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ALRC Incarceration Inquiry
Legal Assistance Branch
Attorney-General's Department

By email: ALRCIncarcerationInquiry@ag.gov.au

13 January 2017

To Whom It May Concern

Submission on Draft Terms of Reference for Australian Law Reform Commission (ALRC) Indigenous Incarceration Inquiry

The National Association of Community Legal Centres (NACLCLC), jointly with its National Aboriginal and Torres Strait Islander Women's Network and the Aboriginal Advisory Group of Community Legal Centres New South Wales, welcome the opportunity to make a submission on the draft terms of reference for the ALRC inquiry into the incarceration rate of Indigenous Australians.

NACLCLC is the peak body for all community legal centres (CLCs) in Australia. CLCs are independent, non-profit, community-based organisations that provide free and accessible legal and related services to vulnerable and disadvantaged members of the community, including Aboriginal and Torres Strait Islander people. For example, the 2015 NACLCLC Census of CLCs in Australia revealed that 15.3% of CLC clients, on average, identified as an Aboriginal and/or Torres Strait Islander person. Some Family Violence Prevention Legal Services (FVPLS) and Aboriginal and Torres Strait Islander Legal Services (ATSILS) have chosen to join state and territory CLC associations and so also now come under the NACLCLC umbrella.

The **National Aboriginal and Torres Strait Islander Women's Network** is a national network of Aboriginal and Torres Strait Islander women who work in CLCs and FVPLS.

The **Aboriginal Advisory Group** of Community Legal Centres NSW draws its membership from the 30 Aboriginal staff working in Community Legal Centres in NSW.

We welcome this inquiry by the ALRC and broadly support the draft Terms of Reference. Briefly, we particularly support the following inclusions in the Terms of Reference:

- The reference to 'laws and legal frameworks', which will ensure the ALRC can look beyond legislative framework and reform options
- the requirement that the ALRC consider the substantial existing evidence base and work done to date
- reference to relevant international human rights standards and instruments
- requirement that the ALRC consider issues relating to data collection, and
- references to the work of legal assistance services.

We do however, make a number of suggestions below.

General Issues

- We prefer and suggest that the Terms of Reference refer to “Aboriginal and Torres Strait Islander peoples” rather than “Indigenous” peoples.
- We strongly suggest that the Attorney-General consider the appointment of an Aboriginal and/or Torres Strait Islander person as an ALRC Commissioner working on the Inquiry.
- We note that the ALRC will be required to provide its report to the Attorney-General by 15 December 2017. Given the nature and scope of the Inquiry, and that the Terms of Reference are yet to be established, we suggest that the Attorney-General consider at least a further 6 month extension of time within which the ALRC can complete the Inquiry.
- We support the reference to consultation with Aboriginal and Torres Strait Islander peoples and their representative organisations, as well as with Indigenous legal assistance services and the legal profession more broadly. We also suggest the inclusion of a reference to the requirement to consult with Aboriginal and Torres Strait Islander community-controlled organisations and all legal assistance providers (including Community Legal Centres) in the list of people/organisations to be consulted as part of the Inquiry
- It is important that the Commonwealth Government lead reform in this area. However, many of the issues considered are likely to fall under state or territory law. Given the role of the ALRC, we suggest the inclusion of reference to ‘modelling in Commonwealth laws’ in the Terms of Reference to ensure the ALRC has sufficient scope to suggest ways in which state and territory laws might be amended. The *Equality, Capacity and Disability in Commonwealth Laws* Inquiry conducted by the ALRC provides a useful example of how this approach might work in practice.
- Given the unique experiences of particular groups of Aboriginal and Torres Strait Islander people, we suggest the inclusion of specific reference to the experiences and needs of Aboriginal and Torres Strait Islander women (as the fastest growing prison population in Australia), children and young people, people with disability and issues of intersectionality.
- We also suggest that the Terms of Reference be amended to incorporate consideration of the overrepresentation of civil and family law matters in Aboriginal and Torres Strait Islander communities, and how these matters interact and intersect with criminal justice outcomes.

Detailed Additions to the Terms of Reference

Factors within laws and legal frameworks that affect decisions to hold or keep Indigenous Australians in custody...

With respect to this element of the Terms of Reference we suggest the addition of:

- penalties that result in incarceration, in particular non-payment of fines and driving offences
- other factors contributing to bail and the length of pre-trial detention, for example the preparation of mental health and health assessments
- recognition of Aboriginal and Torres Strait Islander legal systems and culture

Existing research and data that demonstrates... the effects of laws and legal frameworks on the rate of Indigenous incarceration...

With respect to this element of the Terms of Reference we suggest the addition of:

- the relationship between the child protection and criminal justice systems
- the conditions in custody and the rights of Aboriginal and Torres Strait Islander peoples in custody
- the existence and availability of alternative culturally appropriate court frameworks
- justice reinvestment approaches (as an element of alternatives to custody and/or offending)

We also suggest that the final dotpoint in this section be amended to read: the availability of and access to legal assistance and Indigenous language and sign interpreters, including the issue of the resourcing of legal assistance services

The broader contextual factors contributing to Indigenous incarceration and any laws and legal frameworks with regard to these...

With respect to this element of the Terms of Reference we suggest the addition of reference to:

- the relationship between out of home care and incarceration and the impact of prior contact with the criminal justice system and child protection systems
- issues of gender, including particular reference to the rising incarceration of Aboriginal and Torres Strait Islander women and the impact of factors such as family violence
- mental health and cognitive disability

Conclusion

Finally, we encourage the Attorney-General and the Department to demonstrate ongoing Commonwealth leadership with respect to this issue and to consider in advance the most appropriate structures and processes for considering and implementing any recommendations arising from this Inquiry.

We consent to this submission being made public, including through publication on the Department's website.

We hope the feedback outlined above is useful and would welcome the opportunity to provide further information or discuss any of the points raised. We look forward to contributing to this important Inquiry.

Kind regards

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National Association of Community Legal Centres