



**WOMEN'S LEGAL SERVICES NSW**

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**Incorporating  
Domestic Violence Legal Service  
Indigenous Women's Legal Program**

30 April 2015

Finance and Public Administration References Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600

By email: [fpa.sen@aph.gov.au](mailto:fpa.sen@aph.gov.au)

Dear Madam/Sir,

### **Aboriginal and Torres Strait Islanders' Access to Legal Assistance Services**

1. Women's Legal Services NSW (WLS NSW) thanks the Finance and Public Administration References Committee for the opportunity to comment on its Access to Legal Assistance Services Inquiry.
2. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims support, care and protection, human rights and access to justice.
3. We are a member of Community Legal Centres NSW (CLC NSW), the peak body for community legal centres in NSW. We co-convene the CLC NSW Prisoner's Rights Working Group and the CLC NSW Domestic Violence/Victims Compensation Subcommittee. We actively participate in the CLC NSW Aboriginal and Torres Strait Islander Rights Working Group and the CLC NSW Care and Protection Network.
4. WLS NSW has an Aboriginal Women's Legal Program (IWLP). This program delivers a culturally appropriate legal service to Aboriginal women in NSW. We provide an Aboriginal legal advice line, participate in law reform and policy work, and provide community legal education programs and conferences that are topical and relevant for Aboriginal and Torres Strait Islander women.
5. An Aboriginal Women's Consultation Network guides the IWLP. It meets every quarter over 2 days to ensure we deliver a culturally appropriate service. The members include regional community representatives and the IWLP staff. There is a representative from the Aboriginal Women's Consultation Network on the WLS NSW Board.



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6. This submission will focus on access to justice issues in NSW for Aboriginal and Torres Strait Islander women including victims of domestic violence and sexual assault, those engaged in care and protection matters or family law proceedings, women in prison and women in regional, rural and remote areas.
7. The term 'domestic violence' is intended to include domestic and family violence. We note that some people prefer to identify as victims of violence and others as survivors of violence. When we use the term 'victim' this is intended to mean both victims and survivors.
8. In summary, we recommend:
  - 8.1 Adequate funding of culturally safe specialist legal services, including specialist Aboriginal and Torres Strait Islander women's legal services;
  - 8.2 Adequate funding of culturally safe and accessible early intervention and parental support, including early intervention legal services, for all who wish to access it;
  - 8.3 As recommended in the 2012 *NGO Follow up Report to the United Nations Committee on the Elimination of Discrimination against Women* the Australian Government must work collaboratively with Aboriginal and Torres Strait Islander women, to seek their input and perspectives in relation to issues that affect them including: education, health, domestic violence and justice. This commitment must be adequately and sustainably funded.
  - 8.4 Positive engagement with Aboriginal and Torres Strait Islander women, particularly those who have experienced domestic violence, including sexual assault and intergenerational trauma, to support their capacity to be protective parents;
  - 8.5 Building an Aboriginal and Torres Strait Islander workforce in the justice system and support services;
  - 8.6 Ongoing cultural competency training for all child protection staff, police, judiciary, court staff, children's court clinicians, family report writers and legal practitioners;
  - 8.7 Further research and studies about early intervention and support for families and children in the Australian context<sup>1</sup> and the exploring of alternative solutions, including holistic community based models that include social worker/support services, parent advocates and early intervention legal services to support Aboriginal and Torres Strait Islander women.

### **Adequacy of access to legal services and justice system**

9. In 2012 the *NGO Follow up Report to the United Nations Committee on the Elimination of Discrimination against Women* was co-ordinated by the National Aboriginal and Torres Strait Islander Women's Alliance and the Australian Women Against Violence Alliance.
10. This report reflected upon the insufficient funding for culturally-appropriate Aboriginal and Torres Strait Islander women's legal services in urban, rural and remote areas of Australia.
11. It also recommended greater efforts and investment in recruiting Aboriginal and Torres Strait Islander legal practitioners and support workers.

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<sup>1</sup> While noting the 2008 Special Commission of Inquiry into Child Protection Services in NSW ('Wood Inquiry'), we believe a more extensive inquiry on this issue is required, such as occurred recently in Queensland.

12. It further recommended there needs to be a 'concerted effort in educating Aboriginal and Torres Strait Islander women about the legal process, understanding their rights and encouraging more women to seek justice'.<sup>2</sup>
13. The report also recommended the Australian Government must work collaboratively with Aboriginal and Torres Strait Islander women, to seek their input and perspectives in relation to issues that affect them including: education, health, domestic violence and justice. This commitment must be adequately and sustainably funded.<sup>3</sup>
14. The Australian Human Rights Commission made similar observations and recommendations in its report to the United Nations Committee on the Elimination of Discrimination Against Women.<sup>4</sup>
15. The Family Law Council's 2012 report: *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* includes recommendations to improve community education within Aboriginal and Torres Strait Islander communities about the family law system; promote cultural competency within the family law system; have a greater focus on early intervention and prevention; build an Aboriginal and Torres Strait Islander workforce in the family law system; and ensure access to interpreter services.
16. While some progress has been made in implementing some of these recommendations a considerable amount of work is still required to fully implement these recommendations.
17. To ensure Aboriginal and Torres Strait Islander women can access a culturally safe specialist legal service it is important that a range of services are adequately and sustainably funded. This is important when a conflict of interest arises. It is also empowering for women to have a choice of services to access.
18. It is therefore important to fund a range of culturally safe specialist legal services, including specialist Aboriginal and Torres Strait Islander women's legal services.
19. WLS NSW Indigenous Women's Legal Program has been operating for over 16 years. In addition to the programs mentioned above we also run two legal advice clinics in western Sydney which aim to engage Aboriginal and Torres Strait Islander women early on in their legal problem. For example, this program aims to direct Aboriginal and Torres Strait Islander families to the family law system rather than wait for the matter to escalate and for action to be taken in the children's court.

### **Early legal advice and early intervention support**

20. Based on the experience of our clients, there is a need for earlier intervention in matters involving child protection concerns. Parents and/or primary caregivers should be informed of child welfare authority concerns and referred for free legal advice at an early stage.
21. In NSW, following the 2014 legislative amendments to the *Children and Young Persons (Care and Protection) Act 1998 (NSW)* the Department of Family and Community Services (FaCS) has funded Legal Aid NSW to provide early legal advice to parents and primary caregivers.

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<sup>2</sup> National Aboriginal and Torres Strait Islander Women's Alliance and the Australian Women Against Violence Alliance, NGO *Follow up Report to the United Nations Committee on the Elimination of Discrimination against Women*, 2012 p15.

<sup>3</sup> Ibid at 2.

<sup>4</sup> Australian Human Rights Commission *Report To The Committee On The Elimination Of All Forms Of Discrimination Against Women*, published 31 August 2012, p.14 accessed on 20 April 2015 at: <https://www.humanrights.gov.au/independent-interim-report-cedaw>

22. The legislative amendments include the introduction of a legislated timeframe for a decision to be made about restoration of children to parents – 6 months where the child is younger than 2 years and 12 months where the child is 2 years and over.<sup>5</sup>
23. While there is discretion to grant an extension of time<sup>6</sup> we fear the very mention of a timeframe will lead to rigid decisions that fail to take into account that each child and family is unique and the best outcome will depend on individual circumstances. We do not support legislated timeframes.
24. Legislated timeframes also fail to acknowledge the challenges in accessing support services in a timely manner.
25. Access to early free legal advice is particularly important in the context of legislated timeframes.
26. Legal Aid NSW is working with Community Legal Centres in NSW as well as the Aboriginal Legal Services NSW to provide such services. The focus is on legal advice for parent responsibility contracts, parent capacity orders and alternative dispute resolution processes for contact disputes.
27. This is an excellent initiative to engage families with early intervention legal services.<sup>7</sup>
28. There is also great value in parents and primary caregivers being able to access free legal advice following their first interaction with FaCS or a non-government organisation child protection service, that is, at an earlier stage than is currently happening.
29. The purpose of such legal advice would be to help the parents/primary caregivers understand the reason for the contact with the child protection service, identify issues that need to be addressed and discuss what the parent/primary caregiver can reasonably do to address these issues – including ensuring the service(s) with whom they engage are accessible, available and affordable.
30. Given the over representation of Aboriginal and Torres Strait Islander children in out-of-home-care (OOHC) it is vital Aboriginal and Torres Strait Islander families can access free legal advice as early on as possible.
31. As at 30 June 2013, nationally there were 13,952 Aboriginal and Torres Strait Islander children in OOHC.<sup>8</sup> Aboriginal and Torres Strait Islander children are in OOHC at a rate of 10.6 times compared to non-Indigenous children.<sup>9</sup>
32. We note with concern that the second most common substantiation type is neglect.<sup>10</sup>
33. We submit that flexibility should be especially applied when dealing with Aboriginal and Torres Strait Islander children. Care needs to be given around judging an established culture by a different culture's standard. Through our advice and casework, we have seen many

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<sup>5</sup> *Child and Young Persons (Care and Protection) 1998 (NSW)* section 83(5).

<sup>6</sup> *Children and Young Persons (Care and Protection) Act 1998 (NSW)*, section 83(5A).

<sup>7</sup> Unfortunately, inadequate funding has been provided for this role, and referrals have been slow to develop. For example, most Community Legal Centres receive funding for 1 day a week for this service. These are matters for monitoring and development of the initiative.

<sup>8</sup> Australian Government, *Child Protection Australia 2012-13*, Child Welfare Series No 58, Australian Institute of Health and Welfare, Canberra, 2013 p51.

<sup>9</sup> *Ibid.*

<sup>10</sup> Australian Institute of Health and Welfare, *Child Protection*, accessed on 27 April 2015 at: <http://www.aihw.gov.au/child-protection/>

examples of FaCS staff with poor cultural competence and very little understanding of how a child is raised in an Aboriginal and/or Torres Strait Islander community. Placing western standards on Aboriginal and Torres Strait Islander community and family is not appropriate or helpful. There are many things to consider in determining what is best for the child including issues such as identity, belonging, community, country connection and wellbeing.

34. Parents who are suffering from the effects of trans-generational traumas and disenfranchised grief should be provided support and genuine help including parenting skills with a view to creating safe families.

### **Domestic violence and sexual assault and barriers to accessing justice & services**

35. Aboriginal and Torres Strait Islander women experience higher rates of more serious domestic violence. In a national survey of violence against women, 20% of Aboriginal women, compared to 7% of non-Aboriginal women were likely to have reported violence in the past 12 months.<sup>11</sup> Aboriginal and Torres Strait Islander women are approximately 40 times more likely to be victims<sup>12</sup> and 35 times more likely to be hospitalised due to domestic violence.<sup>13</sup>
36. The experience of the legal system for most Aboriginal and Torres Strait Islander women has been a negative, confusing and disempowering one.
37. Given the history of dispossession of land, culture and identity as well as the forced removal of children from their families, many Aboriginal and Torres Strait Islander women fear the government, police and authority figures. They therefore generally choose not to engage with the family law system as they are concerned that FaCS will be involved and take their children away.
38. A partner who is manipulating things for his own benefit or who is violent may reinforce this concern.
39. This is why community education about the importance of free early legal advice is so important.
40. Aboriginal and Torres Strait Islander women who are victims of violence (including sexual assault) feel an enormous sense of shame and humiliation about what has happened to them. They are afraid of retaliation and blame by their community if they report the violence and the perpetrator is incarcerated.
41. The ability of Aboriginal and Torres Strait Islander women to access the legal system without professional and ongoing holistic support is limited. Aboriginal and Torres Strait Islander women have often had violence inflicted on them by more than one perpetrator, as children and adults. They are particularly vulnerable and generally have moderate to severe post-traumatic stress and associated psychological conditions of varying degrees (eg. depression, severe anxiety, personality disorders). Aboriginal and Torres Strait Islander women are also disadvantaged by generally having low literacy levels and experience significant social, economic, geographic and cultural disadvantage. Many women have other family members

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<sup>11</sup> Jenny Mouzos and Toni Makkai, 'Women's experiences of male violence: findings from the Australian component of the International Violence Against Women Survey (IVAWS)' *Research and Public Policy Series*, No. 56, Australian Institute of Criminology, Canberra, 2004 p. 30.

<sup>12</sup> Richard Harding, Roderic Broadhurst, Anna Ferrante and Nini Loh cited in Mouzos and Makkai, Note 9 p28.

<sup>13</sup> Bronwyn Lumby and Terri Farrelly, 'Family Violence, Help-Seeking & the Close-Knit Aboriginal Community: Lessons for Mainstream Service Provision', *Australian Domestic & Family Violence Clearinghouse Issues Paper 19*, Australian Domestic & Family Violence Clearinghouse, Sydney, 2009 p. 2.

experiencing similar disadvantage, as well as also being victims of sexual assault and/or domestic violence.

42. There are many barriers to Aboriginal and Torres Strait Islander women reporting domestic violence and sexual assault to police. Some of these barriers include racist attitudes, police failing to believe the victim, failure on the part of police to take out an apprehended violence order (AVO) for the victim's protection or if one is taken out a failure to action breaches of AVOs.
43. During community consultations as part of our Human Rights Project in 2011 we heard reports in some rural areas of Aboriginal women being refused AVO requests when the other party was a non-Aboriginal person.
44. Other barriers include a lack of safe housing, refuges or private rentals.
45. Institutionalised ambivalence towards Aboriginal and Torres Strait Islander communities extends beyond the police and into the courts. In one rural area the Court Registrar sent women seeking protection from violence home telling them to "stop being silly."
46. In the case of reporting a sexual assault, an additional barrier in rural areas is the lack of medical staff to conduct a sexual assault investigation kit (SAIK) at the local hospital. For example, in Walgett and Brewarrina there are no medical staff trained to conduct a SAIK. As a result, immediately following an attack, victims of sexual assault must travel with police for up to four hours to the closest hospital where a SAIK can be conducted. They will not be able to change their clothes or have a shower until after the examination. Once at the hospital the police will often leave before the victim has completed the kit, leaving the victim without transport home and traumatised.<sup>14</sup>

### **Specialised domestic violence funding pathway in Legal Aid**

47. We do a considerable amount of work assisting women, including Aboriginal and Torres Strait Islander women, who have experienced domestic violence seek a grant of legal aid. Although domestic violence is recognised in the guidelines in NSW, the tests are complex, are described in gender neutral language which is contrary to lived experience and aid can be difficult to obtain unless advocacy is provided.
48. Women who have been victims of domestic violence are often pressured to settle in accordance with the recommendations of Family Reports as a grant of legal aid is generally withdrawn should a party wish to challenge the findings. This is a concern that Women's Legal Services Australia (WLSA), a national network of community legal centres specialising in women's legal issues, has raised in other inquiries.<sup>15</sup>
49. As WLSA argues, it is particularly troubling that even if there are aspects of the Family Report that should and could be challenged, many of our clients do not have the capacity or are too scared to self-represent if legal aid is withdrawn.
50. In situations of domestic violence, we believe access to justice and a fair hearing is jeopardised where legal aid is withdrawn simply because a parent seeks to pursue an application for orders which are different from those recommended by a Family Report

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<sup>14</sup> Women's Legal Service NSW, Human Rights Project Community Consultation: September 2011.

<sup>15</sup> See, for example, WLSA Submission in response to the Productivity Commission, Access to Justice Arrangements, 4 November 2013 at 18, accessed on 21 April 2015 at: [http://www.pc.gov.au/data/assets/pdf\\_file/0016/129121/sub029-access-justice.pdf](http://www.pc.gov.au/data/assets/pdf_file/0016/129121/sub029-access-justice.pdf)



Writer. This is more worrying in the absence of accreditation which ensures an understanding of the impact of trauma. In such circumstances it is important that the evidence is tested.

51. Additionally, in our experience family report writers and Independent Children's Lawyers do not always demonstrate cultural competence. We recommend the development of a larger pool of professionals, Aboriginal and Torres Strait Islander and non-Indigenous who are culturally competent.
52. If both parties are unrepresented and there is a history of domestic violence this raises additional concerns. There are currently insufficient protections to prevent an alleged perpetrator from directly cross-examining the victim of violence in family law proceedings. Additionally, the victim of violence may have to directly cross-examine the alleged perpetrator of violence.
53. The Productivity Commission recently recommended legislative amendment to provide protection for vulnerable witnesses in family law matters.<sup>16</sup> Legal aid provision is needed as well.
54. We refer to WLSA's submission to the Productivity Commission discussed above and support the development of a specialised domestic violence funding pathway in Legal Aid Commissions for family law that is developed with domestic violence experts to guide internal decision-making on merit. Enhanced funding is also required

### **Regional and Remote Communities**

55. Nineteen out of the top 20 NSW Local Government Areas (LGA) for domestic assault are in rural or regional LGAs. The top five LGAs are all remote (Bourke, Walgett, Moree Plains, Coonamble and Wentworth).<sup>17</sup>
56. Brewarrina, Walgett and Bourke are respectively, the first, third and eleventh most disadvantaged local government areas in NSW. They have large Aboriginal and Torres Strait Islander populations with 58.4%, 24.4% and 26.9% of the respective population identifying as Aboriginal and/or Torres Strait Islander. In 2008-2009 Bourke and Walgett experienced the highest number of domestic violence incidents per head of population than any other LGA.<sup>18</sup>
57. Alongside discriminatory police attitudes, we have found that women in rural areas find it difficult to access domestic violence support services in hospitals. Hospitals provide an ideal safe place for women to receive support, including referrals to legal services. However, there appears to be a lack of doctor/nurse training and a consequential failure to refer the victim to a social worker or any other available service. Considering that Aboriginal and Torres Strait Islander women are 35 times more likely to be hospitalised due to domestic violence, the role of the hospital as a support hub becomes increasingly important in order for Aboriginal and Torres Strait Islander women to access justice.

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<sup>16</sup> Productivity Commission, *Access to Justice Arrangements Report*, 2014, Recommendation 24.2

<sup>17</sup> K Gretch and M Burgess, *Trends and patterns in domestic violence assaults: 2001 to 2010*, Issue paper, no. 61, NSW Bureau of Crime Statistics and Research, Sydney, 2011, pp. 4-5.

<sup>18</sup> *NSW Domestic and Family Violence Action Plan*, p19.

## Aboriginal and Torres Strait Islander Women in prison

58. There has been a 20% increase in the incarceration of Aboriginal and Torres Strait Islander women since June 2011.<sup>19</sup> While it is not clear how many women had children in their care before being incarcerated, based on our experience of working with women in prison, some children would have been removed from their primary caregiver mother for this reason.
59. The offending of Aboriginal and Torres Strait Islander women is often inextricably linked to their experience as victims of violence.<sup>20</sup> A survey of Indigenous women prisoners in NSW found that 70% of respondents had been subjected to physical and sexual abuse as children; 78% reported had been subjected to physical and sexual abuse as children; 78% reported being physically assaulted and 44% sexually assaulted as adults<sup>21</sup>.
60. Such women have limited access to justice with respect to care and protection, family law and civil law matters.
61. The *Legal Education and Advice in Prison (LEAP) for Women* program assists women prisoners in realising and enforcing their human rights, in particular their rights in accessing justice. This service is provided by Women's Legal Services NSW, Warringa Baiya Aboriginal Women's Legal Centre and Hawkesbury Nepean Community Legal Centre.

Yours faithfully,  
Women's Legal Services NSW

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Indigenous Women's Legal Program

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<sup>19</sup> Australian Bureau of Statistics, *4517.0 Prisoners in Australia*, 2012.

<sup>20</sup> Lorana Bartels, "Painting the Picture of Indigenous Women in Custody in Australia", *QUT Law & Justice Journal*, Volume 12, Number 2, 2012, accessed on 27 April 2015 at: [http://www.canberra.edu.au/researchrepository/file/2540481c-c1bf-f0a3-e546-40d58c59f906/1/full\\_text\\_published.pdf](http://www.canberra.edu.au/researchrepository/file/2540481c-c1bf-f0a3-e546-40d58c59f906/1/full_text_published.pdf)

<sup>21</sup> Rowena Lawrie, *Speak Out, Speak Strong: Researching the Needs of Aboriginal Women in Custody*, NSW Aboriginal Justice Advisory Council, 2002.