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Committee Secretariat  
Senate Finance & Public Administration Committees  
PO Box 6100  
Parliament House  
Canberra ACT 2600

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Dear Committee Secretary,

**RE: Inquiry into Aboriginal and Torres Strait Islander experience of law enforcement and justice services**

**Introduction**

National Legal Aid (NLA) represents the Directors of the eight state and territory legal aid commissions in Australia. The legal aid commissions are independent statutory authorities established under respective state or territory enabling legislation. They are funded by Commonwealth and state or territory governments to provide legal assistance to disadvantaged people.

NLA aims to ensure that the protection or assertion of the legal rights and interests of people are not prejudiced by reason of their inability to:

- obtain access to independent legal advice;
- afford the appropriate cost of legal representation;
- obtain access to the federal and state and territory legal systems; or
- obtain adequate information about access to the law and the legal system.

Some of the individual legal aid commissions will make submissions which detail issues particularly affecting respective jurisdictions. This submission addresses terms of reference (a), (b) and (c) summarising a number of over-arching concerns in relation to our role as legal assistance service providers.

## Terms of Reference

### ***a. the extent to which Aboriginal and Torres Strait Islander Australians have access to legal assistance services***

Aboriginal and Torres Strait Islander peoples have limited access to legal assistance services as a result of a number of factors including:

- geography
- communication barriers
- social disadvantage
- economic disadvantage
- legal assistance service provider funding constraints.

The Aboriginal and Torres Strait Islander Legal Services (ATSILS) and the Family Violence Prevention Legal Services (FVPLS), being culturally competent, are the primary providers of legal assistance services to Aboriginal and Torres Strait Islander peoples. Legal aid commissions and community legal centres also provide services to Aboriginal and Torres Strait Islander people. As noted by the Australian Government Productivity Commission “Indigenous Australians are also significant users of legal assistance services provided by legal aid commissions and community legal centres”.<sup>1</sup>

Legal assistance service providers, including legal aid commissions, struggle to meet the presenting need for services. Legal assistance service providers are also aware that people who have legal needs often do not access legal assistance services for a range of reasons including the barriers noted above. Recent Australian research has found that “people who took no action in response to their legal problem achieved the poorest outcomes across jurisdictions”.<sup>2</sup>

Legal aid commission services include legally assisted dispute resolution and representation in court based matters upon a grant of aid being made to either an in-house or private practitioner; duty lawyer services; legal advice and minor assistance (for example, such as letter writing or advocating on someone’s behalf); legal information; community legal education and referrals to other legal and non-legal service providers. Services provided pursuant to a grant of aid generally rely on the applicant, including an Aboriginal and/or Torres Strait Islander applicant, meeting eligibility tests in relation to means, merits, matter type and competing priorities in an environment of limited funding.

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<sup>1</sup> Australian Government Productivity Commission Inquiry Report, *Access to Justice Arrangements*, (2014) p. 766.

<sup>2</sup> Law and Justice Foundation of New South Wales, *Legal Australia-Wide Survey: Legal Need in Australia*, (2012) p. xiv.

In the financial year 2013-2014 a total of 129,977 grants of aid were approved across Australia with 17,484, ie 13.45%, of these grants being made to people who identified as either or both Aboriginal or Torres Strait Islander.<sup>3</sup>

Some legal aid commissions have experience of being unable to find interpreters for Aboriginal and Torres Strait Islander people to enable the taking of instructions and the giving of legal advice, and also for the provision of community legal education to communities.

Further detail about the legal needs of Aboriginal and Torres Strait Islander peoples and access to legal assistance services by them can be found in the report of the Australian Government Productivity Commission's Inquiry into Access to Justice Arrangements September 2014<sup>4</sup>, and in other research and inquiry reports.<sup>5</sup>

***b. the adequacy of resources provided to Aboriginal legal assistance services by state, territory and Commonwealth governments***

The Australian Government is responsible for the funding of the Aboriginal and Torres Strait Islander legal services, with constitutional responsibility pursuant to the race power.<sup>6</sup>

Current levels of funding to all legal assistance service providers are insufficient. The Australian Government Productivity Commission "has estimated that additional funding from the Australian and State and territory governments of around \$200 million a year is needed to:

- better align the means test used by LACs with other measures of disadvantage
- maintain existing frontline services that have a demonstrated benefit to the community
- allow legal assistance providers to offer a greater number of services in areas of law that have not previously attracted funding."<sup>7</sup>

<sup>3</sup> See [NLA website](#) for further detail about services to Aboriginal or Torres Strait Islander peoples.

<sup>4</sup> See esp. Chapter 22.

<sup>5</sup> For example, F Allison, C Cunneen, M Schwartz, L Behrendt, *Indigenous Legal Needs Project: NT* (2012); *The civil & family law needs of Indigenous People in Victoria* (2013); *The civil & family law needs of Indigenous people in Queensland* (2014); and *The civil & family law needs of Indigenous people in WA* (2014); Law & Justice Foundation of NSW, *Legal Australia-Wide Survey: Legal Need in Australia* (2012); Senate Legal & Constitutional Affairs References Committee reports, *Legal aid and access to justice* (2004) and *Access to Justice* (2009); Steering Committee for the Review of Government Service Provision report, *Overcoming Indigenous Disadvantage, Key Indicators* (2014); C Earl, G Ogle, E McArthur, South Australian Council of Social Service (2015), *Justice or an unjust system? Aboriginal over-representation in South Australia's juvenile justice system*.

<sup>6</sup> S.51 Commonwealth of Australia Constitution Act 1900.

<sup>7</sup> Productivity Commission Inquiry Report, *Access to Justice Arrangements* (2014), p. 30.

The terms of reference given to the Productivity Commission required the Commission to inquire and report in relation to the civil justice system (including family law and related matters), as distinct from the criminal justice system.

Attached please find Figure 4 of the report of the Productivity Commission, “The four government funded legal assistance providers 2012-2013”. This table sets out the legal assistance landscape, including the roles of the individual legal assistance service providers, and includes funding information.<sup>8</sup>

Funding to respective legal assistance service providers is also insufficient in relation to criminal law legal need. A lack of representation in criminal law matters can result in the court not being apprised of all relevant matters and an adverse outcome for the individual. It can also result in reduced efficiencies in the courts. These results are particularly likely where the defendant’s capacity to self-represent is limited by factors such as disability and language barrier.

Where an ATSILS is unable to assist an Aboriginal and/or Torres Strait Islander person who has been charged with a state/territory based crime, whether because of reasons such as multiple co-accused and legal conflict or because of insufficient funding, it is likely that the person will be referred to the local legal aid commission which will make a grant of legal aid for the representation of that person/people.<sup>9</sup>

The legal aid commissions are funded by each of the Commonwealth and the State/Territory Governments. Nationally, Commonwealth funding to legal aid commissions for the financial year 2013-14 was \$213.047 million, State/Territory funding was \$283.764 million with a further \$85.883 million from trust & statutory interest funds.<sup>10</sup>

In relation to grants of legal assistance for legal representation services, funding paid to legal aid commissions by the Commonwealth is required to be expended on matters based in or connected to Commonwealth law. State/Territory funding to legal aid commissions is applied to matters based in State/Territory law, that is, primarily criminal law where there is a risk of imprisonment.

The funding arrangements described above produce a “costs shift” when a legal aid commission assists an Aboriginal and/or Torres Strait Islander by providing representation services in a state or territory based criminal law matter. That is, the Commonwealth has not provided the funding required to assist the Aboriginal and/or Torres Strait Islander person/people, rather that person/people has been

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<sup>8</sup> Productivity Commission Inquiry Report, *Access to Justice Arrangements*, (2014) p. 25.

<sup>9</sup> The grant/s will be to an in-house legal aid commission lawyer and/or to a private legal practitioner on a legal aid panel, i.e. practitioners prepared to undertake work at legal aid (low) rates.

<sup>10</sup> See breakdown by State and Territory <http://www.nationallegalaid.org/home/finance/>

assisted by the application of State/Territory funding. This places an additional burden on the already strained state/territory budgets of legal aid commissions, with commissions currently using means, matter type, and competing priorities tests to ration insufficient funds.

NLA supports adequate funding for a national network of Aboriginal and Torres Strait Islander legal services as the primary form of assistance for Aboriginal and Torres Strait Islander communities.

The Productivity Commission concluded that “it would neither be feasible nor necessary that all Indigenous legal needs are met by Indigenous specific services” and that “CLCs<sup>11</sup> and LACs<sup>12</sup> should remain important providers of legal assistance services for Aboriginal and Torres Strait Islander Australians, particularly in regional and metropolitan areas”.<sup>13</sup> NLA is committed to working with Aboriginal and Torres Strait Islander organisations to ensure coordination of service delivery to Aboriginal and Torres Strait Islander communities and to providing services that are as culturally appropriate as possible.

***c. the benefits provided to Aboriginal and Torres Strait Islander communities by Family Violence Prevention Legal Services***

Family violence is a wide-ranging issue, affecting many people and producing a myriad of justice, health, housing and financial consequences.

It is understood that the Senate Finance and Public Administration Committee is currently completing its inquiry into domestic violence in Australia with the final report due in June, and that accordingly the Committee will be well apprised about relevant matters including recent reports.<sup>14</sup>

NLA’s view is that the Family Violence Prevention Legal Services (FVPLS) provide a visible, culturally safe, holistic service response to the very serious family violence problem which Aboriginal and Torres Strait Islander women are disproportionately affected by.<sup>15</sup>

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<sup>11</sup> Community legal centres.

<sup>12</sup> Legal aid commissions.

<sup>13</sup> Productivity Commission Inquiry Report, *Access to Justice Arrangements*, (2014) p. 767.

<sup>14</sup> For example, Australian Law Reform Commission’s reports, *Family Violence and Commonwealth Laws – Improving Legal Frameworks* (ALRC Report 117), and, *Family Violence – A National Legal Response* (ALRC Report 114); Steering Committee for the Review of Government Service Provision report *Overcoming Indigenous Disadvantage, Key Indicators* (2014), Chapter 4.

<sup>15</sup> Steering Committee for the Review of Government Service Provision report *Overcoming Indigenous Disadvantage, Key Indicators* (2014) p 4.88.

**Conclusion**

We thank you for the opportunity to make this submission. Please do not hesitate to contact us if you require any further information.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Ganny', with a stylized, cursive script.

Gabrielle Canny  
Chair

Figure 4 **The four government funded legal assistance providers**  
2012-13

	Legal aid commissions (LACs)	Community legal centres (CLCs)	Aboriginal and Torres Strait Islander legal services (ATSILS)	Family violence prevention legal services (FVPLS)	
<b>Where are they located?</b>	<b>8 LACs</b> <ul style="list-style-type: none"> <li>In all states and territories</li> <li>Metropolitan, regional and remote services including regional offices</li> </ul>	<b>200 CLCs</b> <ul style="list-style-type: none"> <li>In all states and territories</li> <li>Mainly in metropolitan and regional areas</li> </ul>	<b>8 ATSILS</b> <ul style="list-style-type: none"> <li>One in each state, two in the NT; ACT serviced by NSW</li> <li>Majority of outlets in regional and remote areas</li> </ul>	<b>14 FVPLS</b> <ul style="list-style-type: none"> <li>In all states and territories except ACT and Tasmania</li> <li>Service 31 high need regional, rural and remote areas</li> </ul>	
<b>What are their objectives?</b>	<ul style="list-style-type: none"> <li>Provide access to assistance for the vulnerable and disadvantaged</li> <li>Provide the community with improved access to justice and legal remedies</li> </ul>	Contribute to access to legal assistance services for vulnerable and disadvantaged members of the community and/or those whose interests should be protected as a matter of public interest	Deliver legal assistance and related services to Aboriginal and Torres Strait Islander people	Provide legal services and assistance to Aboriginal and Torres Strait Islander victims of family violence and sexual assault	
<b>Who do they target?</b>	<ul style="list-style-type: none"> <li>State and territory communities</li> <li>Focus on vulnerable and disadvantaged people</li> </ul>	<ul style="list-style-type: none"> <li>Local communities (with outreach), except specialist CLCs who service their state/territory community</li> <li>Those who do not qualify for legal aid focusing on the vulnerable and disadvantaged</li> </ul>	Aboriginal and Torres Strait Islander people or a partner or carer of an Aboriginal or Torres Strait Islander person	Aboriginal and Torres Strait Islander people or a partner or carer of an Aboriginal or Torres Strait Islander person, who is a victim of family violence or a child at risk of family violence and in need of protection	
<b>What are their funding arrangements?</b>	Commonwealth	\$212.6 m	\$36.7 m	\$68.2 m	\$19.1 m
	State & territory <sup>a</sup>	\$366.5 m	\$30.9 m	--	--
	Other <sup>b</sup>	\$30.4 m	\$22.0 m	--	--
		National Partnership Agreement (NPA) and funding administered by the state and territory governments	Funding administered by LACs in most states except SA where provided through the Attorney-General's Department (SA). NT and ACT administered by the Australian Government	Funding administered by the Australian Government	Funding administered by the Australian Government

<sup>a</sup> Includes contributions from public purpose funds (PPFs). <sup>b</sup> For LACs, 'other' comprises self-generated income. For CLCs, 'other' includes fee income, philanthropic donations and other sources.