

**Aboriginal and Torres Strait Islander Legal Services
(ATSILS)**

Joint Submission to the National Human Rights Consultation

June 2009

Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd
Aboriginal Legal Rights Movement Inc [ALRM]
Aboriginal Legal Service [NSW/ACT] [ALS (NSW/ACT)]
Aboriginal Legal Service of WA [ALSWA]
Central Australian Aboriginal Legal Aid Service [CAALAS]
North Australian Aboriginal Justice Agency [NAAJA]
Victorian Aboriginal Legal Service Co-operative Limited [VALS]

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ACRONYMS USED

AHRC	Australian Human Rights Commission
AIA	Amnesty International Australia
ALRM	Aboriginal Legal Rights Movement of SA
ALSWA	Aboriginal Legal Service of Western Australia (Inc.)
ATSIC	Aboriginal and Torres Strait Islander Commission (now disbanded)
ATSILS	Aboriginal and Torres Strait Islander Legal Services
CAALAS	Central Australian Aboriginal Legal Aid Service
CAT	Convention against Torture
CCC	Corruption and Crime Commission of WA
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CRoC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
FACS	Department of Family and Children's Services (NT)
EPSC	Ethical and Professional Standards of NT Police Force
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
JRC	Joint Review Committee (NT)
NAAJA	Northern Australian Aboriginal Justice Agency
NSW	New South Wales
NT	Northern Territory
NTER	<i>Northern Territory National Emergency Response Act 2007 (Cth)</i>
PILCH	Public Interest Law Clearing House
OPI	Office of Police Integrity (Victoria)
RCIADIC	Royal Commission into Aboriginal Deaths in Custody
RDA	<i>Racial Discrimination Act 1975 (Cth)</i>
RDH	Royal Darwin Hospital
UDHR	Universal Declaration of Human Rights
UNDRIP	United Nations Declaration on the Rights of Indigenous
UN	United Nations
WA	Western Australia
WAEOC	Western Australian Equal Opportunity Commission
SA	South Australia
VIC	Victoria
VALS	Victorian Aboriginal Legal Service
VAJA	Victorian Aboriginal Justice Agreement
YJW	Youth Justice Worker (NT)

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1. INTRODUCTION

This is a joint submission of the following Aboriginal and Torres Strait Islander Legal Services:

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

Participation in the Australian National Human Rights Consultation is welcomed by Aboriginal and Torres Strait Islander Legal Services (ATSILS)¹ with great interest. This submission has been contributed to by many ATSILS. It is hoped that through this consultation process, Australia can gain the knowledge, insight and initiative to formulate human rights protections in the development of sophisticated systems of jurisprudence. This submission provides information about Aboriginal and Torres Strait Islander Peoples readily available to ATSILS and explained through the assistance of case studies.

Most ATSILS have been allocated topics to address in this submission so some sections may read as only being relevant to one State or Territory. Whilst some of the topics discussed relate to a particular State or Territory, the bulk of this submission is applicable Australia-wide. The human rights topics discussed in this submission have been listed in chronological order and are not in any order of preference.

ATSILS are united in their call for the protection of human rights for all Australians through a Bill of Rights and highlights how such protections could benefit Aboriginal and Torres Strait Islander communities who are particularly vulnerable to having their human rights abused. The United Nations Declaration on the Rights of Indigenous Peoples is a good place to start in relation to protecting the rights of Aboriginal and Torres Strait Islanders. ATSILS jointly express disappointment that discussion about constitutional entrenchment of human rights has been stifled by limiting the debate to statutory protection of human rights.

2. UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Australia is a signatory to a number of international conventions such as the Convention on the Rights of the Child (CRoC), the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR) and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). However, Australia is yet to meet its obligations through the enactment of these into domestic law. Further, the Australian community remains confused and unsure of their rights. As articulated by Williams:

The Rudd Government has made two important symbolic statements on Aboriginal and Torres Strait Islander rights. The first was the apology to the stolen generations. The second came (on Friday) when it gave formal support to the United Nations Declaration on the Rights of Indigenous Peoples. While both are important steps forward, neither can hide the fact that Australia's legal system still reflects the racism of our past.²

Australia is the only democracy without a bill or charter of rights. While locally Victoria and the ACT have seen the recent passing of human rights legislation, there is still a great need for the furthering of human rights for Aboriginal and Torres Strait Islander Peoples.

¹ The ATSILS that have contributed to this submission are the Aboriginal Legal Rights Movement (ALRM), Victorian Aboriginal Legal Service Co-operative Limited (VALS), the North Australian Aboriginal Justice Agency (NAAJA), the Aboriginal Legal Service of Western Australia (ALSWA) and the Central Australian Aboriginal Legal Aid Service (CAALAS).

² Williams, George, "Racist premise of our constitution remains" Sydney Morning Herald - Opinion, 7 April 2009, p.11 as at http://www.law.unsw.edu.au/News_and_Events/InTheNews.asp?type=&name=2387&year=2009

Presently, the best protection for the Aboriginal and Torres Strait Islander community has been through the *Racial Discrimination Act 1975 (Cth)* (RDA). The RDA has proved to be a fragile shield and has been overridden twice in the last decade in relation to Aboriginal and Torres Strait Islander Peoples. On both occasions (the 1998 for native title and 2007 for the Northern Territory Emergency Intervention³) a federal law provided that if the Government decision was racially discriminatory it was to operate despite the RDA.⁴

While Australia's support for the UNDRIP is a landmark for Australia and the international community, it is important to remember that the Declaration makes no change to Australian law. The fact that Aboriginal and Torres Strait Islanders are significantly disadvantaged in almost every category of rights, such as health, education, child protection and employment is a reminder that there is no level playing field in relation to accessing rights in Australia. This disparity continues to reveal itself in degrees of marginalisation, disadvantage and social isolation and manifests itself in statistics that are well documented.⁵

This disparity in social disadvantage endures in spite of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) recommendations. One of the most important recommendations was to use imprisonment as a last resort for Aboriginal and Torres Strait Islander people. The statistics clearly demonstrate that this recommendation has not been implemented. These statistics also fly in the face of widespread research and knowledge that highlights:

*Prisons do not disappear problems, they disappear human beings...mass incarceration is not a solution to unemployment, nor is it a solution to the vast array of social problems that are hidden away in a rapidly growing network of prisons and jails.*⁶

For these reasons and more, our attention needs to be focused on the instruments that can be used to give protection and recourse to the Aboriginal and Torres Strait Islanders. The inclusion of the Aboriginal and Torres Strait Islander peoples perspective to discussions of human rights is essential to self-determination, and in turn wellbeing. According to research released this year, there is a need for renewed focus on the wellbeing of Aboriginal and Torres Strait Islander Peoples.⁷ The research found that those with strong cultural attachment have significantly better self-assessed health, are more likely to be employed and are least likely to have been arrested in the past five years. The findings also support the view that there are other means by which Aboriginal and Torres Strait Islander disadvantage can be addressed and that restoration of Aboriginal and Torres Strait Islander attachment to their culture may be an integral part of the solution.⁸

³ *Northern Territory National Emergency Response Act 2007* (Cth).

⁴ Williams, George, (2009), supra no 2

http://www.law.unsw.edu.au/News_and_Events/InTheNews.asp?type=&name=2387&year=2009.

⁵ According to the 2001 census, unemployment among Aboriginal and Torres Strait Islander Victorians was 3 times higher than for non-Aboriginal and Torres Strait Islander Victorians: Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody Statistical Information Volume 2 October 2005 p. 20. The higher prevalence of Family Violence in the Victorian Aboriginal and Torres Strait Islander community is widely understood to be influenced by the impacts of contemporary social and economic marginalisation: VicHealth 2007. People with a mental illness are overrepresented in Victorian prisons with 40% of prisoners experiencing serious mental illness: Deloitte Consulting 2003. The proportion of Aboriginal and Torres Strait Islander men in prison at 30 June each year has increased each year from 5.2% at 2004 to 5.8% at 2008, and the number has increased significantly from 176 to 230 in the same time period: Department of Justice 2009 *Statistical Profile of the Victorian Prison System 2003-04 to 2007-08* Melbourne: State Government of Victoria. Further, at 30 June 2008 the Victorian Aboriginal and Torres Strait Islander imprisonment rate per 100,000 Aboriginal and Torres Strait Islander adults was 2,443.2 for males = the highest level for the period under review (2003-4 and 2007-8).

⁶ Cunneen C (2000) 'Introduction: Race, prison and Politics in Australia' in A. Davis (ed) 'Masked Racism: Reflections on the Prison Industrial Complex' *Indigenous Law Bulletin* 4(27) [online as at <http://www.austlii.edu.au/au/journals/ILB/2000/113.html>].

⁷ Australian Bureau of Statistics, *2002 National Aboriginal and Torres Strait Islander Survey* as at <http://www.abs.gov.au/AUSSTATS/abs@.nsf/mf/4714.0/>.

⁸ Dockery in Science Alert Australia & New Zealand 2009.

3. ATSILS SUBMISSIONS FOR STATE HUMAN RIGHTS ACTS

3.1. VICTORIA

In 2005, a consultation was conducted by the Victorian Government as to whether or not there should be better human rights protections for Victoria which resulted in the successful adoption of the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic). The VALS facilitated two meetings in order to enable Aboriginal and Torres Strait Islander community to engage with the consultation process of the Human Rights Consultation Committee (Victoria), appointed by the Victorian Attorney-General.⁹

The Victorian Charter of Human Rights and Responsibilities is a step in the right direction to affording some protections to Indigenous peoples, but does not operate as a panacea to all ills in society. For instance, in the Victorian consultation process, it became apparent that any human rights instrument must recognise the specific rights of Aboriginal and Torres Strait Islander peoples, including the right to self determination.

3.2. WESTERN AUSTRALIA

In August 2007, ALSWA participated in a consultation that was conducted in WA to determine whether or not a WA Human Rights Act was required and produced a submission.¹⁰

4. CONSULTATION QUESTIONS

At the time of finalising this submission, ATSILS are aware that more than 10 thousand submissions have already been lodged for this consultation, many of which go into academic debate on whether or not we should have an instrument such as a *Human Rights Act* in Australia and if so, how it should operate and what rights it protect. It is not the intention of this submission to enter into academic debate about the form in which a Human Rights Act should be enacted in Australia, but communicate information about human rights issues readily available to ATSILS that work at the coal face. Case studies will be utilised.

ATSILS are curious to know how many of the submissions received represent the voice of Aboriginal and Torres Strait Islander peoples. The process of seeking written submissions is often inaccessible to Aboriginal and Torres Strait Islander people who experience socio economic and socio cultural disadvantage. This is evidenced by the fact that in WA, when ALSWA drafted and distributed widely an individual submission form for Aboriginal and Torres Islanders in WA, including through the media and facilitation of two community meetings over a period of about two months, only three submissions were received.

4.1. WHICH HUMAN RIGHTS AND RESPONSIBILITIES SHOULD BE PROTECTED AND PROMOTED?

ATSILS recommend that all the rights enshrined under the following international instruments and their protocols, to which Australia is a signatory party, should be protected including:

- *International Covenant on Civil and Political Rights* (ICCPR);
- *International Covenant on Economic, Social and Cultural Rights* (ICESCR);
- *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP);
- *Convention on the Elimination of All Forms of Racial Discrimination* (CERD);
- *Convention against Torture* (CAT);
- *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW);
- *Convention on the Rights of the Child* (CRoC); and
- *Convention on the Rights of Persons with Disabilities* (CRPD).

⁹ VALS' submission to the Human Rights Consultation Committee (Department of Justice) in response to the Discussion Paper - 'Have Your Say about Human Rights in Victoria' - sent 24 August 2005.

¹⁰ ALSWA, "*Submissions of the Aboriginal Legal Service of Western Australia (Inc.) in relation to the draft Human Rights Bill (WA) 2007*": Available online at www.als.org.au or by emailing reception@als.org.au.

4.2. ARE HUMAN RIGHTS SUFFICIENTLY PROTECTED AND PROMOTED?

ATSILS are of the opinion that currently there are some limited protections of Human Rights in Australian domestic Law, such as the RDA, and other administrative and procedural protections under the common law. However, these protections are often ad hoc and inaccessible to Aboriginal and Torres Strait Islander people. In our experience these laws do not go far enough in adequately protecting and providing recourse to Aboriginal and Torres Strait Islander people who have suffered human rights violations.

4.3. HOW COULD AUSTRALIA BETTER PROTECT AND PROMOTE HUMAN RIGHTS?

ATSILS support the adoption of a Commonwealth *Human Rights Act* that is binding on all States and Territories. However, it is important to recognise that this model, as opposed to Constitutional reform, is vulnerable to the whims of successive governments such as the recent suspension of the RDA in the Northern Territory (NT) in order to enact the NT Emergency Response legislation (NTER). In the future, serious consideration needs to be given to constitutional reform.

If a *Human Rights Act* is adopted, the Act should provide for a preamble or some other special acknowledgment of Aboriginal and Torres Strait Islander peoples as the First Nations peoples of Australia. In determining how this acknowledgement is worded and to ensure that the Act adequately protects Aboriginal and Torres Strait Islander people, Aboriginal and Torres Strait Islander individuals and organisations must be sufficiently consulted in ways that are culturally appropriate and accessible to the most disadvantaged and remote sections of the Aboriginal and Torres Strait Islander community.

5. ATSILS HUMAN RIGHTS CONCERNS

5.1. ACCESS TO JUSTICE¹¹

VICTORIA

A human rights issue for Aboriginal and Torres Strait Islander Peoples is the funding of Aboriginal and Torres Strait Islander Legal Services. Inadequate funding of such services in comparison to other services discriminates against Aboriginal and Torres Strait Islanders.

In 2008, the ALRM lodged a formal complaint to the United Nations about treatment of Aboriginal and Torres Strait Islander Peoples. ALRM Chairperson Frank Lampard reported to the media around the time the complaint was sent that “Aboriginal Legal Aid has been static for more than a decade, meaning it has fallen by about 40 per cent in real terms” and “that is discrimination because mainstream legal aid has increased by 120 per cent in the same time.”¹² The formal complaint concludes: “[i]t is our submission that the Special Rapporteur should make the Australian Government aware of its obligations to Indigenous Australians. Repeated requests to the Government for additional funding to support our programs for the benefit of the Aboriginal people over at least the last 8 years have been denied, and all avenues for our complaints have been exhausted within Australia. We wish for the Government to be made to respond formally to our

¹¹ The Victorian Aboriginal Legal Service Co-operative Limited has written this section with the assistance of documentation (complaint to the Special Rapporteur on the Human Rights of Indigenous Peoples) from the Aboriginal Legal Rights Movement (ALRM). It is a topic that is relevant to Australia in general, not just Victoria or South Australia.

¹² ABC News (2009) ‘Aboriginal and Torres Strait Islander rights complaint lodged with UN’ 16 September 2009 as at www.abc.net.au/news/stories/2008/09/16/2366190.htm?section=australia.

complaint, and thus to be held accountable for its lack of spending on Aboriginal legal aid to Aboriginal people.”¹³

VALS recently wrote a letter to the Standing Committee on Legal and Constitutional Affairs in response to the Submission to the Inquiry into Access to Justice, 2009. VALS was critical that the recommendations of a similar inquiry in 2003 have not been implemented. VALS noted that “[s]ince the 2003 inquiry, demand for services has increased and the cost of providing those services has increased. The ATSILS have not received any meaningful increase in funding during the ensuing period. When funding increases to the Commissions and Community Legal Services have been made, they have been inadequate to address even the demand at the door. The situation has therefore worsened since 2003.”

A significant recent paper on funding issues facing ATSILS was completed by Cunneen and Schwartz which highlights that as at 30th June 2006 ‘Indigenous prisoners represented 24% of the total national prisoner population ... [t]he figures on over-representation translate into an acute need for proficient and accessible Indigenous-specific legal advice and representation’¹⁴ and VALS agrees.

The authors note that in 2003, the estimated annual shortfall for funding of ATSILS, compared to Legal Aid Commissions was \$25.6 million. Also, “the number of criminal cases dealt with by ATSILS increased by 67% between 1998 and 2003; yet, despite this massive increase, funding for these services did not substantially increase in that period.”¹⁵ They further argue that “...the static funding environment that ATSILS operate in results in compromised capacity to provide adequate services to the sector of the population that arguably needs the best possible quality legal services ... the issue of the adequacy of legal representation for Indigenous people goes to the heart of questions of access, equity and the rule of law” (2008:38-39). In addition the ALRM noted that the State of South Australia discriminated against it by not extending to it the same exemption from state charges for Court transcripts and filing fees, as are applied to the State Legal Services Commission.

5.2. ADULT GUARDIANSHIP¹⁶

NAAJA (NT)

ATSILS regularly act for clients with intellectual disabilities who are in need of a guardian. In the Northern Territory, the number of people under guardianship orders is higher per capita than anywhere else in Australia. And these figures are increasing. At present, there are in Alice Springs around 130 people under guardianship orders, with 75-80% of these Aboriginal. In the Northern Territory, there are around 200 people under guardianship orders with 65% of these Aboriginal.¹⁷

In our experience, a number of critical human rights issues arise for our clients. These include four key areas. First, the lack of access to support services for people with intellectual disabilities. Second, the process of obtaining informed consent to treatment, and the use of interpreters with remote Aboriginal people. Third, the lack of any appropriate accommodation for young people with intellectual disabilities and high-level care needs. And fourth, the inadequacy of the present departmental structure for the Office of the Public Guardian, given that this Office sits under the Department of Health and Community Services. The problem is that where the Public Guardian is

¹³ Aboriginal Legal Rights Movement letter to the Special Rapporteur on the Human Rights of Indigenous Peoples re Complaint Regarding the Discriminatory Underfunding of the Aboriginal Legal Rights Movement in Australia, 20 June 2008.

¹⁴ Cunneen C & Schwartz M (2008) ‘Funding Aboriginal and Torres Strait Islander Legal Services: Issues of Equity and Access’ *Crime Law and Justice* 32(1): 40.

¹⁵ Cunneen C & Schwartz M (2008) above 14, p. 50.

¹⁶ The Northern Australian Aboriginal Justice Agency has written this section. It is a topic that is relevant across Australia and not just the Northern Territory.

¹⁷ These figures were provided to NAAJA in a meeting with the Adult Guardianship Office on 3 April 2009.

advocating for accommodation and support, they are not independent from the Department of Health, and that this may present a perceived or actual conflict of interest.

Case Study 1: Andrew

Andrew was admitted to Royal Darwin Hospital (RDH) following an incident where he was stabbed. As a consequence of his injuries, he was considered to be in a persistent vegetative state. Andrew received nutrition through a gastrostomy tube, received full nursing support, but he was otherwise described by medical staff as being 'pretty healthy'. He had no means of communication and his cognitive function was greatly impaired.

In 2005, an Adult Guardianship order was made, appointing guardians to make decisions and to act in Andrew's best interests. In the period from November 2005 to Andrew's death in October 2008, he remained a resident in the trauma and burns ward of RDH. Despite repeated attempts by the Public Guardian advocating to the Department of Health and Community Services for the provision of appropriate accommodation, alternative accommodation was not provided.

The only available option for Andrew was to be housed in an Aged Care facility in Darwin. This was objected to by family members and the Public Guardian due to Andrew's age (he was in his late 30's at the time of the accident), and their concerns that Aged Care is not an appropriate place for a young person. A further alternative, housing Andrew in Katherine Hospital, was objected to by family as it was considered too far to travel and to visit him. Andrew's family are from a remote community, and reside between that community and Darwin.

Andrew was ineligible for support through mainstream community disability funding. It was decided by the Public Guardian to utilise Andrew's savings to fund a weekly carer to take him outside the hospital ward to experience fresh air and the sun. This was the only activity or support that Andrew received.

Our concern is that for the duration of his accommodation at RDH, Andrew was not provided with adequate access to appropriate accommodation, support and culture.

Unfortunately, in our experience this case study is not an isolated case. We consider that a Federal Charter is of critical importance, both to stipulate universal standards for the care and support of people with intellectual disabilities, including the young and those from remote Aboriginal communities, and to protect against systemic issues such as the need for the Public Guardian to be independent from the relevant Department.

5.3. COMPULSORY INCOME MANAGEMENT

WESTERN AUSTRALIA

ALSWA has concerns and is currently monitoring compulsory income management that has commenced in the Perth suburb of Cannington and also across the Kimberley region of WA. It seems clear that a disproportionate number of Aboriginal and Torres Strait Islanders are being targeted and involuntarily placed on the scheme. Another scheme of 'no school, no welfare' is of similar concern to ALSWA.

5.4. DETENTION OF ABORIGINAL PEOPLE

WESTERN AUSTRALIA

This section contains a snap shot of issues relating to detention that Aboriginal and Torres Strait Islanders face in one State, Western Australia. Many of the issues are applicable in other States and Territories and are expanded upon in remaining sections of this submission. This section highlights issues relating to the detention of Aboriginal and Torres Strait Islander Peoples in WA.

Aboriginal and Torres Strait Islander people are disproportionately arrested, remanded in custody and sentenced.¹⁸ In WA, the position is more dire with statistics showing that the incarceration of Aboriginal and Torres Strait Islanders, in contrast to the general population, is rising.¹⁹ As well as the alarming statistics, ALSWA has concerns about the conditions of detention, as described below.

Separate Confinement: ALSWA has become aware of an inappropriate use of the separate confinement provisions under s.43 of the *Prisons Act* (WA).²⁰

Juvenile Detention: ALSWA made a submission in January 2008 regarding the overrepresentation of young Aboriginal people in the WA Juvenile Justice System (as of Dec 2008, it was 70.9%).

Police Lockups: ALSWA has concerns about people (including children) being held in police lockups for extended periods of time.

Repatriation (i.e. Stranding): ALSWA made a submission in May 2008 to the WA Government regarding the stranding of people after contact with the justice system. We are advocating for the adoption of a repatriation policy, such as the policy in the NT.

Mental Illness: ALSWA has concerns about the way people with mental illnesses are treated by the justice system, including fitness to plead and indefinite detention ‘at the Governor’s pleasure’.

Prisoner Transport: In WA, the vast majority of prisoners transported, especially in remote regions, are Aboriginal.²¹ Prisoner transport has been an issue that ALSWA has been advocating about for some time. In WA, prisoners are transported thousands of kilometers in unsafe and uncomfortable vehicles, often for minor offences.

In late 2006, a prison transport vehicle filled with 14 prisoners en route to Roebourne from Broome prison broke down not far from the Sandfire Roadhouse, which is about half way between the two destinations. Due to inadequate vehicle design and emergency procedures, the prisoners were forced to remain in the vehicle for 20 hours, in a situation of extreme heat where the air conditioner was not able to be kept on. This incident, known as the ‘Sandfire Incident’ resulted in the WA Minister for Corrective Services, Ms Margaret Quirk, giving a speech in Parliament where she said, amongst other things that:

“It is intolerable that in this day and age people should be subjected to such inhumane conditions, and I have requested the department to scrutinise existing procedures to ensure that similar incidents do not occur in the future.”²²

Although this assurance was given, the changes and scrutiny needed was not implemented and in January 2008 a Warburton Elder, Mr. Ward, died in the back of a prison transport van after no welfare checks were made on him on a very hot day, other than through a faulty CCTV, when the air conditioning was not working.

¹⁸ See generally: *Law Reform Commission of Western Australia – Aboriginal Customary Laws Final Report* (Report No. 94, 2006), chapter 3.

¹⁹ Neil Morgan & Joseph Wallam, “*Inspecting Custodial Settings*”, Presentation at the National Aboriginal and Torres Strait Islander Legal Services Conference, Perth, May 2009. In mid-2002, there were around 870 Aboriginal people in prison. In just three years this had risen to over 1,500, which was around an 80% increase. While the number of Aboriginal prisoners increased by around 750, the total prison population went up by less than 900. This means that during the period, 80% or more of the total increase in prison population in WA was Aboriginal. Taking the period from mid-2002 to mid-2009, the Aboriginal numbers have doubled.

²⁰ See Report No 57 of the Office of the Inspector of Custodial Services (report of an Announced Inspection of Bandyup Prison) at paras 3.22 to 3.28, available at www.custodialinspector.wa.gov.au.

²¹ See, for example, *Thematic Review of Custodial Transport Services in Western Australia*, Office of the Inspector of Custodial Services Report No 43, May 2007, p 1, para 1 [“...mostly Aboriginal.”] (Exhibit 98).

²² Parliament of Western Australia, 2 November 2006, p 8153b.

Mr Ward, who was being remanded on drink driving charges, died an entirely avoidable death by heat stroke including suffering a large third degree burn on his torso from laying against the hot metal seat. At the coronial inquest into the death (where ALSWA was given special leave appear as an interested party) the conditions within vehicle were graphically depicted by the Counsel assisting the Coroner as follows:

“The van itself is the subject of photos in evidence and has also been seen by the court. What is particularly apparent on seeing the rear pod in reality is its small size and its almost total enclosure by metal surfaces. It is difficult to imagine a more uncomfortable environment in which to spend even a short amount of time let alone several hours. There is little natural light, no natural ventilation, the seats face inwards rather than the direction of travel, the bench seats are hard and slippery with no restraints or grab handles, there is no view out other than through thick mesh and no direct means of communication with anyone. It is cramped, isolated and claustrophobic even in ideal weather conditions. It is almost impossible to believe it was ever conceived you could fit up to 6 adults in that section. The thought of more than one or two adult men over any distance seems a stretch.”

The Inquest has uncovered various systemic failings which contributed to the death. The findings were delivered on 12 June 2009.

Aboriginal Community Courts: ALSWA is currently advocating for the extension and roll out of Aboriginal community courts and circle sentencing in WA. A written submission will be sent to the WA Attorney General by 15 June 2009 and can be provided on request. The submission’s main emphasis will be to support the courts and their expansion to other communities, with a recommendation that it be tested in a remote community. The submission will also cover minor recommendations about the courts in their current format. ALSWA believes that the roll out of these courts into other areas of the State is an essential component in the self-determination of Aboriginal people in WA.

5.5. DISCRIMINATION

SOUTH AUSTRALIA²³

The RDA is a partial implementation, into the domestic law of Australia of CERD. Because the RDA is an Act of the Australian Parliament, it can be amended or its operation restricted by subsequent valid acts of the Commonwealth Parliament. As such there have been significant roll backs of the RDA by the Commonwealth Parliament since the enactment of the Act. In particular the *Native Title Amendment Act 1998 (Cth)*, the *Hindmarsh Island Bridge Act (1997)* and the legislation required for the NTER. As such the RDA does not constitute a genuine guarantee of equal treatment for Australian citizens, on the basis of race. The only effective remedy is that the RDA Act be entrenched such that its essential principles cannot be interfered with by subsequent legislation of the Australian Parliament. It is submitted that any consideration that is being given to a Bill or Charter of Rights for Australia should incorporate the notion that the RDA or so much of the CERD convention as is to be implemented into Australian law via the RDA should be entrenched as a constitutional amendment to prevent it being subject to implied or express repeal by the Australian Parliament.

Rights are not guaranteed until they can be protected from such a Parliament. In circumstances where racial minorities in particular Aboriginal people do not get anything like proportional or actual representation of their interests in the Australian Parliament, the Parliament of itself cannot be seen as a guarantee of the protection of their rights and interests. It is that circumstance which requires the entrenchment of RDA principles in the Australian constitution.

²³ The Aboriginal Legal Rights Movement wrote this section. It is a topic that is relevant across Australia and not just to South Australia.

The Breadth of the Racial Discrimination Act

The text of the RDA has been subject to considerable judicial scrutiny and many commentaries by the Racial Discrimination Commissioner and various authors. Combined ATSILS refer to the Racial Discrimination Commissioner's review of the RDA of December 1995, in particular to the papers by Dr Sarah Pritchard on special measures and the response by Professor Garth Nettheim. Combined ATSILS agree with both of those submissions and submits that consideration should be given to adopting a broader conception of racial discrimination such that the work of the special measures provisions is somewhat narrowed. Referring to page 203 of the text we note Dr Pritchard's observation that:

... an understanding of racial discrimination which refers not to any distinction or differentiation, but only to those which are arbitrary, invidious or unjustified. On such an analysis, measures adopted by reference to race would not constitute discrimination under the RDA where the criteria for differentiation are reasonable and objective.

Similarly combined ATSILS refer to and agrees with Dr Pritchard's suggestion that more consideration should be given to Article 2.2 of CERD, namely that it is not intended merely as a shield against challenges but also as positive measures to undertake and address past discrimination. Combined ATSILS also note with approval the suggestions by Dr Pritchard that the Human Rights Commission of the Racial Discrimination Commissioner's alcohol report needs to be seen in light of principles of self determination and cultural integrity.²⁴

Relevant parts of Article 2.1 of CERD also should be considered for inclusion within the RDA; Combined ATSILS have complained that institutional discrimination against Aboriginal institutions has been practised by Governments Federal and State for a long time and so it is submitted that genuine commitment by Government to the principles of non discrimination on the basis of race, would include outlawing such discrimination by Governments.

Article 2.1, paragraph (a) of CERD should also be incorporated into the RDA by expressly outlawing racial discrimination by the Federal, State, Territory or local Governments against persons, groups of persons or institutions.

Pursuant to Article 2(1)(e), Australian Government support for multi-racial organisations and movements should also be enshrined by legislative acknowledgement of Aboriginal Non-Government Organisations, such as ATSILS and Aboriginal Medical Services and like organisations. Recognition should be given to them, as being organisations which require special assistance and acknowledgement of their role in advancing the interests of racial harmony and the elimination of racially based disadvantage. An important aspect of the operation of Aboriginal organisations is that they are multiracial and that within them persons of different racial backgrounds work harmoniously for the achievement of Aboriginal emancipation and for the elimination of disadvantage.

WESTERN AUSTRALIA

ALSWA's Civil and Human Rights unit assist Aboriginal people in making complaints to the WA Equal Opportunity Commission (WAEOC) and the AHRC about racial discrimination and vilification. Complaints include harassment by neighbours (see *Campbell v Kirstenfeldt* [2008] FMCA 1356, where damages of \$7,000 were awarded to Ms. Campbell), security guards, shop keepers, pubs and clubs, housing providers and more. Because conciliation is encouraged, many matters settle confidentially. There needs to be processes that enable the dissemination of the outcomes of conciliation in regards to a public awareness point of view and in regards to monitoring and evaluating the effectiveness of the legislation.

²⁴ Pritchard Sarah Chapter 9 (Special Measures), page 215-6 of Racial Discrimination Act : A Review Race Discrimination Commissioner 1995.

Although there has been some limited indirect discrimination actions in WA, they are extremely difficult to prove. See for example the case of *Martin v State Housing Commission*²⁵ where an action for indirect discrimination against WA State housing was ultimately dismissed.

5.6. DISCIPLINARY REGIMES UNDER THE *CORRECTIONAL SERVICES ACT* 1982 (SA)

SOUTH AUSTRALIA

This submission made about specific aspects of the disciplinary regime for prisoners under the *Correctional Services Act* 1982 (SA) and was written by the Aboriginal Legal Rights Movement (ALRM). It highlights fundamental aspects of unfairness inherent in the present legislation.

Section 42A

No criticism is made of Section 42A, - minor breaches of prison regulations. There is procedural unfairness and irregularity however in Sections 43, 44 and 46,

Section 43

Albeit that a Manager's Inquiry process is a summary process and deals with breaches to be dealt with in front of a manager rather than by a judicial process, penalties imposed under Section 43(2) are significant for a prisoner. The words of Section 43(1) make it plain that the manager is to be regarded as the accuser and the Judge. It is the manager who is able to charge the prisoner and conduct the Inquiry. The prisoner is given no option as to whether or not the matter should be dealt with by a visiting Tribunal, the only power to refer a matter to a tribunal is in the hands of the manager himself pursuant to Section 44(1).

It is submitted that the prisoners should be given the option of having their matters referred to the tribunal after being charged by a manager and before an Inquiry by the manager. It may be commented that prisoners do have redress against manager's enquiries through Section 46 – appeals against penalty imposed by managers, but no appeal against a finding of guilt. In fact Section 46 is defective for the following reasons.

Criticisms of Section 46 Appeal Processes

1. Section 46 provides no process of appeal against a finding of guilt by a manager after an Inquiry in which the manager is both the accuser and the tribunal of fact.
2. The powers of the Tribunal on appeal against penalty imposed by a Manager under Section 46(4)(b) include the power to increase the penalty. It is submitted that in accordance with appeal procedures adopted by the criminal courts of South Australia, that there should be no power to increase a penalty on an appeal made by a prisoner. It is obvious that the threat of increased penalty if an appeal is conducted, might stymie the taking of appeals when they are meritorious.

Criticisms of Section 47 Appeal Processes

3. The limited grounds of appeal found in Section 47(1), really amount to an appeal based around jurisdictional error. As such it is very technical legal ground. Although it probably includes natural justice principles and procedural irregularities it may not take into account manifest errors, or manifest excess of penalty, which would for example be corrected by the appeal processes, allowed for in Section 42 of the *Magistrates Court Act*.
4. Furthermore the legal learning required to comprehend the law of jurisdictional error is complex and requires the services of a competent administrative lawyer. It is not the kind of law which is regularly dealt with in the Magistrates Court or District Court nor is it the kind of law which can be understood easily by prisoners. Rather the words of Section 47 contain some of the most arcane and difficult concepts involved in the law of judicial review. It is submitted that a simplified process should be invoked, similar to the Magistrates Court Act, Section 42 Appeals.

²⁵ P1/1999 [1999] HCA Trans 256 (6 August 1999).

Prisoners for whom English is a second language

It is submitted that the *Correctional Services Act* (CSA) should contain a specific provision for prisoners for whom English is a second language. They should have the right to have an interpreter to assist them in the presentation of their case, as well as a prisoner's friend if they require one, when they are obliged to appear before a Managers Inquiry or before the Visiting Tribunal.

Prisoners who suffer from a mental illness or from other forms of mental incapacity including acquired brain injury should also be allowed to have a prisoner's friend assist them in the conduct of their cases before a manager's Inquiry or a Visiting Tribunal.

Non-provision of interpreters in disciplinary proceedings is contrary to Rule 30 of the Standard Minimum Rules for the Treatment of Prisoners and arguably contrary to the common law of SA as decided in *Frank v Police* [2007] SASC

Division 6A Section 37A to D – Home Detention

The Aboriginal Legal Rights Movement Inc made detailed submissions to the Department of Correctional Services, prior to the passing of the Correctional Services Miscellaneous Amendment Bill 2004. That Bill restricted but to some degree rationalised the procedures for home detention under the pre-existing law.

Section 37A (2)(c) –prevents home detention being granted earlier than one year before the end of the non parole period or the end of the term of imprisonment.

It is submitted that the one-year rule is too limiting and does not allow for the unusual cases where home detention would be suitable in an earlier phase of the sentence. The arbitrary limitation of Section 37A (2)(c), should be removed, and the law should be liberalised.

Section 37C - Revocation of Release from home detention

The criteria for revocation of release of home detention are set out in this section. Nevertheless no procedures are set out for the actual administration of the process of revocation of release. ALRM understands that the Prisoner Assessment Unit referred to in Section 23 of the Act carries out the practical administrative processes. The prisoner concerned is not given a hearing, he or she is simply arrested and brought back to prison on a warrant. There may be practical reasons why an initial order for re-detention should not be subject to an initial right of hearing however the order having been made, ought to be subject to a right of review by the prisoner, in limited circumstances. A limited right of review ought to be provided for, for cases of arbitrary, unjust and unreasonable revocation. Further more, reviews of revocations ought to be made by probative courts, such as occurs with breaches of bonds and suspended sentences, etc.

5.7. DRIVER'S LICENCES

WESTERN AUSTRALIA

There are various problems with licensing for Indigenous people in WA including inability to obtain licenses and access legal services that assist in obtaining extraordinary driver's licenses and removing life disqualifications. This issue has many flow on consequences including detention of Indigenous peoples for driving without a license and economic and social well being of Indigenous peoples who struggle to find and keep employment without a valid driver's license.

5.8. FINES

VICTORIA

The fine system is inherently flawed and is arguably indirectly discriminatory towards Aboriginal and Torres Strait Islander Peoples. The fine²⁶ system is unfair because it has a harsher impact on people of low socio-economic background compared to people of a higher socio-economic background. The fine system contributes to the overrepresentation in the criminal justice system of people from low socio-economic backgrounds (which includes Aboriginal and Torres Strait Islander Peoples) as often fines for such people equate to a prison sentence due to failure to pay the fine.²⁷

VALS notes that the PILCH Homeless Person's Legal Clinic is on a reference group that is providing the Government with advice regarding the development of new legislation to make the fine system fairer. VALS welcome a fine system that is more flexible for people experiencing financial or social hardship (ie: 'warning system' and diversionary programs). VALS is concerned to see that legislation, expected to be enacted by autumn 2005, does in fact go ahead.²⁸ VALS argues that the following methods can also work to make the fine system fairer by introducing means testing when fining a person and increasing flexibility in fine payment.

The fine system [court imposed fines (*Sentencing Act 1991 (VIC)*), parking fine etc] is inherently flawed and is arguably indirectly discriminatory towards Aboriginal and Torres Strait Islander Peoples.²⁹ The fine system is unfair because it has a harsher impact on people of low socio-economic background compared to people of a higher socio-economic background. The fine system contributes to the overrepresentation in the criminal justice system of people from low socio-economic backgrounds (which includes Aboriginal and Torres Strait Islander Peoples) as often fines for such people equate to a prison sentence due to failure to pay the fine.³⁰

The most common sentence imposed on offenders who breached a Family Violence Intervention Order was a fine. VALS argues that this is an inappropriate sanction for breaches of Family Violence Intervention Orders. The prevalence of fines imposed for this offence, as with others, fails to address a broad range of issues related to the alleged offending:

- it is probable that the victim may end up being the payer of the fine;
- the occurrence of the above serves to penalise the victim and fails to address the behaviour of the offender;
- it is an ineffective deterrent to future behaviour involving Family Violence as causes are not addressed and solutions are not remedied through the forfeiting of moneys;
- it may fail to act as a function of punishment due to the offender being of low socioeconomic status and therefore having no facility to service a fine; and
- fines do not meet the purpose of sentencing. They have no rehabilitative or healing effect and do not increase the safety of the victim and the community.

There is far greater facility for behavioural change, increased safety of the victim, and decreased instances of Family Violence stemming from breaking cycles of violence through community-based orders as opposed to fines. Community Based Orders can include counselling and behavioural change programs. This sentencing option should be encouraged over inappropriate "punishment" serviced through fines.

²⁶ The Victorian Aboriginal Legal Service Co-operative Limited has written this section. The topic is relevant across Australia and not only to Victoria.

²⁷ Victorian Aboriginal Legal Service 'Suggested Review of the Summary Offences Act and the Vagrancy Act' 1999

²⁸ Newsletter of the PILCH Homeless Person's Legal Clinic, *Street Rights*, Edition 7- May 2004, pg 1.

²⁹ Victorian Aboriginal Legal Service 'Suggested Review of the Summary Offences Act and the Vagrancy Act', 1999

³⁰ Victorian Aboriginal Legal Service (1999) supra no 29.

5.9. HOUSING

WESTERN AUSTRALIA

ALSWA have little day to day interaction with regards to housing for Aboriginal people in WA. Most tenancy matters are referred to the Tenants Advice Service or Department of Commerce. However, ALSWA advocates for reform and assistance to be provided to Indigenous people in WA in regards to housing. Many Aboriginal people face racial discrimination in the housing market or are forced to accept substandard housing due to intergenerational poverty. ALSWA sits on the WA Equal Opportunity Commission s.80 Implementation and Monitoring Committee which is overseeing the implementation of the 'Finding a Place' report into the existence of discrimination in the public rental market of WA. A similar review by the Equal Opportunity Commission is currently occurring with regards to private rental accommodation in WA. No findings have been released as yet.

5.10. INTERPRETERS³¹

SOUTH AUSTRALIA

Australia has ratified the International Covenant for Civil and Political Rights (ICCPR). The ICCPR has not been fully incorporated into Australian domestic law³². The position has been stated by Toohey J of the High Court in *Dietrich v The Queen* (1992) 177 CLR 292 at 359-360:

Article 14(3)(d) of the I.C.C.P.R. has been mentioned already. The ratification by Australia of the I.C.C.P.R. on 13 August 1980 did not render it part of Australian municipal law. The I.C.C.P.R. is now contained in Sched. 2 to the Human Rights and Equal Opportunity Commission Act 1986 (Cth). While the Act confers power on the Human Rights and Equal Opportunity Commission to investigate and conciliate alleged breaches of rights contained in the I.C.C.P.R., it does not create justifiable rights for individuals.

Still the document is a powerful influence on Australian common law.

Article 14(3) of the ICCPR states that everyone who is charged with a criminal offence is entitled, as a minimum, to be informed of the nature and cause of the charge in a language in which they can understand; ³³to have adequate time and facilities to prepare a defence and to be able to communicate with counsel of their own choosing; ³⁴and to have the free assistance of an interpreter if they cannot understand or speak the language used in court. ³⁵

This right to an interpreter does not mean that a person can choose to address the court in another language, if the language of the Court is not their first language.³⁶ Rather it means that the Court must provide the person with an interpreter if the person is not able to express themselves adequately in the language used by the Court.

On 25 September 1991, Australia acceded to the First Optional Protocol to the ICCPR. By this act, Australia has recognised the competence of the Human Rights Committee to receive communications from individuals claiming to be victims of violations of any of the rights set out in

³¹ This section was written by the Aboriginal Legal Rights Movement. It is a topic that is relevant across Australia and not only to South Australia.

³² *Minogue v Williams* [2000] FCA125 Merkel, Ryan and Goldberg JJ upheld Weinberg J to the effect that the reproduction of the ICCPR as a Schedule to the HREOC Act had not incorporated it into Australian domestic law [25] and further that the proceedings had properly been dismissed on the ground of lack of jurisdiction [30] The judges noted that partial incorporation had occurred through section 138 of the Evidence Act (Commonwealth).

³³ Articles 14(3) (a) *International Covenant for Civil and Political Rights (ICCPR)*.

³⁴ Article 14(3) (b) ICCPR.

³⁵ Article 14(3) (f) ICCPR.

³⁶ *Guesdon v France*; Human Rights Committee DocA/44/40 page 222.

the ICCPR. Individual communications must only be made once all available domestic remedies have been exhausted.³⁷

Whether an interpreter is required under the common law is a matter of judicial discretion. The overriding requirement, arising from the common law of Australia that all parties must have a fair trial. In a criminal law context, a fair trial involves the accused and the tribunal being able to hear and understand the proceedings.

Another relevant case is *Re East; Ex parte Nguyen* [1998] 196 CLR 354,³⁸

In the case of *Frank v Police* [2007] SASC 288 Sulan J dealt with an appeal by a Pitjantjatjara speaking Defendant who had appeared and pleaded guilty to various offences whilst represented, but without an interpreter before a Court of Summary jurisdiction at Marla Bore in the north of South Australia. Sulan J said that:

“The correct course was for the Magistrate to stay the proceedings until an interpreter could be present. The Court has an inherent power to stay criminal proceedings which will result in an unfair trial. A right to a fair trial, or a fair hearing in the case of sentencing, is a central pillar of our criminal justice system.

In *Dietrich's* case, the High Court recognised that the Court has power to prevent an abuse of process of the prosecution of a criminal proceeding which will result in a trial which is unfair. Deane J observed that if the funds and facilities necessary to enable a fair trial to take place are withheld, then Courts are obliged to take steps to ensure that their processes are not abused to produce a miscarriage of justice. He said:

If, for example, available interpreter facilities, which were essential to enable the fair trial of an unrepresented person who could neither speak nor understand English, were withheld by the Government, a trial Judge would be entitled and obliged to postpone or stay the trial and an appellate court, in the absence of extraordinary circumstances, be entitled and obliged to quash any conviction entered after such an inherently unfair trial. Again, if the Government failed to provide the ordinary facilities necessary to enable an accused held in custody to attend his trial, the trial Judge would be entitled and obliged to postpone or stay the trial and, in the absence of such a stay or

³⁷ Article 2 First Optional Protocol to ICCPR.

³⁸ Kirby J said:- page 82: *In the context of criminal trials it is accepted law in Australia that the trial must ordinarily take place in the presence of the accused. This requires not only the accused's corporeal presence but that he or she should understand the evidence and be in a position to make decisions as a result of it affecting the conduct of the case. Such decisions will include giving instructions to the legal representative (if any) appearing in the accused's interests. It is the duty of a judicial officer conducting criminal proceedings to ensure the fair trial of the accused. Where a trial would be unfair because of the absence of an interpreter, it is the duty of the judicial officer to endeavour to ensure that an interpreter is provided. Where the accused is legally represented, the judicial officer can usually rely upon the legal representative to communicate to the court the needs and wishes of the accused. But even then, the judicial officer will not be relieved of the obligation to ensure a fair trial if it should subsequently appear (from something said or done in the trial) that an interpreter is needed. At page 83: The entitlement to an interpreter is not specifically a language right, as such, or a feature of the public character of a trial so much as an aspect of the commitment of the judicature to fairness of the trial process. It has been said that the right extends to the provision of translations of documents essential to the proper conduct of the trial. In some countries the right to an interpreter in a trial appears expressly stated in the constitutional text or has been found to be an implication from a constitutional provision or from a statutory bill of rights. In Australia the right is no less effective because its source has been taken to be the common law. Many cases exist where appellate courts, concerned at the risk of a miscarriage of justice, have set aside a criminal conviction and ordered a retrial where the accused has established that there was a lack of understanding at the trial for want of an interpreter. In the light of this developed jurisprudence, and its regular application in the courts of Australia, it is unsurprising that the Parliament had not made express provision in the Act to give effect to the obligations of Art 5(a) of the Convention. Those obligations were already part of the settled law of this country. They remain so.*

*postponement, an appellate court would be entitled and obliged to quash any conviction.*³⁹

The Magistrate should have ordered a stay of proceedings until he could be assured that a Pitjantjatjara interpreter would be present. The Magistrate should have released the appellant on bail.⁴⁰

Frank v Police was appealed by the Respondent, but the Full Court of the Supreme Court of South Australia dismissed the appeal.⁴¹

The provision of interpreters to Aboriginal defendants in South Australia is still unsatisfactory and although the matter is simplified in this State by the fact that the only Aboriginal languages requiring interpreters are Pitjantjatjara and Yankunytjatjara, still inadequate facilities are provided by the Courts to satisfy the requirements laid down by the Court in *Frank*.

WESTERN AUSTRALIA

In Australia, unlike for other non-English languages, there is no national interpreter service for Indigenous people who do not speak English as a first language. This can result in miscarriages of justice for Aboriginal people, particularly in remote areas where one in five experience difficulty in understanding or being understood by service providers. ALSWA has been advocating for some time for a funded WA statewide interpreter service, such as the service provided in the NT. To date, our submissions have not been adequately responded to.

5.11. MANDATORY LIQUOR RESTRICTIONS

WESTERN AUSTRALIA

In WA, mandatory liquor restrictions are being imposed in a number of regions, including the Kimberley, where there are disproportionate numbers of Aboriginal and Torres Strait Islander people. There are possible issues of indirect discrimination and self-determination however these need to be carefully balanced with the community health and safety needs.

5.12. MANDATORY SENTENCING

NAAJA (NT)

Mandatory Sentencing in the NT does exist in relation to property offences,⁴² sexual offences and violent offending.

Incarceration rates in the NT continue to sky-rocket. In 2007/2008, the rate of imprisonment of adults in the NT was 568 per 100,000 adults, almost 3.5 times the national average rate of imprisonment of 164 per 100,000 adults.⁴³ The figures have continued to increase since then. In the last quarter of 2008, the average daily imprisonment rate in the NT was 629 per 100,000 population.⁴⁴ It is also clear that incarceration rates disproportionately affect Aboriginal people. In 2007/2008, 82% of the prison population was Aboriginal.⁴⁵ Despite no evidence that mandatory

³⁹ *Dietrich v The Queen* (1992) 177 CLR 292,301.

⁴⁰ *Frank v Police* [2007] SASC 288 at para 68-70.

⁴¹ *Frank v Police* (2007) supra n 40].

⁴² See ss 78BA and 78BB *Sentencing Act* 1995 (NT) introduced in the *Sentencing Amendment Act (No 3) 2001*

⁴³ Northern Territory Department of Justice – Correctional Services Annual Statistics – 2007-2008, http://www.nt.gov.au/justice/policycoord/documents/statistics/NTCS%20Annual%20Statistics%202007-08_EBook.pdf, p 3.

⁴⁴ Australian Bureau of Statistics - 4512.0 - Corrective Services, Australia, Dec 2008.

<http://www.abs.gov.au/Ausstats/abs@.nsf/Latestproducts/4512.0Main%20Features2Dec%202008?opendocument&tabname=Summary&prodno=4512.0&issue=Dec%202008&num=&view=>

⁴⁵ *Ibid* p 4.

sentencing has served to reduce crime rates, mandatory sentencing continues in the NT. In fact, new provisions were introduced and tightened as recently as December 2008.⁴⁶

Mandatory sentencing removes or restrains consideration by a Court of factors personal to the offender as well as the objective circumstances of an offence. The arbitrary and capricious nature of mandatory sentencing laws has not only caused increased incarceration rates for Aboriginal people, but frequently results in unfair and unjust outcomes for our clients.

We raise the following three case studies in relation to the four types of mandatory sentencing offence types in the Northern Territory - property offences, violent offences, sexual offences and breaches of domestic violence orders (DVOs):

Case Study 2 (property offences)

Alton is convicted of unlawful entry. He broke into a hotel at night with Jocelyn and stole a six pack of beer. In 1998, Alton was given a community work order for an unlawful entry offence. He has not been in any trouble since 1998. When he goes to court, he is sentenced to 2 months imprisonment, suspended after serving 1 month.⁴⁷

Case Study 3 (violent offences)

Simone is a 35 year old single mother from a remote community. She has 6 children in her care but works in the community's aged care facility. She was convicted of assault, after punching another female once to the forehead, after which a brief fight ensued. The victim suffered scratches to her head. She is sentenced to 2 months imprisonment.⁴⁸ Her incarceration causes her to lose her job, not to mention the massive difficulties for her 6 children.

Case Study 4 (sexual offences)

Sebastian is found guilty of indecent assault. The court heard that when he was intoxicated, he touched the complainant on her bottom, over the top of her clothes. He had no history of prior sexual offending. In fact, he had no criminal history at all. He was sentenced to 3 months imprisonment, suspended after serving 4 weeks.⁴⁹

Case Study 5 (sexual offences)

Nicholas is 18 years of age and from a remote community. Nicholas and Samantha met through family connections. Samantha is 13 years of age. They entered into a relationship, which was sanctioned by their families as well as others as a traditional marriage and correct within their beliefs as to cultural considerations. A few months later, Samantha fell pregnant and had a baby boy, Adam. Nicholas is charged and convicted of having sexual intercourse with a child under 16 years of age. He has no criminal record. He has done some work on cattle stations and has helped out at the aged care facility in his community. Nick was sentenced to 9 months imprisonment suspended on the rising of

⁴⁶ These are discussed below in relation to violence offences. Mandatory sentencing now applies to first-time violent offenders. Previously, mandatory sentencing only applied to violent offenders who had been previously convicted another violent offence.

⁴⁷ Section 78B of the *Sentencing Act* provides that a person convicted of an aggravated property offence (which includes unlawful entry), must be sentenced to a term of imprisonment (which can be partly suspended or wholly suspended if a home detention order is made) or a community work order, unless there are exceptional circumstances in relation to the offender or the offence.

⁴⁸ Section 78BA of the *Sentencing Act* states that a person found guilty of various violent offences, including assault where harm is suffered, must be sentenced to a term of imprisonment. That term of imprisonment can be suspended partly but not wholly. Harm is defined as a physical injury that interferes with the victim's health.

⁴⁹ Section 78BB of the *Sentencing Act* provides that a person found convicted of a sexual offence (which includes a wide range of offences) must be sentenced to a term of imprisonment. That term of imprisonment can be suspended partly but not wholly.

the court for 12 months. Nicholas was in custody from 9.00am and his sentencing concluded at 4.00pm, when he was released from custody.⁵⁰

Case Study 6 (breach DVO)

Mary is a 50 year old traditional Aboriginal woman with 4 children and 8 grandchildren. She speaks little English. She has a prior conviction for failing to comply with a DVO in March 2007. She was fined \$250 for that offence. She has been separated from the male protected person for 5-6 months after an ongoing relationship. Mary attended the protected person's unit when intoxicated and yelled, "You druggie, you steal money, I get my roper brothers to bash you." He told Mary to leave. She picked up a rock, then put it down and left. No harm was alleged. Mary was arrested, made a full confession and claimed that the protected person had abused her in the past. Mary was sentenced to 7 days imprisonment even though no harm was alleged.⁵¹ The Court did not accept that it was appropriate to not record a conviction and therefore sent her to prison.⁵²

That mandatory sentencing still exists and is routinely applied in the Northern Territory is a matter of grave consequence. As our case studies demonstrate, the removal of consideration of factors personal to the offender and the objective circumstances of offence is a grave breach of human rights. Put simply, it means that people who might not otherwise have been sentenced to a term of imprisonment are being incarcerated, with all the attendant destructive impacts (exposure to violence and abuse, dislocation from pro-social supports such as family, employment) that serving a term of imprisonment brings.

We believe that a Federal Charter enshrining full and proper judicial consideration of factors personal to the offender and the objective circumstances of offences is a critical step towards removing mandatory sentencing in individual states and territories, especially in the Northern Territory where despite a complete absence of evidence, it appears to be remodelled and reintroduced to serve the politically expedient ends of the government of the day.

WESTERN AUSTRALIA

In WA, since 1995, sentencing laws have been in operation which result in mandatory imprisonment of adults and juveniles for a minimum of 12 months where they are convicted of their third home burglary. This means the court cannot exercise sentencing discretion and cannot take into account individual circumstances (including the age and background of individuals or the seriousness of the burglary). As age is irrelevant, ALSWA has serious concerns about the mandatory detention of juveniles, in possible contravention of CROC. These laws lead to unfairness and injustice for Aboriginal and Torres Strait Islanders as they have a discriminatory effect.

There are also new laws currently before the WA Parliament to introduce mandatory sentences for the assault of police officers and public officers. ALSWA believes these laws will allow police to target Aboriginal and Torres Strait Islanders and will lead to increased detention.

⁵⁰ A 'rising of the Court' disposition allows a Court to order that a sentence has already been served in part. They are, however not ordered freely, and it is not uncommon for cases with factual circumstances similar to this example to result in offenders serving actual periods of imprisonment. See, for example: *R v Leroy Gibson* NTSC 17 March 2008 per Martin CJ at www.nt.gov.au/ntsc/doc/sentencing_remarks/2008/03/20080317gibson.html.

⁵¹ Her sentence is currently being appealed.

⁵² Section 121 of the *Domestic and Family Violence Act* provides that a person convicted of breaching a DVO and where harm is caused to the protected person must be sentenced to at least 7 days imprisonment if they have previously been found guilty of breaching a DVO.

5.13. MENTAL ILLNESS / HEALTH

VICTORIA

Insufficient understanding of the reciprocal interactions between health and human rights, mental health and human rights and the realisation of all human rights by Indigenous Peoples constitute a triple jeopardy in how these topics are currently being addressed ... Health disparity is one of the most convincing manifestations of the lack of fulfilment of human rights (Tarantola 2007:10-12).

Howells, Thomas-Peter and Day (2004) suggest that although the criminal justice system and the health care system have fundamentally different social functions, there are areas of common purpose and interest. Both hold a responsibility to protect *all* members of the community from harm. The criminal justice system, from initial points of contact with police through to Correctional Services and release, holds an obligation to provide adequate health and mental health services to offenders.

People with a mental illness are overrepresented in Victorian prisons with 40% of prisoners experiencing serious mental illness and the proportion increases when other types of mental and psychiatric disabilities, such as personality disorders, are also considered (Deloitte Consulting 2003). Social disadvantage and inadequate treatment of mental health in the community inevitably equates to too many people with untreated illness ending up in prison:

Ill health and marginalisation, not criminality, are the drivers, but this goes unacknowledged by a justice system which often only serves to exacerbate illness, and may increase reoffending (Smart Justice 2009).

Social disadvantage and inadequate access to services being linked to negative contact with the justice system is an all too common theme for the Aboriginal and Torres Strait Islander community. Misunderstandings and misdealings with mental health matters acts as an additional contributor towards marginalisation for the disadvantaged and the disempowered.

The seriousness of mental health issues can be identified through extreme negative outcomes in the Aboriginal and Torres Strait Islander community. Looking at behaviours linked to mental illness such as suicide, the prevalence in Aboriginal and Torres Strait Islander communities has been shown to be significantly higher than that for non-Aboriginal and Torres Strait Islander Peoples populations; ‘yet Indigenous understandings and definitions of suicide and self-harming behaviours remain under-researched, undervalued and under-utilised’.⁵³

The unique conception of what Aboriginal and Torres Strait Islander communities consider constitutes mental health and wellbeing, as well as what is considered mental illness, must be recognised and incorporated into legislation that deals with decisions around the treatment of persons. Without this inclusion, the significantly disproportionate and tragic consequences, such as the above mentioned, will not improve for the Aboriginal and Torres Strait Islander population.

There are some common threads that run through different conceptions and definitions of what is considered “mental health”, “mentally ill” and “mentally disabled”. There is not, however strong consensus on any one definition of any of these terms. Not only are definitions of mental illness and wellbeing influenced by personal experience, but conceptions and learnings about mental health, mental illness and/or wellbeing evolve with time, place, and culture - as do their respective definitions. When conceptions of mental health evolve decisions about patients should be reviewed to ensure that the measures put in place continue to be relevant and appropriate.

This is of critical note when you consider that it is how we perceive and define mental health, illness and wellbeing that direct the way we approach better avenues to deal with such issues. An imperative tool in guiding the future of mental health matters in Australia is of course the respective

⁵³ Suicide Prevention Australia (SPA) position statement as at <http://suicidepreventionaust.org/PositionStatements.aspx>.

legislation. VALS argues for a broader scope of what is considered under definitions of mental health or mental illness in order for the prospective legislation to attempt to be as inclusive as possible.

The National Mental Health Plan 2003-2008 defines

Mental health as:

A state of emotional and social wellbeing in which the individual can cope with the normal stresses of life and achieve his or her potential; and

Mental illness as:

A clinically diagnosable disorder that significantly interferes with an individual's cognitive, emotional or social abilities

Research further indicates the overrepresentation of people with a cognitive disability in the criminal justice system, with difficulties in identifying such cognitive disability in offenders being further compounded for those who are Aboriginal and Torres Strait Islander:

The problem of disability being masked by other factors of disadvantage is perhaps most evident when it comes to contact with the criminal justice system. If a brain injury is acquired early in life, and is never properly assessed, there is the potential that behaviours that are a consequence of that brain injury will never be properly attributed. During contact with police, behaviour is much more likely to be connected with the immediate influence of drugs and alcohol, or perhaps implicitly linked to the fact of Aboriginality rather than a brain injury. A lack of response to questions may be viewed as being the consequence of language and cultural barriers, rather than reflecting a lack of understanding (Simpson & Sotiri 2004:11).

Corrections Victoria's *Victoria Prisoner Health Study* (2003) concluded:

The overwhelming impression conveyed by the data is that the prisoner population is far less mentally healthy than the wider Victorian population. The overall pattern of findings reflects a greater prevalence of all the major mental illnesses than is found in the general population. Moreover, a very high percentage of prisoners have attempted suicide or otherwise engaged in acts of self-harm. The prevalence of addictive behaviour is also extraordinarily high. This situation is serious enough to require that careful attention be paid to the provision of broad-based mental health services to prisoners (Deloitte Consulting 2003).

Research indicates instances where people with a mental illness may be charged with offences relating to behaviour arising from their illness such as offensive language and conduct, assault, resisting arrest and assaulting police:

As a general rule it's usually public disorder ...where they bring themselves under notice due to their actions.⁵⁴

A lot of our clients with mental health issues or alcohol problems get pulled up on offensive language. If they are walking a bit strangely or they look like they are under the influence, a police officer will pull them up.⁵⁵

The past and present violations or neglect of human rights such as civil, political, social, cultural and economic, not only has negative impacts on the social and emotional wellbeing of the individuals whose rights are violated, but also their families and communities.⁵⁶

⁵⁴ Consultation with NSW police inspector in Karras et al 2006:58.

⁵⁵ Consultation with CLC workers in October 2004 in Karras et al 2006:59.

Victoria's Equal Opportunity Act (1995) makes it unlawful to discriminate against anyone because of their disability/impairment. The Victorian Equal Opportunity and Human Rights Commission's 2008 submission to the *National Disability Strategy* argues that systemic discrimination is manifested in the overrepresentation of (young) Aboriginal and Torres Strait Islander people with an intellectual disability in contact with the justice system.⁵⁷ Also, institutions, policies and practices can create or perpetuate a position of disadvantage. In applying a human rights framework to any disability, a strategy will need to identify different groups amongst the community to target responses explicitly.⁵⁸

Tarantola (2007) highlights the insufficient understanding of the reciprocal interactions between health and human rights and mental health and human rights. In his report, *The interface of mental health and human rights in Indigenous Peoples: triple jeopardy and triple opportunity*, Tarantola expresses how even definitions of health that are considered holistic in their encompassing of social wellbeing, such as that endorsed by the 192 Member States of the World Health Organisation (WHO), are qualified by some as 'reductionist' when applied to Indigenous Peoples as it fails to encompass spiritual dimensions or the degree of harmony that exists between the individual and the community' (11).⁵⁹ This reflects the tension between Western concepts of mental health and the holistic vision on emotional and social wellbeing expressed by some Aboriginal and Torres Strait Islander communities:

Health disparity is one of the most convincing manifestations of the lack of fulfilment of human rights. In turn, human rights principles and instrument are well suited to link health disparity to its societal roots and provide grounds and mechanisms for redress ...

...Not only does the deprivation of certain human rights directly influence mental health – for example, in situations where the right to security or health is challenged by insufficient structures and services – but the very denial of these and any other human rights, including equality, participation, employment, and housing, have a negative impact on self-perception in relation to society, and on dignity, and ultimately on health (Tarantola 2007:12-4).

It can therefore be argued that the fulfilment of all human rights is necessary for the protection of mental health outside of the mainstream Western medical response or a "normative" concept of health – concept of health shaped by State authorities and professional groups that tends to focus on health outcome and notions of risk behaviour and overlooks the holistic view of health in a way that it encompasses spiritual, cultural and emotional wellbeing (Tarantola 2007).

Jails and the Mentally Ill

The prevalence of mental disorders detected in jail populations gives rise to expressions of how jails are replacing hospitals for the mentally ill in many western countries (Draine, Salzer, Culhane & Hadley 2002). One explanation for the increase in the number of people in jail with a mental illness is that these individuals are also members of other groups with a high risk of being arrested (such as substance users, unemployed, fewer years of formal education and lower income etc; Draine et al 2002). The phenomenon of persons with a mental illness being disproportionately caught up in the criminal justice system because of their greater risk of arrest has been documented in Australia in a study showing an increase in the numbers of persons with schizophrenia who were arrested after

⁵⁶ Smallwood G, White C and Kotiw M, 1997 'The relevance of human rights to health status in Australian Aboriginal and Torres Strait Islander communities' *Health and Human Rights* 2: 127-136.

⁵⁷ Australian Human Rights Commission 2008, Preventing Crime and Promoting Rights for Aboriginal and Torres Strait Islander Young People with Cognitive Disabilities and Mental Health Issues.

⁵⁸ See <http://www.humanrightscommission.vic.gov.au/pdf/submissionnationaldisabilitystrategy.doc>

⁵⁹ As sighted in: Brady M 2004 *Aboriginal and Torres Strait Islander Australia and Alcohol Policy: Meeting Difference with Indifference* Sydney: University of New South Wales Press; and Brady M, Kuniz S and Nash D 1997 'Who's Definition? Australian Aborigines, conceptualisations of health and the World Health Organisation, In L Marks, M Worboys (eds) *Migrants, Minorities and Health: Historical and Contemporary Studies* London: Routledge.

deinstitutionalisation. Interestingly this was accounted for by an increase in arrest rates in the general population and not by psychiatric status (Mullen, Burges, Wallace et al 2000 in Draine et al 2002).

This finding goes against conclusions of mental illness being criminalised or that institutionalisation has shifted from state hospitals to jail (Whitmer 1980 in Draine et al 2002). Draine et al highlight that ‘few mental health interventions are conceptualised around the idea that many individuals could reasonably be treated as both criminal offenders and recipients of mental health services’ (2002:567). In light of the above, it could be argued that pro-arrest and pro-incarceration and ‘tough on crime’ policies and practices are by their nature are inappropriately incarcerating the mentally ill over other alternatives.

Case Study 7: “Jill”

In late May 2009, a case came to the attention of a VALS’ solicitor.⁶⁰ As relayed to VALS, “Jill” disclosed that she was taken by two officers (one male, one female) from the Dame Phyllis Frost Centre (DPFC - women’s prison) to the Royal Women’s Hospital for one of her routine checkups on her unborn baby. At these appointments she is required to see a midwife, a counsellor, and a doctor. Handcuffed for the duration, Jill was taken to the hospital in a vehicle where she was denied air conditioning and as a result of air circulation felt very nauseous.

“Jill” remained handcuffed following arrival at the hospital and was not permitted to have them removed at any stage of the time she spent at the hospital. The midwife asked the female prison Officer to remove the handcuffs, which an officer initially did. However, the officer phoned the prison to check that this was appropriate and the officer’s superior gave instructions that the handcuffs were to be put back on.

During the appointment with the midwife and the counsellor, an officer remained inside the examining room. This Officer presence proved to act more than a supervisory function. “Jill” advises that the Officer answered most of the questions asked of “Jill” including matters relating to her diet and treatment, health care and prenatal care while in custody at the prison. “Jill” has stated that she only answered a few questions herself and in these instances the officer in most cases interjected here also.

The nature of these appointments is to discuss private personal matters in relation to “Jill’s” physical, emotional and mental health, history and issues with domestic violence, drug use, trauma and other matters normal to a counselling environment. It is also of note that it is understood that these assessments also partly shape a report that is forwarded to Child Protection. In effect, it can be argued that in this instance there is not only a violation of “Jill’s” rights and privacy, but the effectiveness of reports relating to the future care of herself and her child are grossly limited and altered in content. For instance, it is unlikely that “Jill” would participate in full disclosure relating to her drug use etc with a prison officer sitting with her. This affects not only “Jill” in the immediate sense, but can also contribute to the care and treatment of herself and her child in a long-term sense.

A lot of what is outlined above does not necessarily represent standard operating procedures. However, the high levels of discretion held and used by the Prison Officers possibly in place of rigid or adhered to guidelines and standards, is apparent in light of the fact that on a previous visit to the hospital, the above did not occur. One week earlier, “Jill” was taken to the same hospital appointments by two different Officers in a more appropriate vehicle – a prison car – and was permitted to have her cuffs removed whilst in the hospital. She was also allowed to see her health care providers and counsellors in privacy.

Seclusion and Restraint

The State of Queensland provides that seclusion must not be authorised unless doctor/nurse reasonably satisfied that ‘it is necessary to protect the patient or other persons from imminent physical harm *and* there is no less restrictive way of ensuring the safety of the patient or others’ (see s 151). In relation to mechanical restraint, a doctor may authorise the use of mechanical restraint on

⁶⁰ Through communication with ‘Flat Out’ – a group based in Flemington, Victoria who fight for the human rights of women in prison.

the patient only if the doctor is satisfied it is the most clinically appropriate way of preventing injury to the patient or someone else (see s 143). This is in line with the United Nations *Principles for the protection of people with mental illness and the improvement of mental health care*.⁶¹

Physical restraint or involuntary seclusion of a patient shall not be employed except in accordance with the officially approved procedures of the mental health facility and only when it is the only means available to prevent immediate or imminent harm to the patient or others. It shall not be prolonged beyond the period which is strictly necessary for this purpose. All instances of physical restraint or involuntary seclusion, the reasons for them and their nature and extent shall be recorded in the patient's medical record. A patient who is restrained or secluded shall be kept under humane conditions and be under the care and close and regular supervision of qualified members of the staff. A personal representative, if any and if relevant, shall be given prompt notice of any physical restraint or involuntary seclusion of the patient.

While Victoria currently regulates mechanical restraints and seclusion only, VALS supports calls that there also be regulation for physical restraint.⁶² VALS also argues in favour for regulation around chemical restraint. These principles need to be carefully observed through the lens of a National Human Rights framework that makes it a violation to restraint and/or seclude any person unnecessarily or inappropriately.

5.14. POLICE COMPLAINTS

VICTORIA⁶³

Conduct

Police represent a first point of contact, ‘gatekeepers’ if you like, to the systems of protection of the community and criminal justice and a relationship of trust between the public and police is critical to the effectiveness of law enforcement. Mutual trust does not exist at present between some members of the police and Aboriginal and Torres Strait Islander community. This is greatly due to breaches of human rights by some police through various actions including those that accompany zero tolerance policing. Cunneen suggests that ‘the zero tolerance approach to policing completely ignores both the historical and contemporary contexts of Aboriginal-police relations’ while simultaneously increasing antagonism levels rather than improve relations (1999:10).⁶⁴

The roles the police play in the configuration of the justice system, especially the juvenile justice system, are increasing on a number of fronts. They are the initial decision makers, have considerable discretion and for young people in particular they are to all intents and purposes the legal system (Blagg and Wilkie 1997). While the police are under constant pressure to ‘do something’ about publicly visible problems, heavy-handed law enforcement runs the potential of destroying the legitimacy of police, making their job increasingly difficult.

A common thread between ‘tough on crime’ measures is the concern that there are increasing instances of the criminal justice system not applying fairly to all.

⁶¹ UN principles for the protection of people with a mental illness, Principle 11, paragraph 11. (available at <http://www.unhcr.ch/html/menu3/b/68.htm>).

⁶² Tasmania and the ACT are currently the only jurisdictions that do so.

⁶³ Both the Victorian Aboriginal Legal Service Co-operative Limited and North Australian Aboriginal Justice Agency have contributed to this topic of police conduct and complaints which is a topic also relevant to other Australian States and Territories.

⁶⁴ For much of the 20th Century, police were enforcers of exclusionary social orders that were intended to keep Aboriginal and Torres Strait Islander people in Australia ‘off the streets’ (Cunneen 1999).

The potential conflict punitive measures have with human rights standards is strong. A failure to comply with international standards involves the Convention on the Elimination of All Forms of Racial Discrimination (CERD) which argues the need to eliminate racism in the administration of justice (Article 5). Zero tolerance style policies and policing have a clearly foreseeable discriminatory impact on Aboriginal and Torres Strait Islander people because of the strong focus on public order offences. Whether this is intentional is irrelevant, as intentions are not important here, as the result through indirect discrimination is the same. Additionally, through the over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system, zero tolerance practices have the power to further entrench existing indirect discrimination(s) (Cunneen 1999).

The Flemington and Kensington Community Legal Centre's reports of young people enduring humiliating experiences when encountering police, such as being told to empty their pockets, lift up their shirts and provide their mobile phones where no consent to the search is given suggested that they were arbitrarily and unlawfully targeted, searched, deprived of their property and effectively deprived of liberty through their detention for the duration of the search (Hopkins 2007).

The Youth Advocacy Centre in Brisbane reported research showing that 'street harassment' of young people was a common problem (1993). Young people from marginalised backgrounds were seen to spend most of their lives in public where their behaviour is highly visible.

...in any contact with a police officer, the child depends on the conduct of the officer for the enjoyment of their rights, relies on the officer to fully respect those rights and is at the mercy of any officer who chooses to infringe or violate those rights. We therefore place the full burden for respecting the child's rights and for protecting the child from rights violations on the officer dealing with the child (Blagg & Wilkie 1997:5).

Complaints

Complaints about police is not a topic that is given due attention by the media or Government. The police have a large media unit in addition to the police union (called the police association) which has been called the Victoria's s most powerful union.

In the eighties, an Independent Police Complaints unit was established in Victoria. The Police agitated for its abolition and it was abolished within a couple of years of its establishment. Since that time there have been a couple of name changes for the "police who *police* the police" who today are called the "Ethical Standards Division" (ESD). There is also a branch of the Ombudsman's Office who oversees police complaints. The Ombudsman's Office does *not* do the actual investigation in relation to a complaint against a police officer, the ESD do that.⁶⁵

An attempt to provide a window on how the Police-Koori relationship operates today was provided by a report titled *Kooris and Jungais* (2000).⁶⁶ Four main themes where perceptions vary between the two groups are highlighted in this report:

- Police generally have very little understanding or appreciation of the historical role of the police in dealing with Aboriginal and Torres Strait Islander people;
- Kooris perceive high contact levels with police as in part due to unfair police practices and the effects of colonialism while police perceive high crime rates to be due to Koori behavioural problems and poor family structure;
- Kooris are frustrated at the alleged level of violence against them; and

⁶⁵ A more recent trend has been for people to sue the police for damages. There has been some success for people taking this avenue and in response, some who oppose the suing of police argue for changing the law to stop people being able to sue police. It could be argued that in light of the situation outlined above, the only formal legal mechanism with a robust prospect of success for people with complaints about police is civil action.

⁶⁶ This VALS commissioned report summarised interviews of Police and Kooris. The report was attempting to identify the attitudes that each group had about each other.

- Kooris perceive over policing in the context of racism while police believe that they use their powers fairly.

The results of this report highlight the radically difficult experience of the police that Kooris have had compared to most other people in society. If it is rare for non-Aboriginal and Torres Strait Islander people to make police complaints it is far less likely that Kooris will make police complaints. VALS has major concerns with the handling of complaints by Aboriginal and Torres Strait Islanders about police. VALS is pleased that after an absence of a presence of Aboriginal and Torres Strait Islander Peoples in the Office of Police Integrity for a couple of years, there is now a Koori Project Officer.

Given the unique nature of the relationship between Aboriginal and Torres Strait Islander Peoples and the criminal justice system, there was need for the *Royal Commission into Aboriginal Deaths in Custody* in 1991. The Royal Commission found that the number of Aboriginal and Torres Strait Islander deaths in custody is not due to more Aboriginal and Torres Strait Islander people dying but the fact that Aboriginal and Torres Strait Islander Peoples are over-represented in the criminal justice system. On the basis of 2006 data stated in the Koori Complaints report Aboriginal and Torres Strait Islander people comprises 0.6% of the total Victorian population, but the contact rates with police are not commensurate as Koori people are almost 6 times more likely to come into contact with Victoria Police than the general population.⁶⁷

Significantly, “[the increased contact with police by Indigenous people does not translate into increased representation in complaint data]” and this is a large problem as in order to change police culture complaints need to be filed and followed through.⁶⁸ The Koori Complaints Report recorded that 103 Koori individuals lodged complaints in the 15 year period between 1991 and 2006. ‘The largest number of allegations made by Kooris, (almost 40%) related to assaults by police at arrest, followed by racist language or abuse, failure to provide medical assistance and harassment. The only new type of complaint recently identified is the one involving the use of capsicum spray (OC).

Data sets analysis from Victoria Police now confirms that Kooris receive 12 times the rate of OC spray as the standard population. Injuries located in the complaint files included permanent brain damage, broken cheekbones, severe facial injuries, cuts, dislocations, abrasions and soft tissue injuries including eye injuries.”⁶⁹ The report makes a distinction between complaints of Kooris and the general public. The general public complain either about low-level issues police behaviour such as courtesy, or failures to provide proper service (duty failure) or very high-level accusations of criminal activity. The complaints “made by Koori people are that they believe they are “over-policed” and are subjected to harassment in the form of constant scrutiny, checks, arrests and surveillance”.⁷⁰ Given the level of harassment Aboriginal and Torres Strait Islander Peoples experience it is VALS’ policy to deal with criminal matters first before a police complaint to ensure that the criminal proceedings are not compromised.

The Koori Complaints Report contains suggestions on how to improve the system and VALS agrees with an assessment made that “[t] would be reasonable to expect low levels of complaints to continue, until these changes are made.”⁷¹

⁶⁷ Victoria Police & Department of Justice (2008) *Koori Complaints Project 2006-2008: Final Report* Melbourne: Ethical Standards Department, Victoria Police & Indigenous Issues Unit, Department of Justice.

Victoria Police & Department of Justice (2008) p.7.

⁶⁸ Victoria Police & Department of Justice (2008) above no 68 p.8.

⁶⁹ Victoria Police & Department of Justice (2008) above no 68 p.18.

⁷⁰ Victoria Police & Department of Justice (2008) above no 68 p. 19.

⁷¹ Victoria Police & Department of Justice (2008) above no 68 p. 23.

Case Study 8: 15 year old intellectually disabled male

A 15 year old intellectually disabled boy in the Bendigo area advised his youth justice worker and a VALS' solicitor that he made admissions to a detective following being slapped around the ears and told "don't lie", when he denied the allegations put. There was a complaint lodged with the Office of Police Integrity (OPI) and it was deemed serious enough to be investigated.

The client was in custody in relation to other matters and whilst having a conference at the Bendigo police station, the client and the VALS solicitor were both approached by an investigating officer, who is believed to be located at Bendigo, for an interview in relation to his complaint. The investigating officer said that he believed there was some intimidation by the detective but not the extent alleged and that because of the evidentiary problems with no independent witnesses, it would not be taken any further. The VALS solicitor involved stated that:

"one of the most troubling things about the handling of the complaint was that the investigating officer was familiar with the client and his extensive criminal history, and therefore the discussion of the complaint was interspersed with questions such as 'why do you continue to do these things'?. I tried to isolate the discussion to the complaint only as I believed it inappropriate to attack someone for their criminal history in such a forum. The process is totally flawed, complaints should not be handled by officers from the station that the investigated officer is located".

Case Study 9: 15 year old Aboriginal and Torres Strait Islander male

In March 2004, VALS acted for a young Koori male, allegedly assaulted by police in 2000. On 31 May 2004, His Honour Judge Campbell handed down a Judgment in favour of VALS' client, awarding him seventy one thousand dollars in Damages, taking into account interest he was entitled to \$89,463.00. The Judge found against the three Defendants (police officers) and apportioned part of the liability to the State of Victoria. The Judge awarded Costs against all Defendants jointly and severally which were a substantial amount.

Case Study 10: Adult male

An Aboriginal male complained about police conduct in 2004 to the Ombudsman's Victoria. The alleged stolen car the man was driving was immobilised by police, thus disarming the electronic components of the car. Police forced their way into the car by amongst other things breaking the glass window and pulling the male out of the car and tackling him to the ground. The man claims that he was hit with batons, punched, kicked and slammed head-first into a car. Witnesses likened it to the 1991 bashing of Rodney King by Los Angeles police; one said it was "20 times worse."⁷² The Ombudsman did not find in favour of the complainant and instead found that the behaviour of police was justified and within the law. However, the complainant received a confidential sum of money as an outcome of mediation in the face of a pending County Court lawsuit.

Hopkins (2009) discovered that routine police abuse reported to the Legal Centre included:

- assaults by punching people while they are handcuffed;
- slamming people's heads against interview walls;
- threats to kill made during assaults;
- using capsicum spray as a punishment; and
- producing a firearm during a raid of an unarmed child and in the presence of very young children.

Many of the above instances were reported to the Legal Centre and were made as complaints to the Office of Police Integrity (OPI). They were all found to be unsubstantiated following a police investigation. It can therefore be argued from the experience from one Community Legal Centre alone, that 'the pattern of human rights violations reported by people of migrant descent is strongly indicative of institutional racism within Victoria Police' (Hopkins 2009:13).

⁷² Police pay injured 'Rodney King' man, *Herald Sun*, 22 August 2008 as at <http://www.news.com.au/heraldsun/story/0,21985,24221234-2862,00.html>.

The Stephen Lawrence Inquiry (1999) into racism within the Metropolitan Police defined institutional racism to be:

The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people⁷³

Now that Victoria has a *Charter of Human Rights and Responsibilities 2006*, Victoria Police has publically announced a commitment to the upholding of the rights found in the Charter. It is the job of the OPI to make sure that Victoria Police are observing the Charter. Hopkins argues that each of the above reports made from people in Flemington and around Victoria are allegations of Charter violations and indicates that Victoria Police are not compliant with the Charter.

VALS was not surprised to learn from Hopkin's (2009) report that the Office of Police Integrity investigated only 3% complaints made to it (2009:16). VALS agrees with the analysis she provided that as a result the Office of Police Integrity "... is doing little to ensure police compliance with the Charter and is therefore complicit in these Charter breaches". The Koori Complaints Reports (2008) contained data involving 64 complaints of assault by a police officer on an Aboriginal or Torres Strait Islander person between 1991-2000 and almost half were handed by the direct line manager. Only 1.2% of the most serious and most common type of complaints – assault by police – were 'substantiated' as a consequence of a police investigation. After the complaint was investigated, a Koori complainant was not informed in any manner of the outcome of their complaint in 26.2% of files reviewed.

The Commissioner for Human Rights Concerning Independent and Effective Determination of Complaints against the Police (European Commission of Human Rights) identifies that effective investigation is a state initiated investigation that is:

- a) Independent;
- b) Adequate and capable of resulting in discipline and prosecution of perpetrators;
- c) Prompt;
- d) Transparent and open to public scrutiny; and
- e) Involves and protects the victim of the alleged abuse.⁷⁴

The example below demonstrates clearly the difference in investigations against police from one jurisdiction to another:⁷⁵

While police retain the power to investigate themselves, human rights breaches will continue to occur and will go unpunished. What is more, as these behaviours persist over time without remedy, they continue to exist as part entrenched culture within the police force. If this cycle is not broken, trust between community and law enforcement cannot be achieved and Australia will remain a country who's supposed gatekeepers of peace and safety conversely act to breach our human rights.

⁷³ <http://www.archive.official-documents.co.uk/document/cm42/4262/sli-06.htm#6.6> [accessed 21 May 2009].

⁷⁴ <https://wcd.coe.int/com.intranet.InstraServlet?Index=no&command=com.intranet.CmdBlobGet&IntranetImage=1174204&SecMode=1&DocId=1376740&Usage=2> March 2009, page 3 [accessed 21 May 2009].

⁷⁵ As noted in Hopkins (2009) p.17.

Reform Police Complaint Procedures

Hopkins' (2009) recommendations include (but are not limited to) the following:

Independence

- Investigations of allegations of misconduct, criminality and human rights abuses must be conducted by an agency that is not only institutionally independent of police but also practically, culturally and politically independent. This means that the use of former police officers should be minimal if at all.

Adequacy of Investigation

- Police suspects and witnesses must be separated and interviewed immediately for both criminal and administrative purposes or no later than 24 hours after notification of the details of a complaint. Refusal to participate in an administrative interview must be grounds for dismissal.

Public Scrutiny

- Weekly or fortnightly analysis from the police complaint agency and accountability experts and human rights bodies should be publicly reported describing current trends in complaints. Disciplinary action, civil litigation and prosecutions against police should all be regularly reported.

Involvement of the Victim/ Effective Participation

- Complainants should be provided with a lawyer paid for by the State.
- Complainants should be able to choose not to have their complaint investigated. However this decision should not be because they have not been adequately resourced or have been intimidated.
- There should be established a Police Complaint Civil and Disciplinary Proceedings List at the Magistrates' or County Court. Magistrates or Judges hearing these matters could be provided with the power to:
 - a) judicially determine complaints on the balance of probabilities,
 - b) award compensation to victims and
 - c) make prosecutorial recommendations to the DPP,
 - d) demote and dismiss police from employment, (including police who refuse to testify⁷⁶); and
 - e) recommend policy and procedural changes within Victoria Police.

Police enthusiasm for informal approaches ignores the problem that an informal approach may not always be in individual's best interest and police are going to have difficulty being objective about complaints about their colleagues.

Police investigating police

VALS agrees with a quote from the Australian Law Reform Commission in 1995 that Hopkins included in her report: '[t]o ask the police to investigate complaints against their own places them in a 'hopeless conflict of interest position'. Police investigators, whether consciously or otherwise, will tend to be sceptical of complainants and will be 'softer' on the police concerned. The Aboriginal community has no faith in police investigating police.'

The Victorian Implementation Review of the Recommendations from the Royal Commission into Deaths in Custody provides some insightful comments from Kooris which illustrate the lack of confidence:

⁷⁶ Police must give evidence under compulsion through this process, but their evidence should not be admissible in criminal proceedings.

... ESD don't even take your complaints seriously. ESD is Police investigating Police! Police are not interested in resolving complaints. All they want to do is break your spirit." (2005:423)⁷⁷

Case Study 11: Mr Paul Wayne Carter (D'ced)

Patterns of ongoing mistreatment by police when dealing with members of the Aboriginal and Torres Strait Islander community, and the failure to seek accountability and remedy in such instances, is starkly highlighted through the Inquest into the death of the late Mr Carter an Aboriginal man who was left by police on the Sturt Highway near the Mildura airport almost three years ago. He was subsequently struck by a heavy transport vehicle and died. While the Coroner ruled that Mr Carter's death was suicide, the conduct of police and the management of affairs following Mr. Carter's death are indicative of massive failings.

Mr Carter was an Aboriginal man with a cognitive impairment, and both a mental illness and substance abuse history. He was 33 years old at the time of his death. He died just after midnight on August 7, 2006. On post mortem toxicological examination, he was found to have a blood alcohol content of 0.17 and traces of the active ingredient of cannabis.⁷⁸

In the early hours of Sunday 6th August 2006, Mr Carter learned that his brother had died suddenly from an epileptic seizure. In the early evening Mr Carter left a family gathering and went to the home of his girlfriend. Mr Carter was the subject of a complaint of disturbance at her home and two police vans attended. Mr Carter travelled away from the residence in the van driven by C/ Ritchie with S/C Hoyle.

The Coroner Her Honour Judge Coate made findings including (but not limited to) the following:⁷⁹

- On the balance of probabilities when Paul left Ontario Ave attended by four police members in uniform, Paul would have believed on reasonable grounds that he had to leave with the police and was in their "custody" at that point within the meaning of common law. He was therefore in police custody up until he was left on the Stuart Highway.⁸⁰
- In the circumstances it was not found that Paul was in custody at the time he was struck by the truck.
- Paul was in the "care" of the police once they transported him from Ontario Ave in the sense that they were still required to make decisions about him consistent with his welfare.⁸¹
- S/C Hoyle and C/ Ritchie did not know Paul's blood alcohol reading however they did know that he was an alcoholic prone to erratic behaviour, and they did know that his brother had died that day.
- The request by Paul to have him placed on the side of the road, 13 kilometres away from his father's home at midnight in the middle of winter on the day that his brother has died should have alerted S/C Hoyle and C/ Ritchie that Paul may not have been making appropriate decisions about his own safety.⁸²
- Ultimately, regardless of whether Mr Carter was in "*police custody*" at the time, or had requested to be taken out to the Stuart Highway, the Coroner found that S/C Hoyle and C/ Ritchie knew:
 - Paul was a vulnerable Aboriginal man who was an alcoholic and whose brother had died that day;
 - Paul was unpredictable and erratic with a low intellect;
 - his girlfriend had ended their relationship that night;

⁷⁷ Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody (2005) Vol 1:422 in Victoria Police & Department of Justice (2008) p. 24.

⁷⁸ State Coroner Victoria, Delivered 13 May 2009 at Mildura Court, p.1.

⁷⁹ Please note the findings noted are paraphrased, but done strictly and reflect the exact information found in the footnoted sources.

⁸⁰ State Coroner Victoria (2009) paragraph 158, p. 32.

⁸¹ State Coroner Victoria (2009) paragraph 161, p. 32.

⁸² State Coroner Victoria (2009) paragraph 239, p. 48

- Paul bore the visible physical scars of self mutilation;
- Paul had a long and detailed criminal history with Victoria Police;
- S/C Hoyle knew that Paul was on bail on serious criminal charges involving volatile, irrational behaviour only weeks earlier;
- that the location where Paul was delivered was a dark stretch of open highway that had no footpaths and is an interstate trucking route and was approximately 13 kilometres from his father's home; and
- that he was dressed in relatively dark clothing;⁸³
- The actions of these two police members were not comparable to a situation where the members were under any pressure to make a quick operational decision. Indeed they went considerably out of their way to take Paul out to where they left him.⁸⁴
- Whilst S/C Hoyle and C/ Ritchie were not in the station and able to personally access their system, the evidence was that the information was readily available to them that night via the radio operator. A simple enquiry would have alerted them to the potential risk.⁸⁵
- Transporting intoxicated people into safe places or diffusing situations by taking people out of those situations is good policing, however this needs to be properly supervised and documented and must result in ensuring that the person removed is delivered by police to a destination that is safe and reasonable.⁸⁶

S/C Hoyle and C/ Ritchie left Paul in inherently dangerous circumstances.⁸⁷

- The general exercise of common sense and humanity may have prevented Paul's death on this night in these circumstances. No particular expertise was required to make an assessment that the action taken by S/C Hoyle and C/ Ritchie was not a safe or reasonable one.

S/C Hoyle and C/ Ritchie were the first two police to arrive at the scene after Mr Carter was struck and killed. This raises questions about whether or not the scene was appropriately secured to preserve evidence and whether or not the officers involved should have been allowed to be at the scene engaged in the securing of it and communicating with each other. While the officers involved highlighted the urgency of need in securing the highway and diverting traffic immediately as an explanation, the Coroner expressed this was highly undesirable but reasonable in the circumstances.

However what was found as 'not an acceptable explanation in these circumstances' was the communication between S/C Hoyle and S/C Giles (member of second van attending at Ontario Avenue) via mobile phone at this critical time instead of communicating via the radio:⁸⁸

The higher need to be served in these circumstances...was to ensure that any necessary communication between the two of them for the purposes of securing or controlling the accident scene be over the radio and therefore in public and recorded and that there be no other communication, and definitely not by mobile phone.⁸⁹

A Media Release was issued by VALS on the 18th April 2008 which stated that VALS strongly contends that the death of Mr. Carter is an Aboriginal death in custody. Further, in relation to the deficiency of the Police response that night, VALS contends that this matter exposed both an

⁸³ State Coroner Victoria (2009) paragraph 241 (a)-(j), p. 49.

⁸⁴ State Coroner Victoria (2009) paragraph 243, p. 49.

⁸⁵ The electronic LEAP system has been developed and is used by Victoria Police for (inter alia) flagging and recording warnings about the known risks and vulnerabilities of people with a police history. This flagging system was designed to include information to alert members that a person poses a particular type of threat to police, the public or themselves. The risk to police and risks to Paul were all well documented and seemingly readily available (see State Coroner Victoria (2009) pg 51-52).

⁸⁶ State Coroner Victoria (2009) paragraph 256, p. 52.

⁸⁷ State Coroner Victoria (2009) paragraph 245, p. 49.

⁸⁸ It was submitted by Council on behalf of S/C Hoyle that it was preferable to communicate this way to avoid open communications over the radio, capable of being heard by a "scanner" or to "clog up" the radio and deprive others of being able to use the radio at this time.

⁸⁹ State Coroner Victoria (2009) paragraph 102, p. 21.

inadequate assessment of risk and negligence in relation to the duty of care that should have been afforded to Mr. Carter:⁹⁰

VALS maintains that in such an instance, where intoxication is evident, Mildura Police failed to perform appropriate risk assessment procedures, and were in disregard of the custodial role required by their attendance that night, particularly with reference to Standard Operating Procedures and well-established practices for dealing with Aboriginal Peoples in custody. In addition, VALS contends that the lack of a continuum of care witnessed in this case reflects a broader, systemic problem with in Victoria Police in relation to responses to intoxicated persons.

As stated by Coroner Coate, the on-going concern when police investigate police is that there will always remain a perception that the investigation may be less rigorous as a result of potential sympathy for a colleague. Also:

- The taking of statements from S/C Hoyle and C/ Ritchie was not audio or video recorded; and
- They were not interviewed using the standard procedure for suspects for indictable criminal offences. This does not address the need for absolute transparency and scrupulous documentation.⁹¹

The Coronial Inquest revealed many problems around treatment by police, complaints against police and police investigating police. In terms of police/Aboriginal and Torres Strait Islander relations in Mildura, the Coroner stated that the evidence generally produced disparate views. While the Inquest touched upon this wider issue, it was not done so in any thorough or systemic way. There was, however, general evidence in statements and oral evidence⁹² that complaints made by Aboriginal people about police conduct were a pointless exercise. Further, the Coroner found evidence that Aboriginal people feared retribution from the police for complaints made about their conduct.⁹³

Evidence from two individuals provided Mr Carter's history of being assaulted by the police over the last five to six years. He had made one such complaint two weeks before he died. Mr Carter had never followed through with such a complaint. Another piece of evidence entered into the Inquest that potentially went to the question of whether or not Mr Carter asked to be taken out past the airport (as well as eluding to fallacy that police behaviour such as occurred on this night was a one-off) came from a Mr Leon Jones who gave evidence that when he heard about Mr Carter being left out in the bush he thought he should tell someone about his own experience.

Mr Jones stated that approximately a month before Mr Carter's death, he had been collected from his ex-partner's house because he was drunk. He thought he would be locked up or taken to his mother's house. He was quite happy to get into the back of the van. He stated that police drove for about ten minutes then the van stopped and the doors opened. He stated he got out and did not know where he was. When he asked the policeman where he was the policeman replied "home" and laughed. He stated that the police then drove away and he could see the lights of the airport and thereafter endeavoured to make his way home.⁹⁴ Coroner Coate makes a note that she found Mr Leon Jones to be a credible witness:

Given the evidence of the general unwillingness of Aboriginal people to make formal complaints in a court about police, Mr Jones stands out against this trend ...it is evidence to which Victoria Police should take particular heed.⁹⁵

⁹⁰ Victorian Aboriginal Legal Service (2008) *Media Release: the Death in Custody of the Late Mr. Mr Carter Carter* released 18th April 2008.

⁹¹ State Coroner Victoria (2009) p. 23

⁹² Of Barry Stewart, Sid Clarke and Andrew Jackomos.

⁹³ This evidence was not specifically directed towards police in Mildura.

⁹⁴ State Coroner Victoria (2009) paragraph 177-178, p.35.

⁹⁵ State Coroner Victoria (2009) paragraph 189, p. 38.

NAAJA (NT)

Police investigating police

Police complaints in the NT are dealt with under the “Interim Guidelines between Commissioner of Police and Ombudsman for the Handling of Complaints against Police” (the Guidelines).

The Guidelines provide that the Ethical & Professional Standards Command of the Northern Territory Police Force (EPSC) undertakes the investigations into complaints about Northern Territory police. The EPSC then reports to the Joint Review Committee (JRC) which comprises of the Commander of EPSC, the Deputy Ombudsman and other delegates of the Commissioner and Ombudsman.

The Guidelines require that “a police officer shall not be nominated to investigate a JRC complaint if there is any reason for a perceived or actual conflict of interest.” However, in our experience police investigating police results in actual bias (whether conscious or unconscious) and the strong perception of bias - from the outset many of our clients do not feel that the process will be, or can be, independent. This has also been an issue for our clients in coronial inquests as the deaths of their family members in police custody have been investigated by police.

Statutory time limits

There is a 2 month limitation period to sue the Northern Territory of Australia as vicariously liable for the actions of a police officer in the performance of his or her duties; s 162(1) Police Administration Act. This creates an impossible situation for Legal Services, in many cases we do not receive instructions about such matters within the two month limitation period. Where we do receive instructions in time, we then need to file writs to preserve the position of our clients (putting significant strain on our scarce resources), without being able to complete our investigations into the matter.

This is an extraordinary protection only available to police officers - the usual limitation period for a tort action is 3 years; s 12 Limitations Act.

The Police Administration Act does not provide a right to apply for an extension of time and it is undecided whether the right in the Limitations Act is available when suing police.

The view of the Northern Territory of Australia is that the 2 month limitation period in the Police Administration Act even applies to persons under the age of 18, although for all other torts the limitation period does not commence until the person is legally considered an adult. This point is also undecided.

Disciplinary proceedings against police officers must to be commenced within 6 months; s 162(6) of the Police Administration Act. The Guidelines state that “if the criminal investigation is likely to take longer than the time allowed for instituting disciplinary action (at present 6 months) then the JRC must give consideration to any recommendation for commencing disciplinary proceedings against a member before that time expires. The JRC will also give consideration to seeking an extension of the time for the commencement of disciplinary proceedings.”

In our experience, police complaints are rarely given priority and it can take years for the investigations to be completed, even where the initial complaint is serious (such as for false imprisonment or an excessive use of force). We have had cases where following the completion of the investigation report, we have raised concerns about the process used and/or the reasoning adopted and requested that the investigation be reviewed by the Ombudsman. This request has been refused on the basis that the time period for disciplinary proceedings had expired.

There is a 12 month limitation period for complaints to the Ombudsman. We have had matters where the failure of our clients to immediately complain (although their complaint was made within 12 months), has led to an adverse inference as to their credibility. We believe this fails to recognise that

Aboriginal people are often threatened or intimidated by police, unaware of the complaints process and/or unable to immediately access legal services to assist them in making a complaint, because they live in a remote location.

Poor investigations and analysis

In our experience, police culture will not entertain illegality or wrong doing on their part, particularly where the complaint arises in the context of an arrest and/or the intoxication of the complainant.

This results in a complaint process which is adversarial rather than independent. Complainants have a “burden of proof” that does not exist where complaints of wrong doing are made against someone other than a police officer.

We have had a number of cases in which we have serious concerns about the investigation process including:

- a) The failure to use an Aboriginal language interpreter.

We have acted in a number of matters where an interpreter was not used for the police interview with the complainant, although we believe that an interpreter was required. When we have raised this issue with the Ombudsman (when requesting that a review be conducted into the EPSC investigation), we were advised that the failure to use an interpreter was because the client’s legal representative had not specified that an interpreter was required.

In our view, this is extremely concerning. The Guidelines specify that “only suitably qualified, impartial and senior members shall be authorised to conduct investigations or conciliations”. Given the population of the Northern Territory, we would expect such senior members to be experienced in ascertaining when interpreters are required when interviewing Aboriginal people.

- b) Poor cross cultural communication skills then resulting in miscommunications which are then used to discredit the complainant.

There has been extensive academic analysis of the communication, cultural and language barriers for Aboriginal witnesses when giving evidence. However, we frequently see instances of these communication barriers in investigation reports resulting in complainants becoming confused and inconsistencies arising between their original complaint and the police interview. Rather than acknowledging or seeking to address these communication barriers, the investigation makes an adverse inference as to the complainant’s credibility.

- c) Repeated requests to have a legal representative at the interview, or at the conciliation are generally ignored by the EPSC.
- d) Unless there is corroborating evidence, which in our experience is unusual (noting that video recordings of police cells are only kept for 2 months), a complaint is only upheld where a police officer admits to wrong doing.
- e) The length of time taken to do investigations.
- f) Legally flawed analysis resulting in poor decision making.

Case Study 12 - James

Highlights issues about the use of interpreters, delays in investigation, weakness of recommendations, ineffectiveness of options such as disciplinary proceedings.

In this matter, James (through an interpreter) clearly instructed us that he was assaulted by a police officer (Senior Constable K) while crouched behind a tree and that our client had not used behaved aggressively or violently towards the police officer. A complaint was submitted on James's behalf on 31 August 2007.

On 6 November 2008, we received the JRC findings which showed that James was interviewed months after the original complaint was submitted, without an interpreter. The miscommunication that eventuated can be seen in the following extract from the interview:

Investigating Officer - the policeman follow you?

James - yeah

Investigating Officer - running, walking?

James - I running, 'hey stop' / Just took that, take rock and they throw one.

Investigating Officer - Lots of rocks?

James - Yeah, from rock, even hit me here.

Investigating Officer - Your feet?

James - Yeah - Did you fall down, or pushed down?

James - Ah. She push me.

Investigating Officer - The policeman push you?

James - No, that rock.

Investigating Officer - The rock push you?

James - No, this one throw it there, and like that there.

Investigating Officer - There's a rock and you stepped back, so you fall over?

James - Yeah, I fall over

Investigating Officer - Yeah.

James - And no tree, only a (inaudible).

Investigating Officer - Sorry?

James - No tree, I just sleep there.

Investigating Officer - There's a tree?

James - Only that thing, the stick?

Investigating Officer - Stick tree, little thin tree?

James - Yeah. From fire, fire out there.

Investigating Officer - So you hide there?

James - From must be and burnt.

Investigating Officer - Oh, yeah, so it was a burnt tree?

James - Yeah

Investigating Officer - Oh, I see so you ... ?

James - And I was sleep there. Got (inaudible) like that.

An issue was whether James had lunged towards the police officer such that the police officer may have been acting defensively. In our view, an interpreter was critical to explore this issue properly. We believe that the lack of an interpreter caused misunderstandings and confusion between the interviewer and James about the intricate chronology of events, as evidenced by the circular nature of the interview, and the number of leading questions asked.

We requested that the Ombudsman review the JRC's findings, pursuant to the Guidelines and requested as part of this review that James be re-interviewed with an interpreter.

The Ombudsman declined to do so. In her response, she stated "part of the issue" was NAAJA had not advised that an interpreter was required. The response went on that the "Investigating Officer would, if at all, have reached the conclusion (that an interpreter was required) once the interview was in the process of being conducted. Given there was already quite a delay in concluding the matter one could assume that the Investigating Officer would have just pushed ahead with the interview. I appreciate this is not an acceptable outcome."

We agree that this is not “an acceptable outcome” given that James was interviewed by the Investigating Officer at Berrimah Prison, a 20 minute drive from the office of the Aboriginal Interpreter Service.

The Ombudsman explained the reasons for the “justifiable delay” as being that James was not in the remote community where the events took place “at the same time as the Investigating Officer” and also because of an earlier request by NAAJA that we be present at all interviews with our clients.

However, NAAJA was never contacted with respect to our availability for an interview with James and thus it is difficult to see how this delay is “justifiable”.

Senior Constable K admitted to striking the complainant “a few times” or “at least twice” to his head or “head and back” with a police torch. The report thus found that Senior Constable K used a police-issued torch to strike James about the head and neck contrary to training. The report stated that the use of force by a torch could be equated in similar terms to the use of force by baton and noted that the “NT Police Defensive Tactics Manual” states that a baton should never be used in danger areas such as the head, face, back of neck and spinal region as it could result in serious injury or death.

The report recommended “formal counselling” for Senior Constable K because his conduct was not in line with NT Police training. However, no finding was made as to whether Senior Constable K used the torch in self defence as he claimed.

The Ombudsman refused to re-interview James because she considered that the re-interview of James “would not alter the recommendations made. Although the JRC was unable to resolve the events of the night due to the conflicting information, Senior Constable K’s conduct was still found not to be in line with NT Police Training and so formal counselling was recommended. Even if Senior Constable K’s conduct was found to be a breach of discipline I draw your attention to section 162(6) of the Police Administration Act which requires disciplinary action to be taken within six months of the breach”.

Case Study 13 – Jim

Highlights issues about delay in investigations, flawed decision making,

On 28 March 2007, NAAJA made a complaint on behalf of Jim about the actions of a police officer on 25 January 2007, attaching statutory declarations from Jim and a witness.

On 15 February 2008, we received the JRC report, but with one issue reserved as legal advice was sought about section 129 of the Police Administration Act. The complete report was finally received on 23 January 2009.

Following our receipt of the 15 February 2008 report, we requested that the Ombudsman review the following aspects of the complaint:

- a) whether the requisite standard had been met for intoxication warranting protective custody;

Jim’s complaint included that he was improperly placed in Protective Custody as he was not intoxicated. Under the Police Administration Act, the standard of intoxication for protective custody is “seriously affected apparently by alcohol or a drug”, however the JRC investigation accepted the police officer’s evidence that Jim was “reasonably intoxicated” and “intoxicated enough to be taken into protective custody.” We believe that this finding is legally inconsistent and also at odds with the evidence. In response to our request for a review, the Ombudsman responded that “on reviewing the available material it is clear that there are discrepancies in the accounts of all the witnesses both Police and civilian as to the level of affectation of Jim. The finding of the JRC on the balance of probabilities was that Jim was intoxicated enough to be taken into protective custody pursuant to s 128 of the PAA. Taking these factors into account, on balance the arrest and apprehension of Jim was lawful”. However, our experience in other cases is that where there are different accounts from witnesses, the Ombudsman will not make a finding on the balance of probabilities.

- b) that no reason was provided as to why Jim's version of events in his interview and his statutory declaration was dismissed, or why police officer's account was given more weight;
- c) there was no analysis of the police officer's accounts, that he tripped over a log and landed on top of Jim (this was never put to Jim for comment), nor that the police officer was standing with his hands on his hips (while Jim maintained that the police officer was standing with his hand on his gun holster);
- d) a witness who provided a statutory declaration supporting Jim was not interviewed.;

In response to our request for a review of these aspect of the findings, the Ombudsman stated that "(t)he preponderance of all the facts and circumstances relating to the allegation of assault as a whole do not convince me that the conclusion was so wrong that I should direct further investigation of this issue or reconsideration by the JRC unless medical evidence is provided". The lack of police records supporting Jim's allegation that he was assaulted by police refers to no injuries being recorded on police computer systems, no complaint to watch-house, no witnesses, no handcuffs used and no use of force form submitted. In our view, the absence of any evidence from police or police records corroborating a complaint of an assault by police should not be probative in determining whether it did occur.

Conclusion

These issues and case studies show that current mechanisms for monitoring police conduct in the Northern Territory do not currently protect human rights. This again highlights the need for national human rights protection. We call on this protection to recognize the comments by the United Nations Human Rights Committee on 2 April 2009 with respect to Australia that⁹⁶:

"The Committee expresses concern at reports of excessive use of force by law enforcement officials against groups, such as indigenous people, racial minorities, persons with disabilities, as well as young people; and regrets that the investigations of allegations of police misconduct are carried out by the police itself. The Committee is concerned by reports of the excessive use of the electro-muscular disruption devices (EMDs) "TASERS" by police forces in certain Australian states and territories (articles 6 and 7).

The protection must also out in place the Recommendation of the Committee that:

"The State party should take firm measures to eradicate all forms of excessive use of force by law enforcement officials. It should in particular: a) establish a mechanism to carry out independent investigations of complaints concerning excessive use of force by law enforcement officials; b) initiate proceedings against alleged perpetrators; c) increase its efforts to provide training to law enforcement officers with regard to excessive use of force, as well as on the principle of proportionality when using force; d) ensure that restraint devices, including TASERS, are only used in situations where greater or lethal force would otherwise have been justified; e) bring its legislative provisions and policies for the use of force into line with the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; and e) provide adequate reparation to the victims."

WESTERN AUSTRALIA

ALSWA's Civil and Human Rights unit assist Aboriginal people in making complaints to the Corruption and Crime Commission of WA (CCC) about police. Many complaints are received about a variety of matters including the targeting of Aboriginal and Torres Strait Islander people, excessive force (including taser guns), provocation and unlawful detention. The process of complaining to the CCC is difficult and leads to the strange phenomenon of police investigating police.

The following example of a human rights violation was reported by one person who completed the submission:

⁹⁶ Human Rights Committee, Concluding observations of the Human Rights Committee, Australia. See <http://www.hrlrc.org.au/content/topics/civil-and-political-rights/human-rights-committee-concluding-observations/#hide> at [21].

“My father was taken to hospital after suffering a ‘stroke’ in an ambulance. The staff in emergency dept through he was drunk and rang the police who then threw him in the police van headfirst. He suffered not only the stroke but intensive bruising, and broken ribs on top of that. He was taken for hours. He was 78 years old and was a stroke patient at the time. No one or anybody took responsibility for any of the people’s behaviour. My father died shortly after I believe from this mistreatment.”

5.15. PUBLIC SPACE⁹⁷

VICTORIA

The enforcement of public space laws is a human rights issue as was outlined in an article by the Victorian Aboriginal Legal Service titled ‘The Survival of Public Drunkenness Laws in Victoria’ which appeared in the Indigenous Law Bulletin (2008).⁹⁸ The article was written in the context of public drunkenness not being decriminalised in Victoria and points have been extracted from it below. In addition further points will be made by utilising case scenarios and discussing jurisdictions beyond Victoria. Matters that will be discussed are: indirect discrimination, risk of death in custody, public space, move on powers and sobering up centres.

The main contention of this section is that arguments made in VALS’ article can apply to Australian jurisdictions that have decriminalised public drunkenness, yet have introduced or are proposing to introduce laws that have the same effect as public drunkenness laws. This is a current and topical issue for Aboriginal and Torres Strait Islander Legal Services given the recent announcement in New South Wales to introduce laws relating to moving on people who slur their words. The new law, which amends the *Law Enforcement (Powers and Responsibilities) Act*, lowers the threshold from "seriously" drunk to "noticeably" drunk.

It is the fear of ATSILS that laws such as this will be replicated throughout the country over time given:

Inadequate national human rights protection:

There is currently no national human rights protection to analyse the introduction of such laws from a human rights perspective. It would be useful to require such laws to undergo human rights compatibility assessment processes, as in the case with the Victorian Charter of Human Rights and Responsibilities 2006 (Vic). The human rights implications are outlined in the section below titled case scenarios and relate to the issue of indirect discrimination.

Trends observed:

Public drunkenness laws have a tendency to reappear in different forms either through the application of existing laws or introduction of new laws. Such laws have different forms, for example move on powers or anti-social behaviour orders. Thalia Anthony refers to recent changes to the law in the New South Wales context as “recriminalizing intoxication”.⁹⁹ Other trends are: states often mimic what happens in other jurisdictions. Also, each jurisdiction faces pressures to get seen to be getting tough on crime and the smart on crime stance, which advocates for public drunkenness to be treated as a public health issue (i.e. sobering up centres) is overlooked.

Solution:

The specific solution to the issue of public drunkenness to treat it is a public health issue and properly resource sobering up centres for persons who are intoxicated and or committing minor

⁹⁷ The Victorian Aboriginal Legal Service wrote this section and much of it is relevant to the topic of police complaints outlined above. It is a topic that is relevant in other Australian States and Territories.

⁹⁸ May 2008 edition volume 7, issue 5, page 19.

⁹⁹ Anthony Thalia ‘Slurring laws will criminalise Aborigines, not stop crime’ Online Opinion as at <http://www.onlineopinion.com.au/view.asp?article=8918>.

offences of disorderly behaviour or offensive language. This is more appropriate than arresting them. '(p)ublic drunkenness, while a sad and worrisome spectacle, is not a crime'.¹⁰⁰

Case Study 14: Mr Carter

The Mr. Carter case scenario highlights issues relating to police treatment of people who are drunk in a public place (see above). In that case an appropriate duty of care was not executed. Another case scenario is that of an Aboriginal man local to the Fitzroy, Victoria area who has mental health problems and is often picked up for public drunkenness even though he has not had anything to drink.

The link between the risk of deaths in custody and public drunkenness is apparent by the fact that the majority of deaths investigated in the Royal Commission into Aboriginal Deaths in Custody were of people arrested for public drunkenness.¹⁰¹ More than half (67%) of the Aboriginal Deaths in Custody investigated by the RCIADIC were related to arrests due to public drunkenness.¹⁰² Another example is the Ward case.

The laws concerning public drunkenness disproportionately affects Aboriginal and Torres Strait Islander people because:

- Some Aboriginal people use public space as cultural space and hence are more visible to police than non-Aboriginal and Torres Strait Islander Peoples. This is highlighted through statistics such as found in 2005 by the Australian Institute of Criminology that identified public drunkenness as a key issue relating to police custody. In October 2002 it was also found that of those detained by police there were 17 times more Aborigines than all other groups".¹⁰³
- The law is used a mechanism for the social control of Aboriginal and Torres Strait Islander people.

5.16. PUBLIC TRANSPORT

WESTERN AUSTRALIA

ALSWA have a number of concerns about public transport in relation to Aboriginal and Torres Strait Islander people. These issues are of particular concern to Indigenous people because, due to intergenerational poverty, a high proportion are forced to rely on public transport. Concerns include:

- the way transit guards (which are officers employed by the Public Transport Authority to police the Perth metropolitan train system) target Aboriginal and Torres Strait Islander passengers;
- issues of excessive force;
- new laws that are being introduced in WA that will allow the Public Transport Authority to indefinitely ban people from using public transport; and
- the lack of public transport in regional and remote areas of WA.

¹⁰⁰ The Age Online Editorial 'Public drunkenness, while ugly, should not be a crime', 29 April 2007, as at <http://www.theage.com.au/news/editorial/public-drunkenness-while-ugly-should-not-be-a-crime/2007/04/28/1177460039280.html>.

¹⁰¹ Royal Commission into Aboriginal Deaths in Custody (1991) Vol 2 para 21.1.2.

¹⁰² Victorian Aboriginal Legal Service 'Suggested Review of the Summary Offences Act and the Vagrancy Act' 1999

¹⁰³ Anthony T (2009) 'Slurring laws will criminalise Aborigines, not stop crime' *Sydney Morning Herald* [online] <http://www.smh.com.au/opinion/slurring-laws-will-criminalise-aborigines-not-stop-crime-20090511-b0ir.html?page=-1>.

5.17. SELF-DETERMINATION

VICTORIA

VALS has long advocated for support for the United Nations Declaration on the Rights of Indigenous Peoples. In the Social Justice Report 2002, the then Aboriginal and Torres Strait Islander Social Justice Commissioner, Dr William Jonas, was blunt in his assessment of the Commonwealth Government's position on the rights of Aboriginal and Torres Strait Islander Peoples saying the Governments are relying on:

... inflammatory, provocative untruths to reject Indigenous self-determination. This is shown by the suggestion, mysteriously made 'by some' but clearly endorsed by the Government's uncritical recitation of it, that self-determination may amount to a unilateral right to secede from Australia... There is no historical precedent or basis in international law for the suggestion that a State could be dismembered unilaterally. It is in fact such an absurd suggestion that the only conclusion that can be drawn from the Government's reliance upon it is that it is a deliberate untruth aimed at raising fear and opposition from non-Indigenous people

The Declaration itself, at Article 46, highlights that the Declaration does not create the right to secession:

Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

The failure to include the right to self-determination in the Victorian Charter is unacceptable and the Human Rights Consultation Committee's reasoning put forward for the decision was inconsistent with the views of the Dr William Jonas, the Aboriginal and Torres Strait Islander Social Justice Commissioner in 2002, and against the spirit if not the letter of State Government policy. Given the State Government's diverse effort to improve Aboriginal and Torres Strait Islander people's rights the Charter's exclusion of self-determination from the Charter is a poor reflection of existing good practice and a similar position to the anti self-determination policies advocated by the Commonwealth Government. This same or a similar action/omission cannot be allowed within the drafting of a National Human Rights Charter.

The right to self-determination is included in the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESC) (Article 1 respectively). The Commonwealth Government has been opposing the right to self-determination at both an international level and at a domestic level via a range of policies including mainstreaming services and tendering out funds for services.

At an International level, the Commonwealth Government has been putting the argument that the right to self-determination is synonymous with support for secession. The Aboriginal and Torres Strait Islander Social Justice Commissioner Report (2002) makes it abundantly clear that this argument is mischievous and wrong in political and legal terms. Dr William Jonas says: "...it is a deliberate untruth aimed at raising fear and opposition from non-Indigenous people" (2002: 48).

The arguments made by the Human Rights Consultation Committee to exclude the right to self-determination from the Charter partially rely on the idea that Aboriginal and Torres Strait Islander rights are best protected by generic protections, rather than specific protections. Aboriginal and Torres Strait Islander academic Professor Larissa Behrendt was quoted in the Committee's Report as supporting this view. VALS does not believe that this 'either/or' approach is consistent with Behrendt's approach in her book *Achieving Social Justice* (2003) or comments that she made on August 10th at a Melbourne forum about the Charter. Some State Government policies and the

analysis by Behrendt exemplify the value of a ‘both/and’ approach which values both generic and specific policies to protect rights.

The Human Rights Consultation Committee (Vic) appeared to believe that the right to self-determination is something to be feared as is reflected by the following quote:

[t]he Committee is concerned that, in the absence of settled precedent about the content of the right as it pertains to Indigenous Peoples, the inclusion of a right to self-determination may have unintended consequences.

There has seldom been a piece of legislation which does not have unintended consequences so it is difficult to contest this assertion by the Committee. If Government’s or communities waited for ‘settled precedent’ prior to doing anything the role of Governments in making legislation would be very limited. Deferring consideration of self-determination until there is settled precedent is tantamount to deferring it for a very considerable time. The Committee’s argument about the ‘unintended consequences’ of introducing the right to self-determination in the Charter is an argument that invokes emotion rather than an objective risk assessment of the impact of implementing the right to self-determination in Australia.

‘Both /And’ Approach Versus ‘either/Or’ Approach to Self-Determination

The Human Rights Consultation Committee that overlooked the crafting of the Victorian Charter of Human Rights and Responsibilities used the argument that generic measures are best advanced through laws that are applicable to everyone as a rationale for excluding the right to self-determination from the Charter. This position excludes the both/and option of generic and specific protections.

The Committee’s Report did not specifically address the issue of formal versus substantive equality but in the discussion of individual versus group rights it says: ‘Although the Committee recognises that many people see their rights as having a communal aspect, we note that generally human rights are seen as attached to individuals. Therefore the Committee believes that the Charter should only confer rights upon individuals’ (Department of Justice 2005:51). VALS believes that this approach will disadvantage cultures which place less emphasis on individual rights. It is a form of systemic disadvantage. It is also another example of unnecessary use of ‘either/or’ thinking. It is open to the Committee to include individual and group rights in the Charter, which is a ‘both/and’ approach.

One who takes a ‘both/and’ approach argues that there is a place in a Charter for *both* rights that reflect the theory of ‘formal equality’ *and* rights that reflect the theory of substantive equality. These two notions can co-exist. This would mean that the Charter could apply to individuals and groups and include generic and specific provisions.

The ‘both/ and’ approach is adopted by the Committee in part as it applies this approach to cultural rights. However, the Committee does not apply this approach to the right to self-determination and VALS is critical of this inconsistency.

Self-determination in the eyes of the Federal Government

According to Dr William Jonas, the Federal Government’s history of rejections of the right to self-determination relies upon:

...inflammatory, provocative untruths” which is shown by the “suggestion mysteriously made ‘by some’ but clearly endorsed by the government’s uncritical recitation of it, that self-determination may amount to a unilateral right to secede from Australia ... there is no historical precedent or basis in international law for the suggestion that a state could be dismembered unilaterally. It is in fact such an absurd suggestion that the only conclusion that can be drawn from the Government’s reliance upon it is that it is a

deliberate untruth aimed at raising fear and opposition from non-Indigenous people (2002:47-48).

The verbal advice that VALS has received from legal academics is similar to the view of Dr Jonas, that the idea of secession is nonsense and would only ever be possible by consent.

Anaya (1996) suggests that self-determination has a 'constitutive' aspect relating to the requirement that the governing institutional order be developed through the will of the Peoples governed. It also has an 'ongoing' aspect which means that the governing order be one that people can live in, and develop freely within, on a continuing basis. He suggests that de-colonisation does not require turning the clock back but that remedies can be developed in accordance with the present day aspirations of the aggrieved Peoples.

Anaya (1996) also suggests five standards which are elements of self determination:

- non-discrimination;
- cultural integrity [e.g. right of self-definition - in terms of the basic concept of Aboriginality (recognised by, and accepted as) Aboriginal Peoples are entitled to determine who is an Aboriginal person, and e.g. cultural heritage rights - right to adequate protection by appropriate procedure];
- lands & natural resources, (e.g. ref to recognition and affirmation of existing Aboriginal rights/native title rights;
- social welfare and development; and
- self government (especially in matters regarding Aboriginal and Torres Strait Islander internal and local affairs, including culture, religion, education, information, health, housing, economic activities etc as per the Draft Declaration on Indigenous Peoples Article 33).

VALS supports the 'both/and' approach to self-determination e.g. generic protections which (at least on paper apply to all) and specific protections where necessary which apply to minorities. This approach has already been partially adopted by the Victorian Government. The Victorian Government policy is reflected in the document titled 'A Fairer Victoria' and 'Victorian Aboriginal Justice Agreement' (VAJA) and Aboriginal Affairs Victoria's policy work on Aboriginal and Torres Strait Islander Representative Arrangements post Aboriginal and Torres Strait Islander Commission. The VAJA is underpinned by the recognition of the specific right of self-determination as it is based on the Government working in partnership with the Victorian Aboriginal community. The VAJA has introduced initiatives such as the Koori Court, which empowers Elders/Respected persons. Also, Section 4 of the VAJA articulates a commitment to consult with Aboriginal and Torres Strait Islander Peoples.

It is interesting, in light of Anaya's idea of an evolving understanding of self-determination that the Victorian Government is now renegotiating the VAJA. This highlights the idea of self-determination as something which evolves in response to circumstances, relationships and knowledge.

Opposition to Self-Determination at an International level

Dr William Jonas, the then Aboriginal & Torres Strait Islander Social Justice Commissioner (2002) argues that the right to self-determination is understood as a collective right, and as a right to distinctiveness or cultural identity, and furthermore that this right is granted on the basis of a complex, cultural, pre-modern relationship with the land. It is based on the belief that Aboriginal and Torres Strait Islanders are substantively distinct from the 'mainstream' Australian society, and the Government that represents them. As such, Aboriginal and Torres Strait Islander Peoples who declare their right to self-determination perceive themselves as autonomous or sovereign in some way.

Dr Jonas's conclusion is a logical outcome of the following arguments:

- The United Nations Educational, Scientific and Cultural Organisation (UNESCO) offers a much deeper and revealing definition of self-determination than the simple principle noted by the Committee that self determination means 'decision-making':

[Self-determination is] an ongoing process of choice for the achievement of human security and fulfilment of human needs with a broad scope of possible outcomes and expressions suited to different specific situations. These can include, but are not limited to, guarantees of cultural security, forms of self-governance and autonomy, economic self-reliance, effective participation at the international level, land rights and the ability to care for the natural environment, spiritual freedom and the various forms that ensure the free expression and protection of collective identity in dignity (emphasis added).¹⁰⁴

The last two lines of this passage indicate that these 'guarantees' listed under the right to self-determination all support providing Aboriginal and Torres Strait Islander Peoples with the right and/or capacity to live and be recognised as 'collectives' (i.e. as 'a people') that are distinct from the 'mainstream' of the modern, post-colonial society.

- Working from UNESCO's loose definition of self-determination, it can be understood as: (a) a necessarily collective right; and (b) a right to 'difference', to be recognised as belonging to a substantively distinct culture, community or people. These two aspects of self-determination are inseparable and should really be thought of as two sides of the same coin. (This is especially so in the modern liberal society, in which Aboriginal and Torres Strait Islander Peoples declaring their right to self-determination see themselves as a collective distinct from the individualist mainstream).
- The distinctiveness of Aboriginal and Torres Strait Islander Peoples is granted on the basis of their status as the "First Peoples" of the country, and the unique needs, values and beliefs that arise from this special relationship to the land. Cobo says:

Aboriginal and Torres Strait Islander communities, Peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or part of them. They form at present, non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as Peoples, in accordance with their own cultural patterns, social institutions and legal systems.¹⁰⁵

The right to self-determination is therefore particularly important for Aboriginal and Torres Strait Islander Peoples because of the strong relationship between land and culture. Daes provides four points on the importance of land for Aboriginal and Torres Strait Islander self-determination:

- "(i) a profound relationship exists between Aboriginal and Torres Strait Islander Peoples and their lands, territories and resources;
- (ii) this relationship has various social, cultural, spiritual, economic and political dimensions and responsibilities;
- (iii) the collective dimension of this relationship is significant; and

¹⁰⁴ Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, in Social Justice Report (2002) page 19.

¹⁰⁵ Aboriginal and Torres Strait Islander Social Justice Commissioner (2002) above n 105, page 16.

- (iv) the intergenerational aspect of such a relationship is also crucial to Aboriginal and Torres Strait Islander Peoples' identity, survival and cultural viability."¹⁰⁶

Dr Jonas continues by making an argument to allay the concerns for the Government. Contrary to the Federal Government's fears, the above concept of self-determination does not necessarily entail challenging the territorial integrity of Australia and demanding an independent and autonomous Aboriginal and Torres Strait Islander State. First, not only are such concerns unfounded in Australia, where the Aboriginal and Torres Strait Islander population is so small and dispersed and claims for secession have not been made, but 'the equation of self-determination with secession is made without reference to the existing state of international law and without an eye to history' (2002:26) For example, where a right to self-determination has been drafted, as in the UN Declaration on the Rights of Indigenous Peoples, provisions are included that protect the territorial integrity of states.

Commonwealth Policy within Australia

At a National level, the Federal Government has adopted a policy of mainstreaming Aboriginal and Torres Strait Islander services and in some cases putting Aboriginal and Torres Strait Islander services out to tender. This means the Federal Government is removing Aboriginal and Torres Strait Islander Australian specific services (substantive equality) and replacing them with mainstream services (formal equality). This policy undermines the right to self-determination as Aboriginal and Torres Strait Islander specific service delivery is an expression self-determination or empowerment as it enables people to take control of their lives (substantive equality).

Australians have seen a dramatic turning away from self-determination in Commonwealth Government policy in recent history. The abolition of the Aboriginal and Torres Strait Islander Commission (ATSIC) and the failure to replace it with an improved representative body weakens the opportunity for Aboriginal and Torres Strait Islander people to contribute to effective policy development in Australia. If there is going to be any Government support for progress in recognizing Aboriginal and Torres Strait Islander Peoples' right to self-determination it is going to have to come from the States in the short to medium term. VALS suggests that the Federal Government is in a position to demonstrate practically, that self-determination, like all the other Civil and Political rights can usefully and safely be included in a National Human Rights Charter. VALS argues that such a move would be of benefit to all Australians.

5.18. SILENCE

NAAJA (NT)

Background and Legal Framework

The Northern Territory *Evidence Act* protects the right to silence. Section 9(3) states that no adverse inference can be drawn against an accused person for exercising their right to silence. This is consistent with the presumption of innocence in criminal trials, and that it is for the prosecution to prove beyond a reasonable doubt that an accused person is guilty.

In the criminal process, the right to silence is fundamental. Because the admissions of an accused are of massive importance to the prosecution task of proving an accused's guilt, the right to silence is a protection that every accused person is not only entitled to, but which the law has strenuously defended. Thus, a confession is only admissible as evidence if it was made voluntarily, in the exercise of a free choice by the accused to speak or to remain silent.¹⁰⁷

The NT Police *General Orders* govern the process of police questioning of suspects. General Order Q1 provides that prior to questioning, police must caution a suspect in the following general terms:

¹⁰⁶ Aboriginal and Torres Strait Islander Social Justice Commissioner (2002) above n 105, page 24.

¹⁰⁷ See, for example *R v Lee* (1950) 82 CLR 133 at 149.

"I am going to ask you certain questions about (state briefly nature of inquiry) which will be recorded. You are not obliged to say anything unless you wish to do so, but whatever you do say will be recorded and may be given in evidence. Do you understand that?"

General Order Q2 states:

Great care should be taken in administering the caution when the stage has been reached that it is appropriate to do so. The suspect should be asked to explain what is meant by the caution, phrase by phrase. Questioning should not proceed until it is apparent that the suspect understands the right to remain silent.

R v Anunga and the Right to Silence

General Order Q2 was introduced in response to *R v Anunga* (1976) 11 ALR 412 where two records of interview between Aboriginal accused's and police were excluded from evidence. Forster J delivered the judgement of the Court, and explained why it was necessary to set up specific guidelines concerning the questioning of Aboriginal people to ensure the protection of their right to silence.¹⁰⁸

¹⁰⁸ The Anunga Rules are as follows:

- (1) When an Aboriginal person is being interrogated as a suspect, unless he is as fluent in English as the average white man of English descent, an interpreter able to interpret in and from the Aboriginal person's language should be present, and his assistance should be utilised whenever necessary to ensure complete and mutual understanding.
- (2) When an Aboriginal is being interrogated it is desirable where practicable that a "prisoner's friend" (who may also be the interpreter) be present. The "prisoner's friend" should be someone in whom the Aboriginal has apparent confidence. He may be a mission or settlement superintendent or a member of the staff of one of these institutions who knows and is known by the Aboriginal. He may be a station owner, manager or overseer or an officer from the Department of Aboriginal Affairs. The combinations of persons and situations are variable and the categories of persons I have mentioned are not exclusive. The important thing is that the "prisoner's friend" be someone in whom the Aboriginal has confidence, by whom he will feel supported.
- (3) Great care should be taken in administering the caution when it is appropriate to do so. It is simply not adequate to administer it in the usual terms and say, "Do you understand you do not have to answer questions?" Interrogating police officers, having explained the caution in simple terms, should ask the Aboriginal to tell them what is meant by the caution, phrase by phrase, and should not proceed with the interrogation until it is clear the Aboriginal has apparent understanding of his right to remain silent. Most experienced police officers in the territory already do this. The problem of the caution is a difficult one but the presence of a "prisoner's friend" or interpreter and adequate and simple questioning about the caution should go a long way towards solving it.
- (4) Great care should be taken in formulating questions so that so far as possible the answer which is wanted or expected is not suggested in any way. Anything in the nature of cross-examination should be scrupulously avoided as answers to it have no probative value. It should be borne in mind that it is not only the wording of the question, which may suggest the answer, but also the manner and tone of voice which are used.
- (5) Even when an apparently frank and free confession has been obtained relating to the commission of an offence, police should continue to investigate the matter in an endeavour to obtain proof of the commission of the offence from other sources. Failure to do this, among other things, led to the rejection of confessional records of interview in the cases of Nari Wheeler and Frank Jagamala.
- (6) Because Aboriginal People are often nervous and ill at ease in the presence of white authority figures like policemen, it is particularly important that they be offered a meal, if they are being interviewed in a police station, or in the company of police or in custody when a meal time arrives. They should also be offered tea or coffee if facilities exist for preparation of it. They should always be offered a drink of water. They should be asked if they wish to use the lavatory if they are in the company of police or under arrest.
- (7) It is particularly important that Aboriginal and other people are not interrogated when they are disabled by illness or drunkenness or tiredness. Admissions so gained will probably be rejected by a court. Interrogation should not continue for an unreasonably long time.
- (8) Should an Aboriginal seek legal assistance reasonable steps should be taken to obtain such assistance. If an Aboriginal states he does not wish to answer further questions or any questions the interrogation should not continue.
- (9) When it is necessary to remove clothing for forensic examination or for the purposes of medical examination, steps must be taken forthwith to supply substitute clothing.

Forster J gave two separate but overlapping barriers faced by Aboriginal people, particularly from remote communities. The first was language impediments: “Aboriginal people often do not understand English very well, and ... even if they do understand the words, they may not understand the concepts which English phrases and sentences express.”¹⁰⁹ Moreover, “Police and legal English sometimes is not translatable into the Aboriginal languages at all”¹¹⁰ and that “English concepts of time, number and distances are imperfectly understood, if at all.”¹¹¹

And the second was the relationship between Aboriginal people and authority figures such as the police. Forster J highlighted “the disadvantages ... which Aboriginal people suffer in their dealings with the police,”¹¹² sometimes leading to situations where Aboriginal people “will answer questions by white people in the way in which they think the questioner wants.”¹¹³

We raise the following recent case studies to highlight the current situation in the Northern Territory:

Case Study 15 (record of interview was excluded as inadmissible)

John has just turned 18 years of age. He was interviewed by police in relation to maintaining a sexual relationship with a child under 16 years of age. He initially told police that he did not want his grandmother present. He later changed his mind.¹¹⁴ Police, however did not stop the interview to arrange for his grandmother to be present. Instead, they simply continued the interview. After cautioning John, the officers did not ask John if he understood the caution or to repeat it in his own words. They simply started asking John questions about what happened. John answered police questions, and made several incriminating admissions.

Case Study 16 (Client pleaded guilty, record of interview therefore not challenged)

Bonita told police that she did not want to participate in an interview with them until she spoke to a lawyer. The police ignored this, making no attempt to allow her to contact a legal representative. They simply continued to question her. At the end of the interview, and after she made admissions, police ask Bonita if she had the opportunity to speak to a lawyer. Although she clearly was **not** provided this opportunity, Bonita states ‘yes.’

Case Study 17 (record of interview objected to, but allowed in. Appealed and held inadmissible)

Calvin is a young Aboriginal man from a remote community. English was not his primary language. Police ask him if he can read and write. Calvin says “yeah.” When asked if he can read big bit or little bit, he replies “little bit.” The police make no enquiries about what Calvin’s primary language is. Calvin’s mother is present at the interview as an interview friend to support her son. Police do not explain to Calvin’s mother what her role is in the interview process. Rather, police use her as an interpreter as opposed to arranging an independent and accredited interpreter. At the end of the interview, Calvin is asked to read the number on the interview cassette tape. He tells police that he is not able to read it.

Current Position

Unfortunately, notwithstanding the *Anunga* Rules as well as subsequent decisions affirming the guidelines established by *Anunga*¹¹⁵, it is our experience that in practice, the right to silence for

¹⁰⁹ *R v Anunga* (1976) 11 ALR 412 per Forster J at 413.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid* at 414.

¹¹² *Ibid* at 416.

¹¹³ *Ibid.*

¹¹⁴ Before being questioned, a person must be informed that they “may communicate with or attempt to communicate with a friend or relative to inform the friend or relative of the person’s whereabouts”; *Police Administration Act* (NT) s 140(b).

¹¹⁵ As an example, see *R v Cotchilli* [2007] NTSC 52, unreported, 23 October 2007 where admissions made after an accused told police he wanted to ‘sit quiet’ were held to be involuntary and inadmissible.

Aboriginal people in the NT continues to be routinely disregarded by the police. And this is of critical importance because as with Max's case study, it will not be in every case that admissions made in circumstances breaching the *Anunga* Rules and the NT Police *General Orders* will result in a court finding them to be inadmissible. Similarly, notwithstanding that their admissions might be later found to be inadmissible, an accused may well end up pleading guilty for other reasons. Often when a person's right to silence is disrespected, even if the admissions are ultimately held inadmissible in court, that person may make incriminating admissions which leads the police to further evidence that is subsequently used against them to secure a conviction.

In either case, it is our experience that police interviews periodically take place with Aboriginal suspects who either do not demonstrably understand their right to silence or are overborne when they seek to assert it. That these interviews continue to take place with such regularity with respect to Aboriginal people is, in our view, evidence of a fundamental denial of human rights, and of a vital need for such rights to be further protected in a Federal Charter. The Charter could specifically include a provision that upheld the right to silence by making it compulsory for police to ring ATSILS whenever an Indigenous person was taken into custody. This already happens in some Australian jurisdictions (such as NSW) at the moment but not in others (such as the NT). It would mean that Aboriginal people may be informed of their right to silence and assisted in seeking that it be upheld, if that is what they want.

We also note the importance a Federal Charter could have in relation to the role of ACC following the NT Emergency Response. The ACC has the power¹¹⁶ to undertake intelligence or to investigate "indigenous violence or child abuse" and the ACC's powers include special coercive powers including the capacity to compel attendance at examinations, to produce documents, and to answer questions (similar to the powers of a Royal Commission). A Federal Charter including protection of the right to silence would provide an additional mechanism for persons aggrieved by the ACC process to voice their complaint.

5.19. STOLEN GENERATIONS

The fact that two Aboriginal Legal Services have written about the topic of stolen generations highlights the need for a national scheme to address the human rights needs of members of the stolen generations.

WESTERN AUSTRALIA

During about a 30 year period between 1940 and 1970, thousands of Aboriginal children across WA, mainly those with mixed ancestry, were taken from their parents and put into missions according to their skin caste. Families were torn apart, hearts were broken and children were abused. In 2007, the WA government announced a scheme, "Redress WA" to compensate all children who had been abused in WA State Care up to the 1 March 2006, which included the 'Stolen Generations'. ALSWA has worked hard to keep up with the demand from Aboriginal people in regards to this scheme, which closed on 30 April 2009. Many statements have been taken and people counselled. Although the scheme is a step in the right direction for the WA government, the WA 'Stolen Generations' have still not received an apology, nor have their parents and families from which they were taken. The scheme focuses on abuse and lumps the 'Stolen Generations' in with all other WA children who were abused in state care, including child migrants.

SOUTH AUSTRALIA¹¹⁷

The decision of Justice Gray in *Trevorrow v State of SA* [2007]SASC285 established that the state of SA was liable for damages of \$525,000 +interest of \$250000for the wrongful removal of the plaintiff from his family in Dec 1957.

¹¹⁶ Under ACC Act s 7C(1)(c)

¹¹⁷ The Aboriginal Legal Rights Movement wrote this section and it is a relevant topic Australia-wide.

The Aborigines Protection Board did not have power to remove him. Liability arose from misfeasance in public office (removing him contrary to crown solicitor's advice as to unlawfulness of the practice), wrongful imprisonment, breach of fiduciary duty and negligence. Damages were awarded for loss of Aboriginal identity, exemplary damages, damages for his 'injuries and losses', [no apportionment of economic and non economic, but apportioned past and future 90% and 10%].

The decision of Gray J is under appeal, Mr Trevorrow died last year and the appeal is being pursued against his widow.

ARLM estimates that approximately 250 Aboriginal children were removed from their families by the Aborigines Protection Board SA between approximately 1948 and 1962, in the same way that was found to have been unlawful in the Trevorrow case. ARLM has had approaches from some 150 Aboriginal people and we have held public meetings at which their concerns have been publicised and aired.

There are many reasons why it is important that their claims be resolved fairly, constructively and expeditiously – not the least of which is that the State and the Commonwealth have publicly apologised to the Stolen Children for their treatment. A resolution of these claims will ensure that the State's apology is constructive rather than rhetorical.

Combined ATSILS and ARLM are committed to attempting a negotiation process and the achievement of a just compensation scheme. We envisage that, consistent with the HREOC *Bringing Them Home* Report recommendations, the provision of services to claimants would be part of any compensation scheme. This might include the provision of needed human support services (like counselling) to claimants in recognition and recompense for their suffering and as a direct means to provide material assistance to them. It is not just about money.

Combined ATSILS have concerns which impact significantly on the ability of combined ATSILS to represent and advocate for members of the Stolen Generations in respect of a negotiated settlement and on the ability of its clients to enter into negotiations.

1. Time limits.

Time limitations will always be working against the claimants, having regard to the nature of the Stolen Generations cases. Combined ATSILS seeks a commitment that the Government will not take time limitation points in relation to those persons who enter into negotiations for a settlement. The necessity to file and prosecute actions in every case in order to comply with time limitations will only increase considerably the expense and pressure on all parties.

2. Documents

Combined ATSILS are aware that many claimants still do not know what happened to them. Consistent with Justice Gray's *Trevorrow* judgment on this point (at paras [1002] and [1006]), combined ATSILS assert that the State owes a continuing fiduciary obligation to the Stolen Generations, to ensure that they are given full information as to the circumstances of their removal and to ensure that they are given access to independent professional legal advice as to their legal rights.

This should be done by provision to them of all documentation on their cases, without reservation and consistent with the ongoing duty of a guardian to its ward. This needs to be done quickly and by a transparent process of disclosure to claimants. Combined ATSILS, if it is properly resourced for this purpose, is the appropriate body to provide independent legal advice to the claimants.

3. Costs

The claimants are vehement in pursuit of their claims either through litigation or compensation. The majority of claimants appear to be seeking modest and appropriate compensation in

addition to relevant services such as linkup, health and other relevant support. Combined ATSILS are anxious to avoid litigation and seeks Governments support to funding:

- Consultation with claimants;
- Obtaining and reading documents and advise claimants, including those who, do not have a claim;
- Providing independent legal advice to all claimants as to their rights, and
- Preparing for and conduct a process of negotiation with Government.

Relevant Articles of the Convention on the Rights of the Child are Articles 3 to members of the stolen generations are: 5-6, 9, 14-16, 18-20, 25, 30, 34 and 39.

5.20. STOLEN WAGES

WESTERN AUSTRALIA

During the period between roughly 1901 (Federation) and about the 1970s, there was wide spread institutionalised fraud against Aboriginal people in WA involving: the Commonwealth and State governments (people were not paid their pensions and benefits), churches and missions (benefits meant for Aboriginal people were kept and used for administration), station owners (benefits of their workers were kept and workers were instead paid in rations, including sugar and tobacco) and individuals (re Aboriginal people working in private homes). This has contributed to the intergenerational poverty that the majority of Aboriginal people in WA are born into a live all their lives.

The financial abuses were investigated by the Senate Legal and Constitutional Affairs Committee in their Inquiry into Indigenous stolen wages.¹¹⁸ This and other lobbying has lead to a scheme of compensation in Queensland and one is also commencing in New South Wales. In WA, the Department of Indigenous Affairs set up a stolen wages taskforce in 2007 to investigate and take peoples stories. Despite this, no scheme has been set up in WA to compensate Aboriginal victims.

5.21. VEHICLE SEIZURE

NAAJA (NT)

Under the *Liquor Act (NT)* in the Northern Territory it is an offence to bring, control, possess, consume, sell or otherwise dispose of liquor in a general restricted area.¹¹⁹ All the general restricted areas are on Aboriginal land.¹²⁰ Under the *Liquor Act (NT)* a police officer may seize a vehicle if they believe that an offence under s 75 has been, is being or is likely to be committed.¹²¹ This is regardless of how much alcohol is found in the vehicle. An application can be made for return of the vehicle (see below for more details). However, if the application is unsuccessful, the authorities can sell the vehicle and the owner will not receive any proceeds of the sale. The laws operate outside the usual criminal property forfeiture system.

The purpose of the seizure powers is to prevent 'grog running' in communities which had applied to be dry¹²². In our experience, the laws were administered unfairly. Vehicles were seized with very small amounts of alcohol and which were clearly not being used for grog running. The lack of

¹¹⁸ See Kidd, Rosalind. "Hard labour, stolen wages: national report on stolen wages Australians for Native Title and Reconciliation" 2007.

¹¹⁹ *Liquor Act (NT)* s 75(1).

¹²⁰ There are over 100 general restricted areas in the NT.

http://www.nt.gov.au/justice/licenreg/documents/liquor/Restricted_Areas.pdf

¹²¹ *Liquor Act (NT)* s 95(1)(a)(ii).

¹²² NT, *Parliamentary Debates* (Dr. Burns) Liquor Legislation Amendment Bill 2007 - Second Reading Speech alcohol policy: <http://www.austlii.edu.au/au/legis/nt/bill_srs/llab2007309/srs.html>.

public transport in remote areas, meant that the seizure of the vehicles often disadvantaged whole family groups or communities.

Prior to amendments in November 2007, applications for the return of a seized vehicle were made to the Northern Territory Licensing Commission,¹²³ which often took years to make a decision. Decisions made by the Licensing Commission were often unfair, and review was difficult. Since amendments in 2007, applications for the return of a seized vehicle are made to the Commissioner of Police or to the Local Court.¹²⁴ In both processes, an applicant needs to prove that the applicant “did not know or could not reasonably have known about the commission of the offence”.¹²⁵ An application cannot be made by a person charged (when applying prior to the criminal proceedings being finalized), or found guilty (when applying after the criminal proceedings being finalized), of a criminal offence that led to the seizure of the vehicle.

Though this system appears to be an improvement on the previous system insofar as it allows for the Court, as opposed to the bureaucracy, to make the final decision about the return of seized vehicles, it remains particularly onerous and draconian. We are concerned about the length of time taken for vehicles to be returned; police appear to have no consistent enforcement procedure or practice; and the law continues to focus upon an identifiable racial group. NAAJA has heard anecdotally that there are large numbers of cars being seized, and we believe only a small proportion of the owners of these vehicles are aware that they can apply to have their vehicles returned.

Case study 18 - Lucy

Lucy lent her vehicle to her son whilst she travelled to Alice Springs to attend meetings. Whilst away, Lucy’s son gave some young men a lift home to their community (80km out of Katherine) to another community. The Police found alcohol in Lucy’s vehicle and it was seized. NAAJA is acting for Lucy and seeking the return of her vehicle, however in the meantime she can not attend her meetings in Katherine and Darwin, can not take her relatives to attend medical appointments and can no longer drive from Katherine to Berrimah to visit her husband in gaol.

Case study 19 - Simon

Simon drove into Katherine from Lajamanu to purchase a new vehicle. Three days later he lent the vehicle to his cousin, who allowed people unknown to Simon to put alcohol in Simon’s vehicle. The Police seized the vehicle at Walpiri camp, outside of Katherine. NAAJA is acting for Simon and seeking the return of his vehicle, however in the meantime he can not return to Lajamanu - a 7 hour drive from Katherine. Simon has not seen his children in weeks, and is confused because the sign about alcohol being prohibited at Walpiri camp did not contain any information about the possible seizure of vehicles.

Case study 20 - James

James used the recent payments of \$900 for each of his three children to purchase a vehicle. Shortly after he purchased the vehicle he went to Nhulunbuy for shopping and some family business. While there, he purchased some alcohol and on the return journey he (and a number of others in the vehicle) stopped and consumed the alcohol. James told the other occupants to make sure there was no alcohol left in the vehicle. James returned to Gapuwiyak where he dropped the other occupants and continued to his home. Police arrived at his home and searched the vehicle. They found one spirits bottle with dregs of alcohol in it. James was convicted of possession and bringing liquor into a restricted area. Under the current legislation, James cannot apply to have his vehicle returned.

¹²³ Ibid.

¹²⁴ *Liquor Act* (NT) ss 97 and 98.

¹²⁵ *Liquor Act* (NT) ss 97(5)(b) and 98(4)(a)(ii).

5.22. YOUTH¹²⁶

CAALAS (NT)

Case Study 21

The Youth Justice Worker (YJW) frequently visited young people who were detained in the Alice Springs Court holding cells, whilst awaiting Court. The following observations were made:

On the 23 April 2007 YJW was supporting a young woman who was detained in the court holding cells. The young woman was sitting along side six male police personal and one female, four of whom were consuming hot toasted sandwiches, the chair in which the young woman sat was opposite two holding cells which were at full capacity with older men. One man was crying and screaming. YJW asked the young woman's if this was upsetting her:

she said it was making her very sad as he was crying for his baby, and she was worried for him, she said she felt really shamed sitting with all theses blokes and the men in the cells were looking at her, she also said she was getting hungry looking at the police men eating.

The above observation was promptly relayed to the young person's lawyer, who immediately asked that the young woman be placed in an area that is less visible to the male detainees. Although, the police personnel staff complied with the wishes of the lawyer by moving the young woman, the task was undertaken reluctantly and there did not seem to be any acknowledgement that it was inappropriate for the young woman to be placed in that position in the first place.

The youth justice project recorded five other occasions when young people were seated in the exact same place (i.e. directly opposite holding cells with adult male detainees).

Case Study 22

On another occasion a 16 year old man was wearing sun glasses in the holding cell; he was instructed by the prison guards in a very abrupt manner to remove the glasses. The YJW had to explain to the police personnel that the young man had recently been assaulted and as a result had lost his eye; this was a very sensitive issue for the young man, who stated to the police person

I'm waiting to be flown to Adelaide to have a glass eye put in then I won't have to wear the glasses.

YJW then had to opportunity to speak to the young man alone, he was visibly upset about the above interaction and was clearly grieving the loss of his eye, and stated that the police had been rude to him about his eye.

Case Study 23

A young man, spent a period of 16 hours in the police holding cells. He was detained at 4.30am. The YJP worker visited the young man at 3.15pm the following day. The young man had not been interviewed nor had any responsible adult been contacted to participate in a record of interview. The YJP worker asked the CIB inspector in charge if any one had contacted the young man's mother. She was told that the CIB were very busy and hadn't got around to it. The young man's mother was finally contacted at 4.30pm; she was extremely distressed and worried for her son. She sought advice from the CAALAS duty solicitor who advised her that the young man should wait to speak to a lawyer and not to discuss any of the alleged offence on tape. The young man was released at 8pm without charge.

The above is just one example; however, there are others that could be cited where the time a young person has waited for Court has been excessive – and does not comply with the NT Youth Justice Act..

¹²⁶ The Central Australian Aboriginal Legal Aid Service has written this section. It is a topic that is relevant throughout Australia, not just the Northern Territory.

Case Study 24

In relation to one young woman, NT Family and Children's Service (FACS) was given a time frame of three months to conduct the following tasks:

- To identify an appropriate treatment service to address the young woman's substance misuse;
- To conduct a family assessment at Papunya; and
- A Court ordered psychologist report.

None of the above tasks were completed, and as a result, the senior case worker at Don Dale Juvenile Detention Centre, the young woman's lawyer and Magistrate Liddle all raised concerns regarding the length of time this young woman was spending in custody, due to the lack of written Court support from FACS. The YJW submitted a written Court support letter to assist with the young woman's sentencing. Again, the Magistrate stated that Don Dale Juvenile Detention Centre was not a holding option for FACS in relation to young people in care.

In relation to FACS providing safe accommodation the YJW observed that of the nine young people supported, three of them, whilst in care, were left to live with family in overcrowded situations at town camps in Alice Springs, without much monitoring. Of the more urbanised young people in care there is often a lot of shifting around and staying in hotels at times. Magistrates have also commented on the inappropriateness of having young people living in hotels for extended periods.

On three occasions FACS have requested that young people's matters be adjourned and for the young person to be remanded in custody at Don Dale Juvenile Detention Centre. On these occasions the Magistrate has clearly stated that detention is not an alternative accommodation option for these young people, whilst FACS get a plan together. Generally speaking, there is a real focus on 'crisis management' with the young people in care of the Minister that come before the Courts

Case Study 25

A young woman who is also 5 months pregnant and in the care of the Minister was arrested on a warrant at approximately 2:15am. The police did not contact the on call lawyer to inform the lawyer of the young woman's arrest.

At approximately 8.30am the on call lawyer contacted the Alice Springs Police watch house to ask how many individuals there were to meet with in relation to making bail applications that morning. At that time, the police informed the lawyer that they had a juvenile in custody. The lawyer then advised the YJW that the young woman was in custody.

The YJW went to the police station at 9am, she spoke with police and confirmed that the young woman had been arrested on a warrant. YJW also spoke with young woman and discovered that the young woman had previously surrendered on the warrant and the warrant was recalled. The YJW informed the police. The watch commander advised that if YJW was able to provide the CAALAS file for the young woman which indicated the day on which she had surrendered and the warrant was recalled, he would release the young woman. The YJW was able to provide the necessary information. The police then contacted FACS and released the young woman into FACS care between 9.30 and 10.30am.

Case Study 26

Three juveniles a 14 year old female, a 15 year old male and a 17 year old male were transported by police from Tennant Creek to Alice Springs in the back of a paddy wagon because they had breached their bail conditions.

The two males were held in custody over the weekend in Tennant Creek before being transported together to Alice Springs. The female was held in custody overnight in Tennant Creek before being transported by herself to Alice Springs.

None of the juveniles had any previous criminal history. The breaches each related to being out past curfew one was a matter of 40 minutes. No warning was given to the juveniles rather they were automatically breached. The on-call CAALAS lawyer was not contacted by police. Telephone bail applications were carried out without a lawyer acting for or advising the young person. Bail was then refused by the on duty Magistrate and the juveniles were remanded to appear in Alice Springs.

The distance between Alice Springs and Tennant Creek is 450kms. No family members were informed about any of the juveniles being remanded to Alice Springs. As a result, no family members were in Alice Springs to speak with CAALAS or be present in Court. Thankfully a youth worker based in Tennant Creek was contacted by CAALAS and able to provide background information regarding each of the juveniles.

In relation to each of the juveniles this was the first time each of them had been before a Court. As stated above no family members were present as the families all reside in Tennant Creek and had not been informed about the appearance in Alice Springs. Each of the juveniles were re-granted bail. CAALAS made repatriation arrangements. However, due to the limited transport options available between Tennant Creek and Alice Springs the juveniles had to travel unaccompanied on a Greyhound bus service. The bus service travelled at night and did not reach Tennant Creek until after 2am.

6. CONCLUSION

ATSILS call for the adequate protection of the human rights of Aboriginal and Torres Strait Islander Peoples and are supportive of a statutory Bill of Rights. In saying this we do not wish to close the window to future discussions about Constitutional entrenchment of such rights.

ATSILS are in a unique position in that they have first hand contact with Aboriginal and Torres Strait Islander Peoples who have had their human rights breached. Often the multitude of factors that contribute to Aboriginal and Torres Strait Islanders needing legal assistance relate to human rights abuses. The trauma that so many Aboriginal and Torres Strait Islander Peoples exhibit today can be linked to previous (ie: intergenerational trauma) and ongoing human rights abuses.

The human rights abuses that were discussed in this submission and were accompanied by real life case scenarios relate to the following topics: access to justice, adult guardianship, discrimination, prison disciplinary regimes, fines, right to an interpreter, mandatory sentencing, mental illness/ health, police complaints, public space, self determination, right to silence, stolen generations and vehicle seizure.

This human rights consultation has given services such as ATSILS the opportunity, and we are thankful for this, to highlight how Australia treats its most vulnerable and powerless. It is important that the Government and consultation team recognises the expectation it has generated through opening a discussion about protection of human rights. It is our expectation that the information we have shared will not fall on deaf ears and that the Australian Government will endeavour to pass the test outlined below in partnership with the Aboriginal and Torres Strait Islander community:

...the ultimate test of our commitment to human rights as a nation is not what we aspire to, not the conventions we sign, and not even the laws that are set in place. Rather it is how we treat our most vulnerable and powerless (Ozdowski 2008).

Laws do have a place in the protection of human rights, and the measure of any statutory Bill of Rights that may be enacted as a result of this consultation process is whether it takes as a starting point the protection of the human rights of our most vulnerable and powerless, such as Aboriginal and Torres Strait Islander Peoples. The flow on effect of such a Bill is that citizens who generally exercise their human rights on a daily basis will also have protection on their rights. If such a Bill is not enacted then the human rights abuse scenarios outlined in this submission sadly will continue. This is because history and the present has taught that the benevolence of Governments does foster an environment that upholds the human rights of Aboriginal and Torres Strait Islander Peoples to exercise their human rights. The absence of a safeguard to protect the human rights of such people is a significant and unacceptable gap in Australian law and is an embarrassment to Australia internationally.

Whilst the international community and progressive thinkers within Australia are advocating for the need to protect human rights, Aboriginal and Torres Strait Islanders and non-Aboriginal and Torres Strait Islanders are experiencing human rights abuses on a daily basis, the former arguably to a greater extent.

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