

NATIONAL ABORIGINAL AND TORRES STRAIT ISLANDER LEGAL SERVICES (NATSILS)

Joint Submission to the
Commonwealth Attorney-General's Department

COMMENTS ON “A NATIONAL HUMAN RIGHTS ACTION PLAN FOR AUSTRALIA: BACKGROUND PAPER”

February 2011



**Victorian Aboriginal Legal
Service Co-operative Limited**



**Aboriginal Legal
Service of Western Australia**



**Aboriginal Legal Rights
Movement Inc.**



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1. Introduction and Scope

The National Aboriginal and Torres Strait Islander Legal Services (NATSILS) have prepared this submission to comment on the Australian Government Attorney-General's Department Background Paper on the development of a new National Human Rights Action Plan ('Action Plan'). We thank the Australian Government ('the Government') for the opportunity to provide comment on the Action Plan.

The Action Plan forms part of Australia's Human Rights Framework ('Framework') that was introduced by the Government on 21 April 2010.¹ We note from the outset the major limitation of the Framework is the failure to incorporate a legally enforceable Human Rights Act. The introduction of a Human Rights Act was supported by the NATSILS. We further note that the human rights and fundamental freedoms of Aboriginal and Torres Strait Islander peoples have not been adequately addressed in the Framework.

We support the idea of an Action Plan that uses human rights principles to guide its development to ensure that both the process and outcomes of the Action Plan are respectful of human rights and fundamental freedoms and contributes towards their full realisation in Australia.

We urge the Government to act in accordance with the principles contained in the Declaration on the Rights of Indigenous Peoples ('the Declaration') in the development of the Action Plan. In particular, articles 18 and 19 of the Declaration provide:

Article 18 – right to participate in decision making

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19 – consultation and consent

*States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.*²

This submission contains information about the NATSILS, a critique of the Framework, comments on the proposed approach and process of the Action Plan outlined in the Background Paper, comments on the human rights situation in States and Territories and recommendations for the Action Plan. We also endorse the submission of the Human Rights Law Resource Centre (HRLRC) and the Federation of Community Legal Centres Victoria (FCLC).

¹ Further information about the Human Rights Framework is available at: <http://www.ag.gov.au/humanrightsframework>.

² The Declaration was adopted by General Assembly Resolution 61/295 on 13 September 2007 and is available at: <http://www.un.org/esa/socdev/unpfii/en/drip.html>.

2. The NATSILS

The NATSILS is the peak national body for legal matters affecting Aboriginal and Torres Strait Islander peoples and is a coalition of the following Aboriginal and Torres Strait Islander Legal Services:

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

2.1. Aboriginal and Torres Strait Islander Legal Services (Qld) Ltd (ATSILS (Qld))

Established in its present form in 2005, but with roots stretching back to 1972, ATSILS (Qld) is a non-profit, community based organisation that provides criminal, civil and family law services to Aboriginal and Torres Strait Islander peoples and their families in Queensland. ATSILS (Qld) also provides services in the program areas of law reform and community education, deaths in custody monitoring, and prevention, diversion and rehabilitation.

With a team of over 170 staff across the State, fifteen regional offices, and nine satellite offices, in addition to the head office in Brisbane, ATSILS (Qld) brings together a wealth of experience in the fields of criminal, civil and family law. Growth in the areas of law reform, social work and prison support in recent years has also allowed ATSILS (Qld) to provide a more diverse range of related services to communities across the State.

2.2. Aboriginal Legal Rights Movement Inc (ALRM)

ALRM is an independent incorporated Aboriginal community organisation which was established in 1973. It is controlled by Board of Aboriginal members from Aboriginal communities in South Australia (SA), representing both metropolitan and country areas. Appointments are made by the Board Appointment Committee as provided for in ALRM's Constitution. Services provided including civil and criminal law, the Aboriginal Visitors Scheme, the Low Income Service Programme and other programs.

2.3. Aboriginal Legal Service NSW/ACT (NSW/ACT ALS)

In the first half of 2006, the six Aboriginal and Torres Strait Islander Legal Services servicing New South Wales (NSW) and the Australian Capital Territory (ACT); the Sydney Regional Aboriginal Corporation Legal Service, the Kamilaroi Aboriginal

Legal Service, the Many Rivers Aboriginal Legal Service, the South Eastern Aboriginal Legal Service, the Western Aboriginal Legal Service and the Wiradjuri (Central Southern) Aboriginal Legal Service agreed to come together to form one NSW and ACT wide Aboriginal legal service. That service is the current Aboriginal Legal Service (NSW/ACT) Limited, or more simply, the ALS (NSW/ACT). The ALS (NSW/ACT) commenced operations on 1 July 2006.

The NSW/ACT ALS is committed to providing a quality legal service that is appropriate to Aboriginal communities across NSW and the ACT and welcomes feedback from all sources. Their purpose is to work towards culturally appropriate justice for Aboriginal and Torres Strait Islander peoples and communities and helping to build safer communities for all Aboriginal and Torres Strait Islander peoples.

2.4. Aboriginal Legal Service of Western Australia (Inc.) (ALSWA)

ALSWA is a Western Australian (WA) community based organisation that was established in 1973. ALSWA aims to empower Aboriginal and Torres Strait Islander peoples and advance their interests and aspirations through a comprehensive range of legal and support services throughout WA. ALSWA is a representative body with 16 executive officers³ elected by Aboriginal and Torres Strait Islander peoples from their local regions to speak for them on law and justice issues.

ALSWA provides legal advice and representation to Aboriginal and Torres Strait Islander peoples in a wide range of practice areas including criminal, civil, family, and human rights law. ALSWA also provides support services to prisoners and incarcerated juveniles. ALSWA's services are available throughout WA via 17 regional and remote offices and one head office in Perth.

2.5. Central Australian Aboriginal Legal Aid Service (CAALAS)

CAALAS was established in 1973 and since then has continued to provide a high quality, culturally appropriate legal service to the Aboriginal people of Central Australia. CAALAS provides advice, assistance and representation in the areas of Criminal, Civil and Family law as well as advocating at a policy level; providing Community Legal Education and prison support. CAALAS services an expansive region of the Northern Territory, covering approximately 90,000 square kilometres. This service area takes in a population and potential client base of approximately 18,000 people from some 16 different language groups. CAALAS' main office is located in Alice Springs with another office in Tennant Creek. CAALAS attends bush court circuits in Tennant Creek, Ali Curung, Mutijulu, Kintore, Yuendumu, Papunya, Ti-Tree, Elliott, and Hermannsburg on a regular basis and

³ There are two Executive Officers for each of the former eight ATSIC regions (Metropolitan, Central Desert Region, Murchison/Gascoyne Region, Southern Region, Pilbara Region, Goldfields Region, West Kimberley Region and East Kimberley Region). They are elected by Aboriginal and Torres Strait Islander peoples every three years.

provides outreach services throughout the service area. CAALAS has an Aboriginal board elected by the Aboriginal people of Central Australia.

2.6. North Australian Aboriginal Justice Agency (NAAJA)

The North Australian Aboriginal Justice Agency (NAAJA) provides high quality, culturally appropriate legal aid services to Aboriginal and Torres Strait Islander peoples in the Top End of the Northern Territory. NAAJA was formed in February 2006, bringing together the Aboriginal Legal Services in Darwin (North Australian Aboriginal Legal Aid Service), Katherine (Katherine Regional Aboriginal Legal Aid Service) and Nhulunbuy (Miwatj Aboriginal Legal Service). Combined, NAAJA has 61 years experience in advocating for the rights of Indigenous peoples.

NAAJA has offices in Darwin, Katherine and Nhulunbuy and service both the major towns of the Top End as well as bush courts in 22 remote communities. NAAJA has an all-Indigenous Board which represents the three major regions and employs a staff of around 70, of which about 45% are Aboriginal. NAAJA's core legal services cover the areas of criminal, civil and family law. NAAJA also has an advocacy section, which pursues the rights of Aboriginal and Torres Strait Islander peoples through law and policy reform and community legal education. NAAJA has also recently started a prison support and an Indigenous Throughcare program.

2.7. Victorian Aboriginal Legal Service Cooperative Ltd (VALS)

VALS was established in Victoria as a community controlled Co-operative Society in 1973 to address the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system. VALS plays an important role in providing referrals, advice, duty work or case work assistance to Aboriginal and Torres Strait Islander peoples in the State of Victoria.

Solicitors at VALS specialise in one of three areas of law, being criminal law, family law and civil law. VALS maintains a strong client service focus which is achieved through the role of Client Service Officer (CSO). CSOs act as a bridge between the legal system and the Aboriginal and Torres Strait Islander community.⁴

⁴ For further information about VALS, please see: www.vals.org.au.

3. Critique of Australia's Human Rights Framework

The Government introduced the Framework on 21 April 2010 in response to the Consultation in 2008-2009 and its final report to the Government on 20 September 2009.⁵

The Framework focuses on five key principles:

- reaffirming a commitment to human rights obligations;
- the importance of human rights education;
- enhancing domestic and international engagement on human rights issues;
- improving human rights protections including greater parliamentary scrutiny; and
- achieving greater respect for human rights principles within the community.⁶

We support these principles however note at the outset that the Framework is limited by its failure to incorporate a comprehensive, legally enforceable Human Rights Act. This ultimately impacts on the success of any human rights initiatives introduced by the Government such as the Action Plan because of the lack of accountability in protecting and enforcing human rights through the court system.

3.1. Human Rights Act

The failure to incorporate a Human Rights Act in the Framework leaves Australia falling short of the high standards of other democratic nations like the United Kingdom, Canada and New Zealand, which all have legally enforceable Human Rights Acts or Charters of Rights in their legal system. This situation is even more disappointing in light of the overwhelming majority of participants (87.4%) in the Consultation who supported the enactment of a Human Rights Act.⁷ This instead reflects an acceptance of myths, such as:

"[w]e don't need a Federal Human Rights Act. Our rights are already protected by the Constitution, the common law, and our political system of representative democracy."⁸

We continue to recommend that Australia introduce a Human Rights Act to ensure that human rights can be legally enforced through the courts. This is in keeping with our strong democratic tradition based on the separation of powers

⁵ The Aboriginal and Torres Strait Islander Legal Services (ATSILS) made a joint submission to the Human Rights Consultation in 2009, which sets out a number of key points and recommendations for improving the human rights of Aboriginal and Torres Strait Islander peoples in Australia. The submission is available at: [http://www.humanrightsconsultation.gov.au/www/nhrcc/submissions.nsf/list/944BA170B65A99EFCA25760E000A6045/\\$file/ATSILS%20submission%5B1%5D.pdf](http://www.humanrightsconsultation.gov.au/www/nhrcc/submissions.nsf/list/944BA170B65A99EFCA25760E000A6045/$file/ATSILS%20submission%5B1%5D.pdf).

⁶ Australian Government Attorney-General's Department, Australia's Human Rights Framework: <http://www.ag.gov.au/humanrightsframework>.

⁷ National Human Rights Consultation Report, Ch 12, The Case for a Human Rights Act, available at [http://www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/\(4CA02151F94FFB778ADAEC2E6EA8653D\)~NHRC+Report+\(Chapter+12\).pdf/\\$file/NHRC+Report+\(Chapter+12\).pdf](http://www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/(4CA02151F94FFB778ADAEC2E6EA8653D)~NHRC+Report+(Chapter+12).pdf/$file/NHRC+Report+(Chapter+12).pdf).

⁸ Human Rights Law Resource Centre 'Human Rights Act - Myths and Misperceptions' as http://www.anf.org.au/pdf/Human_Rights_Myths_and_Misperceptions.pdf, page 1.

to ensure adequate checks and balances are maintained between the Parliament, Executive and Judiciary.

A Human Rights Act is needed to protect the rights of marginalised and vulnerable groups, such as Aboriginal and Torres Strait Islander peoples who too often are subjected to violations of their human rights and fundamental freedoms and have little or no recourse to enforce their rights.

A Human Rights Act will ensure greater respect for a culture of human rights that everyone in Australian society can enjoy. It will also demonstrate the Government's commitment to the real protection of human rights in this country.

Recommendation 1: that the Government introduce a legally enforceable Human Rights Act.
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3.2. The rights of Aboriginal and Torres Strait Islander peoples

We are generally disappointed about the lack of attention in the Framework to the historical and ongoing human rights abuses experienced by Aboriginal and Torres Strait Islander peoples. The Government did not respond to the recommendations in the Consultation Report regarding a specific statement of impact for legislation impacting on Aboriginal and Torres Strait Islander peoples nor a framework for self-determination.

ALSWA noted these issues in its submission to the Australian Senate Legal and Constitutional Affairs Committee about the introduction of the Human Rights (Parliamentary Scrutiny) Bill 2010.⁹ In that submission ALSWA referred to the detailed report of the Special Rapporteur of the human rights and fundamental freedoms of indigenous people ('Special Rapporteur'). The Special Rapporteur's Report documented various historical and ongoing human rights violations and made a number of valuable recommendations to the Australian Government.¹⁰ The Australian Government has yet to formally respond to these recommendations.

On a similar note we are yet to see a comprehensive strategy for the implementation of the rights contained within the Declaration.

We are concerned this lack of engagement or commitment to protect and respect the rights of Aboriginal and Torres Strait Islander peoples is in breach of Australia's human rights obligations. ALSWA drafted and delivered a Joint Intervention by the Indigenous Peoples Organisations of Australia during the Third

⁹ This submission is publically available at:

http://www.als.org.au/index.php?option=com_content&view=article&id=120:inquiry-into-the-human-rights-parliamentary-scrutiny-bill-2010&catid=16&Itemid=50.

¹⁰ The Report is available at:

[http://www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/\(4CA02151F94FFB778ADAEC2E6EA8653D\)~NHRC+Report+\(Chapter+12\).pdf/\\$file/NHRC+Report+\(Chapter+12\).pdf](http://www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/(4CA02151F94FFB778ADAEC2E6EA8653D)~NHRC+Report+(Chapter+12).pdf/$file/NHRC+Report+(Chapter+12).pdf).

Session of the United Nations (UN) Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) in Geneva in July 2010 on Agenda Item 3: 'The Right to Participate in Decision-Making'.¹¹

This Intervention is directly relevant to our recommendations in this submission. It expressed concerns about the disproportionate impact of laws and systems not being properly considered and addressed in Australia. It referred to Aboriginal deaths in custody, Aboriginal housing and the Northern Territory Emergency Response as ongoing and worsening issues, despite numerous reports and recommendations that have simply not been implemented. It noted the lack of representation of Aboriginal and Torres Strait Islander peoples in Parliament, low participation in the judicial and executive arms of government and that more is needed to address these issues, including through constitutional reform and increased human rights protections.

We urge the Government to work with Aboriginal and Torres Strait Islander peoples and organisations to adopt a specific strategy for more effectively realising the rights of Aboriginal and Torres Strait Islander peoples. We provide more detailed suggestions below for how this strategy could fit with the Government's proposed Action Plan.

Recommendation 2: that the Government work with Aboriginal and Torres Strait Islander peoples and organisations to adopt a specific strategy for realising the rights of Aboriginal and Torres Strait Islander peoples.

Recommendation 3: that the Government table the report of the Special Rapporteur on the human rights and fundamental freedoms of Indigenous people and indicate a timeframe for implementing recommendations in the report, or alternatively provide reasons for why these recommendations are being rejected or not prioritised by the Government.

Recommendation 4: that the Government develop an implementation strategy that includes targets and timeframes for the Declaration on the Rights of Indigenous peoples in partnership and collaboration with Aboriginal and Torres Strait Islander peoples and organisations.

Recommendation 5: that the Government incorporate the recommendations made by Aboriginal and Torres Strait Islander peoples and organisations in submissions already provided to the Government on issues affecting us and in particular about our human rights into the Action Plan.

¹¹ This intervention is publically available at:
http://www.als.org.au/index.php?option=com_content&view=article&id=129%3Aintervention-on-the-right-to-participate-in-decision-making&catid=14&Itemid=50.

Recommendation 6: that the Government incorporate human rights education into the national curriculum in accordance with Recommendation 2 of the National Human Rights Consultation Report.¹²

4. Approach and Process of the Action Plan

4.1. Consultation and Engagement

Engagement and consultation with Aboriginal and Torres Strait Islander peoples and organisations in the development of the Action Plan should not be taken as a given. Issues around accessibility and capacity to engage need to be considered and addressed by the Government.

The Government must recognise its role in empowering Aboriginal and Torres Strait Islander communities to build capacity in state-wide and peak organisations and community members to work together to improve outcomes for Aboriginal and Torres Strait Islander peoples.

When seeking to engage with Aboriginal and Torres Strait Islander peoples and organisations, we recommend the Government consider the following points:

- Is the location and venue of the forum accessible?
- Is it possible to provide financial assistance to community members to be able to attend the forum?
- Can funding and in-kind assistance be provided to Aboriginal and Torres Strait Islander organisations/community members to facilitate engagement?

The need for capacity building was clearly articulated in a submission VALS contributed to in partnership with peak and state-wide Aboriginal community controlled organisations. The submission was addressed to the Victorian Government and provided a framework for Victoria becoming 'a fairer' place to live. It is commented in the submission that:

Our capacity was greatly diminished by the process of colonisation which dispossessed and fragmented our communities. Today, this diminished capacity is evidenced by disproportionate rates of disadvantage, impoverishment, poor health and incarceration. To foster a true spirit of reconciliation, it is necessary to acknowledge the past and its impact on the present; but also to develop sustainable policies which acknowledge, and build on, the existing capacities and strengths of Indigenous communities.¹³

¹² Commonwealth of Australia' (2009) National Human Rights Consultation Report', p 354
http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReportDownloads.

¹³ Victorian Aboriginal Community Services Association Limited, et al, 'A Fairer Victoria for Indigenous Communities: A Framework for Action: A Proposal for building the capacity of community-controlled Aboriginal organisations in Victoria', 2006.

Recommendation 7: that the Government empower and build capacity in Aboriginal and Torres Strait Islander organisations and communities to ensure their ability to engage effectively in the development and implementation of the Action Plan. This includes ensuring equitable access to the engagement processes and the provision of funding and in-kind support.

4.2. The UN Handbook

The UN Professional Training No. 10 Handbook on National Human Rights Plans of Action ('UN Handbook') is a useful resource with valuable information about goals, benefits and general principles of Action Plans. The UN Handbook is realistic and reflects the need to be inclusive and the importance of process.¹⁴ It would not only be disappointing, but also counterproductive, if Aboriginal and Torres Strait Islander peoples felt that their experience with the Australian Government during the development or implementation of the Action Plan breached their human rights.

In addition:

- the Action Plan needs to be comprehensive, not just the Baseline Report;
- Figure 2 in the UN Handbook contains the Action Plan process however it is missing the critical element of reporting back to community before the plan is launched and then implemented;¹⁵ and
- the UN Handbook should not be prioritised over the sentiment of the Australian public if the Australian public have a different or more localised approach to developing actions plans.

Recommendation 8: that the Government develop a comprehensive Action Plan that builds on the UN Handbook's framework and incorporates accountability through a clear process of reporting back to the community and that also incorporates community preferred approaches.

4.3. Goal of the Action Plan

The Action Plan must ultimately strive for the full realisation and enjoyment of human rights and fundamental freedoms of all Australians. A clear set of goals, including timeframes and benchmarks can be determined through the engagement process.

The process of devising the Action Plan, and the Plan itself, must be strong, comprehensive, realistic, inclusive, actioned and measurable and improve upon previous plans. It can be conceptualised as a Reconciliation Action Plan and have a focus on marginalised and disadvantaged communities in the short term. The Action Plan must enable non-government organisations (NGOs) to make

¹⁴ United Nations – Geneva (Office of the United Nations High Commissioner for Human Rights) – Professional Training No. 10 Handbook on National Human Rights Plans of Action, 29 August 2002, p 15.

¹⁵ Ibid, p 6.

comments on Australian's human rights record without fear of repercussion, for example through funding cuts. The Action Plan must have no exceptions and take a whole of Government, including States and Territories, and a whole of community approach.

Recommendation 9: that the Government set clear goals to guide the development of the Action Plan that incorporate timeframes and benchmarks.

Recommendation 10: that the Government ensure the process and product of the Action Plan be strong, comprehensive, realistic, inclusive, implemented and measurable and improve on previous plans.

Recommendation 11: that the Government conceptualise the Action Plan as a Reconciliation Action Plan with a focus on marginalised and disadvantaged communities as a priority in the short term.

Recommendation 12: that the Government adopt a whole of Government and whole of community approach to development, implementation and evaluation of the Action Plan.

4.4. Baseline Report

We recommend the Baseline Report:

- be evidence based;
- collect data within an Aboriginal and Torres Strait Islander peoples framework and methodology;¹⁶ and
- scope an interim list of rights for protection and promotion in line with Recommendation 5 of the Consultation Report, which calls for this list regardless of whether a Human Rights Act is introduced.¹⁷

Recommendation 13: the Government conduct a Baseline Report that is evidence based, incorporates Aboriginal and Torres Strait Islander peoples' research methodologies and frameworks, and includes a list of rights for protection and promotion in line with the National Human Rights Consultation Report.

4.5. Collaboration and Participation

In order for the consultation process to be 'quality', as called for in the UN Handbook, it should not just be about consultation, but also about collaboration. This requires involvement from the start of the process and throughout implementation and evaluation.

¹⁶ Commonwealth of Australia 'National Human Rights Consultation Report', September 2009, page 361.

¹⁷ Ibid, page 357.

We recommend the following be taken into account when approaching Aboriginal and Torres Strait Islander peoples about the Action Plan:

- a) respect cultural protocols and recognise that Aboriginal and Torres Strait Islander peoples are not a homogenous group and that what works in one location, may not in another and that Aboriginal and Torres Strait Islander peoples have the right to participate in decisions that affect their communities;
- b) ensure accurate information is routinely provided to participants and the general public about the process and status of the Action Plan to continue improving awareness and understanding about human rights; and
- c) be creative when engaging the public at various levels and locations, for example offering a BBQ lunch, paying for participation in engagement or offering alternative times for meetings (i.e. night time).

Recommendation 14: that the Government acknowledge, respect and address cultural protocols, diversity, expertise, resource constraints and work priorities in its collaboration with Aboriginal and Torres Strait Islander peoples.

Recommendation 15: that the Government routinely provide accurate information to participants and the public about the process and status of the Action Plan to continue improving awareness and understanding about human rights.

Recommendation 16: that the Government be creative when engaging the public about the Action Plan at various levels and in different locations, in particular regional and remote areas.

5. The situation in Australian States and Territories

5.1. The situation in Victoria and lessons from the Charter

Victoria has a Charter of Human Rights and Responsibilities that was introduced in 2006 ('the Charter'). Although the Charter does not create a complaint mechanism for individuals the Charter extends beyond the Framework as it is a legislative instrument. The functions of the Charter are similar to that of the Framework. Both the Charter and the Framework aim to improve scrutiny of legislation for compatibility with international human rights obligations through a Statement of Compatibility. The Victorian Parliament can issue an overriding declaration, which means that Bills deemed incompatible with the Charter can still be passed. The Charter requires the Victorian Government and public authorities to consider human rights when they develop policies and provide their day-to-day services. This enables human rights arguments to be raised in judicial review of the Victorian Government and public administration.

The Charter is currently being reviewed, with the report expected by the end of 2011. We recommend that consideration be given to this review in the development and implementation of the Framework and Action Plan.

We suggest that previous submissions prepared by VALS¹⁸ and the Victorian Equal Opportunity and Human Rights Commission's framework for discussion regarding self-determination be considered in this Action Plan.¹⁹

The Australian Government can learn the following lessons from the experiences in Victoria since the operation of the Victorian Charter.

Myths about the protection of human rights through a Charter that lead to some opposition to the Victorian Charter were disproved. For instance, the introduction of the Victorian Charter did not result in a lawyer's picnic' with floods of litigation or a clogging up of court lists.

State based human rights legislation such as the Victorian Charter and the *Human Rights Act 2004* (ACT) can be recognised as successful pilots in relation to protecting and promoting civil and political rights. The Action Plan provides an opportunity for the Australian Government to exhibit national leadership by extending human rights protections to economic, social and cultural rights and the right to self-determination.

A change in culture does not occur overnight. A significant investment in funding towards education, promotion and time is required to ensure a human rights culture is fostered.

As a legislative instrument the Victorian Charter is vulnerable to being repealed by the current Victorian Liberal Government. The Framework and Action Plan are even more vulnerable to a change in Government policy or change of Government. This makes the infiltration of human rights into culture even more imperative.

It is important that the process and outcome of assessing the human rights compatibility of Bills, legislation and policies introduced into Parliament is transparent and that the community has time to use these assessments as a lobbying tool. Where human rights assessments find that a Bill, Act or policy is incompatible with the protection of human rights, it should not proceed.

VALS along with state-wide and peak Aboriginal organisations in Victoria have long been advocating for the need for a strategy around consultation of Aboriginal and Torres Strait Islander peoples. This strategy should recognise

¹⁸ Human Rights in Victoria - 24th August 2005 and Proposed Charter of Human Rights 2005: Secondary submission - 7th September 2005, available at: <http://vals.org.au/law-reform-and-policy-development/submissions/year/2005/>.

¹⁹ Indigenous self-determination and the Charter of Human Rights and Responsibilities – A framework for discussion - Mar 2010: http://www.humanrightsccommission.vic.gov.au/index.php?option=com_k2&view=item&id=1119:indigenous-self-determination-and-the-charter-of-human-rights-and-responsibilities-%E2%80%93-a-framework-for-discussion&Itemid=690

consultation fatigue, consolidate consultations where appropriate and provide advance notice of consultation process for planning purposes.

Recommendation 17: that the Government consider the Report of the Review of the Victorian Human Rights Charter, which is due for release in 2011 in the development and implementation of the Framework and Action Plan.

Recommendation 18: that the Government play a leadership role in building on existing human rights protections and measures to ensure that all human rights, including economic, social and cultural rights and the right to self-determination are included in the Action Plan.

Recommendation 19: that the Government include information and any recommendations from reviews of existing human rights protections in State in the Action Plan.

Recommendation 20: that the Government introduce an Aboriginal and Torres Strait Islander Social Justice Commissioner for each State and Territory.

5.2. The situation in Western Australia (WA)

Human Rights are currently not adequately protected in WA. There is no comprehensive Human Rights Act and there remain significant gaps in protections offered in current legislation and the common law that need to be addressed.

The WA Government conducted an extensive community consultation in 2007 about the proposed introduction of a WA Human Rights Act. The Consultation Committee recommended the introduction of a Human Rights Act as a desirable step for human rights protection in WA.²⁰ However, the WA Government postponed introducing any legislation to await the outcome of the National Consultation.²¹ There has since been a change of government in WA, which has demonstrated a strong resistance to a Human Rights Act at State or Federal levels.²²

ALSWA have repeatedly raised concerns about the lack of human rights protections in WA as the current WA Government continues to introduce punitive laws that disproportionately impact on the rights of Aboriginal and Torres Strait Islander peoples.²³

²⁰ The Community Consultation Report is available at:

http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/mdocs/WA_Human_Rights_Final_Report.pdf.

²¹ See Human Rights Act for Australia, Resources, <http://www.humanrightsact.com.au/2008/link/>.

²² WA Today, Governments get too authoritarian: Gallop, 19 March 2010, <http://www.watoday.com.au/wa-news/governments-get-too-authoritarian-gallop-20100318-qil3.html> accessed 15/02/11.

²³ For example, see ALSWA's submission to the WA Government on proposed new Stop and Search Laws in January 2010: http://www.als.org.au/index.php?option=com_content&view=article&id=112:stop-and-search-laws&catid=16:submissions&Itemid=50.

The lack of recourse to any Human Rights Act is an ongoing concern in WA and no doubt in other States without similar legislation. There is a dire need for the Federal Government to play a leadership role in protecting human rights to encourage State Governments to do the same. This is particularly important in light of the Consultation revealing that many Australians are concerned about the protection of economic, social and cultural rights such as health, education and justice issues that generally falling within State and Territory jurisdiction.²⁴

One positive initiative in WA however is the Office of the Inspector of Custodial Services.²⁵ The role of the Office is to bring independent external scrutiny to the standards and operational practices relating to custodial services within the state. The Office, which falls within the general portfolio responsibility of the Minister for Corrective Services, is answerable directly to the Parliament. Unfortunately, the jurisdiction of the Inspector is only within WA and not extended to police lockups.

Recommendation 21: that the Government encourage State and Territory Governments to adopt a similar approach to developing state-based Action Plans.

Recommendation 22: that the Government urge all States and Territories to introduce a Custodial Services Inspector based on the WA model, and extending the jurisdiction to cover all places of detention including police holding cells.²⁶

5.3. The situation in the Northern Territory (NT)

The NT also lacks a Human Rights Act and has significant gaps in protections offered in current legislation.²⁷ The implications of these gaps are especially felt by Aboriginal and Torres Strait Islander peoples.

The Northern Territory Emergency Response (NTER) has been of particular concern. The NTER has actively suppressed the human rights of Aboriginal and Torres Strait Islander peoples in the NT. The NTER was developed as an explicitly racially discriminatory policy. Whilst some efforts have been made to bring the NTER into compliance with the *Racial Discrimination Act 1975* (Cth) (RDA), it continues to discriminate against Aboriginal and Torres Strait Islander peoples.

²⁴ See the Consultation Report, page 15:

[http://www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/\(4CA02151F94FFB778ADAEC2E6EA8653D\)~NHRC+Report+\(Chapter+2\).pdf/\\$file/NHRC+Report+\(Chapter+2\).pdf](http://www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/(4CA02151F94FFB778ADAEC2E6EA8653D)~NHRC+Report+(Chapter+2).pdf/$file/NHRC+Report+(Chapter+2).pdf).

²⁵ See <http://www.custodialinspector.wa.gov.au/> for more information.

²⁶ We note this is also a recommendation from the Universal Periodic Review and is in line with Australia's commitment to ratifying the Optional Protocol on the Convention Against Torture (OPCAT).

²⁷ See, for example section 3HA of the Parole of Prisoners Act (NT) which excludes natural justice from decisions made by the Parole Board.

It is difficult to quantify the harm done to Aboriginal and Torres Strait Islander peoples in the NT, being singled out for second-class, discriminatory treatment. Many Aboriginal and Torres Strait Islander peoples feel disenfranchised and disempowered by the NTER. Many consider that it has been a return to days of arbitrary and capricious decisions being imposed on Aboriginal and Torres Strait Islander peoples.

While we welcomed the partial reinstatement the RDA in early 2010, significant aspects of the NTER remain discriminatory and fail to respect the human rights of those subject to it. Those aspects include the income management measures which impact disproportionately and unreasonably on Aboriginal and Torres Strait Islander peoples, alcohol restrictions, prohibited materials provisions, law enforcement powers and compulsory five-year leases acquired under the NTER legislation.²⁸

It is also imperative that sections 90 and 91 of the NTER Act be immediately repealed. These sections contravene long-standing legal principle a defendant be able to put all relevant matters before a court. They restrict the extent to which a court can consider customary law issues in bail and sentencing proceedings for Aboriginal and Torres Strait Islander peoples. There is no justifiable basis upon which the discretion of courts should apply in this way to Aboriginal and Torres Strait Islander peoples, but not other Territorians.

Recommendation 23: that the Government commit to a non-discriminatory approach to laws affecting Aboriginal and Torres Strait Islander peoples in the NT and immediately repeals those that are discriminatory.

Recommendation 24: that the Government, acknowledging the significant harm caused by the NTER to its relationship with Aboriginal and Torres Strait Islander peoples, make clear a commitment and dedicate significant resources to educating Aboriginal and Torres Strait Islander peoples about human rights in the context of the partial reinstatement the Racial Discrimination Act 1975 (RDA), and empowering Aboriginal communities to develop local human rights-based solutions to address local law and justice issues.

²⁸ See submissions to the March 2010 Inquiry by the Senate Community Affairs Committee into the changes to the NTER legislation by the Australian Human Right Commission (available at http://www.aph.gov.au/senate/committee/clac_ctte/soc_sec_welfare_reform_racial_discrim_09/submissions/sub76.pdf), the Central Land Council (available at http://www.aph.gov.au/senate/committee/clac_ctte/soc_sec_welfare_reform_racial_discrim_09/submissions/sub61.pdf) and the Law Council of Australia (available at http://www.aph.gov.au/senate/committee/clac_ctte/soc_sec_welfare_reform_racial_discrim_09/submissions/sub83.pdf).

5.4. The situation in Queensland

There are numerous human rights issues facing Aboriginal and Torres Strait Islander peoples in Queensland. These include but are not limited to:

- limited opportunities to negotiate with Government on matters that affect Aboriginal and Torres Strait Islander peoples;
- limited opportunities for self-determination;
- the gross over-representation of Aboriginal and Torres Strait Islander peoples within the criminal justice system;
- the gross over-representation of Aboriginal and Torres Strait Islander juveniles in the criminal justice system and the fact that Queensland is the only State in Australia where the age of adult criminal responsibility is 17;
- the gross over-representation of Aboriginal and Torres Strait Islander children in the child protection system;
- insufficient access to mental health services, especially in relation to the criminal justice system
- an unacceptable rate of deaths in custody of Aboriginal and Torres Strait Islander peoples
- unequal access to justice and limited access to culturally appropriate legal services in particular;
- limited access to safe houses for victims of family or domestic violence;
- limited access to medical services and culturally appropriate medical services, especially in remote areas;
- limited access to reparations for the trauma suffered as a result of past government policies; and
- limited access to sufficient infrastructure including housing, sewerage systems, affordable electricity, safe drinking water, reasonably priced fresh produce, safe roads that are sealed, and street lighting.

Aboriginal and Torres Strait Islander peoples in Queensland have limited access to recourse to address violations of their human rights as no Human Rights Act currently exists and existing legislation does not provide sufficient protections. While the introduction of a Human Rights Act in Queensland has been considered in the past, no affirmative action has been instigated.

The Commonwealth Government has recently renewed its commitment to human rights through the adoption of the Human Rights Framework and its decision to support the Declaration on the Rights of Indigenous Peoples. It is now the Commonwealth's responsibility to fulfil that commitment and take a leadership role in ensuring that State and Territory Governments similarly follow suit and introduce their own State or Territory human rights action plans in collaboration with the community and Aboriginal and Torres Strait Islander peoples in particular.

6. Further recommendations

We reiterate Recommendation 5 (above at 3.2) that previous recommendations by Aboriginal and Torres Strait Islander peoples and organisations be incorporated into the Action Plan.²⁹

The list below contains recommendations about specific actions that are sourced from either VALS, ALSWA or NATSILS endorsed submissions:

6.1. UN Universal Periodic Review (UPR)

The ATSILS made a joint submission for Australia's first UN Universal Periodic Review (UPR), which occurred in January 2011. The ATSILS submission contained a framework for the promotion and protection of human rights as well as key initiatives for implementation to ensure human rights are protected on the ground.³⁰ We consider these to be the primary areas for immediate consideration for incorporation into the Action Plan.³¹ Australia's UPR resulted in 145 recommendations to improve Australia's human rights, more than 30 of which referred specifically to Aboriginal and Torres Strait Islander peoples.³² A summary of these recommendations is attached to this submission as 'Annexure A'.

Recommendation 25: that the Government accept all recommendations from Australia's United Nations Universal Periodic Review referring to Aboriginal and Torres Strait Islander peoples as a priority, then work with Aboriginal and Torres Strait Islander peoples and organisations to develop and incorporate implementation strategies into the Action Plan and Baseline Study.

6.2. UN Convention on the Rights of the Child (CROC)

VALS and ALSWA recently made submissions³³ to the National and Victorian Taskforces for Child Rights Australia who are responsible for producing the NGO report for the UN Convention on the Rights of the Child (CROC) in 2011.

ALSWA also provided a working draft submission of materials and relevant information to the National Taskforce, a copy of which is attached as 'Annexure B'.³⁴

²⁹ ALSWA have a range of relevant submissions listed on our website that can be access by following the links to Publications and Submissions, at www.als.org.au.

³⁰ The Joint Submission is publically available at:
http://www.als.org.au/index.php?option=com_content&view=article&id=122%3Ajoint-atsils-response-australian-government-draft-upr&catid=14&Itemid=50.

³¹ Ibid and see Appendix A for recommendations.

³² United Nations General Assembly (2011) Unedited Version: Draft report of the Working Group on the Universal Periodic Review Australia Geneva: Human Rights Council, Working Group on the universal periodic review. The final document will be issued under the symbol A/HRC/17/10.

³³ http://vals.org.au/static/files/assets/a0cf1eb0/CROC_for_website.pdf.

VALS also made a submission promoting the best interests of the child and considering the preservation of identity, in the *Review of Victoria's Child Protection Legislative Arrangements: Submission to the Victorian Law Reform Commission April 2010*.³⁵

With reference to respecting the views of the child, VALS made the submission *Review of Victoria's Child Protection Legislative Arrangements: Submission to the Victorian Law Reform Commission April 2010*.³⁶

6.3. National Human Rights Consultation

The NATSILS made a joint submission to the National Human Rights Consultation ('the Consultation') in 2009.³⁷ The NATSILS questioned how many of the submissions received as part of the National Human Rights Consultation represent the voice of Aboriginal and Torres Strait Islander peoples. The NATSILS argued that the process of seeking written submissions is often inaccessible to Aboriginal and Torres Strait Islander peoples who experience socioeconomic and cultural disadvantage.³⁸

We support the inclusion of the recommendations made in the Consultation Report relating to Aboriginal and Torres Strait Islander peoples in the Action Plan, as follows:

Recommendation 26: that the Government provide to the Federal Parliament a statement of impact on Aboriginal and Torres Strait Islander peoples when the intent is to legislate exclusively for those peoples, to suspend the *Racial Discrimination Act 1975 (Cth)* or to institute a special measure. The statement should explain the object, purpose and proportionality of the legislation and detail the processes of consultation and attempts made to obtain informed consent from those concerned'.³⁹

³⁴ It will be available on ALSWA's website after a series of case studies and information from workshops ALSWA is conducting in February and March 2011. A copy of the updated submission will be provided in due course to the Attorney-General for consideration in the Action Plan.

³⁵ http://vals.org.au/static/files/assets/35393702/Review_Victoria_Child_Protection_Legislation_VLRC_Sub_Final_April_2010.pdf.

³⁶ Available online at:
http://vals.org.au/static/files/assets/35393702/Review_Victoria_Child_Protection_Legislation_VLRC_Sub_Final_April_2010.pdf.

³⁷ This submission is available at:
http://vals.org.au/static/files/assets/8d4d74d0/ATSILS_National_HR_Submission_2009_Final.pdf.

³⁸ This is evidenced by the fact that in Western Australia when ALSWA drafted and distributed widely an individual submission form for Aboriginal and Torres Strait Islanders along with media and two community meetings over two months. They only received 3 submissions.

³⁹ National Human Rights Consultation Committee (2009) National Human Rights Consultation Report p. xxxiii at
[www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/\(4CA02151F94FFB778ADAEC2E6EA8653D\)?~NHRC+Report+\(Recommendations\).pdf/\\$file/NHRC+Report+\(Recommendations\).pdf](http://www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/(4CA02151F94FFB778ADAEC2E6EA8653D)?~NHRC+Report+(Recommendations).pdf/$file/NHRC+Report+(Recommendations).pdf).

Recommendation 27: that the Government develop and implement a framework for self-determination in partnership with Aboriginal and Torres Strait Islander peoples and communities, outlining consultation protocols, roles and responsibilities (so that communities have meaningful control over their affairs) and strategies for increasing Indigenous Australians participation in the institutions of democratic government.⁴⁰

7. Conclusion

The NATSILS is a collation of community controlled Aboriginal and Torres Strait Islander Legal Services that have a history of advocating for the human rights of Aboriginal and Torres Strait Islander peoples. It is important to provide input at this early stage into the process and content of the Action Plan.

However, we would prefer to be engaging with the Government in relation to a Human Rights Act rather than a Human Rights Framework and in regards to the development and implementation of a specific strategy to protect the rights of Aboriginal and Torres Strait Islander peoples. Despite these limitations there is potential for the Action Plan to enhance the protection of Aboriginal and Torres Strait Islander peoples' human rights providing that the recommendations in this submission are given due consideration and adopted where possible.

Thank you for the opportunity to comment on the Action Plan Background Paper and we welcome your response to our recommendations outlined below and the opportunity for providing further input.

8. List of Recommendations

We recommend the Government:

1. introduce a legally enforceable Human Rights Act;
2. work with Aboriginal and Torres Strait Islander peoples and organisations to adopt a specific strategy for realising the rights of Aboriginal and Torres Strait Islander peoples;
3. table the report of the Special Rapporteur on the human rights and fundamental freedoms of indigenous people and indicate a timeframe for implementing recommendations in the report, or alternatively provide reasons for why these recommendations are being rejected or not prioritised by the Government;
4. develop an implementation strategy that includes targets and timeframes for the Declaration on the Rights of Indigenous peoples in partnership and collaboration with Aboriginal and Torres Strait Islander peoples and organisations;
5. incorporate the recommendations made by Aboriginal and Torres Strait Islander peoples and organisations in submissions already provided to the Government on issues affecting us and in particular about our human rights into the Action Plan;

⁴⁰ National Human Rights Consultation Committee (2009) op cit.

6. incorporate human rights education into the national curriculum in accordance with Recommendation 2 of the National Human Rights Consultation Report;
7. empower and build capacity in Aboriginal and Torres Strait Islander organisations and communities to ensure their ability to engage effectively in the development and implementation of the Action Plan. This includes ensuring equitable access to the engagement processes and the provision of funding and in-kind support;
8. develop a comprehensive Action Plan that builds on the UN Handbook's framework and incorporates accountability through a clear process of reporting back to the community and that also incorporates community preferred approaches;
9. set clear goals to guide the development of the Action Plan that incorporate timeframes and benchmarks;
10. ensure the process and product of the Action Plan be strong, comprehensive, realistic, inclusive, implemented and measurable and improve on previous plans;
11. conceptualise the Action Plan as a Reconciliation Action Plan with a focus on marginalised and disadvantaged communities as a priority in the short term;
12. adopt a whole of Government and whole of community approach to development, implementation and evaluation of the Action Plan;
13. conduct a Baseline Report that is evidence based, incorporates Aboriginal and Torres Strait Islander peoples' research methodologies and frameworks, and includes a list of rights for protection and promotion in line with the National Human Rights Consultation Report;
14. acknowledge, respect and address cultural protocols, diversity, expertise, resource constraints and work priorities in its collaboration with Aboriginal and Torres Strait Islander peoples;
15. routinely provide accurate information to participants and the public about the process and status of the Action Plan to continue improving awareness and understanding about human rights;
16. be creative when engaging the public about the Action Plan at various levels and in different locations, in particular regional and remote areas;
17. consider the Report of the Review of the Victorian Human Rights Charter, which is due for release in 2011 in the development and implementation of the Framework and Action Plan;
18. play a leadership role in building on existing human rights protections and measures to ensure that all human rights, including economic, social and cultural rights and the right to self determination are included in the Action Plan;
19. include information and any recommendations from reviews of existing human rights protections in State in the Action Plan;
20. introduce an Aboriginal and Torres Strait Islander Social Justice Commissioner for each State and Territory;
21. encourage State and Territory Governments to adopt a similar approach to developing state-based Action Plans;

22. urge all States and Territories to introduce a Custodial Services Inspector based on the WA model and extending the jurisdiction to cover all places of detention including police holding cells;
23. commit to a non-discriminatory approach to laws affecting Aboriginal and Torres Strait Islander peoples in the NT and immediately repeal those that are discriminatory;
24. acknowledging the significant harm caused by the NTER to its relationship with Aboriginal and Torres Strait Islander peoples, make clear a commitment and dedicate significant resources to educating Aboriginal and Torres Strait Islander peoples about human rights in the context of the partial reinstatement the *Racial Discrimination Act 1975* (RDA), and empowering Aboriginal communities to develop local human rights-based solutions to address local law and justice issues;
25. accept all recommendations from Australia's United Nations Universal Periodic Review referring to Aboriginal and Torres Strait Islander peoples as a priority, then work with Aboriginal and Torres Strait Islander peoples and organisations to develop and incorporate implementation strategies into the Action Plan and Baseline Study;
26. provide to the Federal Parliament a statement of impact on Aboriginal and Torres Strait Islander peoples when the intent is to legislate exclusively for those peoples, to suspend the *Racial Discrimination Act 1975* (Cth) or to institute a special measure. The statement should explain the object, purpose and proportionality of the legislation and detail the processes of consultation and attempts made to obtain informed consent from those concerned; and
27. develop and implement a framework for self-determination in partnership with Aboriginal and Torres Strait Islander peoples and communities, outlining consultation protocols, roles and responsibilities (so that communities have meaningful control over their affairs) and strategies for increasing Indigenous Australians participation in the institutions of democratic government.

Recommendations submitted to the Australian Government relating to Aboriginal and Torres Strait Islander Peoples

Fundamental Rights of Aboriginal and Torres Strait Islander Peoples

1. Implement the recommendations made by the UN Special Rapporteur on the rights of Indigenous people after his visit in 2009 (Norway).
2. Revise the Constitution, legislation, public policies and programs for the full implementation of the Declaration of the Rights of Indigenous Peoples (Bolivia);
3. Ensure effective implementation of the Declaration on the Rights of Indigenous People, including in the Northern Territory, and provide adequate support to the National Congress of Australia's First Peoples to enable it to address the needs of Aboriginal and Torres Strait Islander peoples (Ghana);
4. Develop a detailed framework to implement and raise awareness about the UN Declaration on the Rights of Indigenous Peoples in consultation with Aboriginal and Torres Strait Islander peoples (Hungary);
5. Take further steps to ensure the implementation of the Declaration on the Rights of Indigenous Peoples (Denmark).
6. Ratify International Labor Organisation (ILO) Convention No. 169 and incorporate it into national norms (Bolivia).
7. Take measures towards ensuring the equal and the full enjoyment of the basic rights of all citizens including Aboriginal and Torres Strait Islander peoples, and to effectively prevent and, if necessary, combat racial discrimination (Sweden).
8. Continue to engage with Aboriginal and Torres Strait Islander peoples and ensure the equal protection of their fundamental rights (Indonesia).
9. Reform the *Native Title Act* 1993 to amend requirements which prevent Aboriginal and Torres Strait Islander peoples from exercising the right to access and control their traditional lands and take part in cultural life (United Kingdom).
10. Include in its national norms recognition and adequate protection of culture, values and spiritual and religious practices of Aboriginal and Torres Strait Islander peoples (Bolivia).
11. Institute a formal reconciliation process leading to an agreement with Aboriginal and Torres Strait Islander peoples (Slovenia).

The Stolen Generations

12. Establish a National Compensation Tribunal, as recommended in the "Bringing Them Home" report, to provide compensation to Aboriginal and Torres Strait Islander peoples that are negatively affected by the assimilation policy, particularly as it applies to children unfairly removed from their families and the parents of those children (Slovenia).

Recommendations submitted to the Australian Government relating to Aboriginal and Torres Strait Islander Peoples

Constitutional Reform

13. Continue the process of Constitutional reform to better recognise the rights of Aboriginal and Torres Strait Islander peoples (France).
14. Continue efforts to attain the Constitutional recognition of Aboriginal and Torres Strait Islander peoples (Colombia).
15. Launch a Constitutional reform process to better recognise and protect the rights of Aboriginal and Torres Strait Islander peoples, including a framework covering the principles and objectives of the UN Declaration on the Rights of Indigenous Peoples (Guatemala).

Legal Protections

16. Focus on nationwide enforcement existing anti-discrimination law and plan adequately for nationwide implementation, especially as it relates to discrimination against Aboriginal and Torres Strait Islander peoples (United States).
17. Fully implement the *Racial Discrimination Act* 1975 and the revision of Federal laws so as to be compatible with the UN Declaration on the Rights of Indigenous Peoples (Norway).
18. Consult with Aboriginal and Torres Strait Islander peoples, and take into consideration guidelines proposed by the Australian Human Rights Commission before considering suspension of the Racial Discrimination Act in the future (Slovenia).
19. Consider implementing the recommendations of human rights treaty bodies and special procedures concerning Aboriginal and Torres Strait Islander peoples (Jordan).

Participation in Decision-Making

20. Promote the inclusion and participation of Aboriginal and Torres Strait Islander peoples in any process or decision-making that may affect their interests (Bolivia).
21. Strengthen efforts and take effective measures to ensure enjoyment of all rights for Aboriginal and Torres Strait Islander peoples, including participation in decision-making (Bosnia and Herzegovina).
22. Ensure that legislation allows for processes of consultation in all actions affecting Aboriginal and Torres Strait Islander peoples (Mexico).
23. Continue efforts to increase the representation of Aboriginal and Torres Strait Islander women in decision making posts (Morocco).

Recommendations submitted to the Australian Government relating to Aboriginal and Torres Strait Islander Peoples

Access to Justice

24. Increase legal advice to Aboriginal and Torres Strait Islander peoples with due translation services, especially for Aboriginal and Torres Strait Islander women in remote communities (Bolivia).
25. Implement measures to address factors leading to overrepresentation of Aboriginal and Torres Strait Islander communities in the prison population (Austria).
26. Enhance contact and communication between Aboriginal and Torres Strait Islander communities and law enforcement officials and enhance the training of those officials with respect to cultural specificities of the above communities (Austria).

Closing the Gap

27. Increase the participation of Aboriginal and Torres Strait Islander communities in the process of closing the gap in opportunities and life outcomes (Austria).
28. Continue the implementation of policies aimed at improving the living standards of Aboriginal and Torres Strait Islander peoples and take all the necessary measures to eradicate discrimination against them (France).
29. Step up efforts to ensure that people living in the remote and rural areas, and in particular Aboriginal and Torres Strait Islander peoples, receive adequate support services relating to accommodation and all aspects of health and education (Malaysia).
30. Continue efforts to narrow the gap in opportunities and life outcomes between Aboriginal and Torres Strait Islander peoples and non-Aboriginal and Torres Strait Islander peoples (Singapore).
31. Intensify on-going efforts to close the gap in opportunities and life outcomes between Aboriginal and Torres Strait Islander peoples and non-Aboriginal and Torres Strait Islander peoples, especially in the areas of housing, land title, healthcare, education and employment (Thailand).
32. Continue addressing effectively the socio-economic inequalities faced by Aboriginal and Torres Strait Islander peoples (Jordan).
33. Carry out, in consultation with the communities concerned, a comprehensive assessment of the effectiveness of actions and strategies aimed at improving socio-economic conditions of Aboriginal and Torres Strait Islander peoples and if necessary correct these actions (Belgium).
34. Take immediate legal measures to remove restrictions against access of Aboriginal and Torres Strait Islander women and children to appropriate health and education services and employment opportunities (Islamic Republic of Iran).

ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA (INC.)

Submission to the Child Rights Australia National Taskforce

NGO Report

January 2011



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1. Introduction and Scope of the Submission

ALSWA prepared this submission for the purpose of contributing information and materials to the Child Rights Australia National Taskforce (**Taskforce**). The Taskforce is in the process of coordinating the national Non-Government Organisation Report on Child Rights in Australia (**NGO Report**) to the United Nations Committee on the Rights of the Child (**CROC Committee**). The CROC Committee is responsible for monitoring Australia's performance of its obligations under the International Convention on the Rights of the Child (**CROC**). Australia became a party to CROC after signing the treaty in 1990¹ and is due to report and will appear before the CROC Committee regarding the performance of its obligations in early 2012.

ALSWA is committed to the protection and enjoyment of child rights and has a long history of advocating for the rights of Aboriginal peoples² and in particular Aboriginal juveniles.³

ALSWA became involved in the Taskforce in September 2010. ALSWA has assisted the Taskforce in its attention to the plight of Aboriginal juveniles, including by recommending and then participating in a sub-committee on issues affecting Aboriginal juveniles within the Taskforce.

ALSWA notes the Taskforce requested information and materials relevant to how Australia protects and provides for its children, to be submitted in December 2010 and that this timeframe was generally extended to early 2011. The information and materials provided by ALSWA are limited to issues within our expertise, which includes:

the plight of Aboriginal juveniles in WA with particular regard to the high involvement of this group in their contact with the justice system.

The following submission will provide information and materials based on our expertise and experience in providing advice and representation to Aboriginal juveniles and their families in the WA justice system. These include a number of recent case studies, information from workshops with Aboriginal juveniles and other submissions prepared by ALSWA.

¹ United Nations Treaty Body Database, <http://www.unhchr.ch/tbs/doc.nsf/Statusfrset?OpenFrameSet> as at 6 January 2011.

² 'Aboriginal peoples' is intended to include Aboriginal peoples and Torres Strait Islander peoples.

³ For the purpose of this submission Aboriginal and Torres Strait Islander children and young peoples will be referred to as Aboriginal juveniles.

2 About ALSWA

ALSWA is a community based organisation that was established in 1973. ALSWA aims to empower Aboriginal peoples and advance their interests and aspirations through a comprehensive range of legal and support services throughout WA.

ALSWA aims to:

- deliver a comprehensive range of culturally-matched and quality legal services to Aboriginal peoples throughout WA;
- provide leadership which contributes to participation, empowerment and recognition of Aboriginal peoples as the Indigenous people of Australia; and
- ensure that Government and Aboriginal peoples address the underlying issues that contribute to disadvantage on all social indicators, and implement the relevant recommendations arising from the Royal Commission Into Aboriginal Deaths in Custody.

ALSWA uses the law and legal system to bring about social justice for Aboriginal peoples as a whole. ALSWA develops and uses strategies in areas of legal advice, legal representation, legal education, legal research, policy development and law reform.

ALSWA is a representative body with 16 executive officers⁴ elected by Aboriginal peoples from their local regions to speak for them on law and justice issues. ALSWA provides legal advice and representation to Aboriginal peoples in a wide range of practice areas including criminal law, civil law, family law, and human rights law. ALSWA also provides support services to prisoners and incarcerated juveniles. Our services are available throughout WA via 17 regional and remote offices and one head office in Perth.

3 Case Studies

ALSWA requested staff to identify any outstanding matters of concern that demonstrate disadvantage or unreasonable treatment towards juveniles in their contact with the justice system. Many staff at ALSWA indicated there was a large volume of Aboriginal juveniles coming into contact with the justice system, and a plethora of common social issues they face that are worsened by unreasonable bail conditions and/or other court orders that are not sensitive to the needs and situation of these children and young people.

One major issue that continues to reoccur is the lack of culturally appropriate (or in some cases any) correctional and/or social services for Aboriginal juveniles. These include bail hostels, mental health and substance abuse treatment facilities and counselling.

The rest of this section will be provided at a later date.

⁴ There are two Executive Officers for each of the former eight ATSIC regions (Metropolitan, Central Desert Region, Murchison/Gascoyne Region, Southern Region, Pilbara Region, Goldfields Region, West Kimberley Region and East Kimberley Region). They are elected by Aboriginal peoples every three years.

4 Workshops with Aboriginal juveniles

This section to be provided at a later date.

5 Submissions prepared by ALSWA

The issues surrounding Aboriginal juveniles and their contact with the justice system have not changed or improved significantly in recent times. ALSWA has prepared a number of relevant submissions on these issues that are summarised below. Electronic copies of these submissions are generally available via ALSWA's website under "Publications" at www.als.org.au.

5.1 High juvenile involvement in the WA Criminal Justice System (December 2009)

ALSWA prepared this submission to Commonwealth House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs in December 2009. Aboriginal juveniles continue to be disturbingly overrepresented in the juvenile justice system. This submission briefly discussed the historical context surrounding the disparities and intergenerational poverty experienced by many Aboriginal peoples in contemporary society. It also provided a snapshot of the current overrepresentation of Aboriginal juveniles in the criminal justice system in WA and highlighted how factors such as:

- over-policing and poor utilisation of diversionary schemes by police;
- an absence of crisis care accommodation, bail hostels and rehabilitation programs;
- limited access to legal advice;
- the absence of a state-wide Aboriginal interpreter service; and
- mandatory sentencing and other punitive laws,

are major contributors to the high involvement of Aboriginal juveniles in the justice system.

The submission also identified some best practice examples that support Aboriginal and Torres Strait Islander youth diversion and rehabilitation.

5.2 Stop and Search Laws (January 2010)

ALSWA provided this submission to the Legislation Committee of the Legislative Council of the WA Parliament to urge the Government to withdraw the Criminal Investigation Amendment Bill, which proposed to give the WA police powers to stop and search people in designated areas without reasonable suspicion. ALSWA highlighted the particular impacts this legislation will have on Aboriginal juveniles. Failing its withdrawal, ALSWA submitted several recommendations aimed at attempting to safeguard the community from over-policing and breaches of fundamental human rights likely to occur as a result of the powers created by the Bill.

5.3 Intervention and Report of the Indigenous Peoples Organisation of Australia at UN Permanent Forum on Indigenous Issues (April 2010)

This Intervention and Report were prepared for the United Nations Permanent Forum on Indigenous Issues (UNPFII) in New York and concerned the alarmingly high and ever increasing rates of incarceration of Indigenous children and youth in Australia and around the world. It noted the legacy of historical abuse and the impact of past and present government policies and practices in contributing to the over-incarceration of Indigenous youth.

The Intervention and Report recognised the need for multi-faceted and inter-related programs to overcome disadvantage and strengthen Indigenous youth as leaders of tomorrow and bearer's of Indigenous culture. The Intervention and Report called upon the UNPFII to urge all States to engage and consult with Indigenous peoples to identify causal factors for offending and incarceration and develop strategies that empower Indigenous peoples to overcome them.

Attached to the report were submissions made by the Aboriginal and Torres Strait Islander Legal Services (ATSILS) for the Commonwealth Inquiry into the high level of involvement of Indigenous juveniles and young adults in the criminal justice system (see below at 5.6).

5.4 Child Protection Permanency Planning Policy Consultation (June 2010)

ALSWA provided this submission to the WA Department of Child Protection (DCP) to provide substantive practical considerations and feedback on DCP's draft Permanency Planning Policy. ALSWA welcomed the development of the Permanency Planning Policy whilst noting the importance of effective implementation which would require DCP staff training and possibly a shift in staff attitudes. ALSWA noted that reunification should not be overlooked in practicing parallel planning. ALSWA warned against legislated timeframes being used as formulaic deadlines and recommended the policy call for assessment of reunification potential as promptly as possible and for DCP to assist parents develop their parenting capacity while maintaining contact with their children. ALSWA also recommended that care plans accompany reunification processes to clearly articulate the steps parents need to take and act as a mechanism against which to measure the progress towards reunification. ALSWA warned against DCP giving undue weight to carer's views and encouraged DCP to develop a greater commitment to working in partnership with birth parents.

5.5 Transport of Juvenile Remandees from Regional WA (June 2010)

This submission was prepared in response to correspondence received from the Director of Youth Custodial Services in Rangeview Remand Centre by ALSWA, and has therefore not been made publicly available. The submission is **attached** to this submission to the Taskforce as Annexure 1.

The correspondence outlined the Department of Corrective Services' (DCS) proposed service description to manage the new DCS responsibility of transporting juvenile prisoners. Previously the transportation of remanded young persons was the responsibility of the WA Police.

ALSWA indicated its support for DCS in assuming this responsibility and commended DCS for taking steps to develop and introduce dedicated policies on the topic of juvenile transportation. DCS' aim of reducing the time that juveniles spend in regional lockup was welcomed by ALSWA given the detrimental effects of prolonged custody in these lockups, particularly for juveniles, is undeniable.

ALSWA was pleased to have been provided with the opportunity to review and comment on the proposed service description outlined in the correspondence. ALSWA appreciated DCS' initiative in developing and proposing the description of the new juvenile transport service, but raised concerns and points requiring further clarification discussed in detail in the submission.

5.6 Prohibited Behaviour Orders Bill (WA) (August 2010)

ALSWA provided this submission to members of the WA Parliament to contribute to the debate against the Prohibited Behaviour Orders Bill (WA) 2010. ALSWA strongly opposed the introduction of the Bill and submitted that existing penalties and offences in the WA criminal justice system already appropriately punished offenders. It was argued that the Bill in its existing form was too broad and did not provide enough protections to ensure that Prohibited Behaviour Orders (PBOs) would be made in appropriate circumstances. ALSWA noted that the Bill was likely to increase incarceration rates for relatively minor offences.

ALSWA argued that the Bill was likely to disproportionately disadvantage vulnerable groups such as Aboriginal and Torres Strait Islander peoples, young peoples, the homeless and people with mental health concerns; and was likely to increase the interaction of these peoples with the justice system, without increased correlation in rates of offending. It was also argued that if enacted, the Bill had scope to breach civil liberties, including the right of association, without appropriate justification.

ALSWA stated grave concerns about the proposed publication of people's names, photographs and general locations which can then be republished by anyone. By allowing publication to automatically extend to children, ALSWA submitted that the Bill contravenes the *International Convention on the Rights of the Child*.

ALSWA called for the Bill to be immediately withdrawn from Parliament.

5.7 Review of the Bail Act 1982 (WA) (November 2010)

ALSWA prepared this submission in response to a review of the *Bail Act 1982* (WA) being undertaken by the WA Department of the Attorney General. The review was prompted by Coronial comments arising from the Inquest into the death of Mr Ward.

ALSWA provided responses to the 42 questions posed by the Department in relation to bail. ALSWA emphasised the primary purpose of bail, to ensure that an accused person attends court when required and does not offend or interfere with witnesses or the trial process. ALSWA submitted that the *Bail Act* should reflect an entitlement to bail as a starting point and a presumption in favour of bail and made special reference to Aboriginal juveniles. ALSWA recommended that bail should be dispensed with for matters that are unlikely to attract a sentence of imprisonment.

In an effort to increase judicial discretion, ALSWA also recommended that children and young people be excluded from the presumption against bail attached to certain offences. ALSWA submitted that the considerations relevant to bail should be expanded to include the interests of the accused person such as their capacity to prepare for their trial. ALSWA further recommended that all accused persons should have access to legal representation for bail hearings and to interpreters where required to ensure equitable access to justice.

5.8 Proposal to investigate the introduction of a 'two tier' framework for Justices of the Peace in Western Australia (WA) (December 2010)