited in NATSILS, *Submission to the Expert Mechanism on the Rights of Indigenous Peoples: Access to Justice for Aboriginal and Torres Strait Islander peoples in Australia* (February, 2013) at 16-17.



- 7.4. Secondly, a key issue is that supporting services are not designed for Aboriginal and Torres Strait Islander people, particularly those with complex multiple needs.<sup>94</sup> These difficulties arise for a number of reasons, including remoteness and inability to physically access services, distrust of government and non-government agencies delivering social services and communication barriers. These obstacles need to be addressed in order to increase the opportunity for Aboriginal and Torres Strait Islander peoples to access help and this means tailoring services appropriately.
- 7.5. Thirdly, there is a need for early referral to services at the outset. Support for services must be referred through culturally appropriate pathways and supported through Aboriginal and Torres Strait Islander liaison and support workers. NATSILS is aware of many examples of people whose conditions were inappropriately managed which lead ultimately to their contact with the criminal justice system, sometimes at a major cost to both themselves and society. The following case study illustrates the ramifications of poor and/ or inappropriate service delivery to extremely vulnerable people with cognitive and psychiatric impairments.

Case Study Seven:

A 16 year old Aboriginal boy from the Goldfields was charged with serious violent offences against another boy, in a similar fashion to offences he witnessed his father commit against his mother at a young age that resulted in her death. The boy did not receive counselling at the time of the domestic incident but has now been diagnosed with schizophrenia and had been living a shambolic life in the care of his maternal grandmother. He was illiterate and innumerate. He did not have assistance to regularly take medication for his schizophrenia or diabetes and had no access to psychological services. The Community Adolescent and Mental Health Services in the Goldfields were responsible for managing his mental health needs but did not provide services to the Central Desert where he resided nor was there a psychiatric service in this region. Prior to the offending, he was twice admitted to the Mental Health ward at Kalgoorlie Hospital in 2009 demonstrating a deteriorating mental state. The boy was sentenced to 15 months detention.<sup>95</sup>

- 7.6. This case study illustrates that early intervention and access to services is critical. It also points to the particular issue of servicing in remote areas. The Productivity Commission has observed that “[d]isability support services are practically non-existent in many remote communities – often limited to basic HACC services (such as meal preparation) and occasional visits by allied health professionals.”<sup>96</sup> While it is recognised that there are significant costs and challenges associated with delivering disability services in remote communities, expanding existing services and improving accessibility in remote communities is vital. Failure to do so simply results in increased costs (both economic and social) in other areas of government expenditure, most notably in the administration of the justice system and prisons.
- 7.7. While NATSILS stresses that prevention before the point of entry into the criminal justice system is the ideal solution, once a person has come into contact with the criminal justice

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<sup>94</sup> The Honourable Phillip Cummins et al, *Report of the Protecting Victoria’s Vulnerable Children Inquiry* (2012) 296; M Willis, *Non-disclosure of violence in Indigenous communities Trends & Issues in Crime and Criminal Justice* (Canberra, Australian Institute of Criminology, No. 405, 2011).

<sup>95</sup> Cited in NATSILS, *Submission to the Expert Mechanism on the Rights of Indigenous Peoples: Access to Justice for Aboriginal and Torres Strait Islander peoples in Australia* (February, 2013) at 17

<sup>96</sup> Productivity Commission, *Disability Care and Support: Productivity Commission Inquiry Report* (31 July 2011, No. 505) at 555. See also KPMG, *Review of Disability Services in the Northern Territory: Final Report*, (2006).



system there are a number of services that are critically needed, but which are unfortunately often severely lacking. Firstly, there is the difficulty in accessing psychiatrist reports. This is a key issue as accused can either be placed on remand until a psychiatrist's report is completed or placed on supervision orders.<sup>97</sup> This is an area where appropriate resourcing, rather than legislative standards, is the main issue. For example, until recently Queensland has legislative requirements for psychiatrist's reports to be completed within 21 days. However, this was not enforced in practice and it was not unusual for people to spend up to 3 months on remand and in some cases, up to 12 months waiting for these reports.<sup>98</sup> The ATSILS have witnessed numerous cases in which a person spends a longer period on remand than the sentence they receive upon conviction, or would have received if convicted.

- 7.8. Secondly, a key barrier to successful community reintegration of people with a mental impairment committed to custody under a supervision order, and to obtaining a community-based supervision order in the first place, is the lack of culturally appropriate and therapeutic supported accommodation places and community services equipped to support people with highly challenging behaviours.<sup>99</sup> Diversion options that may mean that bail is granted such as bail hostels are often either not well suited to meeting the complex needs of people with cognitive and psychiatric impairments or are not available to them making prison a default option. This needs to be urgently addressed through the provision of diversion options that are suitable for people with complex needs (see point 10 below).
- 7.9. Additionally, where a person is committed to a secure care facility under a supervision order, it is important that the secure care facilities are not used as a mere custodial substitute for prison. Secure care should only be used as a therapeutic and temporary measure designed to support a person with high-risk behaviours to manage the behaviours and successfully reintegrate back into the community, not as a de facto prison.<sup>100</sup>
- 7.10. Within the prison setting behavioural issues relating to diagnosed or possible cognitive impairment or mental health problems are at times dealt with by moving the prisoner into maximum security cells. The focus of the response is a security response; programs usually aren't available to manage the behaviour in other ways, and staff may not have specialised training to assist them in responding to behaviour relating to a cognitive impairment or mental health problem.<sup>101</sup> Furthermore, the shortage of diagnostic, treatment and support services within prisons also affects the ability of individuals to successfully apply for parole. Without being able to access the necessary services, those with non-parole periods have little or no chance of being granted parole and frequently simply serve their full time without receiving any rehabilitative treatment. In addition, in some jurisdictions cognitive impairment is a

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<sup>97</sup> Central Australian Aboriginal Legal Aid Service, *Submission to the Australian Human Rights Commission Consultation on access to justice in the criminal justice system for people with disability* (August 2013)

<sup>98</sup> NATSILS, *Submission to the Expert Mechanism on the Rights of Indigenous Peoples: Access to Justice for Aboriginal and Torres Strait Islander peoples in Australia* (February, 2013)

<sup>99</sup> Central Australian Aboriginal Legal Aid Service, *Submission to the Australian Human Rights Commission Consultation on access to justice in the criminal justice system for people with disability* (August 2013) at 12.

<sup>100</sup> Central Australian Aboriginal Legal Aid Service, *Submission to the Australian Human Rights Commission Consultation on access to justice in the criminal justice system for people with disability* (August 2013). See also Jonathon Hunyor and Michelle Swift, 'A Judge short of a Full Bench: mental health in the NT criminal justice system' (paper presented at the Criminal Lawyers Association of the Northern Territory Thirteenth Biennial Conference, Bali, 30 June 2011).

<sup>101</sup> Central Australian Aboriginal Legal Aid Service, *Submission to the Australian Human Rights Commission Consultation on access to justice in the criminal justice system for people with disability* (August 2013).

barrier to accessing prison treatment programs targeted at offending behaviour. In the Northern Territory, a relatively high proportion of Aboriginal and Torres Strait Islander prisoners, often those affected by FASD or a history of volatile substance abuse, are unable to access the major violent offender and sex offender treatment programs. Post-release, this is a major concern as without access to these services the circumstances that lead to a person's original offending are unlikely to be addressed increasing the chances of recidivism.

Case Study Eight:

The CAALAS Prison Support Team provided information and advice on the parole process to a man who was coming near to the end of a very long term in prison. The CAALAS Prison Support Team queried whether a psychiatric assessment and cognitive functioning assessment had been carried out as the offender's behaviour and responses in initial interviews indicated a possible mental health and/or cognitive impairment. They obtained a copy of the sentencing remarks, which referred to a pre-sentencing report and a psychological assessment report.

The prison was not aware of the existence of the previous assessments. No assessment was carried out by the prison, and the offender had not been referred to any appropriate programs. Through CAALAS Prison Support Team's advocacy, the prison is now working with the offender to identify appropriate interventions.<sup>102</sup>

This example highlights how individuals with these impairments may fall through gaps in the criminal justice system and illustrates the critical role that ATSILS can play through the provision of throughcare services. A number of ATSILS offer these services which assist clients in prison to develop post-release plans, in particular through the parole process. They work with clients from the time of sentence to help start the process of thinking about the issues they will face upon their return. For Aboriginal and Torres Strait Islander peoples with cognitive and psychiatric impairments, the availability of an Aboriginal community controlled service skilled in working with people with complex needs is a critical to increasing their likelihood of successful reintegration.

## 8. Access to justice for people with cognitive and psychiatric impairment, including the availability of assistance and advocacy support for defendants:

- 8.1 It is clear that access to legal assistance services is a critical part of providing the necessary support to enabling individuals with cognitive and psychiatric impairments to navigate the legal system. For many Aboriginal and Torres Strait Islander peoples, the mainstream legal system is foreign and they are unable to engage unassisted with common governmental/bureaucratic processes. The difficulties experienced as a result of cross-cultural issues are severely compounded when the individual has a cognitive or psychiatric impairment and/ or other complex needs. In short, such people are extremely vulnerable in legal processes. To ensure substantive equality before the law, it is imperative that we do more to support access to justice for people with a disability, and in particular Aboriginal and Torres

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<sup>102</sup> *Ibid.*

Strait Islander people with disabilities, given their drastic negative over-representation in the criminal justice system.

- 8.2. The ATSILS provide culturally competent legal assistance services to Aboriginal and Torres Strait Islander peoples, including those with cognitive and psychiatric impairments. ATSILS staff are highly skilled in working with Aboriginal and Torres Strait Islander people, with particular attention paid to cross-cultural communication, use of interpreters, and ensuring clients are able to understand and meaningfully participate in court processes. Furthermore, a critical part of ATSILS service delivery is the use of Aboriginal Field Officers who act as a vital link between lawyers and clients by providing cultural safety to clients and ensuring understanding of legal processes. In situations where clients have, or potentially may have, a cognitive and psychiatric impairment, the importance of Aboriginal Field Officers is increased as they can play a vital role in alerting lawyers to potential or actual disabilities and ensuring client understanding.
- 8.3. Furthermore, the ATSILS take a holistic approach to engagement with clients, actively looking for ways to improve outcomes for vulnerable clients including those with disabilities. This includes regularly referring clients to Aboriginal or Torres Strait Islander service providers where considered appropriate (and where there services are available). In this regard the ATSILS hold a number of contacts with local Aboriginal and Islander social services and medical centres many of which provide wrap around services in a culturally competent setting.
- 8.4. ATSILS offer services across civil, criminal and family law. The ability of ATSILS to provide services across these different areas of law is critical for a number of reasons. Firstly, many of our clients, particularly those with cognitive and psychiatric impairments experience multiple and overlapping legal issues, or “clusters” of legal issues. This is a result of disproportionate disadvantage, a lack of awareness and understanding about civil law rights and available remedies and a lack of access to appropriate services to assist in asserting such rights.<sup>103</sup> Secondly, there is increasing evidence that if left unresolved civil and family law issues can escalate into criminal matters.<sup>104</sup> The early resolution of legal problems is therefore critical to prevention of contact with the criminal justice system. Finally, breadth of service provision allows the ATSILS to offer wrap around services to our clients. This is of critical importance to heavily disadvantaged clients, particularly those with cognitive and psychiatric impairments, who face significant barriers in accessing help when needed. The following case study illustrates the importance of this approach.

#### Case Study Nine:

A client of our member organisation, Aboriginal Legal Rights Movement (ALRM) was before the South Australian District Court in December 2015. His mental state was such that he required special care. ALRM arranged for his family and him to be put up in a hotel during the court case (his wife was a witness). When the matter was completed in court the client (who was in a very delicate mental state and had just been released from a psychiatric hospital) - was promptly driven home to the country by an Aboriginal Field Officer, because of concerns about this ability use public transport. Subsequently the Civil team of ALRM commenced working with the family to

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<sup>103</sup> NATSILS *Submission to Productivity Commission Inquiry into Access to Justice Arrangements* (November, 2013) at 26.

<sup>104</sup> Productivity Commission, *Access to Justice Arrangements, Inquiry Report Overview* (September 2014) at 24

obtain a guardianship order and appropriate disability services to the whole family. This is an attempt to use all of ALRM services to provide a "wraparound service" which covers multiple needs. This occurs through good communication between sections within ALRM and culturally competent communication with clients which builds trust and understanding.

- 8.5. However, there are a number of substantive barriers which mean that Aboriginal and Torres Strait Islander peoples with cognitive and psychiatric impairments are heavily disadvantaged in terms of legal access. Firstly, the physical remoteness of the areas in which many Aboriginal and Torres Strait Islander people live is the critical context in which access to legal services must be understood. The Productivity Commission's *Overcoming Indigenous Disadvantage* reported that 21.3 per cent of Aboriginal and Torres Strait Islander people in Australia live in remote or very remote communities, compared to just 1.7 per cent of the nonindigenous population.<sup>105</sup> This geographical isolation presents a major obstacle to accessing legal services. In this regard it is noted that in remote communities, access to justice has been described as "so inadequate that remote Indigenous people cannot be said to have full civil rights."<sup>106</sup>
- 8.6. Secondly, as recognised in a series of government reports, the ATSILS are critically underfunded to meet the needs of Aboriginal and Torres Strait Islander peoples, including those with cognitive and psychiatric impairments. For example, the Senate Inquiry into Youth Justice recommended that ATSILS funding be increased to at least that of Legal Aid Commission funding<sup>107</sup>, while the Productivity Commission report on Legal Access noted that:
- [Services are] vastly under-resourced in terms of capacity to address legal need in Aboriginal communities. Additional funding is urgently required for civil/family law work, with priority to be given to Indigenous legal services as primary providers of legal assistance to Indigenous people.<sup>108</sup>

In similar vein, the Commonwealth Attorney-General's Department has recommended that:

the Australian Government increase the level of funding for Indigenous legal services with a view to sufficiently resource this sector of the legal aid system to meet the needs of Indigenous peoples, including appropriate loading for extra service delivery costs.<sup>109</sup>

- 8.7. However, calls for additional funding have not been addressed, despite ever increasing demand for ATSILS services due to crisis levels of Aboriginal and Torres Strait Islander imprisonment. In fact, the ATSILS funding has remained largely stagnant for the last ten years. Furthermore, in 2017 funding cuts come into effect for the ATSILS with a **decrease of over \$4million** on current funding levels.
- 8.8. The situation is becoming increasingly acute and the ATSILS are seriously concerned about how impending funding cuts will impact on ATSILS operations, particularly as budgets have already been cut to the bone. The cuts will require the ATSILS to reduce staffing numbers not only for 2017-2018, but also going forward into 2019-20. The result will be the unavoidable withdrawal of frontline services which will mean that even more vulnerable Aboriginal and Torres Strait Islander peoples, including those with disabilities, will be unable to access needed legal

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<sup>105</sup> Steering Committee for the Review of Government Service Provision (SCRGSP), *2014 Indigenous Expenditure Report*, Productivity Commission (Canberra, 2014) at 2.

<sup>106</sup> See also C. Cunneen and M. Schwartz, *The Family and Civil Law Needs of Aboriginal People in NSW* (2008) 31.

<sup>107</sup> House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing* (2011) at para 79.

<sup>108</sup> Productivity Commission, *Access to Justice Arrangements, Inquiry Report Overview* (September 2014) at 24.

<sup>109</sup> Access to Justice Taskforce Commonwealth Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009) 147, Recommendation 27.

services. In effect these cuts will deny many Aboriginal and Torres Strait Islander people the access to justice and procedural fairness that all Australian citizens deserve. If the government is serious about addressing the inequality faced by Aboriginal and Torres Strait Islander peoples it must begin with ensuring the most basic of rights – substantive equality before the law. NATSILS **recommends** an immediate reversal of planned funding cuts and that further funding be provided to the ATSILS to ensure that Aboriginal and Torres Strait Islander peoples with disabilities are able to access culturally competent legal services.

- 8.9. A further important part of access to justice for people with disabilities is access to interpreter services. Particularly in remote locations, where a large number of Aboriginal and Torres Strait Islander people do not speak English as their primary language<sup>110</sup>, it is critical that interpreters are used during the court process and in the delivery of ancillary services.<sup>111</sup> While awareness of the need for interpreters has improved, pressures on service providers result in the continuing underutilisation of interpreters in a number of areas, particularly in Western Australia where such services are heavily under-resourced. NATSILS **recommends** that further funding be provided to interpreter services to ensure that Aboriginal and Torres Strait Islander people, including those with cognitive and psychiatric impairments, are able to understand legal processes.
- 8.10. A further obstacle to access to justice for people with disabilities is a lack of awareness about disabilities and its impacts amongst criminal justice system professionals. While justice system professionals are not experts in diagnosing disabilities, it is NATSILS view that some level of training in identifying when a person may have a disability is needed. If justice system professionals fail to detect a person's disability or are unaware of the most appropriate way to respond, it greatly diminishes the chances that a person with disability will be afforded equal access to justice. In particular, awareness about FASD and its impacts is specifically needed.<sup>112</sup>
- 8.11. NATSILS **recommends** that key judicial stakeholders be given basic training to raise their awareness about disabilities and its impacts.

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<sup>110</sup> Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Social Survey (2008)*.

<sup>111</sup> Central Australian Aboriginal Legal Aid Service, *Submission to the Australian Human Rights Commission Consultation on access to justice in the criminal justice system for people with disability* (August 2013); Productivity Commission, *Disability Care and Support: Productivity Commission Inquiry Report* (31 July 2011, No.53) at 544; Christopher J Charles, 'A Few Words on Culture Shock' (2010) Ed 22, *Your Legal Rights Quarterly Newsletter Magazine of Aboriginal Legal Rights Movement Inc.*, 6.

<sup>112</sup> For example, A 2013 study conducted in Western Australia found that many practitioners in the criminal justice sector knew little about foetal alcohol spectrum disorders (FASD) and inter alia recommended increased training on FASD for practitioners in the sector. Raewyn Mutch et al, 'Fetal Alcohol Spectrum Disorder: Knowledge, attitudes and practice within the Western Australian justice system: Final Report' (Foundation for Alcohol Research and Education and Telethon Institute for Child Health Research, The University of Western Australia, April 2013).

## 8. The role and nature, accessibility and efficacy of programs that divert people with cognitive and psychiatric impairment from the criminal justice system and the availability of pathways out of the criminal justice system for individuals with cognitive and psychiatric impairment;

- 9.1. In Australia there is a failure of the justice system to deal with the mental illness and/or cognitive/intellectual disability of a person who has come into contact with the criminal justice system, for relatively minor offending, without resorting to judicial proceedings and detention. While NATSILS supports the use of therapeutic alternatives in the justice system generally, there is a particularly strong need to divert those with cognitive and psychiatric impairments.<sup>113</sup> However, in the experience of NATSILS therapeutic options for diverting people away from the courts are often not well designed or equipped for people with cognitive and psychiatric impairments, particularly for Aboriginal and Torres Strait Islander peoples with these impairments. The first issue, is that people with cognitive and psychiatric impairments are frequently not assessed or diagnosed when they come into contact with the criminal justice system. As mentioned this is for a number of reasons including that such assessments may be prejudicial to an accused because of related legislation and a lack of resources and gaps in processes which do not support such assessments. NATSILS **recommends** that resources need to be provided to ensure that assessments are able to be attained in a timely and competent manner. However, as noted, there also needs to be further changes to ensure that legislation allows for, and that there is sufficient resourcing of ancillary services for accused to be appropriately responded to by the courts.
- 9.2. While some inconsistency exists around the country, overall there is great opportunity to improve the diversionary options that are available to lower courts. NATSILS recommends that diversion options be made more widely available in all the states and territories and their use encouraged within the police force. The range of offences for which this form of diversion should be available should also be widened. In particular, NATSILS would support the development of Mental Health Courts where the causes of the offending behaviour are identified and addressed through treatment and support services while the person is monitored by the court. However, it should be noted that under this approach there is significant reliance upon external services to support clients so that a significant injection of resources into health and welfare services would also be required.
- 9.3. Further important forms of diversion are those aimed at diverting people with alcohol and drug issues away from the criminal justice system. These forms of diversion could make a significant difference to people with cognitive and psychiatric impairments who often have co-morbid drug and alcohol abuse issues. This could include drug and alcohol courts as well as options for individuals to be sentenced to drug and alcohol rehabilitation facilities. Research from Deloitte Access Economics undertaken on behalf of the Australian National Council on Drugs supports the argument that drug diversion schemes would be substantially cheaper and more effective than prison. This report found that the total financial savings

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<sup>113</sup> The Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies* (2014) has noted that early intervention and wherever possible diversion into appropriate programs can both enhance the lives of people with disabilities and support the interests of justice.



associated with diversion to community residential rehabilitation compared with prison is \$111 458 per offender.<sup>114</sup> The report concluded that, “[a]s the residential treatment scenario is lower cost and is associated with better outcomes than incarceration, it is clearly the more advantageous investment.”<sup>115</sup> NATSILS concurs with this assessment and **recommends** that more investment in diversion options is needed.

- 9.4. However, it is important to note that the Deloitte report identified a number of barriers to access to drug diversion programmes, including that Aboriginal and Torres Strait Islander peoples are more likely to have drug misuse problems that are not covered by the drug diversion programs (such as alcohol and inhalants), and are more likely to have a co-existing mental illness. Accordingly diversion options need to be able to cater to people with complex needs including cognitive and psychiatric impairment and specifically Aboriginal and Torres Strait Islander people with these conditions. Aboriginal and Torres Strait Islander community controlled health services are best placed to deal with the breadth of issues faced by Aboriginal and Torres Strait Islander drug users including poor physical health, risk of blood borne viruses, and family issues including detrimental effects on children. We strongly recommend that Aboriginal and Torres Strait Islander community controlled health services are utilised in the delivery of diversion options.

## 10. Conclusion

- 10.1. NATSILS argues that an effective approach to meeting the needs of peoples with cognitive and psychiatric impairments must include greater investment in prevention and early intervention, more appropriate targeting, increased collaboration and cooperation across agencies and a strategic national response to critical challenges and pressures, including those affecting the legal sector.
- 10.2. Underpinning all of the issues discussed, is the fact that for individuals with cognitive and psychiatric impairment not enough is done to diagnose and meet their needs at the earliest opportunity. A justice reinvestment approach holds that in order to achieve long-term sustainably safer communities, government policy and investment needs to address the underlying causes of criminal behaviour, including through appropriately addressing cognitive and psychiatric impairments. NATSILS argues that investment into prevention and intervention in this area would reduce contact with the criminal justice system and would be a more just and humane response to societies most vulnerable members.

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<sup>114</sup> Australian National Council on Drugs, Deloitte, An economic analysis for Aboriginal and Torres Strait Islander offenders: prison vs residential treatment (ANC Research Paper, August 2012) at xi.

<sup>115</sup> Ibid, at xi.