What Does 'Self-Determination' Mean in the Context of Legal Service Provision for Aboriginal and Torres Strait Islander Legal Services (ATSILS)?

by
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under the supervision of
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CERTIFICATE OF ORIGINAL AUTHORSHIP

I, Eddie Cubillo, declare that this thesis is submitted in fulfilment of the requirements for the award of PhD: Law in the Faculty of Law at the University of Technology Sydney.

This thesis is wholly my own work unless otherwise referenced or acknowledged. In addition, I certify that all information sources and literature used are indicated in the thesis.

This document has not been submitted for qualifications at any other academic institution.

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ABBREVIATIONS

ABS – Australian Bureau of Statistics

ACCHOs – Aboriginal Community Controlled Health Organisations

ACCHS – Aboriginal Community Controlled Health Sector

ACNC – Australian Charities and Not for Profits Commission

ACOSS – Australia Council of Social Services

ACT – Australian Capital Territory

ADC – Anti-Discrimination Commission

AGD – Attorney-General's Department

AH&MRC – Aboriginal Health and Medical Research Council

AIHW – Australian Institute of Health and Welfare

AJAC – Aboriginal Justice Advisory Committee

ALRM – Aboriginal Legal Rights Movement

ALS – Aboriginal Legal Service

ALSWA – Aboriginal Legal Service of Western Australia

ASIC – Australian Securities & Investment Commission

ASIO – Australian Security Intelligence Organisation

ATSIC – Aboriginal and Torres Strait Islander Commission

ATSICHS – Aboriginal and Torres Strait Islander Community Health Service

ATSILS – Aboriginal and Torres Strait Islander Legal Services

ATSILS QLD – Queensland Aboriginal & Torres Strait Islanders Legal Services

ATSIS – Aboriginal and Torres Strait Islander Services

BIA – Federal Bureau of Indian Affairs

CAALAS – Central Australian Aboriginal Legal Service

CAEPR – Centre for Aboriginal Economic Policy Research

CATSIA – Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)

CATSINaM – Congress of Aboriginal and Torres Strait Islander Nurses and Midwives

CERD – United Nations Committee on the Elimination of Racial Discrimination

CET – Community Engagement Team

CHC – COAG Health Council

CLANT – Criminal Lawyers Association of the Northern Territory

CLC – Community Legal Centre

CLE – Community legal education

COAG – Council of Australian Governments

CoP – Coalition of Peaks

CQI – Continuous Quality Improvement

CRT – Critical Race Theory

CSOs – Court Support Officers

CTG – Closing the Gap

CWC – Cashless Welfare Card

DGR – Deductible Gift Recipient

DPP – Department of Public Prosecutions

EMRIP – Expert Mechanism on the Rights of Indigenous Peoples

FVPLS – Family Violence Prevention Legal Services

HRLC – Human Rights Law Centre

IAS – Indigenous Advancement Strategy

ICCPR – International Covenant on Civil and Political Rights

ICESCR – International Covenant on Economic, Social and Cultural Rights

ICGP – Indigenous Community Governance Project

IGA – Indigenous Governance Awards

ILAP – Indigenous Legal Assistance Program

ILNP – Indigenous Legal Needs Project

IUIH – Institute for Urban Indigenous Health

KPI – Key Performance Indicator

KRALAS – Katherine Aboriginal Legal Service

LAC – Legal Aid Commission

LCA – Law Council of Australia

LLB – Bachelor of Law

MMY – Mura Malla Yawuru

MYEFO – Mid-Year Economic and Fiscal Outlook

NAAJA – North Australian Aboriginal Justice Agency

NAALAS – North Australian Aboriginal Legal Service

NACCHO – National Aboriginal Community Controlled Health Organisation

NATSILS – National Aboriginal and Torres Strait Islander Legal Service

NBY – Nyamba Buru Yawuru

NHMRC – National Health and Medical Research Council

NSWALS – New South Wales Aboriginal Legal Service

NTLAC – Northern Territory Legal Aid Commission

NTRC – Royal Commission into the Protection and Detention of Children in the Northern Territory

NTU – Northern Territory University

ORIC – Office of the Registrar of Indigenous Corporation

PBC – Prescribed Body Corporate

PLO – Principle Legal Officer

QAIHC – Queensland Aboriginal and Islander Health Council

RCIADIC – The Royal Commission into Aboriginal Deaths in Custody

SEQ – South East Queensland

UN – United Nations

UNDRIP – United Nations Declaration on the Rights of Indigenous Peoples

US – United States

WA – Western Australia

YCG – Yawuru Corporate Group

YRRC – Yilli Rreung Regional Council

ABSTRACT

What does 'self-determination mean in the context of legal service provision by the Aboriginal and Torres Strait Islander Legal Services (ATSILS)? This thesis analyses the complex factors characterising the environment in which ATSILS continue to survive and continue to achieve just outcomes for Indigenous people in Australia's justice system. It also examines the Indigenous legal sector's commitment to Indigenous people and includes a comparative analysis of it with the Indigenous community-controlled health sector.

The research investigated whether or not the ATSILS model is the only model able to provide a legal service to Indigenous people – one that accommodates their clients' unique needs through the shared experiences of their cultural understanding and historical knowledge of its people and its places. Does self-determination play a part in this model, and could a hybrid form of self-management be replicated by non-Indigenous legal service organisations?

This thesis showcases my personal experience through this original contribution to scholarship. I also want to elevate the stories and accounts of First Nations people who have been working at the forefront of Aboriginal legal services since their inception by weaving their voices into the thesis. I include other key voices that have contributed to ATSILS, using my knowledge to put them into context but without losing what has been relayed.

This study's research question and data analysis were fundamentally shaped by my personal experiences as a Larrakia, Wadjigan, Central Arrente man from the Northern Territory. I am a Son, Brother, Uncle, Father, Grandfather, and Lawyer. I have been Chair of the North Australian Aboriginal Justice Agency (NAAJA), Chair of Yilli Rreung Regional Council (ATSIC), Discrimination Commissioner for the NT, NATSILS Executive Officer, and Director of Community Engagement for the Royal Commission into the Protection and Detention of Children in the NT. My cultural obligations to my family, people and land shape who I am.

This is not standard Law thesis, but its great strength is that it presents an Indigenous point of view.

CHAPTER 1
INTRODUCTION TO THE THESIS

A. Introduction

In this thesis I ask, what does 'self-determination' mean in the context of legal service provision for Aboriginal and Torres Strait Islander Legal Services ('ATSILS')? To answer this question, I analyse the complex factors that have characterised the environment in which ATSILS have survived, and continue to survive, in their efforts to achieve just outcomes for Indigenous peoples in the Australian justice system. This analysis is fundamentally shaped by my lived experiences as an Aboriginal man, and lawyer, from the Northern Territory. In this Chapter, I reflect on my personal and professional experiences of how Indigenous people are failed by the substantive law – in particular, criminal sentencing and native title – as well as the evolution of government policy. These experiences have shaped my views about how the justice system perpetuates systemic racial discrimination against Indigenous peoples. In later chapters, I look more closely at the ever-changing political climate and policies that have been directly and indirectly aimed at ATSILS, which makes the job of providing a service to an ever-growing clientele very difficult. In doing so, I examine the foundational concept of ATSILS and explore how these institutions have changed and developed in response, by speaking with those who fearlessly campaigned for Indigenous rights while developing the concept of an Indigenous legal service. I also present the views of those who are currently involved in ATSILS in an effort to understand the limits and possibilities of self-determination going forward.

This reflective chapter presents a picture of an Indigenous person who – although he has not been in trouble with the law (through pure luck) – has, through study and work as a lawyer and social justice advocate, seen how policy, laws and politics have affected Indigenous people disproportionately across all areas of the justice system. On my journey, I have been involved with ATSILS in many roles and have seen many organisational changes due to government policies and misunderstandings of the role of self-determination for ATSILS. The murkiness of inequality continues even after a Royal Commission and many subsequent inquiries and recommendations made by Indigenous communities and experts to governments of all political persuasions.[1] I offer the following accounts, stories, and vignettes to illustrate the failure of the justice system to take account of the different experiences of Indigenous peoples. I also do so to illustrate its failure to protect Indigenous interests in a way that is comparable to the protection expected by and extended to other Australians. I take this approach because it acknowledges my first-hand experiences of how historical and on-going events and policies of this country have impacted my family and continue to affect me and all Indigenous Australians in daily life. Chapter 3 discusses the theoretical positions I have drawn on in developing my approach. My lived experience working within a discriminatory and racist legal system has impacted and shaped me profoundly.

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[1] See Commonwealth, *Royal Commission into Aboriginal Deaths in Custody* (Final Report, 15 April 1991) <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/> and Commonwealth, *Royal Commission into the Protection and Detention of Children in the Northern Territory* (Final Report, November 2017) <https://childdetentionnt.royalcommission.gov.au/Pages/Report.aspx>.

B. Family

I am an Aboriginal man with strong family links in both urban and rural areas throughout the Northern Territory. My mother is of Larrakia/Wadjigan descent.[2] My father is a Central Arrente man.[3] I am a mixture of saltwater Nations (Larrakia & Wadjigan) and a desert Nation (Central Arrente), with family ties that extend across the Aboriginal Nations of the Northern Territory [see Figure 1.1]. Such a mixture is not the cultural norm. It is the consequence of my family having experienced the colonial policy of forced removal of children of mixed descent from their family and country.

[2] The Larrakia people are the traditional owners of the Darwin region. Our country runs from Cox Peninsula in the west to Gunn Point in the north, Adelaide River in the east and southwards down to the Manton Dam area. The Wadjigan (and Kiuk neighboring clan group) country extends from the Tjirrbur (Finnis River) to south of Lirrka (Red Cliff) and far out to ngalgin (sea) where the kayak (sun) sets. Our sea country includes the estuaries, bays, beaches, coastal waters, islands and ocean.

[3] The Central Arrente people are the traditional owners of Mparntwe (Alice Springs).

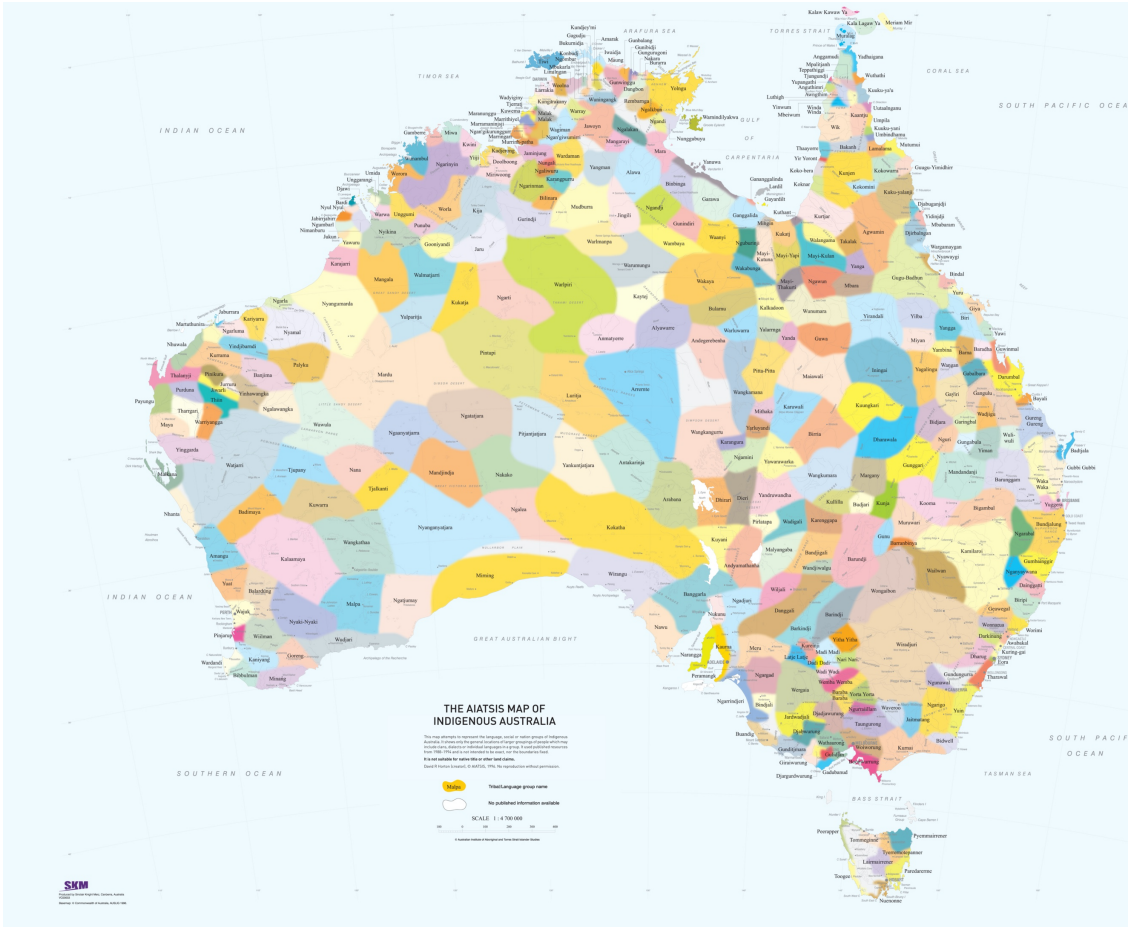

Figure 1.1: Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) map of Indigenous Australia. (Reproduced with permission from AIATSIS)[4]

In 1910, the Commonwealth Government created the position of Chief Protector of Aboriginals, following the practice adopted by the states.[5] The Chief Protector was empowered to assume the care, custody or control of any Aboriginal or 'half-caste' if, in his opinion, it was necessary or desirable 'in the interests of that person' for this to be done.[6] These powers, which remained in place until 1957, derived from the *Aboriginals Ordinance 1911* (Cth), the Commonwealth's first legislation dealing with Aboriginal people in the Northern Territory.[7]

My grandmother was thought to be three years old when she and her older sisters, Margaret and Kathleen (affectionately known as Maggie and Kitty) became victims of this policy. They were taken from their homelands and confined in Kahlin Compound in

---

4 AIATSIS, *AIATSIS Map of Indigenous Australia* (Aboriginal Studies Press, 1966) (permission sought and granted from AIATSIS). This map attempts to represent the language, social or nation groups of Aboriginal Australia. It shows only the general locations of larger groupings of people which may include clans, dialects or individual languages in a group. It used published resources from 1988–1994 and is not intended to be exact, nor the boundaries fixed. It is not suitable for native title or other land claims.

5 See *Aboriginal Ordinance 1911* (Cth). See also the *Northern Territory Aboriginals Act 1906* (SA), which established the Northern Territory Aboriginals Department.

6 Ibid s3(1).

7 Ibid.

Darwin.[8] Their brother was adopted out and they never saw him again. It was many years later – and a year after he had died– that they found where he had ended up. My grandmother would never speak her language in front of me.[9] She understood her language but would not converse in it in front of anyone other than her sisters. She was conditioned not to whilst in the 'protective custody' of the Kahlin Compound. Even when her sisters tried to converse in their language with her, she would often respond in English. I am able to understand the language of my grandmother by piecing together words and the context of the discussion, but I cannot speak fluently or walk into a conversation. It never occurred to me, when growing up, to speak to my other grandmothers and learn the language and the stories of the land.[10] On the few occasions I spoke with my grandmother about my frustrations of not knowing my language, I would blame Kahlin for what they did to her. She would always respond, 'let it be'. She would not talk about her experience. My other grandmothers said that it was 'too painful', although they would sometimes talk about the beatings and the emptiness of family.

My grandmother worked at Government House in Darwin until she married my grandfather. They had seven children. Of the seven siblings, five divorced. My mother had me when she was twenty. Her husband – my father – parted from the family when I was one year old. My mother married again, and I have a brother, ten years younger, from that relationship. That relationship finished when I was 13. After that, my mother, brother and I went to live with my mum's brother, along with his wife and seven kids.

These were some of the happiest days of my childhood. I never felt unwanted and was treated by my cousins as their brother. My uncle, culturally, was responsible for my learnings and he was a very loving person. I look back and cherish his guidance and teachings, not only about cultural aspects of being Indigenous, but on how to survive in 'two worlds'. He facilitated interactions with my father, who had moved back to Alice Springs without my mother knowing. When I turned 15, my mother allowed me to see him and I started to learn more about his side of the family and Arrente culture.[11]

When my cousin-brothers left school to work on the flood plains on our country I found myself at a crossroads. I felt huge pressure to follow them. During school holidays I would go to see them. They were doing some of the hardest work: buffalo catching on country. They worked around the clock mustering and then loading beasts on to road trains. For their labour they were paid nine dollars an hour, out of which they paid for their meals (the meat was from our own land!). At the end of their shifts, they always came in and showed me a good time, sharing their pay and stories of country.[12] They encouraged me to stay at school, and they pitched in to buy what I needed for my studies. They encouraged me to do what I wanted. However, when I

---

8 The Kahlin Compound and Half-Caste Home was an institution for Aboriginal people of mixed descent in Darwin in the Northern Territory of Australia. It operated between 1913 and 1939.

9 My grandmother's language was Batjamalh.

10 My grandmother's sisters are culturally regarded as my grandmothers as well.

11 I am proud of my Arrente heritage, but sad that I know even less about it than my mother's Nations.

12 This usually meant vast amounts of alcohol. Alcohol was consumed on all occasions — birthdays, funerals, etc. It was always present and although it brought good times it also brought the usual anti-social behaviour throughout the family. But that is a story in itself.

realised it was best that I complete Year 12, I had to endure many taunts from the brothers about being 'white' and 'not tough enough'. I knew it was all in jest, but sometimes I wondered.

When I was 19 years old, I had a son. Eighteen months later I had a daughter. My ambition to do further study was limited as I had responsibilities (two kids). Additionally, I was deeply aware of a prejudicial stereotype associated with my path. I was, according to its script, a 'typical Aboriginal': having kids at a young age, likely to end up on welfare or in prison. My life experiences had made me cautious about getting too close to people … they may not be around for too long. Showing feelings and affection is something that still does not come easily to me. This experience is intergenerational, deriving from my grandmother's experience of being taken so young and growing up in Kahlin Compound. My mother did not show too much affection towards me, but I knew she loved me. She showed her love in ways she knew, providing me with what I needed to attend school, and making sure I never went hungry. I did not want my kids to experience some of the things I had experienced, and I wanted to make sure they had a father figure in their lives.

C. Work Life

After leaving high school, I was employed for ten years within the Northern Territory Department of Community Development. I started as a trainee and worked my way up to the position of senior project officer. I loved this job. I got to travel and learn about many different cultures and country. My colleagues in the unit I worked in were predominantly Indigenous people. Of those who were not, all had either married into an Indigenous family or grown up in Darwin.

Over these years I had the opportunity to live in regional parts of the Territory and work with Aboriginal councils on their financial compliance and governance. At that time, many of these communities were incorporating under what was formerly Part 8 of the *Local Government Act 1985* (NT), which related to Community Government.[13] The Act offered communities self-management, giving them local governing powers, legal status, and recognised authority on an equal basis to municipal councils. This flexible approach to governance gave residents the opportunity to develop an incorporated constitution that fitted their needs.[14] They had choice in regard to the electoral system, including how the council would be constituted and composed, what procedures would be involved in calling the election, and who could vote.

Using this Act, Aboriginal communities were developing constitutions that worked alongside their cultural systems. Local representative governance structures were being established to deal with governments and other bodies, while ensuring cultural practice was in the driver's seat. During this time, I had the opportunity to visit and observe the Pirlangimpi Community Government Council Scheme, which provided an early example of such cultural immersion and incorporation. The Pirlangimpi Council had incorporated skin groups in their electoral process.[15] The constitution also

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13 Part 8 of the *Local Government Act 1985* (NT) was amended/repealed in 2017: see *Local Government Act 2008* (NT) As in force at 12 April 2017. See Chapter 20 Repeals and transitional provisions and Schedule 3.

14 Jackie Wolfe, *That Community Government Mob: Local Government in Small Northern Territory Communities* (Australian National University North Australian Research Unit, 1989), 84-85.

15 Northern Territory of Australia, *Pirlangimpi Community Government Council Scheme, Part 2* (20 September 1994).

provided representation of a non-skin group, to accommodate those who were not from Pirlangimpi, allowing representation for all. The Council was constituted as follows:

> Members of Council:
>
> (1) The council shall consist of 13 members, who shall be elected or appointed in the manner provided by this scheme and shall include 3 persons from and to represent each of the Lorrulla (Stone), Miyartuwi (Pandanus), Takaringuwi (Mullet), Wantarringuwi (Sun or Fire) skin groups and 1 person from and to represent electors who are not members of any of those 4 skin groups ('the non-skin group').
>
> (2) Subject to this scheme, the term of office of a member expires upon the declaration of the results of the next election.
>
> (3) The office of a member becomes vacant if the member ceases to be ordinarily resident in the community government area.[16]

Under the Pirlangimpi scheme, the skin groups nominated their representatives. There were no elections amongst the skin groups whilst I worked with the community, as they would work this out amongst their groups. When this part of the Act was repealed in 2017, many Community Government Councils were incorporated into super shires. The amalgamation of these small councils into bigger shires centralised decision-making powers and shifted the authority to urban environments. There was some criticism at the time about the vehicle of Community Government Councils, but looking back now, nothing since has given any opportunity for communities to shape their governance structures along their cultural practices. As we shall see in later chapters, these themes are central to the concept of Indigenous self-determination in the justice sector.

D. Education

While working with the Department of Community Development I studied part time, completing a Diploma in Applied Science (Community and Human Services). Afterwards, in 1997, the course co-ordinator encouraged me to do a pre-law program. I remember laughing initially; I said I couldn't do a law degree and I didn't want to waste anybody's time. However, I was involved in the North Australian Aboriginal Legal Service (NAALAS) at the time as a council member and I had an interest in the law. I ended up enrolling in the pre-law program and was subsequently accepted into a Bachelor of Law (LLB) at the Northern Territory University (NTU) in Darwin.[17] I couldn't see myself studying law part-time so I approached the Department of Local Government and Housing to discuss the possibility of using their Indigenous employment policy for educational development. Although the Government had been committed to this scheme for several years by this point, I was the first employee to apply for access to it. Other cadetships then became established in the same Department, followed by other agencies such as the Director of Public Prosecutions (DPP).

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16 Ibid.

17 Northern Territory University is now known as Charles Darwin University.

After utilising my leave for the first semester, the Government paid me a traineeship wage while I was at university, then 13 weeks on my substantive wage. Although I was appreciative that this was a first for the Government, it was difficult to manage financially with two kids (then nine and seven years of age) and a mortgage. My wife was doing all the heavy lifting in paying bills and teaching the kids things I couldn't.[18] (Had I become assimilated?) We wanted to give our kids the opportunities that we never had: to get an education and to have the choices attached to having a degree. I couldn't encourage them to pursue higher education if I hadn't done so myself.

Luckily for me, the Director of Human Resources at the Department of Local Government and Housing made an executive decision to pool all monies and pay me an accumulated salary. This was a huge positive, but things returned to 'normal' when I returned to my workplace. A non-Indigenous co-worker was acting as manager. He made it known to me that he did not like the idea that I was having a 'free ride' and it would not happen on his watch. He also told me that I would not complete the degree and I 'would be back soon enough'. This individual made it difficult when I returned but he was partly responsible for me finishing my degree – he made me determined to prove him and many others wrong.

When I was accepted to do a Bachelor of Laws I was scared, but luckily I had made some friends in the pre-law program provided by the University to Indigenous people.[19] Like me, they were Indigenous and came from all walks of life. We not only supported each other with our studies but we became an important support network for each other outside of our 'formal' education. We would joke about our common impressions of fellow students and lecturers, how foreign it was, and what our mob was thinking about us studying law. We created a bond, sharing stories, food, eating local delicacies like salty plums and going seasonal hunting for bush tucker. We even ventured as a group to Byron Bay – together with our Indigenous Support Coordinator – attending a National Native Title forum which also solidified our relationship and bonds with each other. Most of those who did pre-law went on to finish their studies. A few deferred or withdrew. All of us were there for each other throughout this experience and beyond. I do not think I would have made it through without them.

After the first year of my law degree I was confused. I was being taught that equality before the law was a key principle in the law of this country. I was taught that this meant that everyone was to be treated equally before the law and that all people were subject to the same laws of justice. Yet outside and inside the classroom I was witnessing many injustices against Indigenous people. At the time, 85 per cent of the prison population in the Northern Territory was Indigenous, and that number was growing. I was thinking of not going back to study because, despite what we were 'taught', the law was not fair, particularly to us blackfullas. Discussions with other Indigenous students were often about our shared feelings of helplessness. We would reflect on how Indigenous and minority groups in other countries had achieved change. Sometimes violence was raised by Indigenous students as the only way of making real change to the system, although that was borne out of frustration.

I ended up returning for second year, but it was tough: the inequity shown by the law towards Indigenous people was thrown in our faces in every subject. Studying the

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18 For example, the importance of showing emotions and developing the ability to speak about them.

19 For more information on the Charles Darwin University's Pre-Law Program see: https://www.cdu.edu.au/files/2020-02/IPLP_2021_Flyer.pdf (Accessed 15 May 2021).

intricacies of cases and decisions such as *Mabo v Queensland (No. 2)*[20] ('*Mabo (No.2)*') and *Wik Peoples v Queensland*[21] ('*Wik'*) made me proud to be Indigenous – it showed how our mob could fight to win in a foreign/biased system – but I then had to endure the disappointment and frustration of hard-won rights being subsequently whittled away by governments. I remember sitting in the class 'Indigenous People and the Law' when the lecturer began discussing Eddie Mabo's case. One of the Indigenous students interrupted him to correct his pronunciation of 'Mabo'. The student was from Cairns and knew the Mabo mob personally. He said they wouldn't be too pleased at the way the lecturer pronounced their name. After the student taught the lecturer the appropriate pronunciation, the class went on to discuss the principles of *Mabo (No. 2)*. I remember there was much debate on the principle that the recognition by the common law of the rights and interests in land of the Indigenous inhabitants of a settled colony would be precluded if the recognition were to fracture a skeletal principle of our legal system.[22]

Our non-Indigenous classmates were putting forth arguments that the judges' decisions had not gone far enough. They argued that it would not have fractured the skeletal principle of the common-law of this country to question the sovereign taking of Australia, which relied on the discredited doctrine of *terra nullius*. Indigenous students in the class had not contributed but we liked what we were hearing. After being asked my thoughts, I said I was confused: here we have an illegal act of the colonisation of Australia, we have a group of white men making a decision without a real understanding of Indigenous law and being unwilling to interpret the common law in a way that would question the system they worked in. Was this a conflict? Was the Court's decision an act of formal equality or just furthering inequality? For me, Professor Mick Dodson best summed it up in his observation:

> The *Mabo* decision does not recognise equality of rights or equality of entitlement: it recognises the legal validity of Aboriginal title until the white man wants that land.... For the vast majority of Indigenous Australians, the *Mabo* decision is a belated act of sterile symbolism. It will not return the country of our ancestors, nor will it result in compensation.[23]

In all honesty, however, I could not see any other decision being made. If, considering the case of *Wik*, the nation could not even give Indigenous peoples an inferior property right without the baseless hysteria that 'the blacks were going to take over people's back yards', how was this nation ever going to recognise Indigenous sovereignty? My personal and professional experiences with land rights (and other legal issues) and subsequent legal education affirmed what I already knew: all things weren't equal and the system was stacked against Indigenous self-determination.

The two cases that hit me the hardest when I was studying were *Kartinyeri v Commonwealth* ('*Hindmarsh Island Bridge Case'*)[24] and *Cubillo v Commonwealth*

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20 (1992) 175 CLR 1 ('Mabo (No.2)').

21 (1996) 187 CLR 1 ('*Wik*').

22 (1992) 175 CLR 1 ('*Mabo (No.2)*') (Brennan J).

23 See Michael Dodson, 'Statement on Behalf of the Northern Land Council' in The Australian Contribution to the *United Nations Working Group on Indigenous Populations*, 10th session equality (July 1992) 35.

24 (1998) 195 CLR 337, ('Hindmarsh Island Bridge Case').

('*Cubillo*').[25] In the *Hindmarsh Island Bridge Case* the High Court considered whether the section of the Australian Constitution that allows Parliament to make laws in relation to people of any race (otherwise known as 'the race power') could only be used to make laws *to the benefit* of Aboriginal and Torres Strait Islander people.[26] This was the first time the High Court considered the scope of the race power as altered by the 1967 referendum.[27] The Commonwealth argued that the race power had no such limitations: the Federal Government could legislate to the *detriment* of Aboriginal peoples as long as the legislation had consequences for people of a certain race. Ultimately, the High Court agreed: the power could be used for actions that were not beneficial for Aboriginal people. It is this finding that has since allowed the Australian Government to suspend the *Racial Discrimination Act 1975* (Cth) to enact controversial, and explicitly discriminatory policies against Indigenous peoples such as the *Northern Territory Emergency Response Act 2007* (Cth), better known as 'the Intervention'.[28]

At the time, what worried me most was the argument made by the Commonwealth Solicitor General in response to a question from the bench on whether a law such as a Nazi race law would be beyond the jurisdiction of the Court to consider. The Solicitor General said:

> Your Honour, if there was a reason why the Court could do something about it, a Nazi Law, it would in our submission, be for a reason external to the races power. It should be for some wider over-arching reason.[29]

The Solicitor General was trying to make the point that it was within the race power for the Commonwealth to make any law, even a Nazi-style law. Accordingly, the Court would have no basis to overturn it. It was so repulsive to me that anyone would even consider such an argument. Then and there I knew that any real equity for Indigenous Australians would not be seen in my lifetime. Another issue that this case highlighted for me was the way in which Aboriginal religions – in this case, the spiritual beliefs of Ngarrindjeri women – were disregarded and disrespected by the political and judicial systems.[30] I was, and continue to be, certain that such disregard would not be shown to any other religious belief in this country.

The second case to hit me the hardest was *Cubillo*,[31] a case that for me is very close to home.[32] It was an appeal by my Aunt, Lorna Cubillo, and her co-claimant Peter Gunner, for damages in recognition of their forced removal from their families and subsequent detention within certain 'Aboriginal institutions'. Studying this case left me with many

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25 (2000) 103 FCR 1 ('*Cubillo*').

26 The Commonwealth 'race power' is articulated in s 51(xxvi) of the *Australian Constitution*.

27 The 1967 referendum resulted in the amendment of the race power to give the Commonwealth power to make special laws in relation to Aboriginal people.

28 The *Racial Discrimination Act* 1975 (Cth) has been amended three times, each time in relation to Indigenous Australians.

29 Transcript of Proceedings, *Kartinyeri v Commonwealth* (High Court, A29/1997, Brennan CJ, Gaudron J, McHugh J, Gummow J, Kirby J, Hayne J, Callinan J, 5 February 1998) (G Griffith, QC).

30 Marcia Langton, 'The Hindmarsh Island Bridge Affair: How Aboriginal Women's Religion became an Administerable Affair' (2006) 11(24) *Australian Feminist Studies* 211-17.

31 (2000) 103 FCR 1 ('*Cubillo*').

32 *Cubillo* is regarded as the landmark decision in relation to legal action taken by members of the Stolen Generations: see *Cubillo* (n 31).

questions: Was the right legal argument run for my Aunt and Mr Gunner? Was it in their best interest? Did they fully understand the action being run? The judge dismissed my Aunt's case on the ground that, while the evidence confirmed that she was forcibly removed, it did not explain the personal motives of those responsible. Under the Act, it was my Aunt's obligation to satisfy the court that the Director of Native Affairs failed to act in accordance with the provisions of section 6 of the *Northern Territory Aboriginals Ordinance 1911* (Cth).[33] My Aunt was seven or eight years old at the time of her removal. By the time of her claim, the relevant officials were all dead and no documents could be found recording the reasons why she was taken. The evidentiary requirements failed to consider the oral traditions of Indigenous people; their Western numeracy or literacy skills at the time; or my Aunt's capacity to obtain, let alone retain, records of removal given she was a child at the time she was stolen.

Unlike my Aunt, Mr Gunner could point to *existing* official documentation. There was an undated form of request for Gunner to be taken to St Marys and given a Western education. The form recorded a thumbprint, attributed to Mr Gunner's mother, Topsy Kundrilba. When I read this case, I wondered whether this should have been admitted as evidence. Was this, in fact, Topsy's fingerprint? And if it was, what did the fingerprint signify? Did Mr Gunner's mother have the education to read, write and understand English? Did she understand what was being put to her, that she would never see her son again? Was she pressured or forced to produce a print? What about the principles of *non est factum?*[34]

My Aunt Lorna is a loving woman who is very gentle in nature and would do anything for anyone. I was in the same class as her daughter and I played footy with and against one of her sons, who was someone I looked up to, not just for his sporting prowess but his respectfulness towards others. In my brief moments with my Aunt since the case, she appears to be a shadow of herself. She once informed me that she felt like she was made out to be a liar, particularly when cross examined. She didn't really understand what had happened. Now, she doesn't speak much of it. Rest in peace Aunty Lorna.[35]

E. Legal Life

I was admitted as a Barrister and Solicitor of the Supreme Court of the Northern Territory in 2002. I completed my Article Clerkship with the Northern Territory Legal Aid Commission (NTLAC). Over this time, I had interactions with the Commonwealth DPP as a junior solicitor on such matters as 'illegal' Indonesian fishing, fraud, contract negotiations, and victims of crime compensation. I gained experience in most areas of general practice, including civil, criminal and family law.

I was at the NTLAC for approximately three years. Throughout I noticed an underlying culture among most of the *administrative* staff to regard our counterpart, the Aboriginal Legal Service (ALS), as an inferior 'product'. In those days, neither legal aid

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33 Northern Territory Aboriginals Ordinance 1911 (Cth)

34 *Non est factum* (Latin for 'it is not [my] deed') is a defence in contract law that allows a signing party to escape performance of an agreement 'which is fundamentally different from what he or she intended to execute or sign': See: non est factum, *Oxford Reference* <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100237457>.

35 Aunty Lorna passed away on the 12th September 2020. Here is my tribute to her: <https://www.sbs.com.au/nitv/article/2020/09/14/courageous-and-remarkable-woman-who-should-never-be-forgotten?fbclid=IwAR0QJthz3SSLOG59tGjhYGPJnVU5w_sBe8wDdQ0X4fVD8T_djNkRib-PMhQ>.

service *administratively* collaborated with the other. Amongst NTLAC *lawyers* however, I discerned respect for ALS lawyers; they knew the caseload that the ALS carried. As a junior solicitor I saw, first-hand, the limited number of Indigenous clients that came through the door at NTLAC. I was required to run the legal clinics which clients had to attend to receive legal aid. Many of these clients were happy to see a black face; they would regularly impart that they felt uneasy coming to the white organisation. Similar views were expressed by a lot of non-Indigenous clients who felt I understood their predicament and had a similar upbringing. Many would ask to see 'the black lawyer'. Looking back, I believe that the NTLAC administration perceived the ALS as an inferior service for many misguided racial reasons as well as pure ignorance of the differing caseloads. They did not understand the historical and systemic reasons why Indigenous clients would feel uncomfortable at Legal Aid, why they would see it as a 'white' organisation, and why they might feel more comfortable at an ATSILS.

I would like to tell a story that emphasises the systemic racism underpinning the justice system, and as such speaks to the 'why' question posed above. It was 2002. I was sitting in the front row of Court One in the Darwin Magistrates Court (now called the Local Court) as a recently admitted lawyer, waiting for proceedings to commence. It was a Monday morning, which meant the 'weekend offenders' were waiting to be heard. A court orderly approached and advised me that as the front row was for 'lawyers' I should move into the second row and sit directly behind *my* lawyer. This shocked me. I had just completed four years of tertiary study as a mature aged student with two small children and a mortgage. Reminding myself to be respectful (as taught by my culture), I advised the orderly that I was a newly appointed lawyer, conjuring up the strength to face my start in the world of criminal law. I also explained that this had now shattered my confidence and conveyed that I was really sorry for her ignorance. Sadly, and to my amazement, not long after she walked away another orderly headed towards me. I could see the first orderly trying to grab her attention to avoid the same thing happening again. Unfortunately, it did.

Jump forward some 18 years. I was sitting again in the same court, working on the Royal Commission into the Protection and Detention of Children in the Northern Territory (NTRC). I was waiting for a client to finish his matter so that we could follow up his evidence. The room was empty except for lawyers and 'this' client. The lawyers had just given each other a welcome nod as we all had worked together over many years. A court orderly, on seeing me wandered over, asked whether I was on 'today's court list' and if I was in the right court. Before I could reply, my colleague, an Indigenous lawyer with whom I had been through law school and whom I recruited to the NTRC saw my facial expressions, produced his NTRC ID and advised that we both worked on the Royal Commission.

There is so much to unpack here. There is an intrinsic problem in our justice system if a non-Indigenous person working in an environment where Indigenous people are the main clients naturally assumes that all black skinned people are there to be tried. What chance have Indigenous people got of getting a fair trial when so many of our people are coming through the system and these biases have already judged the individual? There has been much discussion from judicial officers on unconscious bias and the justice system.[36]

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[36] See: Supreme Court of New South Wales, Chief Justice Bathurst, 2020 Admission Ceremony Speech <https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2020%20Spee

F. Advocacy

F1. North Australia Aboriginal Justice Agency (NAAJA)

Not long after that first incident in court I started to look for opportunities to increase my advocacy for Indigenous issues. I became the Chair of the Northern Territory Aboriginal Justice Advisory Committee (AJAC) and also the Chair of the North Australia Aboriginal Justice Agency (NAAJA). Both organisations were made up of formerly independent ATSILS that had been forced to amalgamate following changes to Commonwealth policy and funding.[37] My role as Chair was to assist in lobbying mainstream law and justice/welfare agencies to promote the issues faced by Indigenous people as a specific group in society. The experience was eye opening and frustrating, and the continuing and alarming incarceration rates of Aboriginal people was depressing. The statistics showed that incarceration rates kept growing. The populist 'tough on crime' policies and legislative response disproportionately affected all Aboriginal people –adults and youth, males and females.

One of the blatant attacks on self-determination of Aboriginal Legal Services happened while I was Chair of North Australian Aboriginal Legal Service (NAALAS).[38] The North Australian Aboriginal Justice Agency (NAAJA) has provided legal representation, advocacy and advice for Indigenous people of the Top End[39] for over 40 years.[40] This includes criminal law where we handled over 80 per cent of matters in the Darwin Magistrates Court and 100 per cent of the matters in the Bush Court sittings, as well as civil and family law matters. Despite this, the Commonwealth Indigenous Affairs Minister, Amanda Vanstone, alleged that Indigenous people were not getting value for money. She announced that the Australian Government, accordingly, was looking to tender out the service by offering more than $120 million in contracts to provide other legal services. I am still not sure of the evidence upon which Minister Vanstone relied. However, I do know that Aboriginal Legal Services in the Territory worked very hard to overcome the challenges faced by representing clients from many differing language groups and cultural backgrounds, over vast geographical distances. Aboriginal Legal Services across the country had developed essential frameworks with the little monies provided to establish Aboriginal Field Officer positions, which allowed for effective and culturally appropriate legal services to be delivered to Indigenous Territorians. Attending Bush Court sittings in remote and isolated locations was essential but expensive and required considerable human resources. Many in the sector said it was

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ches/Bathurst_20200800.pdf> and Wayne Martin 'Indigenous Incarceration Rates: Strategies for Much Needed Reform' (Seminar Paper, Law Summer School, 20 February, 2015) <https://www.supremecourt.wa.gov.au/_files/Speeches_Indigenous_Incarceration_Rates.pdf>.

37 These organisations were formerly known as North Australia Aboriginal Legal Service (NAALAS), Katherine Aboriginal Legal Service (KRALAS), and MIWATJI Aboriginal Legal Services. MIWATJI Aboriginal Legal Services operated in the Nhulunbuy area of east Arnhem land.

38 The North Australian Aboriginal Legal Service is now known as the North Australian Aboriginal Justice Agency.

39 Regarded as the top half of the Northern Territory.

40 The Commonwealth Attorney-General's Department has until recently divided the Northern Territory into two contracts to provide Criminal and Civil Law services to Aboriginal people and their families in the Northern Territory. NAAJA jurisdiction is from the township of Elliott (and outlying communities) back to Darwin. It includes all communities and Islands in this region which is commonly known as the Top End.

hard to see how this system would be viable under a commercial tender arrangement. Nonetheless the services were tendered. No one except the ALS applied for the contracts.

F2. Aboriginal Torres Strait Islander Commission (ATSIC)

In 2002, I nominated myself for the Aboriginal Torres Strait Islander Commission (ATSIC) Yilli Rreung Regional Council (YRRC).[41] My intention was to be a councillor, to give back to my people, and to have a say on government policy making on key issues. I was elected. The Council then had to pick Commissioners and Chairs to represent the regions within the Northern Territory as well as to represent the Northern Territory at a national level. I was elected to the YRRC board along with three other male members and nine female members. That's right – nine female members! Democratically, this board had two female Chairs previously and looked destined to have a third. However, a group of women came to me and said they wanted me to be Chair. I said I was not interested: there were nine women and surely, they could elect one from out of the group. I was happy to vote accordingly; I even encouraged my cousin/sister (whose father I mentioned earlier and in whose family home I grew up), but she advised me that the majority of the women thought I was the best applicant to be the Chair. They were adamant.

I had just started a new role at the Department of Justice – Solicitor of the Northern Territory – and was looking forward to learning new things and arming myself with some new skills. However, after speaking with my wife, I made the decision to leave my career in legal practice and involve myself in Indigenous affairs on a full-time basis. I was subsequently elected as the Chair of the YRRC, which included the Darwin Region in the Northern Territory. This position presented both opportunities and challenges. In my capacity as the Chair, I was responsible for holding Regional Council Meetings; facilitating the Council's policy formulation in key areas; advocating for the needs and aspirations of Indigenous constituents in the Darwin region with Northern Territory and Commonwealth ministers and their governments; and, hosting public forums to facilitate partnership discussions with government agencies.

The regional council that I worked with had representatives from all backgrounds, including survivors of the stolen generations, people from town camps, and those from remote communities. All advocated on what they knew about their people, family, friends and the realities of their daily lives. One example of our work during this time in achieving self-determination, and getting better outcomes for our people, involved the YRRC developing the application of restorative justice principles to address Indigenous incarceration rates in the Northern Territory. The underlying concept grew from a number of community meetings and discussions that I and other members and staff of YRRC attended in our region. These meetings had revealed concerns in relation to the lack of community involvement in rehabilitation programs in the Darwin Correctional Centre and following release from jail.

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[41] The Aboriginal Torres Strait Islander Commission (ATSIC) (1990–2005) was the Australian Government body through which Aboriginal Australians and Torres Strait Islanders were formally involved in the processes of government affecting our lives: see *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth).

Building upon the community consultations, we were able to collect information in relation to potential funds in the Aboriginal and Torres Strait Islander Services (ATSIS) Canberra Office, conduct research in relation to restorative justice projects in jails, and draft a funding submission.[42] The submission, presented to the Federal Attorney-General's Department and the Northern Territory Minister for Justice and Attorney-General, Mr Peter Toyne, canvassed the following projects:

- Community Based Family Violence Offender Programs;
- Community Courts in Darwin and Nhulunbuy;
- Reintegration Officers in Darwin and Alice Springs;
- A Family Violence Perpetrator Program in Alice Springs; and
- The Elders Visiting Program in Darwin and Alice Springs Gaols.

Attorney-General Toyne was supportive of these concepts and initially agreed to fund the new programs dollar for dollar. The concepts outlined in the submission received support from those present in the meeting. National funding exceeding $700,000 was then offered by the Legal and Preventative Branch of the Federal Attorney-General's Department. As a result, a number of additional programs were delivered to Indigenous offenders during their period of imprisonment and post-release. Funding was obtained for these programs, which was allocated to the Northern Territory Government under the badge of an 'Indigenous Justice Partnership' between ATSIC and the Northern Territory.

Despite the success we had in obtaining support for the programs outlined above, this was a time where the value of an Indigenous representative body was constantly being questioned by the Federal government. I personally saw that ATSIC had many flaws, and subsequently I contributed to the *Review of ATSIC* during my term as Chair, with the aim of improving the structure and allowing more input by Regional Councils and other grassroots bodies.[43] However, ATSIC was abolished in 2005. This was the first of many acts to demonstrate that the democratic participation of Indigenous people in governing their own communities was no longer considered important by the Australian Government.[44] I resigned from the YRRC six to eight months out from its finish date. I could not sit around and be paid whilst having no real power as ATSIC was wound up. It was hard to do anything constructive for my people as no one took the role seriously. Obviously, the payout would have been nice, but it's not the way I was brought up. I was there to serve the people. I felt I could not do that, so I left.

F3. Anti-Discrimination Commissioner (NT)

In 2012, I was appointed as the Anti-Discrimination Commissioner of the Northern Territory. I had nine staff to assist in performing the functions set out in the Anti-

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42 ATSIC was originally constituted with a representative arm and an administrative arm. This was significantly altered by the creation of a separate service delivery agency, Aboriginal and Torres Strait Islander Services (ATSIS), in 2003: see Angela Pratt and Scott Bennett, 'The End of ATSIC and the Future Administration of Indigenous Affairs', (2004) *Current Issues Brief,* 4.

43 See John Hannford, Jackie Huggins and Bob Collins 'In the Hands of the Regions – A New ATSIC: Report of the Review of the Aboriginal and Torres Strait Islander Commission – Digest' (2003) 8(3) *Australian Indigenous Law Reporter* 105.

44 ATSIC was abolished by the Aboriginal and Torres Strait Islander Commission Amendment Act 2005 (Cth).

Discrimination Legislation of the Northern Territory. The office was (and remains) small, with resources being directed to three primary foci:

- Public education and training;
- The handling of complaints/hearings; and
- The Community Visitor Program.

I faced several major issues during my time as Commissioner. In 2011/12, *the Stronger Futures in the Northern Territory Act 2012* (Cth) was introduced.[45] This Act repealed the *Northern Territory Emergency Response Act 2007* (Cth) ('the Intervention') and sought to tackle remote Northern Territory Aboriginal issues differently.[46] However, the reforms, at their heart, still maintained the status quo: Commonwealth control and dominance over the affected communities. The presence of the Commonwealth government in remote Northern Territory remains controversial and continues to be of concern to the Office of the Anti-Discrimination Commission. In 2011/12, the issues pressed by me as Commissioner included:

- Culturally appropriate engagement with communities, particularly to ensure widespread participation and to address access issues such as language (including dialect) and deafness. It is important that all members of these communities who wish to be engaged can be.
- Addressing the fundamental discrimination in reforms in remote Northern Territory by understanding and addressing the discrimination felt, experienced and expected by Aboriginal people.[47]

As Commissioner, I lobbied both State and Federal ministers. I particularly advocated on behalf of Aboriginal people across the Northern Territory, who regularly provided feedback about their perception of an unfair justice system that resulted in disproportionate numbers of Aboriginal people being incarcerated. My time on the Commission also highlighted the lack of Justice Key Performance Indicators (KPI) in the Council of Australian Governments (COAG) *Safer Communities Building Block* program.[48] I spoke at many conferences and forums highlighting the indirect racism in legislation targeting low socio-economic people, and in particular Indigenous Territorians.[49]

Prior to negotiating my contract renewal, and with the impending Territorian election in 2012, I wrote to both the Hon. Daniel Robert Knight, Minister for Justice and Attorney-General and Hon. Gerry McCarthy, Minister for Correctional Services of the then Northern Territory Labor Government to express my extreme concern arising

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45 Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011 (Cth)

46 Northern Territory Emergency Response Act 2007 (Cth)

47 Discrimination is a real obstacle to developing real futures for people in the bush. An example of this can be found in the context of education. Any attempts to encourage participation in education must address any beliefs that even if Aboriginal children get an education, they will not have the same chances as non-Aboriginal people. Clear pathways must be provided that show Aboriginal families that there are future possibilities for their children.

48 I wrote to both the then Federal Attorney-General (Nicola Roxon) and spoke with the then Northern Territory Attorney-General Delia Lawrie on many occasions.

49 See, Eddie Cubillo, 'Racism in the Justice System' (Speech, Racisms in the New World Order: Realities of Culture, Colour and Identity, James Cook University, 2012), and Eddie Cubillo, 'Walk Together, Talk Together – Joining in Journeys to Healing and Justice' (Speech, NACLC, Conference, 2013).

from two recent Australian Bureau of Statistics (ABS) reports.[50] My letter highlighted the systemic issues that I saw as predominantly targeting Indigenous people. I called for strong steps to be taken to guarantee minimum conditions for those in custody. If we were serious about community safety and making the justice system more responsive to the needs of Aboriginal people, this needed to be addressed. I emphasised that it would be a significant achievement in the lead up to the Northern Territory election if the law-and-order debate were de-politicised through agreement on the issues between both major political parties.

With the prison population at breaking point, I felt it was essential that the Northern Territory Government commit to targets in specified timeframes. I identified key areas for such targets, including: reducing prisoner numbers; more and better bail support options; extending the reach of community-based rehabilitative options (especially for violent offenders); making court proceedings more understandable and appropriate for Aboriginal people; and, providing additional support for people leaving prison or detention. I was keen to discuss these issues and other opportunities to achieve them, such as establishing an inquiry pursuant to section 13(1) (f) of the *Anti-Discrimination Act* (NT).[51]

I never heard from either Minister. As it turned out, both lost their portfolios when the Labor Government was not re-elected. When I met with the newly appointed Attorney-General, the Hon. John Elferink, of the Country Liberal government, I hand delivered the same letter (now addressed to him). Although we had a very long discussion about the benefits and need of conducting an inquiry, it became clear to me that the new Attorney-General felt *he* knew what was best for Indigenous Territorians. I was ultimately informed that no inquiry would happen. By the time my contract renewal was mentioned I was not hearing anything he said.

As I walked away from Parliament house, I called my wife to see if she was interested in moving back to her country (Ngugi[52] and Wakka Wakka,[53] Queensland where her family was originally from). I had been offered the role of Executive Officer with the National Aboriginal & Torres Strait Islander Legal Service (NATSILS). This position involved a substantial drop in salary but what it lacked in remuneration would be made up for by allowing me to work for my people and do some exciting things with lobbying at the state and national level, as well as in international arenas. In the end, our decision was not hard: we had always talked about moving to Brisbane, and now we had an opportunity to do so.

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50 See Australian Bureau of Statistics, *Criminal Courts, Australia, 2010-11* (Catalogue No 4513.0, 24 February 2012); and Australian Bureau of Statistics, *Corrective Services*, *Australia, December Quarter 2011* (Catalogue No 4512.0, 15 March 2012).

51 Under the *Anti-Discrimination Act 1992* (NT), Functions of the Commissioner –s 13 (1) (f) allows the Commissioner to examine practices, alleged practices or proposed practices of a person, at the Commissioner's own initiative or when required by the Minister, to determine whether they are, or would be, inconsistent with the purposes of this Act, and, when required by the Minister, to report the results of the examination to the Minister.

52 The Ngugi are the traditional inhabitants of Moreton Island and one of three tribes of the Quandamooka peoples.

53 The Wakka Wakka tribe is from the South East Queensland. The people of the Wakka Wakka live in and around the Cherbourg Aboriginal Settlement, which is located on their lands.

F4. National Aboriginal & Torres Strait Islander Legal Service (NATSILS)

NATSILS is the peak national body for Aboriginal & Torres Strait Islander Legal Services (ATSILS) across the country.[54] ATSILS are the primary legal service providers across the country to Aboriginal and Torres Strait Islander peoples. They are also well positioned to engage with Federal, State and Territory governments to provide strategic and well-informed advice about the development of effective law and justice policies as well as appropriate legal services to Indigenous people in remote and urban environments. NATSILS plays a critical role in supporting its member organisations to increase organisational capacity; create strong governance structures; identify, share and implement best practice within service delivery; and provide greater strategic direction. It also has the ability to provide informed insights to its members and governments on national trends in access to justice for Aboriginal and Torres Strait Islander peoples. While this unique capacity of ATSILS and NATSILS is understood across the sector, it is not respected by government. Over my five years as Executive Officer I never felt that either State or Federal governments respected the expertise and knowledge that ATSILS or the peak body offered. When I became Executive Officer, NATSILS' biggest concern was the over-representation of Aboriginal and Torres Strait Islander peoples in all markers of socio-economic disadvantage, and in all stages of the criminal justice system. This was (and still is) one of Australia's most significant social issues.

During my term, the Federal Coalition government made an election promise (on 5 September 2013) that they would cut $42 million from the Indigenous Policy Reform Program.[55] This program provides funding to ATSILS across Australia as well as their peak body, NATSILS. Then, on 17 December 2013, the Federal Treasurer, Joe Hockey, announced that $43.1 million was to be cut across the broader legal assistance sector over the next four financial years.[56] The federal Attorney-General's Department (AGD) confirmed that $13.41 million would be cut from the Indigenous Legal Aid and Policy Reform Program in the 2013-14 to the 2016-17 financial years. The federal AGD has one of the smallest budgets in Federal government, and there has been no major increase in funding to the legal aid sector. There are always cuts, even though there have been numerous reports calling for more funds to be allocated in the legal aid sector. The Commonwealth Government stated that these cuts were aimed at de-funding law reform and advocacy activities. This announcement of the Federal Government's intention to cut funding across the sector – not just to Indigenous legal services – shook the justice space.

Ultimately, these cuts were reversed. This was largely due to the extensive and united campaigns by NATSILS, individual ATSILS, and others in the legal sector as well as other peak Indigenous and non-Indigenous organisations. The entire legal sector – including the judiciary – sighed with relief. This exercise highlighted that the legal services sector (including both Indigenous and non-Indigenous stakeholders) could work together. It

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54 Each state and territory has an ATSILS. The ACT ATSILS is currently run out of the NSW organisation.

55 Jane Lee, 'Coalition Cuts to Indigenous Legal Aid under Fire', *Sydney Morning Herald* (online 6 September 2013) <https://www.smh.com.au/national/coalition-cuts-to-indigenous-legal-aid-under-fire-20130906-2tah9.html>.

56 Ibid.

also showed that when it did, it became a force that the Government had to take notice of.

F5. The Royal Commission into the Protection and Detention of Children in the Northern Territory

After five years with NATSILS I decided it was time to move on. There was a leadership change within the organisation, and the time felt right to bring in a new Executive Officer alongside, someone with new ideas and enthusiasm. I was approached to join the Northern Territory Royal Commission into the Protection and Detention of Children (NTRC), something which I decided to do after some pressure from Co-Commissioner Mick Gooda.[57] Working on the Royal Commission highlighted several things for me. One was that, as a vehicle, a Royal Commission itself is not a good model for inquiry when it is conducted at a time and place which reduces the likelihood of getting the best people for roles. This Royal Commission operated initially with such short notice and under such a short time frame that not only were people unable to commit to roles due to inadequate notice, but employers were not willing to release them as it was hard to recruit others to step in for such limited periods.
Linked to these recruitment issues was another issue of concern: there was an abundance of staff on the Commission who were from Government agencies. Often these Government staff were conflicted with public service responsibilities. They were also not necessarily skilled in how to appropriately work with the complex issues related to Indigenous peoples. Public service employees, adhering to government administration and red tape, are not going to get the required respect and rapport when engaging with Indigenous organisations, communities and peoples who have long held mistrust of government interventions. The ability of government officials to recognise this and leave their colonial mindsets at the door requires them to accept and trust that Indigenous people may know more than they do.
The NTRC focus on child protection and juvenile justice issues further highlighted the paternalism and colonial viewpoints embedded in government policies. The inability of many to accept Indigenous cultural practices and to work with the community was exacerbated by failures to understand or appreciate the low socio-economic background that people were coming from. Underlying all of this was that Indigenous people were not respected to be engaged or have an opinion. Even in my role, I felt my opinions and knowledge were often dismissed by staff until they found out that I was a lawyer and that I had extensive experience in Indigenous affairs. For me, this testified once again to the systemic racism that continues to operate and the lag of colonial policies which hamper our people at every interaction.
That said, I thought the interactions and relationship that the North Australian Aboriginal Justice Agency (NAAJA) and others had with the NTRC were positive, collaborative and successful. As an Indigenous person from the Northern Territory, I was involved in the NTRC as part of the Community Engagement Team (CET). A key responsibility of this team was to ensure that people felt they were being heard and that things would change. Everyone in the CET was Indigenous and the majority came

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[57] See Commonwealth, *Royal Commission into the Protection and Detention of Children in the Northern Territory* (Final Report, November 2017) <https://childdetentionnt.royalcommission.gov.au/Pages/Report.aspx>.

from the Northern Territory. We had a responsibility to our mob, and they would let us know their concerns every chance that they got. They trusted us to come forward to tell their stories. They knew we had heard all the stories through our own families' experiences, and we all were hearing them again.

The stories I heard were not new to me. I heard my grandparents tell me similar ones from generations past. Even though it has been many years since I left the NTRC, I still get telephone calls (I have a new number, but our mob find these new numbers) from people asking if I can assist or help them with their criminal or child protection matters. I still find it hard. I can't unhear what I have heard, or unsee what I have seen. My experiences, and those of my family's history, push me on to fight for justice, despite my frustrations of facing and dealing with the impact of racist policies and settler supremacy that are embedded in all facets of this justice system. These torment Indigenous peoples. The continued ignoring of findings, of reports and research made me realise that my continued work in this space requires me to question these deep and lasting failings by pursuing a doctorate that asks, 'What does 'self-determination' mean in the context of legal service provision for Aboriginal and Torres Strait Islander Legal Services (ATSILS)?'

G. Conclusion

This reflection piece is something that probably echoes in most Indigenous people. Government policies and laws affect us differently than they do for non-Indigenous people. As I will discuss later in the thesis, the simple fact is that, proportionally, Indigenous peoples are much more affected by and are overrepresented in all areas of the justice system.

My life reflects what happens in our society, how we have been impacted by colonialisation, and the ongoing systemic racism, trauma affects us – family break downs, loss of language, culture, lands and family. As an Indigenous law student, I heard how the law was fair and just, and everyone was equal before the law, but this didn't resemble what I had experienced, seen and continue to see in my daily life as an Indigenous lawyer.

My own experiences with family breakdown and witnessing family interactions with the legal system help guide my understanding of the inequity of the legal system. My cultural kinships relationships wrapped around me at these times and helped me to avoid interference of governments and their policies mixed with their racist values. I survived to witness whilst working on a Royal Commission to see how the intrusion of such policies, racist values continue to disrespect our values, culture and our people to use our kinships to address our problems our way.

These strong cultural values and the experience within the legal system have given me an Indigenous viewpoint – not only as an Indigenous person who has been through the usual legal injustices because of the colour of my skin, but also someone who has been trained and worked in this system that continues to treat us differently, whilst claiming to be fair and just.

CHAPTER 2
RESEARCH QUESTION AND LITERATURE REVIEW

A. Introduction

Aboriginal and Torres Strait Islander Legal Services (ATSILS) work to divert Indigenous people away from the justice system through a culturally unique, multi-layered and holistic approach. As research highlights, through this approach ATSILS have significantly contributed to reducing Indigenous overrepresentation in prisons.[1] It was with incredible resourcefulness that Indigenous communities built these organisations. They did so largely in the absence of government funding. Securing legal representation for Indigenous communities depended upon the ability of activists to forge links with the legal profession until the first ATSILS, the New South Wales Aboriginal Legal Service, received its first federal grant in 1971.[2] Over the five decades since then, ATSILS have been able to deliver legal and advocacy services to their communities under extreme political conditions. They have been driven to champion Aboriginal rights and develop –for themselves– self-determination and empowerment objectives in one of the toughest terrains for Indigenous people in Australia: the justice sector.[3]

As an Indigenous person with experience working in the justice system, it was clear to me that the justice sector might be the last bastion of colonialism in this country. While there are 'outposts' of work being done to support and advocate for better outcomes for Indigenous peoples, for the main part the sector seems to lack real commitment to recognise and break its deep-rooted colonial values.[4] It has now been thirty years since the Royal Commission into Aboriginal Deaths in Custody[5] and the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families,[6] two of the most renowned social justice inquiries on the

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1 Elise Klein, Michael Jones and Eddie Cubillo, 'Have Aboriginal and Torres Strait Islander Legal Services Failed? A Response to Weatherburn' (2016) 14(1*) Australian Review of Public* Affairs 1, 7-8.

2 See Nicole Watson, *Tendering of Indigenous Legal Services* (Jumbunna Indigenous House of Learning Briefing Paper No 4, 2005) 3.

3 See Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples: Final Report* (ALRC Report 133, December 2017); Australian Bureau of Statistics, *Corrective Services, Australia, March Quarter 2018* (Catalogue No 4512, 7 June 2018). Both documents highlight the over-representation of Indigenous people in the justice system and the high need for the legal representation ATSILS provide.

4 See Chapter 4 for a comparison of the extensive work undertaken in the health sector to heavily influence government policy on improving service delivery to Indigenous people by promoting Indigenous participation and self-determination. This is reflected in the development of national research ethics and cultural and ethical standards and practices for sector engagement with Indigenous people, things which the legal sector has not achieved.

5 Commonwealth, *Royal Commission into Aboriginal Deaths in Custody* (Final Report, 15 April 1991) <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/>.

6 Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Final Report, April 1997) ('*Bringing Them Home Report*').

historical and contemporary effects of systemic racism against Indigenous peoples in this country. Both, through extensive community engagement, provided credible recommendations for improving Indigenous participation in the justice system and within the domain of child removal (or 'child protection' as it is now called). Yet, since then, there have been no significant, positive changes. In fact, the statistics both in child removal and incarceration are higher than they have ever been.[7] Despite the sector's commitment to so-called 'substantive equality' and 'procedural fairness', matters have deteriorated for Indigenous people who rely heavily on ATSILS to meet the inequalities and to combat a foreign, colonial legal system.

ATSILS were established for two central reasons: the lack of legal representation for Indigenous people in the criminal justice system; and concerns about discriminatory and brutal policing of Indigenous communities.[8] While the majority of the work of ATSILS originated in and continues to be in criminal law, they play an integral role in policy and law reform, outreach (including in prisons and Indigenous communities) as well as civil matters (such as child protection, tenancy and housing, and discrimination and police complaints).[9] ATSILS also provide legal aid in all states and territories.

B. The Research Question

In this thesis I explore the question 'What does "self-determination" mean in the context of legal service provision for Aboriginal and Torres Strait Islander Legal Services?'. In this chapter I review scholarly and policy literature and laws which provide theoretical context and background to this question. I particularly engage with literature which addresses colonisation: its systemic, racially oppressive processes – historically and now, and its effects on the lives, rights and sovereignty of Indigenous peoples. As I do so I pay attention to the role of law in colonisation and its deleterious effects for Indigenous people and organisations within the justice context.

C. The Justice Sector and ATSILS

It is well documented that Aboriginal and Torres Strait Islander people are the most over-incarcerated in the world.[10] In Australia, Indigenous men are imprisoned at 11 times the rate of the general male population,[11] Indigenous women are imprisoned at

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7 In 2016, Aboriginal and Torres Strait Islander children were 9.8 times more likely to be residing in out of home care than non-Indigenous children. This national figure of over-representation is an all-time high: see SNAICC et al, *The Family Matters Report 2017* (Report, 2017) 9 <https://www.familymatters.org.au/wp-content/uploads/2017/11/Family-Matters-Report-2017.pdf>.

8 The impetus for the formation of the ATSILS will be discussed in Chapter 4 with reference to the first-hand experiences of those involved.

9 Some ATSILS also include significant practices in family law, whilst others provide limited services in family law due to inadequate funding.

10 Thalia Anthony, 'FactCheck Q&A: Are Indigenous Australians the Most Incarcerated People on Earth?' *The Conversation* (Online, 1 October 2017) <https://theconversation.com/factcheck-qanda-are-indigenous-australians-the-most-incarcerated-people-on-earth-78528>. (Accessed 20 May 2021).

11 See Australian Bureau of Statistics, *Corrective Services, Australia, June Quarter 2016* (Catalogue No 4512, 8 September 2016) 'ABS, *Corrective Services June 2016'*; Australian Institute of Health and Welfare, *Youth Justice in Australia, 2019* (Bulletin No. 148, February 2020), 'AIHW, *Youth Justice*'.

15 times the rate of the general female population,[12] and Indigenous youth are imprisoned at 21 times the rate of non-Indigenous youth.[13] Similar levels of Indigenous overrepresentation pervade the child protection system.[14] The disproportionate numbers of Indigenous people in our judicial and correctional systems reinforce the huge and growing need for directed, culturally sensitive and specific legal representation for Indigenous Australians, such as those provided by the ATSILS.

Fiona Skyring, in her book *Justice: A History of the Aboriginal Legal Services of Western Australia,* examines the history and development of the Aboriginal Legal Service of Western Australia (ALSWA).[15] As she does so, she touches on the importance of the organisation's Indigenous employment: the creation of Indigenous identities who gave hope to their people; and the development of lawyers with first-hand and lived experience of working with Indigenous people. These lawyers would go on to become important legal dignitaries such as Queens Counsel, magistrates, and judges. Their interactions in the justice system with respect to Indigenous people, and the cultural responsibilities that came with advocating for them, gave them a greater appreciation of the underlying issues affecting Indigenous individuals, families and communities.

Skyring's account depicts the history of the creation of ALSWA, its people, the fights which developed in its DNA for Western Australia's (WA) diverse Aboriginal people and how this service has been the key advocate for Aboriginal rights in Western Australia. Her writings are WA focused, and her work is presented through the lens of a non-Indigenous person. In contrast, my research will look at the history from a national perspective and highlight how various Federal governments' key policies have affected the services and how they have hindered the aspirations of Aboriginal Legal Services to self-determine. This research will look through the eyes of interviewees at what self-determination is, whether they feel they are self-determining and what has hindered them. These perspectives are elicited and interpreted by me, as an Indigenous person who has been heavily involved in the ATSILS and worked closely with each ATSILS across all jurisdictions.

In 1993, Jon Faine, like Skyring, also wrote about the injustice, neglect and prejudice suffered by Aboriginal people, in this case focussing on Central Australia.[16] Faine illustrated the importance of the Central Australian Aboriginal Legal Service (CAALAS), interviewing locals and former CAALAS lawyers who turned up in Alice Springs on an adventure to assist and deliver justice for Indigenous people. Since the experience of clients was so removed from their own lives and cultural understanding, these lawyers

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12 ABS, *Corrective Services June 2016* (n 11).

13 AIHW, *Youth Justice* (n 11) 11 <https://www.aihw.gov.au/getmedia/c3ba6d29-7488-4050-adae-12d96588bc37/aihw-juv-131.pdf.aspx?inline=true#:~:text=Before%20then%2C%20the%20number%20of,2019%2C%20after%20which%20it%20declined>.

14 See eg Australian Institute of Health and Welfare, *Young People in Child Protection and Under Youth Justice Supervision 2015-16* (Data Linkage Series No 23 Report, 17 October 2017) <https://www.aihw.gov.au/reports/youth-justice/young-people-in-youth-justice-supervision-2015-16/contents/summary>.

15 See Fiona Skyring, *Justice: A History of the Aboriginal Legal Services of Western Australia* (UWA Publishing, 2011).

16 Jon Faine, *Lawyers in the Alice: Aboriginals and Whitefellas' Law* (Federation Press, 1993).

relied heavily on locals to act as interpreters between the justice system and traditional Aboriginal people. This reliance, forged through the tragedy of Indigenous peoples' contact with the criminal justice system, was common to most ATSILS. In and around Alice Springs, this eventuated in the formation of local 'field officers', now known as court support officers. While field officers assisted lawyers, they also worked with clients and community, helping to alleviate the constant stress of dealing with racist ignorance. Throughout Faine's book, the interviewees highlight the strong bonds forged between staff and locals and the entity itself. Aunty Pat Miller reinforced the hard work and good rapport that the lawyers and others within the Legal Service developed with the private sector, and other legal firms around the town.[17] As Aunty Betty Carter, interviewed by Faine, explained, the ATSILS in Central Australia 'chang[ed] people's attitudes, they worked so hard and had so much influence, when the black fellas didn't think they were getting the justice they deserved, Legal Aid were there in the forefront, doing whatever they could."[18]

Gary Foley was very critical of Faine's depiction of the history of Aboriginal legal services and the Aboriginal community's relationship with the legal profession.[19] Foley writes that the truth is dramatically different to the fantasies of Faine's mind:[20]

> As a member of the group of Aboriginal people who, in Redfern and Fitzroy between 1969–71 conceived and created the first community-controlled, shop-front, free legal- aid centres in Australia, I feel that I might be even better placed than Mr Faine to provide a brief history of Aboriginal legal services as perceived from a Koori community viewpoint.[21]

Foley expresses a strong Indigenous view on his reality of what happened in the establishment of the ATSILS – which is the essence of what this thesis is about – an Indigenous standpoint on the justice sector, government, and the discriminatory practices and policies that the ATSILS continue to endure. Foley highlights that although people are 'friends' of Indigenous people they do not necessarily understand the Indigenous world around them. Majority are coming from an oppressor's reasoning and when depicting their versions of happenings, they pump up their god-like contributions and fail to recognise the huge contribution from the Indigenous community and their peoples.

If Faine's writings are questionable for their omissions and their distorted 'white' valued views, they should be respected for the fact that they captured historical discussions from important Indigenous people from that geographical jurisdiction, as well as from non-Indigenous people who helped the establishment of the organisation to deliver critical legal aid services to Indigenous people in Central Australia. Such a

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17 Ibid 35.

18 Ibid 104.

19 Gary Foley, 'The Pain of Faine goes mainly to my Brain' (Essay, *The Koori History Website*, 31 June 1994) 1 <www.kooriweb.org/foley/essays/pdf_essays/faine.pdf>.

20 Ibid.

21 Ibid.

service still continues to provide legal services to Indigenous people, who previously had no such service with cultural understandings.

In this context, settler-colonial theory is a means of understanding this. I examine how the over-representation of Indigenous people in the justice system links to the historic development of settler colonialism in Australia and elsewhere. As I do so, I reflect on how such scholarship contributes to a broader understanding of the role of law in systemically entrenching racial discrimination against Indigenous peoples. Throughout, I reflect its continued relevance to contemporary ATSILS' self-determination efforts within the justice sector.

D. Settler Colonialism

Settler colonialism has been defined as a 'specific formation of colonialism in which the coloniser comes to stay, making himself the sovereign, and the arbiter of citizenship, civility, and knowing'.[22] As Patrick Wolfe has written, settler colonisation 'destroys to replace' Indigenous ways of being; it operates within a 'logic of elimination'.[23] Indigenous peoples and their knowledges are disregarded, replaced by colonial views of the world, which are constantly reasserted as the dominant culture through institutions such as schools, the legal system, and policy institutions.[24] The settler erects a new colonial society on the expropriated land base, by displacing and eliminating Indigenous peoples through methods like breaking-down of native title into alienable individual freeholds, native citizenship, child abduction, religious conversion, resocialization in institutions such as missions or boarding schools, and a range of cognate biocultural assimilations. All these strategies, including frontier homicide, are characteristic of settler colonialism.[25]

As Wolfe asserts, colonisation is not a singular event.[26] It is instead maintained by a structure and system, which is reasserted each day of occupation.[27] A key aspect of *ongoing* colonisation is to exclude Indigenous epistemologies and ontological experiences while advancing the experiences of colonising cultures over Indigenous peoples' cultural existence.[28] Colonialism has relied on the distribution of negative discourse of Indigenous people to the mainstream population and the continual reproduction of information, policy, and legislation that contributes to an Australian national imperialist narrative.[29]

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22 Eve Tuck and Ruben Gaztambide-Fernandez, 'Curriculum, Replacement and Settler Futurity' (2003) 29(1) *Journal of Curriculum Theorizing* 72, 73.

23 Patrick Wolfe, 'Settler Colonialism and the Elimination of the Native' (2006) 8(4) *Journal of Genocide Research* 387, 388.

24 See eg Anne Hickling-Hudson, Julie Matthews, and Annette Woods, 'Education, Postcolonialism and Disruptions' in Anne Hickling-Hudson, Julie Matthews, and Annette Woods (eds), *Disrupting Preconceptions: Postcolonialism and Education* (Post Pressed, 2004) 1.

25 Wolfe (n 23) 388.

26 Ibid.

27 Ibid.

28 Ibid.

29 Ibid 389.

To effectively resist settler colonialism in Australia today, we need to understand what the problems of Australian settlement were and what attempts were made, historically, to resist, cope with, reinforce and maintain them. Stephen Roberts has written that we cannot get to the core of white Australian history without understanding black history and accepting it. [30] And, as Ansgar Allen – drawing on Foucault – notes, once we comprehend that history, we can appreciate how the system is liable and open to change.[31] Change is possible at different levels and in places we take for granted like prisons[32] and in the case of this thesis the legal system.

Robert Williams Jr, like Wolfe, examines systemic colonialism as an ongoing process. Williams – a member of the Lumbee Indian Tribe of North Carolina – in his extrapolation of the historical foundations of colonialism, focuses on the settler colonial history and continued framework within the United States. In his critique, the colonial law imposed on 'the new world' was irretrievably and irredeemably racist, from its origins to application.[33]

However, as Williams remarks, this foundational racism is regarded by mainstream United States society today as alien or no longer immediately relevant to its 'national history'. In this and many other ways, outlined below, Williams' critique resonates with the (white) Australian context both in the treatment of Indigenous Australians and 'their history'.

Williams depicts two forms of historic and systemic racism in the United States: one directed towards African Americans; and the other directed at Indigenous peoples. He describes the latter as 'cultural racism', rather than biological racism, meaning the justification of racial privileges on the basis of differences in culture rather than genetics.[34] Historically, systemic and legalised forms of racism directed at African Americans were designed to generally exclude them from assimilation into the dominant society. Such forms as segregation were allegedly based on perceived biological and genetic differences between African Americans and the European-derived society.[35] However, Williams highlights that for Indigenous peoples in the United States racism operated distinctly; it was aimed at displacing tribalism.

This reflected an allegation that Indigenous peoples were deficient in culture rather than through biology and genetics. This 'deficiency' was contrived to justify the rejection of equal rights of self-determination to Indigenous peoples.[36]

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30 See Stephen Roberts, *History of Australian Land Settlement, 1788-1920* (Psychology Press, 1969) xi-xii.

31 Ansgar Allen, Using Foucault in Education Research, British Educational Research Association (Web Page, 2014) <https://www.bera.ac.uk/publication/using-foucault-in-education-research>.

32 See, eg, Michel Foucault 'Truth and Power (1977)' in Craig Calhoun (ed), *Contemporary Sociological Theory* (Blackwell, 2007) 201.

33 Robert Williams, Jr., 'Columbus's Legacy: Law as an Instrument of Racial Discrimination against Indigenous Peoples' Rights of Self-Determination' (1991) 8(2) *Arizona Journal of International and Comparative Law* 51, 53.

34 Ibid 53-54.

35 Ibid 53.

36 Ibid.

For Williams, the racist perceives differences as deficiencies: 'they' do not use the land as we do and therefore are less 'efficient'; 'they' have a different skin colour and therefore are 'genetically inferior'.[37] It is on the basis of this adverse perception that the racist then legislates and enforces a regime of privileges and power discriminating against his or her victims.

Williams' analysis of the historical and normative racist mechanisms at play in the United States resonates with Indigenous Australians' experiences. In the Australian context, Indigenous Australians felt the brunt of both forms of power structures through displacement and segregation.[38] Across Australia, governments reserved land to house Indigenous people, with the underlying rationale being to displace and segregate them. Indigenous peoples' 'welfare' was assigned to a 'Chief Protector' or 'Protection Board'. Entry to and from such reserves was regulated, as were most aspects of Indigenous life. The right to marry and have employment was subject to the 'protector's' discretion. Many of the appointed managers of these reserves were either missionaries or church groups, intent to convert Indigenous people into their faiths. Local enforcement of the protectionist legislation was the responsibility of so called 'protectors', usually the police.[39] By 1911, the Northern Territory and every state except Tasmania had such 'protectionist' legislation.[40]

As Harry Blagg discerns, there is a causal link between historical (and continued) dispossession of Indigenous people initiated by settler colonialism and the disproportionate representation of Indigenous people in Australian criminal justice systems. This problematic relationship has remained unchanged since invasion, when 'justice' became employed as a tool of dispossession.[41] The trauma attached to the segregation and displacement still affects people, including myself, today.

From 2016-17, when I worked on the Royal Commission into the Detention and Protection of Children in the Northern Territory, I heard so many similar stories to those that my own family experienced. This triggered a particular trauma, and regularly made me question whether anyone other than Indigenous peoples really cared enough to change the system. To this day, any discussion with the wider community about historical events and the ongoing and associated trauma is usually dismissed with a cursory 'get over it'.

Wolfe observes that settler colonialism's logic of elimination requires the removal of Indigenous peoples from their territory, not just in any particular way, but by any

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37 Ibid 55.

38 There are many examples of these structures in the Australian context. See eg the *Aborigines Act 1911* (SA) which made the Chief Protector the legal guardian of every Aboriginal and 'half-caste' child. The Chief Protector also had wide-ranging powers to remove Indigenous people to and from reserves. See also the *Aboriginals Ordinance 1911* (Cth) which empowered the Chief Protector to assume 'the care, custody or control of any Aboriginal or half caste if in his opinion it is necessary or desirable in the interests of the Aboriginal or half caste for him to do so'. The *Aborigines Ordinance 1918* (Cth) extended the Chief Protector's control even further.

39 Williams, Jnr (n 33) 53-54.

40 *Bringing Them Home Report* (n 6) 28.

41 Harry Blagg, *Crime, Aboriginality and the Decolonisation of Justice* (The Federation Press, 2016) 3.

means necessary.[42] In Australia, the means have included massacres, forced removal, and assimilation policies. As a Northern Territorian Aboriginal man, I have witnessed such methods in my lifetime. One example – and there are a lot more – was the *Northern Territory National Emergency Response* (more widely known as 'the Intervention'), which was first adopted in 2007.[43] Through this legislative method of control, the Australian federal government compulsorily acquired leasehold tenure over 64 prescribed communities in the Northern Territory.[44] In 2014, Marion Scrymgour – then Chief Executive Officer of the Wurli Wurlinjang Health Service and Chair of the Aboriginal Medical Services Alliance, Northern Territory[45] –highlighted many of her concerns with this little remarked upon aspect of 'the Intervention'. [46] One of these related to the township leases acquired under section 19A of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).[47] These leases, initially acquired by the federal government for 99 years, meant that traditional owners lost control of not just the houses and buildings, but the whole community area for that period. This includes public spaces such as streets, cemeteries, football ovals, beaches, and ceremony grounds. It also includes the inter-tidal zone fought for over for so many years in the *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* (more widely known as the '*Blue Mud Bay case*') litigation.[48]

Historical records of Aboriginal Protectors and legislators, media reports and personal accounts of settlers and Indigenous people reveal that from the late eighteenth century there were persistent attempts to 'eliminate, restructure and reconstitute Aboriginal identity in the interests of the colonizer'.[49] These attempts construed the 'natives' as outsiders in their own land and forced Indigenous peoples to experience their home space as imperial space.[50] This continues today, infiltrating policies, legislation and every facet of the justice system when it concerns Indigenous peoples. The Australian nation state has not forgotten this history through absent-mindedness, but through a remembering of the past which represses it.[51]

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42 Wolfe (n 23) 402.

43 *Northern Territory National Emergency Response Act 2007* (Cth). As enacted 17 August 2007 and repealed 16 July 2012 (*Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012* Cth).

44 Peter Yu, Marcia Ella Duncan and Bill Gray, Report of the NTER Review Board (Report, Commonwealth Department of Families, Housing, Community Services and Indigenous Affairs, October 2008) 39

45 Scrymgour was also awarded an honorary doctorate by the University of Sydney Faculty of Health Sciences in 2013.

46 Marion Scrymgour 'Lessons Learned – Looking Back and Looking Forward After the Intervention' (Nugget' Coombs Lecture, Charles Darwin University, 8 October 2014) as quoted in Bob Gosford, 'Scrymgour on the NT Intervention – Rivers of Grog and Acres of Leases' *Crikey* (online, 12 October 2014) <https://blogs.crikey.com.au/northern/2014/10/12/scrymgour-the-nt-intervention-rivers-of-grog-and-acres-of-leases/>.

47 This township leasing provision was inserted into the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) in 2006: see *The Aboriginal Land Rights (Northern Territory) Amendment Bill 2006*.

48 See *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* [2008] HCA 29.

49 Blagg (n 41) 3.

50 Thalia Anthony, *Indigenous People, Crime and Punishment* (Routledge, 2013) 31.

51 Tracey Banivanua Mar, 'Settler-Colonial Landscapes and Narratives of Possession' (2012) 37/38 *Arena Journal* 176, 178.

Subsequently, the impact of colonialism on Indigenous peoples has been poorly understood in mainstream criminology, and is often ignored in leading textbooks.[52] This can be read as a corollary of the imposition of criminal justice as a tool of colonisation: the criminal law was an important tool for legitimising the state's use of force against Indigenous peoples and in imposing a range of cultural, social, and institutional values and processes.[53] However, in the absence of such critical knowledge and teaching, the use of criminal law in this way continues today, and neither the justice sector nor the political system, shows any appreciation of the urgency of reforms that promote equality for Indigenous Australians. The statistics across all areas of the justice system reinforce the fact that something is systemically wrong, and that a huge, co-operative and combined effort is needed to turn this around.

Perversely, critical academic articles and submissions have become part of the mechanics of this system, with many authors seemingly satisfied 'that they have done something', without attempting or feeling the need to try anything else when nothing changes. But the ever-increasing incarceration statistics of Indigenous men, women and children tell us differently. In this way, the settler-colonial state reinforces its power structures. So analysis of those power structures – a critical approach to them – is essential.

E. Critical Race Theory

Critical Race Theory (CTR) addresses how racism operates through law, power and the imposition of social, cultural and institutional processes. CRT shows us that injustice in the legal system requires specialist services and reforms to help promote substantive equality and procedural fairness. CRT is also committed to challenging racial hierarchies, and indeed hierarchy and subordination in all of its various forms.[54] To that end, CRT insists on progressive race consciousness, on systemic analysis of the structures of subordination, on the inclusion of counter-accounts of social reality, and on a critique of power relationships that is attentive to the multiple dimensions on which subordination exists.[55]

Critical Race Theorists do not place their faith in so called 'neutral' procedures and substantive doctrines of formal equality; rather, they assert that both the procedure and the substance of laws are politically structured to maintain white privilege.[56] As Blagg emphasises, 'Criminal justice institutions such as courts, prisons, and police should not blind us to the wider interest these institutions served, or that they formed part of a much broader system of controls designed to formalise white power and

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52 See Favian Alejandro Martin, 'The Coverage of American Indians and Alaskan Natives in Criminal Justice and Criminology Introductory Textbooks' (2014) 22(2) *Critical Criminology,* 237, 256.

53 Chris Cunneen and Juan Tauri, *Indigenous Criminology* (Policy Press, 2016) 46.

54 I. Bennett Capers, 'Critical Race Theory and Criminal Justice' (2014) 12(1) *Ohio State Journal of Criminal Law* 2.

55 Ibid.

56 See, eg, Francisco Valdes, Jerome McCristal Culp and Angela P. Harris, 'Battles Waged, Won, and Lost: Critical Race Theory at the Turn of the Millennium', in Francisco Valdes, Angela Harris, and Jerome McCristal Culp (eds) *Crossroads, Directions, and a New Critical Race Theory* 1 (Temple University Press, 2002) 1, 1-6.

privilege.'[57] Two of CRT's major tenets relate to debunking 'colour-blindness' and critiquing 'interest convergence'. First, 'formal' and purportedly colour-blind laws often serve to marginalise and obscure social, political, and economic inequality.[58] In the Australian context, an example of this is the Paperless Arrest laws in the Northern Territory. At the time they were introduced 2014, it was profusely claimed that the laws were aimed at the public at large. However, Indigenous people are disproportionately captured by these laws, largely due to socio economic conditions. [59] The second major tenet of CRT is that legal reforms that ostensibly benefit minorities occur only when such reforms also advance the interests of the white majority. This is most often referred to as 'interest convergence.'[60]

Writing of the United States (US) context, legal scholar Michelle Alexander highlights that racism is a main driver behind that country having the biggest penal system in the world. As she contends, US criminal justice institutions have united into a 'stunningly comprehensive and well-disguised system of racial social control that functions in a manner strikingly similar to Jim Crow targeting people of colour'.[61] The former Jim Crow laws were state and local laws that enforced racial segregation in the Southern parts of the United States. These laws were first sanctioned by states dominated by white state legislatures in the late 19th century after the post-Civil War Reconstruction period.[62] They continued to be enforced until 1965. As Alexander argues, while it is no longer socially permissible to use race, explicitly, to justify discrimination, exclusion, and social contempt, the justice system has effectively provided 'cover' for policies that engage in exactly this, with people of colour targeted as 'criminals'.[63] One example Alexander uses to illustrate this is the United States' government's 'war against drugs', which was in fact a war on caste, resulting in mass incarceration of people of colour. As Alexander writes, such systemic persecution amounts to a new Jim Crow, effectively enslaving people of colour.[64]

If we look to Australia, there have been countless inquiries into the high numbers of Indigenous deaths in custody,[65] incarceration,[66] and child removal.[67] Not one of their recommendations has ever been effectively implemented. In effect we have utilised laws to capture and criminalise under the guise of being 'tough on crime' and behind the façade of criminal objectivity. Seen in this light, the criminal law resembles so

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57 Blagg (n 41) 3.

58 Bennett Capers (n 54) 2.

59 'Paperless Arrest' laws are discussed in greater depth in Chapter 4.

60 Valdes, McCristal Culp and Harris (n 56) 2.

61 Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (The New Press, 2010) 4.

62 Recognised as the period after the American Civil War from 1865 to 1877 during which time the United States contended with trying to reintegrate states that had withdrawn in determining the legal status of African Americans.

63 Alexander (n 61) 2.

64 Ibid 4.

65 The most notable was the Commonwealth, *Royal Commission into Aboriginal Deaths in Custody* (n 1), which investigated 99 deaths and delivered 339 recommendations. There have been many individual inquiries since.

66 See Australian Law Reform Commission (n 3).

67 *Bringing Them Home Report* (n 6).

many historical failures of social engineering – for instance the stolen generations – which have done nothing but marginalise, dispossess, and discriminate against Indigenous people.[68] Is the Australian justice system, like Alexander suggests in the United States context, an institution infected by racial bias or is it more than that? Is it, as Alexander says, a stunningly comprehensive and well-disguised system of racialised social control that functions in a manner strikingly similar to Jim Crow?[69]

Paul Butler, in *Stop and Frisk and Torture Lite*, focuses on the deployment of state-sanctioned aggressive stop and frisk tactics against minority communities in the United States, which he examines as the expressive message of race-based stop and frisk. [70] Such methods are used daily in Australia against, and targeting, Indigenous people. We can see further racial disparities in the justice system by looking to the differences as to *why* black and white people are being locked up and the differences in the sentences they receive. Recently, for example, the former Northern Territory Police Commissioner, John Ringland McRoberts, was found guilty of attempting to pervert the course of justice. Although he faced a maximum jail term of 15 years, the court felt the former commissioner should be granted bail "to get his affairs in order".[71] Remarkably, McRoberts had been vigorously contesting the charge since his first court date in 2016…one might have thought the years that had transpired since then would surely have provided plenty of time to get his affairs in order! Indigenous people are not afforded such luxuries.

There are many more examples that show the difference between how Indigenous people and non-Indigenous people are treated by the justice system: with less care and with greater harm. Kwementyaye Ryder died after five young white men went hooning around the Todd Riverbed in Alice Springs to harass Aboriginal people camping there.[72] The offenders were all in their 20s. They received non-parole periods of between 12 months and four years. Theirs was never considered a race related crime. When a white man ran over and killed Elijah Doughty, a 14-year-old boy, while he rode a stolen motorcycle in Western Australia's Goldfields region, the accused was acquitted of manslaughter. Instead, he was convicted of the lesser charge of dangerous driving causing death.[73] There is also the example of Ms Dhu, a 22-year-old Aboriginal woman, whom the West Australian coroner ruled was treated inhumanely

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68 See Commonwealth, *Royal Commission into Aboriginal Deaths in Custody Australia* (n 1). The term 'Stolen Generations' describes children of Australian Aboriginal and Torres Strait Islander descent who were removed from their families by Australian Federal and State government agencies and church missions, under Acts of their respective parliaments and placed in segregated 'training' institutions before being sent to work.

69 Alexander (n 61) 4.

70 Paul Butler, 'Stop and Frisk and Torture-Lite: Police Terror of Minority Communities' (2014) 12 (1) *Ohio State Journal of Criminal Law* 57.

71 Craig Dunlop, 'Disgraced, Former NT Police Commissioner John Ringland McRoberts Found Guilty of Attempting to Pervert the Course of Justice', *Northern Territory News* (online, 1 June 2018) <https://www.ntnews.com.au/news/crime-court/disgraced-former-nt-police-commissioner-john-ringland-mcroberts-found-guilty-of-attempting-to-pervert-the-course-of-justice/news-story/340919512f2e5499f2b906cca821946a>.

72 *R v Doody & Ors (Sentencing Remarks)* (Supreme Court of the Northern Territory, Martin CJ, 23 April 2010).

73 *State of Western Australia v WSM* [2017] WASCSR 128.

in the lead up to her death while in police custody. [74] Ms Dhu had been locked up at South Hedland Police Station in August 2014 for unpaid fines. Some police testified during the inquest into her death that they thought Ms Dhu was faking illness and was coming down from drugs. Some medical staff also thought she was exaggerating and had behavioural issues. A final example is the Inquest into the death of Mulrunji Doomadgee in the Palm Island lock up.[75] The Inquest found that Mr Doomadgee's death was caused by fatal injuries *most likely* inflicted by the sergeant's (Chris Hurley's) knee which caused Mr Doomadgee's liver to be virtually cleaved in two across his spine.[76] However the Coroner Deputy Chief Magistrate, Brian Hine, refused to make a definitive ruling because of inconsistencies in evidence and testimonies.[77] He said he was concerned that some police officers involved had changed their testimonies to be more supportive of Sergeant Hurley. He also said he believed there had been collusion between officers. Nonetheless, he stated that he could not determine if the injuries to Mr Doomadgee had been deliberately caused.[78]

I have given specific examples, but they are replicated on so many occasions that reasonable inferences can be made from them. They provide recurring evidence of systemic inequality in laying charges and sentencing. Non-Indigenous people are afforded the benefit of the doubt, and their ability to rehabilitate and fit back into society is supported and respected. Indigenous people are in contrast locked away and killed, their killers acquitted or given reduced sentences. The outcomes of these trials lay bare the inherent racism in the Australian criminal justice system. As this thesis will explain, they reinforce the argument that there is a need for a strong self-determining Indigenous legal service to combat such blatant inequality and disrespect. Indeed, what is not noted anywhere in media or academic appraisals of such cases is the important role the ATSILS play in these inquiries. For example, they appeared at Mr Doomadgee's Inquest. They also played an active role behind the scenes – for example, meeting with the Attorney General – in getting an inter-state external review and ultimately in getting the police officer, Sergeant Chris Hurley, charged after the Prosecutor initially declined to do so.

The systematic privilege of being white, otherwise known as white supremacy, exemplified above, permeates the psyche of the justice sector. It installs an unconscious bias in the judges and magistrates.[79] It likewise effects those working in the key administrative positions that help the courts and government departments make decisions impacting on Indigenous people. As former Chief Justice of Western

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74 *Inquest into the Death of Ms DHU,* (Coroner's Court of Western Australia, State Coroner Fogliani, 16 December 2016) <http://www.coronerscourt.wa.gov.au/I/inquest_into_the_death_of_ms_dhu.aspx?uid=1644-2151-2753-9965>.

75 See *Inquest into the Death of Mulrunji* (Finding, Office of the State Coroner Queensland, Brian Hine Deputy Chief Magistrate, 14 May 2010) <http://www.courts.qld.gov.au/__data/assets/pdf_file/0008/86858/cif-doomadgee-mulrunji-20100514.pdf>. Cameron Doomadgee was also known by his tribal name 'Mulrunji'.

76 Ibid 48.

77 Ibid 191–224.

78 Ibid 248–249.

79 See, eg, Chris Cunneen, 'Judicial Racism' in Sandra McKillop (ed) *Aboriginal Justice Issues: Proceedings of a Conference Held 23-25 June 1992* (Australian Institute of Criminology, 1993).

Australia, Wayne Martin once noted, the system itself is partly to blame.[80] In his words, across this system:

> Aboriginal people are much more likely to be questioned by police than non-Aboriginal people. When questioned they are more likely to be arrested rather than proceeded against by summons. If they are arrested, Aboriginal people are much more likely to be remanded in custody than given bail. Aboriginal people are much more likely to plead guilty than go to trial, and if they go to trial, they are much more likely to be convicted. If Aboriginal people are convicted, they are much more likely to be imprisoned than non-Aboriginal people, and at the end of their term of imprisonment they are much less likely to get parole than non-Aboriginal people.[81]

His Honour went on to speak about the differences between formal and substantive equality, discerning that the High Court had consistently adopted an approach that favoured the former. Formal equality relies upon the conception that like things must be treated alike, and unalike things must be treated differently.[82] According to this approach, legislation providing for 'move on orders', for example, does not discriminate against Aboriginal people because anybody who is committing a public nuisance can be subject to them. Likewise, the *Bail Act 1982* (WA) does not discriminate against Aboriginal people because people who do not have a home, who are not in stable employment, and who have a long prior criminal record are treated the same whether they are Aboriginal or not. What this approach fails to address is the fact that Indigenous people are more likely than non-Indigenous people to have those attributes because of their socio-economic position, which is itself the product of two centuries of dispossession and discrimination. While it may rest on a presumption of "formal equality", substantive equality is undermined.

In recent times this approach, and its subsequent effects, was brought to light when the Criminal Lawyers Association of the Northern Territory (CLANT) alleged that in July 2019 Judge Borchers, of the Northern Territory Local Court, had engaged in judicial misconduct by making racist remarks to defendants and engaging in bullying conduct towards their lawyers.[83] According to the ABC media coverage of the judicial investigation that ensured, while Chief Judge Morris refused to make a formal determination of the matter, based on the 'lack of a formal complaints process in the Northern Territory … [she] stated that she did not consider Judge Borchers comments "disclosed in this and previous complaints constitutes judicial misconduct warranting removal."'[84] She also stated that those conclusions were reached notwithstanding that

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80 Wayne Martin 'Indigenous Incarceration Rates: Strategies for Much Needed Reform' (Seminar Paper, Law Summer School, 20 February 2015) 8-9 <https://www.supremecourt.wa.gov.au/_files/Speeches_Indigenous_Incarceration_Rates.pdf>.

81 Ibid.

82 Ibid 9.

83 Jacqueline Breen 'NT Chief Judge Elizabeth Morris Finalises Investigation into Complaint against Judge Greg Borchers' *Northern Territory News* (online, 11 December 2019) <https://www.abc.net.au/news/2019-12-11/nt-chief-judges-investigates-complaint-against-greg-borchers/11784300>.

84 Ibid.

she 'had no power to impose any sanctions'.[85] This episode highlights the unconscious bias spoken of above. It is reflected not only in the behaviour of Judge Borchers, and the fact that there is an absence of a complaint's framework, but also in the first assumption that it was acceptable that one of their 'own' could investigate the complaint.

The literature shows inherent discrimination and bias that is endemic in the legal system. It is important to look at the legal roots of this.

F. Doctrine of Discovery

In Western settler states like Australia, the rule of [colonial] law began with the doctrine of discovery and its discourse of conquest, which refused to recognise any meaningful legal status or rights for Indigenous tribal peoples.[86] It did so on the basis that Indigenous peoples were "heathens" and "infidels" and therefore legally presumed to lack the rational capacity necessary to assume an equal status or to exercise equal rights under the West's medievally derived colonising law.[87] The Doctrine of Discovery thus reflected a set of Eurocentric racist beliefs elevated to the status of a universal principle – one culture's arguments to support its conquest and colonisation of its newly discovered, alien world.[88]

The Doctrine of Discovery is accordingly a multifaceted doctrine, designed to support settler supremacy on Indigenous land. It is what Lumbee scholar Robert Williams calls 'a 'complex' of ideas that lies at the core and advent of western civilisation. The 'fact' of discovery gave settler authorities an inchoate title to land that could be consummated by possession. Indigenous title in comparison, was reduced (in the best case) to fragile rights of occupation that could be extinguished by settler unilateralism and were coupled to a settler governmental monopoly on sales of Indigenous land. In different instantiations, the Doctrine of Discovery is a central tenant of settler law and sovereignty in all of the Anglo settler states, in its modern form consolidated by the United States Supreme Court case of *Johnson v McIntosh*[89] in 1823. It is the basis of the Australian common law doctrine of *Terra Nullius.*[90]

The Doctrine of Discovery has helped shape the laws of this country. It continues to be demonstrated when Indigenous peoples are treated as less competent, more deviant, and more incorrigible than non-Indigenous peoples in criminal law. In other words, it continues to be reflected in the denial of fundamental human rights, including the right of self-determination, to Indigenous tribal peoples. The Doctrine of Discovery and its discourse of conquest asserts the West's lawful power to impose its vision of truth

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85 Ibid.

86 David Getches and Charles Wilkinson, *Federal Indian Law Cases and Materials* (West Publishing, 1986) 847, 873.

87 Ibid.

88 Williams, Jnr (n 33) 326.

89 *Johnson v. M'Intosh*, 21 U.S. 543 (1823)

90 See generally Robert J. Miller, Jacinta Ruru, Larissa Behrendt, and Tracey Lindberg, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford, 2010).

on non-western peoples through a racist, colonizing rule of law.[91] It is because of this that Williams has argued that the beginning of the end of colonisation in western settler-states – the United States, Latin America, Canada, Australia and New Zealand – will occur through denying legitimacy of and respect for the rule of law, which evolved from and is therefore maintained by the racist discourse of the Doctrine of Discovery.[92]

If the subconsciousness of the justice sector of Australia is still affected by this discourse and its foundational beliefs, the question that begs to be asked is whether this in turn affects the way Indigenous community-controlled organisations such as ATSILS are dealt with and held accountable. In the following parts I explore how it manifests in operative models of self-management, rather that models of self-determination enabled by less government intervention, red tape and mistrust.

G. Self Determination

Despite the assertions, and Western mythology, of the Doctrine of Discovery outlined above, Aboriginal and Torres Strait Islander people have always asserted that prior to 1788 their ancestors self-governed and exercised sovereignty over the lands and waters now called Australia.[93] They have never ceded their rights to their lands, water, lore and laws. Aboriginal and Torres Strait Islander people assert 'an inherent sovereignty that is independent of the settler state' on the basis that a 'separate autonomous status [is] all-pervasive and [lies] beneath nearly all their claims.'[94] Like most Indigenous people throughout the world, they lay claim to their 'distinctiveness as political communities'.[95]

It is in recognition of this that ATSILS evolved to deliver effective and culturally competent legal assistance services to Aboriginal and Torres Strait Islander peoples. [96] According to their corporate publications, National Aboriginal and Torres Strait Islander Legal Services (NATSILS) bring together over 50 years of experience in the provision of legal advice, assistance, representation, community legal education, advocacy, law reform activities and prisoner through-care to Aboriginal and Torres Strait Islander peoples in contact with the justice system. While ATSILS claim that ATSILS are the experts and most suited to their roles, they are routinely questioned

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91 Robert A Williams, *The American Indian in Western Legal Thought: The Discourse of Conquest* (Oxford University Press, 1992) 325.

92 Ibid.

93 See *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141; *Mabo v Queensland [No 2]* (1992) 175 CLR 1 ('*Mabo [No 2]*'). In both cases, the claimants argued that they self-governed and never ceded their lands.

94 Ibid.

95 P G McHugh, *Aboriginal Societies and the Common Law. A History of Sovereignty, Status, and Self-Determination* (Oxford University Press, 2004) 62-63.

96 This submission highlights the strengths of the ATSILS under harsh conditions they continue to provide quality legal aid services to their peoples as well as advocate on all justice issues affecting Indigenous peoples – National Aboriginal & Torres Strait Islander Legal Services, *Access to Legal Assistance Services* (2015) <http://www.natsils.org.au/portals/natsils/NATSILS%20Submission,%20Access%20to%20Legal%20Assistance%20Services.pdf>.

about whether they are the best place to deliver such services to Indigenous peoples. I argue that the best way to assess this is by exploring whether they are self-determining. While there is no specific literature on the importance of self-determination for ATSILS per se in addressing economic and social disadvantage and achieving positive outcomes for Indigenous people in the justice arena, analogies can be drawn across a wide range of research in multiple jurisdictions to assist in formulating the answer.

While there has been a considerable amount written on Indigenous self-determination in general, including in the justice arena, there has not been much specifically written on ATSILS.[97] A majority of authors have argued that the justice system is failing, that the failure is systemic, and that there is an obvious 'legitimation crisis' for systems of justice in Australia.[98] While this thesis agrees with this literature, in point of difference, it examines self-determination not as a grand narrative but as a practice that occurs within Indigenous organisations, namely legal services. Its hypothesis is that self-determination is fundamental to successful cultural Indigenous justice outcomes. The question is however whether they are able to do so in the current climate of government control in the justice arena. Since the demise of ATSIC and the end of self-determination policy, it may be asked whether Indigenous people and their organisations need to develop hybrid systems to survive.

G1. International Literature

The discussion about the right to self-determination for Indigenous peoples cannot be had without observing the international standards that have developed through the United Nations. Australia has never initiated a treaty or included Indigenous Australians within its Constitution, other legislation or case law in a way that addresses the status of Indigenous peoples as 'peoples' as understood in international law.[99] Consequently, Indigenous peoples of Australia rely heavily on the work of the United Nations and the international instruments that have developed to assert their status as an Indigenous political collective within Australian borders.

According to international law, self-determination includes political rights.[100] These include the positive right to participate in decision-making in matters that would affect our rights, and the State's duties to consult and cooperate with us to obtain our free, prior and informed consent before adopting and implementing legislative or administrative measures that affect us. In both cases, and consistent with the right to self-determination, Indigenous peoples have the right to participate through our own

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97 See eg Blagg (n 41); Anthony (n 50); Cunneen and Tauri (n 53).

98 Blagg (n 41) 12.

99 Larissa Behrendt, Amanda Porter and Alison Vivian, *Indigenous Self-Determination within the Justice Context: Literature Review* (Research Paper, UTS: Jumbunna, 2018), 17.

100 See United Nations Declaration on the Rights of Indigenous People, GA Res 61/295, UN Doc A/Res/61/295 (2 October 2007, adopted 13 September 2007) ('UNDRIP') <https://www.refworld.org/docid/471355a82.html>; International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR') 171 <https://www.refworld.org/docid/3ae6b3aa0.html>; International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('*IESCR*') <https://www.refworld.org/docid/3ae6b36c0.html>.

representative institutions.[101] The United Nations *Declaration on the Rights of Indigenous Peoples* (UNDRIP) is a wide-ranging instrument detailing the rights of Indigenous peoples in international law and policy.[102] A core right to self-determination is emphasised for Indigenous people in its various articles (including articles 3, 4, 18, 19, 23 and 32). UNDRIP contains minimum standards for the recognition, protection and promotion of Indigenous people's rights. While not equivalently or consistently implemented, the UNDRIP is recommended to be used as a framework by States and Indigenous peoples in developing law and policy, including in devising the means to best address our claims.

The United Nations General Assembly has, through the adoption of the Declaration, affirmed that Indigenous peoples have the right to self-determination and the right to freely determine their political status and pursue economic, social and cultural development.[103] Article 3 of UNDRIP mirrors Article 1 of the *International Covenant on Civil and Political Rights*[104] and the *International Covenant on Economic, Social and Cultural Rights*.[105] Common to both Covenants are the following statements:

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.[106]
>
> All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.[107]
>
> The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.[108]

Self-determination is a core right recognised at the international level, which complements the implementation of other rights. All rights in UNDRIP are indivisible and interrelated. Thus, the right to self-determination interacts with all other rights, which should be read in relation to it. This includes the right to autonomy or self-government. As Article 4 of UNDRIP states:

> Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to

101 See *UNDRIP* (n 100).
102 Ibid.
103 Ibid.
104 *ICCPR* (n 100).
105 *IESCR* (n 100).
106 See: Art 1 ss1. (*ICCPR*) and Art. 1 ss1. (*ICESCR*).
107 See: Art 1 ss2. (*ICCPR*) and Art. 1 ss2. (*ICESCR*).
108 See: Art 1 ss3. (ICCPR) and Art. 1 ss3. (*ICESCR*).

> their internal and local affairs, as well as ways and means for financing their autonomous functions.[109]

Furthermore, in relation to the right to autonomy, Indigenous peoples have the right, under Article 34 of the UNDRIP, to 'promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs …' The right to culture includes having autonomy over cultural matters.[110] It should be remembered that Australia and the other so-called 'CANZUS' states (Canada, New Zealand, and the United States) did not support the UNGA resolution when it was voted on in 2007.[111] All four countries subsequently endorsed the UNDRIP, albeit with significant caveats.[112] It is worth noting that that the endorsement of the UNDRIP by the Gillard Labor government in 2009 was met with scepticism from most Indigenous people. This is well-founded, given that Minister Macklin's statement of support reiterated most of the caveats that had appeared in the government's explanation of its negative vote in 2007. In particular, the statement emphasised the non-binding nature of the UNDRIP, carefully recorded the government's view that that rights to self-determination and 'free prior and informed consent' are limited by guarantees of territorial integrity and individual human rights, and noted that Australia's law on land and native title rights are 'not altered' by the UNDRIP.[113] At the time, the Intervention (as discussed in Chapter 1) was due to expire in 2012. Yet, it was the Labor Government that extended the racist Intervention for a further ten years to 2022.[114] These amendments were supposed to dispose of the most offensive aspects of the Intervention and fall in line with their UNDRIP obligations. In December 2020, the Canadian Government showed leadership and introduced legislation[115] to advance federal implementation of the

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109 *UNDRIP* (n 100), art 4.

110 It should be noted however that the UNDRIP does not acknowledge Indigenous peoples' sovereignty so as not to undermine state sovereignty: see *UNDRIP,* art 46.

111 *UNDRIP* (n 100)

112 Sheryl Lightfoot, 'Selective endorsement without intent to implement: Indigenous rights and the Anglosphere' 2012 16(1) *The International Journal of Human Rights* 100-122; S.E. Rice, 2010. Announcement of US support for the United Nations Declaration on the Rights of Indigenous Peoples; Hon. Dr. Pita Sharples Minister of Maori Affairs 2010 endorsement of UNDRIP, Ninth session of the United Nations Permanent Forum on Indigenous Issues, 19-30 April 2010; Joanna Smith, 'Canada will implement UN Declaration on Rights of Indigenous Peoples, Carolyn Bennett says' *Toronto Star* (Online, 12 November 2015 <https://www.thestar.com/news/canada/2015/11/12/canada-will-implement-un-declaration-on-rights-of-indigenous-peoples-carolyn-bennett-says.html>; Jenny Macklin, 'Federal Government Formally Endorses the Declaration on the Rights of Indigenous Peoples' (2009) 7(11) *Indigenous Law Bulletin* 6-8.

113 Jenny Macklin, Statement on the United Nations Declaration on the Rights of Indigenous Peoples (3 April 2009).

114 Emma Rodgers, Aust adopts UN Indigenous declaration, *ABC News* (online, 3 April 2009) <https://www.abc.net.au/news/2009-04-03/aust-adopts-un-indigenous-declaration/1640444>.

115 See House of Commons Canada, Bill C-15: An Act Respecting the United Nations Declaration on the Rights of Indigenous Peoples, first reading, 3 December 2020 <https://parl.ca/DocumentViewer/en/43-2/bill/C-15/first-reading>.

Declaration, which is a very important step in moving Canada's relationship with Indigenous peoples forward.[116]

In 2014, the United Nations *Expert Mechanism on the Rights of Indigenous Peoples* ('EMRIP') published a comprehensive study of the right of Indigenous peoples to participate in decision-making.[117] The study provided an overview of the international legal framework and jurisprudence regarding the rights of Indigenous peoples with respect to their cultural heritage and addressed some of the specific issues faced by Indigenous peoples in this regard. Both the *Expert Mechanism* and the establishment of a Special Rapporteur on the Rights of Indigenous Peoples reinforce a growing jurisprudence on Indigenous peoples' rights. A consistent theme that has emerged, particularly in relation to Indigenous rights to participate in government and administrative decisions, is that Indigenous peoples' consent must be sought for activities that impact significantly on Indigenous people, communities, lands, territories and resources.[118] This state obligation applies in situations where the state considers decisions or measures that potentially affect the wider society as well as Indigenous peoples, particularly in instances where decisions may have a disproportionate effect on Indigenous peoples.[119]

As the former Special Rapporteur on the Rights of Indigenous Peoples, Professor James Anaya, described, the inclusion of the right to self-determination in UNDRIP "responds to the aspirations of Indigenous peoples worldwide to be in control of their own destinies under conditions of equality, and to participate effectively in decision making that affects them." [120] Anaya also said that the right of self-determination "is a foundational right, without which Indigenous peoples' human rights, both collective and individual, cannot be fully enjoyed."[121] It is against these international norms that *self-determination* for Aboriginal people needs to be understood. It is also necessary to keep these in mind when examining the question of what self-determination might look like in relation to legal service delivery to Indigenous Australians, particularly with respect to the criminal justice system.

G2. Policy Disconnect

Policy formation by governments has a huge impact on Indigenous people in their daily lives. As history has shown us, many government policies have been punitive and

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116 Government of Canada, *Implementing the United Nations Declaration on the Rights of Indigenous Peoples in Canada: Building a brighter future. Building a better Canada* <https://www.justice.gc.ca/eng/declaration/index.html>.

117 *Expert Mechanism on the Rights of Indigenous People,* Final Report of the Study on Indigenous Peoples and the Right to Participate in Decision-Making, UN Doc A/HRC/18/42 (17 August 2011) annex ('*Expert Mechanism Advice No.2 (2011): Indigenous Peoples and the Right to Participate in Decision Making*') ('*Expert Mechanism Advice No.2*').

118 Ibid.

119 Ibid [16].

120 James Anaya, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedom of Indigenous Peoples: The Situation of Indigenous Peoples in Australia*, UN Doc A/HRC/15 (4 March 2010) 41 <http://www2.ohchr.org/english/issues/indigenous/rapporteur/docs/ReportVisitAustralia.pdf>.

121 Ibid.

discriminatory towards Indigenous people. The suspension of the *Racial Discrimination Act 1975* (Cth) under section 51 (xxvi) of the Australian Constitution is a salient example. This has happened on three occasions: first to amend the *Native Title Act 1993* (Cth) (which removed existing guarantees of rights to Indigenous people);[122] second, when enacting the *Hindmarsh Island Bridge Act 1997* (Cth);[123] and third, to enact *The Northern Territory National Emergency Response Act 2007* (Cth) (also referred to as "the Intervention").[124]

Indigenous Australians' rights have been subject to political manipulation since they first gained citizens' rights. This has, historically, tended to escalate when Indigenous people have tried to enforce these rights. In his 1968 Boyer Lecture, *The Great Australian Silence*, William Stanner reflected on the lack of change for the better in Aboriginal policy throughout his life and career:

> [I] could return to work very much where I had left off without any acute sense of change in the Aboriginal life around me or in their relations with white Australia.[125]

He noted the invisibility of Aboriginal peoples from the histories and commentaries he worked with and reviewed:

> ... inattention on such a scale cannot possibly be explained by absent-mindedness. It is a structural matter, a view from a window which has been carefully placed to exclude a whole quadrant of the landscape…[126]
>
> What may well have begun as a simple forgetting of other possible views turned into habit and over time into something like a cult of forgetfulness practised on a national scale.[127] We have been able for so long to disremember the Aborigines that we are now hard put to keep them in mind even when we most want to do so.[128]

In the fifty years since Stanner gave his lecture, things have not changed for the better. Professor Mick Dodson expressed similar sentiments in his more recent address to the Australian Human Rights Commission. He emphasised his frustrations with the vast amounts of literature, across sectors, that recommended institutional changes and best practices for ensuring the rights and dignity of Indigenous peoples, which lay undeveloped and ignored:

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122 *Native Title Act 1993* (Cth)

123 *Hindmarsh Island Bridge Act 1997* (Cth)

124 *Northern Territory National Emergency Response Act 2007* (Cth)

125 William Stanner, *The Dreaming and Other Essays* (Schwartz Publishing, 2011) 185.

126 Ibid 188-189.

127 This is a generous characterisation by Stanner. I would argue, similarly to Wolfe, that this more likely reflects the settler logic of "destroying to replace" Indigenous ways of being: see Wolfe (n 23).

128 Stanner (n 125) 297.

> We've had health reports, housing reports, education reports, welfare reports, community violence reports, law reform reports, economic development reports, employment and unemployment reports, Social Justice Commissioner reports, death in custody reports, the taking of children away reports, the list is almost endless... and on top of this we've had assessments, evaluations, pilots, trials, umpteenth policies and policy approaches. And all of this paperwork would comfortably fill a couple of modest suburban libraries. And, it's on the shelf where most of them have stayed. They've stayed there unread, unfinished, their recommendations unimplemented, and they're very much unloved. [129]

Indeed, while the right to self-determination has been adopted as the legal right underpinning Indigenous polities' human rights worldwide, the governments of Australia continue to ignore self-determination as a right for Indigenous peoples of this country.[130] The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) in 1991 recommended that principles of self-determination should be applied to the design and implementation of all policies and programs affecting Indigenous peoples. It also recommended that there should be a devolution of power to Aboriginal communities and organisations so they can determine their own funding priorities and that these organisations should be the preferred vehicles through which programs are delivered.[131] Further, the RCIADIC recognised that despite several years of a proclaimed self-determination policy, self-determination was not really being offered. Instead, Indigenous organisations were being offered an administrative mess.[132]

David Martin and Julie Finlayson conducted a review of the extensive literature addressing the political issues of self-determination and self-management associated with devolution of decision making and administrative process to Indigenous organisations.[133] They explored what they describe as 'organisational self-determination' – a conceptual framework which links self-determination with a notion of 'internal accountability' between an organisation and its members, clients or constituency. This internal accountability also encompasses 'public accountability', that is the financial and other accountability of an organisation to funding agencies and the wider public.[134] The RCIADIC likewise recognised that accountability had to be maintained in the delivery of services by Indigenous organisations, recommending such measures as the development of convenient and simple financial accountability procedures, appropriate performance measures, and the development of advice,

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129 Australian Human Rights Commission, 'Unmet Fundamental Issues Really Gnaw at Me': Mick Dodson' (Blog Post, 15 November 2016) <http://www.humanrights.gov.au/news/stories/unmet-fundamental-issues-really- gnaw-me-mick-dodson>.

130 The United Nations Expert Mechanism on the Rights of Indigenous Peoples conducted a study on this very topic: see *Expert Mechanism Advice No.2* (n 119) [1].

131 *Royal Commission into Aboriginal Deaths in Custody* (n 5) vol 5, Recommendations 188-192.

132 *Royal Commission into Aboriginal Deaths in Custody* (n 5) vol 4, [27.6.1].

133 David Martin and Julie Finlayson, 'Linking Accountability and Self-Determination in Aboriginal Organisations' (Centre for Aboriginal Economic Policy Research Discussion Paper No 116/1996, 1996).

134 Ibid 2.

training and education to Aboriginal organisations.[135] This appears to be more the type of 'model' of self-determination for the current day ATSILS.

Self-determination can take many forms. It can manifest through the historical march in the streets and fight for equality rights across all sectors. It can also mean having no fear of repercussions from government, including the threat of funding being withheld or reduced if contractual agreements are not met or breached. In Australia, threats and tactics such as these became more prevalent in the 1990s when former Prime Minister John Howard embraced a neoliberal ideology.[136] From this point, neoliberal policy has shaped the control of Indigenous interests, with right-wing think tanks enhancing their attacks on Indigenous difference. Sometimes such attacks have been made because remote communities are deemed to have *too many* customs that were incompatible with neoliberalism. Other times these customs have been deemed to be *too broken down*, resulting in unacceptable lawlessness. This has, in turn, been cast as a potential threat to the state and capital, and Indigenous people themselves in remote regions. Australian governments have appeared very comfortable with, if not supportive of, such attacks.[137]

Across Western-style democracies, it is those that have adopted neoliberalism that have highest imprisonment rates, such as the United States of America, Australia, Aotearoa New Zealand, the United Kingdom, South Africa and, more recently Canada. Western social democracies with co-ordinated market economies have the lowest levels of incarceration (see for example Sweden, Norway, Finland, and Denmark).[138] The 'neoliberal way' is to reduce the workforce and minimise wages in order to push up profits. While Scandinavian countries explicitly legislate for the health and welfare of their citizens, Australia in true neoliberal fashion legislates almost entirely to pursue an economic agenda for the benefit of the already wealthy. The irony is that despite the 'economic' posturing of Australia, all Scandinavian social democracies are doing better economically.[139]

In Australia, policy makers working within a neoliberal framework have abandoned policies that work towards Indigenous self-determination. This began during the Howard Coalition government and this continues today. However, the right to self-determination and human rights generally continues to be fundamental to the aspirations of Aboriginal people and communities. It needs to be noted that the neoliberal agenda is not a conservative program of critique and reform; it entails the

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135 *Royal Commission into Aboriginal Deaths in Custody* (n 5) vol 5, Recommendations 193-197.

136 Neoliberalism is regularly used in popular debate around the world to define the last 40 years. It is used to refer to an economic system in which the "free" market is extended to every part of our public and personal worlds. The transformation of the state from a provider of public welfare to a promoter of markets and competition helps to enable this shift: see Kean Birch, 'What Exactly is Neoliberalism?, *The Conversation,* 8 November 2017 <https://theconversation.com/what-exactly-is-neoliberalism-84755>

137 Jon Altman, 'Neo-Paternalism: Reflections on the Northern Territory Intervention' (2008) 39(4) *ANU Reporter* 16, 33.

138 Cunneen and Tauri (n 53) 154.

139 John Biggs, 'Why has Scandinavia Got It Right and We Haven't?' *Tasmanian Times* (online, 3 August 2010) <http://tasmaniantimes.com/index.php/article/why-has-scandinavia-got-it-right-and-we-havent>.

transformation of state forms of governance. The Federal Government's decision to abolish the major Indigenous representative body, the Aboriginal and Torres Strait Islander Commission (ATSIC), in 2005 and to mainstream all specialist Indigenous programs through existing government departments, aligns with this.[140] The abolition of ATSIC conformed to neoliberal forms of governance at a number of levels: it erased intermediary enclaves of professional, ethnic or Indigenous expertise or subjected them to control.[141] According to this script, intermediary enclaves of expertise are more efficiently controlled and fit more effectively into 'good governance' when they are stripped of their discretionary powers to act and, instead, exist as service delivery units subject to evaluation through quantifiable outcomes. Mainstreaming of all specialist Indigenous programs through existing government departments was said to bring similar results.[142]

It is worth noting that within the policy environment, government at times adopts the term 'self-determination' in relation to policy and programs, but, as has been shown, in its interpretation and implementation gives much less power and authority to Indigenous peoples than the way the concept has been articulated, and intended, by Aboriginal and Torres Strait Islander peoples themselves.

The rejection of self-determination as a policy driver and the attempt to bring Indigenous peoples into the 'mainstream' and 'normalise them' to the dominant culture has jeopardised deeply valued Indigenous rights. Governments are ill-equipped to deal with the contemporary political consequences of Indigenous identity, including separate representative structures and inclusive cultural aspirations. This incapacity significantly influences how governments treat those of us who are different.[143] Fundamental questions to consider in models of 'self-determination' or 'self-management' include: what are the social, political, and economic characteristics and the internal structures? And what are the parameters for self-determination or management?[144]

Culturally based models take a more holistic approach to management and administrative issues by recognising ambiguities inherent in the relationship between Indigenous organisations and the bureaucracies upon which they are dependent for funding and other support.[145] Relationships between bureaucracy and Indigenous clients, which are predicated on bureaucratic requirements (such as equity of access, accountability, performance standards, effectiveness, etc), may, in reality, be difficult to achieve given the ambiguity of what the clients understand by the 'indicators' and what the bureaucracies expect.[146] Indigenous organisations within the Indigenous sector experience considerable tensions as they try to reflect Indigenous aspirations

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140 Barry Morris, 'Abolishing ATSIC in the Enabling State' (2004) 15(3) *The Australian Journal of Anthropology* 326.

141 Ibid.

142 Ibid.

143 Kerry Arabena, *Not Fit for Modern Australian Society? Aboriginal and Torres Strait Islander People and the New Arrangements for the Administration of Indigenous Affairs* (Research Discussion Paper No. 16, AIATSIS, 2005) 28.

144 Martin and Finlayson (n 135) 4.

145 Ibid 2.

146 Ibid 2.

and expectations to be self-determining while being dependent for funding on 'mainstream' government departments that apply increasingly incompatible mainstream principles to their Indigenous 'clients'. Indigenous community organisations have become the frontline of these inevitable tensions, and this generates conflict and pressure, which only the most resilient can manage successfully.[147]

Professor Ciaran O'Faircheallaigh has stated that institutional forms created to reflect 'mainstream' and corporate values and practices rather than Indigenous values are inevitably fragile and vulnerable.[148] They may play a useful function for Aboriginal people who understand how they can be employed to make decision makers accountable, but they lack transparency to many of the Traditional Owners and other Aboriginal community members for whose benefit they supposedly operate.[149] Evidence from the past three decades shows clearly that these institutional forms and regulatory processes are insufficient, on their own, to ensure that positive outcomes eventuate for Aboriginal peoples.[150] Indigenous organisations may call it 'self-control' or 'independence from government', but fundamentally they are striving to gain greater control over their lives and to promote the kind of development they value.[151]

G3. Self-Determination and Indigenous Governance

There have been no concerted initiatives by government to recognise the value of Indigenous autonomy or self-government since the abolition of ATSIC in 2005. Indeed, the trend has been in the opposite direction.[152] There is no national advocacy body keeping checks and balances by providing advice and constructive criticism on key policy and legislation affecting Indigenous people. This hiatus has meant an entrenchment of top-down decision making for Indigenous people, usually to their detriment.

Research on good governance consistently demonstrates that top-down models, which usually take a universalist one-size-fits-all approach, are not best practice, and are particularly detrimental to Indigenous peoples. In contrast, models that are adaptive to localised conditions and based on principles of self-governance and active participation produce best practice outcomes, including socio-economic development and resilience. Take for example the findings of the Harvard Project on American Indian Economic Development (Harvard Project), a long running study of the conditions required for effective Indigenous self-governance and economic engagement.[153] Their

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147 Janet Hunt, 'Between a Rock and a Hard Place: Self-determination, Mainstreaming and Indigenous Community Governance' in Janet Hunt et al (eds), *Contested Governance: Culture, Power and Institutions in Indigenous Australia* (ANU E Press, 2008) 41.

148 Ciaran O'Faircheallaigh, 'Mining Royalty Payments and the Governance of Aboriginal Australia' (Griffith University Distinguished lecture, 9 August 2017).

149 Ibid 5

150 Ibid.

151 Janet Hunt and Diane Smith, 'Indigenous Community Governance Project: Year Two Research Findings' (Working Paper No 36/2007, Centre for Aboriginal Economic Policy Research, Australian National University, 2007) ('*ICGP: Year Two Findings*')

152 O'Faircheallaigh (n 150) 12.

153 Miriam Jorgensen, *Rebuilding Native Nations* (University of Arizona Press, 2007) 24-25.

research highlights that governance and organisations of First Nations is critical in successful economic development, more so than the natural resource granting of lands, education or access to money.[154] They found that successful economic development reflects the extent to which Indian nations organise, make decisions, and govern themselves.[155] Of particular importance is sovereignty, or control over their own affairs; and the match, or lack of match, between specific Indian cultural values and practices and the organisational forms used by tribes to pursue economic development.[156] Another significant study of Indigenous governance was conducted by Dustin Frye and Dominic Parker. Their investigation compared Indian reservations in the United States that were outside the jurisdiction of the Federal Bureau of Indian Affairs (BIA) to those that were within the BIA's jurisdiction, after 1934. Those that were outside enjoyed greater autonomy in conducting their affairs than those that remained under BIA influence.[157]

In Australia, the former (2005-2008) Indigenous Community Governance Project (ICGP) had also explored the nature of Indigenous community governance.[158] Much like the Harvard Project, it tried to understand what works, what does not work, and why. The research findings of the ICGP comprehensively confirm that an externally imposed 'one size fits all' approach to addressing Indigenous governance is unlikely to be workable or sustainable. Indeed, it may be counterproductive. Instead, organisational structures and representative arrangements work best when they are responsive to, and integrate, different local and cultural conditions.[159] As the ICGP emphasises, 'when Indigenous governance is based on genuine decision-making powers, practical capacity and legitimate leadership at the local level, it provides a critical foundation for ongoing socioeconomic development and resilience'.[160]

Successive research, then, shows that a key premise of good governance is to recognise one size does not fit all. It also indicates that socio-economics has a huge

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154 Ibid.

155 Ibid.

156 Ibid.

157 Dustin Frye and Dominic Parker, 'Paternalism versus Sovereignty: The Long-Run Economic Effects of the Indian Reorganization Act', in Terry L. Anderson (ed), *Unlocking the Wealth of Indian Nations* (Lexington Books, 2016) 224-44.

158 The Indigenous Community Governance Project was undertaken by the Centre for Aboriginal Economic Policy Research ('CAEPR') and Reconciliation Australia. The research, conducted over five years, explored Indigenous community governance with participating Indigenous communities, regional Indigenous organisations, and leaders across Australia.

159 Janet Hunt and Diane Smith, 'Further Key Insights from the Indigenous Community Governance Project' Research Brief, (Centre for Aboriginal Economic Policy Research, The Australian National University, 2006).

160 Janet Hunt and Diane Smith, 'Understanding and Engaging with Indigenous Governance: – Research Evidence and Possibilities for Engaging with Australian Governments' (2011) 14(2-3) *Journal of Australian Indigenous Issues* 30. See also: Janet Hunt and Diane Smith, *Building Indigenous Community Governance in Australia: Preliminary Research Findings* (Working Paper No 31/2006, Centre for Aboriginal Economic Policy Research, Australian National University, 2006) ('ICGP: Preliminary Findings'); Janet Hunt and Diane Smith, *Indigenous Community Governance Project: Year Two Findings* (Working Paper No 36/2007, Centre for Aboriginal Economic Policy Research, Australian National University, 2007); Janet Hunt et al, *Contested Governance: Culture, Power and Institutions in Indigenous Australia,* (ANU Press, 2008).

impact on policy decision making, and that historically such policy has not been conceived in the best interest of minorities, especially Indigenous peoples. An illustrative Australian case in point is when the Labor government, under the leadership of former Prime Minister Paul Keating – who, to some Indigenous people, is a champion of Indigenous causes – passed the *Native Title Act (1993)* (Cth).[161] Keating set the tone of the Act when he described *Mabo v Queensland [No 2]* (‘*Mabo [No 2]*’) [162] as ‘establishing that Aboriginal and Torres Strait Islander people had a *property* right to their own soil’ (emphasis added).[163] From that time, Indigenous Australia’s inherent rights have been interpreted purely in terms of property rights, with no reference to the right of Indigenous self-government.[164] McNeil is of the view it was not the High Court judgment in *Mabo [No 2]* that had the effect of ‘practically eliminating the potential for Indigenous inherent government authority over native title land.[165166] Instead, McNeil argues that this denial arose from the way in which the Parliament of Australia chose to interpret it in framing the *Native Title Act (1993)*, and the subsequent interpretations of the *Act* by the Australian Courts.[167] That said, the Labor government did oversee two key reforms following *Mabo [No 2]*: the appointment of an Aboriginal and Torres Strait Islander Social Justice Commissioner within the Commonwealth-created Human Rights and Equal Opportunity Commission (HREOC) and the establishment for ten years from 1991 of a national Council for Aboriginal Reconciliation (CAR).

Although *Mabo [No 2]* resolved some issues, major concerns such as the recognition of Aboriginal sovereignty continue to be unresolved.[168] The classification of the acquisition of the continent of Australia continues to be a great concern for Indigenous peoples of Australia. It continues to determine their rights to land, their personal status as “British subjects” or aliens, and whether their political communities are considered sovereign either domestically or internationally.[169] In *Mabo [No 2],* Justice Brennan spoke of the capacity of the common law to flexibly adapt to changing circumstances by recognising that the Crown did not acquire automatically absolute title to all colonial lands on settlement. Accordingly, upon occupation the Crown acquired no more than the radical title, and that title was subject to Aboriginal or native title.[170] However, Brennan J refused to extend the common law’s flexibility to allow for the recognition of Indigenous sovereignty. As noted in Chapter 1, he

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161 *Native Title Act (1993)* (n 124).

162 *Mabo [No 2]* (n 95).

163 Paul Keating, ‘Time to Revisit Native Title Rights’, in T. Bauman and L. Glick (eds), The Limits of Change: Mabo and Native Title 20 Years On, AIATSIS, Canberra, 406-22.

164 Ibid.

165 Kent McNeil, ‘Mabo Misinterpreted: The Unfortunate Legacy of Legislative Distortion of Justice Brennan’s Judgment’ in Toni Bauman and Lydia Glick (eds), *The Limits of Change: Mabo and Native Title 20 Years On* (AIATSIS Research Publications, 2012).

166 Ibid 226.

167 Ibid 226-35.

168 For example, the recognition of Aboriginal title in *Mabo [No 2]* (n 95) 40, 79.

169 Julie Cassidy, ‘The Enforcement of Aboriginal Rights in Customary International Law” (1993) 4(1) *Indiana International and Comparative Law Review* 59. See also Senate Select Committee on Constitutional and Legal Affairs, Parliament of Australia, *Two Hundred Years Later* (Report, 1983).

170 See *Mabo [No 2]* (n 95) 49-50, citing *Witrong and Blany* (1674) 3 Keb 401, 402 and quoting *Amodu Tijani* [1921] 2 AC 399, 403.

reasoned that 'recognition by our common law of the rights and interests in land of the Indigenous inhabitants of a settled colony would be precluded if the recognition were to fracture a skeletal principle of our legal system.'[171] In his view, the court could not question the validity of the 'settled' classification because it provided the foundation for the Crown's acquisition of sovereignty. But it could do so for the notion of *terra nullius* to be rejected to the extent that it suggested Australia's Indigenous inhabitants were 'too low in the scale of social organization to be acknowledged as possessing rights and interests in land'.[172]

We must recognise that since *Mabo [No. 2]*, there has been considerable political and ethical impetus to redress the injustices suffered by Australian Indigenous peoples. On occasion, there has even been a willingness to prefer flexible interpretations of legal doctrine. However, such flexibility has always been accompanied by the caveat that this should not 'fracture the skeletal principle' of Australian law.[173] It is in this context that Australia formally adopted self-determination and self-management. This led to the outstation movement,[174] and to the creation of the Aboriginal and Torres Strait Islander Commission (ATSIC) in 1989.[175] ATSIC was ultimately presented to the world as the epitome of Indigenous self-determination by the Keating-led Labor government. According to Aileen Moreton Robinson however, while self-determination has ostensibly been the dominant policy framework since the late 1960s, a closer analysis of government processes and practices reveals that self-management occupied centre stage. Even after the establishment of ATSIC, regional councils did not have autonomous control over expenditure in their regions. ATSIC's budget was controlled and monitored in the same way as other government departments.[176] Further, as Robinson argues, ATSIC commissioners were for many years developing policy prepared by government bureaucrats. In fact, when that changed and ATSIC adopted a self-determination model that advocated for Indigenous rights, the newly elected Howard government, in concert with the media, responded by framing the commission as being mismanaged, misguided and ineffective.[177]

O'Faircheallaigh adopts a medical analogy in his critique of the historic and contemporary political treatment of Indigenous self-determination efforts. He contends that if the current issues facing Indigenous Australia were a medical condition, and the responsible medical authorities refused to make 'autonomy' the

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171 *Mabo [No.2]* (n 95) 43 (Brennan J).

172 Ibid 58 (Toohey J) citing the International Court of Justice condemnation of the application of the notion of *terra nullius* to inhabited lands in A*dvisory Opinion on Western Sahara* (1975) 1 ICJR 12, 39.

173 *Mabo [No.2]* (n 95) 36 (Brennan J) and *Bulun Bulun v R & T Textiles* (1998) 41 IPR 513 (Von Doussa J). For an example of a flexible interpretation of the concept of native title see *Yanner v Eaton* (1999) 201 CLR 351, in which the right to hunt crocodiles was recognised as a 'nature and incident' of the applicant's native title rights.

174 In Australia, the outstation movement is the movement of Australian Aboriginal peoples from large towns to much smaller communities, called outstations. One of the main reasons behind the movement is for Aboriginal peoples to get back autonomy and self-sufficiency on their homelands:

175 O'Faircheallaigh (n 150) 11

176 See Aileen Moreton-Robinson, 'Introduction' in Aileen Moreton-Robinson (ed) *Sovereign Subjects: Indigenous Sovereignty Matters* (Allen & Unwin, 2007) 4.

177 Ibid 5.

core of their treatment program, they would be struck off for incompetence.[178] Arguably however, Aboriginal peoples face a lot of medical issues and we do not see governments going out of their way to resource and respond to their health care and wellbeing. That said, as I discuss in Chapter 6, in comparison to the Justice sector, the health sector has developed more opportunities for real engagement with Indigenous peoples and communities. They have had the ability through the success of the 'Close the Gap' (CTG) campaign, to develop mechanisms for accountability and public awareness, as well as hold significant leadership forums that have influenced government policies deriving out of CTG. Yet, as O'Faircheallaigh stresses, the position adopted by Australian governments in recent decades is clearly against Indigenous autonomy. This is so, despite the fact that it has long been recognised that Australia, like Canada, has 'a flawed and unsuccessful system of Aboriginal Administration'.[179] Corporate governance isn't self-determination.

G4. Justice Sector

In 1991 the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) recommended:

> That Governments negotiate with appropriate Aboriginal organisations and communities to determine guidelines as to the procedures and processes which should be followed to ensure that the self-determination principle is applied in the design and implementation of any policy or program or the substantial modification of any policy or program which will particularly affect Aboriginal people.[180]

Since then, governments have allegedly applied the principle of self-determination through all facets of policy and program development when engaging with the Indigenous arena.

Criminologist Harry Blagg points out that the colonial processes of dispossession, genocide and assimilation are perpetuated by marginalising and denying the legitimacy of Indigenous culture and law.[181] He suggests that criminologists need to come to terms with the specificity of the Aboriginal peoples' situation as colonialised people, and the historically specific ways criminal justice has, and continues to be, employed as an instrument of colonial governance.[182] Blagg argues that so long as criminologists fail to do so they will not understand the depths of Aboriginal people's sense of alienation from, and frustrations with, existing systems of justice. They will also fail to make sense of the complex strategies employed by Aboriginal people to resist these strategies of domination.[183] For Blagg, 'initiatives with the greatest likelihood of success are those that genuinely engage with Aboriginal law and culture and see these

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178 O'Faircheallaigh (n 150) 11.

179 Ibid.

180 See Recommendation 188 in the *Royal Commission into Aboriginal Deaths in Custody* (n 1) vol 5.

181 Blagg (n 41) 8.

182 Ibid.

183 Ibid.

as a vehicle for change'.[184] Furthermore, he argues that community-led approaches open up spaces for more, not less, engagement with mainstream services, as Aboriginal people seek out resources that they believe can assist.

Indigenous peoples are not ignored in criminology. Criminologists produce and reproduce data on offending, policing, and sentencing patterns, offering comparisons between Indigenous and non-Indigenous outcomes. However, Indigenous understanding and explanations for their own predicament with regard to colonial law and justice are often ignored.[185] In their examination of four settler colonies and their Indigenous communities. Cunneen and Tauri demonstrate how Indigenous peoples have suffered from profound social, political, and economic marginalisation as a direct result of colonisation.[186] As noted above, these forms of marginalisation are the root causes of the over-representation of Indigenous peoples in contemporary criminal justice systems and the high rates of victimisation that Indigenous communities suffer. Particularly relevant to their discussion is the place of Indigenous Australians within the English law.[187] Upon colonial settlement, Aboriginal peoples became subject to colonial law and courts. This reflected the presumption of the coloniser (in line with the Doctrine of Discovery discussed above) that Indigenous peoples were without sovereignty and law.[188] Judgments, such as the Australian High Court in *Coe v Commonwealth*,[189] reinforced this by declaring that Aboriginal peoples 'have no legislative, executive or judicial organs by which sovereignty might be organised'.[190] As Cunneen and Tauri note, subsequent decisions confirmed that 'English law did not, and Australian criminal law does not, accommodate an alternative body of law operating alongside it.[191] This was rehearsed in *Members of the Yorta Yorta Aboriginal Community v Victoria*[192] when the High Court found that 'what the assertion of sovereignty by the British Crown necessarily entailed was that there could be thereafter no parallel law-making system in the territory over which it asserted sovereignty'. These legal interpretations are deeply entrenched in the legal sector's approach to dealing with Indigenous peoples. It presents almost like an underlying unconscious bias –reinstalled through teachings and or precedent– which makes it hard for those legally trained to think past or outside it, even when they acknowledge that there has been a wrong committed in the way this country was taken to have been 'ceded' and what that technically means for the law of this country.

Blagg emphasises the fundamental differences between white Australia and Indigenous realities, particularly demonstrated in the over-representation of Indigenous peoples in the criminal justice system. He refers to an Aboriginal 'domain' comprising ceremony, cosmology, kinship and lore/law which continue to exist in the

184 Ibid 151.
185 Cunneen and Tauri (n 53) 65.
186 Ibid 12
187 Ibid 16.
188 Ibid.
189 *Coe v Commonwealth* (1979) 24 ALR 118.
190 Ibid 129.
191 *Walker v New South Wales* (1994) 182 CLR 45, 50; Cunneen and Tauri (n 53) 16.
192 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538, 552.

non-Indigenous domain.[193] He suggests that between these domains there needs to be a generation of hybrid initiatives.[194] Yolngu[195] elder Dr Djiniyini Gondarra speaks truth to Blagg in that Indigenous peoples continue to practise their laws to this day and also want to engage with governments and others so that they are included in discussions of laws that affect them and can raise possibilities of recognising Indigenous laws.[196] Dr Gondarra, however, relates his community's experiences:

> he has assented to his Law through a ceremonial process called Waŋa Lupthun. And although the Yolngu have been telling the NT and Australian Governments for many years, still no one seems to want to understand or recognise that we are citizens of our own Clans and Nation States; it's like we are a non-people and no one can hear us or have serious dialogue and diplomatic relationships with us. Some of us know that this new Australian Law does try to protect and nurture us but we still find it very strange, unfamiliar and very confusing - and it continues to offend us by opposing, harming and destroying us and our rights established under the Original Law of this land.[197]

Despite this, Dr Gondarra maintains hope that one day things will change, with Indigenous peoples respected as real sovereign peoples. It is only then that other Australians will sit down and talk to us about some real solutions to the problems we face.[198] It is in this way that Dr Gondarra articulates something beyond what Blagg and others talk about: the sovereignty the Yolngu people have practised from a time before colonization and the need for recognition of that sovereignty. To this extent, Dr Gondarra argues for something more than just self-determination –the recognition of the inherent and continued sovereign nationhood of the Yolngu people. I think Wilkinson is right when he asserts that what Indigenous peoples are arguing for is a right to a degree of 'measured separatism'.[199] That means the right to govern their homelands, and those who enter them, by their own laws, customs, and traditions, even when these might be incommensurable with the dominant society's values and ways of doing things.[200] In short, Indigenous people want to secure recognition of their rights to self-determination and cultural sovereignty. This is the right to be different beyond some hybrid system in which Indigenous peoples remain subjugated to the dominant culture.

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193 Blagg (n 41) 37.

194 Ibid 23, 40-45.

195 Yolngu, also 'Yolŋu', translates to human/humans, person/people. It now also refers to Aboriginal people of north-east Arnhem Land.

196 Djiniyini Gondarra and Richard Trudgen, 'The Assent Law of the First People: Principles of an Effective Legal System in Aboriginal Communities' (Conference Paper, Law and Justice within Indigenous Communities, 22 February 2011).

197 Ibid.

198 Ibid.

199 Charles Wilkinson, *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy* (Yale University Press, 1987) 14-19.

200 Ibid.

Although Blagg does not get to this point, he does argue throughout his book that Indigenous community-controlled, developed and run programs are best practice and will have best outcomes.[201] While research, such as that discussed above, supports this theory, it is an oversight of Blagg's not to acknowledge that ATSILS have been at the coal face for nearly fifty years, developing and collaborating on such programs. ATSILS have been the major drivers of critical reform for Indigenous peoples in the justice system and have fiercely advocated for their peoples. Like Dr Gondarra, they have always engaged with those that have wanted to sit down and work through ways that will assist in building better relationships and outcomes for Indigenous peoples in the justice arena. As far back as 1972, the ATSILS (QLD) took the lead in collaborating with the University of Queensland to offer the services of social work students to Indigenous clients.[202] In Victoria, the Aboriginal Victorian Legal Services established an adoption agency several years before the emergence of the Aboriginal Child Placement Principles. [203] These examples provided early evidence that Indigenous peoples, when allowed to make decisions and govern themselves, produce outcomes that best suit their mob and achieve results.

Thalia Anthony and Will Crawford have highlighted the work ATSILS have conducted with various elder groups in developing court processes and other programs that are community focused and well developed. Such programs provide ongoing support in navigating the justice system, which empowers the community and has a positive impact in deterrence and reducing recidivism.[204] As a participating member of the Northern Territory Royal Commission, I observed the vast amounts of work ATSILS did in ensuring community's voices were heard. Without ATILS, the Commission, in the limited time frames that it had, would have struggled to develop the mechanisms for building rapport and trust with people and communities necessary to ensure participation. Due to historical events, many would not otherwise have willingly participated. ATSILS provided important logistical support, helping various Elders and families to participate at meetings and appear at hearings to give crucial and very personal evidence.

The importance of ATSILS' work in promoting community control, oversight and development of Indigenous programs was also demonstrated in the findings of the Indigenous Legal Needs Project (ILNP). The ILNP is the most in-depth study of Indigenous legal need and access to justice in non-criminal areas of law ever conducted in Australia.[205] The ILNP highlighted the value of having Aboriginal and

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201 Blagg (n 41).

202 Jill Brown and Roisin Hirschfield, *Aboriginal and Islanders in Brisbane* (Report, Australian Commission of Inquiry into Poverty, 1974) 90.

203 Phil Slade, 'The ALS – Funding and Guidelines' (1976) *Legal Service Bulletin* 144, 145.

204 Thalia Anthony and Will Crawford, 'Northern Territory Indigenous Community Sentencing Mechanisms: An Order for Substantive Equality' (2013/2014) 17(2) *Australian Indigenous Law Review* 79, 83-84, 89.

205 See Fiona Allison, Chris Cunneen, Melanie Schwartz and Larissa Behrendt, 'Indigenous Legal Needs Project: NT Report' (Research Report, James Cook University, 2012); Fiona Allison, Chris Cunneen and Melanie Schwartz, 'The Civil and Family Law Needs of Indigenous People in WA' (Research Report, James Cook University, 2014); Chris Cunneen, Fiona Allison, and Melanie Schwartz, 'The Civil and Family Law Needs of Indigenous People in QLD (Research Report, James Cook University, 2014), Chris Cunneen, Fiona Allison, and Melanie Schwartz, 'The Family and Civil Law Needs of

Torres Strait Islander staff members as a point of contact. Indeed, this was one of the most frequently reiterated ILNP recommendations for improving access to justice. These roles were established by ATSILS at the point of their formation (in the form of field officers, discussed earlier in this chapter) to assist lawyers in developing trust and rapport with communities and to get the correct information for pending cases.

The importance of the field officer role was further highlighted in the ILNP finding that some mainstream legal service providers call upon ATSILS field officers to carry out field officer duties for their clients. While this level of cooperation between legal services increases the prospect of access to justice exponentially, the obvious problem with this is that ATSILS resources are already stretched beyond capacity. Calling on ATSILS' field officers to assist other legal services adds to an often-unsustainable work environment at ATSILS.[206] That said, it is apparent that various Legal Aid Commissions are establishing specialised Indigenous Units within their organisations and emulating ATSILS' initiatives such as the field officer/court support officer roles to bridge the cultural divide. There is danger inherent in this development however – such initiatives might redirect funding away from ATSILS as politicians, ignorant of the important and complex roles played by ATSILS, begin to question whether they are a needed service in their current form, if at all.

Cunneen and Schwartz have supported ATSILS' participation in working with the Indigenous community across the justice landscape as it maintains the principle that self-determination represents the best position from which to address questions of Aboriginal law.[207] They argue that identifying whether Aboriginal law is customary or not is not the most important issue here. What matters is respecting Indigenous powers to negotiate and allowing Indigenous people the right –within boundaries established by internationally recognised standards of human rights– to establish their own systems of justice.[208] Co-operative initiatives between Indigenous and non-Indigenous organisations represent decolonisation of justice, as they avoid the risk of assimilation by operating between Indigenous and non-Indigenous structures.[209]

There has been one loud critic of the ATSILS – the former Director of the NSW Bureau of Crime Statistics and Research, Don Weatherburn.[210] In his investigation of the contributing factors to, and the possible paths out of, rising rates of imprisonment for Indigenous Australians, Weatherburn dismissed the importance of ATSILS' legal

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Indigenous People in New South Wales: Final Report' (Research Report, University of New South Wales, 2008).

206 Melanie Schwartz, 'Indigenous People and Access to Justice in Civil and Family Law', in Asher Flynn and Jacqueline Hodgson (eds*) Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (Bloomsbury Publishing, 2017) 278.

207 Chris Cunneen and Melanie Schwartz 'Customary Law, Human Rights and International Law: Some Conceptual Issues' (Background Paper No 11, Law Reform Commission of Western Australia, 2006) 94.

208 Ibid

209 Harry Blagg provides the following examples of such structures: Circle sentencing courts, Aboriginal or Koori Courts, Aboriginal self-policing initiatives, Elders groups, homelands and outstations: see Blagg (n 41) Chapters 4-7, which cover these discussions.

210 Donald Weatherburn, *Arresting Incarceration – Pathways out of Indigenous Imprisonment* (Report, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2014).

advocacy in challenging the over-representation of Indigenous peoples in Australian prisons. According to Weatherburn (referring to the report of RCIADIC):

> Many of the Commission's recommendations and much of the Keating Government's reform package had very limited, if any, capacity to reduce Indigenous imprisonment. Nineteen per cent of the reform package was devoted to the provision of Aboriginal legal services and to various reforms involving criminal law, custodial arrangements, judicial proceedings and coronial enquiries. Legal representation is doubtless critical in ensuring a defendant's rights are properly protected but there is no reason to believe that lack of legal representation was a major cause of Indigenous over-representation in prison. Nor is there any evidence that the provision of legal aid significantly reduced that over-representation.[211]

Weatherburn's claims were ill-informed, and he relied heavily on *his* data to justify his means. His definition of ATSILS legal advocacy was so narrow that he only examined their work in providing criminal legal representation, neglecting the work that ATSILS also do, not only in criminal law but in the areas of civil and family law. He also failed to reflect on other aspects of ATSILS work in delivering of community legal education, advocating by writing submissions, and appearing at public inquiries to provide their data insights, research expertise, and advice based on their real-life experience of working for justice and representing Indigenous peoples across the country.[212]

Unfortunately, claims like those Weatherburn has made are quickly seized upon by governments and used to the detriment of ATSILS and Indigenous peoples. Indeed, while I was working as Executive Officer of NATSILS, I was frequently called upon to respond to Weatherburn's assertions in public forums, inquiries and draft submissions.[213]

In response to Weatherburn's criticism of ATSILS' impact in the justice space, I, along with Elise Klein and Michael Jones, published a paper which counterclaimed that Weatherburn understated the role of ATSILS.[214] We used this as an opportunity to tell the real story of the role and work that ATSILS does. We proposed five counterfactual scenarios which explored a world without ATSILS. In doing so, we highlighted the diverse roles ATSILS performs by taking into account the countless cross-cultural and socio-economic issues Indigenous peoples face when interacting with the justice

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211 Ibid 37.

212 Klein, Jones and Cubillo (n 1).

213 See: NATSILS 'Submissions of the National Aboriginal and Torres Strait Islander Legal Services 2010-2014' (2015) 17 (August) *Journal of Indigenous Policy*; Eddie Cubillo, 'Tacking Crime the Smart Way' (Speech, Wheeler Centre, 11th September 2014); Eddie Cubillo, 'Justice Reinvestment' (Speech, National CLCs Conference: Walk Together, Talk Together – Joining in Journeys to Healing and Justice, 25 July 2013); Eddie Cubillo, 'Racism in the Justice System' (Speech, Racisms in the New World Order: Realities of Culture, Colour and Identity, James Cook University, 2012); Eddie Cubillo, 'The Magna Carta: What Does its Rights and Guarantees Mean for Aboriginal and Torres Strait Islander Peoples' (Conference Paper, National Access to Justice & Pro Bono Conference, 18-19 June 2015).

214 Klein, Jones and Cubillo (n 1) 11-18.

system. We explained the broader role ATSILS play in community development and in addressing civil and family law needs by not only highlighting the issues but also providing the research, and the data, to support their claims. By providing some form of civil, and family legal representation, ATSILS ensure that some of their clients do not progress into the criminal legal space. Through community education initiatives, ATSILS help Indigenous peoples to access social services that may reduce their vulnerability. Importantly, we also seized the opportunity to point out that the level of funding ATSILS receive constrains their capacity to pursue their broader aspirations to represent Indigenous peoples in criminal and family legal matters as well as in other forms of advocacy.

G5. Resurgence

Taiaiake Alfred and Jeff Corntassel, Canadian First Nations professors, have argued that the way forward for Indigenous peoples is to turn away from non-Indigenous institutions as a means of seeking justice. Instead, they advocate that Indigenous peoples reclaim what colonialism has taken from them, on their own terms. In their words:

> As Indigenous peoples, the way to recovering freedom and power and happiness is clear: it is time for each one of us to make the commitment to transcend colonialism as people, and for us to work together as peoples to become forces of Indigenous truth against the lie of colonialism. We do not need to wait for the colonizer to provide us with money or to validate our vision of a free future; we only need to start to use our Indigenous languages to frame our thoughts, the ethical framework of our philosophies to make decisions and to use our laws and institutions to govern ourselves.[215]

A similar idea has been expressed by Mohawk scholar, Audra Simpson, who writes about the political concept of Indigenous refusal. Simpson contrasts the politics of Indigenous refusal with the project of recognition, which she sees as a way of drawing Indigenous peoples further into settler or white society. Instead, Simpson describes refusal as a political and ethnic stance that stands in stark contrast to the desire to have one's distinctiveness as a culture, as a people, recognised. Refusal comes with the requirement of having one's political sovereignty acknowledged and upheld. Alongside, it demands that we question the legitimacy of those usually in the position of 'recognizing'. What is their authority to do so? Where does this authority come from? Who are they to do so?[216] Both Simpson's and Alfred and Corntassel's ideas fit within a model of "indigenous resurgence" that is dedicated to recasting Indigenous peoples in terms that are authentic and meaningful. As Alfred explains, indigenous resurgence means

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[215] Taiaiake Alfred and Jeff Corntassel, 'Being Indigenous: Resurgences against Contemporary Colonialism' (2005) 40(4) *Government and Opposition* 597, 614.

[216] Audra Simpson, 'The Ruse of Consent and the Anatomy of 'Refusal': Cases from Indigenous North America and Australia' (2017) 20(1) *Postcolonial Studies* 18, 18-33.

> regenerating and organising a radical political consciousness, reoccupying land and gaining restitution, protecting the natural environment, and to restoring the Nation-to-Nation relationship between Indigenous nations and Settlers.[217]

There are so many unanswered questions on the predicament of Indigenous peoples in Australia but particularly in the justice sector. Is the justice sector the last bastion of imperial values when dealing with Indigenous peoples and their concerns? Are ATSILS able to self-determine in this environment or is this only achievable by turning away from Government funding, as Alfred and Corntassel argue? Or, as Simpson depicts, can ATSILS have a political and ethnic stance that stands in stark contrast to the desire to have one's distinctiveness as a culture, as a people, recognised? Can they deliver a service more aligned to Indigenous autonomy following decades of being maligned by Government and operating on piecemeal funding?

As important as they are, ATSILS are reliant on government funds to combat the ever-increasing statistics of our people participating in the justice system and being incarcerated at the highest rates in the world.[218] It is difficult for ATSILS not to accept government funding as there are huge stakes for Indigenous peoples. Such stakes include liberty, child removal (the number of Indigenous children in out-of-home care has doubled in the decade since the 2008 apology to the stolen generations, according to figures released by the Productivity Commission),[219] and life.[220] From my experience of working in ATSILS, I am unsure if self-determination in its truest sense is possible and the main reason that I hold such doubt derives from the ATSILS' reliance on government funding. Currently it receives this funding as a contracted service provider, and on this basis that it is more likely to adopt a model of self-management. ATSILS must accept funding on Government terms and conditions which are heavily about financial accountability and not open to flexibility in delivering culturally appropriate services to Indigenous peoples. This will be discussed further in Chapter 4. However, if Australia respected and trusted Indigenous peoples, perhaps accepting money from government could be considered more as compensation. In that case, there would be greater likelihood of a mutual understanding that ATSILS should deliver the service that it self-determines. As mentioned above, successive research confirms that when

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217 Gerald Taiaiake Alfred 'Being and Becoming Indigenous: Resurgence against Contemporary Colonialism' (University of Melbourne Narrm Oration, December 2013) <https://taiaiake.net/2013/12/13/being-and-becoming-indigenous-resurgence-against-contemporary-colonialism/>.

218 See Anthony (n 10).

219 Productivity Commission, *Report on Government Services* (Annual Report, 23 January 2018), Chapter 16 <https://www.pc.gov.au/research/ongoing/report-on-government-services/2018/community-services/child-protection/rogs-2018-partf-chapter16.pdf>; See also Natalie Lewis et al, *Family Matters Report* 2017 (Report, SNAICC, the University of Melbourne, Griffith University, and Save the Children Australia, 2017) <http://www.familymatters.org.au/wp-content/uploads/2017/11/Family-Matters-Report-2017.pdf>.

220 See Australian Institute of Criminology, *Deaths in Custody in Australia: National Deaths in Custody Program 2011–12 and 2012–13* (Monitoring Report, 12 June 2015) <https://aic.gov.au/publications/mr/mr26/appendix>.

Indigenous people have control over their own affairs, there are better outcomes for all.[221]

For the many individuals employed by or on boards of ATSILS, what they do is much more than 'just work'. Working for their peoples is a very personal experience for each Indigenous person. Indigenous peoples have all experienced intergenerational trauma in one way or another. There are so many connections that we are all related in some way to those being captured by these policies. This places a huge weight and responsibility on the ATSILS community to fight at all costs because no one else will fight like ATSILS will. There are recent examples that support the proposition that ATSILS cannot rely on others to fill the void. For example, despite it clearly fitting within their mandate, the Australian Law Council and the Northern Territory Law Society failed to make submissions to the Royal Commission into the Protection and Detention of Children in the Northern Territory.[222] The Australian Law Council has an Indigenous Reference Committee which gives 'advice' on particular submissions and subject matter. As a member of that Committee, I can attest to the fact that in the organisation's hierarchy, the Committee does not have much weight to influence overall directions of decision making, particularly when critical of government policies that affect Indigenous peoples. The Northern Territory Law Society also has an Indigenous reference group. Having a Royal Commission in their own jurisdiction should surely suggest that they lodge some form of evidence to it. The Criminal Lawyers Association of the Northern Territory also refrained from making a written submission. Instead, they relied on members speaking "with other hats on" as a means to an end.

Most of these individuals are happy to have such representation on their curriculum vitae when applying for jobs or being bestowed the status of Senior Counsel, or being appointed to the judiciary for services rendered to 'Indigenous causes'. However, the Royal Commission demonstrated once again that Indigenous peoples let alone Indigenous organisations cannot trust such other entities/forums to look after their interests. Examples such as this one reinforces the need for Indigenous legal services to push for self-determination so that they can continue to represent and deliver services that reach to the central needs of their people.

H. Implications for the research question

There is an absence of scholarship that considers the importance of self-determination for ATSILS in working in the justice space to deliver culturally sensitive service to their communities. There is no literature that contemplates whether ATSILS feel that they are delivering such a service to their clients. Nor is there literature that explores the

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221 See the section in this chapter titled Self-Determination and Indigenous Governance for more information.

222 The Northern Territory Law Society contacted the Royal Commission early on and gave the Commission access to previous briefings relevant to the Terms of Reference through their members website. At the time they said they would consider putting in a formal submission, but they never did: see Commonwealth, *Royal Commission into the Protection and Detention of Children in the Northern Territory*, 'Submissions: Public Submissions' (Web Page, 2017) <https://childdetentionnt.royalcommission.gov.au/submissions/Pages/default.aspx>.

way ATSILS take into account community perspectives to ensure best legal service are delivered, or any that concretely examines whether ATSILS are an expression of self-determination. Because of this lack of scholarly analysis, this thesis seeks to shed light on these questions by reporting on interviews with people who worked at the coalface of legal pluralism by actively participating in ATSILS, at various stages in the organisation's development. Crucially, since I was also involved in this work and these debates at different times during my career as an advocate, as an interviewer and as an Indigenous person I am trusted to have empathy and understand what was being said to me, to understand its significance, and then to use those discussions with respect. With little and no academic literature looking at self-determination in the justice sector, interviews together with my own personal experiences provide the best method of getting as close as possible to hearing the voice of ATSILS.

Internationally, there are only a handful of studies that have considered Indigenous good governance. The research findings of the ICGP however comprehensively confirm that an externally imposed 'one size fits all' approach to addressing Indigenous governance is unlikely to be workable or sustainable, indeed, it may be counter-productive. Organisational structures and representative arrangements need to respond to different local and cultural conditions.[223]

There is also an absence of critique that highlights the unwarranted or unjustified attacks on ATSILS by federal governments of all political persuasions. While there have been numerous reports providing evidence of the worth of the ATSILS over the decades, none has showcased the government's recklessness in ignoring such evidence. Given that statistics clearly show the ongoing overrepresentation of Indigenous peoples in all facets of the justice system, it can be surmised the Australian way of doing things is not working. In light of this, the justice sector and governments need to reassess their approach. They need to look inward and accept some hard truths about themselves along with the political sector of this country.

This thesis undertakes empirical research by interviewing key individuals who have worked for decades within the ATSILS. Their stories provide a narrative that examines and reflects on where ATSILs have come from, what a self-determining ATSILS should look like, and what it might achieve. It is of special importance that this map and narrative is put together by the author, an Indigenous man, who over decades has worked with and alongside the ATSILS in advocating for our rights.

As discussed in the next chapter, where I address my methodological approach, in doing this I centre the experiences and perspectives of current and past ATSILS identities. I ask them what self-determination should look like and encourage them to reflect on whether ATSILS are currently producing a service that meets our people's needs, or whether the original focus of what the ATSILS stand for is still the soul of the organisation. I also ask what they see as the implications for governments and the organisations –involving hard questions around finances and trust – if ATSILS develop a framework based on self-determination as the foundation for change.

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223 Hunt and Smith (n 161).

CHAPTER 3
METHODOLOGY

A. Introduction

As an Indigenous person in this country, you are born into harsh and particularly unique realities. You are made aware by non-Indigenous Australians of your racial 'inferiority'. If you are lucky, your elders may share with you the past atrocities to kin – physical violence and government policies that removed your grandparents from family, country, culture, and language.[1] There is a deep emptiness of feeling, an uncomfortableness with your surroundings, due to that loss of contact with family, country, language and culture. This dispossession has made it difficult for many to fit in and fend for themselves in a world structured against them. Like so many other Indigenous people, I have witnessed broken homes, reliance on extended families, alcoholism, drugs and the perpetration of violence. I have visited correctional facilities and seen a lot of death. And, as far back as I can remember, I have been involved in advocacy.

Aboriginal and Torres Strait Islander Legal Services (ATSILS) were established in recognition of, and in response to, the unique inequities and disadvantages experienced by Aboriginal community members, with the support of the legal profession. These services were and are important to the survival of the fabric of many families and individuals. They politically and institutionally trained a new generation of Aboriginal activists, including me. Most of us (black and white) who have worked in or sat on a board of an ATSILS have an undying love for these organisations. There is a particular romance in ATSILS having been established by our elders to fight the racist system and look after our peoples. The experiences of relying on each other, travelling to remote locations, sharing cultural differences, working for nothing, sleeping in swags or staying in unhospitable buildings forge a bond. The shared belief in fighting the racist world as Indigenous peoples is a badge of honour. The experience made many of us feel that we were part of a larger family. It is impossible to understand without experiencing it first-hand.

As foregrounded in previous chapters, this research explores the question, what does a self-determining Indigenous legal service look like, particularly in relation to ATSILS? A complementary sub-question is, how do current ATSILS compare to those services that were initiated in the 1970s? These questions are critical to examining whether the current ATSILS and their services are, or can be, self-determining; and whether Indigenous peoples – who are the most vulnerable in this country – see these services as meeting their legal, cultural and spiritual needs. I explore these questions from an Indigenous perspective.[2] As such, while I engage with colonial discourses, policies and

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1 My grandmother (my mother's mother) would rarely speak about her experiences. Fortunately for me, her elder sisters (who repeatedly told me to call them "grandmother" as well) gave me an insight into what they endured. My grandmother would not speak language in front of us. We gathered what we could from other relatives. For more discussion of this see Chapter 1.

2 Martin Nakata, 'Anthropological texts and Indigenous Standpoints' (1998) 2 *Australian Aboriginal Studies* 3, 4.

laws, I do so through a lens 'informed by the social worlds imbued with meaning grounded in knowledge of different realities of those from a non-Indigenous person'.[3] To this extent, the methodological approach I have adopted, and which I address in this chapter, is inclusive of critical positions that draw on:

- Indigenous standpoint theory that enables the privileging of the Indigenous voice and specifically the use of my own knowledge as an Indigenous man and long experienced practitioner in the legal field;
- an analysis of Australian laws and policies using a decolonising lens;
- a textual analysis of international standards of self-determination;
- interviews based upon a storytelling methodology that situates the Indigenous standpoint approach; and
- a comparative case study of Indigenous participation in policy development in the health and justice sectors to highlight the specificities of the colonial context in which ATSILS operate.

A defining feature of the methodology is that collectively the methods will be captured in a framework that in and of itself articulates self-determination. The methodological approach used is significant because it is Indigenous led. It is conceived of, and performed, to accord with a foundational touchstone of decolonisation – that Indigenous peoples must be the central voice in telling our (legal) histories to counter the misinformation and stereotypical representations of Aboriginal and Torres Strait Islander peoples and societies within the dominant, colonial culture.

B. Indigenous Standpoint Theory as a Decolonising Methodology

Indigenous peoples have a justifiable distrust of 'empirical' research: it developed and was informed by the processes of colonisation. Whether cast as 'adventuring', 'travelling' and 'discovering', colonial researchers approached and configured the 'Other' through what they claimed as an 'objective' and 'neutral' gaze.[4] This could not be further from reality. The crossroads where imperialism, knowledge production and research practices intersected resulted in 'regimes of truth' about Indigenous peoples on a global scale.[5] In turn, these imperial regimes became firmly located in academic disciplines. Such disciplinary 'truths' have significantly influenced the laws, policies and the overall "mindset" of the justice system as it relates to, and discriminates against, Indigenous peoples.

As these disciplinary paradigms have become embedded within 'Australian' society, Indigenous peoples have figured as 'primitive', 'nomadic', 'sexually promiscuous', 'illogical', 'superstitious', 'irrational', 'emotive', 'deceitful', 'simple minded', 'violent' and 'uncivilised'.[6] We were perceived as living in a 'state of nature' in opposition to

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3 Aileen Moreton-Robinson, *Talkin' up to the White Women: Indigenous Women and Feminism* (University of Queensland Press, 2000) xvi.

4 Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (Zed Books, 2nd ed, 2012).

5 Ibid 61.

6 See: Larissa Behrendt, Chris Cunneen, Terri Liberman and Nicole Watson, *Aboriginal and Torres Strait Islander Legal Relations* (Oxford University Press, 2019); Thalia Anthony, *Indigenous People,*

'white civility'.[7] In short, race has been used to structure society and organise people into racist hierarchies, with Indigenous peoples placed at the bottom.[8] Alongside, throughout Australian colonial history, Indigenous peoples have been the *object* (rather than subject) of western research.[9] Knowledge productions about Indigenous worldviews and realities have always been infused by the cultural and race bias of the non-Indigenous observer.[10]

Such 'research through imperial eyes' has oppressed and suppressed Indigenous knowledges and voices from participating in the development of best practice in the legal sector and has allowed this power imbalance to continuously permit the ongoing systemic racism in the justice system of this country, in order to control Indigenous peoples through punitive measures, incarceration and by other means.

Kaurna elder, Uncle Lewis Warritya O'Brien, has discussed the need for Indigenous and non-Indigenous peoples to share the space of Australia legally, politically and historically. As O'Brien laments:

> Ancient and powerful Kaurna called Adelaide city Tandanya, the site of the Red Kangaroo Dreaming. The ignorance of Kaurna culture and its exclusion from the historical record creates obstacles for sharing the current legal and political spaces. Despite the impacts of colonisation and dispossession that forced Kaurna to the margins of the past, we, as Kaurna, have survived. Our Creation stories, our Dreamings, have been passed down to younger generations, through oral and dance traditions, to the present day...while we are forced to speak from the margins of society we resist and struggle for a shared space. This is our history. We're left no choice but to struggle. We struggle to occupy a space where all Australians can live together.[11]

A key part of the struggle O'Brien speaks of is Indigenous peoples engaging in decolonising research and knowledge productions. There has been an important shift in Indigenous research to centre the Indigenous viewpoint or standpoint and by doing

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Crime and Punishment (Routledge, 2013) 27, 33, 39, 67, 164; Harry Blagg, *Crime, Aboriginality and the Decolonisation of Justice* (The Federation Press, 2016); Chris Cunneen, 'Assimilation and the Re-Invention of Barbarism' (2007) 11 *Australian Indigenous Law Review* 42; Chris Cunneen and Juan Tauri, *Indigenous Criminology* (Policy Press, 2016); Irene Watson, 'Aboriginal laws and Colonial Foundation' (2017) 26(4) *Griffith Law Review* 469; Amanda Porter and Chris Cunneen, 'Policing Settler Colonial Societies' in Phillip Birch, Michael Kennedy and Erin Kruger (ed), *Australian Policing: Critical Issues in 21st Century Practice* (Routledge-Cavendish, 1st ed, 2020);.

7 Aileen Moreton-Robinson, 'Imagining the Good Indigenous Citizen: Race War and the Pathology of Patriarchal White Sovereignty' (2009) 15(2) *Cultural Studies Review* 61, 65.

8 Lester-Irabinna Rigney, 'Indigenist Research and Aboriginal Australia', in Nomalungelo Goduka and Julian Kunnie (eds), *Indigenous Peoples' Wisdoms and Power: Affirming Our Knowledges through Narrative* (Ashgate Publishing, 2006) 32-50.

9 Ibid 32.

10 Linda Tuhiwai Smith (n 4) 17-41.

11 Kauwanu Lewis, Warritya O'Brien and Lester-Irabinna Rigney, 'Sharing Space: An Indigenous Approach' in Gus Worby and Lester-Irabinna Rigney (eds) *Sharing Spaces: Indigenous and Non-Indigenous Responses to Story, Country and Rights* (API Network, Australia Research Institute, Curtin University of Technology, 2006) 29.

so to turn the academic gaze back upon itself.[12] This tactic effectively changes the status of Indigenous peoples in research from object to subject.[13] For Martin Nakata, future research should begin from the Indigenous standpoint and go beyond merely reinforcing anticolonial positions.[14] Nakata simplifies standpoint theory in terms that every Indigenous person can easily relate to by using the analogy of Indigenous humour:

> Indigenous humour reveals the ignorance of outsiders of how we operate in and understand our world – and many a merry laugh we have all had at whitefellas' expense in this regard. In humour, there is scrutiny of ourselves as actors in our world and acknowledgment of that world beyond that is omnipresent and often not coherently logical from our point of view.
>
> …this is why we need a theory that as its first principle can generate accounts of communities of Indigenous people in contested knowledge spaces, that as its second principle affords agency to people, and that as its third principle acknowledges the everyday tensions, complexities and ambiguities as the very conditions that produce the possibilities in the spaces between Indigenous and non-Indigenous positions.[15]

Applying this to my research, I argue that ATSILS and their position within the legal and justice system can only be truly understood by looking from within and gleaning the perspectives of those who have worked within its particular environment over the past 40 years. It is not only the time spent in the space that gives ATSILS the capacity to provide culturally appropriate and informed advocacy for Indigenous peoples. For the many staff and their families who daily live with the detrimental effects of racist policies, inequalities and discriminations, their realities are on par with those to whom they deliver the services. There is an inter-connectedness between staff and clients: most are survivors of these experiences. Having this underlying knowledge and experience allows first-hand understanding of the issues being faced. It also gives our fellow Indigenous peoples the comfort that ATSILS understands their predicament enough for them to relax and express where the justice system is failing them.

As articulated in the quote above, Nakata sees the cultural interface across the Indigenous and non-Indigenous divide as a space of possibility that can prioritise Indigenous peoples' epistemologies and voices.[16] Non-Indigenous researchers come to the cultural interface Nakata speaks of as outsiders to the Indigenous worlds of experience. On top of this, they are embedded in an academic environment with

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12 Martin Nakata, *Disciplining the Savages: Savaging the Disciplines* (Aboriginal Studies Press, 2007) 217.

13 Ibid.

14 Ibid.

15 Ibid.

16 Deanne Minniecon, Naomi Franks and Maree Heffernan, 'Indigenous research: Three researchers reflect on their experiences at the interface' (2007) 36(S1) *The Australian Journal of Indigenous Education* 24.

traditions and procedures rooted in the privileging of certain forms of knowledge.[17] This 'outsider' experience echoes across the wider legal fraternity: many are unable to deconstruct the colonial structures of the Australian legal system as they are blinded by their privileges of whiteness. Just as the academy is filled with colonialist values, so too is the legal field. These values reinforce colonial, and therefore racist, structures.

Adopting Nakata's political and theoretical enjoinder in the course of this research, I seek to demonstrate the operation of white privilege and how it manifests in 'legal blindness' by countering its logic and its norms through an Indigenous standpoint. My standpoint is informed by strong family links in both the urban and rural areas throughout the Northern Territory. It is shaped by my family's experience of the intergenerational effects of the policy of forced removal of children of mixed descent from their family and country.[18] It has also been framed through my vast practical experience across the law and justice sectors. This experience includes working as a solicitor, a Discrimination Commissioner (in the Northern Territory) and an Executive Officer of the NATSILS. I have worked at all ends of the social justice space, and most recently on the Royal Commission into the Protection and Detention of Children in the Northern Territory. Through this knowledge and experience I can see a system that is continually contradicting itself. Despite the ever-increasing statistics of Indigenous participation in the justice system, I have witnessed – over many years – the lack of funding to provide adequate services across all areas of the justice space. This has continued despite the numerous reviews and enquiries that, firstly, recommend increasing funding to ATSILS, and secondly, recognise this as paramount to abate punitive policy and legislation which continuously and disproportionately targets Indigenous Australians. The Australian justice system, purports that the culture, attitudes, behaviours and the institutions are all engaging to all. However, there appears to be an underlying reluctance to open the doors and work with Indigenous peoples and organisations (such as ATSILS) and respect their points of view or knowledge on what may be in the best interest for their people. I hope that by bringing forth an informed Indigenous view on the realities of the struggle of working and dealing with the justice sector, across the legal and political streams, I can highlight the need for drastic change. This is a critical aspect of my research.

C. Law and Policy Analysis through a Decolonising Lens

As discussed in Chapter 2, colonisation is a form of structural and historical power wielded over the lives of Aboriginal and Torres Strait Islander peoples.[19] Aboriginal and

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17 Ibid 30.

18 See discussion in Chapter 1 of my maternal and paternal grandparents experienced the *Northern Territory Aboriginals Ordinance 1918* (Cth). This enabled the Chief Protector to assume 'the care, custody or control of any Aboriginal or half caste if in his opinion it is necessary or desirable in the interests of the Aboriginal or half caste for him to do so'. The *Aborigines Ordinance 1918* (Cth) extended the Chief Protector's control even further. My aunt, Lorna Cubillo (now deceased), was a claimant in *Cubillo v Commonwealth* (2000) FCA 1084. My aunt and her co-claimant, Peter Gunner (now deceased), alleged they were forcibly taken as part Aboriginal children from their families and sent to institutions.

19 See, Eve Tuck and Ruben Gaztambide-Fernandez, 'Curriculum, Replacement and Settler Futurity' (2003) 29(1) *Journal of Curriculum Theorizing* 72, 73; Patrick Wolfe, 'Settler Colonialism and the Elimination of the Native' (2006) 8(4) *Journal of Genocide Research* 387, 388.

Torres Strait Islander peoples, through their experiences historically and now, have a clear understanding of how this power works. To critically examine this power, as it has actualised in the policies and practices of government, is to commence the process of decolonisation. Linda Tuhiwai Smith has discussed colonial discipline (power) meted out through exclusion, marginalisation and the denial of Indigenous ways of knowing.[20] However, another way colonial discipline was enforced was through enclosure.[21] This had a significant impact on Aboriginal and Torres Strait Islander peoples: families were separated, removed from country and 'enclosed' on reserves or missions. Its legacy continues through the loss of identity as generations have been dispossessed of land, culture, language and the nurturing of their families and communities.

Statistics clearly demonstrate that the criminal justice system continues to fail Aboriginal and Torres Strait Islander peoples with increasingly dire consequences. The issue is most clearly illustrated in Australian Bureau of Statistics data on Indigenous incarceration rates (ie, the proportion of all prisoners who are Aboriginal and Torres Strait Islanders). In 1991 the Indigenous incarceration rate was 14.4 percent; in 2015, it was 27.4 percent; and in June 2020 it was 29 percent.[22] Such numbers demonstrate that there is even more need for the services that ATSILS provides to ensure Indigenous legal needs are met, as well as to challenge and advocate against laws that disproportionately affect Indigenous peoples. As a nation, we should be unified in an unwavering commitment to stop the high incarceration rates of Indigenous peoples. An important component of this research is to critically review how key government laws, policies and practices might support rather than undermine this end. In doing so I will highlight the many extant (colonial) laws which continue to show a flagrant disregard for the central premise of the rule of law – that the law must be applied equally so that no one is above the law (including government).

To set the scene in the legal system, we need to look to the founding document of Australia, known as the *Australian Constitution* ('*Constitution'*).[23] The *Constitution* ignores Indigenous peoples' prior occupation of Australia. The main provisions at the time of its inception that explicitly addressed Indigenous peoples can be found in sections 25,[24] 51(xxvi);[25] and 127.[26] The extent to which Indigenous peoples were included in these sections was premised on reinforcing our exclusion from participation, at all levels, as citizens and humans. Aboriginal and Torres Strait Islander

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20 Smith (n 4) 212-213.

21 Michel Foucault, *Discipline and Punish: The Birth of the Prisons,* tr. A. Sheridan (Penguin, 1977) 137.

22 See Australian Bureau of Statistics, *Prisoners in Australia*, *2015* (Catalogue No 4517.0, 11 December 2015); Australian Bureau of Statistics, *Prisoners in Australia 2020* (3 December 2020).

23 *Commonwealth of Australia Constitution Act 1900* (Cth).

24 See *Australian Constitution*, s 25, the section heading of which reads 'Provision as to races disqualified from voting'.

25 Prior to its amendment by the *Constitution Alteration (Aboriginals) Act 1967* (Cth), s51 (xxvi) which sets out the legislative powers of the Parliament, originally provided that the powers extended over 'the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws'.

26 Section 127 of the *Australian Constitution* was the final section within Chapter VII (dealing with "miscellaneous matters"). It mandated the exclusion of Aboriginal Australians from population counts conducted for electoral purposes. This section was repealed by the *Constitution Alteration (Aboriginals) Act 1967* (Cth).

peoples were denied citizenship and therefore not a part of 'the people', constitutionally. This was the legal foundation upon which Aboriginal peoples were part of the Commonwealth of Australia from 1 January 1901. It is unsurprising that laws flowing from it are still tainted with much of its origins – Australian laws flow from, and act as agents for, its expression of colonisation.

In 1992, the High Court decision in the case of *Mabo v Queensland [No.2]* ('*Mabo [No.2]*') [27] overturned the foundational doctrine of *terra nullius* ('empty land') as the basis of British sovereignty over Australia. It was found that the law recognised that Indigenous peoples had a pre-existing and, in some cases, continuing proprietary interest in the land.[28] The Court called this interest 'native title'. Unfortunately, a majority of the Court also confirmed that sovereignty over Australia had been acquired by the Crown through settlement in a way that legally 'extinguished' a range of entitlements held by Indigenous peoples. This effectively denied recognition of our laws in the settled areas of this country.[29] And so, to this day, we still have contention about the application of two systems of law in Australia.

Many thousands of Indigenous families, like my own, have experienced the intergenerational effects of the policy of forced removal of children of mixed descent from their family and country. The constant hurt from this experience is everywhere, but in some minute way, this is compensated for in my family as it has had the opportunity to reconnect to country, culture and language – shaped by the provisions of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). That said, owning land alone does not provide self-determination, as we can see from the many communities in the Northern Territory whose inhabitants are some of the poorest, sickest and most incarcerated in the country. Indigenous Territorians have been continuously subjected to punitive policies that reinforce that our people are considered inferior. Further, contrasting this statutory initiative are many cancelling measures such as:

- those taken through the suspension of the *Racial Discrimination Act 1975* (Cth) ('*RDA*') to enable the *Northern Territory National Emergency Response Act 2007* (Cth) (known as 'the Intervention');
- the amendment of the *Native Title Act 1993* (Cth);
- the enactment of the *Hindmarsh Island Bridge Act 1997* (Cth); and
- the introduction of recent policies such as the Indigenous Advancement Strategy.[30]

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27 *Mabo v Queensland* (No 2) (1992) 175 CLR 1 ('Mabo (No 2)').

28 Ibid 49-50 (Brennan J).

29 Ibid 58.

30 The 'Indigenous Advancement Strategy' saw 27 programs – consisting of 150 administered activities from eight separate entities – moved to the Department of the Prime Minister and Cabinet, with a four-year commitment of $4.8bn. It was announced that this would save $534.4 million over five years: see Australian National Audit Office (ANAO), *The Auditor-General ANAO Report* No.35 2016-2017; Department of Prime Minister and Cabinet, *Performance Audit – Indigenous Advancement Strategy* (Commonwealth of Australia, 2017).

Underlying these laws and policies are racist stereotypes, values and beliefs about Indigenous peoples. These are also embedded in administrative structures and decision-making processes, resulting in systemic violations of human rights. One contemporary example can be found in the Cashless Welfare Card (CWC). It is supposedly 'aimed at finding an effective tool for supporting disadvantaged communities to reduce the consumption and effects of drugs, alcohol and gambling that impact on the health and wellbeing of communities, families and children.'[31] The CWC[32] has been disproportionately rolled out in predominantly Indigenous populated areas: 78% of those subject to the CWC policy identify as Aboriginal and Torres Strait Islander people.[33] In placing a decolonising lens on the underlying stereotypes, we must ask the question, whose interests are being served through their propagation in law and policy? And it is through asking this, that we can begin to analyse the structural discrimination/racism/ableism that continues to impede self-determination.

As an Indigenous man from the Northern Territory, I personally have witnessed the direct impact of Parliament's suspension of the *RDA* on my elders, family and friends who had already experienced the intergenerational impact of forced removal. My experience also includes witnessing its effects while being the Discrimination Commissioner of the Northern Territory. The *RDA* has been suspended three times:

1. To amend the *Native Title Act 1993 (Cth)* (which removed existing guarantees of rights to Indigenous peoples);
2. When enacting the *Hindmarsh Island Bridge Act 1997* (Cth); and
3. To enable the *Northern Territory National Emergency Response Act 2007* (Cth) ('the Intervention').

The numerous suspensions of the *RDA* highlight that equality and fairness before the law remain a problem in this country for Indigenous Australians. Indigenous Australians are the only group who have had the *RDA* suspended to enact legislation to explicitly discriminate against them. I note here that *Kartinyeri v Commonwealth* (also known as the *Hindmarsh Island Bridge Case*) decided that the Australian Constitution authorises the Commonwealth to pass racially discriminatory legislation.[34] However, suspending the *RDA* under s51 (xxvi) of the Constitution – to allow *the Intervention* – took the backward step of suspending essential anti-discrimination laws in this country. This allowed the Commonwealth to enact laws and policies which

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31 Janet Hunt, 'The Cashless Debit Card Trial Evaluation: A Short Review' (Topical Issue Paper No. 1/2017, Centre for Aboriginal Economic Policy Research, Australian National University, 2017) 6 <http://caepr.cass.anu.edu.au/research/publications/cashless-debit-card-trial-evaluation-short-review>.

32 The evaluation of the CWC trials by Orima Research has been criticised by academics for poor research practices and lacking rigour. See Department of Social Services, *Cashless Debit Card Trial Evaluation* (2017) (Report, ORIMA Research) <https://www.dss.gov.au/families-and-children/programs-services/welfare-quarantining/cashless-debit-card/cashless-debit-card-evaluation>. For examples of the criticism levelled against ORIMA's evaluation see ACOSS (n 33); Hunt (n 31).

33 Australia Council of Social Services (ACOSS), 'Cashless Debit Card Briefing Note' (February 2018) <https://www.acoss.org.au/wp-content/uploads/2018/02/010218-Cashless-Debit-Card-Briefing-Note_ACOSS.pdf>.

34 *Hindmarsh Island Bridge Case* (1998) 195 CLR 337.

discriminate against people who are Aboriginal because they are Aboriginal. By doing so, this legitimised the views of those who believe that it is acceptable to treat people adversely because of their ('black') race. Even though 'white' is considered the default Australian race, it is Aboriginal and Torres Strait Islander peoples who are thought of as a race in the sense of 'other'. The ability of the government to discriminate against Aboriginal and Torres Strait Islander peoples under constitutional powers is an affront to the rule of law and the right of all to be treated equally under the law. That said, the law has been complicit in some of the worst atrocities committed against Aboriginal and Torres Strait Islander peoples, and those atrocities continue today.

A key focus of this research is to examine select pieces of legislation and policies that appear prima facie as not discriminatory, however disproportionately affect Indigenous peoples, and may thus constitute 'indirect discrimination'. I do so to foreground the importance of having a diverse legal service that is able to meet the ongoing battle against systemic prejudice. An example of such legislation is the 'paperless arrest' laws enacted in the Northern Territory which target people committing minor offences. Another is the Northern Territory's mandatory alcohol treatment scheme. Both have resulted in disproportionate numbers of Aboriginal and Torres Strait Islanders becoming subject to constant surveillance and detention. Paperless arrest laws allow for people to be detained without a court process and without legal representation, with devastating results. They empower police to lock someone up for four hours for minor offences including making undue noise, swearing in public, or keeping a front yard untidy.[35]A person detained under these powers has no effective opportunity to challenge their detention or to ask a court to release them. [36] In effect, the police become both judge and jury. Such law conflicts with the principle that no person should be deprived of their liberty arbitrarily. It also can have lethal effects. As the Northern Territory Coroner warned, the paperless arrest legislation will result in more Aboriginal deaths in custody.[37] The Coroner called for the legislation to be repealed. ATSILS challenge laws like these in higher courts because of the lack of judicial oversight and because they place too much power in the hands of police.[38]

The best-known inquiry into the legal system in regard to Indigenous peoples is the 30-year-old Royal Commission into Aboriginal Deaths in Custody ('RCIADC'). It made 339 recommendations.[39] The RCIADIC was appointed by the Federal Government in October 1987 to study and report upon the underlying social, cultural and legal issues behind the deaths in custody of Aboriginal and Torres Strait Islander people. At the time, it was reported that 99 Aboriginal and Torres Strait Islander people had died in custody. In its final report, the RCIADIC proposed a framework to reduce the ever-

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35 On-the-spot fines can be issued in the Northern Territory under the *Summary Offences Act 1923* (NT), the *Liquor Act 2019* (NT) and the *Misuse of Drugs Act 1990* (NT). See the *Summary Offences Act 1923* (NT) for further circumstances in which on-the-spot fines can be issued.

36 See *Police Administration Act 1978* (NT) s133 AB, under which police are empowered to arrest individuals for minor offences, hold them for 6 hours, then release with infringement.

37 *Inquest into the Death of Perry Jabanangka Langdon* [2015] NTMC 016.

38 *North Australian Aboriginal Justice Agency Ltd v Northern Territory* [2015] HCA 41.

39 Commonwealth, *Royal Commission into Aboriginal Deaths in Custody* (Final Report, 15 April 1991) <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/>.

growing Indigenous incarceration and over-representation of Indigenous peoples in the justice system. Several of its recommendations pointed to the need to decriminalise public intoxication.[40] Most importantly, it called for arrests to be the sanction of last resort when dealing with Indigenous offenders.[41] In what set the precedent for so many inquiries that followed, the RCIADC's findings of systemic fault lines and recommendations were ignored by governments and not acted on across the sector.

Since the findings from the RCIADC were handed down, levels of incarceration of Aboriginal and Torres Strait Islander peoples have increased at alarming rates, as noted above.[42] Federal and state governments have had knowledge of these unacceptable statistics yet allowed them to grow. This remains a point of concern within Indigenous communities, particularly when the raft of recommendations on Indigenous justice issues has not been implemented.[43] In this research I examine the demand from ATSILS and the wider community for preventative policies/legislation that intervene early against this trend, including the need for justice targets aimed at ending the unacceptably high imprisonment rates of Indigenous Australians.[44] As I do so, I reflect on literature that works with a decolonising framework to solidify notions of justice and recommend best practice for the delivery of such services in the Indigenous space.[45] Colonisation tore apart our nations, made many of us landless, destroyed many of our languages and devastated our spiritualties and unique histories. Alongside, it made us and our organisations, including ATSILS, reliant on colonial governments. As such we need to ask about the extent to which the colonial frameworks, we work with affect our ability to act in our own best interests. Do these underlying stereotypes and beliefs, which continue to shape legislation and policies, impede our progress as a people able to realise our rights?

In this research I explore the immediate realities faced by Aboriginal and Torres Strait Islander peoples, their contemporary treatment in the Australian legal system, and the way the ATSILS can deliver a service to meet the legal needs of their clients. Discrimination continues to be felt across land rights, native title and criminal justice. This research will identify how to achieve just outcomes for Indigenous peoples in the justice sector in Australia. It does so in the context of, and despite, decades of

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40 Ibid, vol 5. See Recommendations 79–86 on the decriminalisation of the offence of public drunkenness and the other offences.

41 Ibid. See Recommendations 87 & 88 on reforms to police policies and alternatives to arrest and Recommendations 89-91 with respect to Bail.

42 See 'Aboriginal and Torres Strait Islander Prisoner Characteristics' in Australian Bureau of Statistics (n 22).

43 The importance of early intervention in particular has repeatedly been highlighted: see eg House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Doing Time – Time for Doing: Indigenous Youth in the Criminal Justice System* (Report, June 2011) 2-5 and Ch. 5; Change the Record Coalition, *Blue Print for Change* (Report, November 2016); PwC et al, *Indigenous Incarceration: Unlock the facts* (Report, May 2017).

44 Change the Record Coalition (n 43).

45 See Harry Blagg, *Crime, Aboriginality and the Decolonisation of Justice* (The Federation Press, 2016), in which Blagg speaks about the effectiveness of Aboriginal place-based strategies. See also Thalia Anthony, *Indigenous People, Crime and Punishment* (Routledge, 2013); Chris Cunneen and Juan Tauri, *Indigenous Criminology* (Policy Press, 2016).

reporting and policymaking on Indigenous engagement with criminal justice systems. All have failed to have a transformative and sustainable effect on improving legal outcomes to complement the frontline work of the ATSILS. Additionally, this research explores the heavy reliance on Federal government funding and the tight financial restrictions faced by ATSILS as an expression of imperialism. Indigenous peoples and their organisations have been assimilated within imperial systems and relationships of power. Such systems have never been neutral or objective, whether originally expressed in tales of exploration, or as they evolved in forms of neo-colonialism.

I also analyse key policies that have impacted ATSILS over the past 40 years. These include policies relating to the funding and tendering of services. However, these also include policies that may at first glance appear irrelevant to ATSILS yet have a huge impact on the ways they are able to deliver their services and represent their peoples. The most significant of these are the policies of forced removal of children and assimilation. Another is the demise of the Aboriginal and Torres Strait Islander Commission (ATSIC). The end of ATSIC in 2005 was the end of Indigenous self-determination as it was at the time. It also marked the end of direct Indigenous input into social policy.

D. Self-Determination

Ultimately this research asks whether self-determination means better outcomes when delivering legal services to Indigenous peoples and what self-determination means for service delivery for Indigenous people through ATSILS. As discussed in Chapter 2, the right to self-determination as it applies to Indigenous peoples is explained in Article 3 of the *United Nations Declaration on the Rights of Indigenous Peoples ('UNDRIP').*[46] The UNDRIP also informs understanding of how other existing rights specifically apply to Aboriginal and Torres Strait Islander peoples. In 2009, its core tenets were acknowledged on behalf of the Federal government by the then Minister for Families, Housing, Community Services and Indigenous Affairs in her speech marking Australia's formal endorsement of the Declaration.[47]

A textual analysis of scholarly literature will include influential instruments at the United Nations on the right to self-determination which provide international standards for Indigenous peoples. This is an important consideration given that recognition of the rights agenda for Indigenous peoples in Australia is more reliant on international human rights standards. This is because there are no internal human rights standards, like a bill of rights, enshrined in the Australian Constitution, and only partial adoption of such standards at the state and territory level (in Victoria and the Australian Capital Territory).

Larissa Behrendt has written of the very few rights that are protected by the Australian Constitution and how the few rights that appear in the text have been interpreted by

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[46] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/Res/61/295 (adopted 13 September 2007) Art. 3.

[47] Jenny Macklin, 'Federal Government Formally Endorses the Declaration on the Rights of Indigenous Peoples' (2009) 7(11) *Indigenous Law Bulletin* 6.

the courts in a minimal manner.[48] To rectify this historic exclusion, Behrendt has advocated for a Bill of Rights which would grant rights and freedoms to everyone. She saw this as a non-contentious way to ensure some Indigenous rights protection. Behrendt further examined the possibility of a Non-Discrimination Clause which could enshrine the notion of non-discrimination in the Constitution. Such a clause would adhere to the principle that affirmative action mechanisms aid in the achievement of non-discrimination.[49]

The general right to self-determination is contained in Article 1 of the *International Covenant on Civil and Political Rights* ('*ICCPR*'),[50] and in Article 1 of the *International Covenant on Economic, Social and Cultural Rights* ('*ICESCR*').[51] The UNDRIP is the most comprehensive instrument detailing the rights of Indigenous peoples in international law and policy.[52] It contains minimum standards for the recognition, protection and promotion of these rights. Both Covenants have been ratified by Australia; and UNDRIP was belatedly endorsed by the Australian Government despite its initial refusal to become a signatory to it.[53] Important questions that this research poses are: What influence have they had for Indigenous peoples and for Indigenous organisations self-determining to deliver appropriate services and deliver better outcomes? Moreover, does Australia satisfy its obligations? This includes whether Australian governments continued arguments satisfy the conditions for derogating from its obligations under the core human rights instruments.

As recently as 2017, the United Nations Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli Corpuz, was scathing in her assessment of Australia's lack of progress on addressing the over-incarceration of Indigenous peoples. She urged the Australian Government to adopt 'solid commitments and a national plan of action to address the incarceration crisis of Aboriginal and Torres Strait Islander peoples as a matter of national priority'.[54] Should it do so, any Government measures will need to be consistent and compliant with international human rights obligations. It would also need to include the targets on justice articulated in the 'Closing the Gap' strategy.[55]

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48 Larissa Behrendt, 'Indigenous Rights and the Australian Constitution – A Litmus Test for Democracy' (Conference Paper, *Constitutions and Human Rights in a Global Age Symposium*, 1–3 December 2001) <https://openresearch-repository.anu.edu.au/bitstream/1885/42068/2/Behrendt.pdf>.

49 Ibid 3.

50 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR'*).

51 *International Covenant on Economic, Social and Cultural Rights,* opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976) ('*ICESCR')*.

52 See *United Nations Declaration on the Rights of Indigenous People*, GA Res 61/295, UN Doc A/Res/61/295 (adopted 13 September 2007) Art. 18 ('*UNDRIP*').

53 Australia ratified the *ICCPR* in 1980 and the *ICESCR* in 1975.

54 Victoria Tauli Corpuz, *Report of the Special Rapporteur on the Rights of Indigenous Peoples on her Visit to Australia*, UN Doc A/HRC/36/46/Add.2 (8 August 2017).

55 'Closing the Gap' is derived from the publication of the *Social Justice Report 2005*, which urged Australian governments to commit to achieving equality for Indigenous people in health and life expectancy within 25 years: see Aboriginal & Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2005* (Report No 3/2005, 22 November 2005). After a huge campaign, the Council of Australian Governments (COAG) pledged in December 2007 to close key gaps. In March

As the Harvard Project on American Indian Economic Development has emphasised, there is a need for greater investigation of experiences of Indigenous Nation Building that take into consideration specific communities' dependencies, poverty or self-reliance, sovereignty and community-based governance.[56] All are important components of self-determination, as Indigenous peoples' movement towards self-sufficiency leads to cultural political renewal. It is already well understood within our communities that when Indigenous peoples make their own decisions about what development approaches to take, they consistently out-perform external decision makers on matters as diverse as governance, natural resource management, economic development, health care, and social service provision. In line with Indigenous Standpoint theory, and the central tenets of self-determination, I interviewed past and present ATSILS stakeholders in an effort to provide their perspectives of what self-determination means to them and their clients. This aspect tests Moreton Robinson's position, discussed in Chapter 2, that Indigenous self-determination has to date been in words only.[57] Will a closer analysis of government processes and practices reveal that self-management, as opposed to self-determination, has occupied centre stage, as Moreton Robinson asserts? Is this the case for ATSILS?

E. Storytelling: Interviews with ATSILS Leaders

Australia has a black history. Part of this history includes both the impacts of settler colonialism and its structural resistance to Indigenous efforts at decolonialisation. Over the twentieth century, the violence perpetrated against Aboriginal peoples, and their struggles against dispossession, were comprehensively written out of mainstream accounts of Australian history.[58] This has been replaced with histories of the frontier, and the funding of legal fictions, which preclude discussion of the near genocidal 'protection regimes' that targeted Indigenous peoples.[59] However as Maori scholar Linda Smith emphasises, the violence of the colonial past remains embedded in Indigenous political discourses: our humour, poetry, music, storytelling, and other common-sense ways of passing on both a narrative of history and an attitude about history.[60] Our lived experiences of imperialism and colonialism contribute another dimension to the ways terms like 'imperialism' can, and should, be understood. These lived experiences inform the values that form the basis for Indigenous regeneration.[61] The experiential knowledge and living histories comprise part of the core teachings that Indigenous families transmit to future generations.[62] The value of telling stories about ourselves, by ourselves, cannot be underestimated.

2008 government and non-government delegates to a National Indigenous Health Equality Summit signed a statement of intent to do so.

56 See Miriam Jorgensen, *Rebuilding Native Nations* (University of Arizona Press, 2007) 24-25.

57 See Aileen Moreton-Robinson, 'Introduction' in Aileen Moreton-Robinson (ed) *Sovereign Subjects: Indigenous Sovereignty Matters* (Allen & Unwin, 2007) 4.

58 Tracey Banivanua Mar, **'**Settler-Colonial Landscapes and Narratives of Possession' (2012) 37/38 *Arena Journal* 176, 177

59 Ibid.

60 Smith (n 4) 20.

61 Ibid, 20-21.

62 Jeff Corntassel, 'Indigenous Storytelling, Truth-telling, and Community Approaches to Reconciliation' (2009) 35 (1) *ESC: English Studies in Canada* 135, 138.

Understanding the value and import of storytelling requires an understanding of country.[63] Aboriginal and Torres Strait Islander peoples consider country as a place of origin, culturally and spiritually.[64] Country encompasses all the beliefs, places, resources, stories, and cultural responsibilities linked with the land to which a person has geographical ties.[65] It should be thought of as something that has sophisticated social, environmental and spiritual connections. This country is tens of thousands of years old and has accumulated immeasurable knowledge and wisdom to share. It teaches the way to survive and live sustainably.[66] As Moreton-Robinson has written, Indigenous peoples believe they have been given to country since the beginning of time by being brought to life through their ancestors.[67] Indigenous peoples consider country as being their first teacher and a conduit of memory. This relationship is not one of ownership and property, as characterised in settler societies.[68] For Indigenous peoples, being able to identify which country you derive from communicates your understanding of not only belonging to country, your cultural stories, and language but also the traumatic past of what colonialism has done to us – we have been dispossessed of lands, our families have been torn apart, our culture and languages lost. This understanding helps to break through walls that would normally not be accessible due to mistrust, and it relays shared or similar lived experiences without anything being said.

As legal scholar Teresa Godwin Phelps says, the ability to speak in one's own voice, to 'correct' false stories, and communicate the 'experience of pain and suffering between people who normally cannot understand each other' occasions forms of remembering which can heal and even actualise a radically new kind of constitutive history of an emerging democracy.[69] Through incorporating paradigms and methods of story-telling, this dissertation aims to give voice to ATSILS and the Indigenous peoples who work within them to speak their truths.

In terms of method, interviews were designed and conducted with former ATSILS board members, staff and lawyers. I asked them about their experiences with the organisation, the reasons ATSILS were established and the services ATSILS provide to ascertain the initial purpose and reality of their self-determination. I also conducted interviews with current staff to compare perspectives and experiences. These interviews provide important first-hand stories and observations of ATSILS' claims to self-determination. As I analyse the interview data, I relate my own personal and professional experiences to corroborate, counter and deepen my understanding and findings in relation to the overarching research questions. Contested knowledges

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63 Aileen Moreton-Robinson, 'Towards an Australian Indigenous Women's Standpoint Theory' (2013) 28(78) *Australian Feminist Studies* 331-347.

64 Ibid.

65 Hilary Whitehouse et al, 'Sea Country: Navigating Indigenous and Colonial Ontologies in Australian Environmental Education' (2014) 20(1) *Environmental Education Research* 56, 56-69.

66 Ibid.

67 Moreton-Robinson (n 63) 337.

68 Eve Tuck, Marcia McKenzie, and Kate McCoy, 'Land Education: Indigenous, Post-Colonial, and Decolonizing Perspectives on Place and Environmental Education Research' (2014) 20(1) *Environmental Education Research* 1, 9.

69 Teresa Godwin Phelps, *Shattered Voices: Language, Violence, and the Work of Truth Commissions* (University of Pennsylvania Press, 2006) 55-56.

arising from the interviews highlight and contrast Indigenous perspectives and those of the sector on the value of a self-determining (cultural) service across the community and judicial system. Importantly, it also spotlights what the pioneers of the ATSILS think of the current state of the institution and the service it delivers.

E1. Designing the Interviews

As discussed above, historical persecution and harassment have meant Indigenous peoples frequently distrust academic researchers and are often unwilling to participate in projects or discuss their views openly. Mindful of this, and working within the methodological frame of story and truth telling mentioned earlier, I adopted a semi-structured interview process which lends itself to the informal way in which we speak together as blackfullas: putting Indigenous peoples at ease, allowing the relationship forming component of the 'talking' to have precedence over the knowledge gaining component of the questions. In some Indigenous cultures, people have words that mean 'let's sit down and talk'. Many Indigenous peoples in Australia refer to this Indigenous style of conversation and storytelling as *yarning*. As Alison Laycock et al have noted, by incorporating yarning within the design of semi-structured interviews, researchers can build 'an informal and relaxed discussion... [it] requires the researcher to develop and build a relationship that is accountable to Indigenous people participating in the research'.[70] This can help to get past initial mistrust, and it purposively provides an Indigenous intersection with the traditional form of interviews, which can seem clinical and fixed.

By utilising this approach, my aim was to broker interview relationships based on trust and give organisations and communities a sense of ownership of the research. In this, I was aided by my experience of more than 20 years working with or sitting on ATSILS boards. This long, and shared, working experience at the coal face, as well as my life experiences, helped me to develop rapport with, and secure trust and respect from participants. It assisted me in getting people to open up, particularly as I asked difficult questions, and it gave me access that would unlikely have been forthcoming otherwise.

These interviews provide a historical recording of those (Indigenous and non-Indigenous) people who set up the initial Aboriginal Legal Services. They provide insight into why they did so and their perceptions of how ATSILS have subsequently evolved, including whether they see these organisations as still standing for the values and purposes they were initially created for. The interviews also explore present day ATSILS employees' perspectives of their organisations; whether they perceive self-determination as important or being realised; and how they see the governance model evolving.

All interviewees were asked to consider and respond to the following questions:

- What is self-determination?

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[70] Alison Laycock et al, *Researching Aboriginal Health: A Practical Guide for Researchers* (The Lowitja Institute, 2011) 51.

- How can a legal service promote the goal of self-determination when the sector and system is not regarded by Indigenous people as Indigenous friendly?
- What is the best way to provide legal services to Indigenous Australians?
- Can there be a true self-determining service within the existing dominant western structure and concept of justice? How does an ATSILS do this?
- What are the benefits of an Indigenous self-determining legal service to the individual, to the legal process, and for legal representation?
- Is a non-Indigenous person able to provide cultural competency? How can non-Indigenous legal organisations provide culturally competent services for Indigenous Australians (generally or in particular areas)? What are the limitations, if any?
- Do governments and the justice sector appreciate cultural and spiritual differences between Indigenous and non-Indigenous peoples? What national standards, commitment, and ethics have been implemented to have the sector work better with Indigenous clients, organisations, etc?
- Have participants experienced intimidation and harassment as they have carried out the roles within ATSILS?

E2. Selection of Interviewees and Ethical Considerations

Fourteen potential interviewees – individuals who had previously worked or currently worked with ATSILS, members of community organisations within the Indigenous justice space, and members of the judiciary – were initially identified and approached. These individuals were selected to represent different ATSILS across Australia, as well as those organisations or courts that more frequently interact with them. The most important criteria for inclusion were that interviewees worked in or help set up the ATSILS, or that they have worked in the sector or with an organisation that interacts with the ATSILS and have the ability to contribute knowledge on the worth and functioning of the ATSILS. I identified 14 as a realistic and workable number of participants given that most were likely to be time poor. Another consideration was the demography of Indigenous peoples, many of whom were likely to be living remotely, have chronic health issues or have passed. After an initial approach, a few declined, citing poor health, community politics, cultural reasons, or lack of time or interest. In other cases, participants suggested the availability of others, whom I subsequently approached.

Ultimately, interviews were conducted with 18 individuals: 3 by phone; 15 in person. Given they belonged to such a small group within the justice space, and many had served as leaders over several decades, preserving participants' anonymity was not possible. As such, all interviewees were asked for, and gave their consent, to be identified by name. All were given the opportunity to review their interview transcripts and my reflections and inclusion of excerpts in this thesis.

Although ethics approval was sought and obtained for this research through the University of Technology Sydney (UTS) Human Research Ethics Committee,[71] conducting these interviews nonetheless raised some concerns for me. Many

[71] Ethics approval number is UTS HREC REF NO. ETH18-2826.

interviewees and their families have spent much of their lives in these organisations; their experiences have been costly personally, and the organisations have a special meaning for them. To ask individuals to review their organisations, and talk to best practice, is hard for anyone. However, to ask such questions of those who have spent their entire life working for a community-controlled organisation and fighting for justice confronted me with particular conflicts arising from cultural obligations. Many interviewees are elders. They deserve respect, and by interviewing them and asking them to reflect on their practice I was deeply aware that it may have seemed as though I was questioning their authority and perhaps even their morals. This relationship also presented a dilemma when writing up the findings or critiquing participant offerings, as it sat uneasily against these cultural obligations: it is a difficult set of obligations to adhere to in a doctorate where there is an expectation that such critique is built into the analysis. I have worked in two worlds for a very long time and have gained experiences and respect from Indigenous and non-Indigenous peoples. Subsequently, at the outset of interviews, I attempted to navigate the tension between my cultural obligations and the academic nature of this research. I did this by foregrounding my respect for the status and authority of the interviewee and explaining that this research was ultimately about trying to understand the best way forward for all, in particular Indigenous peoples requiring legal assistance.

F. Assessment of Limitations

The changing of governments and the lack of willingness to participate made it difficult to get government officials to provide their insights. Additionally, some interviewees were very guarded in their responses due to the roles they held or the structures that they had to continue working with or under, or because they did not want to be seen to be critical of people. I also encountered difficulties with some of interviewees not making themselves available and/or the excessive costs associated with conducting face-to-face interviews with participants located in other states or remote and rural areas. The remoteness also entailed other issues around accessibility due to weather. For example, in the Top End of the Northern Territory the monsoonal ‘wet season’ makes some places unvisitable. Additionally, several participants lived with cognitive issues and many were hard of hearing; they preferred to do face-to-face interviews rather than by phone.

Despite these limitations, the interviews are significant: they are Indigenous led and designed, and they address what self-determination means from a community perspective. This has not been done before. Individuals within different professional communities drew on their personal experiences in answering questions around self-determination. The interviews provide an original and primary source of knowledge from people who have progressed through ATSILS organisations and the justice sector as community members, clients, board members, executive leaders, and employees. The views represented include those of a number of original advocates for the ATSILS, and thus they provide an important historical record of the genesis of ATSILS in Australia.

G. Comparative Case Study

The entrenched effects of colonialism within the legal sector are reflected in the sector's non-formation or tepid attempts at developing national research ethics or cultural and ethical standards/practices when dealing with Indigenous peoples. This is especially highlighted when one compares the extensive work undertaken in other sectors, which has heavily influenced government policy in those spaces.[72] As stated in Chapter 2, while there are 'outposts' of work being done in the justice space, in the main there appears to be little commitment to break deep-rooted colonial values.[73] In Chapters 4, 5 and 6, I undertake a comparative case study of the learnings the justice sector can gather from the health sector's approach to Indigenous peoples and running a community controlled organisation. According to Willig, a case study is not a method per se.[74] Rather, it is an approach that uses many different methods of data collection and analysis to understand the investigated situation. Case studies can be used for social critique, with the intention to reveal or problematise aspects of power relationships or constructions within society.[75] Furthermore, this approach is well suited to develop theory because it incorporates:

- Process tracing that links causes and outcomes;
- Detailed exploration of hypothesised casual mechanisms;
- Development and testing of historical explanations;
- Understanding the sensitivity of concepts to context; and
- Formation of new hypotheses and new questions to study, sparked by deviant cases.[76]

It is for these reasons that I adopted a comparative case study approach in my efforts to understand and trace how the structures of settler colonialism play (and played) across both the justice and health sectors. In Australia, the health sector leads the way in developing and supporting cultural standards/practices, and in building relationships with Indigenous peoples across the sector and government. Indigenous organisations are at the table, unlike the justice space. This comparative study particularly examined

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72 See health sector example: Aboriginal and Torres Strait Islander Research Agenda Working Group of the National Health and Medical Research Council (NHMRC), 'The NHMRC Road Map: A Strategic Framework for Improving Aboriginal and Torres Strait Islander Health through Research' (2003) <http://www.nhmrc.gov.au/publications/synopses/_files/r28.pdf>; Australian Human Rights Commission, 'Close the Gap: Indigenous Health Equality Summit Statement of Intent' (20 March 2008) <https://www.humanrights.gov.au/publications/close-gap-indigenous-health-equality-summit-statement-intent>.

73 It was disturbing that at the recent *Royal Commission into the Protection and Detention of Children in the Northern Territory*, there was no submission contributed by the Law Council of Australia, the Northern Territory Law Society or the Criminal Lawyers Association of the Northern Territory. But the Royal Australasian College of Surgeons thought it warranted them to put a submission into the Royal Commission: Royal Australian College of Surgeons, Submission, *Royal Commission into the Protection Detention of Children in the Northern Territory (*4 November 2016) https://webarchive.nla.gov.au/awa/20180615090332/https://childdetentionnt.royalcommission.gov.au/submissions/Documents/submissions/Royal-Australasian-College-Surgeons.pdf

74 Carla Willig, *Introducing Qualitative Research in Psychology* (McGraw-Hill Education, 2008).

75 John O'Toole and David Beckett, *Educational Research: Creative Thinking and Doing* (Oxford University Press, 2013).

76 Alexander George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (The MIT Press, 2005).

the campaign to 'Close the Gap' as it operates across both justice and health domains. In the health space, this campaign has provided a vehicle for better health outcomes for Indigenous peoples, as well as develop Indigenous inclusion with government policy building and better practices, ethics and standards.[77] Ultimately, the federal government committed to improving the health and wellbeing of Aboriginal and Torres Strait Islander peoples.[78] The Council of Australian Governments (COAG) 'Closing the Gap Strategy' was developed by Australian governments following their signing of the 'Close the Gap Statement of Intent' from March 2008 onwards.[79] The 'Close the Gap Statement of Intent' is, first, a contract between Australian governments and Aboriginal and Torres Strait Islander peoples. Second, it applies a human-rights approach to a health-based blueprint for achieving health equality, with six ambitious targets to close the gap between Indigenous and non-Indigenous peoples. In this thesis, this is referred to as the 'close the gap approach'.[80]

These targets were agreed with all states and territories through COAG. As part of this framework, they provided unprecedented levels of investment, underpinned by a series of Aboriginal and Torres Strait Islander-specific and mainstream National Partnership Agreements between the Australian, state and territory governments. In 2018, the COAG Health Council (CHC) members met with Indigenous health leaders at an Aboriginal and Torres Strait Islander Health Roundtable. There, state and territory Ministers acknowledged the breadth and depth of the Indigenous health knowledge, experience and leadership represented at that forum, as well as the proven record of Aboriginal-controlled health organisations in improving the health and wellbeing of Indigenous Australians.[81]

In contrast, Aboriginal and Torres Strait Islander peoples' over-representation in the criminal justice system and their inability to access justice is still a national crisis. As noted above, Indigenous Australians constitute 29 percent of Australia's prison population while constituting just 3 percent of the Australian population.[82] The current cost of Indigenous incarceration is $7.9 billion and growing,[83] and there are also well-established downstream consequences of imprisonment affecting future employment prospects, families and communities.[84] These have inestimable social and economic

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77 See Tom Calma, 'Indigenous Health Leaders Helped Give Us a Plan to Close the Gap, and We Must Back It' *The Conversation* (Online 13 February 2016) <https://theconversation.com/indigenous-health-leaders-helped-give-us-a-plan-to-close-the-gap-and-we-must-back-it-54480>.

78 Australian Government Department of Health, 'National Aboriginal and Torres Strait Islander Health Plan: 2013-2023' (2013).

79 Australian Human Rights Commission, 'Close the Gap: Indigenous Health Campaign' (Web Page, 2020) <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/close-gap-10-year-review>.

80 Australian Human Rights Commission, 'Close the Gap: Indigenous Health Campaign' (Web Page, 2020) <https://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/projects/close-gap-indigenous-health>.

81 COAG Health Council, 'Indigenous Roundtable Communiqué' (Web Page 2018) <https://www.coaghealthcouncil.gov.au/Portals/0/CHC%20Indigenous%20Roundtable%20Communique_010818.pdf>.

82 Australian Bureau of Statistics, *Prisoners in Australia, 2020* (Catalogue No 4517.0, 3 December 2020).

83 PwC et al (n 43) 27-33.

84 Ibid.

costs for the broader community and increase the risk of recidivism. Numerous reports have identified that the provision of adequate and accessible legal services for Aboriginal and Torres Strait Islander peoples in the areas of civil and family law will assist in reducing the level of over-representation in the justice system.[85] Notwithstanding, ATSILS and the Aboriginal Family Violence Prevention Legal Services (FVPLS) have faced repeated cuts to their funding.[86]

The 'Change the Record' campaign, as well as the 'Redfern Statement' on Indigenous participation, tries to address some of these concerns.[87] The 'Redfern Statement' comprehensively sets out Aboriginal and Torres Strait Islander expectations and priorities for engagement and progress by Australian governments. It is an Aboriginal and Torres Strait Islander blueprint to address the disadvantage and inequality still besetting their communities today. The 'Redfern Statement' has called for the adoption of justice targets as part of the 'close the gap' framework.[88] Currently the Safer Communities Building Block of the COAG 'Closing the Gap Strategy' is the only area that is not accompanied by any specific targets. This failure has meant that the root causes of high imprisonment and violence rates, including social determinants such as poverty and socio-economic disadvantage, are not being acknowledged or targeted. It also points to the lack of acceptance of Indigenous self-determination within the justice space.

This comparative study explores why ATSILS (in representing Indigenous views) are not at the table with government, influencing policy in their sector, and why there are no analogous forums or bodies to highlight and close the 'justice' gaps. In the health sector, COAG's focus has been placed on First Nations health, with Indigenous participation in developing health policy foregrounded through the involvement of an Indigenous Health Minister in all meetings moving forward.[89] The COAG Health Ministers' forum has also endorsed the creation of an Aboriginal-led Workforce Plan, with the aim of increasing the number of Aboriginal and Torres Strait Islander peoples working in the sector, while ensuring more professionals remain on Country. Through comparative critique, this research asks why such government investment and

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85 For articles that highlight the civil and family law issues for Indigenous people see: Melanie Schwartz and Chris Cunneen, 'From Crisis to Crime: The Escalation of Civil and Family Law Issues into Criminal Matters in Aboriginal Communities in NSW' (2009) 7(15) *Indigenous Law Bulletin* 18; Fiona Allison et al (2012) *Indigenous Legal Needs Project: NT Report*, Cairns Institute, JCU <https://www.jcu.edu.au/__data/assets/pdf_file/0014/122126/jcu_113496.pdf>.

86 See Jaan Murphy and Michele Brennan, 'Budget Review 2017–18 Index: Legal Aid and Legal Assistance Services' (Research Paper, 2016-17, Parliamentary Library, Parliament of Australia, 9 May 2017) 43, Table 3. For a detailed discussion of the history of these funding cuts and their impact on ATSILS see Chapter Four.

87 See Change the Record (n 43); and Redfern Statement Alliance, *Redfern Statement* (14 February 2017) <https://www.reconciliation.org.au/wp-content/uploads/2017/11/The-Redfern-Statement.pdf>. The members of the Redfern Statement Alliance, led by the National Congress of Australia's First People, presented the Redfern Statement to Prime Minister Malcolm Turnbull at Parliament House.

88 *The Redfern Statement* (n 87).

89 Ken Wyatt was appointed Minister for Indigenous Health on 24 January 2017, a position he held until 29 May 2019, when he became Minister for Indigenous Australians: see 'Hon Ken Wyatt AM, MP', *Parliament of Australia,* (Web Page) <https://www.aph.gov.au/Senators_and_Members/Parliamentarian?MPID=M3A>.

apparent respect for Indigenous expertise and leadership is not applied across all sectors. In doing so, it highlights important aspects of self-determination aspirations and related accountability mechanisms. In turn, it reflects on the adequacy of system design and function and its intersection with Indigenous Australians within the health sector. How Indigenous participation was established and how it has influenced change in health are key considerations for Indigenous self-determination in the justice space.

H. Conclusion

As we might gather from the ever-worsening statistics of Indigenous peoples' participation in the justice system in this country, and as the analysis in this thesis will demonstrate, a service specifically for Indigenous peoples is required. We hear from all levels of the legal fraternity, in submissions to inquiries and in media releases, that they too value the service ATSILS provide to their people and recognise that it would have dramatic negative effect across the sector if they were to no longer exist.[90] However, words are just words. Keeping the status quo means failing to meet the growing legal needs of Indigenous peoples across this country. The ongoing willful blindness by governments to the fact that there is an endemic crisis of Indigenous men, women and children filling jails and filtering through all other parts of the justice system reinforces the systemic racism and power relationship inequalities that I believe are embedded in the subconscious of this country. This state of affairs has eventuated from the dispossession and colonial discourse around justice for Indigenous peoples. This research is intended to contribute to new ways of thinking that can help move us through the current impasse.

This research values the role of a 'self-determining' ATSILS in the provision of Indigenous legal services, and it does so from an Indigenous perspective. This is a key aspect of my methodological approach. In explaining self-determination, the research is seeking to understand what 'self-determination' *means* to ATSILS, what it might involve, and the different methods for placing 'value' on a service delivery to Indigenous peoples, all in Indigenous terms. It is structured around a self-analysis of ATSILS own historical and contemporary perspective of what self-determination means to ATSILS. It asks key stakeholders what they see is the importance of ATSILS in combatting the issues facing Indigenous peoples. It asks for their thoughts on whether anyone else could provide a better service. And it asks them to consider those elements that make their model successful and if there is more to consider or improve. In the process, the research assesses ATSILS' claim that they produce different and

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90 See Joanna Crothers, 'NT Chief Justice Trevor Riley Blasts Cuts to Legal Aid Services as a 'Blow to Heart' of Justice System' *ABC News* (online, 6 February 2015) <https://www.abc.net.au/news/2015-02-06/nt-chief-justice-trevor-riley-blasts-cuts-to-legal-aid-services/6074702>; Carolyn Bond, 'Funding cut for Aboriginal and Torres Strait Islander legal services should be reconsidered' *Human Rights Law Centre*, (Blog Post, October 17, 2013) <https://www.hrlc.org.au/news/funding-cut-for-aboriginal-and-torres-strait-islander-legal-services-should-be-reconsidered>.

more competent advocacy for Indigenous peoples than other legal service providers.[91] Throughout, I examine the particular skills and strengths of ATSILS in meeting the complex legal and other needs of Aboriginal and Torres Strait Islander peoples with a particular reference to demonstrations of cultural worthiness.

By premising this research on the important place of ATSILS in the efforts towards Indigenous legal justice, I attempt to expose what would be lost if these services were not provided (the true cost of not providing these services). As I do so, I am mindful of the demise of the former Aboriginal and Torres Strait Islander Commission (ATSIC), which, prior to its dismantling, was highly criticised by all and sundry, including Indigenous peoples. However, in ATSIC's absence most now recognise the importance of the role it played. Even the former Indigenous Affairs Minister of the time, Amanda Vanstone, recently admitting it was 'probably a mistake' to dismantle ATSIC in its entirety in 2005.[92]

The significance of ATSILS in the legal landscape is, however, only part of the picture. It is critical for this research to examine non-Indigenous services as providers of legal assistance to, and advocacy for, Aboriginal and Torres Strait Islander communities in order to delve into the deep complexities to address the research questions. Rigorous evaluation is required to improve access to quality data and add to the existing knowledge base of initiatives that have the potential to reduce the rates of Indigenous incarceration. In unpacking this complexity, this research will provide recommendations based on the evidence and, without being prejudicial, point to strategies for the systemic decolonisation of mainstream legal services and the strengthening of structures for self-determination.

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91 See, eg, the NATSILS submissions that purport their expertise: *Journal of Indigenous Policy* - Issue 17, 'Submissions of the National Aboriginal and Torres Strait Islander Legal Services 2010-2014' (2015) (August).

92 Stephen Fitzpatrick, 'Dismantling ATSIC Probably a Mistake, Says Amanda Vanstone, *The Australian* (online, 1 August 2018) <www.theaustralian.com.au%2Fnation%2Fdismantling-atsic-probably-a-mistake-says-amanda-vanstone%2Fnews-story%2F8637b58bd217f610b71477f83cbdd90a&usg=AOvVaw00FyoNIRqV7itOv9gZ-onW> .

CHAPTER 4
THE ROLE OF, AND NEED FOR, ABORIGINAL AND TORRES STRAIT ISLANDER LEGAL SERVICES

A. Introduction

This chapter examines the proud history of ATSILS, the community recognising the systemic and institutional racism surrounding the daily lives of their people and the mostly brutal treatment from the constabulary. The impediments and the ongoing funding concerns that ATSILS face when delivering their services are detailed and analysed. Throughout, I provide empirical evidence of these challenges through presenting and analysing interviews with key players in ATSILS' establishment and contemporary operations. The impediments explored include the continued imposition of punitive legislation at state and federal levels; the destabilising and styming impact of funding uncertainty and declining funding; the continuing impact of settler colonial structures and logic that are subconsciously embedded across the justice field; and the missed opportunities to progress positive reforms due to government distrust/dismissal of ATSILS expertise and the deliberate steps taken to limit the advocacy role that ATSILS can play.

Although governments (commonwealth and state) insist their legislation – often designed to pursue populist policies such as those directed to being 'tough on crime' and 'welfare reform'– do not discriminate, research clearly shows that the most disadvantaged populations across Australia, especially Indigenous peoples, are more likely to be adversely affected.[1] Governments have consistently ignored the many recommendations from independent inquiries, inquests and Royal Commissions (usually government initiated) to increase funding to match the ever-increasing numbers of Indigenous peoples captured by these policies, incarcerated or removed from family homes.

As Nigel Browne highlighted when interviewed, these funding cuts are demoralising and destabilising:

> I don't think there's ever adequate funding from year to year. When you throw in uncertainty about future funding [that] puts stress on people, sometimes I think rather unduly, because you'll have someone who's got 20 files on the go and they're not sure whether they're going to be employed two months from now. I mean in such high stress, high burnout roles, you really don't need that sort of

[1] See, eg, Harry Blagg et al, *Systemic Racism as a Factor in the Overrepresentation of Aboriginal People in the Victorian Criminal Justice System* (Victorian Equal Opportunity Commissioner of Victoria and the Crime Research Centre in Western Australia, 2005); Chris Cunneen, 'Racism, Discrimination and the Over-Representation of Indigenous People in the Criminal Justice system: Some Conceptual and Explanatory Issues' (2005) 17 *Current Issues Criminal Justice*, 329.

> uncertainty… generally speaking I don't think they're funded adequately at all.[2]

John Mackenzie echoed these sentiments:

> [T]he incredible effect of decades long of starving them of proper funding to be able to do their job, they've had to so narrow their services that they're ending up with almost just employing lawyers and people to do the admin and the secretarial work, and not much more.[3]

As will be addressed in this chapter, the declining funding greatly inhibits the ability of ATSILS to meet the increased demand for provision of legal advice to clients caught up in the judicial system.[4] It also stymies their capacity to work proactively towards systemic change. The withdrawal of funding that ATSILS has faced over the years has been accompanied by continuous opposition from government to ATSILS providing advocacy beyond court representation. Such governmental attitudes negate the fact that ATSILS, with their vast specialist and culturally specific knowledge, coupled with the practical experience they have built up over decades, can assist governments to develop better early intervention and restorative justice processes and programs. There is a plethora of evidence to suggest that such approaches increase community safety and wellbeing, while decreasing crime and rates of incarceration.[5]

ATSILS are a 'preferred' place of employment and are strong employers of Indigenous staff that prioritise their employees' development.[6] Due to the nurturing and encouragement provided at ATSILS, many – like me – go on to become professionals whether it be in law or other fields. There is also evidence that ATSILS services are economically attractive and far less costly to the public than incarceration and removal of children from their families.[7] ATSILS also provide a significant benefit to Government and society through their Community Legal Education (CLE) programs. ATSILS are community-controlled organisations and have a unique ability, built through years of building culturally appropriate practices, rapport, trust and networks, to consult with and inform the Indigenous community about how the law works and about the regular changes to legislation and policy.

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2 Interview with Nigel Browne (Eddie Cubillo, Darwin, 12 August 2019). Nigel is a Larrakia man and was formerly Crown Prosecutor in the Northern Territory.

3 Interview with John McKenzie (Eddie Cubillo, Sydney, 11 June 2019). John was formerly the Principal Legal Officer of ATSILS NSW. He is currently the NSW Legal Services Commissioner.

4 As discussed in Chapter 3, Australian Bureau of Statistics data show that Indigenous incarceration rates have increased steadily from 14% in 1991 to 29% in 2020.

5 See Law Council of Australia, Submission 97 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (22 March 2013) 6; Thalia Anthony and Will Crawford, 'Northern Territory Indigenous Community Sentencing Mechanisms: An Order for Substantive Equality' (2013/2014) 17(2) *Australian Indigenous Law Review* 79.

6 See Appendix (A) ATSILS Employment Stats provided by each ATSILS 2018; ABS, ATSI Population (2016 census)

7 Pip Martin, 'Glimmer of Hope in a Broken Child Protection System' (2015) 8 *Indigenous Law Bulletin* 16; PwC et al, *Indigenous Incarceration: Unlock the facts* (Report, May 2017).

It is hoped that by highlighting the impediments that ATSILS face in their work, this chapter may contribute to a better understanding – by Government, ATSILS and the sector – of the settler colonial structures and logic that are subconsciously embedded across the justice field, which prevent any real change for Indigenous peoples. It is clear that Indigenous communities recognise and reject these mindsets, calling instead for self-determination in the justice sector. One interviewee, Cheryl Axelby, responded that

> Our cultural strengths go unrecognised because of the dominant cultural world view, its colonial historical aspect of dealing with our people in a racial and often harsh and unjust manner, rather than one of a rehabilitative and strengthening and creating positive opportunities for change, to address causal factors such as poverty, intergenerational trauma and health and wellbeing.[8]

As John Boersig (non-Indigenous) CEO of Legal Aid Commission, Australian Capital Territory (ACT) declares:

> Unless people are empowered in our system, they always remain subject to colonial structures and colonial authorities…So for it to really work in terms of self-determination, we – *our culture, the non-Indigenous culture – has to give up power and that has to be ceded to Aboriginal organisations, Aboriginal systems.*[9]

Such realisations should lead to better relationships and hopefully will generate the required understanding of behaviour that is required to have a real influence on how best to approach the endemic crisis of the overrepresentation of Indigenous people at all levels of the justice sector in this country.

B. History of the Establishment of ATSILS

In the years prior to the establishment of Aboriginal and Torres Strait Islander Legal Services (ATSILS), Aboriginal people lined the streets outside the Darwin Police Court to be 'processed'. In Darwin, most Aboriginal defendants in the 1960s and early 1970s were unrepresented. Those that were represented had an income or had "connections" – often through local football or rugby clubs – that provided them access to barristers like John 'Tiger' Lyons[10] or Richard 'Dick' Ward.[11] Most defendants

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8 Interview with Cheryl Axelby (Eddie Cubillo, Adelaide, 10 October 2019). At the time of interview, Cheryl was Chief Executive Officer of the Australian Legal Rights Movement.

9 Interview with John Boersig (Eddie Cubillo, Canberra, 1 August 2019).

10 Lyons was known to have a keen sense of justice. He often represented the less privileged in cases where there was little chance of payment. He later became a judge and was elected as mayor of Darwin in 1958.

11 Ward, originally from Melbourne, moved with his family to Darwin. He became a partner in a Darwin legal practice, and in 1947 was elected to the first Northern Territory Legislative Council. Many families in Darwin speak of the work that he did for advocating for Indigenous peoples in those early days.

who appeared before the Stipendiary Magistrate pleaded guilty and were dealt with by a police prosecutor and fined.[12] A large number were (inevitably) jailed.[13]

When I interviewed Gary Foley, he gave me a first-hand account of how the first Aboriginal Legal Service was established.[14] Paul Coe had approached him with the idea of setting up a group of young people who could discuss what was going on in Redfern, Sydney, particularly with regard to police harassment and intimidation. So, a small (very small) group began to meet. As they talked amongst themselves, they realised that in order to understand what was happening to them, and what was happening to Aboriginal people in general, they needed to politically educate themselves by examining what was going on in similar communities in Australia and elsewhere. One community's experiences that felt very familiar was the African American community in the United States of America, and within that broad community, the particular experiences of the African American community in Oakland, California. At the time, the community in Oakland was developing methods of resisting and countering police brutality, harassment and intimidation. The small Redfern group began reading Malcolm X, Bobby Seale's book *Seize the Time*, and other 'radical' material.[15] They took note of the social programs that the Black Panthers were developing in Oakland: breakfast programs for kids, free food distribution in a poverty-stricken community similar to what they were living in. While they were less interested in the Black Panthers' radical rhetoric or their carrying guns to defend themselves, they were interested in the Black Panthers' unique methods of trying to counter the racist policing in California through conducting what they called 'Pig Patrols'. 'Pig Patrols' involved community members arming themselves with guns and monitoring police activities.[16]

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12 Jon Faine, *Lawyers in the Alice: Aboriginals and Whitefellas' Law* (Federation Press, 1993) 111

13 I know by looking at people's criminal records that Aboriginal peoples were jailed for minor offending, especially when they appeared before Justices of the Peace. That is anecdotal of course, but before ALSs existed I imagine that was the case everywhere.

14 Interview with Gary Foley (Eddie Cubillo, Melbourne, 20 June 2019).

15 Bobby Seale, *Seize the Time: The Story of The Black Panther Party and Huey P. Newton* (Random House, 1970).

16 Ibid.

Figure 4.1*: Gary Foley (fourth from the right) and colleagues from the Redfern Legal Service.*[17]

The Redfern group felt the basic idea of monitoring the police was a good one and could be appropriated to the Australian context as a means of countering police violence against Indigenous communities. The following account by Gary Foley provides a window to the types of police harassment and brutality experienced in Redfern at the time:

> [T]here was a hotel in Redfern called The Empress Hotel, which was the primary social gathering point every Friday, Saturday night for the Aboriginal community. It was a big Black pub and the only white normally were the people behind the bar [laughs] who were making all the money. Even the police were not game to go in there in ones and twos and they used to have a method on Friday and Saturday nights of raiding Empress Hotel whereby they'd park their police wagons up to 10 at time out the front of the pub until they had sufficient numbers to feel safe and then they'd form a flying wedge and charge into the hotel and just grab people and arbitrarily arrest people – well when I say arrest just drag them out through the doors fling them in the vans. When the vans were full they'd take them to three different police stations around the area – Redfern Police Station, Newtown Police Station and Regent Street Police Station – and they would solve all the burglaries and car thefts for the week all

[17] This photo is reproduced with permission from the National Archives. See: Aboriginal Affairs Photographic Negatives, Aboriginal People and Torres Strait Islander Peoples –Reserves, Missions and Homeland Centres – Armidale Aboriginal Reserve, 1974, A8739/1, NAA: A8739, A17/4/74/20. Also see: NAA: A8739, Aboriginal people and Torres Strait Islander peoples – industry and employment – Aboriginal Legal Aid Service, Redfern A17/4/74/20.

> in one go, which meant that there were dozens of Aboriginal people being arbitrarily arrested on trumped up charges and many people going to jail because the police would bash people in the cells and say 'You either plead guilty to this tomorrow or you get more bashing' or whatever. People were pleading guilty. That's what happened to me when I got bashed. They bashed me and said, 'Plead guilty to this in the court tomorrow otherwise you will get more of this' and because we were young and defenceless people were pleading guilty.

To counter this, Gary Foley, Gary Williams and Paul Coe, set up what Gary Foley described as 'a little miniature pig patrol' in Redfern. This became known as the Black Caucus in Redfern, and subsequently, and variously, the Black Power Movement and the Self-determination Movement.[18] Alongside, Foley and others invited Hal Wootten, then the Foundation Dean of Law at the University of New South Wales, to The Empress Hotel to witness what was going on. As Gary Foley related in my interview with him, Wootten could not believe what he saw. It was in this context that Paul Coe spoke to Wootten about how communities were responding to similar experiences of police violence in the United States, including setting up little shopfronts, where people could access free legal advice. Gary Foley and Paul Coe encouraged Wootten to put the word out amongst his graduates and others he knew in the legal profession that they were looking to establish a shopfront legal aid centre using volunteer lawyers. The idea was to raise enough numbers of volunteers so that lawyers could provide advice on a roster basis.[19]

There are similarly rich histories of localised activism in other urban, rural and remote regions across Australia.[20] In February 1972, for example, Denis Walker and Sam Watson co-founded the Brisbane Chapter of the Australian Black Panther Party and

developed a local 'Pig Patrol' to monitor police encounters with the Aboriginal community in housing estates and other public areas. Denis Walker's political activism and involvement with the Aboriginal Black Panther Movement brought him into contact with the aggressive policing and surveillance of the Australian Security Intelligence Organisation ('ASIO'). This occurred during the now notorious but at that time covert ASIO program, operative between 1969-1975, which deliberately targeted Black

Panther Party members and monitored their daily actions. Subsequently, many ASIO dossiers now held in the National Archives of Australia provide an unexpected source of information on the forerunners of the Aboriginal Legal Service in Queensland, including the 'Pig Patrol' which provided a defence mechanism against police

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18 Interview with Foley (n 14).

19 Ibid.

20 Space precludes an in-depth discussion of the civil rights activism taking place simultaneously in regional centres such as Perth and Alice Springs but see, eg: Fiona Skyring*, Justice: A History of the Aboriginal Legal Services of Western Australia* (UWA Publishing, 2011); Faine (n 12).

brutality.[21] Denis Walker also spearheaded three test cases on Aboriginal and Torres Strait Islanders and the criminal jurisdiction: *R v Walker,*[22] *Walker v New South Wales,*[23] and *Walker v Speechley*.[24]

[21] See for more discussion on the Black Panther movement in Australia: Amanda Porter, 'Dennis Walker: Profile of a Freedom Fighter' in N. Watson and H. Douglas (eds) (2020) *Indigenous Judgments Project* (Routledge, 2020); Gary Foley, 'Black Power in Redfern 1968-1972' (Essay, 5 October 2001) <http://vuir.vu.edu.au/27009/1/Black%20power%20in%20Redfern%201968-1972.pdf>.

[22] (1989) 2 Qd R 79.

[23] (1994) 182 CLR 45.

[24] *Walker v Speechley* (17 August 1998) S133/1997.

Figure 4.2: *This photo, taken in 1971, was included in ASIO surveillance files released publicly in 2001. Denis Walker is identified in this photo as 'Number 3'.*[25]

Aboriginal Legal Services (ALS), now commonly known across Australia as ATSILS, developed from these early activists' efforts. As Foley expressed above, their concerns grew out of the inequalities and disadvantages experienced by Aboriginal community members. The first service was established in Redfern NSW in 1970. Queensland Aboriginal & Torres Strait Islanders Legal Services (ATSILS QLD) formed in 1972. North Australian Aboriginal Legal Aid Service (NAALAS) was established in July 1973 (this service is now known as North Australia Aboriginal Justice Agency (NAAJA). In 1973 Aboriginal Legal Services Western Australia (ALSWA) was established in Perth. The South Australian Aboriginal Legal Rights Movement (ALRM) began in 1973. The Central Australian Aboriginal Legal Service (CAALAS) was founded in 1973.[26]

ATSILS continue to provide these services today, under extremely hostile conditions. National data indicates Aboriginal and Torres Strait Islander peoples are being incarcerated at rates higher than they have ever been. According to the latest Australian Bureau of Statistics (ABS) (2019-20) Indigenous status data, around 42,000 Aboriginal adult defendants had their matters finalised in criminal courts across the four jurisdictions of the Northern Territory, Queensland, New South Wales and South Australia. Notably the ABS only compiles data relating to these four jurisdictions as this is the only data that can be compared across states. Data for other states and

[25] Amanda Porter, 'Dennis Walker: Profile of a Freedom Fighter' in N. Watson and H. Douglas (eds) (2020) *Indigenous Judgments Project* (Routledge, 2020).

[26] In 2018, through pressure from the Federal Attorney General's department, CAALAS was consumed by NAAJA.

territories are not of sufficient quality and/or did not meet ABS standards for self-identification for national reporting in 2019-20.[27] Earlier ABS data for the year 2013/14 showed that there were 31,000 finalised Indigenous criminal defendants across the Northern Territory, Queensland and Western Australia.[28] Despite the increased legal need that this may reflect, ATSILS are operating with no commensurate increases in funding. Whilst the majority of ATSILS' work occurs in the criminal courts, the services play a significant role in policy and law reform advocacy. Many ATSILS also have significant practices in civil law. Some also offer family law services, although some have ceased to do so due to a lack of adequate funding.[29]

ATSILS advocate for, and protect, the rights of Indigenous peoples through the provision of culturally appropriate and high-quality legal representation. Legal issues that proceed to appellate courts for criminal matters are either in relation to sentence or conviction. Appeal grounds generally require a party to persuade the court that the judge or magistrate who heard the original case made an error of law and that the error was of such significance that the decision should be overturned. Some examples of significant errors of law are that the judicial officer who heard the original case:

- applied an incorrect principle of law; or
- made a finding of fact or facts on an important issue which could not be supported by the evidence. [30]

If a judge or magistrate has made an error of law when deciding a case, it may be appealed to a higher court. Over the years, ATSILS have appealed matters including where individual rights have been breached and on points of law considering matters that have had a significant detrimental impact on the rights of Indigenous peoples.[31]

The Aboriginal Legal Services were established by Aboriginal communities as a result of their treatment by the criminal justice system. They were designed to be a space that understood the unique needs of Aboriginal clients in a system that didn't work for them – and, in fact, worked against them.

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27 Australian Bureau of Statistics, *Criminal Courts, Australia, 2019-29* (Catalogue No 4513.0, 25 March 2021).

28 Australian Bureau of Statistics, *Criminal Courts, Australia, 2009-10* (Catalogue No 4513.0 , 27 June 2011).

29 The Indigenous Legal Needs Project was the first comprehensive national study of Indigenous civil and family law needs conducted in Australia. The ILNP website is at: <http://www.jcu.edu.au/ilnp/>.

30 See eg Federal Court of Australia. Appeals from Courts, Introduction to appeals from courts. <http://www.fedcourt.gov.au/law-and-practice/guides/appeals/from-courts>. This article provides a thorough review of appeals in all Aust jurisdictions (but its focus is Vic) and considers human rights and charters of HR in Act and Vic. Chris Corns (2017) 'Leave to Appeal in Criminal Cases: The Victorian Model', *Current Issues in Criminal Justice,* 29:1, 39-56.

31 See eg *Bugmy v R* (2013) 302 ALR 192, discussed in greater detail below. In that case, the NSWALS represented Bugmy through the appellate courts and then engaged counsel for the High Court. Throughout all appeals, the NSWALS did the briefing.

C. Impediments to Access to Justice

The legal system is short-staffed, underfunded and overworked. There are too many cases and too few courtrooms to properly deal with them. Indigenous people who too frequently encounter the justice system confront an assortment of challenges — poverty, substance abuse and cognitive issues — and quickly find themselves trapped on an assembly line, where cases are moved in and out with harsh efficiency. This severely impairs Indigenous people's ability to access justice. In an address to the *Access to Justice Roundtable 2002*, Justice Ronald Sackville of the Federal Court of Australia outlined the various ways 'access to justice' can be impeded.[32] He identified the use of complicated language, discrimination and inadequate resources as the main barriers to justice for disadvantaged people in Australia. Sackville also argued that four propositions underpinned contemporary thinking about access to justice. These were that: the courts are the key to providing justice; governments should continue to increase financial support through legal aid for legal advice and representation of society's most vulnerable in the court system; new laws should extend people's rights, particularly in the area of appeal against Government decisions; and finally, that Governments should continue to provide basic services to people, rather than outsourcing them to private businesses.

In 2014, the Productivity Commission conducted an inquiry into access to justice arrangements within Australia.[33] Its final report highlighted what ATSILS have known for a long time, namely, that lack of adequate funding for their services in civil and family law matters is a major issue in Australia, and that this leads to involvement with child protection systems and experiences of violence. The Productivity Commission also found that the 'inevitable consequence of these unmet legal needs is a further cementing of the longstanding over-representation of Indigenous Australians in the criminal justice system'.[34] In its submission to the Productivity Commission, the Indigenous Legal Needs Project (ILNP) argued that access to justice necessarily includes access to lawyers who can assist with casework, advice and representation for individual clients.[35] Furthermore, there should be sufficient capacity within legal assistance services –including capacity to provide pro-bono assistance– for certain cases to 'go the whole way', in order to establish relevant legal precedent with wide-ranging impacts. In this respect, Indigenous peoples should be, and are, entitled to equal access to the formal court/tribunal system, including through the provision of legal representation (where disputes are not resolved at an earlier point in time).[36]

Such issues – those identified by the ILNP, by Sackville, and by 'access to justice' literature more generally – reflect more problems than just 'access to justice'. They mirror the Indigenous and colonial sovereignty impasse more generally – the clash of

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32 Ronald Sackville, 'Access to Justice: Assumptions and Reality Checks' (Keynote Address, *Access to Justice Roundtable*, 10 July 2002).

33 See Productivity Commission, *Access to Justice Arrangements* (Inquiry Report, No 72, 5 September 2014).

34 Ibid, vol 2, 784.

35 Indigenous Legal Needs Project, James Cook University, Cairns, Submission No 105 to Productivity Commission, *Access to Justice Arrangements* (19 November 2013) [4.1.4].

36 Ibid.

laws and systems– and the subsequent limits of judicial reasoning within Australian courts (i.e. Australian courts can not recognise tribal sovereignty and vice versa). Ultimately, they reflect the legacy and the history of racism, genocide, and inequality in Australia which continue in a system unable to recognise Indigenous peoples as sovereign subjects. A key part of this legacy is the continuing withdrawal of funding from ATSILS as a means of controlling, limiting and undermining Aboriginal and Torres Strait Islander autonomy.

The challenges around access to justice that Aboriginal people face are another reason Aboriginal Legal Services are needed. They are uniquely placed to address access to justice issues.

D. The Funding and Defunding of ATSILS

In 2010, the Aboriginal Legal Rights Movement (ALRM) raised concerns of chronic underfunding of Aboriginal legal aid with the United Nations Committee on the Elimination of Racial Discrimination (CERD).[37] In their submission, the ALRM noted that the funding of Aboriginal legal aid had been stagnant since 1996, resulting in the decrease of funding, in real terms, of over 30 per cent. State funding of mainstream legal aid during that time had increased by over 120 per cent.[38] In response, CERD wrote to the Australian Permanent Mission to United Nations to express its concerns about the underfunding of Aboriginal legal aid services, highlighting that the Government might be violating its obligations under article 2 (1c) and (1e) and article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination.[39] It requested the Government of Australia to respond by submitting detailed information addressing the issue.[40] This is just one episode of many in which the Australian Government was clearly informed that it was putting access to justice at risk through prolonged under-funding. The successive failures of governments to address this suggests political disinterest in ensuring that the most vulnerable in our society have access to advice, representation and advocacy, let alone access through services that provide a vehicle for self-determination.

In his interview with me, the former Indigenous Crown Prosecutor, Mr Nigel Browne, stated that so long as the government 'holds the purse strings' to ATSILS around the country, those structures are always going to be subject to the whims of the government of the day.[41] Research participants were in fierce and universal agreement about ATSILS being underfunded. Fiona Hussin, Deputy Director of the Northern Territory Legal Aid Commission, was resolute that ATSILS were 'not adequately funded,

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37 See Letter from Anwar Kemal to Peter Woolcott, 31 May 2010 <https://www.ohchr.org/Documents/HRBodies/CERD/EarlyWarning/Australia31052010.pdf>. Anwar Kemal was writing in his capacity as Chairperson of the Committee on the Elimination of Racial Discrimination to Peter Woolcott, Permanent Representative of the Australian Permanent Mission to the United Nations in Geneva.

38 Ibid.

39 Ibid.

40 Ibid.

41 Interview with Nigel Browne (n 2).

they're significantly under-funded, and it's having an impact every day'.[42] Shane Duffy, the CEO of the Queensland ATSILS, after looking at his organisation's caseload data, expressed his frustrations that 'year on year they have grown and grown and grown but our funding hasn't, so, as service demand increases, funding remands stagnant'.[43]

The CEO of Aboriginal Land Rights Movement (ALRM) Cheryl Axelby suggested that the funding levels reflected that that the Australian government regard ATSILS as 'a form of apartheid' and don't value the services ATSILS provide.[44] What the government fails to recognise is that ATSILS services create cultural safety and competency, because they have a wealth of knowledge and awareness of their communities, the trends, and the key issues, at the localised as well as the operational and government level.[45] They provide a service that cannot be delivered by mainstream organisations, especially on the money that they receive. As Axelby saw it,

> I don't believe that a non-Indigenous legal organisation could ever achieve to the same level services of being culturally competent or being attuned to the needs of the community or representation as an Aboriginal Legal Service can do, and staff, and I think the ILAP report itself reflects that – just the nature of the work, the nature of the people, the nature of who we attract, the nature of the values of this organisation is to literally help Indigenous people and to go beyond not just the court matter. … I don't believe that a non-Aboriginal Legal Service will invest as much, not in money or resources, but to that commitment and those values as an Aboriginal organisation would do.[46]

> Further mainstream legal services do not deliver the quality of services we do to our people, nor do they understand our communities, the diversity of families and communities, nor have many engaged with Aboriginal people in a positive and non-judgemental manner.[47]

Over the past two decades the Aboriginal Community Controlled Health Sector (ACCHS) has been more successful in shifting government thinking on service provision, governance and funding models with regard to primary health care.[48] By contrast, ATSILS are to this day required to continually justify their existence, beg for non-recurrent funding to top up the inadequate recurrent funding and live daily with the (not so quietly spoken) suggestion that 'mainstream' legal services might or should

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42 Interview with Fiona Hussin (Eddie Cubillo, Darwin, 8th August 2019). At the time of interview, Fiona was Deputy Director Northern Territory Legal Aid Commission (NTLAC).

43 Interview with Shane Duffy (Eddie Cubillo, Darwin, 14 August 2019). At the time of interview Shane was the Chief Executive Officer of ATSILS QLD.

44 Interview with Cheryl Axelby (n 8).

45 Ibid.

46 Interview with David Woodroffe (Eddie Cubillo, Darwin, 12 August 2019). At the time of interview, David was the Principal Legal Officer of NAAJA.

47 Interview with Cheryl Axelby (n 8).

48 See Chapter 6 for a more detailed comparison between the health and justice sectors.

subsume their role. This is despite the important role the ATSILS play in meeting the distinct and pressing legal needs of Aboriginal people.

D1. The Long Arm of the Attorney General

ATSILS have operated in a hostile environment since their funding was first brought under the control of the Federal Attorney General's Department in 2005.[49] However, even before then they were under continuous scrutiny to create 'efficiencies' and 'value for money', as demonstrated by the number of inquiries that have been instigated on, and addressed these terms. These include the 2003 *Evaluation of the Legal and Preventative Services Program* undertaken by the Office of Evaluation and Audit, ATSIC;[50] the 2003 Australian National Audit Office report *ATSIS Law and Justice Program: Aboriginal and Torres Strait Islander Services*;[51] and the June 2005 Joint Committee of Public Accounts and Audit report, *Access of Indigenous Australians to Law and Justice Services.*[52] Alongside, several (ignored) parliamentary committees continued to recommend substantial increases to ATSILS funding to promote Indigenous peoples' access to injustice.[53]

In 2008 Chris Cunneen and Melanie Schwartz highlighted that the static funding environment within which ATSILS operate compromises their capacity to provide adequate services to the sector of the population that arguably needs the best possible quality legal services.[54] Basically, what ATSILS get from government is 'legal rations' that create a system of dependence that does not allow for self-sustaining growth. In their study, Cunneen and Schwartz compared the financial budgets of mainstream legal aid services and ATSILS. Looking particularly at the Northern Territory, they identified that the Northern Territory Legal Aid Commission (NTLAC) had a 59% larger budget than the North Australian Aboriginal Justice Agency (NAAJA).[55] These budgets did not match the respective demand for services in either organisation. By far the most significant difference related to criminal law matters: NAAJA, at the time, dealt with three times the number of criminal matters compared to NTLAC.[56] That said, even when all matters were combined (family, civil and criminal), NAAJA had the greatest number (7,462 compared to NTLAC's 6,878).[57]

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49 In 2004-05 responsibility for Indigenous legal assistance services was transferred to theAttorney-General's Department from the Aboriginal and Torres Strait Islander Commission and Aboriginal and Torres Strait Islander Services: AGD. 2018b. *Submission to the Review of the Indigenous Legal Assistance Program, October 2018*.

50 Office of Evaluation and Audit, *Evaluation of the Legal and Preventative Services Program* (Aboriginal and Torres Strait Islander Commission, 2003).

51 Australian National Audit Office, *ATSIS Law and Justice Program* (Aboriginal and Torres Strait Islander Services) (Audit Report No.13 2003-2004).

52 *Access of Indigenous Australians to Law and Justice Services* (Report No 403, 22 June 2005).

53 See eg Senate Legal and Constitutional References Committee, Parliament of Australia, *Inquiry into Legal Aid and Access to Justice* (Final Report, 8 June 2004); Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Inquiry into Access to Justice* (Report, 8 December 2009).

54 Chris Cunneen and Melanie Schwartz, 'Funding Aboriginal and Torres Strait Islander Legal Services: Issues of Equity and Access' (2008) 32(1) *Criminal Law Journal* 38.

55 Ibid 17.

56 Ibid.

57 Ibid

Since then, there has been significant growth in raw numbers of crime matters in the Northern Territory, which affects both NAAJA and the NTLAC. Over the past eleven years, NAAJA's criminal matters have increased by 48%; their civil matters have increased by 27%.[58] NTLAC Aboriginal and Torres Strait Islander client numbers more than doubled over an 8-year period: from 510 legal aid applications approved in 2009/10,[59] to 1066 applications approved in 2017/18.[60] As Priscilla Collins, the Chief Executive Officer of NAAJA shared with me when interviewed, although NAAJA has continually raised this issue with the Attorney Generals Department (AGD) – as recently as 25 June 2018 – they received no response.[61] ATSILS federal funding levels continue to fall, despite increasing need for the services they provide. The table below shows the Attorney General's forward estimates, which project that funding to ATSILS will decrease in real terms over the four years 2016-17 to 2020-21 by some $8.9 million. The effect of these forward estimates is to put all ATSILS on alert, causing them to hold back on projects unless absolutely necessary, in the hope that long-term funding issues will be resolved.[62]

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58 The North Australian Aboriginal Justice Agency (NAAJA), *Annual Report – 2016/17* 36 <http://www.naaja.org.au/wp-content/uploads/2018/07/Annual-Report-in-Full.pdf>.

59 National Legal Aid Statistics, National Legal Aid, 2009/10. See: <https://nla.legalaid.nsw.gov.au/nlareports/reportviewer.aspx?reportname=ATSI> Statistics can be found here.

60 Ibid, National Legal Aid, 2017/18. See: <https://nla.legalaid.nsw.gov.au/nlareports/reportviewer.aspx?reportname=ATSI>.

61 Interview with Priscilla Collins (Eddie Cubillo, Darwin, 25 June 2018). At the time of interview, Priscilla was Chief Executive Officer of NAAJA.

62 This occurred for example in 2017, until the Government reversed its funding cuts: see Henry Belot and Louise Yaxley, 'Federal Government to Reverse Community Legal Funding Cuts in May Budget', *ABC News* (online, 24 April 2017) <https://www.abc.net.au/news/2017-04-24/federal-government-to-reverse-community-legal-funding-cuts/8465420>.

Table 4.1: *Indigenous Legal Assistance Program Funding*
Sourced from the Attorney-General's Portfolio additional estimates statements.[63] [64] [65] [66] [67] [68]

(all figures in $'000)	2016-17 estimated actual expenses	2017-18 estimated actual expenses	2018-19 estimated actual expenses	2019-20 estimated actual expenses	2020-21 estimated actual expenses
Indigenous Legal Assistance Program/ Aboriginal and Torres Strait Islander Legal Services	73,585	74, 463	74, 365	77,690	79,479

Note that funding for the Indigenous Legal Assistance Program transferred to the Department of Treasury from the 2020–21 Budget onwards and is included in the

[63] Funding commitments for the Indigenous Legal Assistance Program. (2017) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview201718>.

[64] Australian Government, *Budget 2017-18, Portfolio Budget Statements 2017-18 Budget Related Paper No. 1.2, Attorney-General's Portfolio* (2017) 20. <https://parlinfo.aph.gov.au/parlInfo/download/publications/tabledpapers/1130a775-e090-4fc1-b13e-b7045e51698d/upload_pdf/Attorney-Generals-portfolio-2017-18-PBS.pdf>.

[65] Australian Government, *Budget 2018-19, Portfolio Budget Statements 2018-19 Budget Related Paper No. 1.2, Attorney-General's Portfolio* (2018) 19. <https://parlinfo.aph.gov.au/parlInfo/download/publications/tabledpapers/74c86ee9-c216-4bda-9357-e8e1f003672f/upload_pdf/2018-19%20PBS%20-%20Attorney-General's.pdf>.

[66] Australian Government, *Budget 2019-20, Portfolio Budget Statements 2019-20 Budget Related Paper No. 1.2, Attorney-General's Portfolio* (2019) 25. <https://parlinfo.aph.gov.au/parlInfo/download/publications/tabledpapers/7f27dd92-b86d-4b33-a66b-bc22df0b4142/upload_pdf/PBS-attorney-gen-full-report-2019-20.pdf>.

[67] Australian Government, *Budget 2020-21, Portfolio Budget Statements 2020-21 Budget Related Paper No. 1.2, Attorney-General's Portfolio* (2020) 27 <https://parlinfo.aph.gov.au/parlInfo/download/publications/tabledpapers/5ffba18f-4d31-43bd-ad10-c9259a93e79c/upload_pdf/2020-21%20PBS%20Attorney-General's.pdf>.

[68] *Australian Government, Budget 2021-22, Portfolio Budget Statements 2021-22 Budget Related Paper No. 1.13, Treasury Portfolio* (2021) 34 <https://treasury.gov.au/sites/default/files/2021-05/TSY_PBS_2021-22.pdf>.

National Legal Assistance Partnership as the Aboriginal and Torres Strait Islander Legal Services program.[69]

The National Legal Assistance Data Standards –which came into operation in July 2017 – mean (or should mean, if everyone has their act together), sector-wide consistency in reporting case matters. [70] However, data-based figures are by their nature a poor way to judge the 'quality' of work outputs. At the time I was Executive Officer of NATSILS, for example, ATSILS perceived great disparity between the qualitative assistance they provided clients, and what was provided by officers at the Legal Aid Commission (LAC). It was felt at the time that LAC would log 'advice' on the basis of 'just receiving a phone call', and this would become reflected in their client statistics. ATSILS also suspected that the LAC 'double dipped' on duty matters by counting first appearance and adjournments as two separate matters. Hence, despite the pretence of the National Legal Assistance Data Standards, it is by no means clear that everyone delivering legal aid is counting matters the same way.[71] That said, changes to the database to beef up such fields by allowing individual organisations to provide qualitative insight would mean more and more time uploading data (at a cost) and less time providing services. There would also be the risk (with individual sector changes) of losing the sector-wide comparisons.

Some things – for example cultural competency as a component of the quality of service delivery – are best left to written reports and qualitative research and analysis. As Fiona Hussin, Deputy Director of the Northern Territory Legal Aid Commission (NTLAC) has emphasised, when it comes to profiling organisations and the services they provide, it is not just about the numbers.[72] Illustrative of this is the considerable hidden costs and efficiencies in delivering services to Indigenous peoples in remote locations. Costs can be inflated seasonally due to the difficulty and sometimes impossibility of getting to places by road at the best of times of year, let alone in the wet season. Hussin related in her email in 2018 that NTLAC spent $3,000 to charter a plane to Ngukurr in order to represent a client at a bush court.[73] Knowing the expense of representation in the matter and the Prosecutor's reliance on witnesses to prove the charges, NTLAC made an early approach to the Prosecutor, requesting that the brief be considered at the earliest opportunity and advice provided if charges would not proceed. Ultimately the hearing went ahead. While all parties were present, no Crown witnesses attended to give evidence, including the 'victim'. The charges were withdrawn. The Katherine lawyer was paid the usual grant of aid, recompensed for

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69 Australian Government, *Budget 2020-21, Portfolio Budget Statements 2020-21 Budget Related Paper No. 1.2, Attorney-General's Portfolio* (2020) 29; *Australian Government, Budget 2021-22, Budget Paper No 3* (2021) 86.

70 The National Legal Assistance Data Standards Manual facilitates the collection of consistent and comparable data across the legal assistance sector: Attorney General's Department, 'National legal assistance data' (Web Page) <https://www.ag.gov.au/LegalSystem/Legalaidprogrammes/Pages/National-Legal-Assistance-Data-Standards.aspx>.

71 NATSILS representatives spent five years in meetings to establish sector-wide consistency. Despite this, some people are now pushing for changes in how the ATSILS collect data.

72 Email from Fiona Hussin to Eddie Cubillo, 13th August 2018.

73 Ngukurr is a remote Aboriginal community on the banks of the Roper River in southern Arnhem Land, Northern Territory.

their eight hours travel time and reimbursed for the cost of fuel. The Darwin lawyers were paid the usual grant of aid plus travel time (32 hours in total). They were also reimbursed for fuel and accommodation was arranged for two nights' accommodation in Katherine. Such avoidable costs are ongoing issues for both NTLAC and NAAJA.

Understanding the complexities of delivering services in unique situations such as those detailed above might alleviate funding bodies' concerns of wastage and predilections to micro-manage the organisations that work under these trying conditions. In the Northern Territory, consideration also should be given to section 8(a) of the *Legal Aid Act 1990* (NT) which stipulates that 'in the performance of its function, the [Northern Territory Legal Aid] Commission must … ensure that legal assistance is provided in the most effective, efficient and economic manner'. ATSILS have reputations as trusted, community controlled organisations that have been, over the past 50 years, the preferred providers of legal assistance services within Aboriginal and Torres Strait Islander communities. The continued funding withdrawal, coupled with the government's lack of comprehension, and disregard, of the unique services they provide, however pose real risks. Any further deterioration in capacity will have a domino effect on access to justice for Indigenous peoples.[74]

D2. Defunding

On 17 December 2013, when the Federal Treasurer Joe Hockey delivered the Mid-Year Economic and Fiscal Outlook, he clarified that $43.1 million would be cut across the 'broader' legal assistance sector over the next four financial years. This decision, which affected all legal services including ATSILS, shook the legal sector. This decision showed that the government did not grasp that services were already being delivered on limited funding. For Indigenous peoples, it provided further evidence of the lack of government interest in supporting their access to justice and aspirations for self-determination. Two years prior to Hockey's announcement, the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs had recommended that the Commonwealth Government *increase* funding for ATSILS to achieve parity per case load with Legal Aid Commission funding in the 2012-13 Federal Budget.[75] It also recommended appropriate loadings to cover additional costs in service delivery to regional and remote areas.[76] These recommendations highlighted that the Government was already getting a quality service and so called 'value for money', for much less than what was being provided to other legal aid services. For ATSILS, the announcement of a further reduction in federal funding – despite overwhelming evidence that funding, on the contrary, needed to be increased – suggested that the government maintained settler assumptions that Indigenous

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74 Cox Inall Ridgeway, *Review of the Indigenous Legal Assistance Program* (ILAP), 2015-2020 (Final Report, 1 February 2019) 14-15.

75 See Recommendation 26 of the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Doing Time – Time for Doing: Indigenous Youth in the Criminal Justice System* (Report, June 2011) 246.

76 Ibid.

peoples are inferior, do not require a quality service and cannot be trusted to operate their own legal services.[77]

Despite a groundswell of opposition to the proposed budget cuts, by NATSILS and others in the legal sector, which emphasised the negative consequences that would follow, the Treasurer initially persisted.[78] Indigenous and non-Indigenous peak organisations from outside the legal sphere then joined in their condemnation, arguing that the cuts would have a domino effect across all sectors. Eventually, after a concerted campaign led by NATSILS and members of Change the Record Campaign, the proposed budget cuts were reversed and there was a huge sigh of relief across the legal sector, including the judiciary. This exercise highlighted the importance of the ATSILS and showed that the sector could influence political decision-making when they worked together.[79] However, soon afterwards, the Federal Attorney-General's Department confirmed that $13.41 million would still be cut from the Indigenous Legal Aid and Policy Reform Program in the 2013-14 and the 2016-17 financial years.[80] Whatever the government's intentions were, by targeting Indigenous services in this way and in this context, the move was seen as an attempt to further silence Indigenous voices that speak to the inequality and racism suffered by Indigenous Australians throughout the justice and child protection systems.

The government's proposed cuts would be contradicted by the Productivity Commission in its 2014 report on 'Access to Justice Arrangements'.[81] A key recommendation it made was that Federal and State governments boost funding to all

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77 Anecdotally, at the time, the Indigenous Legal Assistance Program (ILAP) –which manages and provides funding to ATSILS across Australia and NATSILS (their peak body) – was experiencing a high turnover of junior staff in key roles. This may have contributed to the misunderstandings and lack of trust at the time between the government and ATSILS, compounding the issue of building any rapport or respect between the two parties. I believe this to be the case. During my time on the Northern Territory Royal Commission, it was relayed to me by senior staff of the Attorney General's Department that it was widely believed within that institution 'that your career went to die when you went to work in the ILAP'.

78 Various NGOs, including the Change the Record Coalition, lobbied against the proposed funding cuts: see eg 'Government must not go ahead with cuts to Aboriginal Legal Services' *Oxfam Australia* (Blog Post, 18 December 2013) <https://www.oxfam.org.au/2013/12/government-must-not-go-ahead-with-cuts-to-aboriginal-legal-services/>; Open Letter from ANTaR to Prime Minister Tony Abbott, 25 March 2015 <https://antar.org.au/sites/default/files/open_letter_atsils_funding_cuts_march2015.pdf>.

79 Demonstrative of the respect held for ATSILS across the sector, the following sector leaders and organisations campaigned to reverse the funding cut: Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda; ANTaR; Amnesty International; Australian Council of Social Service; Federation of Community Legal Centres (Vic); First Peoples Disability Network (Australia); Human Rights Law Centre; Law Council of Australia; National Aboriginal Community Controlled Health Organisations; National Aboriginal and Torres Strait Islander Legal Services; National Congress of Australia's First Peoples; National Family Violence Prevention Legal Services Forum; Oxfam Australia; Secretariat of National Aboriginal and Islander Child Care; Sisters Inside; Victorian Commissioner for Aboriginal Children and Young People; Andrew Jackomos.

80 National Aboriginal and Torres Strait Islander Indigenous Legal Service (NATSILS), *Funding Cuts to Aboriginal and Torres Strait Islander Legal Services* (Fact Sheet, 2013) <http://www.natsils.org.au/portals/natsils/submission/Funding%20Cuts%20Factsheet%202%20April%202013.pdf>.

81 Productivity Commission (n 33).

legal assistance services – Legal Aid Commissions (LAC), ATSILS, Community Legal Centres (CLC), and the Family Violence Prevention Legal Service (FVPLS) – by around $200 million a year.[82] The Productivity Commission also acknowledged a number of important issues relating to the legal needs of Indigenous peoples: firstly, that there is a substantial level of *unmet* legal need amongst Aboriginal and Torres Strait Islander peoples; secondly, that such a need cannot be met by system reform alone; and thirdly, that a specialist legal assistance service for Aboriginal and Torres Strait Islander peoples (such as ATSILS) was necessary.[83] Their independent analysis affirms the observations of many of my interviewees, canvassed in earlier sections.

The 2014 Australian Senate Estimates also contained a substantial discussion of the funding cuts to ATSILS.[84] Former Senator Penny Wright, for instance, highlighted that the Treasurer's Mid-Year Economic and Fiscal Outlook had explicitly stated that funding for the provision of so-called 'front-line' legal services would not to be affected.[85] Wright asked how the Attorney General's Department distinguished 'front-line' legal services from others in applying the ATSILS cuts[86] In response, the Attorney General, George Brandis, acknowledged there was not a universal definition of 'front-line' services. However, he explained that, according to his interpretation, front-line services involved two things: (1) a client; and (2) services that actually helped the 'flesh and blood individual'. Services that were deemed essentially 'academic' or related to advocacy – activities that did not directly assist a particular client in a particular case – were not, in Brandis' view, front-line.[87] In short, representing someone for a court matter was regarded as a 'front-line' service; advocacy, responding to calls for submissions on areas of ATSILS expertise, and community legal education were excluded. When Brandis was asked whether he had personally consulted ATSILS on what constituted front-line work – after all, they would be directly affected by the changes – he was adamant that he had: he had consulted Caxton Legal Centre in Brisbane.[88] For the record, the Caxton Legal Centre is not an ATSILS; it is a member of the Community Legal Centres.

The Senate Estimates' discussion, as outlined above, highlights a few things. The Attorney General did not know what an ATSILS was and therefore could not correctly identify one. By extension, this also signified that he, and those who made the decision to make the cuts, did not know how ATSILS operate. If they did, they would have known that the ATSILS do not generally have people employed in an issue-specific advocacy role. Instead ATSILS have a range of staff who fill in and provide support to fulfil their additional roles in advocacy and providing submissions to inquiries and at

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82 Ibid, 30 and Recommendation 21.4 therein.

83 Ibid, 66. The Productivity Commission also noted that funding uncertainty has affected the services for too long: 751-3.

84 See Commonwealth, *Parliamentary Debates*, Senate Legal and Constitutional Affairs Legislation Committee, 24 February 2014, 51-53.

85 Commonwealth, *Parliamentary Debates*, Senate Legal and Constitutional Affairs Legislation Committee, 24 February 2014, 51. (Penny Wright).

86 Ibid.

87 Commonwealth, *Parliamentary Debates*, Senate Legal and Constitutional Affairs Legislation Committee, 24 February 2014, 52 (George Brandis).

88 Ibid, 53.

government request. During this time, I was the Executive Officer of NATSILS. With the then Chairman, I tried on many occasions to meet with the Attorney General. On two occasions we met with his Senior Advisor because the Attorney General was unavailable. On the third occasion, while en route in a taxi to his chambers in Canberra, we were called to say that he could no longer meet with us 'because his schedule had changed'. We had just flown into Canberra to see him, with a 3:00 am start to ensure we met the appointment.

The Government's discrimination between so called 'front-line' legal services and the many other services ATSILS provide also suggested that the decision makers either did not respect or had not made themselves aware of the research around early prevention as a proven, evidence-based approach.[89] Or perhaps they really did not care. Perhaps, as a cost saving exercise, they believed mainstream organisations (Legal Aid Commissions) could provide these services in ATSILS' place, even if this was to the detriment of the most disadvantaged group in this country. At the same time, as Senator Wright pointed out, advocating for and providing systemic change in contexts of manifest injustices is far more efficient than dealing with its symptoms on a case-by-case basis, where many people will not get help at all and add to growing court lists.[90]

There is a trend in Australia for governments to by-pass calls to address systemic problems by blaming or passing the buck to previous governments, particularly when justifying withdrawing funds. The debate around the ATSILS cuts, discussed above, proved the rule. For instance, when responding to concerns of access to justice, the Attorney-General, George Brandis, said that while it would be great to be able to spend a lot more on that area, unfortunately, the government had no money to do so. Why? Because it was all spent by the previous government and the country was left with $400 billion of public debt.[91] The Attorney General went on to say that it is possible for people to do things that are not paid for by the Commonwealth government, even if that was a notion the Labor party was uncomfortable with.[92] Such politicking at the expense of Indigenous peoples has come to be expected in the area of justice. However, there is no doubt that if non-Indigenous peoples faced the same rates of incarceration as Indigenous peoples, and their legal services were being cut, there would be a national outcry.

Over the years, what has remained constant are continued attacks on funding, micro-managing, and the other ways Indigenous organisations are continually mistreated by Commonwealth and state governments. Part of this is reflected in the fact that ATSILS do not get consulted when significant changes to program funding and guidelines are made, while in the aftermath they experience rigorous review. One example occurred

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89 On the importance of early intervention see: House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (n 75); Change the Record Coalition, *Blue Print for Change* (Report, November 2016); PwC et al (n 7). See also Harry Blagg, *Crime, Aboriginality and the Decolonisation of Justice* (The Federation Press, 2016) in which the effectiveness of Aboriginal place-based strategies is discussed.

90 Commonwealth, *Parliamentary Debates*, Senate Legal and Constitutional Affairs Legislation Committee, 24 February 2014, 51 (Penny Wright).

91 See Commonwealth, *Parliamentary Debates*, Senate Legal and Constitutional Affairs Legislation Committee, 24 February 2014, 54 (George Brandis).

92 Ibid.

when the *Northern Territory National Emergency Response Act 2007* (Cth) ('The Intervention') was introduced and NAAJA received funding to meet the needs of Aboriginal people. Originally the funding was administered through the Commonwealth Attorney General's Department which mandated that NAAJA provide performance and financial reports every three months. NAAJA would then be questioned over insignificant minor expenses.[93]

When the incoming Labor Government held contentious consultations about the Intervention – later rebadged as the *Stronger Futures in the Northern Territory Act 2012* (Cth)) ('Stronger Futures') – they extended the funding to NAAJA.[94] As the interviews and correspondence reveal, NAAJA were informed that they would receive Stronger Future funding for 10 years.[95] After the subsequent change of government, questionable consultations were then held by the Liberal-National Coalition. The Stronger Futures monies which had been held by the Department of Attorney General, was subsequently moved into the Prime Minister and Cabinet Indigenous Advancement Strategy (IAS) funding bucket. This was done without any notice being given to NAAJA.

It was only after numerous phone calls to the Departments of the Attorney General and Prime Minister and Cabinet, that NAAJA finally ascertained this change.[96] When NAAJA sought clarification over whether this would affect their 10-year funding, they were directed to call a general 1800 number. When their call was taken, the Prime Minister and Cabinet staff could not tell NAAJA how many years of funding they could apply for. In fact, one person they spoke with had no idea what the Intervention or Stronger Futures legislation was.[97] In one instance, NAAJA were told they had to apply once for the whole organisation. Later they were told they could apply as many times as they liked. They were then told they could only apply for one year. Eventually they received three years funding, which expired on 30th June 2019.[98] After this, when NAAJA contacted the department to find out the process of applying for funding post-expiration they were provided with no information. As it turned out, under IAS funding guidelines there were no open or close dates. NAAJA was required to put in an expression of interest. If successful they would be requested to put in a funding application. NAAJA followed this process for their Throughcare Program and have been waiting for eight months for a response.[99] The NAAJA experience is just one of many

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93 Email from Priscilla Atkins to Eddie Cubillo, 13 August 2018; Interview with Priscilla Atkins (Eddie Cubillo, Telephone Interview, 13 August 2018). At the time of correspondence, Priscilla Atkins was the Chief Executive Officer of the North Australia Aboriginal Justice Agency.

94 See Alastair Nicholson et al, *Listening but not Hearing: A Response to the NTER Stronger Futures Consultations – June to August 2011* (Report, March 2012). This report reviewed the consultation process against the applicable criteria for classification of governmental initiatives as 'special measures'. The authors concluded that the criteria were not met.

95 Ibid footnote 86.

96 Ibid footnote 86.

97 Ibid.

98 Ibid.

99 NAAJA's Throughcare Program assists clients from their initial reception into prison through to the time that they leave. See North Australian Aboriginal Justice Agency 'Throughcare Program', (Webpage, nd) <http://www.naaja.org.au/our-programs/throughcare/>. See also Alastair Nicholson et al (n 94) 71.

similar encounters by ATSILS. With such deplorable treatment of key service deliverers by all areas of government, there continues to be unwarranted tension and mistrust between ATSILS and all persuasions of government.

D3. Paternalism

According to the Government's policy narrative, it wants greater participation of Indigenous peoples and organisations in the wider economy. Its script reads that it supports Indigenous peoples' inclusion in the workforce, in economic development and participation in the economy. However, an analysis of the current government's approach and practice does not support its rhetoric. Just looking at financial practices and restraints in relation to Indigenous organisations, the following examples bring this into stark relief:

- Indigenous organisations are not able to use leverage available in assets such as buildings that are transferred to them to develop or grow as there are caveats placed on them by the Commonwealth. In some cases, the delay in the transfer of title to assets of funded organisations does not allow for funded organisations to carry out restructuring work to suit their operations.[100]
- From a trust perspective, although many organisations have strong levels of corporate governance and are incorporated under the *Corporations Act 2001*(Cth) or Australian Charities and Not for Profits Commission (ACNC), and thus subject to stringent regulatory oversight and reporting requirements, there continues to be an additional layer of bureaucratic oversight in place when compared to other funded mainstream service providers. While I was Executive Officer of the NATSILS I attended various ATSILS Chief Financial Officers meetings that where conducted to discuss the issues and best practices. I heard on many occasions of bureaucratic red tape.[101]
- There is a general lack of timely feedback given by government on contractual performance. Faster feedback on contractual performance to allow any corrective actions that need to be implemented would support stronger accountability, capacity building and compliance. For example, contract funding acquittals for a financial year are not received until after six months even though reports are required within three months of the financial year end. Contracting should include Continuous Quality Improvement (CQI) processes.[102]

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100 Some ATSILS are still awaiting asset transfers since the amalgamations of ATSILS due to the competitive tendering process. In my role as EO of NATSILS we had numerous discussions with a former Registrar of the Office of the Registrar of Indigenous Corporations (ORIC) who was adamant that he would not transfer the assets, despite the Prime Minister and Cabinet office informing us that such a request should be a 'tick and flick' exercise.

101 For example, in some states when ATSILS were tendered this resulted in the amalgamation of several regional organisations. At the time of writing, I am aware that one ATSILS in particular is still waiting for ORIC to transfer the building to the current ATSIL, even though it has been paying its rent and upkeep over 10 years.

102 The Commonwealth Department of Health and the Aboriginal Health and Medical Research Council (AH&MRC) – in partnership with the jurisdictions – have endorsed Continuous Quality Improvement (CQI) as a key strategy to ensure Aboriginal Community Controlled Health Services are effective, sustainable and reflect local Aboriginal community needs. AH&MRC has re-

- There are no reporting frameworks across the country to allow for greater benchmarking of contractual performance by service providers, e.g. standardised chart of accounts; reporting templates etc. Successive research demonstrates that Aboriginal Torres Strait Islander community-controlled organisations achieve better outcomes.[103]
- Across the public service there is an inadequate understanding of accrual accounting, concepts such as financial materiality, consistency and the matching of income and expenditure. Instead, public servants are fixated on standard reporting templates and variance ratios that would not pass basic financial scrutiny, let alone be considered a representation of financial best practice.
- Indigenous organisations are micromanaged by bureaucrats with little or no financial expertise in the periodic review of an organisation's financial performance. This risks misinterpretation of data but more importantly their being unaware of signs that an organisation is in strife, a project being financially unviable or an organisation trading while insolvent. The risk to public funds is obvious – the tendency to come in with auditors when an organisation's affairs have gone seriously wrong is in my view similar to crafting policy on the run. It also places greater pressure on bureaucrats in the long run and incurs additional clean-up costs.

Across the interviews I conducted, many participants described the government's claims in regard to Indigenous economic participation as problematic. As Ross Sivo, the Chief Finance Officer (CFO) of ATSILS QLD noted, if reduction in red tape is one of government's stated priority areas, the evidence on the ground is totally different. Organisations are weighed down with onerous reporting responsibilities which detract a lot from the delivery of the very services they are funded for. In fact, the 'red tape' drains these organisations' resources.[104] While Sivo recognised a need for public funds to be properly accounted for and for service delivery outcomes to be measured against the funding committed, he believed this can be done in a better and more efficient manner.[105]

> What we find is we are micromanaged and rather than looking at a ratio of the business to be able to pay debt when and if it falls due should we be defunded tomorrow, and working off that ratio as your headlight item, what we find is the Commonwealth attorneys focus on line by line items.[106] So an example was a $1,100 line item for stationery on Thursday Island. They said, 'what's your risk mitigation plan?' 'cause there was four months to go in the financial year and

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established the CQI Support Program with funding from the Commonwealth Department of Health: see Aboriginal Health and Medical Research Council of New South Wales, *The Aboriginal Health & Medical, Research Council of NSW* (Annual Report 2011-12) *32.*

103 See eg Judith Dwyer et al, *The Overburden Report: Contracting for Indigenous Health Services* (Report, July 2009); Department of the Prime Minister and Cabinet, Creating *Parity: The Forrest Review* (Report, 1 August 2014) 201.

104 Interview with Ross Sivo (Eddie Cubillo, Brisbane 7 August 2019).

105 Ibid.

106 Interview with Shane Duffy (n 43).

> already $900 of $1100 had been expended. They said, 'what's your risk mitigation plan? By the looks of this, looking at your track record, you're going to go over the $1,100 budget? So the whole focus was let's be serious, let's look at the ratio and the cash flow and the profit and loss and look at the entirety of the business, not look at a micro part or a line item within a budget because you haven't got the skills to understand cause you're not an accountant.

Sivo's colleague, Greg Shadforth, the Principal Legal Officer (PLO) of ATSILS QLD, confirmed Sivo's observations. He described the accountability requirements as so onerous in his own role that it takes up the equivalent of two months' work a year of his time![107] Shadforth suggested that one thing governments could do to address this is curtail reporting requirements for funded organisations that have established a track record of excellence/compliance. This would free up funds which could then be spent on actual service delivery rather than compliance matters.[108]

However, as Cheryl Axelby pointed out, there appears to be a systemic racial bias in the way funding requirements are being applied to Aboriginal community-controlled sectors in comparison to state and territory governments and non-Aboriginal non-government entities.[109] For Axelby this was apparent, more recently, in the government contracted Cox Inall Ridgway Review of the Commonwealth Indigenous Legal Assistance Program (ILAP) held in 2018.[110] The ILAP Review demonstrated positively that the program was delivering quality services to Aboriginal and Torres Strait Islander peoples through Aboriginal Legal Services.[111] It also demonstrated the cost effectiveness and cultural competency of Aboriginal Legal Services, favoured by Aboriginal & Torres Strait Islander peoples.[112] It highlighted how valued the Aboriginal Legal services are across the legal assistance sector. Despite the Review's first recommendation being that the Commonwealth retain the ILAP as a standalone program, the Government determined to disband it.[113]

The Chief Executive Officer (CEO) of the NSW Legal Aid Commission, Brendan Thomas, spoke to what he felt the Government's intention was in ignoring Cox Inall Ridgeway's recommendations. Thomas sensed that it indicated that the Commonwealth intended to wash their hands of the ATSILS and instead suggest that state governments should become their primary funders. He predicted they will justify this on the basis that ATSILS 'deal with crime', and crime, constitutionally, is a state matter.[114] If this actually transpired, a real concern for Thomas was that states would keep their funding level flat. A second major concern was that if the states believed ATSILS work was largely crime, the Attorney General of each state might begin to assess the efficacy of having

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107 Interview with Greg Shadforth (Eddie Cubillo, Brisbane, 29 August 2019. At the time of interview, Greg Shadforth was Principal Legal Officer of ATSILS QLD.

108 Ibid.

109 Interview with Cheryl Axelby (n 8).

110 See Cox Inall Ridgeway (n 74).

111 Interview with Cheryl Axelby (n 8).

112 Ibid.

113 Ibid.

114 Interview with Brendan Thomas (Eddie Cubillo, Sydney, 18 December 2019). At the time of interview, Brendan Thomas was Chief Executive Officer of NSW Legal Aid Commission.

two major legal aid services: Legal Aid and ATSILS. For Thomas, the danger was that this might end with the decision that there should be one legal aid provider to all.[115]

As a counterpoint to the risks articulated by Thomas, however, Greg Shadforth, PLO of ATSILS QLD, related a conversation he had recently had with representatives of Legal Aid. They made it clear to him that they saw maintaining ATSILS (QLD) as a stand-alone service provider was crucial on a number of fronts. No one has ATSILS regional coverage, especially in remote areas, their 'time' coverage (24-hour services), or their level of cultural competency. Nor can they do what ATSILS do for the same budget. All aside, having two independent, stand-alone legal-aid type law firms is crucial when it comes to needing to refer clients in contexts of legal conflicts of interest. The Legal Aid Commission and ATSILS thus complement one another, and in so doing, enhance service delivery to the Indigenous sector.[116]

Alongside the direct funding cuts to ATSILS, the Federal Government, under the leadership of Prime Minister Tony Abbott, instigated what it called the 'Indigenous Advancement Strategy' (IAS) in 2014. [117] Under this scheme, more than $500 million was taken from Indigenous programs, which had a disastrous impact on Indigenous services, including ATSILS. Although the ATSILS were not funded through its program, the knock-on effect of its implementation was felt acutely. The IAS was heavily criticised in that first year, and subsequent financial years, for not applying an evidence-based approach or efficient community engagement strategies. It was criticised, in particular, for assigning an exorbitant amount of funding to non-Indigenous organisations with no experience working with Aboriginal and Torres Strait Islander communities.

The change affected many strength-based case management and referral service organisations that ATSILS worked with to help people access the support and services they needed to help them stay out of prison. Such Indigenous organisations that provided wrap around services to ATSILS clients were lost totally or had funding reduced. These included services that focussed on: ongoing rehabilitation; accommodation; employment; education and training; health; life and problem-solving skills; and reconnection to family and community. These programs literally disappeared within weeks without any thought of who would replace them. Many of the organisations that eventually did replace them, due to their inexperience and bias, made bail applications and other legal applications difficult. In 2017, the Australian National Audit Office released its report into the IAS. It found, among other things, that its grants administration processes fell well short of the standard required to effectively manage a billion dollars of Commonwealth resources.[118] The basis by which projects were recommended to the Minister was not clear. As a result, there was

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115 Ibid.

116 Interview with Greg Shadforth (n 107).

117 The Indigenous Advancement Strategy was announced in May 2014: see Australian Government National Indigenous Australians Agency, 'Indigenous Advancement Strategy' (Webpage, 2020) <https://www.indigenous.gov.au/indigenous-advancement-strategy>.

118 The Auditor General, *Indigenous Advancement Strategy* (ANAO Report No 35 2016-17, 3 February 2017) 8.

limited assurance or evidence that the projects that did receive funding supported the policy's desired outcomes. [119]

It is worth reflecting here on research and scholarship examining models of federal funding of Indigenous organisations in other sectors. In 2009, for example, Judith Dwyer and colleagues examined funding models for Indigenous health services. By reviewing contemporary practices and policies of health authorities, they were able to identify characteristics of the funding relationships that either enabled, or provided barriers to, good practice. A key finding was that while governments were committed to developing a robust comprehensive primary health care sector, the classical contracting model was not adequate to support the achievement of this goal. As such, the authors advocated for a shift in approach, one that moved away from a model of being risk averse and towards a more relational paradigm. [120] This required a different way of thinking about the relationship between government and the sector, with implications for both sides.[121]

E. The Policy Story

Between 1996 and 2007, the Australian federal government, under the Prime ministership of John Howard, introduced a great number of policies that had huge impacts on Aboriginal organisations, including the ATSILS. Over this time the Howard Government forged a neoliberal ideology which continues to overshadow Indigenous interests today. In keeping with neoliberal ideals, Howard's approach to Indigenous affairs emphasised market-based economic development, rigid measures of formal equality, and competitive individualism though 'self-sufficiency.[122] Under its mantle, policy makers abandoned self-determination as a framework to underpin Indigenous policy. The Howard Government did so while strategically and rhetorically positioning Indigenous peoples and organisations as citizens and community bodies, respectively, that had not taken responsibility for 'dysfunctional' behaviour. Indigenous organisations were described as mismanaged, misguided and corrupt. The efficacy of this rhetoric was a dire consequence of systemic racism, a racism so internalised that even our own people can start believing this discourse.[123] It is not surprising, in this context, that the Howard Government directed Australia to vote against adopting the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) in September 2007.[124] It was one of just four states to do so alongside Canada, New Zealand and the United States. The Australian government's policy disconnect on Indigenous self-

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119 Ibid.

120 Judith Dwyer et al (n 103).

121 For further discussion of lessons that might be learnt from the health sector, see Chapter 5.

122 See Jon Altman, 'Indigenous Policy: Canberra Consensus on a Neoliberal Project of Improvement' in Chris Miller and Lionel Orchard (eds) *Australian Public Policy: Progressive Ideas in the Neoliberal Ascendency* (The Policy Press, 2014) 115-18.

123 Aileen Moreton-Robinson, 'Imagining the Good Indigenous Citizen: Race War and the Pathology of Patriarchal White Sovereignty' (2011) 15(2) *Cultural Studies Review* 61 highlights the discourse used by the Howard Government – Noel Pearson, race, nationhood and the media used as powerful weapons to gain support from white citizens for exercising power over Indigenous peoples.

124 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/Res/61/295 (2 October 2007, adopted 13 September 2007).

determination is significant and frames the ongoing inequality in health, employment, education and justice outcomes.

The right to self-determination, and other human rights, remain fundamental to the aspirations of Aboriginal communities. Indeed, the right to self-determination has been adopted as the legal principle underpinning international Indigenous polities' human rights.[125] In my interview within him, Gary Foley spoke of self-determination as the means through which Aboriginal people regain control of their own destiny. For Foley, it encompassed Indigenous peoples 'regaining control of their own affairs, being able to decide for themselves how and where and if they fit into the future of Australia and we saw self-determination as meaning economic independence.'

When asked whether he saw todays ATSILS as self-determining, he strongly and very bluntly described the institution as having become 'politically emasculated', now run by a 'middle-class managerial entrepreneurial elite' and, in this way, in direct contradiction to the initial principles of its original establishment. [126]

Dennis Eggington, a Nyoongar man from great south-west of Western Australia, and Shane Duffy, a Kalkadoon man from Mt. Isa in Queensland held similar views. They are the longest serving CEOs of ATSILS, each having accumulated over 20 years of service in Western Australia and Queensland, respectively. In Eggington's words,

> [Self-determination is] an evolving thing because most people now are talking about the ILAP programme saying, "oh shit, we're being mainstreamed". Well, we've been in the Attorney General's department for a long time. We've been mainstreamed for a long time. They're talking about, you know, our self-determination, where we really want to be a community-controlled organisation. Well, one, two, three, four, or five of us are all company limited by guarantee. We're not community controlled. We're Aboriginal managed and Aboriginal controlled, but we're not community controlled.

In his interview, Shane Duffy reiterated Eddington's perspective, reflecting 'we'd like to think that we're truly self-determining but we're not. We're controlled, day in/day out, second by second, down to the thousandth of an inch.'[127] Greg Shadforth, PLO of ATSILS Queensland, also spoke of the extent to which ATSILS structures have been unfairly shaped through government interferences and biased policy directions. To the extent that ATSILS is self-determining, Shadforth noted that

> ATSILS addresses self-determination largely through having a Board of Directors who are themselves Indigenous Australians – to set the strategic direction; and just as crucially, by having an Indigenous CEO,

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125 The right to self-determination is contained in article 1 of both the International Covenant on Civil and Political Rights (ICCPR) and in article 1 of the International Covenant on Economic, Social and Cultural Rights.

126 Interview with Gary Foley (n 14).

127 Interview with Shane Duffy (n 43).

> to oversee and set the operational direction. Indigenous staff in key roles adds the icing to the cake.

He went on to describe other ways in which ATSILS might be viewed as self-determining. For him,

> Access to justice is also a component – and ATSILS mode of operations enhances such access for Indigenous Australians (especially via our geographical spread and 24-hour operations).[128] Further, our "cultural competency" also plays a key role – both in terms of an ability to provide quality services as well as in maintaining the confidence of the various Indigenous communities to actually utilise ATSILS' services. Community Legal Education and a preparedness to challenge and put up solutions to governments in regard to legislation that adversely affects Indigenous Australians is another aspect. In some respects, "self-determination" is like the layers of an onion – it is not a one-dimensional concept – and clearly, can mean different things to different people.

Perhaps part of this multidimensional concept is reflected in the central philosophy and practices of ATSILS which foster and support accountability and probity. As David Woodroffe saw it, these are part and parcel of the ATSILS framework, and are reflected in the fact that – contrary to the perceptions outside of the legal sector– ATSILS consistently have been deemed low risk agencies.[129] Despite having worked in a national crisis for decades, under extreme financial conditions, successive independent and government commissioned reviews have identified ATSILS as good service providers, and providing value for service. [130] Indeed you would think with so many similar findings across volumes of reports that speak to the organisations' accountability and low risk classification, ATSILS would be afforded more government investment. However, the central stumbling block is the continuation of a colonial mindset which, despite the evidence built over decades that ATSILS are institutions of probity, manifests in biased and discriminatory funding and other policies that undermine or meddle with the capacity of ATSILS to practise autonomy.

E1. The Aboriginal Torres Strait Islander Commission

A prime example of how the colonial mindset has resulted in sustained government meddling and biased policy making is the demise of the Aboriginal and Torres Strait Islander Commission (ATSIC). When John Howard came into office in 1996 he immediately set about dismantling Indigenous governance. In fact, Howard's first act as Prime Minister was to state his intention to abolish ATSIC. No government-sponsored, elected body would be put in its place.[131] Instead, an administrator would

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128 Ibid.

129 Interview with David Woodroffe (n 46).

130 Ibid.

131 John Howard 'Press Conference Parliament House Canberra' *Department of the Prime Minister and Cabinet: PM Transcripts* (Web Page, 2 December 2004) <https://pmtranscripts.pmc.gov.au/release/transcript-21525>.

take over the powers and functions of the ATSIC board. Howard's plans required legislative change and his first attempt to dissolve ATSIC was blocked in the Senate. In response, his government appointed a special auditor to investigate allegations of 'widespread fraud' within ATSIC funded organisations. The special auditor found none. Rubbing salt into Howard's wound, the Federal Court soon thereafter deemed the appointment of the special auditor illegal under administrative law. That is, the Court found that the Government had overstepped its powers to appoint the auditor in the first place.[132] Two months later, in his first budget delivered in May 1996, Howard announced a cut of $470 million from the ATSIC budget. It became clear that coercive funding was going to become a primary means through which the Government was going to pursue its stated goal. As stated previously, funding has always been a mechanism of government control.

The funding cuts forced ATSIC to close women's centres and a raft of community and youth support programs. However, throughout this ATSIC showed leadership, stood its ground, and with the RCIADIC in the back of their minds, they supported ATSILS (such support for ATSILS has not happened since).[133] Over this time, for example, ATSIC:

- protected ATSILS funding from an across-the-board cut to ATSIC's revenue in 1996;
- provided additional funds to support the changes to ATSILS it perceived as necessary;
- conducted a program of reviews of Aboriginal legal services; and
- developed model service guidelines and negotiated their introduction in each legal service. [134]

The National Commission of Audit, appointed by the Howard Government, highlighted the direction that the government proposed to take when dealing with Indigenous programs and services in its final report published in June 1996.[135] As it turned out, its report was used as the basis for a later review of the ATSILS. The National Commission had recommended that any duplication and overlap between ATSILS and mainstream legal aid delivery should be removed by amalgamating ATSILS with Legal Aid Commissions (LACs).[136] Under this system:

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132 Aboriginal Legal Service v Minister for Aboriginal Affairs (1996) 139 ALR 577.

133 Although Labor made a one-off increase of $6.2 million for ATSILS in 2009: see Bob Debus, Minister for Home Affairs and Robert McClelland, Attorney General 'Funding for Legal Assistance Services' (Joint Media Release, 9 May 2009). <http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/SGIT6/upload_binary/SGIT6.pdf;fileType=application%2Fpdf#search=%22media/pressrel/SGIT6%22> (Accessed 28 November 2020).

134 Gordon Renouf, 'Aboriginal and Torres Strait Islander Legal Services: Threats and Opportunities' (1998) 73 *Australian Law Reform Commission Reform Journal* 11 <http://www5.austlii.edu.au/au/journals/ALRCRefJl/1998/19.html>.

135 See National Commission of Audit, *Report to the Commonwealth Government* (Final Report, 19 June 1996). A digital copy of the report is available here: 'The Howard Government National Commission of Audit', *Michael Smith News* (online, 22 October 2013) <http://www.michaelsmithnews.com/2013/10/the-howard-government-national-commission-of-audit-march-1996.html>.

136 See Recommendation 4.27 in National Commission of Audit (n 135).

- legal representation would be provided by LACs;
- legal advice would continue to be provided by specialist Aboriginal and Torres Strait Islander Community Legal Centres (CLC);[137]
- ATSIC would fund major test cases on a purchaser/provider basis, preferably, but not exclusively, through LACs;
- accountability for Aboriginal and Torres Strait Islander CLCs would be provided through LACs to Legal Aid and Family Services in the Attorney-General's Department with funding provided by ATSIC to the Attorney-General's Department; and
- LACs would be provided with increased funding to reflect the increased level of legal representation. The increase would be based on the number of matters dealt with by ATSILS in 1995-96 and the average rate for these matters funded by LACs.

These recommendations directly contradicted a recommendation given by the RCIADIC some five years before, which emphasised that 'in providing funding to Aboriginal legal services, governments should recognise that Aboriginal legal services have a wider role to perform than their immediate task of ensuring provision of legal services to Aboriginal persons.'[138]

In 2002, the Federal government, still under Howard's leadership, initiated another review of ATSIC. The final report of this review – *A New ATSIC: Report of the Review of the Aboriginal and Torres Strait Islander Commission Review Panel* – was handed to the Government in November 2003.[139] While the report recommended against the abolition of ATSIC, it concluded that ATSIC was in urgent need of structural change. To this end it recommended:

- an overhaul of ATSIC's representative structure, in order to overcome the sense of detachment between local Indigenous communities and the national board;
- a strengthening of, and increased emphasis on, regional planning processes; and,
- a permanent delineation of the roles of ATSIC's elected representatives and its administrative arm, but through amending the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) rather than the existence of a separate agency (ATSIS).

The Government nonetheless determined that ATSIC should be abolished. In her interview with me, Jackie Huggins, a highly respected Indigenous woman who was a member of the Review panel, described her disappointment that the Government had not accepted the Committee's recommendation to restructure ATSIC.

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137 The use of the acronym 'CLC' reflects the language used in the National Commission of Audit report. Current usage of 'CLC' within the justice sector refers to Community Legal Centres, which are different organisations to ATSILS.

138 See Recommendation 106 in Commonwealth, *Royal Commission into Aboriginal Deaths in Custody Australia* (n 5) vol 5.

139 John Hannford, Jackie Huggins, and Bob Collins, 'In the Hands of the Regions – A New ATSIC: Report of the Review of the Aboriginal and Torres Strait Islander Commission – Digest' (2003) 8(3) *Australian Indigenous Law Reporter* 105.

> We were cut off at the knees. I declined the offer three times to be a member of the Review, for likely reasons. I felt outraged and incredibly used by Government that a $2m process amounted to nothing. Nor did the usual lateral violence on both sides abate. In my role at National Congress that hasn't stopped either. When you lead or put yourself out there, you become a target. It is unfair and unwarranted.[140]

As Huggins points out, Indigenous peoples have reason to be wary of participating in government-initiated reviews and inquiries as they, as individuals, are highly criticised by Government, the wider community and their own communities. Indigenous peoples have a long history that lends itself to Indigenous peoples' distrust of governments and this continues with such treatment of those who genuinely want to make real change and not cower to token politics.

After the RCIADIC handed down its report and recommendations in 1991, funding to ATSILS dramatically increased. This reflected the strong leadership by ATSIC, which stuck firm in making sure that funding met the requirements of the RCIADIC recommendations. However, in 2003, the administration of funding to ATSILS was moved from ATSIC to the Aboriginal and Torres Strait Islander Services (ATSIS). ATSIS was based in the newly established Law & Policy branch of the Federal Attorney General's Department.[141] This was a move that everyone feared and was a move away from self-determination. Indigenous employment within ATSIC had been high, and subsequently the institution conveyed a real understanding of the underlying issues ATSILS dealt with and represented.[142] The subsequent demise of ATSIC has meant that this cultural understanding of the historical events that have shaped Indigenous peoples' identity was lost in dealings with governments and bureaucracy.

ATSIC was recognised for doing things in the law and justice portfolio that have not happened since. The Howard era was a blatant attack on Indigenous self-determination. At the time, to be an Indigenous person working for community-controlled organisations, or on a board trying to improve conditions for your people, was very difficult and hurtful. The incidents mentioned above, and others, not only set back improvements in social determinants of health but in other areas such as education and justice. It damaged any relationships of trust between government, the wider community and the Indigenous community that had been built during the Hawke and Keating eras. Other key incidents in the Howard era that contributed to the demise of the relationship of Indigenous community and government are detailed chronologically in the diagram below.

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140 Interview with Jackie Huggins (Eddie Cubillo, Brisbane, 12 March 2018).

141 ATSIC was originally structured into two parts: a representative arm, and an administrative arm. This structure was significantly altered by the creation of a separate service delivery agency, the Aboriginal and Torres Strait Islander Services (ATSIS), in 2003.

142 For example, in the Darwin head office, the Indigenous employment rate was 60% across all levels. The two highest roles in the organisations – State Manager and Deputy – were filled by Indigenous people. In fact, the State Manager role was filled by an Indigenous woman.

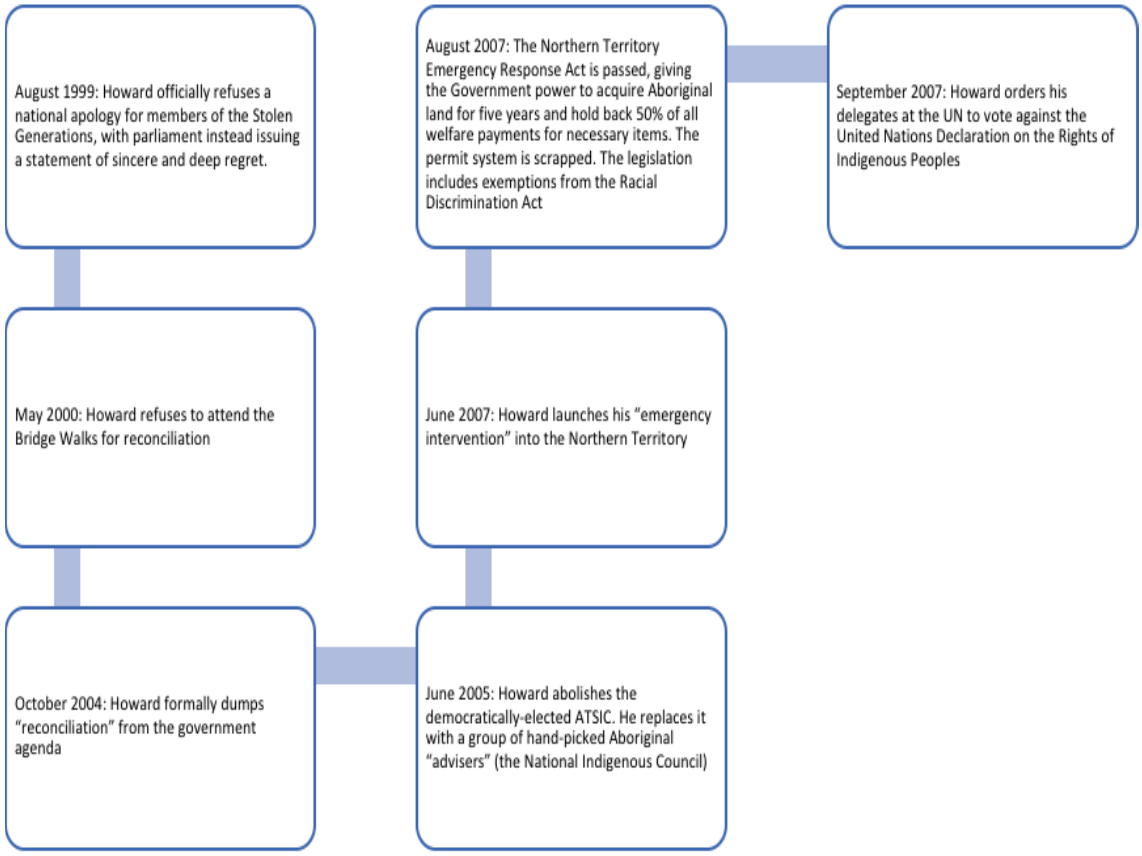

Figure 4.2: *The PM and Aboriginal Australia — A Timeline*
Source: *Crikey*.[143]

The Shadow Minister for Indigenous Affairs and Reconciliation, Kim Carr, best summed up the situation during the Second Reading of the Aboriginal and Torres Strait Islander Commission Amendment Bill 2004 (Cth) when he said:

> This [Coalition] government's approach is now crystal clear. Its attitude to ATSIC and Indigenous people was clearly articulated in 1988, but now it has become abundantly clear for all to see. When the bill to establish ATSIC was first introduced in the parliament in 1988, it was heavily amended by the [Coalition] opposition of the day. The debate in the Senate lasted 40 hours. At the time, it was the most heavily amended bill by an opposition in the history of the parliament.[144]

In hindsight, ATSIC may have benefited from a review after 10 years in existence which looked at how to improve the statutory body. I remember the Yilli Rreung Regional Council that I was the chair of thought it was simply good business practice to conduct such a review, although we were cautious of the government's intent. However, the Review commissioned by the government in 2002 which recommended keeping ATSIC,

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143 See 'The PM and Aboriginal Australia — A Timeline' *Crikey* (online, Oct 12, 2007) <https://www.crikey.com.au/2007/10/12/the-pm-and-aboriginal-australia-a-timeline/> (accessed 4 June 2021).

144 See Commonwealth, *Parliamentary Debates*, Senate, 10 March 2005, 24 (Kim Carr).

albeit with some distinct changes, was used to provide impetus to the Howard Government's plan to abolish it and thereby remove Indigenous peoples from the policy-making process. Howard fulfilled his ideological stand of dismissing the notion that a minority group should be granted separate rights as special citizens or First People (as stipulated in the *United Nations Declaration on the Rights of Indigenous Peoples*). Howard once proclaimed, 'we cannot share a common destiny if these rights are available to some Australians but not all'.[145] He saw measures facilitating, what he considered to be, 'special' rights and programs for Indigenous people as an indication that the 'pendulum [had] swung too far in favour of Aboriginal people'.[146] He was happy to arbitrate accordingly.

The Government's ATSIC Review recognised the importance of ATSIC and, in particular, the role of its Regional Councils, which by then were working with community and governments to develop ground up policy and programs. Many of these policies and programs are still in operation, proving that when ATSIC was around to give directions, better outcomes were happening for all involved.[147] The abolition of ATSIC has hindered progress and the historical knowledge lost has had detrimental effects across the spectrum of Indigenous affairs.

E2. The Tendering of Aboriginal and Torres Strait Islander Legal Services

In 2004 the Howard Government announced that funding of Aboriginal and Torres Strait Islander Legal Services (ATSILS) would shift from a grant funding process to a competitive tender process from 1 July 2005.[148] Successful tenderers would be engaged under government contracts for three-years. In a submission to the House of Representatives Joint Committee of Public Accounts and Audit, the Department of Immigration and Multicultural Affairs and Indigenous Affairs (DIMIA) explained the government's reasoning as to why the services provided by ATSILS were put out to tender:

> One is cost … rationalisation of the number of providers and reducing overheads … But the other thing it targets, which you do not get through simple rationalisation, is necessary improvements in the quality of service to make sure you get the best provider, as opposed to simply the cheapest provider. *[149]*

At the time these changes were made I was Chair of the North Australian Aboriginal Justice Agency (NAAJA). During this time I attended many meetings with government

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145 See Department of the Prime Minister and Cabinet: PM Transcripts 'Transcript of the Prime Minister, the Hon John Howard MP, Opening Address to the Australian Reconciliation Convention – Melbourne' (Webpage, 26 May 1997) <https://pmtranscripts.pmc.gov.au/release/transcript-10361>.

146 Ibid, Speech given at the 1997 *Reconciliation Convention* in Melbourne 27 May.

147 For example, the Regional Council that I was involved with developed multiple programs, including the Elders' Visiting Program, which are still running in the Northern Territory.

148 The Attorney General (Cth), 'Tendering for Indigenous Legal Services Starts' (Media Release No 183, 12 November 2004).

149 House of Representatives Joint Committee of Public Accounts and Audit, Parliament of Australia, *Access of Indigenous Australians to Law and Justice Services* (Report No 403, June 2005) 70.

and other ATSILS; all wholeheartedly agreed that having a three-year contract made more financial sense than shorter contractual agreements or single-year extensions.[150] However, the changes to service contracts still did not allow for proper long-term planning, projection of services, or stability of funded organisations. They prevented ATSILS from further developing or pursuing long term self-sustaining business activities. Additionally, the costs of doing business increased for Indigenous service providers for basic big-ticket operational items as many were negotiating from a position of disadvantage due to the short-term nature of the service contracts.

In relation to DIMIA's claim that tender processes delivered the best provider, there are many examples that proved otherwise. Tender processes often do not give you the best entity for the job, but rather the one that writes the best tender document. One example is the failed attempt to tender out the Domestic Violence Legal Service in Darwin.[151] In that case, a three-year contract was awarded however by the end of one year there were so many complaints about the lack of service that the contract was revoked. The service was subsequently allocated to the Legal Aid Commission.[152]

The Howard Government's decision to move towards tendering ATSILS service was the first time the Government rendered its legal services subject to the open market. The consensus was that the exposure draft was policy-narrowing, separated the range of services currently available, and made it easier for non-Indigenous service providers, rather than Indigenous-controlled ATSILS, to win the tender. It appeared that the Government was disregarding research and on-the-ground experience that culturally appropriate services are an essential component in effective legal service provision. That the Government failed to recognise the economic value of ATSILS was strange given that they were driving an agenda of economic rationalism. It needs to be asked, was this a known contradiction or a blind spot in their own policy enactment?

There was no requirement in the new criteria for the winning tender to be an Aboriginal organisation, let alone employ persons who have any experience in dealing with the Indigenous community. This might have been avoided had the legal aid sector been given the opportunity to have input into the funding design. The sector having input into the design and construction of the tender process may have also led to a stronger relationship between Government and the legal aid sector, with the sector having a sense of ownership and responsibility, not only for their community but for government policy.

As it turned out, the policy failed insofar as no entities other than the ATSILS applied for the contracts. It was well known in the sector that it was difficult to deliver such a service on the funding provided. However, the policy continues today, with the Attorney General's Department regularly forcing different ATSILS to merge with others for arbitrary non-compliance. This starkly contrasts with what occurs in the health sector, where there are numerous examples of the government working with organisations and, if necessary, appointing an administrator to improve their

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150 I know, first-hand, the relief of getting three-year funding and the benefits this had in terms of easing tensions with staff, landlords and so on.

151 House of Representatives Joint Committee of Public Accounts and Audit (n 149) 70.

152 Ibid.

standards, then handing the reins back to the community to control.[153] In the justice sector there is no Government recognition of the importance of a holistic Indigenous service provided by an Indigenous organisation that is culturally accepted in that region. There is also no recognition of the right to self-determining decision-making by Indigenous peoples for Indigenous peoples.

Sections of the Indigenous community voiced their dissent/disagreement towards the ATSILS mergers. They threatened violence towards the executive that was responsible for rolling the mergers out. As a chair of an ATSILS at the time, I had some hard discussions on the phone and on the streets. In Queensland, ATSILS that were amalgamating with others had it much tougher: threats were sent from other organisations, political manipulators within their communities, and the wider community, none of whom had all the information on this forced change.[154] While everyone knew what was happening in relation to the tenders, ATSILS boards did not communicate it to the community well. This could have been for a plethora of reasons, including concerns about personal safety, or the difficulty of exchanging this across diverse languages.[155]

When I interviewed Shane Duffy, (QLD ATSIL CEO), he expressed how he did not support the mergers at first, particularly as his team felt coerced and pressured by the Commonwealth government.[156] Now, however, he feels many of the mergers turned out to be positive. According to him, on a state-by-state basis, it has allowed purchasing power and the ability to cut down on wastage, particularly in regard to duplicated positions across the organisations. In Queensland, for example, ATSILS went from having 16 independent organisations to becoming merged into one. Others, however, thought that having regional ATSILS gave a stronger connection to the community. As Brendan Thomas saw it for example,

> So, you set up one organisation that's going to cover the state almost by default it becomes less connected to the community because by nature of its structure its dealing with issues at a state level. And my sense is the restructure they did with the tendering killed the regional management structures that had Aboriginal managers who were connected then to local communities and put lawyers in charge.[157] And just hearing mob talk about it, people were saying, 'well this is a Black service run by white people now'.[158]

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153 This can be seen in how the Federal government handled Derbal Yerrigan Health Service in Perth. In that case an administrator was appointed, issues sorted out, and the service was handed back to the community to manage.

154 I first became aware of this through through national meetings I attended. I have since learned of more incidents after bumping into former chairs who have recalled the threats in conversation.

155 Throughout ATSILS jurisdictions there are hundreds of different languages. It is very likely that the policy could not be interpreted or relayed across all of them due to certain words not having a language equivalent.

156 Interview with Shane Duffy (n 43).

157 Interview with Brendan Thomas (n 114).

158 Ibid.

The forced mergers were justified on the basis of a perceived wastage of resources in most ATSILS, with the number of individual and independent organisations in some states ranging to twelve.[159] While merging made financial sense according to economies of scale and streamlining – allowing for savings to be redirected to areas of need and towards frontline contact in the courts and in the health sector – it had cultural implications that were not considered. As Aunty Pat Millar highlighted, the amalgamation of services within states or territories put groups together who had cultural and geographical differences.[160] One example she raised was the amalgamation of services in the Northern Territory, which combined services delivered to the saltwater people and the desert people. There are significant differences between these two peoples: geographically, culturally, linguistically and historically in terms of their contact with non-Indigenous Australians. The opportunity to discuss these issues with government was never afforded to the ATSILS. Rather, merging was forced upon ATSILS by a government that could have relied on, and benefited from, their experience and cultural knowledge. The government's distrust continues to fracture the brittle relationship between them and the ATSILS.

E3. Access to Justice

As discussed earlier in this chapter, in 2014 the Productivity Commission released the report from its inquiry into 'Access to Justice Arrangements'.[161] This report acknowledged a number of important issues such as: the significant unmet legal need amongst Aboriginal and Torres Strait Islander peoples; that this need cannot be met by system reform but requires the investment of additional resources; and that there remains a need for a specialist legal assistance service for Aboriginal and Torres Strait Islander peoples (such as ATSILS). Furthermore, the Commission noted the importance of law reform, advocacy and community legal education programs to ensure an effective and efficient justice system overall.[162] Without law reform and community legal education programs, systemic issues are not identified and addressed. This means people are not encouraged or assisted to resolve legal disputes at an early stage where the costs to the system are low. On this basis, the Commission recommended that Australian, State and Territory Governments should provide funding for strategic advocacy, and law reform activities that seek to identify and remedy systemic issues and so reduce demand for frontline services.[163] It also recognised that the policies of State and Territory Governments have a significant impact on the demand for Aboriginal and Torres Strait Islander legal services and

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159 Prior to July 2015, there were 11 ATSILS on mainland Queensland and a 12th in the Torres Strait (however, it should be noted that before July 2008, there were only 2 in Queensland). New South Wales had 6 ATSILS (down to 1). South Australia, Victoria, Western Australia, Tasmania always had just one respectively. The Northern Territory had two (pre- and post-tender), however since January 2020 when CAALAS amalgamated with NAAJA there has been just one. Prior to June 2005 there were 2 ATSILS in the NT. In 2020 there are 7 – as NAAJA winning tender for CAALAS meaning there is only 1 for the Northern Territory.

160 Interview with Aunty Pat Millar (Eddie Cubillo, Alice, 31st October 2019).

161 Productivity Commission (n 33).

162 Productivity Commission (n 33) vol 1, 28-31.

163 Ibid 62 (Recommendation 21).

family violence prevention legal services, especially in relation to criminal matters.[164] The Commission suggested that State and Territory Governments should contribute to the funding of these services as part of any future legal assistance funding agreement with the Commonwealth Government.[165]

The Productivity Commission found that the provision of services by ATSILS represents significant value for money at current funding levels.[166] However, it appears that value for money and reducing Indigenous peoples' overrepresentation in all levels of the justice system is not a priority for government. This was highlighted by the Coalition's election promise, made on 5 September 2013, to cut $42 million from the Indigenous Policy Reform Program (IPRP).[167] This is contrary to the evidence and advice continually provided to governments (often by government agencies, departments and inquiries) that adequately funded ATSILS are not only economically feasible but are necessary to facilitate access to justice for Indigenous Australians. The fact that the current federal government continues to articulate a desire to reduce funding for ATSILS appears indicative of a lack of political will to reduce Indigenous Peoples' interaction with the justice system.

F. Law Reform and Advocacy

F1. Where Are We Now?

In 2018, the Attorney-General's Department coordinated a review of the National Partnership Agreement on Legal Assistance Services (NPA) and the Indigenous Legal Assistance Program (ILAP). At the same time, the Department of Prime Minister and Cabinet coordinated a review of Family Violence Prevention Legal Services (FVPLS). The Federal Government in its wisdom ultimately decided to cut funding to the National Family Violence Prevention and Legal Services Forum (National FVPLS) from June 30, 2020. [168] When its intention to do so was announced, Phynea Clarke, Deputy Chair of the National FVPLS Forum, described the decision as 'baseless' and 'unjustified'. She noted the cruel irony of the government announcing the cuts on the 25 November 2019, the International Day for the Elimination of Violence Against Women.[169] This decision was made despite the ILAP Review recommending resources to FVPLS be increased.[170]

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164 Productivity Commission (n 33) 113.

165 See Senate Legal and Constitutional References Committee (n 53) 66 (Recommendation 22.4).

166 The Productivity Commission estimated that additional funding from the Australian and state and territory governments of around $200 million a year was needed: Productivity Commission (n 33) 30. Also see Cunneen and Schwarz (n 54).

167 The former Indigenous Policy Reform Program was rolled in with others to establish the current ILAP, indicating the government's confusion with the operative programs at the time.

168 'Funding Cuts Silence Aboriginal Women' *Mirage News* (online, 6 December 2019) <https://www.miragenews.com/funding-cuts-silence-aboriginal-women/>.

169 Ibid.

170 Cox Inall Ridgeway, Review of the Indigenous Legal Assistance Program (ILAP), 2015-2020 (Final Report, 1 February 2019).

A forward-thinking review such as that conducted by Judith Dwyer et al and published in *The Overburden Report* is needed in the ILAP.[171] In 2018, the Commonwealth Attorney General's Department stated the purpose of the Review of the ILAP was to assess its effectiveness, efficiency and appropriateness as a mechanism for achieving its objectives and outcomes within available resources and to identify best practice and opportunities for improvement.[172] Further, the Department stipulated that the outcomes of the Review of the ILAP would inform future funding arrangements for Indigenous legal assistance services from 1 July 2020. On face value, this appeared to lay the foundation for an ongoing commitment to move towards better collaboration and outcomes for all involved. However, in the documentation that was given to consultants to tender for the role of conducting the Review itself, its guidelines stipulated that:

> The Review of the ILAP will not conduct new research or consider in-depth analysis of the broader issues, including the level of Indigenous legal need in Australia and/or whether existing funding is sufficient to meet that need. This will not exclude consideration of existing research and analysis on these issues and legal assistance services and service delivery.

These guidelines suggest no real commitment to look at the unmet legal need or funding disparity to deliver services by organisations that are currently underfunded and overwhelmed by the ever-increasing workloads to assist people. As the Law Council of Australia noted, in order to prevent the further deterioration of Australia's legal system due to under-funding of legal aid and to achieve the efficiency savings possible through properly funded legal aid system, the Australian Government must match the contributions of states and territories and return legal aid funding to a 50-50 share. [173] The outcome of this review will be discussed in Chapter 5.

Just as importantly, from the ATSILS perspective, will be the Council of Australian Governments (COAG) decision on refreshing the Closing the Gap policy.[174] With four of the seven targets expiring in 2020, COAG agreed to 'refresh' the Closing the Gap agenda, providing an opportunity for genuine partnership with Indigenous Australians to shape what these targets should look like going forward. A serious omission of the Closing the Gap policy to date has been the lack of formal justice targets to close the gap in imprisonment rates.[175] As the Aboriginal and Torres Strait Islander Social Justice Commissioner has argued, expanding the Closing the Gap targets to include a criminal

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171 See the discussion of Judith Dwyer et al's research finding above: Judith Dwyer et al (n 103).

172 See Auditor General's Department, *Review of the Indigenous Legal Assistance Program, Terms of Reference* (2018) 2-3 <https://www.ag.gov.au/sites/default/files/2020-03/Review-of-the-indigenous-legal-assistance-program-terms-of-reference.pdf>.

173 The Council of Australia, 'NPA and ILAP Effectiveness Under Review' (Blogpost, 5 April 2007) <https://www.lawcouncil.asn.au/media/news/npa-and-ilap-effectiveness-under-review>.

174 Australian Government, 'Close the Gap Refresh' (2018) <https://www.coag.gov.au/sites/default/files/communique/coag-statement-closing-the-gap-refresh.pdf>.

175 It is also worth mentioning that there are no targets to reduce the number of child removals or increase the reunification of families. This would be a policy lever for greater fund allocations to ATSILS for representation in child protection cases.

justice target would address the disproportionate representation of Aboriginal and Torres Strait Islander peoples as both victims of crime and as overrepresented populations within the prison system.[176]

The 'Close the Gap Refresh' is a time for ATSILS and the legal sector to be proactive and push for a new approach, one that focuses on greater investment in early intervention, prevention and diversion strategies. This means developing smarter solutions that increase safety and address the root causes of violence against women, cut reoffending and imprisonment rates, and build stronger and safer communities.[177] It also provides an opportunity to strengthen relationships between government and the ATSILS and reinvigorate the push for appropriate funding to meet the ATSILS workload needs and more importantly reduce the violence and incarceration rates faced by Indigenous peoples.

For any relationship to work there needs to be trust at its core. The development of this trust begins at initial engagement between two parties with interactions over time leading to a more dynamic and ultimately prosperous working relationship.[178] Any agreement based on trust requires each party to be responsible or work in a responsible manner in achieving the outcomes sought. Where there is an imbalance in the levels of trust and responsibilities/obligations, the relationship is likely to be strained and could, if not dealt with early, become unworkable leading to all types of dysfunctional behaviour from either party.[179] The refresh of the Closing the Gap policy is an opportunity for both ATSILS and Government to develop such renewed and meaningful relationships.

Unfortunately, the opportunity has already been imperilled. In early February 2018, COAG convened a 'special gathering' with Indigenous representatives to discuss the 'Closing the Gap Refresh' and set priorities for the next decade.[180] NATSILS and many of the peak organisations that make up the Redfern Statement Alliance were excluded.[181] Only after the fact were many informed via email that the 'gathering' had taken place, described as 'a historic opportunity for participants to provide independent advice to First Ministers'. [182]

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176 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2009* (Report, 23 December 2009) 53–54.

177 Change the Record Coalition (n 78), Blue Print for Change (2015) <https://drive.google.com/file/d/0B3OlOcaEOuaFU3BNc3Zrbl9wa0U/view>.

178 Janet Hunt, Engaging with Indigenous Australia – Exploring the Conditions for Effective Relationships with Aboriginal and Torres Strait Islander Communities (Closing the Gap Clearinghouse Issues Paper No 5, October 2013). Hunt specifically discusses trust and relationship with Government and Indigenous organisations.

179 Ibid.

180 See NATSILS, *Submission to the Closing the Gap Refresh 'The Next Phase'* (Public Discussion Paper, May 2018) <https://www.natsils.org.au/wp-content/uploads/2020/12/NATSILS-Closing-the-Gap-Refresh-submission44da.pdf>.

181 For information on the membership of the Redfern Alliance see: <https://protect-au.mimecast.com/s/clnYCNLwzjF0wwgw3UmjZ9X?domain=reconciliation.org.au>.

182 NATSILS (n 180) 4.

F2. Troublemakers, Activists and Lefties

In the early days, many Aboriginal and Torres Strait Islander lawyers and social reformers who advocated for the establishment of ATSILS were similarly socially excluded from the institutions of the settler society.[183] They were also abused and insulted, and often had the tools of the bureaucrat used against them very effectively. Many ATSILS organisations were, and continue to be, sternly warned that advocating on certain topics could jeopardise future funding. Notably, in more recent times, when the Queensland ATSILS brought an action to the High Court in *Maloney v The Queen* ('*Maloney*')[184] they heard on the grapevine that it was causing a few headaches for the Queensland Attorney General. At no time, however, was there any pressure brought to bear from that office for them to desist.[185] One wonders whether this would have been the case if they were funded by the state and not federally. Throughout this action, the ATSILS was openly criticised by a few private individuals on talk-back radio and the like, who complained that the High Court appeal was 'a waste of taxpayer funds'. In response, ATSILS simply pointed out that they were running the action with their salaried staff and pro bono counsel with minimal cost to the taxpayer.[186] When I asked him about this action and others, Greg Shadforth, the Principal Legal Officer of Queensland's ATSILS, could not recall if the organisation had ever been warned about potential funding ramifications for advocating for a client or for putting forth a particular position in a law reform submission. He did note however, that if they ever were, in the absence of a contractual (funding) obligation to the contrary, ATSILS would tell them in no uncertain terms to go away.[187]

ATSILS strives to rebalance the judicial scales by providing in-court presence for Indigenous clients and advocating for systemic equality. They do so, and have done so historically, even with the risk of having unjustified labels placed upon them, or their funds threatened. In providing this advocacy – whether on behalf of victims, bereaved families, or incarcerated populations – ATSILS and their staff have faced retribution by the government, media and the wider community. One example was when the Aboriginal Legal Service of Western Australian (ALSWA) considered making a formal complaint to the Discrimination Commission on the basis that the actions of a pub in Coolgardie were 'offensive and unlawful' and breached racial discrimination laws. [188] In that case, the publican's iPhone had been stolen so she had put up a sign on the wall of the pub which read, 'No Indigenous person will be served in this hotel until my apple iPhone is returned that was stolen on 1st March 2014.'[189] The sign named the person that the publican believed had stolen her phone. When the Government heard that ALSWA was planning to lodge a complaint, the Government 'reminded' ALSWA that such an action was outside the scope of their funding and warned that if they

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183 For examples see Jon Faine (n 12).

184 *Maloney v The Queen* [2013] HCA 28 ('Maloney').

185 Email from Greg Shadforth to Eddie Cubillo, 3 February 2020.

186 Ibid.

187 Ibid. Email from Greg Shadforth to Eddie Cubillo.

188 Interview with Sarouche Razi and Dennis Eddington (Eddie Cubillo, Perth, 10 May 2018). Sarouche Razi was formerly Senior Solicitor of the Civil and Human Rights Unit, Aboriginal Legal Service of Western Australia. At the time of interview Dennis Eggington was Chief Executive Officer.

189 Ibid.

proceeded, it could jeopardise their funding. The people and the systems who assert authority and power in many aspects of our life, perceive many of the actions of ATSILS and their staff as an attack on their authority. Subsequently ATSILS and their staff are deemed 'troublemakers', 'activists' and 'lefties'.[190] Such labelling of organisations and advocates is intended to stigmatise those who fight for the rights of minorities and can foster a belief that the organisation and their advocates are inferior. Even our own people start believing the stories.

As a former chair of an ATSILS, I have been confronted on a number of occasions in the street by various government officials and law enforcement officers who have questioned media statements the organisation or I made during my term. These same individuals would often go on to personally attack the organisation publicly through different channels. Another personal experience of such targeted attacks occurred while I was Executive Officer of NATSILS. I had recently published an article which questioned the 'paperless arrests' legislation of the Northern Territory.[191] As I was walking back to my accommodation on a popular Darwin street I was stopped by Police and interrogated about whether I had been drinking. From their questions and tone, it became apparent they had stopped me as result of my role and my article. But as they informed me, 'They were just doing their job!'[192]

F3. The Role of ATSILS

The role of ATSILS is broader than the wider public –even the Indigenous community– understands. It is more than just court representation. Many Australians, including Indigenous peoples, are unaware of the legal process until they are in trouble, when they then have to access legal aid and are subjected to foreign processes of court appearances and so on. After 40 years of working in the justice space, ATSILS have developed a real understanding of what needs to be done to meet the overwhelming needs of their people caught in the justice web. David Woodroffe – the only Indigenous Principal Legal Officer of an ATSILS – best explained the roles of ATSILS in an interview with me. He said he did not believe that a non-Indigenous legal organisation could ever achieve, to the same level of services, being culturally competent, being attuned to the needs of the community, or in representation.[193] He also noted that the findings of the ILAP report reflected that.[194] In his words,

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190 Ibid. In this interview, Dennis Eggington spoke about these labels and the many others he had been subjected to as a result of advocacy throughout his 22 years as CEO of Aboriginal Legal Service of Western Australia.

191 Eddie Cubillo, 'Aboriginal Deaths in Custody: NT's 'Paperless Arrest' Police Powers Need Urgent Review' *The Sydney Morning Herald* (online, 31 May 2015) <https://www.smh.com.au/opinion/aboriginal-deaths-in-custody-nts-paperless-arrest-police-powers-need-urgent-review-20150531-ghdf8u.html>.

192 I later had a laugh with one of my family members who was watching from across the road. They presumed I had been speaking to a friend that I knew through my legal background.

193 Interview David Woodroffe (n 46).

194 See Cox Inall Ridgeway. Review of the Indigenous Legal Assistance Program (ILAP), 2015-2020, Final Report, February 2019 Prepared for the Attorney-General's Department. The ILAP review will be discussed further in Chapter 5.

> Just the nature of the work, the nature of the people, the nature of who we attract, the nature of the values of this organisation is to literally help people and to go beyond not just the court matter. You know, literally after the court matter, taking the person to the airport, or taking them to the rehab centre, waiting there for four, five hours, picking them up, making sure they've got a safe place to stay that night, picking them up the next day – all those sort of things, which are always seen as social work and non-core activities… are incredibly important for the individual, and for the way that you do these sort of things. I don't believe that a non-Aboriginal Legal Service will invest as much, not in money or resources, but to that commitment and those values as an Aboriginal organisation would do.[195]

As Woodroffe captures, ATSILS' role goes beyond the service for which they are funded. A key component of their work is building rapport with and understanding individuals and communities. This gives them unparalleled insight through which they provide informed submissions, whether in court or to public inquiries. In the sections that follow, I attempt to illustrate the diverse functions of ATSILS, which frequently are not recognised, despite their importance for meeting the legal needs of Indigenous peoples.

F3(a) Activist Research and Written Submissions – The Power of the Pen

Activist and community action research is frequently undersold and under-appreciated. Over the years, federal governments of all persuasions have attempted to stop ATSILS from engaging in such advocacy work, which is typically critical of government. This has been explicit at times, observable in the terms of government service contracts with ATSILS; it has also manifested in governments' inaction to reinstate the funding of this activity, although governments nonetheless frequently approach ATSILS to make submissions to governmental or parliamentary inquiries. Despite this, ATSILS engage in a lot of media awareness activities based on research they conduct, particularly on deaths in custody. They often advocate for bereaved families by holding press conferences, often at the detriment of their organisations, with no concern other than for their people. The research most practised by ATSILS is not conventional or targeted for publication in journals. Rather, it is action driven research. A good example of the kind of the research ATSILS engages in and the outcomes it achieves is through its work on the Customer Notification Service (CNS). Developed following a recommendation by the Royal Commission into Deaths in Custody, ATSILS across all states and territories provide a 24/7 CNS, which enables an Aboriginal or Torres Strait Islander person who is arrested or detained by the police to access an appropriate ATSILS solicitor immediately upon their detention at a police station. [196] ATSILS did this until recently with no extra funding as they saw this met a

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195 Interview David Woodroffe (n 46).

196 See Commonwealth, *Royal Commission into Aboriginal Deaths in Custody Australia* (n 5), Recommendation 224.

community need. While providing an invaluable data source of the numbers of people being detained, the research achieves real life results.

Law reform submissions are another key mechanism through which ATSILS have input into proposed federal, state and territory laws and policies, even though they are not specifically funded to do so. Submissions are based on their research and insights gained from experiences of working across all facets of the justice system. ATSILS publish such research independently as well as in partnership with others. The provision of submissions is an important role that ATSILS fulfil based on their first-hand research, on the ground experience, and the extensive knowledge they have accumulated through having worked in the field for over 50 years. This can only provide invaluable input into developing better policies, which will lead to better outcomes. Without such input from ATSILS in the making and reviewing of laws and policies which impact directly on the rights of Aboriginal and Torres Strait Islanders, valuable and crucial information would be unavailable in the process of decision making.

As detailed further below, the government's defunding of ATSILS law reform and advocacy activities (other than court work) has jeopardised the capacity of ATSILS to fulfil these functions. The government withdrew these funds, despite the regard held by politicians and the profession for ATSILS work in this respect.[197] It is ironic then that ATSILS are consistently asked for their input in Parliamentary Committees and Royal Commissions, often by the very people who have supported the withdrawal of funding for such activities. The withdrawal of this funding has made it extremely difficult for ATSILS to be proactive and has curtailed its ability to provide detailed submissions on areas of concern, areas where they hold expertise and experience. Subsequently ATSILS are often unable to provide, or can only provide limited research, information and submissions on matters where they could assist in developing policy and processes to achieve better outcomes for all, particularly Indigenous Australians. Indeed, by withdrawing funding for ATSILS' law reform and advocacy activities, the government has devalued and delegitimised the experiences and opinions of Indigenous Australians.

ATSILS' law reform and advocacy work today is now predominantly covered by staff who are employed in other full-time roles within the organisation.[198] The withdrawal of funding meant the removal of dedicated advocacy positions. Community legal

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197 As discussed above, many politicians from all political persuasions fought hard to get the Coalition Government's election promise to cut ATSILS funding overturned in 2014. Various NGOs from the Change the Record Campaign lobbied for the funding cuts not to go ahead: see n 78.

198 Previously, there were separate funding agreements for Advocacy and Operational staff. In 2012-13 this changed, when advocacy moved under the umbrella of "ATSILS operational agreements: see NATSILS, Funding Cuts to Aboriginal and Torres Strait Islander Legal Services (April 2013) < https://www.natsils.org.au/wp-content/uploads/2020/12/Funding-Cuts-Factsheet-2-April-2013.pdf>, North Australian Aboriginal Justice Agency, Annual report 2013/14 (2014) <http://www.naaja.org.au/wp-content/uploads/2014/05/Annual-Report-13-14.pdf>, Davidson, Helen, 'The Guardian Coalition's legal aid cuts a 'slap in the face' for Indigenous communities' (6 September 2013) The Guardian https://www.theguardian.com/world/2013/sep/06/coalition-legal-aid-cuts-indigenous?CMP=Share_iOSApp_Other. See also the discussion, above, on defunding law reform.

education officers, solicitors, managers and Principal Legal Officers now often complete law reform and advocacy activities in their own time so as not to impede on their substantive roles. In disallowing funds to be utilised for advocacy and law reform activities that may contradict government policy, the Federal government and its bureaucracy highlighted how out of touch they were. Removing dedicated law reform and advocacy positions had a 'domino effect' across the entire organisation, causing serious issues for frontline service delivery.

When I interviewed Shahleena Musk, a Larrakia woman who worked as a lawyer for ATSILS for over 14 years, she reflected on the difficulty of being confined by the funding grants-terms and conditions, which restrained any advocacy outside of court appearances.[199] Musk, who has since worked in NGOs that are not substantially reliant on government funding, spoke to the freedom and flexibility this gave to work outside of the limited confines of the western model for provision of legal services dictated by government.[200] Such NGOs can litigate to address systemic issues, speak out against Government illegality or impropriety and be fearless in their advocacy.[201] Based on these experiences, Musk argued that the ATSILS need to have funding or financial resourcing external to Government to be fearless and to tackle systemic issues that impair or impact adversely Aboriginal peoples.[202]

NATSILS and its members are not 'anti-government'. They exist to deliver professional and culturally competent evidence-based advice, to respond to legislative and policy reforms of Australian governments, and to provide a cohesive stance on issues of national and international importance for Aboriginal and Torres Strait Islander peoples.[203] There have been times that ATSILS have supported aspects of government-introduced legislation. For example, in 2011, NATSILS supported aspects of the government's proposed amendments to the *Crimes Act 1914* (Cth) which would allow a court to take into account customary law or cultural practice in making bail and sentencing decisions in relation to laws involving the protection of Aboriginal and Torres Strait Islander cultural heritage. [204]

However, there are times when reforms are inadequate for Indigenous peoples, for example, when they do not allow the full exercise of sentencing discretion in considering customary law and cultural practice. Indigenous customary or tribal law is often seen as harsh and brutal; however, it can also be a form of diet or mediation. It developed as a method of ensuring order and discipline. Payback is the most known form of customary law and is still practiced. This often leads to conflicts between white law and tribal law. As Mr Woodroffe, the NAAJA Principal Legal Officer, noted in his interview with me, there are many instances where payback is deemed irrelevant in

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199 Interview with Shahleena Musk (Eddie Cubillo, Melbourne, 17 July 2019). Shahleena Musk is a former ATSILS Lawyer (having worked with both NAAJA and ALSWA). At the time of interview Shahleena Musk was working with the Human Rights Law Centre.

200 Ibid.

201 Ibid.

202 Ibid.

203 See NATSILS, 'Submissions of the National Aboriginal and Torres Strait Islander Legal Services 2010-2014' (2015) 17 *Journal of Indigenous Policy* 1, 6.

204 See Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011 (Cth) sch 4.

judicial considerations of criminal matters. One example Woodroffe raised was a bail application in which payback could not be considered.[205] However, the more important issue that stems from this conflict is that lawyers cannot raise such issues of customary law in sentencing as it is deemed as irrelevant to judicial considerations. This has the effect of silencing Aboriginal law. A number of sections of the *Crimes Act 1914* (Cth) – such as sections 15AB(1)(b), 16A(2A) and 16AA(1) – continue to preclude the consideration of customary law or cultural practice in judicial decisions on criminal offences involving an Aboriginal and Torres Strait Islander person.

NATILS submissions are genuinely about the best interest of their clients, and often highlight the importance of recognising customary law and practices. And as such, while NATSILS supported aspects of the government's reforms to the *Crimes Act 1914* (Cth), it simultaneously argued that to confine these amendments to those offences relating to cultural heritage was to maintain legislative provisions that are illogical, contradictory and contrary to fundamental notions of fairness. [206] Its advocacy, and particular insight here, can be juxtaposed with the recommendations made by the Australian Law Reform Commission in the report of their inquiry into the incarceration rate of Aboriginal and Torres Strait Islander peoples.[207] The ALRC 'encouraged' the Commonwealth Government to review the operation of sections 16A(2A) and 16AA of *Crimes Act 1914* (Cth) to ensure that they are operating as intended.[208] It recommended the Government only 'consider' repealing or narrowing the application of the provisions if it is necessary to the successful implementation of statutory requirements to consider unique and systemic factors of Aboriginal and Torres Strait Islander offenders in Northern Territory sentencing procedures.[209] As ATSILS argued in their submission to the ALRC inquiry, customary law and cultural practice are not now, nor have they previously been, considered in determining the guilt or innocence of an accused person.[210] It is important that Aboriginal cultures and traditions are recognised and able to be considered as factors that may have contributed to offending, as is the case for every other Australian.

F3(b) Community Legal Education – Early Intervention

Community legal education (CLE) is another core component of ATSILS' work. Its main aims are prevention and early intervention. The Productivity Commission highlighted the importance of ATSILS' work in this area in its inquiry into Access to Justice, discussed above.[211] It stated that such culturally competent legal education not only prevented civil and family law matters from escalating into more complex matters, but also prevented them from escalating into criminal matters.[212] In 2009, the Commonwealth Attorney-General's Department's Access to Justice Taskforce also

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205 Interview with David Woodroffe (n 46).

206 NATSILS (n 203) 93.

207 Australian Law Reform Commission, Pathways to Justice - Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples (Final Report No 133, 1 December 2017).

208 Ibid 212.

209 Ibid.

210 NATSILS (n 203) 93.

211 Productivity Commission (n 33) ch 5.

212 Ibid 156-164.

emphasised the importance of prevention and early intervention. In its 'Strategic Framework for Access to Justice in the Federal Civil Justice System', the Taskforce stated:

> Resources need to be directed to the most efficient and effective means of resolving legal problems and disputes. Ensuring that more legal assistance funding is directed to prevention and early intervention will enable more people to get the assistance they need at an early stage, so that their legal problems do not become entrenched and require costly court intervention. Failing to intervene early to prevent legal problems and disputes from escalating is not only costly in terms of resource usage, it also affects individual and community well-being by embedding disadvantage and limiting capacity to participate fully in the economy and society.[213]

As Shahleena Musk stressed in her interview with me, each community has specific needs. There are crucial issues that are burning in our communities, and all desire community education on various topics.[214] The community needs to be re-assured that governments at state and federal level are committed to their long-term well-being.[215] The issue of trust is an important driver here. However, there is also community understanding that there needs to be a longer-term perspective in developing policy, rather than short-term service delivery or 'policy on the run', which normally is developed as a knee jerk reaction to a current news event concerning Indigenous peoples and their communities.[216]

ATSILS provide a CLE presence at federal, state and territory levels, while providing submissions and attending inquiries to advocate on behalf of Indigenous peoples in their jurisdictions. At a national level, there is coordination between NATSILS and its members to develop a national consensus on the issues affecting their clients. For example, submissions have been presented in a collection in the *Journal of Indigenous Policy*.[217] This collection dates from 2010 to 2014 and includes submissions to various government inquiries and to the Australian Human Rights Commission, on matters such as domestic violence, alcohol consumption, customary law, and welfare reform. In this way, and in others previously mentioned, ATSILS have been creative in using a variety of staff (CLE staff are usually a contingent of this group) to continue to contribute, have a presence and be heard. This has ultimately been to ATSILS's own detriment, as governments see that they are able to continue to perform these functions without appropriate or additional funding. This raises a conflict in Indigenous organisations: if they stopped providing this service, who else would provide it? For Indigenous community-controlled organisations, not engaging in such advocacy would mean seeing their own kin suffer.

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213 Attorney-General's Department Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009) 146.

214 Interview Shahleena Musk (n 199).

215 Ibid.

216 Ibid.

217 NATSILS (n 217).

The system fails Indigenous peoples in the inflexibility of the bureaucratic structure. It fails to properly take into account the Indigenous world view and adopt a more holistic approach in certain cases. And it fails to use alternatives to prison on a more regular basis.[218] The importance of the voice of the NATSILS for the public policy debate relates not only to the criminal justice system but also to other areas such as civil and family law that are just as critical to Indigenous communities given the inequalities and treatment they face. Its contribution is crucial in providing an Indigenous perspective, with ATSILS having extensive experience at the coalface, with first-hand knowledge of what programs and policies are working and the ability to provide unique insights and constructive criticism of system failures, successes, and opportunities for improvement as well as grounds for test cases and strategic litigation.

F3(c) Test Cases – Challenging the Law through the Courts

Historically, the Attorney General's Department provided test case funding through ATSILS' individual budgets. That changed in 2008. From that point ATSILS could *apply* for test case funding under the Attorney Generals Department's Commonwealth broad public interest and test cases scheme.[219] Through this funding mechanism, the Attorney General determines what is in the 'public interest' and, therefore, who is eligible. When this funding mechanism was introduced, ATSILS did not support it. It was seen as another form of restraint by which ATSILS, and through them Indigenous peoples, were expected to succumb and relinquish their cultural and spiritual authority to address what they saw as issues that affect Indigenous peoples, regardless of whether they were not recognised in the mainstream. ATSILS have extensive experience working with Indigenous peoples and have an understanding of the inequalities that their clients face, and what they need. By limiting ATSILS' autonomy, the government was seen as once again enforcing, and prioritising, the 'settler's' perspective. Subsequently, many ATSILS did not apply for the test case funding. Another major (and related) reason for this is to protect organisations from government recourse, given their historic tendency to cast such test cases, taken on behalf of Indigenous peoples, in a negative light. [220] Despite this, ATSILS get by, drawing on the relationships they have built over the 50 years working within the justice system.

Although Aboriginal and Torres Strait Islander peoples comprise only three per cent of the Australian population, this cohort is one of the most vulnerable in society. As discussed in Chapter 2, many laws that are apparently 'colour blind' and applicable to 'all' are in many respects well-disguised aspects of a system of racialised social control which intentionally or unintentionally prey on Indigenous peoples and their unique

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218 Interview with Stewart O'Connell (Eddie Cubillo, Sydney, 23 August 2019). Stewart O'Connell is a former ATSILS Lawyer who worked throughout the NT. He is currently working for O'Brien's Solicitors.

219 See Attorney-General's Department, 'Commonwealth Public Interest and Test Cases' (Webpage, nd) <https://www.ag.gov.au/LegalSystem/Legalaidprogrammes/Commonwealthlegalfinancialassistance/Pages/Commonwealthpublicinterestandtestcases.aspx>.

220 While Executive Officer of NATSILS, I regularly heard this discussed during the quarterly national gatherings of ATSILS.

vulnerabilities. It is extremely hard for someone to recognise systemic racism when they have no personal experience or have not worked with clients who deal with it on a daily basis. Below I provide examples of ATSILS' role in appealing decisions and questioning laws that are discriminatory towards Indigenous peoples despite systemic guises. Some of these exemplify the importance of ATSILS' everyday job of submission writing. Others speak to the important work they do in representing those going through the lower-level courts for minor criminal and traffic matters.

F3(d) Improving Police Practices: Challenging Paperless Arrests

At the core of the ATSILS' mission is the realisation of recommendations from the Royal Commission into Aboriginal Deaths in Custody (RCIADIC).[221] One of the Commission's major recommendations was that 'custody should only be used as a last resort and reserved for the most serious of situations and where absolutely necessary'.[222] One example of ATSILS' role in striving for the realisation of this recommendation is through its work in response to the Northern Territory's 'paperless arrest' laws. Such laws achieve the opposite of what the Royal Commission into Aboriginal Deaths in Custody sought. They empower police to lock someone up for four hours for minor offences such as making undue noise;[223] swearing in public;[224] or keeping a front yard untidy.[225] Such offences would normally only attract an on-the-spot fine.

In 2017, a freedom of information application showed the paperless arrest laws had been used an extraordinary number of times – more than 700 in their first three months of operation.[226] Although these laws were ostensibly aimed at 'everyone', in practice they were being applied disproportionately against Indigenous peoples: more than 75 %of those arrested were Aboriginal people.[227] If this was not enough to highlight the racist application of these laws, the following statistics provide further evidence of the degree to which systemic racism was and is at play: in the Northern Territory, Aboriginal people comprise approximately 25.5 % of the population,[228] yet

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221 Commonwealth, *Royal Commission into Aboriginal Deaths in Custody Australia* (Final Report, 15 April 1991) <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/>.

222 Ibid ch 22. See in particular Recommendation 92 which urged 'governments which have not already done so… to legislate to enforce the principle that imprisonment should be utilised only as a sanction of last resort'.

223 *Summary Offences Act 1923* (NT) s 53(1).

224 Ibid, s 53(A), 53(B).

225 Ibid s 78.

226 The Freedom of Information request was lodged by the Human Rights Law Center: see Eddie Cubillo, Aboriginal deaths in custody: NT's 'paperless arrest' police powers need urgent review, *The Sydney Morning Herald*, 31 May 2015. <https://www.smh.com.au/opinion/aboriginal-deaths-in-custody-nts-paperless-arrest-police-powers-need-urgent-review-20150531-ghdf8u.html>.

227 Inquest into the death of Perry Jabanangka Langdon' [2015] NTMC 16, [66].

228 See Australian Bureau of Statistics (2016), *Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016* (Catalogue Number 2071.0, 31 October, 2016) <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20Population%20Article~12>.

more than 80 % of the prison population.[229] The Northern Territory's imprisonment rate is around four and a half times the national average.[230]

A person locked up under these powers has no effective opportunity to challenge their detention or to ask a court to release them. The police essentially act as both judge and jury. There is no separation of powers. This flies in the face of a just democratic society, which includes having a functioning judiciary. The Northern Territory Attorney-General said in Parliament that the 'paperless arrest' laws make it simpler for police to 'catch and release people'.[231] People from all backgrounds understand that police have a tough job and that every reasonable effort should be made to make their job easier. However, in a liberal democracy having safeguards around police powers is appropriate and necessary, and the statistics above highlight the real need for such safeguards.

It is in this context that the North Australian Aboriginal Justice Agency (NAAJA) and the Human Rights Law Centre (HRLC) jointly challenged the 'paperless arrest' regime in the High Court.[232] They did this without the use of test case funding provided by the Federal Attorney General's Department discussed above. In their submission, NAAJA argued that the laws were invalid because they gave punitive powers to police, contrary to the separation of powers under Chapter III of the Constitution (which, it was also argued, should be found to apply in the Northern Territory); and/or that the laws undermined the institutional integrity of the courts, contrary to the *'Kable principle'*.[233] The majority of the High Court disagreed, deciding against NAAJA and its client. They concluded that the laws did not give police an 'unfettered discretion' to hold a person for four hours. Rather, the four hours provided a 'cap' on detention, subject to the requirement that a person was brought before a court as soon as reasonably practicable unless sooner released.[234] By construing the laws in this way, the High Court declared that they were not punitive, and did not undermine the institutional integrity of the courts.[235]

Although the outcome was adverse, the importance here was that such laws –those that do not appear prima facie to target Indigenous peoples–were tested. This is why the role of ATSILS, and in this case NAAJA, in running such test cases is so important. They hold the legislators to account for Indigenous peoples and by so doing highlight

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229 Australian Bureau of Statistics, *Prisoners in Australia, 2016* (Catalogue No 4517.0, 8 December 2016).

230 Ibid.

231 Northern Territory, *Parliamentary Debates* (Legislative Assembly, 26 November 2014) (John Elferink, Attorney-General).

232 *North Australian Aboriginal Justice Agency v Northern Territory* [2015] HCA 41 ('*NAAJA v NT*'). NAAJA's workload was becoming untenable with the number of people they were representing due to the paperless arrest laws.

233 The 'Kable principle' refers to *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51. The case marked an important extension of the concept of judicial independence from the federal executive to apply it also to the executives of the states.

234 *NAAJA v NT* (n 232) 2 (French CJ, Kiefel and Bell JJ), 214–215 (Nettle and Gordon JJ).

235 Ibid 43–44 (French CJ, Kiefel and Bell JJ), 239 (Nettle and Gordon JJ).

how laws are discriminatory, if not on their face, in their application. If ATSILS did not do this on behalf of Indigenous peoples, who would?

F3(e) Improving Judicial Processes: Acknowledging Social Disadvantage of Aboriginal Offenders

In 2011, while Mr Bugmy was serving time in Broken Hill, NSW, he had 'an altercation' with a prison guard, which left him blind in one eye. Subsequently, Mr Bugmy was charged with, and convicted of a serious assault. He was given additional jail time, a non-parole period of four years and three months. After the local court sent Mr Bugmy's matter to the District Court in Dubbo, the New South Wales Aboriginal Legal Services (NSWALS) took carriage of the matter. Their in-house solicitor did an excellent job with the client, who initially received a lenient sentence and was reportedly happy with the result.[236]

The Director of Public Prosecutions, after considerable pressure from the Correctional Officers' Union, appealed to the NSW Court of Criminal Appeal (NSWCCA), arguing that the sentence was manifestly inadequate. Additional grounds of appeal were later filed: these included that the Acting District Court Judge had inadequately assessed the seriousness of the offence, and that too much weight had been given to Mr. Bugmy's subjective circumstances. For NSWALS, the appeal entailed two Dubbo-based solicitors working closely on the matter over weeks and engaging in repeated trips to Sydney and Canberra, amounting to 10-15 days travel between them. Some of these trips involved a significant amount of strategising with approximately 5 days input from other solicitors.[237] NSWALS also engaged a Public Defender (the Service has a flat rate annually for access to Public Defenders) who was briefed by a junior research solicitor, acting as lead counsel. NSWALS had retained this solicitor for 6 months specifically to work on the case.

The NSWCCA decided to increase Mr Bugmy's non-parole period by a year. It would have been an otherwise uncontroversial ruling, except that the presiding Justice Hoeben remarked that with the passage of time, the extent to which social deprivation in a person's youth and background can be taken into account must diminish.[238] It was on this ground that the decision was appealed to the High Court. The High Court was thus presented with the opportunity to decide the relevance of an offender's background of profound social deprivation to the application of sentencing principles.[239] Ultimately, the High Court effectively decided that Aboriginal offenders could rely upon evidence of systemic social deprivation as a relevant factor in determining an appropriate sentence on an individual basis. As NSWALS subsequently highlighted, one of the most significant effects of this decision was that the NSWCCA,

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236 Information relayed to author from former Principal Legal Officer of NSWALS John McKenzie and Jeremy Styles, Senior Crime Lawyer at NSWALS. Phone discussion with John McKenzie on 19 March 2018, email 3 April 2018; Emails from Jeremy Styles dated the – 21March 2018 (x4), 9 April 2018, 27 April 2018, 28th May 2018. On file with the author.

237 Ibid. Information provided by McKenzie and Styles.

238 *R v Bugmy* [2012] 1 SCR NSWCCA 223, 50.

239 *Bugmy v The Queen* (2013) 249 CLR 571.

and indeed all sentencing courts, have to give full and appropriate weight to the social disadvantage of Aboriginal offenders.[240]

The High Court's decision, while representing a breakthrough in these respects, was however, misreported. Mainstream commentators described it as giving Aboriginal people 'special consideration' in criminal justice sentencing. [241] It did no such thing. In fact, the High Court completely rejected that notion. The decision simply reinforces a long-standing legal principle that the circumstances of someone's background, regardless of their race or ethnicity, must be given proper weight by sentencing judges.[242] The decision basically affirmed that Indigenous Australians are entitled to the same legal rights when sentencing as every other Australian.

F3(f) Challenging Systemic Racism by Highlighting Discriminatory Practices: Liquor Restrictions

Another, and final, example of the important advocacy work ATSILS engages in through the courts was the significant role the Queensland ATSILS played in bringing the High Court appeal of *Maloney v The Queen*.[243] In that case, the High Court determined that while certain liquor restrictions against Indigenous communities were discriminatory, they amounted to 'special measures'. In the view of many at ATSILS, the High Court got it wrong. According to this view, the High Court should have examined whether or not the legislation amounted to a form of positive discrimination or special measure from the perspective of the target of the legislation – i.e. those being charged and criminalised – that is, not from the perspective of any good that might flow on to the wider community. ATSILS were not alone in this view. The journalist Richard Ackland described the High Court's decision as out of step, and against the tide of decisions being made by international courts. [244]

Despite the High Court finding, the case attracted positive publicity to the Queensland ATSILS organisation. Many news outlets, for example, reported on the importance of the case in confirming that the liquor restrictions were prima facie discriminatory.[245] ATSILS ran the case in-house, with the assistance of a number of pro bono legal counsel from Sydney. A number of those who assisted were Queens Counsel or Senior Counsel. In that sense, aside from filing fees, the appeal was cost neutral. As discussed previously, this was a point ATSILS would emphasise when commenting on the case

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240 Helen Davidson, 'Court Deliberates on Indigenous Disadvantage in Sentencing Offenders', *The Guardian* (online, 1 October 2014) <https://www.theguardian.com/australia-news/2014/oct/01/court-deliberates-indigenous-disadvantage-sentencing-offenders>.

241 See eg: Sol Bellear 'The Case for Indigenous Self-Determination' *The Drum (ABC)* (online, 21 Oct 2013) <http://www.abc.net.au/news/2013-10-21/bellear-indigenous-sovereignty/5032294>; Andrew Boe, 'Question of Law Yes, Politics No' *The Australian* (online, 11 October 2013) <https://www.theaustralian.com.au/national-affairs/opinion/question-of-law-yes-politics-no/news-story/136f4180032018f5fc014cd024ab4ed5>

242 These sentencing principles were set out in *R v Fernando* (1992) 76 A Crim R 58 ('*Fernando*').

243 [2013] HCA 28.

244 Richard Ackland, 'Rum Times as Court Decides What Makes Discrimination Legal' *The Sydney Morning Herald* (online, 19th July 2013) <https://www.smh.com.au/opinion/rum-times-as-court-decides-what-makes-discrimination-legal-20130718-2q76b.html>.

245 Ibid.

publicly, to stem potential negative reportage of the case on the lines that the appeal was a 'waste of taxpayer funds'.

Appellate cases that are brought forward by ATSILS on behalf of Aboriginal peoples play a major role in the protection of fundamental rights and liberties of all people, Aboriginal and non-Indigenous Australian alike. ATSILS' work in this regard contrasts with that of state and territory Legal Aid Commissions, which do not act in summary or minor offences. It is left to ATSILS to ensure appropriate accountability of police and government officials at the coalface. Major civil cases that ATSILS have run have dealt with fundamental civil rights of tenancy, debt, adult guardianship and governmental bureaucracy. Indeed, for some aspects of appeals, ATSILS might arguably be better placed than Legal Aid Commissions. As statutory bodies heavily reliant on the state for their funding, the Legal Aid Commissions are more likely to baulk at running an appeal against their primary (government) funder. ATSILS have more leeway in that regard. As discussed previously, I have been told, for example, that while the *Maloney* appeal was considered a real nuisance by the Queensland Attorney General, ATSILS (QLD) had no reservations about proceeding.[246] Had Maloney been a Legal Aid Queensland client, one wonders whether the appeal would have been run, as there might have been more pressure placed upon them, implicitly or explicitly, by the Queensland Attorney General's Department.

In ATSILS work, the greatest concern for advocacy and client representation is the systemic disadvantage so many Indigenous clients face in Australia, which filters through the numbers of people who are subject to the justice system. Indeed, this is why these days ATSILS place such an emphasis upon restorative justice principles of prevention and early intervention. Such disadvantage is often related to historical considerations –colonisation; stolen generations; inter-generational trauma etc –which give rise to the lower socio-economic status of so many Indigenous peoples. It is these 'up-stream' considerations that need to be addressed as they are the key triggers to bringing so many Indigenous Australians before the courts and thereafter into prisons.

G. Conclusion

ATSILS across Australia were formed in response to growing concerns about the inequalities and disadvantages experienced by Aboriginal community members, with the support from friends of the legal profession. To this day, ATSILS continue to provide services under extremely hostile conditions: Aboriginal and Torres Strait Islander peoples are being incarcerated or removed from families at rates higher than they have ever been, and ATSILS are operating with no commensurate increase in funding to accommodate this increased legal need. Governments have continually ignored recommendations from successive, independent inquiries (usually government initiated) to increase funding to match the ever-increasing numbers of Indigenous peoples being captured by their policies. Many of these recommendations recognise the importance of the cultural connection of ATSILS and how that plays in delivering a service to a people that a wary of non-indigenous people and have developed historic distrust of governments and their institutions, including the justice system. The deficit

[246] Interview with Greg Shadforth (n 107).

in government funding hugely impacts the ability of ATSILS to provide front-line services to their ever-increasing client numbers and severely hampers their abilities to participate in advocacy or law reform activities. It also places huge pressure on staff, including those who have worked or sat on boards of these organisations for years. Indeed, in the interviews I conducted, many respondents conveyed a sense of losing the urge to fight ... at times it was almost as if some were in a semi-conscious state, falling into line with all government demands.

Has the lack of respect for Indigenous self-determination in the justice sector so greatly impeded the ability or the will of ATSILS to meet the increased demand for provision of legal advice to their clients? In the next chapter I present and analyse interviewees' responses on the future of self-determination, and what is hindering them from doing so. As mentioned above, ATSILS play a major part in our democratic process. They represent an important aspect of Indigenous Australians' aspirations for self-determination. They also act as an accountability mechanism that questions the adequacy of system design and function regarding all aspects of the justice system and its intersection with Indigenous Australians. Aboriginal Legal Services are the best vehicle for providing culturally appropriate, tailored, efficient, effective and economically viable service for Indigenous peoples. This is something that needs to be recognised and resourced by the government and the sector.

It is important to highlight here that the government and the justice sector could easily do more to build a better relationship with ATSILS and Indigenous communities. However, as history shows, the current attitudes and stereotypes in the justice sector need to change if we are going to make a real effort to reduce the rising statistics of Indigenous participation in the justice system. Much can be learnt from the health sector here. The health sector acknowledges that best practice service delivery to Indigenous peoples is through community control. That is a given. The health sector leads the way in developing and supporting cultural standards/practices, and in doing so has built a co-operative relationship with Indigenous peoples. While there is still much room for improvement, Indigenous organisations are at the table contributing to change.

In contrast, currently there is no such relationship of trust between ATSILS, the government, and the wider justice sector. ATSILS have the knowledge and expertise to deliver a better service. What they need is the government and the sector to allow them the autonomy to do so, with less financial and administration restraint. As previously mentioned, for any relationship to work there needs to be trust at its core. The development of this trust is through initial engagement and interaction over time between two parties leading to a more dynamic and ultimately prosperous working relationship. In the justice space, this means acknowledging and then freeing the mind of deep-seated colonial values. With the ever-increasing statistics of Indigenous participation in the justice sector this needs to happen now; the government and the sector need to acknowledge that the current practices have not worked and that they themselves are contributing to this. Leadership on this is overdue. Efforts need to be directed to developing a strong relationship across the sector, including with ATSILS, but also with the wider Indigenous community on these terms.

CHAPTER 5
ATSILS THROUGH THE LENS OF THE RESEARCH PARTICIPANTS: EMPIRICAL FINDINGS

A. Introduction

Is self-determination pivotal to the delivery of Aboriginal and Torres Strait Islander Legal Services (ATSILS)? If it is, then why and how do the principles of Aboriginal and Torres Strait Islander self-determination provide a framework for achieving justice for Indigenous communities within Australia's legal jurisdictions? To answer these questions, I conducted 18 semi-structured interviews with several former and current staff and leaders of ATSILS (see Appendix B). I asked them to answer some difficult questions about how they perceived the current ATSILS. Did they see these organisations as still standing for the values and purposes they were initially created for? I also asked them to consider the relationship between these organisations' operations, and concepts such as self-determination, culturally appropriate service provision, cultural competency, and cultural safety. [1] The interviews explored whether self-determination was being realised by ATSILS and what participants saw pragmatically and ideally as the future of ATSILS' governance models. This research delved into the possibilities, practices and limits of self-determination for ATSILS as key service providers dependent on government funds. Drawing on the literature and theoretical concepts explored in previous chapters, in this chapter I present interviewee perspectives to argue that ATSILS work within more of a hybrid self-management model that delivers a culturally appropriate service that only they can successfully provide.

B. Self-Determination

In Chapter 2, I highlighted the wide range of research and international and national policy frameworks on Indigenous self-determination, specifically exploring their application to the justice sector in Australia. As discussed, international standards promoting self-determination have been developed through the research and writings of the United Nations (UN), manifesting in treaties and other instruments of international law and jurisprudence. It is now internationally recognised that states should recognise and facilitate Indigenous self-determination measures when developing policies and laws that affect the wider society but have a disproportionate effect on Indigenous peoples.[2] The *United Nations Declaration on the Rights of*

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[1] For the purposes of this paper, the terms 'culturally appropriate', 'culturally competent' and 'cultural safe' are defined as:

- Culturally appropriate: led and run by Indigenous peoples – could deliver culturally competent legal services
- Culturally competent: goes to the core of effective service delivery ensuring that any non-Indigenous staff (in particular, legal practitioners), receive accredited cultural competency training (both at induction and periodically thereafter). Secondly, ensuring that Indigenous Australian staff are employed in key positions (CEO, Court Support Officers, Field Officers, etc)
- Culturally safe: same as culturally competent or when Indigenous people discuss non-Indigenous services providers. Eg. can work towards 'cultural safety', but that 'cultural competence' can only sit with Indigenous people individually. See Nigel Browne's comments at footnote 44.

[2] See eg *Expert Mechanism on the Rights of Indigenous People*, Final Report of the Study on Indigenous Peoples and the Right to Participate in Decision-Making, UN Doc A/HRC/18/42 (17

Indigenous Peoples (*'*UNDRIP*'*) is an instrument specifically dealing with the rights of Indigenous peoples in international law, and should have a major influence on state practice, when formally adopted.[3] The right to autonomy or self-government is articulated in Article 4. It states that, 'Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.'[4]

Aboriginal and Torres Strait Islander peoples are very familiar with the challenges of dealing with the current justice system – its inherent systemic racism and, interrelatedly, the differential impact of laws individually and communally on Indigenous peoples. Indigenous peoples have been at the forefront of addressing these challenges since colonisation. For the last five decades Indigenous peoples have led the fight to develop, create and fund ATSILS' legal services. ATSILS are respected throughout the sector for their knowledge about how to deliver these services and advocate, at all levels, for their peoples.[5] As the interviews with stakeholders reveal, however, throughout the years ATSILS have been vulnerable to an ever-changing political climate which has consistently targeted them through different policies (directly or indirectly). This has made the everyday task of providing legal services to an ever-increasing clientele very difficult. There appears to be no real respect for the quality of service or the quantity of matters they deal with daily, both by the sector and importantly their funder (the Federal Government).[6] As will be discussed below, the political and sectoral treatment played on the minds of the interviewees as they responded to questions relating to whether ATSILS were, or could be, self-determining. Below I address two themes that emerged in the interviews: firstly, the understanding of self-determination as autonomy and political independence; and secondly, the limits of its expression in current-day ATSILS' modes of operation.

B1. Understanding of Self-Determination as Autonomy and Political Independence

All interviewees were asked what they believed self-determination 'looks like' for ATSILS. In response, participants described how present and future visions of self-determination could manifest in a 'transformed' Australia. Many related self-

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August 2011) annex ('Expert Mechanism Advice No.2 (2011): Indigenous Peoples and the Right to Participate in Decision Making') [16]; The *United Nations Declaration on the Rights of Indigenous People*, GA Res 61/295, UN Doc A/Res/61/295 (2 October 2007, adopted 13 September 2007) Art 19 also imposes obligations on states to 'consult and cooperate in good faith' with indigenous peoples through their own representative institutions to obtain their prior and informed consent. See also Report of the Committee on the Elimination of Racial Discrimination, UNGAOR, 52nd sess, Supp No 18, UN Doc A/52/18 (26 September 1997) annex V ('General Recommendation on the Rights of Indigenous Peoples, Adopted by the Committee, at its 1235th meeting, on 18 August 1997').

3 UNDRIP (n 2).

4 Ibid.

5 See for an example Cox Inall Ridgeway, *Review of the Indigenous Legal Assistance Program (ILAP)*, 2015-2020 (Final Report, 1 February 2019) 72.

6 It should be noted that with the Federal Attorney-General's decision to ignore the recommendation not to mainstream the independent ILAP, funding will now be administered by the States and Territories through their allocation from the Federal Government under the National Legal Assistance Program.

determination to the idea of having a 'voice' as a political community. For Shane Duffy (CEO, ATSILS QLD), self-determination meant the ability to undertake lobbying and advocacy for the needs of Aboriginal and Torres Strait Islander peoples.[7] Glen Dooley, currently a senior Northern Territory Government Prosecutor (former Principal Solicitor NAALAS and NAAJA and CAALAS) described self-determination as being proactive, rather than reactive, to government.[8] Gary Foley, who described ATSILS at their inception as 'politically dynamic organisations', expressed his disappointment that the current services had become 'politically emasculated'.[9]

Across all interviews, participants described self-determination as creating an environment that enabled community values to be prioritised and respected. For Cheryl Axelby, (CEO, ALRM) it was key that ATSILS were 'strengths-based and move to adapting the system to meet all diverse cultural peoples' legal needs.'[10] However, there was general and emphatic agreement across interviews that the historic and current restrictiveness of grant funding hampered the autonomy and political independence of ATSILS to achieve this. As Foley pointed out:

> … all government money comes with conditions, and initially in the early days the list of conditions you could fit on that bit of paper there. [If] you look at the list of conditions today … if an Aboriginal organisation wants a government grant to operate a health service or whatever, you get a list of conditions that's almost as thick as the Bible, and it is a sort of Bible in a way. It's a Bible of government control, and so governments then were able to impose controls over those organisations, which is in part the way in which the political effectiveness of the early legal and medical services was undermined and destroyed.[11]

Like Foley, other interviewees confirmed that grant reporting requirements were extremely onerous for ATSILS. As mentioned in the previous chapter, Greg Shadbolt, ATSILS (QLD) Principal Legal Officer (PLO), for example, described how, 'In my own role, [grant reporting] probably takes up the equivalent of two months' work a year!'[12] While interviewees agreed that financial accountability was important, most perceived that there was a higher burden[13] placed on ATSILS to justify and account for use of funds. This over-policing was expressed as likely due to unconscious biases or institutional racism. Additionally, it was widely perceived as preventing and distracting from service delivery; staff were instead tied up with addressing peculiar financial requirements, that is requirements that other non-Aboriginal legal aid providers were not equally obliged to address. As Ross Sivo, Chief Finance Officer at ATSILS (QLD), explained:

> Reduction in red tape is one of governments' priority areas of late. However, the evidence on the ground is totally different with some

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7 Interview with Shane Duffy (Eddie Cubillo, Darwin, 14 August 2019) 1.
8 Interview with Glen Dooley (Eddie Cubillo, Alice Springs, 31 October 2019) 4.
9 Interview with Gary Foley (Eddie Cubillo, Melbourne, 20 June 2019) 10.
10 Interview with Cheryl Axelby (Eddie Cubillo, Adelaide, 10 October 2019) 8.
11 Interview with Gary Foley (n 9) 6.
12 Interview with Greg Shadbolt (Eddie Cubillo, Brisbane, 29 August 2019) 7.
13 Then their legal aid counterparts.

> organisations weighed down with onerous reporting responsibilities which detract a lot from the delivery of the very services such organisations are funded for and are often a drain on the organisation's resources. There is indeed a need for public funds to be properly accounted for, and for service delivery outcomes to be measured against the funding committed. However, I believe this can be done in a better and more efficient manner.[14]

Across the interviews, there was a consensus on the view that for ATSILS to be self-determining they must be community controlled, especially as a counterpoint to the current western structure that they work in. Fiona Hussin recognised the importance of community accountability within this. This meant having mechanisms that ensured that boards are accountable, and know and respond to community concerns:

> … community doesn't always know the concerns, and the community sometimes gets things a bit, you know, crooked, but that's the benefit of self-determination, is it brings the community's views and – I mean, for example, like our Board [Northern Territory Legal Aid Commission (NTLAC)] I'd be surprised if more than a couple a times a year someone would say to one of our Board members, 'What are you doing at Legal Aid? I'm sure it doesn't happen in the same way it happens in the Indigenous community,' and then the representatives, you know, feed down.[15]

There was general agreement that community control is central to the ATSILS' legitimacy to their communities, and their ability to fulfil their purpose as 'culturally appropriate' legal services. As Brendan Thomas put it, 'I think quite rightly we want to control our services and we want to control our destiny and to do that we need community-controlled organisations.'[16] Thomas, an Aboriginal man, is the Chief Executive Officer (CEO) of the biggest mainstream Legal Aid Commission in the country. He understands the importance of a community-controlled organisation from an Indigenous perspective as well as a collaborator in delivering a legal aid service to the neediest.

B2. Are ATSILS Self-Determining?

The thesis that self-determination is a rich multidimensional concept is best reflected in the observation by Shadbolt and as noted in a previous chapter: 'In some respects, "self-determination" is like the layers of an onion – it is not a one-dimensional concept – and clearly, can mean different things to different people.'[17] In expression of this among the interviewees, there were many thoughts on what self-determination is. Gary Foley, who was there in Redfern establishing the first Aboriginal Legal Service (ALS) – as it was called prior to being renamed ATSILS – described self-determination as it was seen in the beginning by the people setting up the ALS:

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14 Interview with Ross Sivo (Eddie Cubillo, Brisbane, 7 August 2019) 2.

15 Interview with Fiona Hussin (Eddie Cubillo, Darwin, 8 August 2019) 13.

16 Interview with Brendan Thomas (Eddie Cubillo, Sydney, 18 December 2019) 42.

17 Interview with Greg Shadbolt (n 12) 5.

> Self-determination is Aboriginal people regaining control of their own destiny, regaining control of their own affairs, being able to decide for themselves how and where and if they fit into the future of Australia, and we saw self-determination as meaning economic independence. The only way you can gain genuine self-determination in the sort of society that's been imposed upon us in Australia today is through economic independence. Because economic independence equals political independence, equals the ability to be able to decide for yourselves what you do.[18]

Most interviewees expressed the view that self-determination was either unachievable, or was a *theoretical* possibility, unlikely to be attainable in reality. Amongst the CEOs I interviewed, all strongly agreed that under present arrangements, ATSILS are not self-determining. As Shane Duffy put it as he reflected on his time as CEO of ATSILS Queensland (QLD), 'Well we'd like to think that we're truly self-determining, but we're not.'[19]

I think it's important to highlight again, Dennis Eggington, CEO of Aboriginal Legal Services Western Australia (ALSWA), drew a link between self-determination and community control, emphasising that self-determination is a local experience where he points out that although 4 or 5 of the ATSILS think they are self-determining and community-controlled, but he feels their incorporating as a company limited stifles them and he strongly says, 'we're not community controlled we're Aboriginal managed and Aboriginal controlled, but we're not community controlled.[20]

What Eggington is alluding here to the way the organisations have been pushed to incorporate under a system that does not recognise the accountability required by Indigenous organisations to their peoples and their communities. As discussed in Chapter 4, ATSILS were pushed to quickly amalgamate with regional ATSILS in their states and territories and then to incorporate so as to tender for their own services. This left little time to develop something more meaningful in recognition of the specific cultural obligations of each community represented. Instead, ATSILS were left with a western corporate structure, without the cultural values and obligations that should connect them to their peoples.

The endemic crisis in the justice system involving Aboriginal people was reflected by ATSILS adopting a form of crisis management, leaving organisations little time to embed cultural values and integrity. Instead ATSILS have been preoccupied by appeasing government, to secure funding. To this degree, Gary Foley described ATSILS as having become 'completely emasculated…. The white lawyers [previously] took orders from the black fellas; today it is completely the opposite'.[21] Shane Duffy, Dennis Eggington and Gary Foley are well known in the ATSILS space and are well respected within their communities, as well as the profession, for their commitment to Indigenous justice. They did not mince their words as they articulated their frustrations of dealing with what they saw as a broken system. This highlights the problematic relationship between the Australian criminal justice system and Aboriginal peoples.

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18 Interview with Gary Foley (n 9) 5. See Chapter 4 for discussion of Gary Foley's account of establishing the Aboriginal Legal Service in Redfern.

19 Interview with Shane Duffy (n 7) 3.

20 Interview with Dennis Eggington (Eddie Cubillo, Darwin, 12 August 2019) 11.

21 Interview with Gary Foley (n 9) 6.

The fundamental nature of that relationship has remained unchanged since the early days of colonisation, when the system was employed as a tool of dispossession.[22] However, for Fiona Hussin, the Deputy Director of the Northern Territory Legal Aid Commission (NTLAC) the degree of self-determination practised and achievable by ATSILS was more nuanced: '… in the sense of service delivery, it's self-determining, but is constrained by Western structures and justice, so it's a balancing act.'[23] For Nigel Browne, the capacity of ATSILS to be self-determining is inextricably linked to its reliance on government funding:

> I think whilst government holds the purse strings to ALS's and ATSIL, ATSILS, around the country those structures are always going to be subject to the whims of the government of the day. We probably won't see an end to that until such time as either there is a standalone department, or government body in the sort of space that ATSIC used to fill, where Aboriginal people were making important policy and funding decisions for Aboriginal people and communities.[24]

It was largely for the reasons articulated by Browne that the majority of interviewees thought that it was just not possible, under current arrangements, to have a truly self-determining ATSILS. As examined in Chapter 2, Aileen Moreton-Robinson has argued that while self-determination was for many years touted as the favoured and operative Australian government policy in its understanding and support of Indigenous organisations, closer examination reveals that the actual model *imposed* on Indigenous organisations was one of self-management. ATSIC, for example, was represented to the world as the epitome of Indigenous self-determination by the Keating Labor government. However, even then regional councils did not have autonomous control over expenditure in their territories, and ATSIC's budget was controlled and monitored, in the same way as other government departments.[25] This scenario extends and applies to all present-day Indigenous service deliverers, particularly the ATSILS. Subsequently, all interviewees expressed that genuine self-determination could only be achieved with economic independence that would free them from government interference.

C. What is a Culturally Appropriate Service?

As Chapter 4 highlights, despite many reports, reviews and Royal Commissions that have emphasised the importance of ATSILS to Aboriginal and Torres Strait Islanders and the justice system, successive governments have failed to recognise their worth. They have continually ignored multiple recommendations from independent inquiries (usually government initiated) to increase funding to match the ever-increasing numbers of Indigenous peoples captured by 'justice' policies and incarcerated or removed from family homes. This has hugely impacted the ability of ATSILS to provide frontline services. It has also severely hampered ATSILS' abilities to participate in advocacy or in law reform activities.

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22 Harry Blagg, *Crime, Aboriginality and the Decolonisation of Justice* (The Federation Press, 2016) 1.

23 Interview with Fiona Hussin (n 15) 6.

24 Interview with Nigel Browne (Eddie Cubillo, Darwin, 12 August 2019) 8.

25 John Maynard, 'Sovereign Subjects: Indigenous Sovereignty Matters', Aileen Moreton-Robinson (ed.) (2007) 36(1) *Australian Journal of Indigenous Education* 4-5.

Such recommendations for reform have recognised the importance of ATSILS in providing 'culturally appropriate' legal services to Aboriginal and Torres Strait Islander communities that for good reasons – historically and now – do not trust non-Indigenous peoples, governments, government institutions and the justice system. Indeed, beyond such recommendations for reform, it is common for ATSILS' work to be described as providing 'culturally appropriate' legal services to Aboriginal and Torres Strait Islander communities across government policy, and for this to be identified as a goal that informs their service design and planning.[26] This claim has extended to wider recognition that ATSILS are *the most* culturally appropriate service to deliver legal aid to Indigenous peoples. The degree to which this is recognised may have been the major contributing factor to their survival.

Several key documents governing the Indigenous Legal Assistance Program (ILAP), which provides the primary funding for Aboriginal and Torres Strait Islander legal assistance services in Australia, make the claim that ATSILS are culturally appropriate legal services. The Commonwealth Attorney-General's Department, for example, states on its website:

> The Indigenous Legal Assistance Program funds organisations to deliver culturally appropriate legal assistance services to ensure that Indigenous Australians receive the help needed to overcome legal problems and fully exercise their legal rights as Australian citizens.[27]

The emphasis placed on ATSILS' provision of 'culturally appropriate services' was reiterated in the Attorney-General's Department's submission to the Cox Inall Ridgway Review of the ILAP, in which it noted that 'the ILAP currently provides funding to seven ATSILS for the delivery of high quality, culturally appropriate legal assistance services.'[28]

In the Final Report of the ILAP Review, Cox Inall Ridgeway drew a connection between community-controlled structures and culturally appropriate service provision, stating:

> The ILAP supports the delivery of unique and specialised types of legal assistance services by ATSILS. ATSILS are widely recognised as appropriate organisations to continue to provide services, as Aboriginal and Torres Strait Islander community-controlled organisations possessing the necessary knowledge, skills and expertise to provide culturally appropriate services.[29]
>
> The ILAP provides funding for service delivery to ATSILS in recognition that these organisations provide specialist, culturally appropriate services tailored to Aboriginal and Torres Strait Islander clients. Although culturally appropriate service delivery is not defined

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26 For example, see ATSILS Strategic plans: NAAJA, 'Strategic Plan 2017-2020' <http://www.naaja.org.au/wp-content/uploads/2018/02/NAAJA-Strategic-Plan-2017-2020.pdf>; QLD ATSILS, Strategic Plan, 2018-2020 <https://www.atsils.org.au/atsils-strategic-plan-2018-2020/>.

27 Attorney-General's Department, 'Indigenous Legal Assistance Programme – Programme Guidelines' (July 2014) 1.

28 Attorney-General's Department, 'Submission to the Review of the Indigenous Legal Assistance Program' (Submission, 5 October 2018), 18.

29 Cox Inall Ridgeway (n 5) 13.

> by ILAP funding agreements, it is commonly understood as service delivery which understands, respects and reflects the cultural background of the client, including reflecting an understanding of the person's cultural background, family and community context, including socio-economic, historical and other influences … ATSILS are widely acknowledged as providing culturally appropriate services to clients. 'Cultural safety' is a related concept which refers to respectful services, delivered by Aboriginal and Torres Strait Islander community-led organisations that adopt a holistic, whole-of-life, person-centred response to their clients. [30]

The importance of 'culturally appropriate' legal assistance is also repeatedly and explicitly reiterated in the Programme Guidelines on the Indigenous Legal Assistance Programme ('The Guidelines'). The Guidelines provide that 'ILAP addresses … disadvantage by providing the culturally appropriate legal assistance services necessary to ensure that Indigenous people can effectively access justice.'[31] The Guidelines further state that 'despite improvements to mainstream programmes, Indigenous people continue to face barriers accessing culturally appropriate services.'[32] This statement implies that it is possible for mainstream legal services to provide culturally appropriate services to Aboriginal and Torres Strait Islander clients, if certain barriers are removed.

Given this recognition across government policy and review, it is important to question what a culturally appropriate legal service for Aboriginal and Torres Strait Islander communities looks like. This includes asking:

- Whether certain restrictions on ATSILS' funding and operation restrict or inhibit the ability of ATSILS to provide culturally appropriate services to the communities they serve; and,
- Whether non-Indigenous controlled legal services, for example Legal Aid Commissions (LACs) and Community Legal Centres (CLCs), can provide culturally appropriate services.

Further, while ILAP is silent on the relationship between the provision of cultural appropriate services and broader questions of self-determination, we need to ask:

- What is the nexus between self-determination and culturally appropriate services?
- Is self-determination necessary to deliver culturally appropriate services?

Such questions have underscored ATSILS' identity, design, and funding description since their inception. As interviewees noted, there are real community concerns that the ATSILS, as an institution, is drifting away from its original concept and losing its relevance to the people it serves. Many expressed their unease that ATSILS no longer continue the fight for a real understanding of what it means to be an Indigenous Australian, including the inequity Indigenous peoples face at all levels of Australian society. They also spoke apprehensively about the demise of this institution in its current form. For some, it seemed likely that should it continue in the current direction it would suffer from degeneration, or be replaced with an inferior institution, one that

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30 Ibid.

31 Attorney-General's Department, 'Programme Guidelines: Indigenous Legal Assistance Programme from 2015-2016' (Guidelines, nd) 3.

32 Ibid.

cannot deliver the necessary services to accommodate the complexities not only of the services, but of Indigenous communities, and the intricacies of history that have traumatised Indigenous peoples.

As highlighted above, it is common for ATSILS' work to be described as providing *culturally appropriate* legal services to Aboriginal and Torres Strait Islander communities, or for this to be identified as a goal that informs their service design and planning. There have been many reviews, inquiries and Royal Commissions that recognised that ATSILS provide culturally competent services to Indigenous peoples. Successive reports by the Productivity Commission,[33] House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs,[34] the Law Council of Australia's Justice Project,[35] and most recently the Cox Inall Ridgeway Review,[36] all acknowledged the importance of ATSILS in this way. The Cox Inall Ridgeway Review produced four key findings[37] regarding culturally appropriate, and culturally safe service delivery:

- ATSILS provide culturally appropriate services that incorporate an understanding of the diversity of Aboriginal and Torres Strait Islander communities and cultures, of social and emotional wellbeing and the impacts of intergenerational trauma.[38]
- ATSILS' delivery of culturally safe services is enabled by a high level of trust within Aboriginal and Torres Strait Islander communities, supported in turn by high levels of direct community engagement (often led by respected community members). At the client level, ATSILS' staff are skilled at communicating legal concepts and processes to Aboriginal and Torres Strait Islander clients.[39]
- Cultural safety and the principles of Aboriginal and Torres Strait Islander community control are embedded in ATSILS' governance, board structures, strategies, staff employment practices, interagency collaboration, service planning and service delivery approaches.[40]
- Aboriginal and Torres Strait Islander staff within ATSILS play an important role as cultural conduits between clients, court users and justice systems.[41]

This ILAP Review recommended that to further strengthen the delivery of culturally appropriate legal assistance services to Aboriginal and Torres Strait Islander peoples, the aims and objectives of the ILAP should be amended to promote Aboriginal and Torres Strait Islander self-determination.[42]

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33 See Productivity Commission, *Access to Justice Arrangements* (Inquiry Report, No 72, 5 September 2014), particularly ch 5.

34 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Doing Time – Time for Doing: Indigenous Youth in the Criminal Justice System* (Report, June 2011) 210.

35 The Law Council of Australia, *The Justice Project: Final Report* (Report, August 2018) 5, 21.

36 Cox Inall Ridgeway (n 5).

37 Ibid 72.

38 Ibid.

39 Ibid.

40 Ibid.

41 Ibid.

42 Ibid 135.

The interviews I conducted showed that it was important to question what a culturally appropriate legal service for Aboriginal and Torres Strait Islander communities looks like, including:

- Organisational knowledge of culture, law and tradition.
- Whether an ATSILS can be culturally appropriate, without being self-determining.
- Respect for values and relationship with community.
- Understanding of the community's experience of racism, and willingness to prioritise work responding to these experiences.

Nigel Browne, a Larrakia man, former Senior Crown prosecutor, and current CEO of the Larrakia Development Corporation, commented that he thought any organisation (Indigenous or non-Indigenous) can work towards 'cultural safety', but that 'cultural competence' can only sit with Indigenous people individually.[43] He reasoned:

> I think the only culturally competent people that exist are Aboriginal people, with respect to Aboriginal culture. I think those organisations can be culturally safe, but I don't think it should extend to being culturally competent because competency, to my reckoning, invokes a level of authority to act in culturally, I suppose, enforceable ways which I don't think should sit with organisations. The cultural competency sits with the individual, but those individuals in those organisations can make those places culturally safe.[44]

Browne's view suggests that the more Indigenous employees there are in an organisation, the more culturally safe the organisation is.[45] This brings into question the current ATSILS governance structures, which lay claim to being culturally competent (or is it culturally *appropriate?*) because they have an Indigenous board. David Woodroffe, (who worked at NAAJA for 20 years after being admitted to practice and is currently the Principal Legal Officer) shared his insight of the importance of being Indigenous – having that lived experience and connection with clients– when providing legal assistance to Indigenous peoples:

> Being an Aboriginal lawyer, being Indigenous is that deep connection with your staff, the clients, you know, they're people that you know, people that you've grown up with, you now know their children and the next generation coming through but still, you know, I think it's really part of the territory, just knowing families and things of that nature.[46]

In this way, both Browne and Woodroffe suggest that cultural competency arises from your background, Indigenous cultural heritage, family, and family history. It is intrinsically linked to things like growing up with the impact of the Stolen Generation being a part of your family's history, identity and culture. It means having first-hand knowledge of the continued impact, not only on peoples' lives but on generations after. This shared history, and intergenerational experience of the ongoing trauma,

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43 Interview with Nigel Browne (n 24) 7.

44 Ibid.

45 As long as those people are culturally competent – maybe some Indigenous peoples are not? Which is discussed below in the context of black boards.

46 Interview with David Woodroffe (Eddie Cubillo, Darwin, 12 August 2019) 1-2.

gives an appreciation and understanding that cannot be obtained from any course or book. According to this view, cultural competency is more than just empathy, understanding and respect. It encompasses 'world view' and experience – the inability to see the world through someone else's eyes.

As interviewees expressed it, cultural competency as an idea seems inextricably bound to cultural authority: having the right experience and connections to understand what is and is not culturally appropriate and responsive. That would make a board with cultural authority a key component of a culturally competent legal service. However, as Browne points out, having an Indigenous board on its own, it is still not enough. If, as Browne notes, 'cultural competency sits with individuals', it must be a quality shared by many, perhaps by most of the people who work for the organisation in question. A board can advise on how an organisation or staff achieve this, but on its own this will not make the organisation sufficiently competent. On the other hand, cultural safety is about empathy, understanding, respect and ensuring that there are enough Indigenous employees in the appropriate and relevant positions. This is a lower standard, one that can be achieved by an organisation with fewer Indigenous employees. Is this all that ATSILS should aim for? Interviewees suggested that the answer is 'no' for the reasons discussed below.

C1. Knowledge of Culture, Law and Traditions

Interviewees emphasised the importance of ATSILS and their staffs understanding their clients' culture, laws and traditions. For example, Aunty Pat Millar spoke about the importance of 'really knowing your client'. This involves understanding the client's cultural background, the people they belong to, the geographical area they come from, whether they are urbanised or traditional people who have been caught up with the law.[47] As Aunty Pat explains, this also means understanding the differences between Indigenous peoples:

> There are differences. Look the main differences, like the saltwater people compared to the desert people but even geographically around this area [Alice Springs] you get differences.[48]

Cultivating such understandings are critical, not least for practical reasons. Acknowledging differing Indigenous languages means ensuring clients get the right interpreters. Having all the correct information is important when completing bail applications. However, it also is pertinent to *understanding* the clients' particulars and needs. 'Really knowing your client' means knowing where they are from because you recognise their facial and body features, ceremonial markings or language (not only traditional language, but also English words that can identify where that person is from). Particular words have several meanings depending on the context in which they are stated.[49] Knowing these things is essential to ensuring the right questions are

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47 Interview with Aunty Pat Millar (Eddie Cubillo, Alice Springs, 31 October 2019) 2.

48 Ibid 2.

49 Take, eg, the word 'unna'. In Western Australia (Perth) it roughly translates into 'am I right/is that right/true' akin to the way some people use the word 'yeah' as a question (eg 'that's your deadly car, yeah?') Essentially, in Perth, you would substitute the word 'yeah' with 'unna'. In North Queensland, the words 'Which way?' can mean 'where?' 'what are you doing?' 'where are you

asked when preparing for court. It will also assist in making an Aboriginal or Torres Strait Islander client comfortable and establishing the rapport and trust necessary to properly represent them. Understanding the history of the area and the people gives you an appreciation of why the client is in their predicament. This includes having insight into location-based and local historical trauma due to past policies, mission influences in their community and homelands, massacres as well as ongoing tensions such as deaths in custody, stolen generation, child removal and so on. People are not necessarily required to know this type of information; however Indigenous organisations innately recognise the needs and historical trauma of their clients and endeavour to make sure that this informs how they approach, assist, and represent their clients. They have created specific positions (for example, Field Officers, discussed further below) within their organisations to assist staff to bridge that gap. Many interviewees described how Aboriginal and Torres Strait Islander laws and spiritual practices tend to be misunderstood or not given as much weight as other religious practices in the legal system. David Woodroffe said there was little to no understanding of Aboriginal spirituality within the justice system, an issue that arises constantly in criminal and civil representation, to Indigenous peoples' detriment.[50] One example he proffered was in matters before the court where a spiritual issue was causal to an individual's action, stemming from and according to the Indigenous client's beliefs and understanding. In pleas of mitigation, courts will sometimes take into account 'black magic' or cursing that occurs in Indigenous communities. Spiritual beliefs and practices also impact on the criminal justice process in other ways. Another example given by Browne, shows how important this impact can be:

> [There was] a fraud case where an employee of the Traditional Credit Union was ripping off a particular branch in a particular community, and to try and stymie the investigation they cursed the branch and for a long while the investigation was stalled because no-one would provide any evidence related to the fraud.[51]

As Woodroffe described, things can happen for reasons in the Indigenous world that the law or the justice system of this country does not understand or recognise (or does not want to) because the justice system is built on a settler evidence-based thinking. [52] This is white rational thinking, based on a preoccupation with empirical science – a non-spiritual, agnostic or atheist view of life – which leaves little room for Indigenous spiritual thinking or acceptance.[53]

C2. Respect for Values

Interviewees emphasised the importance of Indigenous values being 'put to the front' in environments so that they can be heard and not challenged by non-Indigenous cultures, or muted or moulded by non-Indigenous lawyers, and white bureaucrats.[54]

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going?' 'What's up?' In the Kimberley in Western Australia, the phrase 'what now?' has a similar meaning to 'which way?'. Other states have similar, yet different, expressions as well.

50 Interview with David Woodroffe (n 46) 3-4.

51 Interview with Nigel Browne (n 24) 5-6.

52 Interview with David Woodroffe (n 46) 3-4.

53 Ibid.

54 Interview with Glen Dooley (n 8) 3.

Likewise, participants stressed a need for lawyers to work with respect for community values and practices, understanding similarities as well as differences. As Aunty Pat observed,

> I think the difference is respect.… There are saltwater people as well as desert people. Lot of those saltwater people have engaged with white people, missionaries, long before people down here [Central Australia].[55]

Aunty Pat highlighted that culturally safe practice requires appreciation that all Indigenous peoples are not the same. For example, in a small jurisdiction like the Northern Territory, where Indigenous peoples account for some 25% of the total population, a large proportion of these people know each other or are related. [56] That said, within this population there are many different language groups, clans and family groups. All share culture and histories while at the same time have significantly different cultures and histories. Some of these differences existed prior to colonisation. However, the differences have been compounded by the differential application and impacts of past policies like child removal, and the localised adaptations Indigenous peoples made in order to survive.

Interviewees emphasised that the need for lawyers to work with respect for community values and practices extended to circumstances in which lawyers do not fully understand cultural and community practices, beliefs and histories.[57] They also highlighted that respectful practice, when working with Indigenous peoples, meant meeting with Elders, seeking understanding of the social fabric of each unique society, and the values that underpin it.[58] As John McKenzie, former Principal Legal Officer of the New South Wales Aboriginal Legal Service (NSWALS), currently NSW Legal Services Commissioner, explained:

> There needs to be strong training [and] education so that staff, bureaucrats are continually reminded [that] they need to be sure the cultural 'stuff' is being properly respected. It's all about respect, it's all about realising that we as non-aboriginal people have got just as much, if not more, to learn from them than any Aboriginal persons got to learn about the white man's law.[59]

McKenzie's statement attests to the wealth of experience and knowledge he has accumulated over more than 36 years working with Aboriginal peoples. He understands the politics of working in Indigenous organisations as well as distinct cultures of the areas that he has worked in. In my experience of working with ATSILS as a board member and staff member, such longevity of experience by a non-Indigenous person speaks to the full respect held for and by the Indigenous community they work for. Otherwise, they would have been long gone.

McKenzie related three things that he emphasised to young lawyers who joined ATSILS:

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55 Interview with Aunty Pat Millar (n 47) 2.

56 See Australian Bureau of Statistics, Census of Population and Housing: Reflecting Australia - Stories from the Census, 2016 (Catalogue Number 2071.0, 3 October 2016).

57 Interview with John McKenzie (Eddie Cubillo, Sydney, 11 June 2019) 10.

58 Interview with Shahleena Musk (Eddie Cubillo, Melbourne, 17 July 2019) 1.

59 Interview with John McKenzie (n 57) 35-36.

> The first one's *respect*, and that's *respect* for your clients, *respect* for your position as an ATSILS lawyer, *respect* for everything and everyone: show *respect.*
>
> The second thing is *humility.* Lawyers have a tendency to be arrogant sons of so-and- so's, and it doesn't make them any better lawyers, and it actually, I see it when it happens, I see it really get the goat up of some of the Aboriginal clients who really think: 'You're just a bloody big head, you don't care.' Perhaps the person does really care, but they think that this is the way you act, as a really important lawyer, is you act a bit arrogant. Well, no, sorry. *Humility* is actually really pretty important.
>
> And then the third one is, that if you're going to do this sort of work, [it's] got to be scrupulously done with *integrity*, because the opponents to the Aboriginal people and the causes you're fighting for, they're looking for just the smallest little bad thing you do, and they'll come through like the hordes of, you know, the invaders, they'll say, 'Right, we've got you.'[60]

Are respect, humility, and integrity the key tenets underlying the ability of an organisation's non-Aboriginal staff to ensure culturally safe practices? The comments of interviewees suggest they might be. It may seem simple – just show respect – but history and present experience indicate that this is not as easy for non-Indigenous people. This is precisely why the need for culturally competent service providers exists.

C3. Relationship with Community

Interviewees emphasised the importance of having knowledge of the community inform legal work. Cheryl Axelby, for example, says that ATSILS recognise and know many of the people we service, because of our connectedness as a community:[61]

> Strengths are that we are able to connect with our community members we serve, as through our community and kinship knowledge. We have the ability to reach communities, individuals and families, in comparison to non-Aboriginal agencies, who do not know their clientele group as intimately as we do. Other strengths are that we include the Aboriginal cultural and spiritual identity of the person we represent. We know families, we know their challenges, and we know how to assist them, to bring forward issues that lawyers in mainstream would never know.[62]

Axelby's observations align with my own personal and professional experiences of working with ATSILS. Through their knowledge of family and relationships, Indigenous staff and lawyers in these organisations will tend to have greater insight and understanding of, for example, who is the relevant person or next-of-kin to speak to concerning legal matters. I know of Indigenous lawyers who have been approached by

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60 Ibid 18-19.

61 Interview with Cheryl Axelby (n 10) 4.

62 Ibid 7.

interstate coroners to assist in identifying and contacting families when there has been very limited information to go on. Private firms working on class actions will also regularly seek their assistance to locate or help identify people and communities. Because of their skills and intrinsic knowledge of their clients and the communities they come from, Indigenous lawyers and staff can identify kinship relationships and explain, for example, why a witness or interpreter should not be involved in the case. They have the ability to provide information on family plans and locate relevant persons to report to courts when the Departments of Corrections or Families are unable to locate them. Most importantly, they can ensure litigation is instigated by or on behalf of the appropriate person, based on kinship and not traditional western structures, for example by challenging guardianship and carer responsibility based on kinship relationships as a matter of best practice.

Shahleena Musk also emphasised that when it comes to providing culturally competent legal services to Aboriginal and Torres Strait people, more needs to be done to understand the client, and the community, to ensure understanding within the organisation of their values and practices. Musk provided the following examples of what this meant in practice:

> … go and see the health centre, go and visit the Men's shed, or the Women's shelter. Get to understand who the people in the community are, what are the issues that are impacting them uniquely, and also speak to them about their experiences. [Because] needs and experiences would be very different from community to community, and you won't be effective, you won't be able to assist them as best you can, unless you know intimately about those communities, and you are seen to be in those communities.[63]

She later added to the list:

> … go a day before court, hand flyers out when you're going out to community, so that people know that you're going to be there, that you're accessible, and just be accessible the day before court, if possible.[64]

As Musk notes, it is what many might regard as doing the 'little things' that are integral to developing relationships of trust and mutual respect: 'If you show them respect and go out of your way to do the little things, people see that, and will begin to trust you.'[65] Others emphasised that trust was generated through establishing an ongoing relationship. For Shadbolt, an important aspect of this was being 'present' in communities through day-to-day interactions, establishing informal communication channels and feedback mechanisms through Aboriginal and Torres Strait Islander staff or the organisation's board. [66] For Sivo, sometimes just lending a sympathetic ear is important, even when the issue raised might not directly refer to the services ATSILS provide.[67] Such relationships resulted in accountability to the community. As Browne noted, ATSILS staff

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63 Interview with Shahleena Musk (n 58) 1.

64 Ibid.

65 Ibid.

66 Interview with Greg Shadbolt (n 12) 1.

67 Interview with Ross Sivo (n14) 1.

> are driven and understand because they are also a part of those same communities. They have a vested interest in those communities and those people, they don't have a choice as to whether they can come and go, and they are all driven to try and provide the best service possible.[68]

Interviewees highlighted the important role of Court Support Officers (CSOs) or Field Officers (as they were historically known) in developing organisational relationships with client communities. Musk observed:

> CSOs in my time were … kind of like the brokers in information. They were the link between the clients, their communities, and these non-Indigenous lawyers, who were totally oblivious to what are these cultural obligations, what are these responsibilities on our clients.[69]

Field Officers were initially set up to be the conduit between the community and non-Indigenous legal staff members. They knew (or were supposed to know) the small things, for example, to get a recently bailed client thongs, so they could get on a Greyhound Bus if they came out barefoot; and the big things that non-Indigenous lawyers were likely to be unaware of, for example, the Anunga Rules.[70]

C4. Non-Indigenous Legal Services and Cultural Competence

For many interviewees, non-Indigenous people could never really understand the position of Aboriginal peoples. Therefore, Aboriginal services would always be better placed to provide services to Aboriginal and Torres Strait Islander clients. Justice Blokland, for example, felt that it was much better to have a good majority of Aboriginal people running the services and setting the policy agendas.[71]

The key limitation is that an 'imitation' is never as good as the 'real thing.' Obviously, non-Indigenous service providers can become more culturally competent through staff training and by modelling themselves on Indigenous staff. However, Indigenous 'ownership' (in the sense of an Indigenous governing board of directors) is a key aspect of both community acceptance and actual knowledge of what works best. It is important, however, for mainstream legal aid agencies to be as culturally competent as possible, as they will provide services to Indigenous Australians – even if only in 'conflict' situations.[72]

All interviewees agreed that Indigenous legal services are preferred. As Stewart O'Connell stated:

> The best and proven way to provide legal services to Indigenous people is to have a dedicated legal service that is run by and for Indigenous people. The various ALSs have, over the years, not only

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68 Interview with Nigel Browne (n 24) 2.

69 Interview with Shahleena Musk (n 58) 54-56.

70 Interview with Stewart O'Connell (Eddie Cubillo, Sydney, 23 August 2019) 2-3. As a result of a series of cases dealing with the admissibility of the evidence of Aboriginal people taken during interviews, the landmark Anunga Rules were articulated to guide police during interviews with Aboriginal and Torres Strait Islander peoples: *R v Anunga* (1976) 11 ALR 412, 414-415.

71 Interview with Jenny Blokland (Eddie Cubillo, Darwin, 15th August 2019) 2.

72 Interview with Greg Shadbolt (n 12) 4.

> ensured Indigenous people have had access to quality legal representation, but they have also argued successfully in and out of court for significant changes to the law to the benefit of Indigenous Australians. Although there are still many challenges, the situation for Indigenous Australians, had these services not existed, would have been much direr than they are now.[73]

However, participants emphasised that it was also important for mainstream organisations providing legal services to do so in a culturally appropriate manner so that they can be regarded as 'culturally safe' places. As John Boersig, CEO of the Legal Aid Commission of the Australian Capital Territory, put it:

> We need to support ALS and Indigenous-specific services to the hilt, but we also need to provide other people options if they need them. And, as mainstream service providers, we need to provide culturally appropriate services to people who come for that.[74]

Brendan Thomas, an Indigenous man who has worked at all levels of the justice system (government and non-government) and is currently the CEO of the NSW Legal Aid Commission, supported Boersig's reasoning of providing options:

> I think there needs to be ATSILS, and there needs to be self-determined Aboriginal legal services. But there's always going to be people who need other kinds of legal service, and there are going to be Aboriginal clients who need that service, and organisations like mine have to provide the service to those people, in the best way that they possibly can. In the same way a hospital has to provide that treatment to somebody who's Aboriginal in a way that that person's going to best appreciate and receive. So, I don't know if there's a choice. I think we need to provide culturally competent services to Indigenous people.[75]

Several participants noted that there may be a tension for some clients between choosing the 'best' legal service, and a culturally competent service. Some participants argued that the most important thing was for services to provide a strong legal outcome for the clients, as the clients' primary motivation was to have the 'best' lawyer. Brendan Thomas raised some valid points:

> I think there's a couple of things there to answer the question. One is the service needs to be legally competent. That's really important. I'll get back to that question of if you're facing a prison term would you rather be represented by a lawyer that's just got out of admin, or someone who's been doing it for five years. Whether they're black or white. I mean the answer's pretty simple there, I think. There's a general skill question that needs to be answered, I think.[76]

He goes on to say:

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73 Interview with Stewart O'Connell (n 70) 1.

74 Interview with John Boersig (Eddie Cubillo, Canberra, 1 August 2019) 2.

75 Interview with Brendan Thomas (n 16) 30.

76 Ibid 29-30.

> And then the question of can non-Aboriginal organisations provide culturally competent services? I think the question is, they have to. I always say: 'If a black fella gets cancer they're going to a hospital.' They're not going to go to an Aboriginal hospital. They're just going to go to the best service they can get, for the treatment that they need.[77]

Greg Shadbolt has been an in-house legal counsel with ATSILS (Queensland) since 1996. He is regarded as one of the best non-Indigenous lawyers to work for ATSILS in Queensland, and he has seen it all; nothing would surprise him. He also offered the same analogy as Brendan Thomas referencing the medical profession, strongly acknowledging that all clients wanted was the most effective lawyer possible - irrespective of their cultural background. Such is akin to wanting the best surgeon possible if you are undergoing a life-threatening operation.[78]

Lastly, as Brendan Thomas and Glen Dooley asked separately: Can you claim to be culturally competent if your staff are not?

> Like you can't really say you're culturally competent, if you've got really junior staff who don't really understand the law. Or they understand the law, but they don't understand the practice of it. But I mean, again, a practical example you take, I've met lawyers in the ALS, again just graduated from university, the first time they've met a black fella, is in the court when they're representing them. Yeah, you can't say that's a culturally competent service.... And so, you've got one of those lawyers being managed by another lawyer, who might have been there for slightly longer, but it's not a competent service, it's not.[79]

Dooley continued:

> … white lawyers are going to court, standing up in the court and telling the court what they think should be happening, and we've actually had cases recently where the client's yelled out from the dock, 'No, no, I didn't tell you that. I didn't tell you that. I want to plead guilty,' or, 'I want to plead not guilty.' But the lawyer thinks they know better; they've never really communicated with the client, and they don't listen to their clients. They think: 'I know what this person needs,' and they probably don't have the communication skills. That's why they probably don't even talk to them, because they don't know how to do it.[80]

Participants noted however that mainstream agencies currently do not provide culturally appropriate services to Aboriginal and Torres Strait Islander clients. For example, Cheryl Axelby was of the view that:

> Mainstream legal services do not deliver the quality of services we do to our people, nor do they understand our communities, the

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77 Ibid.

78 Interview with Greg Shadbolt (n 12) 2.

79 Interview with Brendan Thomas (n 16) 31.

80 Interview with Glen Dooley (n 8) 11-12.

> diversity of families and communities, nor have many engaged with Aboriginal people in a positive and non-judgemental manner.[81]

Likewise, John McKenzie did not think highly of the services provided by mainstream organisations:

> I don't think they, the people who are making the decisions, have got no idea about this, and that's actually the central bloody problem. They think it's good enough that a lawyer turns up to represent Joe Blow. They don't really give a damn.[82]

Most interviewees stated that while there was some understanding about the necessity of culturally appropriate service in mainstream organisations, this did not translate to meaningful practice.[83] For example, David Woodroffe noted that some non-Indigenous lawyers had an understanding of the cultural aspects of legal services and felt that it stemmed, in those cases, from their own long histories of working in Aboriginal legal aid, or in the Northern Territory. However, he did qualify this: while there was a level of understanding, it was not 'incredibly deep'.[84] Justice Jenny Blokland also thought along similar lines. She said that there were those who 'got it'; nonetheless, the vast majority did not really understand the complexities of Indigenous peoples' cultural responsibilities:

> … if they were brought up in the Aboriginal community in the NT, they get it. Otherwise, I think it's very, very hard to get it. But the justice system generally in terms of cultural issues, I think it's understood there are issues around language. I don't think the majority of people working in the system understand just the burdens and benefits of things like serious kinship, relationships, and all that flows from that. Because it really governs how people move on decisions they make.[85]

Participants identified a number of further shortcomings in mainstream organisations delivering services, specifically relating to a lack of trust in the system itself by Aboriginal and Torres Strait Islander people, and the inability of non-Indigenous people to break away from their historical biases, particularly when they cannot see these biases. In Chapter 2, the systemic privilege of whiteness in the Australian justice system was discussed. That chapter explains how this privilege continues to influence the psyche of the whole justice sector. An unconscious bias persists in the judges and magistrates, and in those working in key administrative positions, that determines how courts and government departments make decisions that impact Indigenous peoples. The interviews addressed this bias. Fiona Hussin, for example, spoke about the inherent biases in the system:

> … we, the majority of players in those roles, have an inherent bias, you know, and sometimes, most of the time, it's probably

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81 Interview with Cheryl Axelby (n 10) 4.
82 Interview with John McKenzie (n 57) 4.
83 Interview with Fiona Hussin (n 15) 6-7.
84 Interview with David Woodroffe (n 46) 3-4.
85 Interview with Jenny Blokland (n 71).

> unconscious, and sometimes it's not probably. But I think ultimately, yeah, that's the situation.[86]

She went on to discuss the big picture of how this bias runs throughout the legal system:

> But I guess, you know, the deeper aspects to it is, you know, that the whole legal system is really biased, and things like the presumption that, you know, there's no Judges who can speak your own language. There are not many Aboriginal Judges, the system doesn't accommodate Aboriginal customary law, it doesn't allow for community courts, and those sorts of things.[87]

David Woodroffe characterised the justice system as a system of oppression, and spoke to the inability of people who want to make change to achieve this in their work and life:

> If you don't do things and you don't change, and there's no hope, and this will always be the same and we'll imprison more and more Aboriginal people and they'll get younger and younger. The numbers will grow, and people will die earlier and earlier and earlier: that's oppression.
>
> So, I think they have to look at this – everyone needs to look at their part in the justice system: 'Am I contributing to a system of oppression? If I'm not willing to change, this is a system of oppression.'[88]

Woodroffe articulated what he saw as one of the biggest impediments to reform: the wider sector does not have the drive that Indigenous peoples have for hope and change. There is no desire or vision for doing things differently. Instead, there seems to be an acceptance and normalisation of unjust and racist systems. According to this logic, 'it always has been, and always will be, this way'.[89]

> There is an acceptance and I think equally, from their perspective, I think there's an inability to see something different. So, it's the norm, it's always been that way, it'll never change, so why bother to make efforts to change?[90]

An overarching theme in the interviews was that it is preferable to have legal services that are responsive and attuned to the needs of the community, for example, through having an Indigenous Board of Directors. Aside from enhancing service delivery, it is also crucial to community 'confidence' in the service. As Greg Shadbolt noted, the significance of 'confidence' in the historical setting of colonisation is not to be underestimated.[91]

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86 Interview with Fiona Hussin (n 15) 7.
87 Ibid 4-5.
88 Interview with David Woodroffe (n 46) 5-6.
89 Ibid 5.
90 Ibid.
91 Interview with Greg Shadbolt (n 12) 2.

C5. Working towards Culturally Appropriate Service Provision

As stated above, although there were strong opinions that only Indigenous organisations – led and run by Indigenous peoples – could deliver culturally competent legal services to Indigenous peoples, there was a strong understanding that other legal aid providers will also deliver services to Indigenous peoples. Subsequently, many advocated for cultural competency initiatives within these organisations. For Fiona Hussin,

> … the main thing is to have a good relationship with the Indigenous legal service and defer to them as the starting point for advice, learn lessons from them. Secondly, ensure that where possible, you're employing Aboriginal people in the organisation, and thirdly, then making sure that all staff are, you know, undertaking regular and ongoing cross-culture awareness training, working with interpreters training, and have a passion and commitment to social justice, in the region that they're working in.[92]

Many interviewees felt there was a need for better cultural safety education of lawyers within law schools and during practice. The lack of emphasis currently placed on cultural safety was seen as a problem that impacted both ATSILS and mainstream legal service providers. It was felt that lawyers needed accredited training in the legal profession as well as really strong ongoing Indigenous cultural education, and continuous on the job training and supervision to make sure that staff are provided with guidance and cultural understanding when working with clients. John McKenzie said,

> … we need a really strong presence of Aboriginal people training the non-Indigenous lawyers, doing the work in the other agencies, and employing field officers. …and maybe, you don't call them field officers, maybe you call them cultural translators.[93]

A number of participants referred to the idea of having a nationally accredited cultural safety program. Duffy thought this was paramount:

> There is no national accreditation other than solicitors coming out of law school and getting law degrees. There are no cultural standards that'd be applied, that I would suggest would be like what the health sector has done …[94]

David Woodroffe questioned the impact of this lack of training on professional ethics:

> So, there's obviously all the profession itself does, all these things from the perspective of being a professional lawyer, being a specialist in your particular field, being an ethical lawyer. But how do you do that in an Aboriginal context?[95]

He also agreed strongly that accreditation was needed:

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92 Interview with Fiona Hussin (n 15) 12.
93 Interview with John McKenzie (n 57) 4.
94 Interview with Shane Duffy (n 7) 34.
95 Interview with David Woodroffe (n 46) 6.

> Absolutely there has to be the accreditation. Representing an Aboriginal person, you should be a specialist. You should have two, three years' training. Not just in law and trauma, but also in cultural understanding, and things of that nature.[96]

Such basics aside, being 'culturally competent' goes to the core of effective service delivery and being 'present' touches upon this key aspect too. Shadbolt described two key components of how this might be cultivated in non-Indigenous or mainstream services:

> Firstly, ensuring that any non-Indigenous staff (in particular, legal practitioners), receive cultural competency training (both at induction and periodically thereafter). Secondly, ensuring that Indigenous Australian staff are employed in key positions (CEO, Court Support Officers, Field Officers, etc).[97]

However, there was a fear expressed by some participants that even with such initiatives some non-Indigenous organisations would still engage in a level of 'window-dressing'. Such window-dressing might, for example, take the form of a non-Indigenous organisation employing Indigenous staff, with no real intent to implement any substantive change or take advice from Indigenous employees. The term 'black cladding' has also been used in some quarters to describe instances where a department or organisation 'utilises' an Indigenous Australian as something of a shop window 'figurehead' in order to present an outward appearance of being culturally aware, whilst internally going about their business as usual.[98]

It is worth re-emphasising that while the majority of interviewees used the language of 'cultural appropriateness' and 'competency' when discussing the importance of Indigenous-led service provision, this language changed to 'cultural safety' when participants discussed non-Indigenous services providers. This reflected the general perception that non-Indigenous providers cannot see through the eyes of Indigenous peoples. Nonetheless, it should be noted that despite this intentional code-switching to distinguish between Indigenous and non-Indigenous cultural understandings, participants tended to blur distinctions between the terms 'culturally appropriate', 'culturally competent' and 'culturally safe'. This suggests that ATSILS will need to clarify amongst themselves the different meanings of the terms, and then roll out the definitions throughout the sector for consistent usage.

Furthermore, there needs to be some recognition that there are situations (not many) when Indigenous peoples do not have the gamut of cultural competence. This is mainly due to past policies of forced removal, and in those circumstances, individuals may require more time to experience working with their mob to feel like they belong. These issues, stemming from historic trauma, are also what connect Indigenous peoples. For Indigenous lawyers, these issues can help them to understand their clients more through relating to the shared trauma that has led their client down their current path. With guidance from the senior Indigenous staff, and the cultural learning mechanisms in place for all staff, the vast majority will flourish.

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96 Ibid 6-7.

97 Interview with Greg Shadbolt (n 12) 2.

98 Ibid.

Most of what is discussed in a mainstream education and professional settings in terms of cultural competency relates to training non-white lawyers. It does not acknowledge existing Aboriginal knowledge within these organisations. Only ATSILS can provide culturally competent services.[99] According to Cheryl Axelby, mainstream legal aid cannot, nor will it ever, be able to achieve this.[100] She explained why:

> Because only Aboriginal Torres Strait Islander people are culturally competent. We have lived experience, we identify strongly with our identity, our culture our land, and we know our history and the legal system.[101]

Axelby explained that the only way to deliver culturally competent legal aid services is to continue ATSILS as separate entities that provide services to vulnerable Indigenous Australians, in complement to other mainstream legal services. Community control and self-determination are vital in providing services to our people.[102]

D. Community Control

A theme that emerged from the research and interview data related to community control. Many interviewees highlighted that for many ATSILS, community control derives from the basic fact that they have an Indigenous board, and what that brings. As Cheryl Axelby described:

> As community-controlled organisations, we also have greater accountability to our communities through our Aboriginal Board of Directors, who are also connected with the community, and who are recognised within our communities as having responsibility, and who are held accountable for their roles within our organisations.[103]

Also referencing the importance of community accountability, Nigel Browne described how this affected Aboriginal Boards' motivations and decisions on organisational directions:

> … you're answerable to your mob. I've got more of a fear of being chased down the street by a group of Aunties than I do by the banks, I can tell you right now. So that's always a motivation, and at the end of the day, we want to see our mob move forward.

Browne did however provide the qualification that the extent to which this transpired reflected the individual members of the board:

> Again, you still need to have the right people in those positions making those calls but any organisation including ATSILS, I suppose that's the point of difference for them is, you know, the people that occupy the roles are there … to provide the service. But they're all keenly aware that they're all, they all come from the oldest civilisation on the planet, which has been battered from pillar to post since 1788 and is now making headways to re-join the rest of the

99 Interview with Cheryl Axelby (n 10) 7.
100 Ibid.
101 Ibid.
102 Ibid.
103 Interview with Cheryl Axelby (n 10) 2-3.

> country, across different industries, in the private and public sector, in individual and community achievement.[104]

However, as Dennis Eggington – the longest serving Indigenous CEO of ATSILS and a man renowned for his advocacy for Indigenous rights – poignantly pointed out, the evolving status of ATSILS' governance has meant a move away from original understandings and models of community-control.

> So, the governance of our organisations, I think, is an evolving thing. Because most people now, are talking about the ILAP programme saying, 'Oh shit, we're being mainstreamed,' well, we've been in the Attorney General's department for a long time. We've been mainstreamed for a long time. They're talking about, you know, our self-determination, where we really want to be a community-controlled organisation.[105]

Despite this, Eggington recognised that ATSILS can implement the essence of Indigeneity in developing new directions, albeit with changed models of governance.

> So, there's a bit of misunderstanding among our own mob about those things, but I think, all in all, they're the sort of things that you continually look to, to see if you're doing it right. So, you're incorporating proper values in what you do, whether it's employment or whether it's how you deliver a service, or how you interrelate to one another, even in a big office, where you've got 70 people.[106]

However, a big part of this change in moving away from traditional understandings of community control is that while current ATSILS' models do have Indigenous boards, the board members are no longer elected by their communities. As Eggington also pointed out, all the ATSILS are companies limited by guarantee, highlighting that they are all incorporated under the Australian Securities and Investments Commission (ASIC) legislation.[107] In my time with ATSILS, I always heard that ATSILS felt they were moving away from models of community control as a result. In recent communications with Cheryl Axelby, she made the same inference:

> … we changed from a South Australian incorporated body, due to the federal government AG advising ATSILS had to do so to continue to receive funding if you received more than 500k from Australian govt. E.g. under SA incorporated body every SA Aboriginal and Torres Strait Islander over 16 years became an automatic member of ALRM, whereas now members are those that make application. Just a point from ALRM who felt that the ASIC aspect removes us further away from Aboriginal governance principles.[108]

As ATSILS are incorporated under Corporations legislation, directors may only be appointed by members at an Annual General Meeting in line with the organisation's

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104 Interview with Nigel Browne (n 24) 15.

105 Interview with Dennis Eggington (n 20) 11.

106 Ibid 11.

107 Australian Securities and Investment Commission Act 2001 (Cth).

108 Personal communication from Cheryl Axelby to Eddie Cubillo, 7 June 2020.

constitution, or replaceable rules.[109] To become a member you have to apply to the board, who appoint members according to their constitution, or replaceable rules. Then as a member, you can nominate for the board. This process does not reflect the historical vision where the community elects their representatives from their community. In the current day process, you have a small group of handpicked members, who then could become directors. Today, there is no real community input in these selections and appointments. However, there is another option to the status quo: that ATSILS get the skills required to run a community representative organisation. As former Chair of the NSW Aboriginal Legal Service, Brendan Moyle, suggested:

> We need [to] look at how to bring in, and strengthen skills based and community representation approaches to our boards. We have a relatively small membership base to base elections on, which means we may not be picking up the level experience within board members that we often need. Still good people with lived experience that come from and will fight for our communities, but often without significant management or legal service experience that comes with running a significant organisation.[110]

Shane Duffy held similar views to Moyle. He argued that the strength of the ATSILS' operations come from having women and men, representing different parts of the state, so that Aboriginal and Torres Strait Island representatives can clearly articulate the needs of their mob or country.[111] He did however pose the following caveat:

> The challenge is balancing that professional acumen with the passion, experience and drive that comes with being an Aboriginal community-controlled organisation I'll be honest, just 'cause you're on a board, doesn't mean you know your business. And the concern for me, is well-intentioned beautiful people, don't know what they're doing in relation to making big picture decisions.[112]

Duffy later clarified that a skilled board is necessary to support the establishment of an effective strategic direction of any organisation so that the day-to-day operational needs align with the organisation's aims and objectives.[113]

As the discussion above suggests, there are conflicting understandings of what community control is and means today. From the interviews, it appears that the leadership of ATSILS is extending the concept of 'community controlled' to fit within government parameters, while also recognising the importance of having Indigenous representatives on the board. Interviewees recognised that board members need to be highly skilled. Such skills relate to knowing and keeping up to date on their communities' affairs, being able to articulate the strategic direction for the organisation's business and having the insight to pave a clear pathway for how the

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109 A company can follow the replaceable rules in the Corporations Act or adopt their own constitution. Each ATSILS has a constitution and has similar clauses to appointment of members and Directors.

110 Personal communication from Brendan Moyle, phone call to Eddie Cubillo, 7 June 2020.

111 Interview with Shane Duffy (n 7) 2.

112 Ibid.

113 Personal communication from Shane Duffy, phone call to Eddie Cubillo, 9 June 2020.

organisation operates in challenging situations.[114] On top of this, ATSILS directors and boards need to understand their corporate responsibilities. This includes directors having the ability to ensure that cultural understandings are present in planning for legal service provision and advocacy. This is vital for the service to reflect community concerns and needs. It is important that directors and boards are able to interpret the legal complexities and then relay this information back to their communities. From the interviews, the question of how to ensure community accountability in these ways is potentially under-developed and devalued.

E. Final Insights

As the empirical data shows, ATSILS are *the most* culturally appropriate service to deliver legal aid to Indigenous peoples. The degree to which this is recognised may have been the major contributing factor to their survival. The interviews provide a source of material that is not represented in mainstream scholarship or policy and has not to date been the subject of sustained analysis. In particular, interviews spoke about their first-hand experiences of ATSILS at various stages in the institution's evolution, and reflected on the meaning of cultural competency, and self-determination.

While the majority of interviewees used the language of 'cultural appropriateness' and 'competency' when discussing the importance of Indigenous-led service provision, this language changed to 'cultural safety' when participants discussed non-Indigenous services providers.

All the Indigenous interviewees noted that there are real community concerns that the ATSILS, as an institution, is drifting away from its original concept and losing its relevance to the people it serves. Across all interviews, participants described self-determination as creating an environment that enabled community values to be prioritised and respected.

There was a consensus among interviewees that for ATSILS to be self-determining they must be community controlled, especially as a counterpoint to the current western structure that they work in. However, it was highlighted that the degree of self-determination practised and achievable by ATSILS was more nuanced: '… in the sense of service delivery, it's self-determining, but is constrained by Western structures and justice, so it's a balancing act.'[115]

Most of the Indigenous interviewees expressed the view that self-determination was either unachievable, or was a *theoretical* possibility, unlikely to be attainable in reality due to government constraints and internalised mentalities. The non-Indigenous participants felt that this question was for the Indigenous people to answer this.

The majority of interviewees thought that [while ATSILs are the most culturally appropriate ... it was just not possible, under current arrangements, to have a truly self-determining ATSILS]. There was general agreement that community control is central to the ATSILS' legitimacy to their communities, and their ability to fulfil their purpose as 'culturally appropriate' legal services.

The feeling emanating from the interviews was that cultural competency is more than just empathy, understanding and respect. It encompasses 'world view' and experience – the inability to see the world through someone else's eyes.

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114 Interview with Shane Duffy (n 7) 4.

115 Interview with Fiona Hussin (n 15) 6.

Interviewees expressed that cultural competency as an idea seems inextricably bound to cultural authority: having the right experience and connections to understand what is and is not culturally appropriate and responsive.

It was very imperative to interviewees, that they emphasised the importance of ATSILS and their staffs understanding their clients' culture, laws and traditions. Majority of the interviewees felt there was a need for better cultural safety education of lawyers within law schools and during practice.

An overarching theme in the interviews was that it is preferable to have legal services that are responsive and attuned to the needs of the community. The comments of interviewees suggest respect, humility, and integrity are the key tenets underlying the ability of an organisation's non-Aboriginal staff to ensure culturally safe practices.

The interviews also confirmed that grant reporting requirements were extremely onerous for ATSILS. Majority of the interviewees agreed that financial accountability was important, as most perceived that there was a higher burden placed on ATSILS to justify and account for use of funds than their legal aid counterparts.

Many of the interviewees perceived it as preventing and distracting from service delivery; staff were instead tied up with addressing peculiar financial requirements, that are requirements that other non-Aboriginal legal aid providers were not equally obliged to address.

Cultural legitimacy in their governance arrangements means having rules, structures, and processes that are informed by an understanding of your community's own cultural traditions which are respected by your people. Self-determination remains the most effective model for ATSILS, but this aspiration has been stymied.

There are real questions about whether ATSILS, under the current western corporate structures, can be self-determining, and if not, how they can best represent their people? Is self-determination achievable through a business model? Is quasi self-determination possible through community control?

In addition to the material gathered through interviews, my research highlights that despite many reports, reviews and Royal Commissions that have emphasised the importance of ATSILS to Aboriginal and Torres Strait Islanders and the justice system, successive governments have failed to recognise their worth.

My experience tells me that self-determination is pivotal to the successful delivery of Aboriginal and Torres Strait Islander legal services. My research, which is consistent with numerous reports, inquiries, independent research and various Royal Commissions, combined with my own personal and professional experience, confirms they are the most skilled and culturally competent service to deliver legal aid to Indigenous peoples in this country.

This is because self-determination allows Indigenous peoples the freedom to develop their own solutions, a task for which they are best equipped. Indigenous peoples know the problems that they face at all levels. They know the solutions because they live with the problems enforced on them from settlers.

Aboriginal and Torres Strait Islander peoples governed themselves for 60,000 years before their lands were illegally occupied. They ran their communities and country – using systems of cultural values and traditions to govern themselves, which gave them cultural legitimacy amongst their people.

Throughout my involvement with ATSILS over the past 25 years, there has not really been an organisational mindset to look too far beyond the question of government

funding in delivering their services. Yet self-determination requires that ATSILS are self-sufficient and not reliant on the feeding hand of government.

However, there are various reasons that ATSILS remain tied to the hand that feeds them. First, they have become dependent on government funding for basic functions that they have not had the capacity to challenge this reliance. Their survival mentality has precluded a space to plan for their organisations to thrive and lead community from the ground up. Second, there is a fear that if they demand a fund that is autonomously generated that they will be denied any funding at all. (Compare the proposal by The National Congress of Australia's First Peoples was the national representative body for Aboriginal and Torres Strait Islander Australians.)[116]

It is important to bear in mind that Indigenous Australians are the lowest socio-economic group in the country: without government funding for legal aid, many would not be able to pay for legal services. Nonetheless, an internalised subordination sustains ATSILS dependence on government handouts, which in turn continues to squeeze ATSILS funding and entrench the dependence.

As interviewees emphasised, and as was discussed at length in Chapter 4, the Federal Government, through its contract-funding model, has severely restricted ATSILS' capacity to self-determine, and this approach has taken a toll in relation to its advocacy work.

Considering these challenges, in the next and final chapter of this thesis I will explore the possibility of revenue raising as a means of building capacity for greater political autonomy for ATSILS. Through cultivating business opportunities, or possible philanthropic buy-in, I explore whether ATSILS might achieve greater community control and provide services or programs as a means of circumventing their dependency on, and the restraints of, government funding. It is also clear that, even if self-determination is not being achieved, ATSILS still provide the most culturally competent environment for their clients. To this end, I will elaborate on the concept of cultural competence and recommend that ATSILS debate this idea to find and own a narrative of what it means in their space.

[116] Australian Human Rights Commission, Report of the Steering Committee for the creation of a new National Representative Body, *Our future in our hands: Creating a sustainable National Representative Body for Aboriginal and Torres Strait Islander peoples* (Paragon Printers Australasia, 2009).

CHAPTER 6
CONCLUDING THOUGHTS AND RECOMMENDATIONS

A. Introduction

ATSILS were once the only game in town. Now they take their place among a variegated range of Indigenous institutions, all closely connected to community, and all fulfilling different functions. ATSILS need to tackle this challenge head-on, by playing to their strengths, and taking the time to think about how they can best provide specialist and strategic legal advice to their Indigenous community clients. This is not an easy task.

While there is considerable ambivalence about the positioning of ATSILS as self-determining organisations, most interviewees understood that the original vision,[1] of a community-controlled organisation, needs to be reworked to reflect the changed political, economic and cultural environment in which ATSILS operate today. This chapter takes up this challenge by suggesting that the role of ATSILS is still vitally important but the expectations of the community and of government have changed in important ways.

In this chapter I explore the options and consider what approach would work best for community. I conclude that the ATSILS need to tear down the box that they have been placed in and reclaim their own identity, one that reflects what they and their communities see as culturally legitimate bodies to represent them. As possible comparisons, I look at some examples of organisations in other fields that have utilised cultural practises of their communities to accommodate their incorporation under western business practise to maintain their legitimacy to their communities. As my research shows, ATSILS are questioning their own cultural legitimacy. As a key service deliverer to their community, they need to determine, in their own voice, who they are, who they are providing their services to, and what the boundaries are between community, business and politics. The community needs to be heavily involved in this. They cannot be rushed to appease government time frames: history testifies that this is recipe for disaster for our people. Lastly, I explore options to look at how ATSILS may become more financial independent and in doing so also removing political interference by all persuasions of governments,

B. A Principle of Self-Determination

International human rights standards are now well established in international law. [2] They should provide a framework towards self-determination and lead to better

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1 Foley's depiction in the last chapter is that self-determination means Aboriginal people regaining control of their own destiny, regaining control of their own affairs, being able to decide for themselves how and where and if they fit into the future of Australia. We also saw self-determination as meaning economic independence.

2 See e.g., S. James Anaya, *Indigenous Peoples and International Law.* Oxford: Oxford University Press. 2004.

conditions for our peoples. In Chapter 2, I highlighted the international standards and the academic research that attempt to define what self-determination means for Indigenous peoples.

Article 4 of the *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP') expresses self-determination for Indigenous peoples (as opposed to territorial self-determination) in the clearest terms: Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.[3]

It was a principle that shaped the formation of the first Aboriginal legal services.

Gary Foley's insights on this topic are telling and should be given the gravitas deserved by someone who has been at the forefront of the ATSILS movement for most of his adult life. As a young man he was present at the foundation of the ATSILS, when Indigenous peoples moved into urban centres like Redfern in Sydney and looked for a better life after the 1967 referendum.[4] In his interview with me, recounted in Chapter 3, Foley articulated what they strove for from the outset of the establishment of the ATSILS. He also spoke to how, in the current political climate, economic independence is the only means by which Aboriginal and Torres Strait Islander peoples will be empowered to make their own decisions.

The dependence on government and its bureaucratic framework, as well as whim to withdraw funding, impedes on organisation autonomy, self-determination and accountability to community. Gary Foley has highlighted the hidden costs of accepting funding from governments in relation to constraining independence and responsibility to their people. He emphasised how 'government money comes with conditions' and these conditions have exploded over the past fifty years since ATSILS came into existence. He states that the conditions enforce control over ATSILS to undermine and destroy their effectiveness.[5]

For Foley and others who founded the Aboriginal Legal Services, the goal at the outset was for Aboriginal and Torres Strait Islander peoples to regain control of their destiny and affairs without interference from governments. At the time, ATSILS served their purpose as a vehicle that fought for the communities' rights against many injustices when there was little or no representation for Indigenous peoples. This advocacy was created to deliver independence from governments, using ideas borrowed from the

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3 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/Res/61/295 (2 October 2007, adopted 13 September 2007).

4 In the 1967 Referendum, Australians voted overwhelmingly to amend the Constitution to allow the Commonwealth to make laws for Aboriginal peoples and include them in the census: see Gabrielle Watson, 'The lessons in the 1967 Referendum campaign' (2019) 5(1) *NEW: Emerging scholars in Australian Indigenous Studies* 1, 3 <https://epress.lib.uts.edu.au/student-journals/index.php/NESAIS/article/view/1565>.

5 Interview with Gary Foley (Eddie Cubillo, Melbourne, 20 June 2019).

Black Panthers and other civil rights activists in the United States, refigured for the Australian Indigenous context.[6]

Several years later, the Aboriginal and Torres Strait Islander Commission (ATSIC) was established under the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth). It came into existence on 5 March 1990 in response to longstanding struggles of Indigenous peoples and their allies for self-determination. As a former Chair of an ATSIC Regional Council, I am deeply aware of and know first-hand the ways in which ATSIC's existence was subjected to government oversight. However, our membership was elected by our community, and we had considerable resources and control over services to serve our communities. Prior to the Howard Government coming into office in 1996, we had the power to engage with state and federal governments to provide policy direction and deliver funding to programs under specific funding items.

During this time, Indigenous organisations like ATSILS fed information to ATSIC representatives in their regions, who would deal with territory, state and federal governments. This is a simplistic description but there was a clear and accepted delineation of roles and responsibilities. It allowed service providers to concentrate on delivering the best service to our people without risking conflict with their funder. Speaking from my experience as the Chair of the Yilli Rreung Regional Council, although we were recognised as the key advocate for our people, it was clearly understood that the Traditional Owners and the Northern Land Council (in our case) had jurisdiction and cultural authority for land and cultural issues relevant to the regions within their boundaries. They needed to be consulted. The landscape for representation is now further complicated with recognition of land rights held by Native Title and Traditional Owners through their Prescribed Body Corporate (PBC). These communities increasingly want to make decisions for their people and lands, not to channel their voices through the old structures of government service providers.

As discussed in Chapter 2 and further supported by Larissa Behrendt's work in this area, research conducted both in Australia and North America has shown that better socioeconomic outcomes are achieved when Indigenous peoples are involved in the setting of priorities within their community, the design of representative structures, the development of policy, the delivery of services, and the implementation of programs. [7] This involvement can be characterized as self-determination and, when control is given centrally to Aboriginal peoples without constraint, can be a form of sovereignty.[8]This aspect of sovereignty is about providing Aboriginal peoples with the space, resources, and mechanisms to determine their own future. It is not just an ideological embrace of 'sovereignty'; it is a research-based policy approach.[9]

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6 Ibid. In his interview, Gary spoke about how they looked into the social programs the Black Panthers were delivering and not their radical rhetoric or their carrying guns to defend themselves.

7 See Larissa Behrendt, 'Aboriginal Sovereignty: A Practical Roadmap' in Julie Evans et al (eds) *Sovereignty: Frontiers of Possibility* (University of Hawaii Press, 2013) 163, 171. Behrendt L, Cunneen C, Libesman T, Watson N. *Aboriginal and Torres Strait Islander Legal Relations*. Oxford University Press; 2019.

8 Ibid.

9 Ibid.

These frameworks of self-determination must lie at the heart of ATSILS.

C. Are ATSILS Self-Determining?

How is it possible that even with these powerful international norms behind us, self-determination has been kept from Indigenous peoples by settler governments? Chapter 2 addressed this by examining the historical impact of the colonial history of this country and how it has impacted on Indigenous Australians and their fight for equality through all facets of being recognised as the First Australians and citizens. We are citizens who have different cultural values and needs to those of the dominant settler colonial class. The chapter investigated how this suppression of our values and lives perpetuates the over-representation of Indigenous peoples in the Australian criminal justice system, and the impact that it has for ATSILS in dealing with ignorant and hostile governments when trying to deliver a service under such conditions.

There was consensus amongst the ATSILS' staff whom I interviewed that self-determination is unachievable, or at the very least not achievable in the current political context. Alternatively, many also expressed it as a theoretical possibility, but not attainable while structural barriers remain. The interviews with key Indigenous community members who have worked, or continue to work, for or be engaged in the governance of ATSILS also highlighted that they do not see the organisations as self-determining.[10] There was a collective emphasis on the restrictiveness of funding conditions, and an acknowledgement that this deficit has hampered the autonomy and political independence of ATSILS.[11] Reporting requirements were seen as extremely onerous for ATSILS and considered by some to be higher than the burden experienced by non-Aboriginal legal services providers.[12]

Interviewees expressed their understanding of the application of self-determination in the current ATSILS context as implying more of a *relational* self-determination model. This looked like collaboration and co-option – between communities, and between communities and government stakeholders. This begs the question, is this self-determination in any sense of the definition? Participants also spoke about the importance of being community controlled and of ATSILS being a visible symbol of Aboriginal and Torres Strait Islander political presence.

As discussed above, there is broad concern that Indigenous organisations that are contracted by government to provide services to Indigenous peoples are hamstrung by government bureaucracy in a manner that denies true self-determination in the provision of its essential services.[13] There is a drive within Indigenous Australia for structural reform to give Indigenous Australians some power over all decisions that are

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10 Janine Mohamed, 'Cultural Safety Matters – The Conversation We Need to Keep Having', *Indigenous X* (Blogpost, 24 March 2018) <https://indigenousx.com.au/janine-mohamed-cultural-safety-matters/#.Wt12F4huZPY>.

11 Interview with Gary Foley.

12 Interview with Greg Shadbolt (Eddie Cubillo, Brisbane, 29 August 2019) 7.

13 Megan Davis, 'New Agreement Won't Deliver the Change Indigenous Australians Need', *The Sydney Morning Herald* (online, 8 July 2020) <https://www.smh.com.au/national/new-agreement-won-t-deliver-the-change-indigenous-australians-need-20200705-p5593d.html>.

made about us. Currently, there are currently three jurisdictions in Australia that are investigating treaty processes: Queensland, the Northern Territory and Victoria.[14] There has also been the Uluru Voice movement, looking at structural reform and constitutional reform at the Commonwealth level.[15] These processes reinforce and acknowledge the underlying truth that Indigenous peoples want more responsibility for decision making to lie with them, not with government or government contractors.

Our service deliverers (like the ATSILS) were once the backbone of the organisations lobbying for our rights as Aboriginal peoples. However, due to the hollowing out of the services and the restrictive contractual conditions they have been required to operate within, their advocacy roles have diminished over time. With respect to ATSILS, their members and employees know that things have changed. The findings of the interviews conducted for this thesis highlight that the ATSILS are now grappling with their own identity, integrity and claims of cultural competency and community control.

A general observation I had throughout the interviews was that the majority stated or alluded to the fact that ATSILS has been forced to move away from a community control model to a western corporate structure to satisfy the requirements put in place by governments, and so receive taxpayer money. This was seen as being reflected in superficial changes such as a shift from official job titles (from 'Chair' to 'Chief Executive Officer') through to more fundamental shifts at the level of funding, governance and regulatory compliance (the introduction of KPIs etc). This brought forth tension between Indigenous communities and the professional corporate boards of these entities, as the latter no longer necessarily represent the community in their makeup.

D. Impeding the Principle of Self-Determination

Since its inception some five decades ago, ATSILS has been subjected to colonial and paternalistic state and federal government policies and laws. Born through mistrust and inherent racism, such government policies have perpetuated and inculcated a master-servant relationship –with its trappings of inadequate consultation and undermining of key principles of self-determination– between Australian governments and the ATSILS sector. At a federal level, the government has declined to follow unequivocal advice and recommendations provided by either ATSILS and independent consultants (contracted by the government) without justification, especially in relation to recommendations around increasing, or at the very least not reducing, ATSILS funding levels.[16]

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[14] See Queensland Government, 'Path to Treaty' (Web Page, 25 October 2020) <https://www.datsip.qld.gov.au/programs-initiatives/tracks-treaty/path-treaty>; Northern Territory Treaty Commission (Web Page, 2020) <https://treatynt.com.au>; First People's Assembly of Victoria (Web Page, 2020) <https://www.firstpeoplesvic.org>.

[15] Megan Davis, 'Correspondence' (2018) 70 *Quarterly Essay: Moment of Truth* 81–91 <https://www.quarterlyessay.com.au/content/correspondence-megan-davis>.

[16] Over the past 50 years, ATSILS and NATSILS have provided numerous submissions to both state and federal governments: see e.g., NATSILS 'Submissions of the National Aboriginal and Torres Strait Islander Legal Services 2010-2014' (2015) 17 (August) *Journal of Indigenous Policy*; Commonwealth, *Royal Commission into Aboriginal Deaths in Custody* (Final Report, 15 April 1991)

D.1 A Legacy of Paternalism

As Chapter 4 explained, Australian governments abandoned self-determination as a framework to underpin Indigenous policy when John Howard became Prime Minister in 1996. Instead, they spoke of 'mainstreaming Indigenous affairs' and 'practical reconciliation'. The Howard Government pushed through a neoliberal ideology that has dictated policy from this time and has shaped the control of Indigenous interests, with right-wing think tanks enhancing their attacks on "Indigenous difference".[17] The neoliberal agenda to reject self-determination was an attempt to assimilate Indigenous peoples into the 'mainstream' and 'normalise them' to the dominant culture. It was a move that has jeopardised deeply valued Indigenous rights. Integral to this, was the decision of the Howard Government to abolish the major Indigenous representative body, the Aboriginal Torres Strait Islander Commission (ATSIC) and mainstream all specialist Indigenous programs through existing government departments.[18] Subsequently, Indigenous strategies for advocacy were forced to change.

D.2 Funding as a Tool of Constraint

In 2005, government funding of ATSILS was overhauled: the process changed from grant funding to competitive tender. The short lead-in time for these changes to service contracts did not allow for proper long-term planning, projection of services, or the stability of funded organisations. It prevented ATSILS from incorporating their governing structures in a way that embedded their cultural and community values and integrity. Instead, the government incorporation model required ATSILS to enter the competitive tender process, which pushed them further from their community. It pushed them further from the ethos of self-determination and community acceptance, which these service providers had once embodied, as advocates for all things black.

Indigenous peoples' ideas of self-determination evolved over the years as they gained rights and were empowered and recognised to speak for themselves. Today as always, Indigenous need structural reform that will give Indigenous Australians power over all and any decisions that are made about us. Indigenous service deliverers (like the ATSILS) and their peak bodies are a testament to the tireless activism of our elders who lobbied for our rights as Aboriginal peoples to the same level of services as all citizens of Australia, and for community control of those services. However, these organisations rely on direct government funding of their services (as opposed to one level removed from Government, as was the case when ATSIC managed the funding). This means that their activities and functions are often shaped or controlled by government views, objectives and outcomes. *Their* priorities are not *ours* and, where there is conflict, governments can defund services without plausible justification.

It is important to note that the elders who established these organisations and fought to get these rights are recognised and respected by community. It is important to

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<http://www.austlii.edu.au/au/other/IndigLRes/rciadic/>; Cox Inall Ridgeway, *Review of the Indigenous Legal Assistance Program (ILAP), 2015-2020* (Final Report, 1 February 2019).

17 See Chapter 2 of this thesis.

18 Barry Morris, 'Abolishing ATSIC in the Enabling State' (2004) 15(3) *The Australian Journal of Anthropology* 326.

recognise ATSILS and the people who established them. However, it is also important to realise that people shop around to look elsewhere for more general advocacy or specifically legal representation today.

In March 2019, the Federal government announced a single national funding mechanism for Legal Assistance Services, scrapping the Indigenous Legal Assistance Program (ILAP) through which ATSILS and their peak organisation, the National Aboriginal and Torres Strait Islander Legal Service (NATSILS), are funded. ILAP had been administered by the Attorney General's Department with the purported intention of ending the disadvantage to Indigenous peoples in the justice system. This political decision ended a near 50-year commitment to stand-alone funding for ATSILS, which had been developed to recognise their unique capacity to improve justice –or at least mitigate the excesses of injustice– for Indigenous peoples.

The Federal government's decision to mainstream legal services funding in this way flew in the face of the recommendation of an independent review (which the government commissioned) that the ILAP should continue as a stand-alone program administered by the Federal government to directly fund ATSILS and NATSILS with transparency and certainty.[19] It undermined the government's supposed commitment to accountability, transparency and its purported policy of reducing Indigenous peoples' disadvantage in the justice system. In the month prior to the its announcement (February 2019), the Morrison Coalition government with much fanfare made a prominent commitment to working in "genuine partnership" with Aboriginal and Torres Strait Islander peoples and their peak organisations on Closing the Gap.[20] The decision to abandon the ILAP –which will most likely increase the *justice* gap– makes a mockery of the government's purported commitment, and undermines any genuine partnership with ATSILS as representatives of Aboriginal and Torres Strait Islander peoples.[21]

History has shown that when state and territory governments resort to 'tough on crime' policies it is because their tenure to govern is in jeopardy.[22] And they have done so despite the research clearly demonstrating that 'tough on crime' approaches do not work, are discriminatory and are counterproductive.[23] Multiple reports have instead produced a strong evidence base and made numerous recommendations emphasising the importance of independent Aboriginal legal services.[24] The ILAP Review itself recognised the significant and unique role that ATSILS play in addressing the disadvantage of Aboriginal and Torres Strait Islander peoples within the justice

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19 Cox Inall Ridgeway (n 2) 16.

20 Department of the Prime Minister and Cabinet National Indigenous Australians Agency, 'New National Agreement on Closing the Gap' (Media Release, 30 July 2020) <https://www.pmc.gov.au/news-centre/indigenous-affairs/new-national-agreement-closing-gap>.

21 Prime Minister, Minister for Indigenous Affairs, Patricia Turner 'Partnering with Indigenous Australians to Close the Gap' (Media Release, 27 March 2019) <https://www.pm.gov.au/media/partnering-indigenous-australians-close-gap>.

22 Hogg, R., 1998. Rethinking law and order.

23 See generally, David Baker, *Tough on Crime: The Rhetoric and Reality of Property Crime and Feeling Safe in Australia* (Policy Brief No56, The Australia Institute, August 2013).

24 See, e.g., Productivity Commission, *Access to Justice Arrangements* (Inquiry Report, No 72, 5 September 2014), vol 2, 767.

system.[25] The work of ATSILS and the peak body NATSILS was found to be 'critically important', through their cultural and legal expertise, in reducing the impacts of the justice system on Aboriginal and Torres Strait Islander peoples and informing solutions to end the injustices that they face in the system.[26] The headline recommendation of the ILAP Review was that 'Commonwealth Government funding should continue to be delivered through a standalone, specific purpose funding program with minimum five-year funding terms'.[27] This reflects the overwhelming majority of testimony and evidence in the submissions and consultations that formed the basis of the report.[28]

The Government's dismissal of this key recommendation is beyond ATSILS' control. Five decades of trying to educate successive governments about the particular value of their work appear to have amounted to nothing, despite inquiries like the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) emphasising the importance of autonomous Aboriginal legal services.[29] Successive governments have continued to ignore and dismiss recommendations that 'autonomous regional services' be provided[30] and 'that Aboriginal Legal Services be funded to ensure that legal assistance is available to any Aboriginal complainant'.[31]

This thesis has demonstrated that Indigenous peoples deeply involved with ATSILS equivocate on whether it is better understood as a self-determining, 'community controlled' organisation, or whether it is in reality a mainstream business service-deliverer, as per its contractual responsibilities. This suggests that ATSILS have to come to the realisation that they must take stock of how they've been treated by the government. They need to – on their own terms – decide the best way forward to run their organisations and decide what that looks like if they are to best service their clients and continue to work towards the goal of ending disadvantage for Indigenous peoples in the justice system.

I struggle with these hostile conditions. The governments' lack of commitment to real self-determination, and their intentional manipulation of the system, obstruct ATSILS' ability to genuinely work towards a self-determining model. Perhaps it is more damaging to the spirit to think that equality is achievable, if in fact it is not. Consider the numerous reports discussed in Chapter 2; consider the RCIADIC recommendations thirty years ago, namely, that principles of self-determination should be applied to the design and implementation of all policies and programs affecting Indigenous peoples, that there should be a devolution of power to Aboriginal communities and organisations to determine their own funding priorities, and that these organisations should be the preferred vehicles through which programs are delivered.[32] Despite these recommendations, the oppression of Indigenous peoples continues under all persuasions of state, territorial and federal governments. No government has

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25 Cox Inall Ridgeway (n 2) 8, 86.
26 Ibid 122.
27 Ibid 16.
28 Ibid.
29 *Royal Commission into Aboriginal Deaths in Custody* (n 16), vol 3, 22 [22.4.75].
30 Ibid Recommendation 107.
31 Ibid Recommendation 105.
32 See *Royal Commission into Aboriginal Deaths in Custody* (n 16) Recommendations 188-192.

implemented systemic change or mechanisms that genuinely support self-determination.

E. The Cultural Competence of ATSILS

While the principle of self-determination has not been respected by governments in their relationships with ATSILS, and despite all the constraints placed on them, ATSILS are still best placed to provide services to Aboriginal and Torres Strait Islander peoples and provide a better understanding cultural space.

How have other organisations incorporated cultural competency and community control within western governance models when delivering essential services under government contracts? How have they managed to be relevant, a cultural fit to their communities, and meet their cultural and everyday needs? To do so, they need to own the narrative around what cultural competency is for their sector. As community-controlled organisations, they need to make their services distinctly 'theirs' and implement innovative and culturally appropriate services that can adapt and withstand frustrating bureaucratic whims.

E1. Is There Cultural Competency?

The interviews delivered a range of discussions around cultural competency and provided a vast number of examples of what that looks like to those at the coal face, whether from the perspectives of ATSILS staff or others. There was also some conjecture as to whether ATSILS are in fact culturally competent. This was mooted due to the fact that the majority of ATSILS lawyers are non-Indigenous and generally do not have either the cultural knowledge or experience of Indigenous peoples until they begin working for the organisations. That said, interviewees (as well as many reports and recommendations) emphasise that the ATSILS are the most appropriate service deliverer to provide legal aid to Indigenous Australians. From my personal and professional experience, I have no doubt there is no other organisation that can currently deliver the services to Indigenous peoples with the limited resources that the ATSILS have. I have witnessed first-hand in community situations, court days and the Royal Commission that the services they provide to their clients are second to none.

There is, however, a need for ATSILS to re-evaluate their standing in the Indigenous communities they serve. As stated previously, the communities' dependence on ATSILS for advocacy in current days is not as strong as it was historically, but the dire need for legal advocacy and legal representation is higher than ever. To achieve recognition as the key advocate in the Indigenous legal sector, ATSILS will need to work with other actors to have them formally recognise and endorse that ATSILS are the most culturally competent and to develop a standard establishing what is required to deliver a culturally competent service.[33] This would instigate and reinforce national professional standards that must be met *before* organisations and individual staff members work

[33] It is an unfortunate reality that to have an impact in the justice sector Indigenous peoples will have to have a champion – a 'white' champion that everyone respects in the sector, for example the Australian Law Council and/or the judiciary to convince the profession to support and follow suit.

with Indigenous peoples. Notwithstanding these criticisms, ATSILS are at least having the conversation and have this awareness, which is more than can be said for the Australian firms and legal establishment more generally!

E2. What Could Be Done?

In John Rawnsley and colleagues' article on a pilot training framework for staff on cultural competency, staff from the North Australian Aboriginal Justice Agency (NAAJA) identified that ATSILS are uniquely placed to assess cultural competency in a legal setting, considering its direct engagement with Indigenous peoples. [34] As the authors noted, the idea for developing the Framework:

> emerged from an acceptance that the organisation is described as delivering 'culturally appropriate services', but with this description having no broadly accepted or commonly understood meaning. The absence of a commonly understood meaning dilutes the importance and value of the 'appropriateness' of the cultural aspects of a service, core business to any service engaging Aboriginal and/or Torres Strait Islander peoples.[35]

This again highlights the underlying concerns that ATSILS have about their service and the validity of their claims of being culturally competent, with NAAJA themselves raising the need to have a common meaning of cultural competency. The work NAAJA has done in developing this framework could be a precursor for discussions with the NATSILS' membership to develop a common meaning of cultural competency in delivering a legal service to Indigenous peoples.

ATSILS need to reclaim the narrative and be clear on what cultural competency means to them and their community in regard to providing legal aid. There is plenty of evidence in the many reports produced over the decades supporting this notion. Furthermore, the evidence gathered in the interviews show that ATSILS have substantial ammunition to clearly state what they would like that definition of cultural competency to look like. ATSILS cannot claim cultural competency unless their communities accept first and foremost and that they legitimate to their community. That their community are and are directly involved in developing exactly what that legitimacy looks like, in regard to their service delivery. This is discussed further below in the section on community control.

Once this is clear, the ATSILS should engage with the wider legal sector. They should begin with significant bodies, such as the Law Council of Australia (LCA), to rally their membership to look at developing a model like that of the nursing profession's code of conduct. In terms of the latter, the health sector agrees to have a culturally safe and respectful practice that requires nurses (in this case) to have better understanding of how their own culture, values, attitudes, assumptions and beliefs influence their

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[34] John Rawnsley et al, 'Cultural Competency in a Legal Service and Justice Agency for Aboriginal Peoples' (2018) 28(2) *Legal Education Review* 1, 2.

[35] Ibid 1.

interactions with people and families, the community and colleagues'.[36] The ATSILS, in partnership with the LCA, could develop a framework to make the whole sector accountable when representing Indigenous clients in the legal system. Another example they could look to is the 'Close the Gap Statement of Intent' that the Indigenous 'Community Control' Organisations helped drive in the health sector. The Statement of Intent says:

> the Government of Australia and the Aboriginal and Torres Strait Islander Peoples of Australia, supported by non-Indigenous Australians and Aboriginal and Torres Strait Islander and non-Indigenous health organizations – [commit to work] together to achieve equality in health status and life expectancy between Aboriginal and Torres Strait Islander peoples and non-Indigenous Australians by the year 2030.[37]

Signed in 2008, this became the foundational document that committed governments, the health sector and other key stakeholders in their efforts to close the gap. It was signed by both sides of Federal politics and State governments. The subsequent 2008 Social Justice Report was the first report to include the Close the Gap Statement of Intent, noting that it was a compact between Australian governments and Aboriginal and Torres Strait Islander peoples.[38] Additionally, the Statement embodied a human rights-based blueprint for achieving health equality.[39] The idea, in theory, was to remove *ad hoc* and vague notions of 'improvement' and instead tie action to measurable targets. Subsequently, governments and the health sectors in Australia initiated a nationally coordinated approach across all states and territories which recognises that cultural competency and community control is a significant factor in successful outcomes.

It is not clear why governments have not replicated the health sector's successful partnerships and collaborative work in the justice sector. As discussed in Chapter 5, Close the Gap was the vehicle that assisted the health sector to develop such collaborative partnerships with Indigenous organisations and government, which in turn developed better communications and outcomes. In the justice space, this is urgently needed. Sectoral programs and policies need to be adapted to suit the needs of Indigenous peoples and to facilitate their input at all levels, respecting that Indigenous peoples are more likely to have appropriate solutions to their problems. Perhaps, 'justice' reform is not as publicly palatable as health reform. Everyone can relate to universal health care, as it is something that impacts everyone at some stage

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36 Lynette Cusack et al, 'Nursing and Midwifery Board, Joint statement – Cultural safety: Nurses and Midwives Leading The Way For Safer Healthcare', *Nursing and Midwifery Board* (Webpage, 5 April 2018) <https://www.nursingmidwiferyboard.gov.au/news/2018-03-23-joint-statement.aspx>.

37 See Australian Human Rights Commission, 'Close the Gap: Indigenous Health Equality Summit Statement of Intent', (Webpage, 20 March 2018) <https://www.humanrights.gov.au/publications/close-gap-indigenous-health-equality-summit-statement-intent>.

38 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2008* (Report No 1/2009, 6 February 2009) 4, 208.

39 Chris Holland, *A Ten-year Review: The Closing the Gap Strategy and Recommendations for Reset* (Report, February 2018) 3.

in their life. In the eyes of much of the public, justice reform only affects "naughty" individuals who have made the "wrong choices". It seems that it is easier for the Government to dismiss or stall reform in justice than health, and harder for the justice sector to get the public on board. And the law-and-order rhetoric employed by governments and oppositions does not help!

As discussed in Chapter 4, the 'Close the Gap Refresh' has now included Justice targets and has ATSILS representation on the Coalition of Peaks (CoP).[40] The CoP is a representative body comprised of around fifty Aboriginal and Torres Strait Islander community controlled peak organisations, which have come together to be partners with Australian governments on closing the gap, a policy aimed at improving the lives of Aboriginal and Torres Strait Islander peoples.[41] The inclusion and participation of the ATSILS brings real hope that the strategy will harness expert advice to help address the overrepresentation of Indigenous peoples throughout the criminal legal system. In the context of legal *practice*, there is no conclusive definition of cultural competence. However, legal *scholarship* has a generally accepted definition:

> [a] set of congruent behaviours, attitudes and policies that come together in a system, agency or among professionals and enable that system, agency or those professionals to work effectively in cross-cultural situations.[42]

E3. Learning from the Health Sector

In the health sector – starkly contrasting with justice – there are more examples of working with Indigenous peoples to build on their strengths, represent their own interests and those of their communities, and negotiate terms to improve health and wellbeing outcomes. Many of these initiatives are referred to under the broad term of "cultural safety". One example is the amendment to the Nursing profession's code of conduct by the Congress of Aboriginal and Torres Strait Islander Nurses and Midwives (CATSINaM), then led by a Narrunga Kaurna woman, Janine Mohamed (now CEO at The Lowitja Institute). Despite some vocal yet small resistance from isolated nursing groups, the Code now advocates "for culturally safe and respectful practice and require nurses to understand how their own culture, values, attitudes, assumptions and beliefs influence their interactions with people and families, the community and colleagues."[43]

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40 For a list COP members see National Aboriginal Community Controlled Health Organisation, 'Coalition of Aboriginal and Torres Strait Islander Peak Organisations' (Webpage, 2020) <https://www.naccho.org.au/wp-content/uploads/Membership-list-Coalition-of-Aboriginal-and-Torres-Strait-Islander-Peak-Organisations-2.9.pdf>.

41 See National Aboriginal Community Controlled Health Organisation, 'Coalition of Peaks on Closing the Gap' (Webpage, 2020) <https://www.naccho.org.au/programmes/coalition-of-peaks/>.

42 Terry Cross et al, 'Towards a Culturally Competent System of Care: A Monograph on Effective Services for Minority Children Who Are Severely Emotionally Disturbed' (Report, Georgetown University Centre for Child Health and Mental Health Policy, March 1989) 7 <https://files.eric.ed.gov/fulltext/ED330171.pdf>.

43 Cusack et al (n 35).

Furthermore, consistent with the collaboration between Indigenous Health peak and mainstream health organisations, CATSINaM's ensured that the Australian Nursing and Midwifery Federation, the Australian College of Nursing, the Australian College of Midwives were all "strongly supporting" the guidance around cultural safety in the new codes of conduct.'[44] CATSINaM's leadership and partnership with key mainstream stakeholders were essential to ensuring the Code included principles of cultural safety.

Breakthroughs with respect to Aboriginal health organisations and practices have occurred because that sector has been able to evolve with the support of their membership. Governments have subsequently respected the urgency of closing the gap. They have also respected that Aboriginal and Torres Strait Islander organisation are 'different' and should be able to develop their own practices to provide services to Indigenous peoples; services that have not been provided by general health systems.

There have been some major moments in the past 45 years that have shaped the Aboriginal and Torres Strait Islander health and justice sectors. Notably, the creation of community-controlled services, both Aboriginal Medical Services and Aboriginal Legal Services in the 1970s, were a major reform in the development of both sectors. For health, a catalytic moment for change came in 2005 when then Social Justice Commissioner, Professor Tom Calma, released the 2005 Social Justice Report.[45] This seminal report highlighted the inequality in health status between Aboriginal and Torres Strait Islander peoples and the non-Indigenous population and the well-known fact that a large gap in health equality exists in Australia. The gap in life expectancy between Aboriginal and Torres Strait Islander peoples and the non-Indigenous population at the time was estimated to be over 17 years.[46] Calma called on the Federal government to commit to achieving equality for Aboriginal and Torres Strait Islander peoples in the areas of health and life expectancy within 25 years.[47]

The 2005 report provided a roadmap for governments, the health sector and the community-controlled health organisations to collaborate. It underlined the importance of a human rights framework for addressing health inequality by providing a system to guide policy making and to influence the design, delivery, monitoring and evaluation of health programs and services.[48] Importantly, it called on all governments to make time-bound commitments to overcome the disadvantage and discrimination. This recommendation for time-bound targets was an attempt to build accountability into the system. It was a rallying call: merely acknowledging that we need to improve Aboriginal health is not good enough; governments must commit to equality, set

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44 Janine Mohamed, 'Cultural Safety Matters – The Conversation We Need to Keep Having', *Indigenous X* (Blogpost, 24 March 2018) <https://indigenousx.com.au/janine-mohamed-cultural-safety-matters/#.Wt12F4huZPY>.

45 The report also contained five follow up actions that the Commissioner's office would undertake in the following 12 months in relation to the new arrangements. See Aboriginal and Torres Strait Islander Social Justice Commissioner. (2005), *Social Justice Report 2005* (Report No 3/2005, 22 November 2005).

46 Ibid Chapter 2 'Summary: Achieving Aboriginal and Torres Strait Islander health status and life expectation equality within the next generation' 1 <https://humanrights.gov.au/our-work/social-justice-report-2005-summary>.

47 Ibid 1.

48 Ibid 48.

timeframes around that commitment, and plan accordingly. Indeed, it reminded everyone that the 'right to health' requires governments to directly confront issues of inequality.[49] Envisioning a Council of Australian Governments (COAG) process, the report called on all governments to address inequality within health services, particularly primary health care, as well as health infrastructure.

The Close the Gap Campaign then helped develop structures to redress the power imbalance and allow Indigenous peoples to sit in the policy-making domain to influence legislation, policy, guidelines, contracts and funding agreements. Many stakeholders that I spoke with from the original members of the Close the Gap campaign[50] said that one of the best outcomes of Close the Gap was that it helped professionalise the advocacy of the Indigenous Health peak bodies. Over time, the campaign developed trust with the community and ways of working that supported Indigenous leadership and expertise, and it did so while drawing on the expertise and experience of non-Indigenous stakeholders. Campaign and advocacy strategies were developed, parliamentary events held, and progress reports developed as tactics to increase public awareness and pressure government to act. The strategies developed around the 'Shadow Report' on Progress Towards Closing the Gap including the parliamentary event resulted in campaign co-chairs meeting three different Prime Ministers and presenting them with the Progress report.[51] Indigenous and non-Indigenous people working together allowed for expertise to be developed and understanding to be created around self-determination, community controlled organisations, and Indigenous solutions, as well as broader strategic campaigning, advocacy and policy work.

The Close the Gap policy and related campaign, has allowed Indigenous peoples to build on their strengths, represent their own interests and those of their communities and negotiate the terms to improve health and wellbeing outcomes. There are many lessons to be derived from here for the justice sector.

F. Keeping ATSILS Community Controlled

It has been almost 50 years since the establishment of ATSILS, which grew out of the dire need for representation for Indigenous peoples to advocate for their basic rights and rally against the police harassment, intimidation and many other inequalities and disadvantages experienced by Indigenous communities.[52] This 'need' harnessed people to come together and develop the ATSILS concept. People from the community were elected to boards to genuinely represent community perspectives and sentiments and

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49 Again, I suspect that the reason why a similar realisation has not occurred in the justice space is that there is general acceptance and understanding of the right to universal health care. The universal right to legal equity and justice is more removed for many people.

50 Former Social Justice Commissioner Tom Calma; Gary Highland, the CEO of ANTaR; Romlie Mokak, former CEO of Australian Indigenous Doctors' Association (AIDA) just to name a few.

51 See e.g. Chris Holland, C., 2018. *A Ten-Year Review: The Closing the Gap Strategy and Recommendations for Reset* (Report, February 2018); Australian Human Rights Commission, 'Close the Gap – 10 Year Review (2018) Executive Summary' <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/close-gap-10-year-review>.

52 For further discussion of the original concept and development of ATSILS see Chapter 4.

shape the organisation and the service itself. However, over these 50 years the role and responsibilities of the service have drastically changed.

F1. An Evolving Role

The interviews highlighted that people still identify with ATSILS' original definition and understanding of community control. The problem is that it does not appear that ATSILS have responded to the significantly altered Indigenous community dynamics including how governing structure has changed. The ways in which people are now selected as members and then elected to the board raise the question of whether these people are really elected from the community. Additionally, following developments in Native Title, people want the political voice to speak for themselves and their lands recently gained under the Native Title regime. The political and operational landscape of providing fundamental and important legal services to Indigenous peoples needs to adapt to these important changes. True self-determination is not a one-way relationship. Equally it is not something that can be "contracted" by the delivery of services at the whim of a government that can dissolve the relationship at any time. There needs to be real community and cultural integrity that gives the organisation its mandate to deliver a service that no one else can deliver without their input.

There is no shame in accepting that service deliverers like ATSILS are no longer the vehicle for general rights advocacy for Indigenous peoples and their communities. ATSILS deliver key services to our peoples, services that no other body or organisation can do. They have been pioneers for lobbying and advocating for our peoples' basic rights, those that non-Indigenous Australians regularly take for granted. The ATSILS inspired many individuals, myself included, to get a law degree to go on become advocates for our people.

The reality is that organisations, contracted by government, deliver services for outcomes that are government initiated; they are not 'our' outcomes. They are bound by their contracts to deliver specific services and are required to use corporate structures to allow them to gain taxpayers' monies. These corporate structures fail to incorporate the dynamics of Indigenous governance and decision making. Contracts that are based on 'activities' or are otherwise very rigid prevent organisations from delivering services in a more self-determined way. This might be different if the contracts were, for example, about the delivery of outcomes, which enabled the provider to determine how they did that.

Across my interviews with Indigenous CEOs, all strongly agreed that under present arrangements ATSILS are not self-determining. Respondents in general also emphasised that if ATSILS are to be self-determining they must be community controlled. Community control is seen as central to the ATSILS' legitimacy to their communities, and their ability to fulfil their purpose as 'culturally appropriate' legal services.[53] Key stakeholders like Fiona Hussin, the Deputy Director of the Northern

[53] The importance of legitimacy and self-determination was emphasized across all interviews. See Chapter 5 for more discussion of this.

Territory Legal Aid Commission (NTLAC) – someone removed from ATSILS but respected for her understanding not only of Indigenous affairs but also the legal aid arena– highlighted the conflict between the goal of self-determination and the system and structure of contemporary governance. She stated that '… in the sense of service delivery, it's self-determining, but is constrained by western structures and justice, so it's a balancing act.'[54] ATSILS believe they are not self-determining in the way they can deliver services. While more flexible than government services, they are curtailed by the rigidity of their funding contracts.

With this in mind, ATSILS need to connect with their people. They need to find a way to ensure that their very important services are delivered to the communities they represent and meet their needs. I believe that ATSILS can deliver this by using the government's own words to allow them to build more of a "cultural fit".[55] Government buzzwords include 'co-design' and 'collective impact practices'. Such concepts can encapsulate how the ATSILS connect with community and design/review/refine services to community. We can look to the work of the National Aboriginal Community Controlled Health Organisation (NACCHO) as an example.

NACCHO is the national leadership body for Aboriginal and Torres Strait Islander health in Australia. It represents 144 Aboriginal Community Controlled Health Organisations (ACCHOs) that are operated by the local Aboriginal and Torres Strait Islander communities. The ACCHOs are controlled by communities through a locally elected board of management.[56] NACCHO and its members have been recognised throughout the Indigenous community as being at the forefront of the fight to establish respect for what defines community control.

Unlike ATSILS, NACCHO defines an Aboriginal Community Controlled health service in its constitution as follows:

> Community Control is a process which allows the local Aboriginal community to be involved in its affairs in accordance with whatever protocols or procedures are determined by the Community. The term Aboriginal Community Control has its genesis in Aboriginal peoples' right to self-determination.
>
> By definition, organisations controlled by Government to any extent are excluded. By definition, organisations which adopt a vertical approach to health, inconsistent with the Aboriginal holistic definition of health as defined by the National Aboriginal Health Strategy are excluded.[57]

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54 Interview with Fiona Hussin (Eddie Cubillo, Darwin, 8 August 2019) 6.

55 See below for further discussion on 'cultural fit'.

56 National Aboriginal Community Controlled Health Organisation, *Annual Report 2018-2019* (1 October 2019) 14.

57 See National Aboriginal Community Controlled Health Organisation, 'Constitution for the National Aboriginal Community Controlled Health Organisation', (Webpage, 2020) s1.3 <https://f.hubspotusercontent10.net/hubfs/5328468/NACCHO_April_2020/PDFs/NACCHO-CONSTITUTION-Ratified-Ver-151111-for-ASIC-.pdf>.

For locally driven Indigenous empowerment, the NACCHO structure requires its members to meet the following criteria:

1. Local Aboriginal Community controlled as defined by the Organisation's Rules;
2. Commitment and adherence to the NACCHO definition of Aboriginal Health as defined by the Organisation's Rules;
3. Culturally appropriate;
4. An incorporated local Aboriginal Community controlled organisation operating an Aboriginal Health Service; and
5. Providing primary health care.[58]

Unlike NACCHO, there is no definition or reference to community control in any of the ATSILS current constitutions. In fact, the constitutions look generic, similar to any non-Indigenous incorporated businesses. General clauses in the objects of the company speak of providing high quality and culturally appropriate legal aid and related services for Indigenous peoples in need of benevolent relief (by reason of poverty, sickness, suffering, distress, misfortune, disability, destitution or helplessness and so on). This wording aligns to the definition of a charity or a deductible gift recipient (DGR) for tax purposes etc. It suggests two things: firstly, the constitution has been at least partly a tax driven; and, secondly, no one considered these more fundamental questions of community control when establishing these entities.

As western structures and colonial assumptions created the need for ATSILS in the first place, the application of their constitutional markers and concepts with respect to governance is deeply problematic. This is especially so as there appears to have been no real effort to reshape these constitutions to fit, and prioritise, Aboriginal cultural and decision-making needs. Western structures and assumptions have led to Indigenous women being locked up at record levels, to our people being systemically incarcerated at record levels. They should not form the basis for the development of decision-making and solution building frameworks to respond to those challenges. Without organisations and peak bodies constitutionally recognising community control and self-determination, corporate structures fail to account and pay tribute to how our people governed themselves for thousands of years before any outside influences, and how we continue to govern ourselves and make decisions with reference to our elders, ancestors and world view.

As discussed in Chapter 2, the Indigenous Community Governance Project (ICGP),[59] the Jumbunna Indigenous Nation Building Project [60] and the Harvard Project on American

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58 See National Aboriginal Community Controlled Health Organisation (n 51) s 4.2.5.

59 The Indigenous Community Governance Project (ICGP) was conducted in partnership between the Centre for Aboriginal Economic Policy Research ('CAEPR') and Reconciliation Australia. They undertook research over five years on Indigenous community governance with participating Indigenous communities, regional Indigenous organisations, and leaders across Australia. See Janet Hunt et al, *Contested Governance: Culture, Power and Institutions in Indigenous Australia* (ANU Press, 2008) 351.

60 Vivian, A., Jorgensen, M., Reilly, A., McMillan, M., McRae, C. and McMinn, J., 2017. Indigenous self-government in the Australian federation. *Australian Indigenous Law Review*, *20*, pp. 215-242.

Indian Economic Development,[61] identified conditions required for effective governance of Indigenous communities and Indigenous economic engagement. The ICGP findings comprehensively confirmed that an externally imposed 'one size fits all' approach to addressing Indigenous governance is unlikely to be workable or sustainable; it may in fact be counterproductive. Organisational structures and representative arrangements need to respond to different local and cultural conditions.[62]

Mick Dodson, in his role as Chair of the Indigenous Governance Awards, reinforced the importance of ensuring a 'cultural fit'. As he put it, Indigenous governance is not just talking about sticking to the business rules and regulations, "[i]t is also about how you fit in the Aboriginal and Torres Strait Islanders' ancient principles and standards."[63] While, at times, these are in conflict with western laws and regulations, Indigenous community-based organisations are increasingly using ancient First Nations philosophies that underpin their cultural legitimacy.[64] To be stable and effective in self-governing, governmental systems have to fit with the way a particular culture answers the who, how, what and where questions.[65] This is a cultural match: a fit with the shared norms of the community. It is this cultural grounding that is a critical element in government, as a sacred trust and a sacred responsibility to serve the people and their interests in an appropriate way.[66]

ATSILS need to sit down with their communities and discuss what they want to stand for and what that looks like. Does their governance reflect their community? Do they want cultural legitimacy reflected in their corporate structure and everything that they do? While some may think that ATSILS are managing well and providing a good service, the overwhelming finding of the interviews was that they themselves feel they are not community controlled or self-determining. Although they are meeting their contractual obligations, the questions that need to be asked are, do ATSILS meet their communities' needs? And how would they know this, under their current corporate structures?

F2. What Could Be Done?

There is real anxiety within our communities about the makeup of ATSILS' governance structures, particularly in relation to board representation. As discussed in Chapter 4, in 2005 the ATSILS were forced, within a very short space of time, to amalgamate with

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61 More information on the Harvard Project is available on its website: see especially, The Harvard Project on American Indian Economic Development, 'About Us' (Webpage, 2015) <https://hpaied.org/about>.

62 Janet Hunt and Diane Smith, 'Further Key Insights from the Indigenous Community Governance Project' Research Brief, Centre for Aboriginal Economic Policy Research, The Australian National University, 2006).

63 Kath Walters, 'These Organisations Are Leading the Way for Indigenous Governance' *Company Director Magazine* (Online, 1 March 2019) <https://aicd.companydirectors.com.au/membership/company-director-magazine/2019-back-editions/march/indigenous-governance>.

64 Ibid.

65 Miriam Jorgensen, *Rebuilding Native Nations* (University of Arizona Press, 2007) 48-49.

66 Ibid 49.

other ATSILS within their states to be able to meet the Federal Government's tender requirements. The ATSILS were required to quickly incorporate new structures, and this meant using 'off the shelf' western incorporation/business models that did not account for the cultural values of the diverse communities they were representing.

Gary Foley has written at length about the original concept of free, shopfront Aboriginal legal-aid centres.[67] This was very much a Koori community idea without any input whatsoever by any non-Koori lawyers:

> In fact, there is a considerable school of opinion in Aboriginal Australia that the later (1973 onwards) advent of the salaried lawyers and vast Govt sums allocated to ALS's resulted in most of them ultimately being controlled and run by non-Koori lawyers and this in turn led to the dramatic decline in quality of service provided by ALS's ever since.[68]

As my research showed, amongst interviewees there was a clear tension between the recognition that current day boards require 'skills' to navigate around incorporation and government funding requirements while staying true to community and their cultural integrity.

As Foley pointed out, the hidden costs of accepting funding from governments reduces one's independence and responsibility to their people.[69]

This compromise comes with the many accountability requirements which board members originally did not have to meet when these organisations were established. And part of this reflects the fact that, then, people volunteered their services and very little monies were involved in the early days. People were not required to have expertise in finances or directors' roles and responsibilities. And they did not have to juggle this with bringing a cultural perspective to the strategic direction of the organisations and their operations. Reliance on colonial (government) funding regimes underly the complex challenges that Indigenous peoples are facing in the justice sector across the states and territories.

As was articulated loud and clear in the interviews, having an Indigenous board does not necessarily mean cultural competency; we need to consider the make-up of key legal staff as well. Typically, legal staff are very young. They are also usually non-Indigenous. Often, these staff applied to work at ATSILS with the best of intentions, not least a belief in social justice. However, often their choice was made to expedite their careers in the field, with limited prior knowledge of, exposure to, or experience with Indigenous peoples, their world view and social fabric. This reality raises real questions as to the cultural competency of the ATSILS, particularly when there is no agreed

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67 Gary Foley, 'The Pain of Faine goes mainly to my Brain', originally published in *The Age* (31 June 1994), republished on the Koori History Website Project <http://www.kooriweb.org/foley/essays/pdf_essays/faine.pdf>.

68 Ibid 5.

69 Interview with Gary Foley, 6.

definition of cultural competency in the sector, nor any professional standards or framework to support the concept.

Being a former Chair, director and board member of Indigenous community-controlled organisations, I am fully aware that meeting the different needs of ATSILS as a cultural representative of community and corporation is not easy. I have witnessed many Indigenous boards floundering because they lack corporate governance skills and struggle to bring cultural understandings to the helm while they mediate white man's requirements. I have witnessed cultural leaders struggle to relay the cultural integrity requirements, just as they have limited ATSILS' ability to ensure that community cultural values and governance structures are embedded. This is a real, ongoing struggle. And it reflects the fact that everything that the organisations represent (community culture, law, peoples) is disconnected from a system that has never respected Indigenous peoples and their own institutions and laws. It is not a level playing field.

Indigenous leaders can bring a wealth of traditional and contemporary cultural knowledge about both Indigenous governance prior to colonialism and how it has adapted, by force, to so many punitive situations afterwards. However, as mentioned in Chapter 5, while people today see the need for cultural representation, this should not be at the expense of other skills. As Brendan Moyle, former NSW ALS chair, remarked:

> We need to move to skills based and community representation as elections on small membership base doesn't mean we are picking up the level of board members that we often need. Still good people, but often without significant management or legal service experience.[70]

So while there is "pragmatic" acceptance of the real need to have western board and governance skills, there is still the realisation that the strength of the operation comes from having Indigenous women and men in the driver's seat, representing their communities and regions, and clearly articulating the needs of mob and country.[71] It needs to be remembered here that accountability to communities is often a much more important mechanism for the success of an Aboriginal organisation than capitulating to onerous government requirements that often contribute to their demise.

As mentioned previously, research shows that 'when Indigenous governance is based on genuine decision-making powers, practical capacity and legitimate leadership at the local level, it provides a critical foundation for ongoing socioeconomic development and resilience'.[72] Education and encouragement for our people to explore how their

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70 Personal communication from Brendan Moyle to Eddie Cubillo, 7 June 2020.

71 Interview with Shane Duffy (Eddie Cubillo, Darwin, 14 August 2019) 2.

72 Janet Hunt and Diane Smith, 'Understanding and Engaging with Indigenous Governance: – Research Evidence and Possibilities for Engaging with Australian Governments' (2011) 14(2-3) *Journal of Australian Indigenous Issues* 30; Janet Hunt and Diane Smith, 'Building Indigenous community governance in Australia: Preliminary research findings' (Working Paper No 31/2006,

cultural governance practices can be used to meet government requirements needs further development within our structures. We need to inspire confidence that our practices could substitute and are just as good, if not better than, mainstream corporate governance practices.

Governments of all persuasions need to recognise that one model does not fit all. Australian governments must respect that Indigenous Australians are not one people and that our governing practices – which assisted our peoples' survival for thousands of years prior to colonial contact – continue to be pertinent and vital. Once this is recognised, better outcomes will come. First Nations peoples of this country are similar in many ways, but totally different in many others. These differences are incorporated in our cultural beliefs, languages, and the way we have governed. These need to be understood for better governance for all, particularly when delivering essential services.

F3. Models to Consider

Indigenous organisations throughout Australia are committing to their communities, listening to the research, and focusing more on developing governance structures based on cultural practices. To demonstrate governance structures that have gone out of their way to embed cultural practices for more effective governance, below I examine the joint winners of the 2018 Indigenous Governance Awards (IGA). I have been involved with the biennial IGA since its inception in 2005. They were created by Reconciliation Australia in partnership with the BHP Foundation to identify, celebrate and promote effective Indigenous governance. [73] The joint winners in 2018 were Nyamba Buru Yawuru (NBY) and the Institute for Urban Indigenous Health (IUIH). They could not be separated for their excellence in Indigenous governance.

The NBY applied on behalf of the Yaruwu Corporate Group (YCG). The YCG accommodates a remote model that operates in their lands granted under the Native Title. This encompasses the small open town of Broome in Western Australia as well as the outlying lands of the Yaruwu. The IUIH is more like the ATSILS, with an urban setup. It leads the planning, development, and delivery of comprehensive primary health care services to the Indigenous population of Southeast Queensland (SEQ). IUIH claim that more than 65,000 Indigenous Australians live in the SEQ urban footprint, comprising over a third of the Indigenous population in Queensland.[74] To put this in perspective, this number amounts to more than the Indigenous population of each of Victoria

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Centre for Aboriginal Economic Policy Research, Australian National University, 2006) ('ICGP: Preliminary Findings'); Janet Hunt and Diane Smith, 'Indigenous Community Governance Project: Year Two Research Findings' (Working Paper No 36/2007, Centre for Aboriginal Economic Policy Research, Australian National University, 2007) ('ICGP: Year Two Findings'); Janet Hunt et al, *Contested Governance: Culture, Power and Institutions in Indigenous Australia* (Research Monograph No 29, Centre for Aboriginal Economic Policy Research, Australian National University, 2008) (*Contested Governance*).

[73] For more information on the Indigenous Governance Awards (IGAs) see Reconciliation Australia 'Indigenous Governance Awards' (Webpage, 2020) <https://www.reconciliation.org.au/iga/#iga-past-winners>.

[74] See Institute for Urban Indigenous Health (IUIH), 'About IUIH' (Webpage, 2020) <https://www.iuih.org.au/About/Empowering_Communities>.

(57,767) and South Australia (42,265).[75] The governance of both organisations will be discussed separately below.

Nyamba Buru Yawuru (NBY)

The Yawuru Corporate Group (YCG) includes the Yawuru Registered Native Title Body Corporate (Yawuru PBC), the holding company Mura Malla Yawuru (MMY) and the operational subsidiary, Nyamba Buru Yawuru (NBY). These three entities work together to carry out the task of providing for the long-term benefit of Yawuru people.[76]

Yawuru Native Title was recognised on 30 May 2006 by the Federal Court.[77] Yawuru PBC was established to hold the Native Title rights in trust for the Yawuru community. The Yawuru Area Agreement and the Yawuru Prescribed Body Corporate Agreement were officially registered by the National Native Title Tribunal on 6 August 2010.[78] The Yawuru PBC, as the parent entity of the YCG, represents the Yawuru Native Title holders as a communal group.[79]

As this case study demonstrates, the way organisations incorporate does not prevent embedding cultural practices to govern the organisation, although it does take time and desire to construct something that respects and upholds cultural responsibilities. For example, the YCG members and the PBC were established under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) ('*CATSIA*').[80] The CATSIA is the legislative regime under which all PBCs are required to register. MMY is incorporated under the *Corporations Act* as a proprietary limited company (i.e., as a private company). NBY is incorporated under the *Corporations Act* as a company limited by guarantee (i.e., as a public company).[81]

The PBC is the peak body for the Yawuru Corporate Group. Of the 12 Directors, six are elected by Yawuru Membership and the remaining six are 'law bosses' who are appointed by Yawuru cultural leaders.[82] The law bosses ensure important knowledge is carried on through succeeding generations and that connections with neighbouring cultural groups are maintained across the region in a traditional way.[83] The MMY Board is the holding company. It is constituted by four Yaruwu people and its role is to appoint the Directors of NBY. The MMY Board is accountable to the PBC.

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75 See Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians* (2016 Census) <https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/estimates-aboriginal-and-torres-strait-islander-australians/latest-release>.

76 Nyamba Buru Yawuru, *Indigenous Governance Awards Application 2018* (Application, 30 June 2018) 2.

77 *Rubibi Community v State Western Australia* (No 6) [2006] FCA 82.

78 Ibid 3.

79 Ibid 3.

80 *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).

81 *Rubibi Community v State Western Australia* (No 6) (n 77).

82 See *The Rule Book of Yaruwu Native Title Holders Aboriginal Corporation* (approved by the Delegate of the Registrar of Indigenous Corporations, Lorraine Rogge, on 18 February 2014) s8.

83 Nyamba Buru Yawuru (n 75) 10.

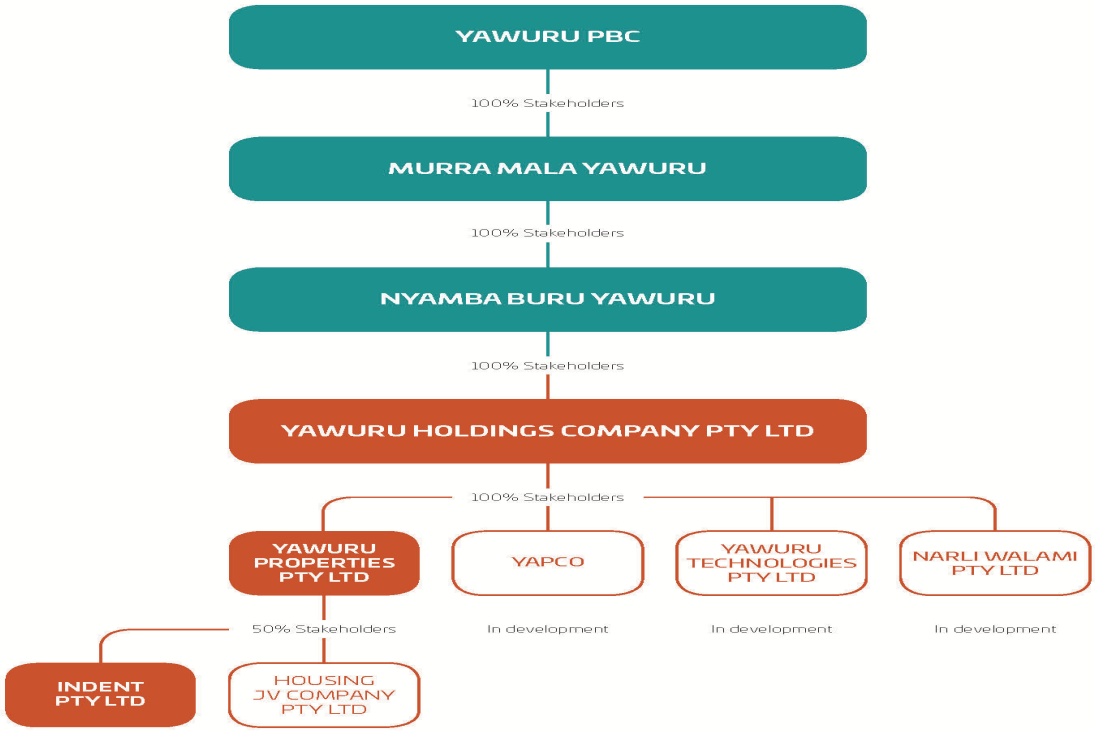

Figure 6.1: The YCG Organisational Chart[84]

NBY, as a not-for-profit company, is the business arm of the YCG. It undertakes day to day activity, employs staff, drives enterprises, and delivers community programs. The purpose of NBY is to deliver benefits for the Yawuru community in perpetuity. Its Board has seven members: five are Yawuru community members, nominated for their expertise in enterprise, law, community relations or other professional experience; two are Independent Directors who bring expertise in governance, networks or enterprise development and are selected biennially through a rigorous nomination process. [85]

The PBC Board endorses the directions of the development company, NBY, and ensures that NBY works with community approval and support for its activities. [86] While the overall structure appears complex with its many arms, this model was developed with all the Yaruwu people. All understand their role and the

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84 Nyamba Buru Yawuru, Organisational Chart, provided as part of the Indigenous Governance Awards Application 2018, (on file with author).

85 See Constitution of Nyamba Buru Yawuru (19 November 2015) s17. <https://acncpubfilesprodstorage.blob.core.windows.net/public/7eb8377e-38af-e811-a963-000d3ad244fd-a27ab94d-ca60-405c-ac02-fb4ae2ec7450-Governing%20Document-10197e1e-44b0-e811-a95e-000d3ad24c60-NBY_Company_Constitution_(ID_9388).pdf>.

86 Ibid s17.5.

responsibilities of these 'arms' and most of all, they understand the underpinning of the Mabu Liyan philosophy which ties it all together.

The Mabu Liyan philosophy is a guiding principle for the Yawuru people. It is the philosophy that underpins the NBY development approach, defining the ambitions and framework for community programs, cultural and language maintenance, land management and economic development. Mabu Liyan is inclusive, supportive and committed to the principles of sustainability and community cohesion. It is the basis for the Liyan-ngan Nyirrwa Cultural Wellbeing Centre.[87]

The values of the organisations are heavily underpinned by the cultural and values of the Yawuru people, guided by the Mabu Liyan, and captured in the Yawuru Corporate Group Strategic Plan 2016–2020.[88]

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87 Nyamba Buru Yawuru, 'Mabu Liyan Framework' (Webpage, 2020) <http://www.yawuru.org.au/find-information-on-the-vibrant-yawuru-community-and-our-nby-pragrams-and-projects/mabu-liyan-framework/>.

88 See Nyamba Buru Yawuru, 'Our Strategic Plan' (Webpage, 2020) <http://www.yawuru.org.au/about/stratiegic-plan/?doing_wp_cron=1593309609.4236059188842773437500>.

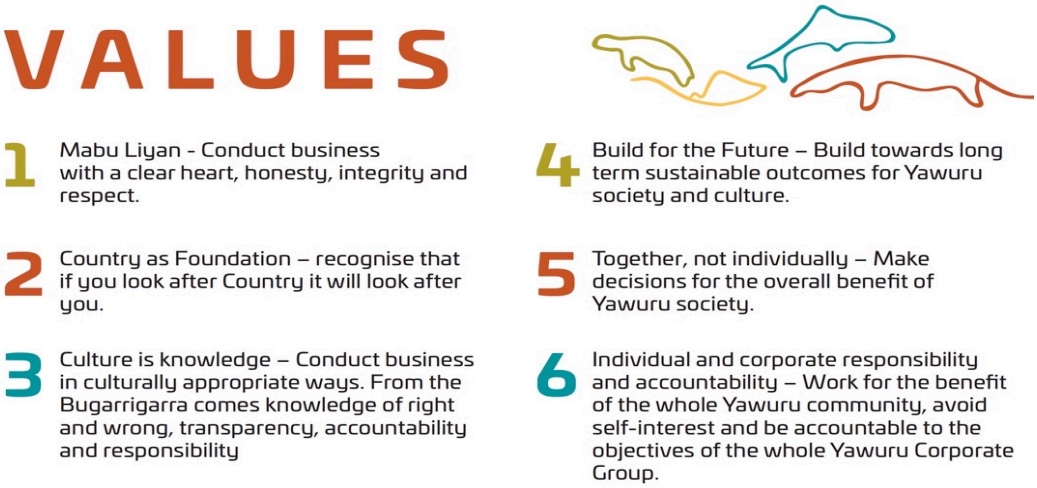

Figure 6.2: The Values of Mabu Liyan
(Source: Yawuru Corporate Group Strategic Plan 2016–2020)[89]

Yawuru law boss, Patrick Dodson, has explained the Mabu Liyan and what it means not only to the Organisation but the Yawuru people and others living on their country:

> Liyan is a Yawuru concept and hard to explain in English. It describes the interconnectedness between the self, the wider community and the land. For Yawuru people, mabu liyan is at the heart of what it is to have and to know a good life. The closest English translation would perhaps be 'wellbeing', but mabu liyan is different from the Western concept of wellbeing.
>
> Liyan is individual spiritual wellbeing. But it is more than that. Liyan recognizes the continuous connection between the mind, body, spirit, culture and the land. Liyan is about relationships, family, community and what gives meaning to people's lives.
>
> Yawuru people's strong connection to country and joy in celebrating our culture and society is fundamental to having good liyan. When we feel disrespected or abused our liyan is bad, which can be insidious and corrosive for both the individual and the community. When our liyan is good our wellbeing and everything else is in a good space.
>
> Mabu liyan was once at the centre of Yawuru society and culture. It informed our obligations to family, community and country. The impact of colonisation has been traumatic for our people. It has contributed to a loss of connectedness through the destruction of culture and respect. This has resulted in harmful behaviours and

89 Ibid.

> dysfunctional relationships, substance abuse, family violence, and ultimately the loss of hope and the loss of the will to live.[90]

Because of its importance, Mabu Liyan has been woven into the fabric of the organisational language and functions of the YCG. The Liyan gives the YCG an ethical base for interactions and ambitions, but it also connects the organisation back to its Native Title foundation and culture. As stated in the Nyamba Buru Yawuru, Indigenous Governance Awards Application 2018:

> Cultural and language maintenance and ongoing activity are supported by the YCG through NBY's community development programs such as Nurlu[91] and Managra[92].
>
> Cultural activity is also important to the PBC whose six law boss directors have active roles in decision making of the board and also come together as part of the Yawuru Cultural Reference Group as an advisory group.[93]
>
> The YCG also supports traditional cultural activity as part of its mandate, ensuring ongoing connections with neighbouring groups and succession of cultural knowledge into the future. How do your members' cultural values inform the ethics of your organisation?[94]

YCG not only see the importance of their corporate governance, but they see the need for strong cultural immersion in their organisation's accountability as well as their accountability to community (black and white). This accountability extends to cultural obligations to neighbouring tribal groups and the cultural obligations they have shared for millennia. This respect can be seen by the support that the elders and senior leaders receive from within the organisation to share the knowledge and experience that will assist generations. This is an expression of the Mabu Liyan philosophy, a galvanising philosophy that is understood by everyone who is involved with the YCG. It is woven into the vision and mission of YGC.

This is a deliberate attempt to develop a cohesive corporate culture within the organisation, creating resilience within a sometimes-challenging environment. Leadership and staff can be relied upon as there is cohesive understanding by everyone within the YCG of the values of the organisation, its mission, and its

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90 Pat Dodson, 'Mabu Liyan – I Hope You Feel Well in Your Heart, the Coronial Inquest into 13 Suicides in the Kimberley', *Pat's Opinion Pieces* (Blog Post, 22 August 2018) <http://www.patrickdodson.com.au/27_07_17_mabu_liyan_i_hope_you_feel_well_in_your_heart_the_coronial_inquest_into_13_suicides_in_the_kimberley>.

91 The Nurlu project collects recordings of cultural performances to bring knowledge back to the Yawuru community see: Nyamba Buru Yawuru, 'Nurlu' (Webpage, 2020) <http://www.yawuru.org.au/culture/yawuru-seasons/>.

92 The Mangara Yawuru Storylines 'is a community-based, multi-media digital archive which contains photographs, documents, oral histories, films, books, media and other cultural materials': see Nyamba Buru Yawuru, 'Mangara & Special Projects' (Webpage, 2020) <http://www.yawuru.org.au/culture/mangara/>.

93 Nyamba Buru Yawuru (n 76) 26.

94 Ibid.

character. Cultural values inform the ethics of the organisation in all facets of their business including the decision making and policy development. The YCG recognises that they can only operate effectively with support from its membership. On top of this, the YCG has a code of conduct and corporate policies and procedures that are reviewed and updated regularly.[95]

Figure 6.3: Vision and Mission of the Yawuru Corporate Group (Source: Yawuru Corporate Group Strategic Plan 2016–2020)[96]

The Yawuru values mandate accompanying 'behaviours' for all Staff and Directors. These behaviours form part of YCG corporate culture and include 'acting respectfully', 'responsibility' and 'working together'.[97] Each staff member has a mouse mat with the values and behaviours artistically designed into a Yawuru mangrove plant, which symbolises both flexibility and strength and is a familiar plant for Yawuru saltwater country. This creative reminder ensures these core values are always available for reference and reassurance.[98]

The philosophy of Mabu Liyan, always reflects the interconnectedness between the individual and their country, culture and community. It is this understanding of wellbeing and respect that links Yawuru's commitments to both its communal native title rights and its goal to succeed in a competitive global economy. The key philosophy and practice of NBY's approach to business development, growth, investment, and leadership is designed around transparency. When on site for the Indigenous Governance Awards (IGA) I asked a Law Boss to explain the Mabu Liyan to me. He replied:

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95 These documents, along with the values outlined in the Mabu Liyan philosophy, define the relationship between the CEO and the governing body: see Yawuru Corporate Group, 'Strategic Plan 2016–2020' <http://www.yawuru.org.au/wp-content/uploads/2019/05/pocket-strategic-plan-2018-new-logos-ID-178696.pdf>.

96 A copy of the Pocket Strategic Plan can be located here: http://www.yawuru.org.au/wp-content/uploads/2019/05/pocket-strategic-plan-2018-new-logos-ID-178696.pdf.

97 Nyamba Buru Yawuru (n 87), 14.

98 As described on Yaruwu's Twitter account, the lanjyi lanjyi tree (mangrove) is their symbol: strong, flexible, rooted in the earth and vital to the ecosystem. As is #Yawuru culture. See picture: <https://twitter.com/YawuruAU/status/834232971523534848/photo/1>.

> You know when you get a good feeling and you get butterflies and goose pimples 'cause, you know, you have done something special? That's what Mabu Liyan is – when you do something for the whole community, and you know it's right.

I knew the significance of this philosophy right there. When I went to the garage later that day to buy an iced coffee and the owner explained the significance of Mabu Liyan I realised that everyone (black and white) in the Broome area had engaged with the Mabu Liyan philosophy in some way.

Institute for Urban Indigenous Health (IUIH)

The Institute for Urban Indigenous Health (IUIH) is a company limited by guarantee, incorporated under the *Corporations Act 2001* (Cth). IUIH believed that incorporating under this legislation was the best fit for them to support the type and scale of the IUIH's business operations. The IUIH is now the largest Aboriginal Community Control Health Services (ACCHS) in Australia by a significant margin. It is also the largest community health organisation (mainstream and Indigenous) listed with the Australian Charities and Not for Profit Commission (ACNC). IUIH feels that operating with the majority of its collaborating partner organisations within the regulatory framework provided by the *Corporations Act* has given the IUIH wider corporate respect. This has allowed it to better leverage business opportunities, attract independent skilled directors, and demonstrate its corporate credentials more broadly.[99] At the same time, the IUIH is able to increasingly celebrate its community-controlled status in the corporate world and strengthen its strong cultural foundations.[100]

The IUIH structure provides an overwhelmingly positive demonstration of Indigenous and community-led reform, representing a transformational shift in the government-community dynamic. By both necessity and design, the Southeast Queensland (SEQ) IUIH initiative was not a response to, or product of, government developed policies and purchased programs. Instead, it showcased a new paradigm where increased responsibility, agency and autonomy by Indigenous peoples created the catalyst for change.[101] At the heart of this empowerment approach has been IUIH's proactive cultivation of community-driven demand, through an organised approach to community engagement. As IUIH's nationally acclaimed Deadly Choices program illuminates, through valuing and using cultural identity to articulate what it means to make healthy and deadly choices, it can give collective 'deadly voices' to community, in this case the over 35,000 Indigenous peoples who engage with the IUIH Network each year.[102]

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99 Institute for Urban Indigenous Health, *Indigenous Governance Awards Application 2018* (Application for the awards, Saturday 30 June 2018) 7.

100 Ibid 7.

101 Ibid 3.

102 Deadly Choices is a health promotion initiative of the IUIH. It aims to empower Aboriginal and Torres Strait Islander peoples to make healthy choices for themselves and their families – to stop smoking, to eat good food and exercise daily. Deadly Choices also encourages people to access their local Community Controlled Health Service and complete an annual 'Health Check': see Deadly Choices, 'What is Deadly Choices' (Webpage, 2018)

The IUIH structure comprises the founding ACCHSs which collaborated to establish the organisation in 2009 including:

- The Brisbane Aboriginal and Torres Strait Islander Community Health Service (Brisbane ATSICHS);
- Yulu-Burri-Ba Aboriginal Corporation for Community Health (Yulu-Burri-Ba);
- The Kalwun Development Corporation (Kalwun);
- The Kambu Aboriginal and Torres Strait Islander; Corporation for Health (Kambu); and
- Moreton Aboriginal and Torres Strait Islander Health Service (Moreton ATSICHS).

The IUIH has a 'mixed' Board Director membership model, with both community representation and skills-based Director composition. To optimise Board capability, the IUIH's constitution stipulates that there will be not less than three, nor more than eight Directors; and a majority of the Directors must be Aboriginal and / or Torres Strait Islander.[103] This governance structure was developed as a strategic response to the demographic and health challenges emerging in SEQ, including the specific cultural, social and geographic imperatives defining the SEQ context. In 2009, there were unprecedented challenges: the region had the largest and fastest growing Indigenous population in Australia, the biggest health gap between Indigenous and non-Indigenous Australians, and scarce capacity and capability of existing services to meet these challenges.[104] IUIH realised that only a new way of doing business would deliver the level and pace of improvements necessary to meet the requirements of the sector and most importantly the needs for its community.[105]

IUIH's Cultural Integrity Investment Framework embeds Indigenous 'Ways' into all that it does. The objective of the IUIH Cultural Integrity Investment Framework is to bring to consciousness Aboriginal Ways and Terms of Reference and embed those values and knowledge within all aspects of community and organisational operations.[106] The Cultural Integrity Investment Framework and its 'The Ways Statement' express cultural and philosophical understanding, and have become the foundations upon which all organisational and operational processes are embraced.[107] This Framework overcame the struggle to move beyond cultural awareness training and equip staff and embed cultural knowledge in every facet of the business, service delivery and community commitment.

Through 'The Ways Statement', IUIH reinforces the certainty of the cultural authority and legitimacy that Aboriginal people of the SEQ area use to run the country – a stable

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<https://deadlychoices.com.au/about/what-is-deadly-choices/>; Institute for Urban Indigenous Health (n 98) 7.

103 See Institute for Urban Indigenous Health, 'Constitution' (amended 27/11/2019) s.26.1.

104 Emily Brand, Chelsea Bond and Cindy Shannon, *'Urban Indigenous Health: Opportunities and Challenges in South East Queensland'* (Research Brief, University of Queensland Poche Centre for Indigenous Health, 4 October 2016) 425.

105 Ibid. See Institute for Urban Indigenous Health Application (n 98) 36.

106 Ibid.

107 Ibid.

system based upon historical Indigenous approaches to humanity and relationality between people and country. The Cultural Integrity Investment Framework[108] evolved through the conviction that the IUIH – as an organisation with a mandate and reason for its being – must be driven by its cultural and philosophical values.[109] The following core principles are fundamental tenets:

- Balance – in gender, structure and society;
- Relatedness and Kinship – the need for connectivity with other mob and the land and the importance of demonstrating congenial manners towards each other;
- Non-hierarchal systems – lateral arrangements inclusive and balanced across genders, ages and experiences;
- Subtlety – on a non-literal and non-linear basis in recognising and working with how knowledge is situated and created;
- Proportionality – in terms of equitable measures, not necessarily about equality or a concept of 50/50;
- Competence – valuing individual capability instead of evaluating performance against a standard or measurement;
- Complexity and contradictions – valuing that human beings and society are complex and exhibit contradictions;
- Reflexivity – how members' cultural values inform the ethics of the organisation.

Southeast Queensland is home to 38% of Queensland's and 11% of Australia's Indigenous peoples.[110] Yet in 2009, only a fraction of the Indigenous population was accessing community controlled comprehensive primary health care.[111] The imperative to address these challenges shaped the blueprint for the ground-breaking new regional community governance architecture and the formation of a regional backbone organisation - the IUIH. As discussed above, this contemporary regional model was underpinned by traditional ways of being, doing and belonging, practised for thousands of years by Aboriginal tribes and nations to achieve shared and cross-territorial goals. Through strengthened community self-determination, an entrepreneurial business model, and pioneering a brand-new regional health 'ecosystem', the IUIH operates with an annual budget of $70 million and over 550 staff. It is the biggest employer of Indigenous peoples in SEQ.[112]

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108 The Cultural Integrity Investment Framework can be found here: <https://www.iuih.org.au/about-iuih/our-vision/uihs-cultural-integrity-framework/>.

109 Ibid.

110 Institute for Urban Indigenous Health, Submission No 53 to Productivity Commission, *Indigenous Evaluation Strategy – Issues Paper* (26 September 2019) 1.

111 Ibid 7.

112 Institute for Urban Indigenous Health, 'Building A Regional Health Ecosystem: How a New System of Care is Closing the Gap Faster for Australia's Largest Indigenous Population, Closing the Gap Refresh Submission' (Webpage, April 2018) 4 <https://www.iuih.org.au/strategic-documents/policy-submissions/>.

G. Reclaiming Greater Independence for ATSILS

ATSILS could apply learnings from both YCG and IUIH, which have self-evaluated and taken time to engage with their communities to embed cultural practices and norms for more effective governance and services that meet their peoples' needs. The ATSILS have worked under harsh conditions, as depicted in Chapter 4, them from stepping back and reflecting upon their current governance and structures. It has also prevented them from giving deep consideration to the best cultural fit and therefore from ensuring that their legal and advocacy services are appropriate to their people and communities. The honest answers from key ATSILS people whom I interviewed shows that they are aware of the divide between them and their communities –all of whom questioned their own claims of self-determination, cultural competency, and the idea of community control. They know it lays the foundation for change and working towards better structures and better represent and deliver services with a better cultural fit for their people.

If, as per Foley's view discussed above, economic independence is key to ensuring self-determination and community governance, how might ATSILS achieve this? Some ATSILS have considered this question, and some of their initial thinking has been around the following key questions:

- Given the brand, and the connections between ATSILS and Indigenous communities, are there *other legal services* (e.g., private legal services, Indigenous or non-Indigenous) that could be delivered to generate more income?
- Could ATSILS deliver services across *other areas of the 'legal continuum'* (e.g., around early intervention and prevention programs), to generate more income?

The interviewees made many references to the issue of funding (see Chapter 4). The economic independence of ATSILS is consistent with the Commonwealth's aspirations outlined under the self-management or self-determination policies. It provides an opportunity for communities and Aboriginal and Torres Strait Islander community-controlled organisations to promote the economic and social development of their peoples to ensure self-sufficiency.

During my time as the executive officer of NATSILS, I witnessed and experienced many forms of micromanagement by bureaucrats in the Attorney General's Department. Remembering that the majority are lawyers who bring little or no financial expertise to their periodic review of an organisation's financial performance, there is a real risk that audits will misinterpret data. In my experience, public servants within the Attorney General Department are often fixated with standard reporting templates and variance ratios that would not pass basic financial scrutiny. As stipulated in the interviews by Sivo (CFO), their financial review procedures are far below what is generally considered best practice. Absence of transparency and unwillingness to show ATSILS and their qualified Chief Financial Officers respect jeopardises working relationships with government and causes ATSILS extreme concern about the defunded.

I was privy to discussions with the Commonwealth about ATSILS seeking ways of generating funds to do certain advocacy tasks without utilising federal funds. The Federal Attorney-General's Department was very clear that this was not allowed under *their* contract.[113] We were informed that any dollar that the ATSILS generated would be deducted from their funding allocation. The rationale behind this was not made clear. It is also at variance with my short stint working for the Queensland Aboriginal and Islander Health Council (QAIHC), which with government approval (both state and federal) has the ability to generate funds through their member services contributions. These contributions provide financially affordable services such as corporate and financial services to members and other organisations or entities requiring them.

The ability for QAIHC to utilise self-generated funds without a reduction in core funding enabled the organisation to employ specialist expertise to look at health justice initiatives.[114] For example, QAIHC commissioned a body of work from the Queensland Anti-Discrimination Commission (ADC) to undertake a pilot examining the major role played by institutional racism in the health gap between Aboriginal and Torres Strait Islander peoples and non-Indigenous Australians in Queensland. In a personal communication with me, the former QAIHC CEO, Matthew Cooke, advised that this Indigenous-led collaboration ultimately led to the Queensland Hospital and Health Services –there are 16– putting at least two First Nations Board Members on each Hospital Board, with each hospital also employing a Senior First Nation Executive to take charge of Aboriginal and Torres Strait Islander Health.[115] This also led to legislative changes ensuring that each Queensland Hospital and Health Service (responsible for all state-run hospitals) has a 'Health Equity Plan'.

The incongruence between the views, objectives, and outcomes of the government of the day and ATSILS means that alternative, self-generating funding mechanisms need to be pursued. The key initial questions we should ask are:

(a) What areas of the law would it commercially make sense to engage in?[116], and
(b) How close (or not) would the new service offering (and resulting structure) be to ATSILS? For example, it could be a subsidiary, a line of service within ATSILS run differently, or an entirely separate, and a private enterprise.

The answers to these questions could take the ATSILS in very different directions. By setting up a completely different structure, with similar stakeholders who can look at other things, that new incarnation can decide itself what it does with any monies it generates. It might be to support the ATSILS 'causes or objectives'. However, it could

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113 The then Federal Attorney, George Brandis reinforced this in question time in Estimates. See Chapter 4 for further discussion.

114 See Christopher Bourke, Henrietta Marrie and Adrian Marrie, 'Transforming institutional racism at an Australian hospital' (2018) 43(6) *Australian Health Review* 611.

115 Discussion with Matthew Cooke on file with author (15th August 2020).

116 Take eg, Salvos Legal. It is a unique social enterprise law firm wholly owned by The Salvation Army, which exists to be a self-sustaining commercial enterprise so as to wholly fund lawyers for people in need: see 'Interview with Luke Geary, Salvos Legal Founder' *The Reasonable Observer* (Webpage, nd) <https://www.thereasonableobserver.com/luke-geary-salvos-legal-founder-1>.

be set up in a way that does not risk having the ATSILS funding reduced. Of course, there are many things to consider and recognise, including:

- as it currently stands, ATSILS' future is tied to the policy settings and therefore the whims of government, which are themselves changeable;
- the tension between what 'culturally competent' services need to look like and government funding and contractual requirements;
- the above settings are unlikely to move in the short to medium term, if ever. Because of this, we should be open to exploring other possibilities; and
- as ATSILS have a reputation for supporting community, it is likely that the community will ask, semi-regularly, what else ATSILS mobs might be able to help with. Examples might include business and contractual issues, Prescribed Body Corporates (PBC) legal issues, possibly even wills and estates.

No matter the trajectory, before proceeding with a structural change, ATSILS need to:

- confirm the right target market/area of law;
- secure the key shareholders/stakeholders;
- ensure the structure is appropriate for their community and purpose;
- get the right lawyers (not just those who are skilled but those who have the right values);
- lock down key relationships;[117] and
- have someone who can run the 'business' of the law firm, since incorporated legal practices have standards and requirements. This does not need to be a senior who demands a steep paycheck, just an administrator who understands this space. This also opens up the shareholding to a broad cross section, which could enable access to considerable expertise, across very different areas.

The issues scaffolded above are internal ones. Once resolved in a way that enables it to become community controlled, the ATSILS could be given more teeth. Some thought could be given, for example, to investigating roles like deaths in custody or even drafting legislation in relation to Aboriginal justice issues.

Below I suggest two imagined alternatives of new entities for these purposes: the first focused on native title legal advice; the second focused on intervention and prevention.

Example 1: New Entity Focussed on Native Title Legal Advice

Given the strength of relationships, stakeholders connected with Aboriginal Legal Services decide to establish ‘New Legal Co’ – an incorporated legal practice focused on Native Title legal issues. New Legal Co delivers excellent advice, and generates income, resulting in an annual profit. At the end of the financial year, the key stakeholders in New Legal Co decide to apply that profit in a way which might also benefit the objects of the ALS (e.g., advocacy, education etc).

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[117] One idea might be to have NNTC as a minority shareholder or otherwise set up to receive small referral fees.

Example 2: New Entity Focussed on Intervention and Prevention

Given the inherent knowledge of ALS stakeholders around the drivers and issues relating to the criminal justice system – key stakeholders consider how this knowledge might be leveraged to generate an economic return. This could occur in different ways, from the building of products that might be sold; the creation of a knowledge base/intellectual property that could be used by others in providing advice to government or others; or even the establishment of a new organisation that could for example, provide advisory consulting services to government or others around this or related areas. Any profit generated by this new organisation could be applied in a manner consistent with the objects of the ALS.

H. Overcoming Public Policy Hurdles

As discussed above, policymakers have previously considered any additional income generated by ATSILS to be subject to a dollar-for-dollar reduction in government funding. This challenging the prevailing thinking of the federal governments, and an exploration of structuring alternatives, amongst other things. Again, innovations in community-controlled health services might provide ATSILS with some important insights here. Another option is to consider the possibility of philanthropic funding options. Both will be considered below.

H1. Again, Insights from Health

An idiosyncrasy of the Aboriginal Community Controlled Health environment is that they have available to them both block funding, and activity-based funding (e.g., Medicare income based on the number of clients serviced). If services are well-regarded by patients –through the delivery of culturally competent services that drive greater patronage by Indigenous patients– then this is a mechanism by which greater income can be generated. Indeed, the Federal Government encourages greater 'activity-based' funding, and less 'block' funding. Depending upon the level of activity-based funding (the number of patients that a provider can attract, repeatedly and sustainably), well-run operations can deliver surplus income. This of course also requires a thorough understanding not just of the mechanics of the funding within an operating environment, but also the costs involved with running these enterprises. Put simply, if expertise around business management can deliver surplus income, how can or should that surplus be applied?

In the right setting, this surplus could be applied in ways that support Indigenous ways of knowing, being and doing. For example, surplus could be applied to Elders' support, or any number of initiatives that deliver benefit to Indigenous communities. The above scenario describes what is possible when activity-based funding can be used to increase overall income, which in turn can be applied to culturally minded initiatives. Could this be applied to ATSILS?

The first point to make is that this is very much a funding model discussion. This is an important lens, but only *one*. For this to be possible within an ATSILS context, the Government would need to consider an entirely new funding paradigm. An activity-

based funding model resonates with some economic rationalists. Under this type of model, organisations receive funding for each unit delivered (the level of funding provided by government is demand-driven). This contrasts to block funding whereby a predetermined amount of funding is allocated to an organisation to deliver services, irrespective of the actual level of demand. Under an activity-based funding model, culturally competent services would become more important, as clients could then 'vote with their feet', and their decisions would have direct and immediate financial implications for legal service providers. However, an activity-based funding model can also result in perverse incentives as the funding recipient is incentivised to increase patronage rather than reduce the number of people in the system. For this reason, there would need to be considerable consultation, design and policy thinking undertaken if an activity-based model were to be applied to ATSILS.

The Close the Gap Refresh provides an opportunity to strengthen relationships between government and the ATSILS. It might also reinvigorate the push for appropriate funding to meet the ATSILS' workload needs and more importantly reduce the violence and incarceration rates faced by Indigenous peoples. If this is not achievable, ATSILS will need to reconsider what they can realistically achieve with the funding they receive, and either withdraw services or seek other fundraising alternatives.

H2. Philanthropic Funding

ATSILS have always battled to prove themselves as entities and organisations suitable for long-term philanthropic investment. I was always under the impression that philanthropic entities typically provide short term funding for specific projects or campaigns. Therefore, it has always seemed that ATSILS are not attractive to them – to make significant, systemic change is a long haul with no short cuts. However, many complex factors have created barriers and challenges to accessing philanthropic funding. These factors include:

- An expectation from organisations (which to a large degree is a correct expectation, especially from a human rights perspective) that it is the role of government to adequately fund legal assistance services to ensure access to justice for all. Indeed, this is an observation I would make of the legal assistance sector more broadly (including CLCs and legal aid commissions).

- Significant support from philanthropy for long-term capacity funding is generally very difficult to find. Most philanthropic support is project or program based, often capped to one or two years. It rarely takes the form of long-term organisational capacity funding. Unlike other public and private enterprises, ATSILS don't have capacity as say universities or other orgs in this space.

- For a range of complex historical reasons, many Aboriginal people and organisations do not have the same relationships with philanthropic funders as large mainstream organisations. The philanthropic community is necessarily made up of the wealthy and the privileged. And relationships of trust and

> confidence are critical for philanthropic funders when it comes to providing funding – no matter how big or small the grant.

There is also racial stereotyping at play in this field, as elsewhere, meaning that philanthropic funding organisation might not trust Aboriginal organisations sufficiently to invest in them. In my own professional experiences of seeking philanthropic support, I have felt this. In meetings, different organisations did not respect what we were saying, were not really interested in the first place or "were doing a friend a favour" when they agreed to speak with us. When we went back with a non-Indigenous person that they knew, I found we were treated differently, with different results. When I have spoken with people who are experienced in the philanthropic field, they agree that this racial prejudice and stereotype exists, largely because it is the way that governments have always talked about Aboriginal organisations. Many were convinced that this is part of the story of why it is hard for Aboriginal organisations to attract philanthropic support. That said, I am reassured that the factors mentioned above are the more significant reasons than this one.

What philanthropists need to be reminded of is that governments set up the outcome measures so that they achieve what they want to achieve. One can hope that with the new relationship created with the Coalition of Peaks and Governments through the justice targets, these new levers will deliver more flexibility in contractual agreements. If so, ATSILS can adapt the output to achieve the outcomes. For example, governments could consider placing a cap on participant numbers in the funded ATSILS programs agreements to encourage providers to concentrate on qualitative rather than quantitative measures. My experience with many prospective funding providers revealed that they were too fixated on supplying the government or trust with the *numbers* rather than the *quality* of the service they were delivering.

Philanthropy can be a particularly opaque environment. There are many public and private philanthropists, foundations and the like, many areas of focus, and many ways in which these groups might like to invest. It is also true that there is typically a large disconnect between the world of philanthropy and Indigenous organisations. At the same time, some philanthropists refer to their desire to invest across Indigenous affairs. So, there are avenues to better link the two worlds. In addition, ATSILS and similar groups could do a better job of capturing their activity and using that data to tell the compelling story of the value they deliver. This 'value for money' equation is one of the key questions that philanthropists (and their advisers) will ask themselves. There is also the marketing element. Perhaps one entry point for discussion is impact investing, discussed briefly below.

H3. Impact Investing

The impact investing space appears to still be in its formative stages in Australia, yet there is growing and a sustained level of interest. Two key areas are ripe for exploration in the ATSILS context relating to the use of the intellectual capital built up over decades to:

1. Help reduce recidivism; and

2. Reduce the numbers of Indigenous peoples coming into contact with the criminal justice system in the first place.

Any material improvement across either of these areas would deliver a very significant financial dividend to government. More than that, they would deliver fantastic human outcomes for Indigenous peoples. From an impact investing point of view, there has already been interest in developing social impact bonds in this space. Properly advised, considered, and developed, it is possible that an ATSILS could partner with others to pilot an initiative in either or both of these areas.

I. Final Thoughts

In summing up, I need to first reflect on what the Aboriginal Legal Services mean to me and most of our people. This service is one of the oldest, if not the oldest, continuing Indigenous organisations in this country. It was established because people from the community had grown tired of the mistreatment that they and their families and communities endured daily. Our people endured (and continue to endure) police bashings, incarcerations, deaths in custody, lack of access to justice and lack of empathy from the judiciary. But it was more than that then too. It was not being able to use public amenities or having to sit in a 'black designated area', whether it was in a cinema or on a bus. We were subjected to ill-treatment from government agencies, schools, real estate agents, shops, and the general population – all were given the licence to racially vilify or physically harm us.

Subsequently, organisations like the Aboriginal Legal Services, or as they are now known ATSILS, became more than just organisations in the psyche of Indigenous people in this country. They resemble the big sibling that you went to when you were being unfairly picked on or robbed of your dignity or mental and physical well-being. ATSILS staff were people who not only could help you get justice but could do so with empathy, knowing full well what you have been through and how you feel – sick, abused, hopelessness, alone, terrified. This group of people were there to listen and help you when the whole world was against you, with no reservations.

This is how I felt as a young man 30-odd years ago, when I joined the board of an ALS – I was working with an organisation that was going to fight for my people. It drove me to be better. Despite having children at a young age, it gave me the confidence that I could be more. I remember sitting in law school with a few other Indigenous mob when we were asked in a class what we saw ourselves doing after we finished our studies. After all the non-Indigenous students relayed their ambitions of corporate law, or the judiciary, one of our brothers said he was going to work for Aboriginal legal services. The rest of us nodded. That's all we wanted to do – work for our mob. We aligned ourselves to the fight for our people against the continuing injustices of this country. I am proud to say that the brother who spoke is now a Principal Legal Officer of an ALS, doing exactly what he said he would do 20 years ago, and the rest us went on to do exactly that – fight for our people. We are still fighting.

When I interviewed ATSILS personnel (past and present, across Australia) for this project, their views were compelling. There was also so much indecisiveness on

whether their organisations were self-determining, culturally competent and community controlled. I had the underlying feeling that this was likely due to two considerations. Firstly, the nostalgia for those early years of Indigenous activism, which I discuss above. We are all respectful of our elders and know how hard they fought to establish these organisations and how they fought for our basic rights when our mob came off the missions. Secondly, they recognised that the make-up of the organisations' governance structure today no longer represents a true community-controlled model. As discussed throughout this thesis, times have changed and while the pressures of government accountability grow, other policies continue to drive the overrepresentation of Indigenous peoples in the justice system and the overall workload of the ATSILS. This is exacerbated by the governments' micromanagement of ATSILS, and the funding crisis. All of this continues to make it difficult for ATSILS to operate in the way they once did.

The situation that ATSILS face is further complicated by the governments' successive failures to adhere to recommendations from independent and government-initiated reviews, all of which have positively supported the work of ATSILS and recommended increased funding. These reviews have been largely ignored. More recently this was highlighted by the flouting of recommendations from the ILAP review.[118] The result is that ATSILS is again faced with going down a new road – having a new "master" to receive their funding through State and Territory allocations and a new relationship to work out how these governments will reign over their new responsibilities. This has occurred at a time when, finally, justice targets have been included in the new Close the Gap agreement and supposedly a new relationship has been negotiated for far greater Indigenous involvement in leading its implementation and measuring its progress — a significant change from the previous strategy.[119] Unfortunately, ATSILS will now deal with State and Territory governments that historically are responsible for criminal legislation and have always taken "tough on crime" stances. This 'new' relationship is already in question with the State and Territory Attorneys-General refusing to raise the age of criminal responsibility.[120] Their refusal came just days before they signed off on the new Close the Gap Agreement.[121]

Despite NATSILS' involvement with the Coalition of Peaks in negotiating the new Agreement with government, on the day of the public release ATSILS released a press statement strongly articulating their 'stand with communities who have demanded stronger, more ambitious targets to be set by governments to end our over-

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118 Cox Inall Ridgeway (n 2) 16-18.

119 Isabella Higgins, Sarah Collard and Brad Ryan, 'Closing the Gap Agreement Reset With 16 New Targets To Improve Lives of Aboriginal and Torres Strait Islander Australians' *ABC News* (Online) 30 July 2020 <https://www.abc.net.au/news/2020-07-30/closing-gap-targets-agreement-aboriginal-torres-strait-islander/12506232>.

120 'Government Failing Children By Refusing To Raise Criminal Age Of Responsibility, Say Activists And Experts' SBS News (Online) 27 July 2020 <https://www.sbs.com.au/news/government-failing-children-by-refusing-to-raise-criminal-age-of-responsibility-say-activists-and-experts>.

121 'Closing the Gap in Partnership: National Agreement on Closing the Gap' *Closing the Gap in Partnership* (Webpage, July 2020) <https://www.closingthegap.gov.au/sites/default/files/files/national-agreement-ctg.pdf>.

incarceration urgently, rather than the target adopted by governments'.[122] They also acknowledged that the National Agreement failed to include everything that the Coalition of Peaks wanted and everything that Aboriginal and Torres Strait Islander peoples have said is needed to improve their lives.[123] Ultimately the press release underlined the precarity of the whole agreement and relationship.

This type of behaviour by governments is no surprise. If anything, it is consistent and reinforces that the ATSILS need to re-evaluate their status, most importantly to reset the relationship with the communities they represent so they continue to be the best legal service for our people. They need to determine, as a key service deliverer, in their own voice 'who they are', who they are providing their services to, and what the boundaries are between business and politics. The community needs to be heavily involved in this. Government time frames don't necessarily mean best outcomes, remember history testifies that this is recipe for disaster for our people when our organisations and communities haven't work through things to adapt to their circumstances. As demonstrated in the interviews in this project, ATSILS are questioning their own cultural legitimacy. To find the answers, they need to sit down with their communities to discuss what they want to stand for and what that should look like. Does their governance reflect their community? Is it culturally legitimate, as is the organisation meeting community expectations? Should community control and culture be reflected in their corporate structure and everything that they do?

The answers to these questions are for ATSILS and their communities to determine going forward.

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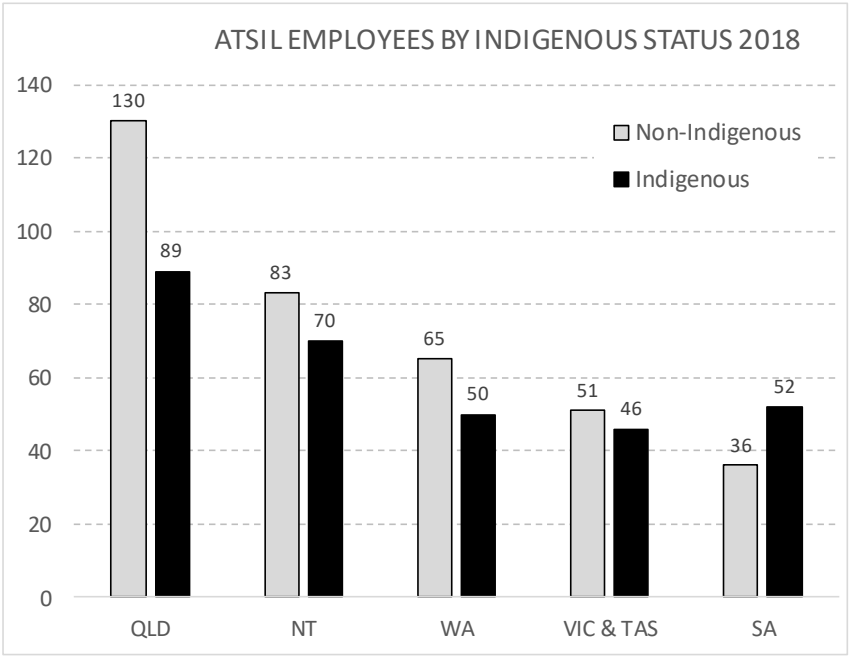
122 National Aboriginal and Torres Strait Islander Legal Services, '"We must see change in our lifetimes": Historic Closing the Gap Agreement Is Missed Opportunity for Ambitious National Justice Targets' (Media Release, 30 July 2020) <http://www.natsils.org.au/portals/natsils/Media%20Releases/300720%20Media%20Release%20Closing%20the%20Gap%20Agreementf12f.pdf?ver=2020-07-30-100903-650>.

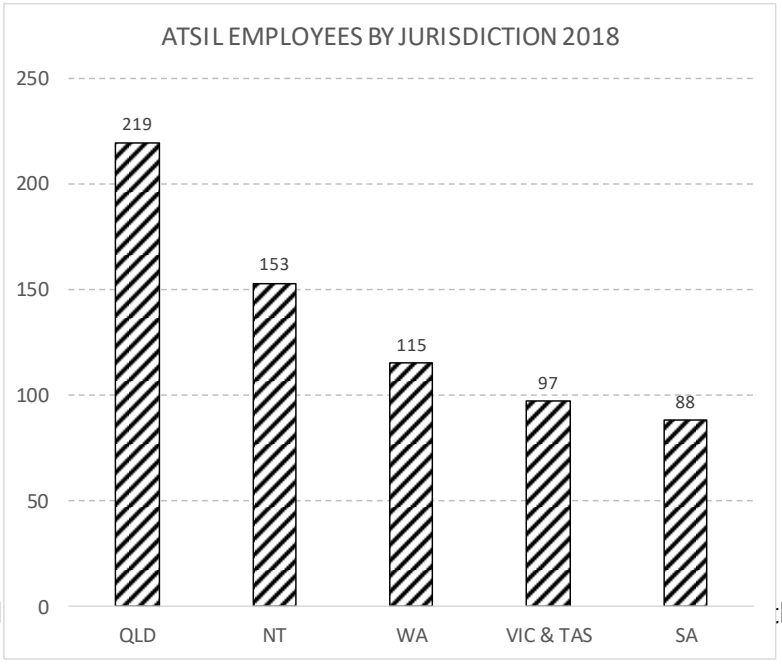
123 Ibid.

APPENDIX A
ATSIL Employment Statistics

National Breakdown [#]	
Non-Indigenous	365
Indigenous	307
TOTAL	672

ATSILS Employees		ATSI Population (2016 census)*	ATSIL employees per 10,000 Indigenous Popn
QLD	219	186,482	11.7
NT	153	58,238	26.3
WA	115	75,984	15.1
VIC & TAS	97	71,365	13.6
SA	88	34,184	25.7
TOTAL	672	426,253	15.8





Source: Individual [redacted]h the author.

State & Territory Breakdown of Indigenous & non-Indigenous Staff [#]	Non-Indigenous	Indigenous
QLD	130	89
NT	83	70
WA	65	50
VIC & TAS	51	46
SA	36	52
TOTAL	365	307

*Source: Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians* (2016 Census) <https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/estimates-aboriginal-and-torres-strait-islander-australians/latest-release>

APPENDIX B
Interviews

As outlined in Chapter 3, semi-structured interviews were sought with a range of ATSILS stakeholders; however, after initial contact was made, 18 individuals ultimately participated. Those people, identified below, gave their time and knowledge to assist me in getting this research done, and I want to thank them all dearly. They all have had some influence in ATSILS, or in the justice system, for extensive periods during their careers and have shown commitment to change in this space.

Name	Interview Date	Location
Aunty Pat Miller – former CEO CAALAS	31st October 2019	Alice Springs
Brendan Thomas CEO NSW LAC	18 December	Sydney
Cheryl Axelby – CEO ALRM	10 October 2019	Adelaide
David Parsons – Former Vic Judge	18 June 2019	Melbourne
David Woodroffe – PLO NAAJA	8th August 2019	Darwin
Dennis Eggington – CEO ALSWA	12th August 2019	Darwin
Fiona Hussin – Deputy CEO NTLAC	8th August 2019	Darwin
Gary Foley – Prof. Uni Victoria	20 June 2019	Melbourne
Glen Dooley – Former PLO NAAJA, DPP	31st October 2019	Alice Springs
Greg Shadbolt – PLO, ATSILS QLD	29 August 2019	Brisbane
Jenny Blokland – NT Judge of the Supreme Court	15th August 2019	Darwin
John Boersig – CEO ACT Legal Aid	1st August 2019	Canberra
John McKenzie – Legal Service Commissioner NSW	11 June 2019	Sydney
Nigel Browne – Former NT Prosecutor	12-15 August 2019	Darwin
Ross Sivo – CFO, ATSILS, QLD	7 August 2019	Brisbane
Shahleena Musk – former lawyer with ALSWA & NAAJA,	17 July 2019	Melbourne

Name	Interview Date	Location
Shane Duffy – CEO, ATSILS QLD	12-15 August 2019	Darwin
Stewart O'Connell – Lawyer	23 August 2019	Sydney

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