



## **Criminal Justice Consultation Paper**

### **Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse**

---

**October 2016**

---

The Aboriginal Legal Service (NSW/ACT) ('ALS') is an Aboriginal community organisation providing professional legal assistance services to Aboriginal and Torres Strait Islander men, women and children in NSW and the ACT.

We operate a criminal law, family law and care and protection practice providing legal advice and court representation. In addition to legal services, we provide information and referral for civil matters, work and development orders and other non-legal matters. ALS is the largest private criminal Defence practice in NSW.

ALS also delivers a Custody Notification Service providing early legal advice and an RU OK welfare check for Aboriginal people taken into police custody.

ALS has 23 offices across NSW and the ACT working towards achieving culturally appropriate justice for Aboriginal people and communities.

[WWW.ALSNSWACT.ORG.AU](http://WWW.ALSNSWACT.ORG.AU)

(02) 8303 6699

PO Box 646 Surry Hills NSW 2010

## Introduction

The Criminal Justice Consultation Paper (“the Consultation Paper”) was published by the Royal Commission into Institutional Responses to Child Sexual Abuse (“the Royal Commission”) to seek submissions from interested parties to assist with “*understanding the contemporary response of the criminal justice system to institutional child sexual abuse and on identifying how it can be made more effective*”.<sup>1</sup> The ALS welcomes the opportunity to contribute to the Royal Commission’s inquiries in this respect.

As stated above, the ALS is the largest private criminal defence practice in NSW. However, the ALS is also an Aboriginal community organisation. Both of these aspects of the ALS are reflected in our values and guiding principles:

*We are proudly Aboriginal;*

*We acknowledge, honour and respect our traditional and cultural practices;*

*We are community focused;*

*We are fearless in our advocacy;*

*We are ethical;*

*We make a difference and create better futures.*

The ALS is also a member of the National Aboriginal and Torres Strait Islander Legal Services (“NATSILS”) peak body. The ALS supports and endorses the submission made by NATSILS in response to the Consultation Paper, and makes this submission to specifically reflect the needs and experiences of our clients who are Aboriginal and Torres Strait Islander people from communities across NSW and the ACT.

### Historical context

In their report for the Royal Commission, the UNSW Gendered Violence Research Network explained that:

---

<sup>1</sup> Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice* (2016) 9.

*(t)here is consensus in the literature that the sexual abuse of Aboriginal and Torres Strait Islander children must be viewed in the context of the historical legacy of colonisation, racism, deprivation, the forced removal of children from their families and ensuing intergenerational trauma.*<sup>2</sup>

The ALS acknowledges the role of the legal system in perpetuating structural violence against Aboriginal and Torres Strait Islander people, and in facilitating the still ongoing colonisation and dispossession of Aboriginal and Torres Strait Islander people throughout Australia.<sup>3</sup> This is best illustrated by the overrepresentation of Aboriginal and Torres Strait Islander people in prison. As at 1 August 2016, the offender imprisonment rates (per 100,000 adults) for NSW was 2221.2 for Aboriginal or Torres Strait Islander offenders, as compared to 162.9 for non-Aboriginal or Torres Strait Islander offenders.<sup>4</sup> At that same date, 24.2% of all offenders (male and female) in full-time custody were Aboriginal or Torres Strait Islander; similarly, 34% of women in custody were Aboriginal or Torres Strait Islander.<sup>5</sup> Additionally, statistics from the Department of Juvenile Justice indicate that as at August 2016, 53% of young people in custody in NSW are Aboriginal or Torres Strait Islander. These rates of imprisonment, when compared to the fact that Aboriginal and Torres Strait Islander people make up 2.9% of the NSW population,<sup>6</sup> demonstrate that the legal and criminal justice systems continue to have a disproportionate effect on Aboriginal and Torres Strait Islander people.

As stated in the report of the Royal Commission into Aboriginal Deaths in Custody (“RCIADIC”), “[n]on-Aboriginal Australia has developed on the racist assumption of an ingrained sense of superiority that it knows best what is good for Aboriginal people”.<sup>7</sup> The ALS acknowledges the perspective of many Aboriginal and Torres Strait Islander people that the legal system imposes colonial justice upon Aboriginal and Torres Strait Islander people, rather than allowing Aboriginal and Torres Strait Islander people to dictate the means required to achieve justice goals for their respective communities.

---

<sup>2</sup> Jan Breckenridge and Gabrielle Flax, *Service and support needs of specific population groups that have experienced child sexual abuse* (Report, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016) 30.

<sup>3</sup> See Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 1, [1.4].

<sup>4</sup> Corrections Research, Evaluation & Statistics, *Aboriginal Offenders Report* (August 2016, Corrective Services NSW).

<sup>5</sup> Ibid.

<sup>6</sup> Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians, June 2011* (30 August 2013) Australian Bureau of Statistics <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/3238.0.55.001>>.

<sup>7</sup> See Commonwealth, above n 3, vol 1, [1.4.10].

It is in this broader context, which is further elucidated in the submission made by NATSILS,<sup>8</sup> that the ALS makes the following submission.

### **Chapter 3: Issues in police responses**

As explained in the report of the RCIADIC:

*Police officers naturally shared all the characteristics of the society from which they were recruited, including the idea of racial superiority in relation to Aboriginal people and the idea of white superiority in general; and being members of a highly disciplined centralist organisation their ideas may have been more fixed than most; but above and beyond that was the fact that police executed on the ground the policies of government and this brought them into continuous and hostile conflict with Aboriginal people. The policeman was the right hand man of the authorities, the enforcer of the policies of control and supervision, often the taker of the children, the rounder up of those accused of violating the rights of the settlers.<sup>9</sup>*

It is accepted that police played a role in the removal and institutionalisation of children from Aboriginal and Torres Strait Islander people during the Stolen Generations.<sup>10</sup> In this context, it is therefore understandable that “*a deep animosity and often hatred developed between Aboriginal people and police*”,<sup>11</sup> and that there may be a reluctance on the part of Aboriginal and Torres Strait Islander people to report crimes that took place and trauma suffered in institutions to a body that assisted in placing them there.

It is in this broader context, which is further elucidated in the submission made by NATSILS,<sup>12</sup> that the ALS makes the following observations and submissions about police responses to institutional child sexual abuse.

#### **Training**

In its consultation paper, the Royal Commission recommended that:

<sup>8</sup> National Aboriginal & Torres Strait Islander Legal Services, Submission to Royal Commission into Institutional Responses to Child Sexual Abuse, *Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse*, October 2016, 2.

<sup>9</sup> Commonwealth, above n 3, vol 1, [1.4.16].

<sup>10</sup> National Aboriginal & Torres Strait Islander Legal Services, above n 8.

<sup>11</sup> Commonwealth, above n 3, vol 1, [1.4.17].

<sup>12</sup> National Aboriginal & Torres Strait Islander Legal Services, above n 8, 3-7.

*All police who may come into contact with victims or survivors of institutional child sexual abuse should be trained to:*

- *have a basic understanding of complex trauma and how it can affect people who report to police, including those who may have difficulties dealing with institutions or persons in positions of authority (such as the police); and*
- *treat anyone who approaches to police to report abuse with consideration and respect.*<sup>13</sup>

The ALS supports this recommendation as a baseline standard for all police officers involved in cases involving institutional child sexual abuse.

However, as observed by the Family Violence Prevention Legal Service Victoria:

*There is still evidence of fear amongst ATSI communities about asking for police assistance for numerous reasons, yet police members show limited understanding of this.*<sup>14</sup>

The ALS further suggests that police engage in training to gain an understanding of the specific nature of trauma suffered by Aboriginal and Torres Strait Islander people and how that may impact their interactions with police. For example, an Aboriginal or Torres Strait Islander survivor's "*difficulty asking questions or giving their opinions*"<sup>15</sup> is likely to be influenced by the ongoing colonial and inequitable relationship between police and Aboriginal and Torres Strait Islander communities. Aboriginal and Torres Strait Islander survivors are also more likely to have had prior "*difficulties dealing with institutions*"<sup>16</sup> given the historical and ongoing institutionalisation of Aboriginal and Torres Strait Islander people, demonstrated by the Stolen Generations and current disproportionate rates of Aboriginal and Torres Strait Islander incarceration and youth in out of home care ("OOHC").

In an article detailing concerns raised during the *National Yarn Up: Sharing the Wisdoms and Challenges of Young People and Sexual Abuse* forum, Leticia Funston observed that participants in the forum suggested the following topics to be included in training of sexual assault workers:

---

<sup>13</sup> Commonwealth, above n 1, 14.

<sup>14</sup> FVPLS Victoria, Improving accessibility of the legal system for Aboriginal and Torres Strait Islander victims/survivors of family violence and sexual assault, Paper 3 (June 2010) 126.

<sup>15</sup> Commonwealth, above n 1, 109.

<sup>16</sup> Ibid.

*the history of genocide committed against Aboriginal and Torres Strait Islander people, the impacts of racism experienced within the workplace, white privilege, systemic racism, and acculturation stress.*<sup>17</sup>

The ALS submits that police would benefit generally from training in these areas, and specifically in relation to institutional child sexual abuse.

## Reporting

In her *National Yarn Up* report, Funston asserted that:

*[n]ot only does ongoing colonial and post-colonial oppression create the context for interpersonal violence to occur, but it also creates innumerable barriers for victims of abuse to disclose violence and receive effective support.*<sup>18</sup>

The Royal Commission outlined several of these barriers to reporting that specifically relate to Aboriginal and Torres Strait Islander victims and survivors in their Consultation Paper.<sup>19</sup> The UNSW Gendered Violence Research Network listed similar barriers in their report for the Royal Commission.<sup>20</sup> The ALS agrees that these barriers prevent Aboriginal and Torres Strait Islander people from reporting institutional child sexual abuse, with mistrust of police and the criminal justice system, and fear of authority and state institutions,<sup>21</sup> being of particular concern where child sexual abuse has occurred in state institutions, such as OOHC or juvenile detention centres.

## Cultural safety

The ALS agrees that the key to encouraging Aboriginal and Torres Strait Islander people to report institutional child sexual abuse is to establish cultural safety and relationships of trust within services that deal with reporting.<sup>22</sup> According to Funston:

---

<sup>17</sup> Leticia Funston, "Aboriginal and Torres Strait Islander Worldview and Cultural Safety Transforming Sexual Assault Service Provision for Children and Young People" (2013) 10 *International Journal of Environmental Research and Public Health* 3818, 3823.

<sup>18</sup> Funston, above n 17, 3818, 3827.

<sup>19</sup> See Commonwealth, above n 1, 118-119.

<sup>20</sup> Breckenridge and Flax, above n 2, 33.

<sup>21</sup> Australian Human Rights Commission, *Ending family violence and abuse in Aboriginal and Torres Strait Islander communities – Key issues*, Overview paper (2006) Section 4(g).

<sup>22</sup> Commonwealth, above n 1, 119-121; see also FVPLS Victoria, Strengthening on-the-ground service provision for Aboriginal and Torres Strait Islander victims/survivors of family violence and sexual assault in Victoria, Paper 2 (June 2010) 51.

*[c]ultural safety relies on services establishing **meaningful, accountable and equitable long-term relationships** with communities built on an understanding of their cultures and worldviews as well as their unique needs and strengths.<sup>23</sup>*

While the ALS stresses the need for Aboriginal and Torres Strait Islander support people within services to assist those reporting instances of child sexual abuse, effort also needs to be made for all police to meaningfully engage with Aboriginal and Torres Strait Islander communities,<sup>24</sup> and to be aware of services and external support that may be available for Aboriginal and Torres Strait Islander victims and survivors.<sup>25</sup>

In order to reduce re-victimisation of victims and survivors during the reporting process, the ALS advocates for a “*strengths-based approach*”<sup>26</sup> which aims to respect and support Aboriginal and Torres Strait Islander families and their communities, rather than attributing shame to the family or community.<sup>27</sup> The ALS supports the role of specialised counselling services for Aboriginal and Torres Strait Islander victims and survivors of child sexual abuse, family violence and sexual assault.<sup>28</sup>

The presence of a culturally-appropriate support person for victims and survivors may also assist in building trust at the initial reporting stage.<sup>29</sup> The NSW Ombudsman observed that there is “*a clear need in NSW for vulnerable witnesses to have a greater level of support when they are participating in interviews with police*”<sup>30</sup>. The ALS submits that Aboriginal and Torres Strait Islander victims and survivors are in a uniquely vulnerable position when interacting with police even on a voluntary basis.<sup>31</sup> Having access to a support person similar to a Witness Assistance Scheme (“WAS”) Officer or intermediary may assist not only in encouraging reporting but also ensuring the full engagement of Aboriginal and Torres Strait Islander victims and survivors in the interview process. Having the same

<sup>23</sup> Funston, above n 17, 3818, 3830 (emphasis added).

<sup>24</sup> FVPLS Victoria, above n 14, 135.

<sup>25</sup> FVPLS Victoria, above n 14, 135 (quoting an Aboriginal support worker).

<sup>26</sup> Funston, above n 17, 3818, 3824.

<sup>27</sup> FVPLS Victoria, above n 14, 128.

<sup>28</sup> See NSW Law Society, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice*, 2.

<sup>29</sup> FVPLS Victoria, above n 14, 137-138.

<sup>30</sup> NSW Ombudsman, *Auditing the implementation of the NSW Interagency Plan to Tackle Child Sexual Assault in Aboriginal Communities* (December 2012) 169.

<sup>31</sup> Aboriginal and Torres Strait Islander people are acknowledged to be vulnerable people when in custody – see *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) r 24(1).

WAS Officer or intermediary available through all “*key stages of the criminal justice process*”<sup>32</sup> would allow for continuous support and assistance (see Chapter 7 and Chapter 9 below).

### Flexibility in reporting

The ALS submits that the reporting process needs to be sufficiently flexible in order to ensure that the setting is comfortable for victims and survivors and maintains their confidentiality, and allowing for meetings in places other than police stations.<sup>33</sup> The ALS notes that issues of confidentiality are of particular concern in smaller regional and rural towns.<sup>34</sup>

The ALS supports the provision of multiple channels for reporting, including channels for reporting that do not require attendance at a police station,<sup>35</sup> or communication with police.<sup>36</sup> The ALS especially notes the need to have appropriate channels for prisoners to report sexual abuse, including institutional child sexual abuse. The ALS supports the submission of Legal Aid NSW that these channels include an ongoing free telephone service for people reporting from prison, the establishment of a confidential space for prisoners to report within prisons, and culturally safe support services (such as counselling or witness assistance) both during and after disclosure interviews.<sup>37</sup>

## **Chapter 7: Issues in prosecution responses**

As observed by the Royal Commission in its Consultation Paper, many of the issues with prosecution staff are similar to those with police. As such, the ALS’ submissions in relation to Chapter 7 are similar to the submissions in relation to Chapter 3.

### Training

As with police, the ALS submits that all prosecution staff who may come into contact with victims or survivors engage in training to gain a basic understanding of the trauma suffered by Aboriginal and

---

<sup>32</sup> NSW Ombudsman, above n 30.

<sup>33</sup> Funston, above n 17, 3818, 3823.

<sup>34</sup> FVPLS Victoria, above n 14, 128, 132-133.

<sup>35</sup> Commonwealth, above n 1, 15.

<sup>36</sup> Legal Aid NSW, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, October 2016, 8.

<sup>37</sup> Ibid.



Torres Strait Islander people in general, and specifically in relation to institutional child sexual abuse. Understanding the cultural and social context of the complainant will allow prosecution staff to focus on “*the credibility of the complaint rather than the credibility of the complainant*”<sup>38</sup>.

#### Intermediaries/Witness Assistance Services

Again, the ALS stresses the importance of having continual support for victims and survivors from reporting, to preparing for the trial, and through the trial itself.

As explained in the report of the NSW Ombudsman, with Aboriginal and Torres Strait Islander victims and survivors:

*[s]upport is often provided to extended family and community members, and there is often a range of complex needs which need to be addressed. It can also be more difficult and time consuming to make telephone contact, and it can be more difficult to provide information and build rapport without engaging in face to face contact.*<sup>39</sup>

At present, WAS employs three Aboriginal WAS Officers (although one position is vacant). The Aboriginal WAS Officers are based in Sydney, Newcastle and Dubbo but are required to service the entire state. The ALS submits that the current number of Aboriginal WAS Officers is not sufficient to support the “*range of complex needs*” of Aboriginal and Torres Strait Islander victims and survivors of institutional child sexual abuse, as well as Aboriginal and Torres Strait Islander victims and survivors of other offences. The ALS supports the recommendation to increase the number of WAS Officers in NSW,<sup>40</sup> and submits that an expanded and continuous support service, accessible from reporting to trial, will improve the ability of prosecution departments to communicate with victims and survivors.

## **Chapter 9: Evidence of victims and survivors**

### Prerecording evidence

In the Bringing them Home Report, Dr Jane McKendrick explained that:

<sup>38</sup> Commonwealth, above n 1, 141.

<sup>39</sup> NSW Ombudsman, above n 30, 142.

<sup>40</sup> NSW Ombudsman, above n 30, 141.

*If people have been traumatised and are still suffering from the effects of that trauma, they are re-traumatised every time something reminds them of the trauma, even people who have made some degree of recovery...Things that remind people of the trauma will bring back memories of the trauma and severe distress.*<sup>41</sup>

The ALS acknowledges that the trauma and distress felt by victims and survivors during evidence can be exacerbated by courtroom dynamics.<sup>42</sup> The ALS submits that the trauma and distress felt by Aboriginal and Torres Strait Islander victims and survivors is compounded by the specific trauma suffered by Aboriginal and Torres Strait Islander people when encountering the legal system.<sup>43</sup>

In order to minimise the detrimental effect of cross-examination on all victims and survivors, the ALS supports the extension of pre-recording of a witness' evidence in cases of child sexual abuse, including institutional child sexual abuse, to cases beyond those involving children or otherwise vulnerable witnesses.<sup>44</sup> The ALS also notes the other advantages of pre-recording evidence set out by the Royal Commission in the Consultation Paper.<sup>45</sup>

### Intermediaries

The ALS submits that intermediaries should be available for all Aboriginal and Torres Strait Islander victims and survivors giving evidence in matters involving institutional child sexual abuse. Although not defined as a category of 'vulnerable person' under the *Criminal Procedure Act 1986* (NSW), the ALS acknowledges that many Aboriginal and Torres Strait Islander victims and survivors are emotionally, culturally and linguistically vulnerable during court proceedings. The ALS submits that these vulnerabilities cannot be completely addressed by the use of interpreters (who may address language and cultural differences, but would not be available to assist in cases where the victim or survivor speaks a sufficient level of English) or by professional training for judges and counsel.

---

<sup>41</sup> National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, Commonwealth, *Bringing them home* (1997) 16, quoting Dr Jane McKendrick, Victorian Aboriginal Mental Health Network, Evidence 310.

<sup>42</sup> NSW Ombudsman, above n 30, 167.

<sup>43</sup> See page 3 above.

<sup>44</sup> See Law Council of Australia, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice*, 17 October 2016, 15.

<sup>45</sup> Commonwealth, above n 1, 379.

Examples of difficulties faced by Aboriginal and Torres Strait Islander witnesses, including victims and survivors, include:

- Other court participants may fail to understand styles of social interaction common to Aboriginal and Torres Strait Islander cultures that arise during oral evidence, such as tendencies towards indirect communicative styles, avoiding eye contact, or favouring silence;
- Other linguistic characteristics that affect evidence - such as gratuitous concurrence (where a witness appears to agree with questions in order to appease the questioner)<sup>46</sup> and scaffolding (where a witness answers questions by building upon a Standard English speaker's contributions)<sup>47</sup> - are more prevalent amongst Aboriginal and Torres Strait Islander witnesses;<sup>48</sup>
- Many Aboriginal and Torres Strait Islander cultures favour narrative styles of communication over the question-and-answer style of cross-examination favoured by the adversarial system;<sup>49</sup>
- Evidence may not be understood by counsel or the jury due to a lack of understanding about Aboriginal and Torres Strait Islander cultural practices; or conversely, the witness may understand counsel's language, but not the specific cultural values that inform the meaning of their question.<sup>50</sup>

The ALS agrees with the Royal Commission that the availability of intermediaries - and specifically, Aboriginal and Torres Strait Islander intermediaries for Aboriginal and Torres Strait Islander witnesses - would improve the quality and reliability of evidence provided.<sup>51</sup> The ALS supports the system currently used in England and Wales as a potential model,<sup>52</sup> and submits that, for the purposes of continuity, utilising the same intermediary or Witness Assistance Officer from police interviews during the trial would be ideal.

The ALS supports the expansion of the current NSW Child Sexual Assault Pilot to vulnerable defendants, including Aboriginal and Torres Strait Islander defendants, in particular youth

<sup>46</sup> David Dixon and Nicholas Cowdery, "Silence Rights" (2013) 17 Australian Indigenous Law Review 23, 31.

<sup>47</sup> Michael Cooke, 'A different story: narrative versus 'question and answer' in Aboriginal evidence' (1996) 3(2) Forensic Linguistics 273, 275.

<sup>48</sup> Criminal Justice Commission, Aboriginal Witnesses in Queensland's Criminal Courts, Chapter 4: Giving evidence.

<sup>49</sup> Cooke, above n 47, 273, 279.

<sup>50</sup> Michael Cooke, 'Indigenous Interpreting Issues for Courts' (Paper presented at Australasian Institute of Judicial Administration 19 the Annual Conference, Hobart, 21-23 September 2001), 21.

<sup>51</sup> Commonwealth, above n 1, 382.

<sup>52</sup> NSW Ombudsman, above n 30, 168.

defendants. The ALS acknowledges the resource implications of expanding the scheme, but submits that having intermediaries available will allow Aboriginal and Torres Strait Islander defendants to participate more effectively in the trial, and noting that the majority of defendants will themselves have histories of suffering trauma and abuse.

The ALS would also support the expansion of the NSW Child Sexual Assault Pilot to a court in rural or regional NSW, provided adequate resources are made available to support the implementation of the Pilot.

## Chapter 14: Post-sentencing issues

The Royal Commission notes that there are three criminal justice responses available after an offender is sentenced for an institutional child sexual abuse offence:

- Treatment while serving sentences in custody or community;
- Indefinite sentences and supervision or detention orders; and
- Risk management measures including sex offender registration schemes.<sup>53</sup>

### Treatment

The Royal Commission outlined a number of treatment programs available in NSW for offenders in custody and in community.

The ALS has previously raised, and continues to maintain, concerns about the availability of culturally appropriate treatment options for Aboriginal and Torres Strait Islander offenders, either in custody or in the community.<sup>54</sup> The ALS is also concerned about the lack of treatment options, assessment centres, or testing facilities for Aboriginal and Torres Strait Islander offenders returning to communities located in remote and regional areas.

---

<sup>53</sup> Commonwealth, above n 1, 530.

<sup>54</sup> Aboriginal Legal Service (NSW/ACT) Limited, Submission to NSW Department of Justice, *Statutory Review of the Crimes (High Risk Offenders) Act 2006 (NSW)*, August 2016, 11.

The ALS has voiced support for the recent recommendations made by Dr Jill Guthrie and Dr Clarke Jones for consistent evaluation of rehabilitation programs offered to Aboriginal and Torres Strait Islander offenders, in particular the availability of culturally relevant rehabilitation programs.<sup>55</sup>

In relation to rehabilitation programs, the Royal Commission referred to Static-99, a risk assessment methodology utilised by Corrective Services in determining which offenders can access programs.<sup>56</sup> In *Director of Public Prosecutions (WA) v Samson*, McKenchie J observed in relation to Static-99 that:

*...it is not a valid test for Indigenous males of the same cohort as the respondent. Until validated, its use, if any, must be limited to members of the cohort on which it was developed. There is simply no evidence to suggest whether the Static 99 result has any efficacy whatsoever in relation to Australian Aboriginal men.*<sup>57</sup>

Similarly, the NSW Sentencing Council noted that:

*A further important limitation of risk assessment tools is that they are developed by studying the characteristics of particular samples of individuals. There is no guarantee that those characteristics are common across other samples. As Ogloff and Davis point out, **assessment instruments should be validated in each population and sample in which it is intended that they will be used.***<sup>58</sup>

The ALS shares these concerns about the use of Static-99 and similar risk assessment tools that have not been validated amongst Aboriginal and Torres Strait Islander men and women. The ALS supports the recommendation made by the Law Council of Australia that the Royal Commission consider the “*validity, rigour and predictive power*” of risk assessment methodologies.<sup>59</sup>

#### Supervision and detention orders

The ALS has made two lengthy submissions to the NSW Department of Justice in relation to continuing detention orders and extended supervision orders made under the *Crimes (High Risk*

<sup>55</sup> Dr Jill Guthrie and Dr Clarke Jones, ‘Efficacy, accessibility and adequacy of prison rehabilitation programs for Indigenous offenders across Australia’ (Review Paper, Australasian Institute of Judicial Administration, June 2016) 2.

<sup>56</sup> Commonwealth, above n 1, 532.

<sup>57</sup> *Director of Public Prosecutions (WA) v Samson* [2014] WASC 1999 at [51] (McKenchie J) (emphasis added).

<sup>58</sup> NSW Sentencing Council, ‘High Risk Violent Offenders: Sentencing and Post-Custody Management Options’ (Report, Department of Attorney-General and Justice (NSW), May 2012) 25 (emphasis added).

<sup>59</sup> Law Council of Australia, above n 44, 7, 29.

*Offenders) Act 2006 (NSW).*<sup>60</sup> The ALS maintains concerns that this Act overlooks the fundamental and long-standing principle of proportionality, that:

*a sentence should not be increased beyond what is proportionate to the crime in order merely to extend the period of protection of society from the risk of recidivism on the part of the offender.*<sup>61</sup>

In relation to supervision and detention orders made under that Act, the ALS agrees with McCallum J's recent observation that:

*whereas the Royal Commission recommended the introduction of legislation to enforce the principle that imprisonment should be utilised only as a sanction of last resort (recommendation 92), the present legislation allows the use of detention not as a last resort but for the purpose of rehabilitation, giving primacy to the immediate protection of the community over long term goals.*<sup>62</sup>

The ALS is concerned about the disproportionate impact of the Act on Aboriginal and Torres Strait Islander offenders, and its impact on the increasing rates of Aboriginal and Torres Strait Islander incarceration in NSW.<sup>63</sup> In order to best meet the objects of the Act, the ALS submits that the cost of implementing the Act would be better directed to ensuring that 'adequate resources' exist for the offender's rehabilitation in the community.<sup>64</sup>

### Risk management measures

The ALS submits that the effect of ongoing consequences of offending – such as being placed on the Child Protection Register – on young people should be considered by the Royal Commission. The ALS supports the suggestion of the Law Council of Australia that an exception be carved out for young people who are disqualified from the Working With Children Checks regime,<sup>65</sup> and supports the

<sup>60</sup> Aboriginal Legal Service (NSW/ACT) Limited, Submission to NSW Department of Justice, *Review of the Crimes (Serious Sex Offenders) Amendment Act 2013*, February 2016; Aboriginal Legal Service (NSW/ACT) Limited, Submission to NSW Department of Justice, *Statutory Review of the Crimes (High Risk Offenders) Act 2006 (NSW)*, August 2016.

<sup>61</sup> *Veen v R (No 2)* [1988] HCA 14 at [8] (Mason CJ, Brennan, Dawson and Toohey JJ).

<sup>62</sup> *State of New South Wales v Bugmy (preliminary hearing)* [2016] NSWSC 1128 at [50] (McCallum J) ('*NSW v Bugmy*').

<sup>63</sup> See *NSW v Bugmy* [2016] NSWSC 1128 at [51] (McCallum J).

<sup>64</sup> See Paul Ames Fairall, 'Violent Offenders and Community Protection in Victoria – The Gary David Experience' (1993) 17 *Criminal Law Journal* 40, 52.

<sup>65</sup> Law Council of Australia, above 44, 7, 27.

submission of Legal Aid NSW for a greater distinction between the risks of juvenile and adult offending,<sup>66</sup> especially in relation to sex offender registration.

## Chapter 15: Juvenile offenders

Given the high proportion of Aboriginal and Torres Strait Islander children and young people involved with the child protection system<sup>67</sup> and the criminal justice system,<sup>68</sup> the ALS is particularly concerned with how the criminal justice system deals with juvenile offenders of child sexual abuse in institutions, including in out of home care (“OOHC”).

The ALS supports the recommendation of the Law Council of Australia and Legal Aid NSW that the age of criminal responsibility should be increased to 12 years of age.<sup>69</sup> The ALS agrees that *“society benefits more from keeping young children away from the criminal law system than putting them into it”*<sup>70</sup>, especially in the context of disproportionately high rates of Aboriginal and Torres Strait Islander juvenile incarceration. The ALS agrees that a large number of children and young people who commit sexual assault are themselves victims or survivors of sexual assault and abuse,<sup>71</sup> and supports an approach to juvenile offending that is based in rehabilitation and reconnection to community, land and culture, rather than custodial sentences.

The ALS agrees with the Australian Law Reform Commission that a review of child sex offences *“should recognise contemporary realities of consensual and non-exploitative sexual activity between young people”*.<sup>72</sup> As such, the ALS is concerned about the unavailability of diversionary options (such as conferencing) for minor sexual offences committed by juveniles,<sup>73</sup> although the ALS notes that

<sup>66</sup> Legal Aid NSW, above n 36, 28-29.

<sup>67</sup> Breckenridge and Flax, above n 2, 31.

<sup>68</sup> According to the NSW Department of Justice, as at August 2016 53% of young people in custody in NSW are Aboriginal or Torres Strait Islander.

<sup>69</sup> Law Council of Australia, above n 44, 7; Legal Aid NSW, above n 36, 24-25.

<sup>70</sup> Law Council of Australia, above n 44, 30.

<sup>71</sup> National Aboriginal & Torres Strait Islander Legal Services, above n 8, 11.

<sup>72</sup> Australian Law Reform Commission, *Family Violence – A National Legal Response* (Report No 114, 11 November 2010) 25.50.

<sup>73</sup> Kate Warner and Lorana Bartels, “Juvenile Sex Offending: Its Prevalence and the Criminal Justice Response” (2015) 38(1) *UNSW Law Journal* 59.

diversionary options are less likely to be used for cases involving Aboriginal or Torres Strait Islander young people.<sup>74</sup>

The ALS is also concerned about the perceived unavailability of non-custodial sentencing options for Aboriginal and Torres Strait Islander young people.<sup>75</sup> However, the ALS notes that there is a dearth of research to show why Aboriginal and Torres Strait Islander young people are less likely to receive non-custodial sentences. It is unclear whether Aboriginal and Torres Strait Islander young people are more likely to be ineligible for non-custodial sentencing options, or whether there is a lack of resources in communities where Aboriginal and Torres Strait Islander young people are likely to be located (especially rural and remote communities).

## Conclusion

The ALS thanks the Royal Commission into Institutional Responses to Child Abuse for the opportunity to make this submission.

---

<sup>74</sup> Between 2010 and 2012, 64.8% of eligible matters involving Aboriginal and Torres Strait Islander young people were diverted, as compared to 85.1% of eligible matters involving non-Aboriginal and Torres Strait Islander young people; see Clare Ringland and Nadine Smith, "Police use of court alternatives for young persons in NSW" (BOCSAR, Contemporary Issues in Crime and Justice Number 167, January 2013) 7.

<sup>75</sup> For instance, 2013 BOCSAR data showed that only 79.6% of Aboriginal and Torres Strait Islander young people without a prior custodial sentence were given a non-custodial sentence for an offence, as opposed to 94.1% of non-Aboriginal and Torres Strait Islander young people.