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Submission to Inquiry on Aboriginal and Torres Strait Islander Access to Legal Assistance

Dear Committee

The National Association of Community Legal Centres (NACLC) welcomes the opportunity to make this submission to the Committee as part of its current Inquiry into Aboriginal and Torres Strait Islander access to legal assistance services.

This submission has been prepared by NACLC,¹ the peak national body for Australia's approximately 200 community legal centres. By way of background, community legal centres (CLCs) are independently operating community-based not-for-profit organisations that provide free and accessible legal and related services to vulnerable and disadvantaged members of the community, including Aboriginal and Torres Strait Islander peoples and communities.

This submission addresses a number of the Terms of Reference for the Inquiry, including:

- the extent of access to legal assistance for Aboriginal and Torres Strait Islander peoples, with a focus on assistance from publicly funded legal assistance providers, including CLCs
- funding of Aboriginal and Torres Strait Islander Legal Assistance Services
- the role and benefits of family violence prevention legal services
- mandatory sentencing
- alternatives to imprisonment, and
- justice targets.

NACLC encourages the Committee to consider the important submissions made by the other peak legal assistance bodies, the National Aboriginal and Torres Strait Islander Legal Services (NATSILS), and the National Family Violence Prevention Legal Service Forum (NFVPLS), as well as a by individual CLCs across Australia.

Previous Inquiries and Reviews

NACLC considers that it is important to highlight that there have been numerous reviews and inquiries into access to justice-related issues for Aboriginal and Torres Strait Islander peoples over many years, with limited positive reform or real change to

¹ NACLC's members are the eight State and Territory Associations of Community Legal Centres.

issues such as the over-representation of Aboriginal and Torres Strait people in the criminal justice system, or access to legal assistance.

By way of example, in 2014 alone the Productivity Commission's Access to Justice Arrangements Inquiry considered the operation and funding of Aboriginal and Torres Strait Islander Legal Services (ATSILS) and Family Violence Prevention Legal Services (FVPLS). The Aboriginal and Torres Strait Islander Social Justice Commissioner in the 2014 Social Justice and Native Title Report addressed high rates of incarceration of Aboriginal and Torres Strait Islander peoples and made recommendations for reform.

As a result, NACLC encourages the Committee to consider the submissions made, and reports produced, as part of these inquiries and processes and build upon the existing evidence base in making recommendations for reform to ensure greater to legal assistance for Aboriginal and Torres Strait Islander peoples.

Extent of Access to Legal Assistance for Aboriginal and Torres Strait Islander Peoples

The focus of this section of the submission on access to legal assistance for Aboriginal and Torres Strait Islander people is on the four publicly funded legal assistance providers, given NACLC's role as the peak body for CLCs in Australia, and in light of the prohibitively high cost of private legal assistance for many Aboriginal and Torres Strait Islander people.

However, in considering the extent of access to legal assistance for Aboriginal and Torres Strait Islander peoples, it is important to outline briefly broader factors that impact on access to legal assistance for Aboriginal and Torres Strait Islander peoples, including:

- **Intergenerational and Multi-Faceted Disadvantage:** The systemic, intergenerational and multi-faceted disadvantage experienced by Aboriginal and Torres Strait Islander people across a range of indicators directly impacts on the ability of Aboriginal and Torres Strait Islander people to access legal assistance.
- **Remoteness:** There is a significant lack of access to legal services in remote areas. In 2011, 43% of Aboriginal and Torres Strait Islander people were living in outer regional, remote and very remote areas.² This remoteness creates a significant barrier to access legal assistance.
- **Lack of Awareness:** In some instances Aboriginal and Torres Strait Islander people may lack awareness of their rights, or what remedies or legal assistance is available when legal issues arise. In addition, Aboriginal and Torres Strait Islander people may not recognise the legal issue arising from particular circumstances.
- **Language and Interpreters:** In some instances Aboriginal and Torres Strait Islander people require access to interpreters to facilitate communication with legal assistance providers and the legal system more broadly, either because they do not speak English as their first language, they speak Aboriginal English, or they have hearing difficulties. Unfortunately, as outlined in the submission

² See, eg, Productivity Commission of Australia, Steering Committee for the Review of Government Service Provision, *Overcoming Disadvantage: Key Indicators 2014* (November 2014), 3.12.

made by the National Aboriginal and Torres Strait Islander Legal Services, there is a shortage of appropriate interpret services across Australia.

- **Mistrust of Government and Justice System:** As a result of historical and ongoing marginalisation, systemic discrimination and negative engagement with Government authorities, police and the justice system, Aboriginal and Torres Strait Islander people may be hesitant to seek legal assistance or engage with the justice system.

In addition, a crucial factor in assessing and considering the extent of access to legal assistance by Aboriginal and Torres Strait Islander people is the significant level of unmet legal need in Australia.

The level of unmet legal need has been widely recognised, including by the Law and Justice Foundation's Legal Australia-Wide Survey and the Productivity Commission in its recent Access to Justice Arrangements Inquiry, and is reflected in the high turnaway rates record by legal assistance providers. Unfortunately, unmet legal need, including for Aboriginal and Torres Strait Islander peoples often has serious flow-on effects and leads to greater and more complex legal problems and ultimately to higher costs to the justice system and other areas of government spending.³

Legal Assistance Providers

There are four publicly funded legal assistance providers in Australia—CLCs, Legal Aid Commissions (LACs), Aboriginal and Torres Strait Islander Legal Services (ATSILS) and Family Violence Prevention Legal Services (FVPLS). The nature, purpose, work and capacities of each of these legal assistance providers are complementary, but not interchangeable. Legal assistance providers play a crucial role in the Australian legal system for vulnerable and disadvantaged members of the community and are vital to ensuring access to legal assistance for Aboriginal and Torres Strait Islander peoples.

It is NACLC policy and firm belief that the most appropriate providers of legal services for Aboriginal and Torres Strait Islander peoples are the specifically dedicated ATSILS and FVPLS staffed and managed, as far as is possible, by Aboriginal and Torres Strait Islander people.

Aboriginal and Torres Strait Islander peoples have experienced, and continue, to experience, historical marginalisation from mainstream services, and generally prefer to and feel culturally secure in attending Aboriginal and Torres Strait Islander specific services. Importantly, both ATSILS and FVPLS offer community-controlled culturally safe services to Aboriginal and Torres Strait Islander peoples.

As recognised by the Productivity Commission in its 2014 *Access to Justice Arrangements* report, 'Aboriginal and Torres Strait Islander Australians often have complex legal needs and face substantial barriers in accessing legal assistance. The nature and complexity of their civil law needs means that specialist legal assistance services remain justified'.⁴

³ See, eg, Productivity Commission of Australia, *Access to Justice Arrangements*, Final Report, Vol 2, 759, 781.

⁴ Productivity Commission of Australia, *Access to Justice Arrangements*, Final Report, Vol 2, 761, Finding 22.1.

Aboriginal and Torres Strait Islander Legal Services

Aboriginal and Torres Strait Islander Legal Services (ATSILS) across Australia are the largest provider of legal assistance to Aboriginal and Torres Strait Islander people, providing approximately 200,000 legal assistances to Aboriginal and Torres Strait Islander people each year.

Family Violence Prevention Legal Services

There are 14 FVPLS across Australia and service delivery has traditionally been limited to 31 specific rural and remote locations. The primary functions of FVPLSs is to provide legal assistance, casework, counselling and court support to Aboriginal and Torres Strait Islander adults and children who are experiencing, or who have experienced, family violence. The FVPLS provide a holistic service delivery model that attempts to address the complex and intersectional legal and non-legal issues facing clients.

Community Legal Centres

As outlined above, CLCs are independently operating community-based not-for-profit organisations that provide free and accessible legal and related services to vulnerable and disadvantaged members of the community, including Aboriginal and Torres Strait Islander peoples and communities.

There will be occasions when ATSILS and FVPLS are unable to assist a client because of real or perceived conflict, lack of resources, or because it is a specialist area of law that is outside their practice expertise. It may also be the case that in some matters, particularly in smaller communities, a person may not wish to consult, or be seen to consult a particular legal service where other members of family or community attend or work. It is therefore important that Aboriginal and Torres Strait Islander people have the choice to access other, culturally appropriate legal assistance providers if they so wish.

As a result, CLCs provide vital culturally appropriate services to Aboriginal and Torres Strait Islander peoples. NACLC and CLCs across Australia are committed to ensuring that CLCs provide a culturally safe and appropriate service. In addition to employing Aboriginal and Torres Strait Islander staff in CLCs, including in some CLCs a dedicated Aboriginal liaison officer, NACLC recommends the inclusion of cultural safety indicators as good practice in the National Accreditation Standards and intends to make these mandatory in the next cycle.

In addition, many individual CLCs run a range of programs and projects which ensure CLCs connect with their local Aboriginal and Torres Strait Islander communities, build relationships or trust, and offer services in a culturally appropriate ways.

In the 2014 NACLC National Census results indicated that of the 134 CLCs that answered the question, services for Aboriginal and Torres Strait Islander peoples were amongst the top three service types and 32.3% of those CLCs provided such services. In addition, among the 121 CLCs that answered the question, the average proportion of Aboriginal and/or Torres Strait Islander clients was 13.3%.

Funding of Aboriginal and Torres Strait Islander Legal Assistance Services

NACLC is concerned about the effect of recent cuts and uncertainty to funding for all legal assistance services and the impact such cuts will have on the ability of the most vulnerable members of our community to access legal assistance.

More broadly, as outlined earlier, there is a high level of unmet legal need in Australia and underfunding of legal assistance services to meet such need. As a result, NACLC strongly encourages the Committee to reiterate the recommendation made by the Productivity Commission that all levels of government inject an additional \$200 million per year to meet unmet legal need in Australia.

Funding of Aboriginal and Torres Strait Islander legal assistance services at a Commonwealth level is part of a complex arrangement spanning portfolio responsibilities.

ATSILS

The National Aboriginal and Torres Strait Islander Legal Services (NATSILS) is the peak body for Aboriginal and Torres Strait Islander Legal Services in Australia. Under the IAS grants announced on 4 March 2015, NATSILS did not receive funding and was in a position of being forced to close at the end of June 2015. However, following a long period of uncertainty, NACLC welcomes the announcement made by the Commonwealth Government on 5 May 2015 that NATSILS will receive ongoing funding for a period of five years. This announcement is an important acknowledgement of the role of NATSILS in providing a voice for Aboriginal and Torres Strait Islander peoples in relation to the operation of the justice system and the interaction of Aboriginal and Torres Strait Islander people with the justice system.

Following the 2015-2016 Federal Budget, NACLC understands that ATSILS across Australia will be provided with ongoing direct funding by the Commonwealth Attorney-General's Department, but that such funding will decrease significantly from 2017-2018 onwards.

NACLC encourages the Committee to consider the submissions made and any evidence given by the NATSILS in relation to the funding situation for ATSILS across Australia.

FVPLS

In the 2014-2015 Federal Budget, it was announced that more than 150 Indigenous programs under the responsibility of the Department of Prime Minister and Cabinet would be 'rationalised' into five high-level program streams under the Prime Minister's *Indigenous Advancement Strategy* (IAS). It was also announced that, under this strategy, \$534.4 million is to be cut from Indigenous Affairs over the next five years.

As part of the IAS, the FVPLS no longer exists as a standalone program or as a core service model that provides legal assistance services. As a result, FVPLS were required to apply for funding (including core funding) alongside other services to Aboriginal and Torres Strait Islander people as part of an open competitive grant round. In a welcome development, under the IAS, six FVPLS received funding for three years, and nine received funding for two years.

However, the provision of existing levels of funding rather than increased funding in the face of a family violence 'crisis' and failure to provide direct funding to FVPLS is of ongoing concern to NACLC. NACLC is also concerned about a number of aspects of the IAS and resulting funding, including the apparently very high proportion of non-

Aboriginal or Torres Strait Islander organisations that received funding under the IAS.

NACLC encourages the Committee to consider the submissions made and any evidence given by the NFVPLS in relation to the funding situation for FVPLS across Australia.

CLCs

In light of the role of CLCs in providing legal assistance to Aboriginal and Torres Strait Islander peoples, funding cuts and uncertainty for CLCs also negatively impacts on the ability of Aboriginal and Torres Strait Islander to access legal assistance.

In recent years CLCs have experienced funding cuts and uncertainty. The recent Australian Government decision to reverse the majority of funding cuts to the sector announced as part of the 2013 Mid-Year Economic Fiscal Outlook is a welcome one, however it does not reverse all funding cuts, and there are a range of unintended consequences arising from the decision that have the potential to negatively impact CLCs across Australia.

As part of the 2015-2016 Federal Budget, funding for CLCs across Australia will drop significantly from 2017-2018 onwards. For example, in total from the Commonwealth CLCs will receive \$40 million in 2015-2016 and \$42.2 million in 2016-2017, however this funding is forecast to drop to \$30.1 million in 2017-2018 and \$30.6 million in 2018-2019, a cut in the order of \$12 million per year from 2017-2018.

Further, as part of the proposed legal assistance reforms due to take effect from 1 July 2015, it appears likely that CLCs in particular jurisdictions including South Australia, Western Australia, Tasmania and the Northern Territory, as well as individual CLCs across Australia, will face funding cuts in 2015-2016 that will further limit the ability of Aboriginal and Torres Strait Islander people to access legal assistance.

These funding cuts will directly impact the ability of CLCs to provide legal assistance to Aboriginal and Torres Strait Islander peoples, and are contrary to the 2014 recommendation made by the Productivity Commission as well as subsequent inquiries and reviews.

Funding for Civil and Family Law

In considering funding of Aboriginal and Torres Strait Islander legal assistance services (and legal assistance services that assist Aboriginal and Torres Strait Islander people), it is important to consider particularly issues relating to access to assistance in civil and family law matters. As a result of finite resources and prioritisation of assistance in matters where there is a risk of incarceration, limited LACs and ATSILS funding is directed more towards assistance in criminal rather than civil or family law matters.

This is not to say that LACS and the ATSILS do not provide family and civil law services, or that they do not have female clients, however their required focus on representation in criminal law cases strongly works against funding being used for family and civil law problems, and against gender equity in the allocation of legal assistance funding. This also has flow-on effects with respect to conflicts of interest, often precluding Aboriginal and Torres Strait Islander women from accessing ATSILS.

As a result, there is particular and significant unmet legal need amongst Aboriginal and Torres Strait Islander women for legal assistance in civil and family law matters and the need for additional funding for such assistance. This need for additional funding for civil

and family law was recognised by the Productivity Commission in its 2014 Access to Justice Arrangement Report.

The Role and Benefits of Family Violence Prevention Legal Services

Numerous reports and submissions have highlighted the nature and extent of family violence in Australia. For example, *Time for Action* estimated that '[a]bout one in three Australian women experience physical violence and almost one in five women experience sexual violence over their lifetime'.⁵

Aboriginal or Torres Strait Islander women report higher levels of physical violence during their lifetime than non-Aboriginal and Torres Strait Islander women. For example, the results of the National Aboriginal and Torres Strait Islander Social Survey indicate that approximately 25% of Aboriginal and Torres Strait Islander women had experienced one or more incidents of physical violence in the previous 12 months and that 94 % knew the perpetrator.⁶ Aboriginal and Torres Strait Islander women are also 31 times more likely to be hospitalised as a result of family violence-related assault than non-Aboriginal and Torres Strait Islander women.⁷ However, the true extent of family violence experienced by Aboriginal and Torres Strait Islander women is unclear; in large part, as a result of under-reporting.

In light of the significant and increasing level of family violence, and impact on Aboriginal and Torres Strait Islander women in particular, FVPLS play a crucial role in providing legal assistance to Aboriginal and Torres Strait Islander people, in particular women and children.

The FVPLS have a holistic service delivery model and provide specialist legal assistance by a community controlled and culturally safe service. In particular, FVPLS are often the only available and culturally safe option for Aboriginal and Torres Strait Islander women. FVPLS workers have a thorough understanding of the nature and dynamics of domestic and family violence, the intersecting nature of disadvantage faced by Aboriginal and Torres Strait Islander victims of family violence and provide a safe space for Aboriginal and Torres Strait Islander women and children.

The importance of FVPLS has been acknowledged in numerous reports, including the 2004 Legal Aid and Access to Justice Report, and the Productivity Commission's 2014 Access to Justice Arrangements Report.

NACLC strongly supports the important work undertaken by the FVPLS and highlights the importance of additional and direct funding of the FVPLS, including of early intervention, prevention, policy and advocacy activities.

Mandatory Sentencing

Mandatory sentencing laws currently apply in Western Australia, the Northern Territory, New South Wales, Queensland, South Australia, Victoria and under some Commonwealth laws.

⁵ National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009-2021* (2009), 9.

⁶ Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Social Survey*, (2009), Cat. No. 4714.0.

⁷ Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2011*, (2011).

NACLC is of the view that mandatory sentencing laws are arbitrary and undermine basic rule of law principles by preventing courts from exercising discretion and imposing penalties tailored appropriately to the circumstances of the case and the offender. Of particular concern is the disproportionate impact of such laws on Aboriginal and Torres Strait Islander peoples in light of the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system.

Significantly, in 2000, the United Nations Human Rights Committee concluded that mandatory imprisonment laws in Western Australia and the Northern Territory 'lead in many cases to the imposition of punishment that are disproportionate to the seriousness of the crimes committed and would seem to be inconsistent with the strategies of [Australia] to reduce the over-representation of indigenous person in the criminal justice system [and] raises serious issues of compliance' with Australia's international human rights obligations.⁸

Alternatives to Imprisonment

The over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system, including in prisons, is a national crisis. Aboriginal and Torres Strait Islander peoples are now more overrepresented in custody than at the time of the 1991 Royal Commission into Aboriginal Deaths in Custody and at a rate approximately 15 times higher than for non-Indigenous Australians.⁹ NACLC is also concerned that Aboriginal women are now the fastest growing prison population.

This section of the submission considers a number of issues in particular, including the early intervention and prevention work of CLCs in addressing this over-representation as well as addressing the root causes of legal problems, and the benefits of a justice reinvestment approach.

Prevention and Early Intervention Work of CLCs

CLCs utilise a range of early intervention and preventative strategies such as community legal education and community development, individual skill building, systemic advocacy and law and policy reform activities that assist individual clients, as well as disadvantaged and vulnerable groups in the community, including Aboriginal and Torres Strait Islander peoples.

One such strategy is through community legal education (CLE) of targeted groups in the community and other relevant stakeholders (such as community services workers). Such CLE involves accessible and culturally safe dissemination of information and can also include raising awareness about legal issues or consequences, the development of skills to deal with problems arising, and other community development strategies.

Another strategy is through strategic litigation, specifically running a test case that may clarify the law or draw attention to the need for new law or a change in existing law. Finally, another and often more cost effective way is to undertake policy and law reform work to address, at a systemic level, the issues identified through individual advice and casework services, and through CLCs' connections with community. In some instances, the most efficient means of avoiding or resolving civil disputes, particularly those arising

⁸ United Nations Human Rights Committee, 'Concluding Observations on Australia in 2000', (2000) UN Doc A/55/40, [522].

⁹ See, eg, Australian Bureau of Statistics, *Prisoners in Australia*, Cat 4517.0 (2012).

from unfair operation or application of a law or policy, is to advocate for legislative, policy or practice reform. Accordingly, this work constitutes a core prevention strategy.

These prevention and early intervention strategies utilised by CLCs often benefit Aboriginal and Torres Strait Islander clients and communities, and NACLC suggests that funding and support for legal assistance services undertaking this work is a key element of facilitating access to justice for Aboriginal and Torres Strait Islander peoples, as well as addressing over-imprisonment.

Unfortunately however, Commonwealth funding agreements with CLCs were amended in 2014 to include clauses amend the definition of 'core legal services' to make clear that services funded by the Commonwealth do not include law reform or policy advocacy. Similarly, in the context of proposed reforms to legal assistance due to take effect on 1 July 2015, NACLC understands that a similar restriction on undertaking such work will be included.

While not explicitly preventing CLCs from undertaking this work, failure to provide Commonwealth funding for these activities has had and will continue to have an impact on the ability of CLCs to engage in this work, to the detriment of the most vulnerable and disadvantaged members of the community, including Aboriginal and Torres Strait Islander peoples.

It is also concerning that, as NACLC understands, Commonwealth funding for the important early intervention and policy advocacy work undertaken by ATSILS and FVPLS has also been removed.

Justice Reinvestment

NACLC is supportive of a justice reinvestment approach in Australia and considers that it is a crucial element of addressing the high levels of imprisonment of Aboriginal and Torres Strait Islander peoples.

One of the key elements in any solution focussed on addressing over-representation in the criminal justice system is to address disadvantage, including through approaches such as justice reinvestment which seek to divert funding from prisons to community programs. Accordingly, NACLC strongly supports investment in community-based and led programs that seek to address the issues and disadvantage underlying offending behaviour.

The Senate Legal and Constitutional Affairs Committee,¹⁰ the Aboriginal and Torres Strait Islander Social Justice Commissioner and organisations and communities across Australia have recognised the potential benefits of a justice reinvestment approach in Australia and the need for additional support and funding of such an approach.

Briefly, NACLC considers that:

- the Commonwealth Government must play a leadership role in encouraging State and Territory Governments to adopt justice reinvestment strategies
- additional research, funding and pilot programs are an important step in introducing such approaches across Australia, and
- justice reinvestment approaches must be tailored to the needs of the particular community and must involve Aboriginal and Torres Strait Islander peoples and

¹⁰ See, eg, Senate Legal and Constitutional Affairs Committee, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia*, (June 2013).

communities in determining how such approaches are implemented in communities.

NACLC draws the Committee's attention in particular to the work of its member the Federation of Community Legal Centres in Victoria in leading Smart Justice, a coalition of 25 legal and community organisations seeking to promote understanding of criminal justice policies that are effective, evidence-based and human rights compliant; as well as the recently launched Change the Record campaign of the National Justice Coalition.

Justice Targets

NACLC strongly supports the introduction of justice targets into the COAG Closing the Gap Strategy. NACLC considers that justice targets are a vital tool in attempts to address the over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system and would facilitate measurement of government initiatives against clear targets. The inclusion of a justice target in the Closing the Gap would also strengthen and support the necessary commitment to justice reinvestment strategies.

Importantly, Aboriginal and Torres Strait Islander peoples, communities and organisations must be involved in the development of any such targets.

NACLC notes that a key mechanism to support any such justice targets is to ensure Aboriginal and Torres Strait Islander people have equitable access to adequately funded legal assistance across Australia.

Conclusion

Please feel free to contact me on 02 9264 9595 or amanda.alford@clc.net.au to discuss any aspect of this submission. NACLC would welcome the opportunity to provide the Committee with further information, and to appear before the Committee as part of any public hearings conducted as part of the inquiry.

Yours sincerely

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National Association of Community Legal Centres