10861NAT Diploma of Aboriginal & Torres Strait Islander Legal Advocacy

LEARNER MANUAL

Block 2

Court and Bail

NAT10861006 Ensure access and equity with Aboriginal and Torres Strait Islander clients in the legal system

Contents

Introduction to *NAT10861006 Ensure access and equity with Aboriginal and Torres Strait Islander clients in the legal system*

This unit describes the performance outcomes, skills and knowledge required to promote fair and equal access to legal services and hearings for Indigenous Australians in need of legal assistance, including recognizing and responding to those with disabilities, mental health, alcohol and other drug issues.

Customary Law Recognition in Australia

Customary law in Australia relates to the systems and practices amongst Aboriginal Australians which have developed over time from accepted moral norms in Aboriginal societies, and which regulate human behaviour, mandate specific sanctions for non-compliance, and connect people with the land and with each other, through a system of relationships. Customary laws are passed on by word of mouth and are not codified (nor can they be easily codified). In addition, they are not singular throughout Australia — different language groups and clans have different concepts of customary law, and what applies within one group or region cannot be assumed to be universal.

History of Customary Law

The customary laws of Aboriginal and Torres Strait Islander peoples were given little recognition by the legal system until recently. When the English colonised Australia, they ignored ownership of land. This continued until quite recently, assisted by the legal fiction that Australia was terra nullius (land belonging to no-one) at the time of colonisation. The legal argument was that Australia was "settled" (because it was, effectively, vacant) rather than conquered.

Places where Customary Law is Recognised

As a result of the High Court decision in Mabo in 1992 there is now limited recognition of Aboriginal ownership and use of land (native title). As well, customary law has some limited influence in the sentencing of some Aboriginal Indigenous offenders and in areas such as family relationships and the protection of sacred sites.

In particular customary law is often recognised in the following situations:

Through the courts:

- Judicial responses and discretion;
- Sentencing discretions;
- Criminal law in the assigning of criminal responsibility;
- Compensable injury;
- Traditional marriage; and
- Interrogation rules through trial.

Through legislation:

- Grant of land rights and native title;
- Protection of sites and sacred sites;
- Hunting and fishing rights;

- Aboriginal traditional marriages;
- Aboriginal child care practices;
- Traditional distribution on death; and
- Aboriginal courts.

Sourced on 3/8/22:
https://www.timebase.com.au/support/legalresources/Customary_Law_Recognition_in_Australia.html

Aboriginal Land Rights (Northern Territory) Act. 1976

In December 1976 the federal parliament passed the Aboriginal Land Rights (Northern Territory) Act. It was the first legislation in Australia that enabled First Nations peoples to claim land rights for Country where traditional ownership could be proven.

For almost 200 years First Nations peoples had been losing rights to their lands as white settlers encroached. This Act was the first step to enabling First Nations peoples to regain these rights.

Colonisation of Australia

First Nations people's rights to land have been challenged ever since the British arrived to occupy the Australian continent. Despite resisting the occupation, many communities were no longer able to live on Country.

In the Northern Territory the occupation was largely through pastoral leases and many communities managed to retain connection to Country through pastoral work, although conditions on the worst stations meant that Aboriginal workers were treated little better than slave labour.

Pushing for land rights

In 1963 the federal government announced, with no consultation with Yolngu people, that it would excise a portion of their homeland in north-east Arnhem Land for the construction of a bauxite mine.

The Yolngu sent a bark petition to the House of Representatives insisting that their land rights be respected. The government initiated an inquiry but ultimately disregarded the Yolngu's requests and the mine went ahead.

In 1966 the Gurindji people at Wave Hill cattle station in the Northern Territory went on strike, demanding an increase in wages and the return of a portion of their homelands from the lessees (Vestey Brothers). In the first year of the strike, the Gurindji moved 20 kilometres from the cattle station settlement back to their traditional country at Daguragu.

The move highlighted a symbolic shift away from demands around wages and working conditions to a focus on the Gurindji's need to control their homelands again.

Their struggle went on for nine years during which time the Gurindji and their supporters campaigned tirelessly around the country, bringing the issue of Aboriginal land rights to the fore of the public agenda.

Woodward Commission

Eventually, as part of its successful 1972 federal election campaign, the Labor Party made Aboriginal land rights part of its platform. Labor leader Gough Whitlam said at the launch of the campaign: 'We will legislate to give Aboriginal land rights – because all of us as Australians are diminished while the Aborigines are denied their rightful place in this nation'.

This was in stark contrast to the previous coalition government, which in January 1972, announced the implementation of a system of 50-year general purpose leases to First Nations communities for Country that First Nations peoples considered to be their traditional homelands.

This decision led to the wave of action by Indigenous rights protesters and the establishment of the Aboriginal Tent Embassy in Canberra.

The Labor Party was elected and in 1973 Prime Minister Whitlam appointed Mr Justice Woodward to investigate suitable ways to recognise Aboriginal land rights in the Northern Territory.

In April 1974 Justice Woodward handed down the final report of the Aboriginal Land Rights Commission, which recommended 'the provision of some basic compensation in the form of land for those Aborigines who have been irrevocably deprived of the rights and interests which would otherwise have been inherited from their ancestors'.

The commission recommended procedures for First Nations peoples to claim land and that such property should be held under inalienable freehold title whereby it could not be acquired, sold, mortgaged or disposed of in any way – and insisted that mining and other development should only take place on First Nations land with the consent of First Nations landowners.

Land Rights Act 1976

In mid-1975 the Whitlam government had introduced legislation to parliament based extensively on Woodward's recommendations. However, before the Bill could be passed the government was dismissed in the November 1975 constitutional crisis.

The December 1975 election brought the Malcolm Fraser led Coalition to power with a landslide victory. Fortunately, the new government had promised to continue the push for Aboriginal land rights.

In December 1976 the Aboriginal Land Rights (Northern Territory) Act was passed with historic bipartisan support. It was the first legislation that allowed for First Nations peoples to claim land title if traditional association could be proven.

- Four land councils were established under the Act:
- the Central Land Council, responsible for the southern half of the Northern Territory
- the Northern Land Council, responsible for the northern half of the territory
- the Tiwi Land Council, responsible for Bathurst and Melville Islands
- the Anindilyakwa Land Council, responsible for Groote Eyland and Bickerton Island.

Currently, about 50 per cent of the Northern Territory and 85 per cent of its coastline is recognised as being owned by First Nations groups.

Sourced on 3/8/22: https://www.nma.gov.au/defining-moments/resources/aboriginal-land-rights-act

Aboriginal Legal Service

NATSILS is the national peak body of Aboriginal and Torres Strait Islander legal services who operate across Australia.

NATSILS represents and is the national voice of community-controlled Aboriginal and Torres Strait Islander Legal Services. We advocate at the national level for the rights of Aboriginal and Torres Strait Islander peoples within the justice system and work to ensure that our peoples have equitable access to justice.

The first community-controlled Aboriginal and Torres Strait Islander Legal Services (ATSILS) were established 50 years ago to provide culturally competent legal assistance services to Aboriginal and Torres Strait Islander peoples.

NATSILS members include:

- North Australian Aboriginal Justice Agency
- Aboriginal Legal Service of Western Australia
- Aboriginal Legal Rights Movement, South Australia
- Victorian Aboriginal Legal Service
- Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd
- Aboriginal Legal Service (NSW/ACT) Limited
- Tasmanian Aboriginal Legal Service

Sourced on 3/8/22: https://www.natsils.org.au/

The Aboriginal Legal Service (ALS) in NSW/ACT

Aboriginal activists and lawyers established the Aboriginal Legal Service (ALS) in 1970 in the Sydney suburb of Redfern. It was staffed by volunteers who provided free legal advice and representation to the Aboriginal people of inner Sydney.

In 1971, the service received its first government grant for the salaries of a full-time solicitor, a field officer and a secretary. In 2010, 18 lawyers were working for the ALS.

The service was Australia's first free legal service, setting the model for mainstream community legal aid. There are now legal services all across Australia.

The ALS assists Aboriginal people in many ways in and outside the courtroom:

- Custody Notification Service. By law, the police must notify the ALS when an Aboriginal person is arrested. The lawyer speaks with the person and gives advice.
- Prisoner Support Unit. The Prisoner Support Unit aims to prevent Aboriginal deaths in custody by visiting and checking in with prisoners. It assists in their rehabilitation, provides crisis support, helps prisoners stay in contact with their families and when they are released in unfamiliar towns.
- Community legal education. The ALS develops, produces and delivers community legal education activities.
- Aboriginal Field Officers. Field Officers assist ALS lawyers in talking to Aboriginal clients and families, arrange for referrals, and provide law and social justice education in the community.

- Family Violence Officers. The ALS works with people who have become victims of family violence. Family Violence Officers can also arrange referrals.
- Law reform. The ALS advocates for the protection of the rights of Aboriginal people, in particular coronial reform and other advances in the criminal justice system.

Sourced on 3/8/22: https://www.creativespirits.info/aboriginalculture/law/australias-first-aboriginal-legal-service

Today the ALS is made up of over 200 staff across 24 offices throughout NSW and the ACT. The ALS does legal work in Criminal law, children's Care and Protection law and Family law. We assist Aboriginal and Torres Strait Islander men, women and children through representation in court, advice and information, and referral to further support services.

After the apology in 2007, the number of Aboriginal children in out-of-home care is nine times higher than the rate for non-Aboriginal children. Aboriginal children taken from their homes are the most vulnerable children in our society. The ALS has dedicated Care and Protection Lawyers and Field Officers who work with child protection matters.

Of the 2,608 people who have died in custody since 1979–80, almost one-fifth were Aboriginal or Torres Strait Islander. Rates of Aboriginal deaths in custody remain high.

Despite only making up 3% of the Australian population, Aboriginal and Torres Strait Islander people make up 28% of the adult-prison population. These statistics continue to impact on Aboriginal communities throughout NSW and ACT.

Sourced on 3/8/22: https://www.alsnswact.org.au/about#:~:text=The%20Aboriginal%20Legal%20Service%20opened,to%20rule%20over%20our%20communities.

Community Legal Centres

Community legal centres (CLCs) are independent non-government organisations that provide free legal services to people and communities, at time when that help is needed most - particularly to people facing economic hardship and discrimination.

Community legal centres provide a safety net to prevent people's legal problems from escalating. Without early legal advice, families can break down and health problems can escalate; people can be unnecessarily evicted and can lose their jobs.

Sourced on 3/8/22: https://www.clcnsw.org.au/what-are-community-legal-centres

In 1975 a group of lawyers, volunteers, academics, social workers and community activists met in Redfern to explore the concept of "community control of legal services". This group came together to advocate for the idea that everyone should be able to access justice, regardless of financial means. This was the impetus for the birth of community legal centres in NSW.

Two years later, in response to the scarcity of legal services for disadvantaged and marginalised people, the Redfern Legal Centre was established. The centre had one paid lawyer, supported by volunteers largely from the student body of UNSW. It provided free services to anyone who walked

through the door, there was no means or merits testing. The centre was accountable to the community, to a committee led by community members, volunteers, lawyers and students. If there was no legal solution to injustice the centre fought for reform.

Generalist community legal centres soon developed in Parramatta and Marrickville with strong involvement from law students at Sydney and Macquarie University. In the 1980s Bob Ellicott QC helped to establish the Inner-City Legal Centre, which was supported by large law firms committing pro bono support to the centre. A fifth centre was opened at Kingsford by UNSW to provide opportunities for new law students to gain experience and to serve the community.

It soon became apparent that generalist community legal centres could not service all areas of legal need. Demand for assistance from the community in some areas required more focus and specialised response than generalist legal advice could provide. So, specialist community legal centres developed to cater to specific legal need and specific groups in areas including disability rights, immigration, tenancy, welfare rights, seniors rights, environmental law to meet community needs.

Centres realised that they needed centralised support for common issues, rather than working as individual centres. In 1990 NSW Community Legal Centre's Secretariat was established after advocacy from centres. The secretariat supported the work of the centres and advocated on their behalf. The Secretariat became the Combined Community Legal Centres Group NSW in 1999, before changing its name and constitution to Community Legal Centres NSW in 2009. Community Legal Centres NSW is an independent peak body governed by a board elected by members and drawn from community legal centres. In 2018 its constitution was updated to enable board member positions from independent experts (not necessarily from community legal centres).

Community legal centres are now recognised and established as a core part of the legal assistance sector in NSW. The movement is still growing, and still committed to access to justice for all.

Sourced on 3/8/22: https://www.clcnsw.org.au/history-of-CLCs

Community legal centres are community-embedded organisations that can provide you with free help for your legal problems. We do not generally work in criminal law although we do provide lots of legal services and support to victims/survivors of DV. For assistance with criminal law issues please go to the Aboriginal Legal Service or Legal Aid NSW.

We provide legal information and legal assistance in areas such as:

- Domestic violence
- Family violence
- Sexual violence
- Family law
- Traffic fines
- Credit & Debt
- Housing
- Employment
- Discrimination
- Centrelink
- Wills
- Victims Compensation
- Police complaints

and more.

Community legal centres are not part of government. We do not provide your information to government or police, and we are bound by our professional obligations and community ethics to keep your information private.

There are 40 community legal centres in NSW - from Lismore to Nowra, Broken Hill to the Sydney metropolitan. Three of these centres are Aboriginal-controlled organisations:

Wirringa Baiya Aboriginal Women's Legal Service (state-wide, but based in Marrickville): http://www.wirringabaiya.org.au

Warra Warra Legal Service at Broken Hill: https://www.warrawarra.org

Thiyama-li Family Violence Service (Walgett, Bourke and Moree): https://thiyamali.com.au

There are also some specialist state-wide community legal centres that run Aboriginal programs, like the Indigenous Women's Legal Program at Women's Legal Services NSW, Mob Strong Debt Help at the Financial Rights Legal Centre, and Aboriginal Tenants Advice and Advocacy Services at the Tenants' Union of NSW.

Apart from these Aboriginal community controlled centres and specialist services that operate Aboriginal programs, you can also find generalist community legal centres in communities right across New South Wales.

There are about 31 Aboriginal people employed across 22 community legal centres in NSW in roles such as Solicitors, Paralegals Community Legal Education Officers, Community Development Workers, Children's Court Assistance Scheme Workers, Legal Information Officers, Administrators, Financial Legal Advocates, Program Coordinators, and Centre Managers.

Sourced on 3/8/22: https://www.clcnsw.org.au/find-legal-help-aboriginal-people

Aboriginal Legal Access Program

The Community Legal Centres NSW Aboriginal Legal Access Program makes a significant contribution to access to justice for Aboriginal and Torres Strait Islander people in NSW by:

- Embedding cultural safety into the framework of community legal centres;
- Improving the numbers of Aboriginal staff in the legal sector, and thereby strengthening community connections to civil and early intervention legal services;
- Role modelling employment pathways and culturally appropriate settings for legal education;
- Delivering legal information and advice; and
- Developing and supporting relationships between community legal centres and local Aboriginal community controlled organisations and groups, including developing MOUs with the ALS and with Tranby College.

Sourced on 3/8/22: https://www.clcnsw.org.au/index.php/Aboriginal-Legal-Access

Legal Aid

Legal Aid in Australia

There are eight legal aid commissions in Australia, one in each state and territory. The purpose of legal aid commissions is to provide vulnerable and disadvantaged Australians with access to justice.

Our society invests in a necessarily complex system of justice, a system of institutions - the courts, tribunals and other related agencies - to protect rights, ensure civil liberties and enforce civic responsibilities. If access to these institutions was reserved only for wealthy citizens, the confidence of the broader community in our system of justice would be undermined. Without a strong system of justice the rule of law would be compromised and without the rule of law we would not have the rights and liberties we all enjoy.

Our democratic society therefore depends on the premise that all Australians are equal before the law, a premise which needs to be understood in relation to the question of access. Legal aid commissions play a defining role in achieving equality before the law by striving to ensure that all citizens, including those who can't afford to pay, have access to the legal services they need to obtain justice.

Commissions provide access to justice by providing the following types of legal assistance:

- financial assistance to enable people who cannot afford a lawyer to be legally represented in court proceedings and other cases;
- duty lawyer services for people appearing at court on the day without a lawyer;
- information and advice about legal rights, responsibilities and remedies, and
- education programs to inform the community about the law and legal remedies.

State and Territory Legal Aid Commissions:

- Victoria Legal Aid
- Legal Aid New South Wales
- Legal Aid Queensland
- Legal Aid Western Australia
- Northern Territory Legal Aid Commission
- Legal Aid Commission of Tasmania
- Legal Services Commission of South Australia
- Legal Aid ACT

Sourced on 3/8/22: https://www.legalaidact.org.au/

Legal Aid NSW

Legal Aid NSW is a statewide organisation providing legal services to socially and economically disadvantaged people across NSW. We are the largest legal aid commission in Australia and employ over 1,300 staff. We deliver legal services in most areas of criminal, family and civil law. Find out more about our services.

Legal Aid NSW was established in 1979, when it was known as the Legal Services Commission, before becoming the Legal Aid Commission of NSW in 1987. The Legal Aid Commission was renamed Legal Aid NSW in 2006.

We provide legal services across NSW through a statewide network of 25 offices, two satellite offices and 243 regular outreach locations. We offer telephone advice through our free legal helpline LawAccess NSW.

We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients. We also work closely with community legal centres, the Aboriginal Legal Service (NSW/ACT) and pro bono legal services. We strive to support clients and improve access to justice through initiatives such as the Cooperative Legal Service Delivery Program and by supporting and administering funding for the state's 29 Women's Domestic Violence Court Advocacy Services and 32 community legal centres. We collaborate with other agencies providing social and support services to disadvantaged and marginalised people, helping us deliver integrated services to address clients' legal and non-legal needs.

Sourced on 3/8/22: https://www.legalaid.nsw.gov.au/about-us/who-we-are

Legal Aid NSW provides legal services to disadvantaged clients across NSW in most areas of criminal, family and civil law.

Legal Aid NSW also assists people experiencing domestic and family violence.

Our services include:

- free legal advice to disadvantaged people about issues that affect them. Call LawAccess NSW on 1300 888 529 to find out if you can get legal advice.
- legal representation for eligible clients, provided through duty services and case grants for ongoing representation
- family dispute resolution services to parties in a family law dispute
- free workshops and webinars for the public and community organisations
- free legal information written in plain English to help people resolve their legal problems
- specialist services for particular groups in the community.

We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent our clients.

We administer funding for a range of community partnership programs.

We also take a broader role in identifying opportunities to improve access to justice for our most disadvantaged clients. We contribute to law and policy reform by writing submissions and policy papers on issues that affect our clients.

Sourced on 3/8/22: https://www.legalaid.nsw.gov.au/what-we-do

Barriers to Accessing the Justice System

Aboriginal people and access to civil law remedies

It is well known that Aboriginal people are over-represented in our criminal justice system. What is less-well recognised, or analysed, is the evidence that they do not access civil remedies as often as other Australians.

In 2004 the Law and Justice Foundation published the Data Digest, the first report on its Access to Justice and Legal Needs Program. The report is a compendium of service usage data from NSW legal

assistance and dispute resolution services between 1999 and 2002 and identifies a number of interesting points in respect of Indigenous people's access to legal services. First, it shows that the proportion of enquiries from Aboriginal people comprised four per cent of all those received by duty solicitors at Legal Aid NSW. The equivalent figure at NSW community legal centres was five per cent. Both figures increased steadily between 1999 and 2002. This is disproportionately high for a group that represents just 1.9 per cent of the state's population. However, inquiries by Indigenous people to the Legal Aid NSW Advice Service were about two per cent of all inquiries, a figure that has not altered significantly since 1999.

The areas of greatest interest with inquiries to the Legal Aid NSW Advice Service were the areas of crime (accounting for 36 per cent of inquiries) and family law (31 per cent of inquiries). However, considering that Indigenous people are overrepresented at much higher rates in the criminal justice system and as victims of racial discrimination, Indigenous people should be accessing these services at a greater rate than what these statistics indicate. In its report on public consultations for the same project, the Law and Justice Foundation identified the following barriers confronting Indigenous people in accessing legal aid services:

- a reluctance to involve outsiders in matters that are considered private;
- a lack of awareness of Indigenous people of the scope and ability of the law to resolve certain types of problems;
- the limited ability of the law and traditional legal approaches to resolve problems that in many cases involve not just legal but also significant political, historical and cultural issues;
- the reliance on documentary evidence to substantiate legal claims and its reluctance to accept or rely on anecdotal or oral evidence by Aboriginal people;
- long term distrust of and previous negative experience with the legal system;
- the formality of the legal system and its services;
- lack of cultural awareness, sensitivity and compassion among justice system staff and legal service providers;
- lack of confidence in confidentiality, support and empathy in accessing Legal Aid NSW services;
- lack of Aboriginal personnel;
- lack of relationship between Legal Aid offices and local Aboriginal communities;
- intimidation in approaching legal services;
- lack of awareness of the services of Legal Aid NSW;
- the need to book Legal Aid services;
- location of Legal Aid offices;
- and lack of public transport to Legal Aid's offices.

Distrust of the legal system is just one barrier to overcome when encouraging Aboriginal people to explore their civil law rights.

Many do not have adequate education or knowledge of government agencies, whilst others cannot overcome an inherent distrust of public servants. Facing any legal system and its formalities is a daunting experience for everybody, not just Aboriginal people. However, it becomes yet more frightening for those people who only know of a system involving the police and criminal charges. The fear, and often misunderstanding, by some Aboriginal people that the law is only for responding to police charges leaves our people with many civil law matters being unpursued or unresolved. Civil matters such as welfare rights, housing, discrimination law, consumer rights, credit and debt, employment law, motor accidents compensation, crimes compensation, social security, intellectual

property, negligence and family law are just some of the areas of law where avenues for redress are perceived as so far removed from the familiar criminal justice system that they are simply not worth worrying about. The NSW Legal Aid Commission, community legal centres and the Aboriginal legal services provide a valuable service to our people, often without adequate funding or due recognition. However, when accessing these particular services, Indigenous people are sometimes confronted by a lack of cultural awareness, sensitivity or compassion on the part of the solicitors. Unfortunately, this may get worse before it gets better. It will be exacerbated by the proposed Aboriginal legal services tendering scheme because Indigenous lawyers are under-represented in law firms and community legal centres. Aboriginal legal services, under-resourced as they are, have necessarily focused their efforts on helping Indigenous people ensnared by the criminal justice system. Many ALS offices simply do not have the requisite knowledge base or resources on hand to assist Aboriginal people in civil law matters - especially in rural and regional areas of the state. Consequently, an Indigenous family may live with injuries for which they will never be compensated, become involved in unjust financial arrangements, accept racial vilification or suffer under adverse administrative decisions. Domestic violence, residence and contact disputes and abduction of children are rarely dealt with by the Aboriginal legal services. Whilst the Aboriginal and Torres Strait Islander legal services in metropolitan Sydney employ a family law solicitor from time to time, services in far western NSW and north-western NSW generally have not had family lawyers and do not usually act in such matters. At present the Legal Aid Commission has an arrangement with the ALS, whereby LAC officers visit the ALS office at Blacktown to provide advice to clients in civil law matters. These officers attend each fortnight on a Friday and, on average, address inquiries from three Indigenous people per visit. Unfortunately, these outcomes can be directly attributed to the ALS prioritising their case loads and directing their allocated funding to the high number of criminal law matters that they handle.

Too many Indigenous people simply do not know anything about potential civil remedies. In the past, Indigenous people were subjected to racist and discriminatory treatment and had no alternative but to accept it. Sadly, this acceptance is intergenerational. Many Aboriginal people today are still unaware that they have equal rights and may have civil remedies available to them. There are a number of ways highlighted by the Law and Justice Foundation through which all lawyers can help to bring some balance into the civil law arena for Aboriginal people. The first is to rebuild trust and confidence in the legal system generally and the profession in particular. One way to achieve this is to employ more Indigenous lawyers at the front line of the Legal Aid Commission, the community legal centres, the Aboriginal legal services and especially in those law firms who are involved in the legal services tendering process. Education of Aboriginal culture and history needs to go further for the legal profession. Most importantly we all need to ensure that Aboriginal people are themselves educated and are aware that there are civil law services in place available to them. It has been 35 years since a collective body consisting of both Aboriginal and non-Aboriginal people established the Redfern Aboriginal Legal Service. This group founded the ALS in response to the continual police harassment of Aboriginal people and the lack of legal representation afforded to them. After its establishment, the ALS provided an advocate for Aboriginal people and produced a dramatic shift in the dynamics of the criminal justice system. It provided a substantial reduction in miscarriages of justice but more importantly it provided the initial steps towards equality and Aboriginal empowerment in the NSW justice system. This positive change would not have occurred without the support and assistance of volunteer white lawyers and Aboriginal people working together for a common cause. The injustices and disadvantages faced by Aboriginal people in the criminal jurisdiction motivated and inspired those in 1970 to act and bring about a level of equality.

The time has come for our generation to continue that legacy and not let civil law be a casualty of that battle.

Sourced on 3/8/22: http://classic.austlii.edu.au/au/journals/NSWBarAssocNews/2005/48.pdf

The Law Society of Western Australia makes the following recommendations on access to justice to address the overrepresentation of Indigenous people within Western Australia's judicial system:

1. Improve funding to Community Legal Centres (CLCs), in particular to the Aboriginal Legal Service of Western Australia (ALS) and the Family Violence Prevention Legal Service (FVPLS) The overrepresentation of Indigenous people within our judicial system is largely due to limited access to justice. The funding of CLCs has been proven to greatly reduce incarceration rates. In relation to Indigenous people, dedicated legal services are the preferred and most culturally appropriate provision of community legal services. Research shows that Indigenous people, and in particular women, are dissuaded from approaching mainstream legal services, with language barriers and cultural sensitivity being the main reasons for this. Greater funding to Indigenous legal services, such as ALS and FVPLS would provide greater access to justice for Indigenous people and would greatly decrease their incarceration rate.

2. Improve funding for interpretation and translation services within the Courts, allowing Indigenous people to communicate with the Court in their native Australian language. For some Indigenous people, English is a second language. This creates confusion and misunderstandings in the legal system and procedures. Justice would be improved if Indigenous people were given better access to interpretative and translation services in relation to judicial proceedings. Indigenous people could be granted a statutory right to have interpreting services available at all stages of the judicial proceedings, as is the case in certain areas of Canada. They could also have the statutory right to lodge documents and correspond with the court in their native languages, as is the case in certain areas of Norway. In order to do this, funding for interpretation and translation services within the court must be improved.

3. Improve funding for Indigenous judicial and corrective service staff. It has been proven in the Rangatahi Youth Courts of New Zealand that the incorporation of cultural beliefs and practices into court procedure places greater expectations on Indigenous offenders and causes greater remorse. The effect that these practices have had on court proceedings can also be applied to other areas of the judicial system. By using Indigenous judicial and corrective service staff, an element of cultural expectation can be applied to the offender and used to encourage better social behaviour in the future. It also improves communication between accused persons and the corrections system, allowing the accused to better understand the reasoning behind what is happening, and for the judicial and corrective service staff to better understand the offending behaviour.

Sourced on 3/8/22: http://www.lawsocietywa.asn.au/wp-content/uploads/2015/10/2017OCT06_LawSociety_BriefingPapers_AccessJusticeIssues_ATIPIA.pdf

Legal Needs of Indigenous People

The Law and Justice Foundation of NSW has published a paper which summarises findings from the Legal Australia-Wide (LAW) Survey showing that Indigenous Australians had high prevalence of multiple legal problems and government, health and rights problems. They were also less likely to have finalised their legal problems.

The Conclusion of the paper is as follows:

The LAW Survey demonstrated that Indigenous respondents had increased prevalence of multiple legal problems, and they had increased levels of government, health and rights problems. Indigenous people also had low levels of finalising their legal problems. Given their level of disadvantage, it is noteworthy that the LAW Survey did not find a greater number of associations involving Indigenous status. It is possible that methodological issues, such as the small numbers of Indigenous respondents interviewed and the underestimation of the level of Indigenous disadvantage, may have militated against observing a greater number of significant associations. Nevertheless, given their disadvantage and tendency to experience multiple legal problems, Indigenous people are likely to benefit from a more holistic or client-focused approach to their problems, including a coordinated response across legal and other human services. Furthermore, their lower levels of finalising legal problems suggest that they may sometimes have a reduced capacity to achieve legal resolution and may require considerable legal and non-legal support to do so.

Reducing multiple disadvantage for Indigenous people is a whole-of-government goal in Australia. For example, the National Integrated Strategy for Closing the Gap in Indigenous Disadvantage outlines targets for reducing disadvantage in the areas of life expectancy, early childhood, health, education and employment. A multitude of small-scale initiatives have been introduced at the national and state/territory level to address these targets (Department of Families Housing Community Services and Indigenous Affairs 2011). Although such initiatives often extend to disadvantage in access to justice, they tend to focus on criminal rather than civil justice, given the overrepresentation of Indigenous people in the criminal justice system (ABS 2011; SCRGSP 2007; Snowball & Weatherburn 2006). In fact, it has been observed that Aboriginal and Torres Strait Islander Legal Services across Australia tend to focus on criminal law matters, and there is a paucity of Indigenous legal services for family and civil law (Cunneen & Schwartz 2008; Joint Committee of Public Accounts and Audit 2005; Senate Legal and Constitutional References Committee 2004). The present results more firmly entrench civil and family legal needs among the multiple legal needs that should be addressed for Indigenous people. The results suggest that the scope of Aboriginal and Torres Strait Islander Legal Services need to be broad enough to comprehensively address criminal, family and civil law needs. They suggest that multidisciplinary initiatives that aim to reduce Indigenous disadvantage should also include the aim of increasing legal capability and effectively meeting legal needs in all areas of law, including civil and family law.

Sourced on 3/8/22:
http://www.lawfoundation.net.au/ljf/site/templates/UpdatingJustice/$file/UJ_25_Legal_needs_of_Indigenous_people_FINAL.pdf

Legal Support for People with a Disability

The Disability Royal Commission

A Royal Commission is an investigation, independent of government, into a matter of great importance. Royal Commissions have broad powers to hold public hearings, call witnesses under oath and compel evidence. Royal Commissions make recommendations to government about what should change. Each Royal Commission has terms of reference, which define the issues it will look into.

The Disability Royal Commission was established in April 2019 in response to community concern about widespread reports of violence against, and the neglect, abuse and exploitation of, people with disability. These incidents might have happened recently or a long time ago.

The Disability Royal Commission will investigate:

- preventing and better protecting people with disability from experiencing violence, abuse, neglect and exploitation
- achieving best practice in reporting, investigating and responding to violence, abuse, neglect and exploitation of people with disability
- promoting a more inclusive society that supports people with disability to be independent and live free from violence, abuse, neglect and exploitation.

The Disability Royal Commission will investigate and report on experiences and conditions in all settings and contexts, including:

- schools
- workplaces
- jails and detention centres
- secure disability and mental health facilities
- group homes or boarding houses
- family homes
- hospitals
- day programs

The Disability Royal Commission gathers information through research, public hearings, the personal experiences people tell us about and submissions, private sessions, and other forums.

We will deliver a final report to the Australian Government by 29 September 2023. In this report, the Royal Commission will recommend how to improve laws, policies, structures and practices to ensure a more inclusive and just society.

Sourced on 4/8/22: https://disability.royalcommission.gov.au/about-royal-commission

Your Story Disability Legal Support

A free legal advisory service is available to help you interact with the Disability Royal Commission. Your Story Disability Legal Support is independent from the Royal Commission. It provides free legal advice to:

- people with disability
- their families
- carers
- supporters and
- advocates.

Your Story Disability Legal Support is funded by the Australian Government and is delivered by National Legal Aid and the National Aboriginal and Torres Strait Islander Legal Services.

Some of the reasons you might want to contact Your Story Disability Legal Support include:

- You want to use the name of an organisation or person in your story

- You have a confidentiality or non-disclosure agreement that stops you sharing some, or all, of your story
- You are concerned about payback if you share your story
- You are worried that you or someone else will be unsafe, lose access to services or employment, or your rights will be affected
- Your story talks about current or past court matters
- Your story talks about something you did, that you should not have done or think may be illegal
- You are registered to speak at a Royal Commission community forum
- You want support to get ready for a private session with the Royal Commission.

Legal financial assistance

You may be able to get financial support for reasonable legal costs when you are:

- being called, or granted leave to appear, as a witness at a hearing of the Royal Commission
- being requested to attend, or attending an interview of the Royal Commission
- complying with a notice to give information or a statement in writing that will be used as evidence in the Royal Commission, and/or
- complying with a notice to produce issued by the Royal Commission.

If you have been called by the Royal Commission in your personal capacity you will be eligible for legal financial assistance. If your organisation has been called, you may be eligible for legal financial assistance, subject to an assessment of whether the organisation can meet the cost of its legal representation without incurring serious financial difficulty.

The legal financial assistance scheme is administered by the Attorney-General's Department, independently of the Royal Commission.

Sourced on 4/8/22: https://disability.royalcommission.gov.au/counselling-and-support/legal-services

First Nations People

If you are an Aboriginal or Torres Strait Islander (First Nations) person with a disability, and you have experienced violence, abuse neglect or exploitation, the Royal Commission would like to hear from you. We also want to hear from families, friends, and support people of First Nations people with disability.

- violence – if someone is hurting you physically
- abuse – if someone is treating you badly
- neglect – if someone is not helping you the way they are supposed to help you
- exploitation – if someone is taking advantage of you.

There are many ways to get involved with the Royal Commission. You can:

- write or record your story in a submission
- meet with a Commissioner in a private session (registrations closed 30 June 2022)
- come to a community forum, or
- participate in a public hearing.

Sourced on 4/8/22: https://disability.royalcommission.gov.au/share-your-story/first-nations-people

First Peoples Disability Network Australia (FPDN)

We are First Peoples Disability Network Australia (FPDN) – a national organisation of and for Australia's First Peoples with disability, their families and communities. Our organisation is governed by First Peoples with lived experience of disability.

We proactively engage with communities around Australia and advocate for the interests of Aboriginal and Torres Strait Islander people with disability in Australia and internationally. We follow the human rights framework established by the United Nations *Convention on the Rights of Persons with Disabilities*, to which Australia is a signatory, and the United Nations *Declaration on the Rights of Indigenous Peoples*.

First Peoples with disability and their families are amongst the most seriously disadvantaged and disempowered members of the Australian community. We give voice to their needs and concerns and share their narratives of lived experience.

We work for the recognition, respect, protection and fulfilment of the human rights of First Peoples with disability and their families.

We work within a social model of disability, in which we understand 'disability' to be the result of barriers to our equal participation in the social and physical environment. These barriers can and must be dismantled. The social model stands in contrast to a medical model of disability, which focuses on diagnosis.

We were born of the efforts of advocates who were working from the early 1980s to bring attention to the specific needs of First Peoples with disability and their families.

Our journey has been long and difficult. Because of the intersection of race and disability, we have had to confront and overcome apathy, neglect and prejudice, both in the general community and in our own communities. That struggle continues.

FPDN was established informally in 2010 and registered as a public company limited by guarantee in 2014. Our founders are the leaders of the Aboriginal disability movement and have been working to uphold the rights of our people since the 1960s.

Sourced on 4/8/22: https://fpdn.org.au/about-us/

National Disability Advocacy Program

The National Disability Advocacy Program (NDAP) provides people with disability with access to effective disability advocacy that promotes, protects and ensures their full and equal enjoyment of all human rights enabling community participation.

Advocacy for people with disability can be defined as speaking, acting or writing with minimal conflict of interest on behalf of the interests of a disadvantaged person or group, in order to promote, protect and defend the welfare of and justice for either the person or group by:

- Acting in a partisan manner (i.e. being on their side and no one else's);
- Being primarily concerned with their fundamental needs;

- Remaining loyal and accountable to them in a way which is empathic and vigorous (whilst respecting the rights of others); and
- Ensuring duty of care at all times.

Approaches to disability advocacy can be categorised into six broad models being:

- **Citizen advocacy:** matches people with disability with volunteers.
- **Family advocacy:** helps parents and family members advocate on behalf of the person with disability for a particular issue.
- **Individual advocacy:** upholds the rights of individual people with disability by working on discrimination, abuse and neglect.
- **Legal advocacy:** upholds the rights and interests of individual people with disability by addressing the legal aspects of discrimination, abuse and neglect.
- **Self advocacy:** supports people with disability to advocate for themselves, or as a group.
- **Systemic advocacy:** seeks to remove barriers and address discrimination to ensure the rights of people with disability.

NDAP agencies can also assist with issues that may arise with the National Disability Insurance Scheme (NDIS) or with service providers.

Sourced on 4/8/22: https://www.dss.gov.au/our-responsibilities/disability-and-carers/program-services/for-people-with-disability/national-disability-advocacy-program-ndap

Unfitness to Plead Project

Aboriginal and Torres Strait Islander People with Disability in the Criminal Justice System

There is a lack of understanding, services and support for Aboriginal and Torres Strait Islander people with disabilities in the criminal justice system. This can lead to people becoming caught up with police, courts and in prison. 'Unfitness to plead' laws are supposed to protect people with disabilities in the criminal justice system. They are used when a court decides that a person cannot participate in criminal proceedings because of her or his disability. They can lead to good things, like a person being connected to disability services rather than prison. But they can lead to detention without an end date. It's clear we need to change to law to prevent indefinite detention, but we also need to make sure the supports are available on the ground. Aboriginal and Torres Strait Islander people with disabilities who come into contact with the criminal justice system need to be connected to appropriate support. This is especially the case for young people with disabilities in contact with the criminal justice system. In 2015-17, researchers collaborated with the Victorian Aboriginal Legal Service and the North Australian Aboriginal Justice Agency for the 'Unfitness to Plead Project'. The Project aimed to help develop supports for Aboriginal and Torres Strait Islander clients with cognitive and mental health disabilities. This brochure shares some of the findings and includes comments from Aboriginal and Torres Strait Islander researchers, professionals and activists involved with the project.

Legal Services Need Workers Who Understand Disability

Disability advocates can be co-located at Aboriginal and Torres Strait Islander legal services. The first activity that needs to happen, or frankly should have happened yesterday, is there needs to be

disability advocates co-located with Aboriginal legal services around the country actually, because the legal profession, the Aboriginal legal sector and the community legal sector is overwhelmed by the work they have to do from a legal perspective. The researchers developed this kind of support program with active input and training from members of Deaf Indigenous Community Consultancy, First Peoples Disability Network, and other Aboriginal and Torres Strait Islander researchers and advocates. A 'Disability Justice Support Person' was co-located at the Victorian Aboriginal Legal Service and the North Australian Aboriginal Justice Agency. The Unfitness to Plead Project tries to make sure Aboriginal and Torres Strait Islander people with disabilities not only have the right communication access and supports but the physical presence of an advocate and interpreter to assist their understanding of the justice system.

There Are High Levels of Stress, Loss, Grief and Trauma in Aboriginal Communities which Increase Likelihood of Disability

Aboriginal communities are greatly affected by loss, grief, trauma and economic disadvantage. This comes from generations of Aboriginal people experiencing racism, dispossession, forcible removal of children, poor education, overcrowded housing, a lack of appropriate health care, early loss of family and community members, over-policing, and high rates of incarceration. It has a big impact on the health and wellbeing of many Aboriginal people. We have high rates of unresolved intergenerational trauma, which has led to disability, alcohol-related disability, brain injury and mental health issues. Put it this way. When I first met [the support person] I was hidden underneath a table … I was actually in a foetal position under the table and they got me out. That's how bad my anxiety was. When [the support person] came on the scene I've never gone back under a table.

We Need Better Supports for Aboriginal and Torres Strait Islander People with Disabilities in the Community

Aboriginal people with mental and cognitive disability who have been in prison can feel isolated and disconnected from family, often face discrimination and have no access to appropriate community-based supports. They are more likely to have early and regular contact with police. We need better education and information for police, teachers, lawyers, magistrates, health, corrections, disability and community service providers regarding understanding and working with Aboriginal and Torres Strait Islander women and men with cognitive impairment and complex support needs. We should be intervening as early as possible in a child's life to identify and address disabilities, and support their parents to care for their child as much as possible. It is a travesty that in 2016 we can have over representation in the criminal justice system because we haven't prevented or addressed early health, developmental vulnerabilities or intergenerational trauma in the first 2 years of life. We do not need prison solutions for health issues.

Culturally-Appropriate Support for Aboriginal and Torres Strait Islander People with Cognitive and Communication Disabilities

The interaction of people with cognitive and mental health disability and the justice system has been identified by the Australian Government as an issue of national concern, but the unique nature of disability and social circumstances affecting Aboriginal and Torres Strait Islander people requires a trauma-informed and rights-based approach to disability justice which is led by Aboriginal and Torres Strait Islander people. The work is often overwhelming due to the complexities, not only of the legal system, but also those of culture, community and the disability itself. Effective communication skills are very different with Aboriginal people. There are various subtleties that will be often miscommunicated. The availability, the access, and the right to have information told to

you is a human right. Culturally-informed support that is designed and developed by Aboriginal and Torres Strait Islander people is required to make sure that the support is relevant and effective.

What Can Be Done?

1. Self-Determination

Aboriginal leaders, lawyers, workers, services and community members aspire to be self-determining in supporting the most disadvantaged people in their communities. The capacity in Aboriginal communities and legal services to support people with disabilities needs to be fostered, and Aboriginal-led knowledge and solutions appropriately supported and resourced.(1)

2. Accessible Justice

The criminal justice system needs to be designed so it can be used by Aboriginal and Torres Strait Islander people with disabilities and all people with disabilities, so they can participate and get the support they need. The criminal justice system can be modified to be more accessible to persons with disabilities. Courts and lawyers can use plain language, interpreters and disability advocates can be provided, and space can be made to include elders and family members.

3. Co-Locate Disability Support Workers in Aboriginal and Torres Strait Islander Legal Services

Formal supports for Aboriginal and Torres Strait Islander people with disabilities (whether they are victims, accused persons, or in prison) would help them access the justice system on an equal basis with others. A formal support person can improve outcomes, including helping a person to communicate, secure their rights and get connected to relevant support in the community.

4. Change Unfitness to Plead Laws

Current unfitness to plead laws need to be changed to make sure Aboriginal and Torres Strait Islander people with disabilities can't be detained with no end in sight, or get 'lost in the system'. Laws in every State and Territory need to make sure that Aboriginal and Torres Strait Islander people with disabilities who are accused of a crime get the same opportunity as anyone else to challenge the case against them, but with the support they need to participate.

5. Education

Better education and information on Aboriginal and Torres Strait Islander people with disability, including mental health issues and complex needs, is needed for police, teachers, education support workers, lawyers, magistrates, health services, corrections, disability and community service providers, and so on.

(1) Eileen Baldry, Ruth McCausland, Leanne Dowse and Elizabeth McEntyre, A Predictable and Preventable Path: Aboriginal People with Mental and Cognitive Disabilities in the Criminal Justice System (University of New South Wales, 2015).

Sourced on 4/8/22:
https://socialequity.unimelb.edu.au/__data/assets/pdf_file/0003/2477037/Unfitness-to-Plead-Project-ATSI-Legal-Services-Brochure.pdf

Legal Support for People with a Mental Health Issue

Mental Health Advocacy Service

The Mental Health Advocacy Service at Legal Aid NSW provides free legal advice about mental health and guardianship law.

You or your mob can call LawAccess NSW on **1300 888 529** for information and advice about any mental health or guardianship law problem.

Relatives and friends are also welcome to call for information.

How can the Mental Health Advocacy Service help you?

We can help you if you have to appear before the Mental Health Review Tribunal ('the Tribunal') or the Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT) or you have been kept in a hospital under the *Mental Health Act*. We can also help you by giving advice over the telephone about these things and some other related matters like financial management orders and community treatment orders.

Mental Health Review Tribunal

If you have been kept in a hospital under the *Mental Health Act* you may appear before the Mental Health Review Tribunal ('the Tribunal'). This Tribunal conducts mental health inquiries, makes and reviews orders and has some appeals about the care of people with a mental illness. A lawyer can act for you in the inquiry.

Your lawyer can also tell you about:

- going to hospital under the *Mental Health Act*;
- inquiries and hearings in front of the Tribunal;
- financial management orders;
- community treatment orders; and
- appeals.

The Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT)

The Mental Health Advocacy Service can advise, and sometimes act for people appearing before the Guardianship Tribunal.

Call LawAccess NSW on **1300 888 529** as soon as you know the date you have to appear at the Guardianship Tribunal. We need as much time as possible before the hearing date to talk to you and arrange for someone to act for you.

What if I am in hospital?

If you are in hospital and seeing the Tribunal for the first time, a lawyer will come to see you first. Our lawyers, or private lawyers paid by Legal Aid NSW go to each hospital in New South Wales where people are kept under the *Mental Health Act*.

A lawyer will also visit you if you are kept in hospital and will be seeing the Tribunal about:

- keeping you for a longer time
- having your money managed by the NSW Trustee and Guardian.

Sometimes a lawyer can act for you if:

- the hospital or community mental health centre is asking for a community treatment order (CTO) for you, and
- you ask us to represent you.

There are other times when a lawyer can represent you including when you want to leave hospital and the doctor won't let you.

You can call the Mental Health Advocacy Service if you don't understand what is happening to you. We will pay for the call if you are outside Sydney.

Call LawAccess NSW on **1300 888 529** for information and advice about any mental health or guardianship law problem.

Sourced on 4/8/22: https://www.legalaid.nsw.gov.au/publications/factsheets-and-resources/mental-health-advocacy-service

Mental Health Coordinating Council

Mental Health Coordinating Council champions community-based mental health services to support better outcomes for people living with mental health conditions. We work to strengthen mental health organisations by advocating to government and key decision makers, delivering sector-leading resources and tools, and providing quality training for the mental health workforce.

The Mental Health Coordinating Council has published a Mental Health Rights Manual. Extracts from Chapter 8 Section B: Aboriginal People in NSW living with mental health conditions, are provided below:

Terminology varies across documents and contexts. This manual refers to First Nations people as Aboriginal people in recognition that they are the original inhabitants of NSW. The use of 'Torres Strait Islander' and 'Indigenous' is only used when quoting the Commonwealth Government.

Aboriginal and Torres Strait Islander peoples, like other Australians, have community and family members living with mental health conditions. Different cultures have very different conceptualisations of mental health. Use of the term 'mental health' can act as a barrier to engaging with Aboriginal people, and the concept of 'recovery' is somewhat foreign to people whose perspective of mental health embraces the mind, the body and the environment as inseparable, preferring to use the term 'social and emotional wellbeing'.

For Aboriginal people, social and emotional wellbeing includes connection to family, community, ancestry, culture, spirituality and land. Conceptualisations of mental health will differ from community to community.

Aboriginal peoples are more likely to experience disadvantage in Australian society. This is reflected in the level of poverty Aboriginal people and communities experience. They often have poor access to basic services, including health services, when compared to non-Aboriginal Australians. It can be challenging for an Aboriginal person to seek help from a mental health system that may not understand their culture, family obligations or unique community structures. If an Aboriginal and/or

Torres Strait Islander person has had previous negative experiences with government systems or authority figures, it may take time for that person to develop trust with a mental health professional.

This section highlights some mechanisms and services that are available to Aboriginal people that work to maximise fair access to mental health care, treatment and support in NSW.

You will find information on:

- **Racial discrimination**
- **Why it is important to consider culture in relation to mental health and mental illness**
- **Health and support services for Aboriginal people with mental health conditions**
- **Stolen Generation issues: reparations, healing and tracking down lost relatives** ; and
- **Where to find legal assistance.**

It is acknowledged that while Aboriginal communities share cultural believes, they also remain diverse and individual.

8B.1: Racial discrimination and Aboriginal people

If you are discriminated against when you are trying to access services (including health services), you can use anti-discrimination law to complain about it, possibly to get compensation, and prevent it from happening again.

If the discrimination you experience is because of your mental health condition, click **here** to find out more about what you can do.

If the discrimination is because you are Aboriginal or Torres Strait Islander, this is called racial discrimination.

There are two laws that apply to racial discrimination that happens in NSW:

- The *Racial Discrimination Act 1977* (Cth) that applies to discrimination that happens anywhere in Australia, including NSW; and
- The *Anti-Discrimination Act 1977* (NSW) that applies to discrimination that happens in NSW.

These laws make it unlawful to discriminate against a person because of their race in a range of areas of life, such as work, provision of goods and services, housing, access to public places and education.

There are similar laws in each state and territory, some of which are called anti-discrimination laws, others of which are called equal opportunity laws. You can find out more about these laws **here**.

In NSW, the **Anti-Discrimination Board (ADB)** investigates racial discrimination complaints made under the *Anti-Discrimination Act 1977* (NSW), and tries to resolve such complaints by conciliation, a process which tries to reach an agreement between the person who has made the complaint and the person or organisation against whom the complaint has been made. If no agreement is reached, then the ADB may refer the matter to the Administrative and Equal Opportunity Division of the NSW Civil and Administrative Tribunal for determination by an independent Tribunal.

The ADB has Aboriginal Outreach Program which helps Aboriginal people deal with discrimination. This program has Aboriginal staff members and provides a culturally appropriate service. **More information is available here** or through the ADB's enquiries line on 1800 670 812*.

At a national level, the **Australian Human Rights Commission (AHRC)** is responsible for dealing with complaints of discrimination under the *Racial Discrimination Act 1977* (Cth). Like the ADB, the AHRC will investigate the complaint and try to resolve such complaints by conciliating an agreement between the parties to the complaint. If an agreement cannot be reached, the person making the complaint then has the option of making an application to the Federal Circuit Court of Australia or the Federal Court of Australia for determination of the complaint.

The AHRC also has a specific race discrimination unit and **Aboriginal and Torres Strait Islander Social Justice Unit** that undertake policy and advocacy activities in relation to race discrimination and social justice for indigenous peoples.

Click here for information about racial discrimination from the Australian Human Rights Commission and from the **Anti-Discrimination Board**.

Complaints to the ADB should generally be made within twelve (12) months of the actions that you believe were unlawful discrimination. Complaints to the AHRC should generally be made six (6) months of the actions that you believe were unlawful discrimination. You should ask the ADB or AHRC for more information about the time limit for your particular complaint.

To find more information about how to seek legal assistance, **click here**.

8B.3: Mental health services for Aboriginal and Torres Strait Islander peoples

There are specific services available to help Aboriginal people living with mental health conditions in NSW:

- **Aboriginal Mental Health Workers**
- **First Peoples Disability Network NSW**
- **Aboriginal Medical Services**
- **Medicare Indigenous Access Scheme**
- **Closing the Gap Pharmaceutical Benefits Scheme**

To find information about health services for Aboriginal and Torres Strait Islander people in NSW follow this link to the **Aboriginal Health and Medical Research Council of NSW website**.

If you are an Aboriginal person seeking help for mental health issues, you may wish to ask if you can bring a family member or support person to appointments with you.

8B.3.6: Further resources for social and emotional wellbeing

For more information about the social and emotional wellbeing (including mental health needs) of Aboriginal and Torres Strait Islander people and communities, visit the websites below:

- **Yarn Safe**, by headspace, including the Mental Health and wellbeing page.
- **Australian Indigenous Health InfoNet** provides information and a list of programs for Aboriginal and Torres Strait Islander people.

- **Social and Emotional Wellbeing and Mental Health Services in Aboriginal Australia**: this Australian Psychological Society website provides information and allows you to search a health service near you.
- iBobbly suicide prevention app: a free and confidential suicide prevention app designed especially for Aboriginal and Torres Strait Islander people to use on mobile phones or tablet devices. Therapy is delivered in a culturally relevant way. iBobbly can be downloaded from the **iTunes App Store** (IOS) or on **Google Play** (Android)

Sourced on 4/8/22: https://mhrm.mhcc.org.au/chapters/8-people-with-mental-health-and-co-existing-conditions/8b-aboriginal-people-in-nsw-living-with-mental-health-conditions/

Legal Support for People with an Alcohol or Other Drug Issue

Walama Court

The Aboriginal Legal Service (NSW/ACT) Limited ('**ALS**') welcomes the wide-ranging recommendations of the Special Commission of Inquiry's Report into the Drug 'Ice', saying only a 'paradigm shift' away from a criminal justice lens to a health-based response will help address the devastation caused by drugs.

Importantly, the Inquiry found that NSW Government action must be grounded in an 'understanding of Aboriginal definitions of health and wellbeing; the importance of family, community, culture and Country to Aboriginal health and wellbeing; the impacts of colonisation and racism on the health of Aboriginal people; the effects of trauma experienced personally, intergenerationally and culturally; the disproportionate effects of socioeconomic disadvantage; and the principles of self-determination.

Chief Executive Officer Karly Warner said the ALS had long-campaigned for many of the Inquiry's 109 recommendations, such as the expansion of the highly-successful Youth Koori Court into regional areas of NSW and the implementation of the Walama Court proposal.

"We welcome the Inquiry's acknowledgement of the important role of culturally-specific courts in providing holistic and wraparound support for our communities. We know that courts that involve Elders, Aboriginal community controlled organisations and culturally-appropriate members, provide the most effective support for our mob. We call on the NSW Government to act without delay to establish a Walama Court in NSW – an Aboriginal-specific court that can deal with drug and alcohol matters."

"The ALS is pleased that the Inquiry has acknowledged the need for a health-focused response to address the use of 'Ice'.

"Community-designed and community-led diversionary programs, together with advice from drug and alcohol experts, will address the underlying issues that result in substance abuse and provide much-needed support and counselling to ensure Aboriginal people and their families get the help they need.

"The greater use of culturally-specific courts like the Youth Koori Court and Walama Court, as well as a Family Drug Treatment Court, would also allow people to receive treatment in the community,

reducing the risk of them getting stuck in the quicksand of the justice system and recognising the crucial role that connection with Aboriginal culture plays in healing."

Ms Warner said the ALS supports calls for greater funding for drug and alcohol services and rehabilitation programs for Aboriginal people.

"The NSW Government must act without delay to implement the Inquiry's important recommendations to ensure there is greater prevention, diversion and rehabilitation initiatives to support our communities, particularly in regional areas."

Sourced on 4/8/22:
https://www.alsnswact.org.au/als_welcomes_renewed_calls_for_walama_court_and_greater_support_for_communities

The District Court of NSW has published a Walama List Fact Sheet. Extracts appear below:

WHAT IS WALAMA?

'Walama' is a word from the Dharug language meaning 'come back' or return. In the context of the Walama List, it is a coming back to identity, community, culture, and a healthy, crime-free life. The Walama List will provide a therapeutic and holistic approach to sentencing eligible Aboriginal and Torres Strait Islander offenders. Walama will achieve this by working with Elders and respected community members, government, and non-government services to address underlying needs and risk factors related to offending behaviour. The Walama List aims to reduce re-offending, keep communities safe and reduce the overrepresentation of Aboriginal and Torres Strait Islander peoples in the criminal justice system.

WALAMA LIST OBJECTIVES

- Reduce the risk factors related to re-offending.
- Reduce the rate of breaches of court orders.
- Reduce the overrepresentation of Aboriginal and Torres Strait Islander persons in custody in NSW.
- Increase community participation and confidence in the criminal justice system; and
- Increase compliance with court orders.
- Facilitate a better understanding of any underlying issues which may increase the likelihood of re-offending.

WHO CAN PARTICIPATE IN WALAMA LIST?

The Walama List Pilot will start in the NSW District Court at the Downing Centre in 2022. It will be a sentencing court only for adult Aboriginal and Torres Strait Islander offenders with matters before the NSW District Court. Eligibility for the Walama List requires that the offender:

- has sentence proceedings listed in the NSW District Court Downing Centre
- is descended from an Aboriginal person or Torres Strait Islander, identifies as an Aboriginal person or Torres Strait Islander, and is accepted as such by the relevant community

- has pleaded guilty to the offence(s)
- has signed an Agreed Statement of Facts on Sentence; and
- consents to having their matters dealt with in the Walama List.

WHAT HAPPENS IN THE WALAMA LIST?

Walama List proceedings will involve Elders and other Respected Persons (ERPs) in sentence proceedings and is a critical component of a community-led sentencing approach. The Walama List is set up by a Practice Note of the NSW District Court. The ERPs assist in the Walama List by sitting with the presiding Judge during a Sentencing Conversation and Case Plan Conversations and providing advice regarding the background of the offender and the possible reasons for the offending behaviour. The ERPs may be required to explain relevant kinship connections of the offender, how a particular crime has affected the Aboriginal community and advice on cultural practices, protocols, and perspectives relevant to sentencing. The ERPs symbolise the importance of Aboriginal and Torres Strait Islander cultural authority in decision-making and respect for the judicial process in sentencing.

ROLE OF ELDERS AND RESPECTED COMMUNITY PERSONS (ERP'S)

ERP's of the Walama List give honest and fearless advice to the Walama List Judge, informed by their cultural knowledge, wisdom, and experiences. They advise the Judge on cultural issues relating to the offender and their offending behaviour. The voices of ERP's are a powerful cultural aspect of the Walama List and their participation sends a clear message to the offender that the offences committed are not condoned by either Aboriginal and Torres Strait Islander or non-Aboriginal communities. The ERP's will provide valuable insight to the sentencing proceedings by informing the court about cultural, historical, and social issues relating to the offender's background and community in a culturally safe way.

Sourced on 4/8/22: https://www.aboriginalaffairs.nsw.gov.au/media/website_pages/our-agency/news/pilot-of-specialist-approach-for-sentencing-aboriginal-offenders/Walama-List-Fact-Sheet.pdf

The Mental Health Coordinating Council has published a Mental Health Rights Manual. Extracts from Chapter 8 Section F: People with mental health conditions who have alcohol and other drug issues, are provided below:

8F.2.2: Alcohol and drug support services for people in contact with the criminal justice system

Services specifically for people with alcohol and drug issues in contact with the criminal justice system include:

- **The Connections Project** – provides post-release support to people leaving prison in NSW who have a history of problematic drug use, many of whom also experience mental health issues. This is available in all Correctional Centres in NSW with follow-up provided anywhere is NSW. If you are currently in prison and are interested in joining the Connections Project or would like to get more information about it, you can talk to a nurse in the clinic in your correctional centre.
- **Guthrie House**: is a community-based residential rehabilitation and transition service for women who are involved in the NSW criminal justice system. Call 02 9564 5977 from 8:00am to 4:00pm from Monday to Friday.

- **Justice Health and Forensic Mental Health Network**: provides government health care to adults and young people in contact with the forensic mental health and criminal justice systems, in community, inpatient and custodial settings.

8F.3: Involuntary treatment for alcohol and other drug problems

Consent is needed for treatment for alcohol and other drug (AoD) issues in the same as for any other medical condition. Treatment can usually only be given with the informed consent of the person getting the treatment. This means that the treatment must be voluntary.

However, there are laws that allow involuntary treatment for AoD problems in NSW:

- You can be treated without your consent under the ***Drug and Alcohol Treatment Act 2007* (NSW)**; and
- If you are charged with a serious criminal offence, you can also be ordered into compulsory treatment by the *NSW Drug Court under the* ***Drug Court Act 1998*** (NSW).

8F.3.1: Involuntary Drug and Alcohol Treatment Program

The *Drug and Alcohol Treatment Act 2007* (NSW) is the law that provides for NSW Health's Involuntary Drug and Alcohol Treatment Program (IDAT).

The IDAT Program is a AoD treatment program that provides medically supervised withdrawal, rehabilitation and supportive interventions for patients with severe substance dependence. The IDAT Program provides short term care to protect the health and safety of people with severe substance dependence who have experienced, or are at risk of, serious harm and whose decision making capacity is considered to be compromised due to their substance use. It includes an involuntary supervised withdrawal component. Participants are usually referred through their local health district.

Under the IDAT Program, an Accredited Medical Practitioner at the IDAT Facility can issue a Dependency Certificate that means the person who is subject to the certificate can be detained for up to twenty eight (28) days in the first instance as an involuntary patient. There is an option to extend the Dependency Certificate for up to a total treatment period of three (3) months in extreme circumstances where withdrawal, stabilisation and discharge planning may take longer. The IDAT Program also provides three (3) to six (6) months of voluntary community-based treatment and support following discharge.

An Accredited Medical Practitioner from one of the IDAT units conducts an assessment, and if all the eligibility criteria are met, will issue the person with a Dependency Certificate. If a Dependency certificate is issued, and a bed is available, the person can be admitted for treatment. Local health districts can arrange transportation to the treatment unit.

Within seven (7) days of admission, the Dependency Certificate is reviewed by a magistrate in an informal hearing usually at the treatment unit. Legal aid is available through duty solicitors for the reviews held before the visiting magistrate. Contact Law Access on 1300 888 529* for more information.

At the end of the involuntary treatment, the patient is discharged and transitioned to community care. If you are unhappy with the visiting magistrate's decision, you can apply to the NSW Civil and Administrative Tribunal (NCAT) for a review of the decision. **For more information about the NCAT, click here.**

The *Drug and Alcohol Treatment Act 2007* (NSW) also allows you to name a person as your Primary Carer so that they will have access to certain information about you while you are detained under this Act. For example, the primary carer must be notified within twenty-four (24) hours after a Dependency Certificate has been issued by an Accredited Medical Practitioner. They will be noted as soon as possible if you are absent from the treatment centre without permission or are discharged. As far as possible, they should be consulted about your discharge plans.

If you are considering a referral to IDAT and you require additional information, please contact:

- Alcohol and Drug Information Service at (02) 9361 8000 or 1800 422 599* (outside Sydney); or
- Your Local Health District Drug and Alcohol Centralised Intake contact number to discuss with the local **Involuntary Treatment Liaison Officer.**

Contact numbers for the two state-wide IDAT programs are:

- Herbert Street Clinic, Royal North Shore Hospital: 02 9463 2533.
- Lachlan IDAT Unit, Bloomfield Hospital: 02 6369 7700.

You can search for the right contact by following this here, alternatively **click here to find out more information about the IDAT Program.**

*Mobile phone calls to freecall numbers (numbers starting with 1800) are charged to the caller at the usual mobile rate.

Independent Official Visitors have been appointed to inspect IDAT facilities regularly. They have the same role as Official Visitors under the Mental Health Act 2007 (NSW). This means that you can contact an Official Visitor if you have concerns about your care and treatment as an involuntary patient as well as to make complaints and concerns about the physical conditions at the IDAT Facility.

To contact the **Official Visitors Program**:

Postal address: Locked Bag 5016 GLADESVILLE NSW 1675
Telephone: (02) 8876 6301
Website: **www.ovmh.nsw.gov.au**

8F.4: Diversionary programs for people with alcohol and other drug problems

There are programs available for people with alcohol and other drug issues who face less serious criminal charges. These are usually called ‘diversionary programs’ because they are designed to ‘divert’ a person from the criminal justice system and to provide treatment for problems linked with alcohol and other drug issues rather than punishment.

Diversionary programs are voluntary in that they are not carried out with you being held behind locked doors in an institution, such as prison or a psychiatric hospital. However, there may still be serious consequences if you fail to finish or cooperate in a program. If you fail to finish or cooperate you are likely to be taken back to court to have the original offence dealt with again. It is best to get **legal advice** before you agree to participating in a diversionary program.

This section provides information about Drug Court programs and the Magistrates Early Referral into Treatment (MERIT).

Other examples of diversionary programs include the **Extra Offender Management Services (EOMS)**, Cannabis Cautioning Scheme (CCS); and Circle Sentencing.

Click here to find information about the diversionary programs that may be available to you.

There is also the NSW Youth Drug and Alcohol Court (YDAC), which aims to reduce re-offending by young people who have become entrenched in the criminal justice system, by diverting them into diversionary programs to overcome their drug and alcohol problem.

8F.4.1: Drug Court Programs

In some instances, the Local or District Court may refer to you to the Drug Court to consider if you are eligible for the Drug Court program.

The Drug Court of NSW aims to address underlying drug dependency which has resulted in criminal offending behaviour. The Drug Court can require an offender to participate in an ongoing rehabilitation program, under court supervision instead of imposing a punishment. The relevant law is the *Drug Court Act 1998* (NSW).

To be eligible for the Drug Court program, a person must:

- be likely to be sentenced to full-time imprisonment;
- have indicated they will plead guilty to the offence;
- be dependent on the use of illicit drugs;
- live within **certain catchment areas** and referred by certain courts;
- be eighteen (18) years of age or over; and
- be willing to participate.

A person is not eligible if they:

- are charged with an offence involving violent conduct;
- are charged with a sexual offence or some types of drug offence; and
- are experiencing a mental condition that could prevent or restrict participation in the program.

People with a history of violent or dangerous behaviour may be ineligible for participation.

If the Drug Court finds that the offender is not eligible for drug court programs, the person will be referred back to the Local or District Court.

If the Drug Court decides that an applicant is eligible for a residential Drug Court program, the person will go into a ballot. If that person is chosen from the ballot, they will be remanded in custody for detoxification and assessment. This takes place at the Drug Court Unit in Silverwater Complex, which is separate from inmates in the main gaol. The initial assessment takes up to two (2) weeks and includes general and mental health reviews conducted by Justice Health. Each person's Drug Court program is tailored to their specific needs.

The offender must agree to the program of treatment and conditions proposed by the court. The Drug Court imposes a penalty for the offence, but the sentence is immediately suspended while the person is on the Drug Court program. If the offender completes the program, that will be taken into

account in determining the final sentence, such as a good behaviour bond. The final sentence cannot be higher than the original, suspended sentence.

During the Drug Court program, the offender in custody may have the opportunity of receiving a community services order and engaging in work in the community. The offender may live at an approved residential address (for example the offender's home) or at a residential rehabilitation facility (for example, Salvation Army William Booth House in Sydney). The length of the program depends on the person's progress.

For more information about the Drug Court and the three phases of the Drug Court program click here.

8F.4.2: Magistrates Early Referral into Treatment

The Magistrates Early Referral into Treatment (MERIT) program is an alcohol and drug program available to eligible defendants who appear at certain Local Courts. To be considered eligible for MERIT, a defendant must:

- be aged eighteen (18) years old or over;
- be eligible for bail or not require bail consideration;
- have a treatable drug/alcohol problem for which there is appropriate treatment available;
- live in a **certain catchment area** (or have sufficient connection to the area, for example, have full-time employment in the area); and
- voluntarily consent to undertake the MERIT program.

The defendant must not be charged with sexual, certain serious offences or have such offences pending before the court.

The MERIT program allows defendants to focus on treating their alcohol or drug issue separate from their legal matters. An agreement to become involved is not an admission of guilt for the offence(s) charged. Treatment generally takes place before any pleas are made and the court matters are adjourned (delayed) until the completion of the program.

The program normally lasts three (3) months. Treatments will depend on the circumstances of each participant, and may include:

- detoxification
- weekly individual counselling
- methadone and other medication
- residential rehabilitation; and
- case management and support.

During the bail period, participants will:

- have the support and guidance of their MERIT caseworker;
- participate in the treatment program as agreed to with their caseworker;
- comply with all conditions of bail and the MERIT treatment plan; and

- appear before the Magistrate during this period to provide an update on treatment progress.

MERIT caseworkers will report any incidents of non-compliance with the treatment plan to the Magistrate. The Magistrate may remove the defendant from the program. If removed from MERIT, the defendant goes back to court for a plea or hearing. The defendant will not have any extra charges specifically because they did not comply with the treatment program.

After the treatment program is completed, the defendant will have a hearing or sentencing of the outstanding court matter(s):

- the Magistrate hearing the case will be provided with a report from the MERIT Team;
- the report will give information on the client's participation in treatment and any further treatment recommendations; and
- where possible, a detailed aftercare program will assist participants to continue in their rehabilitation.

The sentence of the participant after successful completion of MERIT should reflect successful completion of MERIT and any recommendations for further treatment.

For more information about MERIT, click here.

8F.5: Alcohol and Drug Treatment in custody

Justice Health and Forensic Mental Health Network provides treatment and support for people in custody with alcohol and drug (AoD) issues.

For example, the **Adolescent Community and Court Team** – works with other government agencies and Area Child Adolescent Community Mental Health Services to divert young people from custody.

For services specifically for people with AoD issues in contact with the criminal justice system, click here.

8F.5.1: Intensive Drug and Alcohol Treatment Program

Intensive Drug and Alcohol Treatment Program (IDATP) is a residential (live in) program at the John Morony Correctional Centre for male and female offenders who have drug and/or alcohol problems linked to their offending behaviour.

Eligible prisoners can be referred to IDATP by a variety of sources that include active recruitment by program staff, the Probation and Parole Service, other CSNSW staff and self- referrals. Recommendations can also be made by the court at the time of sentencing and acted on by corrections staff after imprisonment. In addition to meeting the eligibility criteria, the IDAPT team assess whether an offender is suitable for the program. This assessment comprises an interview that considers such things as the drug use and offending history, physical and mental health, cognitive functioning, drug treatment history, institutional security or safety alerts and medical needs.

Participation in IDATP is voluntary and offenders can refuse a referral or refuse to be placed on the program. Once an offender has commenced the program they can also discharge themselves at any time.

It is a group program which can take six (6) to eight (8) months to complete, depending on each person's progress.

IDATP aims to:

- help offenders gain an understanding of their substance use and offending behaviour;
- reduce the likelihood of re-offending; and
- give offenders the skills, resources and support needed to return to the community, free from alcohol and/or drug-free and offending behaviour.

The program includes a range of therapeutic, health, education, vocational (job) and pre-release interventions aimed at addressing substance dependence, offending behaviour and reintegration. It is offered to offenders at the Outer Metropolitan Multi-Purpose Correctional Centre and Dillwynia Correctional Centre.

8F.6: Information about drugs and the law

In NSW, it is an offence to possess, use, produce or supply a drug which has been declared prohibited. Most charges regarding drug in NSW will be because a person broke the law *Drug Misuse and Trafficking Act 1985* (NSW).

The Commonwealth Criminal Code deals with offences involving bringing drugs into Australia or exporting drugs to other countries.

For information about drugs and the law, you can read the resources below:

- NSW State Library, "**Drugs and the Law**": this website Information about the law in New South Wales relating to drugs, including possession, use and supply, manufacturing, importing and exporting.
- Department of Health "**Drug laws in Australia**": this provides information about drug laws in each state and territory.

Sourced on 4/8/22: https://mhrm.mhcc.org.au/chapters/8-people-with-mental-health-and-co-existing-conditions/8f-people-with-mental-health-conditions-who-have-alcohol-and-other-drug-issues/

Closing the Gap

The National Agreement on Closing the Gap sets out ambitious outcomes and new priority reforms that will change the way governments work to improve life outcomes for Indigenous Australians.

It has been developed in genuine partnership between Australian governments and Aboriginal and Torres Strait Islander peak organisations.

The National Agreement was agreed on 30 June 2020 by:

- all Australian governments
- the Coalition of Aboriginal and Torres Strait Islander Peak Organisations
- the Australian Local Government Association.

The National Indigenous Australians Agency is leading the Commonwealth's whole-of-government efforts on Closing the Gap.

Commonwealth Implementation Plan

The National Agreement commits all parties to action. Its success depends on all parties committing the right resources and efforts to deliver on these actions in practice.

All parties to the National Agreement have developed an implementation plan that sets out how their policies and programs align with the National Agreement and what actions they will take to achieve the priority reforms. Parties will report annually on their progress.

On 5 August 2021, the Australian Government released its first Closing the Gap Implementation Plan- external site. This whole-of-government plan was developed in consultation with Aboriginal and Torres Strait Islander partners and in particular with the Coalition of Aboriginal and Torres Strait Islander Peak Organisations.

The National Indigenous Australians agency led the development of the Implementation Plan, working closely with relevant Australian Government agencies, including our department.

It provides an overview of the Australian Government's new investments and future work as well as existing actions that contribute to achieving the Closing the Gap outcomes and priority reforms.

Our actions under the Closing the Gap Implementation Plan

We are working to embed the priority reforms within our broader policies, programs, culture and practices. This work will continue for the lifetime of the National Agreement.

Together with the National Indigenous Australians Agency, we are leading Australian Government action on the Adult and Youth Justice Outcomes (Outcomes 10 and 11), as well as the Land and Waters Outcome (Outcomes 15a and 15b).

Read more about the Closing the Gap Socioeconomic Outcomes and Targets- external site

Adult and Youth Justice Outcomes

Closing the Gap Outcome 10 and Outcome 11 are that adult and young Indigenous Australians are not overrepresented in the criminal justice system.

There are 2 targets for these outcomes:

- Target 10: By 2031, reduce the rate of Aboriginal and Torres Strait Islander adults held in incarceration by at least 15%.
- Target 11: By 2031, reduce the rate of Aboriginal and Torres Strait Islander young people (10-17 years) in detention by at least 30%.

Under the Australian Government's Closing the Gap Implementation Plan, we are delivering 4 key new investments:

- $9.3 million in legal assistance funding for Aboriginal and Torres Strait Islander Legal Services to assist families in coronial inquiries and to support clients involved in complex and/or expensive cases.

- $8.3 million for Aboriginal Community Controlled Organisations to assist Aboriginal and Torres Strait Islander families to resolve post-separation parenting and property disputes through culturally safe and tailored models of family dispute resolution.
- $7.6 million to support the establishment of the Justice Policy Partnership, a joined up policy partnership on justice between the Commonwealth, states and territories and Aboriginal and Torres Strait Islander representatives to agree focus action areas to drive outcomes on reducing Indigenous incarceration.
- Funding to support jurisdictional implementation of the Optional Protocol to the Convention Against Torture. This will lead to better outcomes for detainees and support greater public confidence in the justice system by helping reduce Aboriginal and Torres Strait Islander deaths in custody and ensuring safe conditions of detention.

Sourced on 4/8/22: https://www.ag.gov.au/legal-system/closing-the-gap

Justice Policy Partnership

The Justice Policy Partnership brings together representatives from the Coalition of Peaks- external site, Aboriginal and Torres Strait Islander experts, and Australian, state and territory governments to take a joined-up approach to Aboriginal and Torres Strait Islander justice policy.

It is the first of 5 policy partnerships to be established under Priority Reform One of the National Agreement on Closing the Gap. Policy partnerships under the National Agreement will:

- drive Aboriginal and Torres Strait Islander community-led outcomes on Closing the Gap
- enable Aboriginal and Torres Strait Islander representatives, communities and organisations to negotiate and implement agreements with governments to implement all priority reforms under the National Agreement and policy specific and place-based strategies to support Closing the Gap
- support additional community-led development initiatives
- bring together all government parties, together with Aboriginal and Torres Strait Islander people, organisations and communities to the collective task of Closing the Gap.

Parties to the National Agreement have committed to reducing the rate of Aboriginal and Torres Strait Islander adults held in incarceration by at least 15% by 2031 (target 10), and reducing the rate of Aboriginal and Torres Strait Islander children (10-17 years) in detention by at least 30% by 2031 (target 11). The Justice Policy Partnership is focussed on reducing the disproportionate rate at which Aboriginal and Torres Strait Islander People are incarcerated.

The Agreement to Implement the Justice Policy Partnership sets out scope and purpose of the partnership as well as the roles and responsibilities of members.

Read a copy of the Agreement to Implement the Justice Policy Partnership.

Membership

The Justice Policy Partnership has members representing all Australian, state and territory governments and Aboriginal and Torres Strait Islander members. This includes:

- 10 Aboriginal and Torres Strait Islander members – 5 from Coalition of Peaks organisations and 5 independent Aboriginal and Torres Strait Islander members, selected by the Coalition of Peaks in an open and transparent expression of interest process
- 9 government members – 1 from the Australian Government and 1 each from state and territory governments (all senior officials).

The Justice Policy Partnership is co-chaired by the Chair of the National Aboriginal and Torres Strait Islander Legal Services and the Deputy Secretary of the Legal Services and Families Group in the federal Attorney-General's Department.

Further details on the Justice Policy Partnership membership is contained in the Agreement to Implement.

Sourced on 4/8/22: https://www.ag.gov.au/legal-system/closing-the-gap/justice-policy-partnership

How to Assist an Aboriginal Defendant

The Legal Services Commission of South Australia has published guidelines on working with Aboriginal Defendants. Extracts appear below:

Using Interpreter Services

Aboriginal people in the remote north-west of South Australia may speak in the Western Desert language which has many dialects. Port Augusta has a settled population of Aboriginal people, and is also a traditional meeting place and crossroads for Aboriginal people who travel to and through this area from the north-west of the state and beyond. This means that people from many different Western Desert language groups are in this area at any one time.

For those people from the *Anangu Pitjantjatjara Yankunytjatjara Lands* (APY Lands), their first language may be Pitjantjatjara or Yankunytjatjara and their second language may be English. It is important to remember that Pitjantjatjara and Yankunytjatjara people identify as separate and distinct groups despite intermarriage between the two groups. Pitjantjatjara can be understood by Yankunytjatjara, Ngaanyatjarra, and Manjiljarra speakers. Interpreter services are available for Pitjantjatjara and Yankunytjatjara. For further information on interpreting services, including other Aboriginal languages, please visit the Aboriginal Language Interpreting Service (ALIS) website.

Many people speak Aboriginal English which is a recognised separate dialect of English. Not only may this be difficult to understand, it also incorporates indigenous words, and some English words have different meanings. As there is no interpreter service available to assist with Aboriginal English, the duty solicitor needs to be attentive when taking instructions in Aboriginal English to avoid making false assumptions and misinterpreting the defendant's instructions.

As discussed in the Role of the Duty Solicitor chapter, many legal terms and concepts are not only culturally foreign, they may be uninterpretable. A very able court interpreter has given evidence on many occasions in South Australian courts that the words of the *police caution* are untranslatable into Pitjantjatjara, containing as they do propositions put in the alternative, and abstract concepts such as "rights", which are divorced from immediate experience [see Role of Duty Solictor chapter]. It is therefore important for the duty solicitor to avoid using legal jargon, and instead to describe the

situation the defendant is in and their rights in general terms and plain English. An interpreter should also be able to assist with this dilemma.

Gratuitous Concurrence

Gratuitous concurrence is when a person appears to assent to every proposition put to them even when they do not agree. For many indigenous people, using gratuitous concurrence during a conversation is a cultural phenomenon, and is used to build or define the relationship between the people who are speaking. For example, it may indicate respect towards a person, cooperation between people, or acceptance of a particular situation.

However, it is widely recognised that people who are in a position of powerlessness when confronted by alien institutions and authority figures, and who are disadvantaged due to a language barrier, may adopt a strategy of always agreeing or saying what they think the person in authority wants them to say, regardless of the truth of the matter. Gratuitous concurrence is not confined to traditional Aboriginal people from the north-west of the State [see Role of the Duty Solicitor chapter].

Different ways of communicating

Often taking an indirect approach to seeking information is more appropriate when taking instructions from an Aboriginal defendant. This may avoid gratuitous concurrence, as discussed above, as it removes the necessity to respond to direct questions, or respond to questions with expected “yes” or “no” answers. Allowing a person to tell in their own words what has happened is culturally appropriate when taking instructions from an Aboriginal defendant and allows moments of silence and pause while thoughts are put together. Silence and pause are an important and normal part of communication and the exchange of information. A duty solicitor has to possess the virtues of patience and sympathetic understanding and must listen attentively to an Aboriginal person's story. The story and the telling of the story are essential aspects of Aboriginal culture. Stories are only revealed to people who can be entrusted with them [see Role of the Duty Solicitor chapter].

The use of body language is an integral part of communication for many Aboriginal people. For example, hand gestures and movement of the head and eyes can be important. Direct eye contact may be taken as a sign of aggression, rudeness or disrespect; lowered eyes and talking in a quiet manner may be seen as respectful behaviour.

Issues for Duty Solicitors

The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) and the final report handed down in 1991 demonstrated very clearly that disproportionate numbers of Aboriginal people compared to the mainstream community have contact with the criminal justice system. It is widely recognised that this contact has a destructive influence on Aboriginal communities, families and individuals. The over-representation of Aboriginal people in the criminal justice system continues to this day; arrest and imprisonment rates remain at disproportionate rates. Needless to say, a number of Aboriginal people have had a lot of experience of the criminal courts, Magistrates, police prosecutors and defence lawyers. Not surprisingly, they do not enjoy being defendants in criminal cases and in some cases hold cynical and negative views of defence lawyers. It is important for the duty solicitor to be culturally aware and behave in a culturally appropriate manner when assisting Aboriginal defendants.

Some responses to duty solicitors

Assuming that the language barrier has been overcome and the Aboriginal client is able to communicate effectively with the duty solicitor in English, then a variety of responses may be experienced. These responses are no different in kind from what may be experienced with non-Aboriginal defendants, but there will be differences in emphasis that reflect Aboriginal peoples' cultures, society, world view and past experience. Both non-Aboriginal and Aboriginal duty solicitors may be experienced as alien because they are seen as part of the alien court system, and not "one of us". Again, attentiveness, patience and courtesy to the defendant are of the utmost importance [see Role of the Duty Solicitor chapter].

Gender issues

Gender issues inevitably arise for duty solicitors dealing with Aboriginal people, particularly when dealing with traditional people [see Role of the Duty Solicitor chapter].

Charged up or seriously ill?

Aboriginal and Torres Strait Islander people have a disproportionate lower life expectancy and health status compared to non-Indigenous people. They die on average twenty years earlier than non-Indigenous Australians and infant mortality is three times higher than for non-Indigenous Australians. It is widely accepted that the ongoing disadvantage faced by Aboriginal people is due to a complex web of socioeconomic factors such as: poverty, overcrowding in houses, inadequate access to clean water and sanitation, inadequate access to education, housing and employment, lack of access to medical assistance and treatment, poor nutrition, drug and alcohol abuse (including petrol and solvent sniffing), ongoing discrimination and racism, dispossession from land, the separation of families, loss of culture, and emotional upheaval. Chronic diseases such as heart disease, diabetes, stroke, and renal failure are common and escalating, as is drug and alcohol addiction. Taking into account the prevalence of chronic illnesses within Aboriginal communities, it is important that the duty solicitor is aware that not all people who appear unwell or charged up are in fact high on drugs or alcohol, but rather are chronically ill.

The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) showed that Aboriginal people were disproportionately represented in relation to the offences of assault, drunkenness and public order offences. The deaths investigated by RCIADIC showed time and again that alcohol withdrawal in particular is life threatening, and that alcohol intoxication is potentially dangerous because it has the effect of masking effects and symptoms of other life threatening illnesses and conditions, such as closed head injuries [see Role of the Duty Solicitor chapter]. Taking these factors into consideration, it is important for the duty solicitor to not make assumptions about the condition of any defendant and be vigilant to the possibility that instructions may be needed in order to have the defendant medically examined.

Clearly, some defendants will be under the influence of alcohol or drugs. Where it is impossible to take instructions, the duty solicitor is obliged to obtain instructions to have the matter held over until the defendant is able to communicate effectively. Instructions should be obtained to warn the cell guards of the defendant's condition, and to remind them of their obligation and duty of care towards that person [see Role of the Duty Solicitor chapter].

The names of deceased people

For many Aboriginal people, raising the name of a dead person will cause serious offence and is culturally insensitive. For those people who speak Pitjantjatjara, the deceased person's name is not to be spoken until the grieving family decides the name can come back into use. It is a matter of

respect for traditional culture that one does not disturb its members' memories of the dead by reviving the use of their name. In place of the person's name, the word "Kunmanara" is used. *Kunmanara* means "one whose name cannot be mentioned" or "no name". It is used by all people who have the same name as a person who has died recently, and may also be applied to the duty solicitor if it is appropriate. The rule is simple: if the defendant calls the duty solicitor "Kunmanara" or if the defendant calls somebody else "Kunmanara", then it is very important the duty solicitor does not use that person's name, but rather call the person in question "Kunmanara".

In addition, the duty solicitor should be aware that it is culturally inappropriate to show community members material such as video, voice recordings and photographs which contain images of the deceased person.

Ceremonial obligations

The Magistrates Court of South Australia, when it sits in the north-west of the State, will consider ceremonial obligations as reasons for absence from court, however more weight is given to such submissions where supporting information is also provided. This particularly applies to people of the Western Desert Language Groups, who reside at Yalata, Oak Valley and in the Pitjantjatjara Homelands. It is helpful to remember:

- It is never appropriate to ask of a defendant the nature of the ceremonies, because they relate to secret and sacred business;
- It is usually appropriate to adopt a euphemistic form of expression such as "going on business";
- Ceremonial obligations apply to young, middle-aged and old men as well as women. Both men and women occasionally travel on business, especially when relatives are involved;
- Family relationships and obligations have a wide context; the obligation to attend funerals for more distant relatives is just as important as for direct family members. Community members are generally approachable in providing confirmation of when and where a funeral will be held.

Business usually takes place during the summer months, though this is by no means an invariable rule and there is usually a fairly long lead-up time prior to the occasion when the travelling starts.

It is obviously important to the maintenance of the tradition of the courts giving leeway to defendants at ceremony time that the present arrangements not be abused. Some communities have gone so far as to arrange for traditional leaders to speak with visiting Magistrates and to request them to impose *bail* conditions consistent with attendance on business, but requiring the immediate arrest of defendants who have absented themselves from the community during "business time" so as to go on a drinking binge. This is cited as an example of the seriousness with which community leaders regard the importance of Aboriginal people attending traditional ceremonies and not abusing the leeway that Magistrates give in those circumstances.

Sourced on 4/8/22: https://lsc.sa.gov.au/dsh/print/ch03.php

The Law Society Northern Territory has published Indigenous Protocols for Lawyers. Extracts are provided below:

Many lawyers in the Northern Territory act for and provide advice to Aboriginal people. For many lawyers, especially those who do not identify themselves as Aboriginal or Torres Strait Islander,

those who do not have Indigenous heritage and those who are new to the Territory, communicating with Indigenous clients poses some special challenges. For example, because of the significant differences in language and culture, there is a much higher than usual risk of miscommunication. This is problematic and can often result in serious consequences. Consultations with Indigenous organisations and the legal profession in the Territory suggested a need for protocols to assist communication between lawyers and their Aboriginal clients. Based on the obligations of lawyers under Australian law and influenced by international law, such protocols can set a basic standard of conduct to assist legal practitioners and their Indigenous clients.

The ongoing need for these protocols is plainly evident when it is considered that more than 30 % of the Northern Territory's population is comprised of Aboriginal people.

Further, in December 2012 of the 1,452 people in custody in the Northern Territory only 239 were non-Indigenous. Currently, Aboriginal people comprise close to 86% of the jail population in the Territory. Of the 64,000 Aboriginal people in the Northern Territory, 1,279 were in prison as at 30 June 2014.1 The Productivity Commission's Overcoming Indigenous Disadvantage report released in 2014 identified that the rate of Aboriginal and Torres Strait Islander imprisonment increased by 57 % Australia wide between 2000 and 2013.2 Indigenous incarceration rates are even worse for young people. On 31 January 2013, there were 65 juvenile detainees held across three detention centres in the Northern Territory. Of the 65 detainees, 96% identified as Aboriginal or Torres Strait Islander.3 The Australian Institute of Health and Welfare's report "Youth Detention Population In Australia 2014" looks at the numbers and rates of young people who were in youth detention due to their involvement or alleged involvement in criminal activity. It focused on trends over the four-year period from June 2010 to June 2014. The report found that over that period, the over-representation of Indigenous young people in detention rose from 22 times to 25 times the rate of non-Indigenous young people.4 The legal profession has a critical role to play in being part of the solution to the serious problem of over-representation of Indigenous people in custody in the Northern Territory. Further, the issue of improving communication between Indigenous clients and their lawyers extends to all aspects of providing proper advice and representation to Indigenous people in the justice system. This means the protocols apply with equal importance and effect in the civil jurisdiction of the courts as well as the criminal jurisdiction and with that, the legal profession can more readily facilitate the delivery of justice to Indigenous people. As a basic tool, these protocols will do much to assist in the ultimate end of increasing criminal and civil justice for Indigenous people and as a starting point the role of interpreters is critical. The importance of Aboriginal interpreting services has been well documented in several national reports, including:

- the Royal Commission into Aboriginal deaths in custody (1991) (recommendation 100)
- the Recognition, rights and reform social justice report (2000)
- the Bringing them home report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (1997).

The six protocols

Protocol 1 Assess whether an interpreter is needed before proceeding to take instructions.

Protocol 2 Engage the services of a registered, accredited interpreter through the Aboriginal Interpreter Service.

Protocol 3 Explain your role to the client.

Protocol 4 Explain the relevant legal or court process to the client prior to taking instructions.

Protocol 5 Use 'plain English' to the greatest extent possible.

Protocol 6 Assess whether your client has a hearing or other impairment that may affect their ability to understand.

Sourced on 4/8/22: https://www.lawsociety.com.au/sites/default/files/2018-03/indigenous_protocols_for_lawyers_0.pdf