kimberley community legal services

Submission to Indigenous Evaluation Strategy Project

1. Introduction and Executive Summary

Thank you for the opportunity to make a submission to the Productivity Commission's project on developing an Indigenous Evaluation Strategy.

Kimberley Community Legal Services (**KCLS**) is a not-for-profit Community Legal Service that addresses the civil law needs of people in the Kimberley who are unable to afford a lawyer. The vast majority of our clients are Aboriginal people. KCLS and other non-profit legal service in the Kimberley are grossly under-resourced compared to the extent of the disadvantage and legal needs. We note that we are not an Aboriginal organisation. We have operated for 20 years and can comment with experience on service delivery in the Kimberley.

Our submission is that any strategy evaluating government policies and programs in relation to Aboriginal people in the Kimberley must be based on self-determination.

This means that evaluation must be principled, authentic and accountable to Aboriginal people. Evaluation should operate from and implement the principle of free, prior and informed consent, and must do so in good faith. Evaluation must be culturally capable, fully able to reflect Aboriginal ways of knowing and Aboriginal knowledge systems. Being in good faith requires time and space for dissenting community views, and frameworks and engagements must not be tokenistic. Self-determination requires that Aboriginal people be treated as rights holders in relation to decisions about whether, when and how to evaluate the impacts on Aboriginal people of government policies and programs. It is expected that in many cases the exercise of these rights would result in Aboriginal Community Controlled Organisations (ACCOs) choosing to direct or undertake evaluation, or proceed collaboratively with non-Aboriginal entities or stakeholders.

Unfortunately, this concept is the reverse of what is currently occurs.

2. Recommendations

2.1. Self-determination must be the guiding principle in the Indigenous Evaluation Strategy.

2.2. Self-determination would be best effected if the decision making for evaluation were handed to ACCOs.

2.3. Evaluation must be consultative, meaningfully participatory and based on free, prior, and informed consent.

2.4. Evaluation must respect and reflect Aboriginal ways of knowing and be shaped by those systems of knowledge.

2.5. Frameworks must engage in deep listening, allow time and space for dissenting and diverse views, and be genuine and not tokenistic.

3. About Kimberley Community Legal Services

KCLS is a public benevolent institution incorporated under the *Associations Incorporation Act 2015* (WA), operating in the Kimberley of Western Australia, with offices in Broome and Kununurra, with the additional support of a permanent paralegal office based in the Australian National University in Canberra. The distance between the two main offices is over a thousand kilometres. Broome is situated on land of the Yawuru people; Kununurra is situated on land of the Miriwoong people, and Canberra is situated on land of the Ngunnawal people. In the Kimberley, we work, live, and travel on the land of many First Nations, and they include:

Bardi	Jabirrjabirr	Kukatja	Nimanburu	Walmajarri
Bunuba	Jaru	Kwini	Nyikina	Wangkatjungka
Doolboong	Jawi	Miriwoong	Nyul Nyul	Warwa
Gadjerong	Jukun	Miwa	Umida	Worla
Gamberre	Karajarri	Ngarinyin	Unggarangi	Worora
Walmajarri	Yawuru	Yiiji		

KCLS was established in 1999 and is an accredited Community Legal Centre under the National Association of Community Legal Centre accreditation scheme. KCLS is one of the most distinctive legal services in Australia given its location, the geographical span of its

communities and its client base. About 90% of KCLS clients are Aboriginal, and many clients live in remote communities across the Kimberley.

KCLS objectives include providing legal advice, information, support, and representation to people of the Kimberley in a readily accessible and culturally appropriate way. However, there is a vast gap between the legal needs of the communities we work in, and KCLS resourcing.

KCLS is not an Aboriginal organisation. KCLS has Aboriginal staff and has had Aboriginal board members and seeks to make the internal representation of the organisation more representative of the community but like many non-Aboriginal organisations, continues to wrestle with questions of engagement with respect to our Aboriginal clients.

4. Supporting self-determination

Policy making with respect of Aboriginal people can only be understood in the context of its history. This means taking account of: invasion and denying the existence and humanity of the First Nations people (terra nullius); widespread frontier violence; the taking of land; the forcible removal of Aboriginal children into state care; and successive governments actively fighting against recognising civil, land, social, economic, cultural and human rights. In the recently determined *Timber Creek* case, a community deeply connected to the Kimberley, the High Court upheld compensation for cultural loss for the extinguishment of Native Title, and Federal and Territory governments argued against those extinguishments being compensated.[1] Policy making continues to be deeply problematic.

The right to self-determination is contained in Article 1 of the International Covenant on Civil and Political Rights and in Article 1 of the International Covenant on Economic, Social and Cultural Rights. Australia is a party to both treaties.

Article 1 of both Covenants states:

> *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*

[1] *Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* [2019] HCA 7.

development.[2]

Our submission is that self-determination must be a guiding principle to the project.

Importantly, as successive attempts have been made to give meaning to self-determination, policy making has often had perverse and adverse consequences. For example, the struggle in the Kimberley for equal wages in the 1960s meant that many sectors ceased to employ Aboriginal people at the same time as the welfare system expanded. Many Aboriginal people went from being employed but unpaid/underpaid to being paid little and being unemployed. Therefore, self-determination has not been given meaningful effect in policy making.

KCLS supports the submissions to the Productivity Commission by the National Family Violence Prevention Legal Services Forum, and other ACCOs, which call for self-determination to be given effect *meaningfully* and *genuinely*.

Aboriginal communities and community programs in the Kimberley may well be the most over evaluated and poorly evaluated in the country. It is fair to say that communities in the Kimberley suffer from evaluation fatigue, and the monitoring and evaluation exercises around new policies and projects end up taking significant time away from the community's service delivery needs. As these frameworks come mostly from outside of the communities, they are regarded as interventionist and surveilling in nature. Therefore, to abide by a principal of self-determination would require government to hand over the decision making on the evaluation process to ACCOs.

To this extent KCLS draws attention to international approaches. For example, Indigenous Services Canada and the Assembly of First Nations co-developed a 10-year grant regime, which acknowledged that the existing fiscal relationship between First Nations and the Government of Canada is not working and tried to reset this relationship.[3]

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[2] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, [1980] ATS 23 (entered into force 23 March 1976) art 1; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, [1976] ATS 5 (entered into force 3 January 1976) art 1.

[3] See 'A new approach: Co-development of a new fiscal relationship between Canada and First Nations', *Indigenous and Northern Affairs Canada* (Web page, 23 January 2018) < https://www.aadnc-aandc.gc.ca/eng/1516389497863/1516389603336>.

The shared vision of the new fiscal relationship was to:

- constitute a regime that by design recognizes and is responsive to First Nations' right to self-determination – a recognition-of-rights approach;
- strengthen First Nations' exercise of their right to self-determination by supporting First Nations-led capacity enhancement;
- be a learning, evolving and empowering relationship – a conscious break from rigid colonial structures - with whole-of-Government approaches that address the realities of all First Nations;
- be founded on a mutual accountability relationship whereby First Nations governments operating under the auspices of the Indian Act are primarily accountable to their own citizens, while the Government of Canada and First Nations governments hold one another mutually accountable for the commitments they make to one another and work together to achieve results for First Nations citizens;
- ensure sufficient funding;
- empower First Nations to plan and invest based on their own priorities, by ensuring greater predictability, flexibility and autonomy of funding arrangements; and,
- underpin progress toward the elimination of socio-economic gaps between First Nations citizens and other Canadians.

Key aspects of this vision: grants for 10 years, mutual accountability, and ensuring sufficient funding are absent of the vast majority of program and policy making for Aboriginal people in the Kimberley. This is a powerful framework in considering an Indigenous Evaluation Strategy and gives a much stronger sense of what self-determination could look like. In terms of evaluation, accepting that Aboriginal people are first accountable to their own communities and their First Nations, means that decision making about evaluation must be handed to ACCOs.

Importantly, self-determination is not an esoteric concept. It makes good policy sense for the people for whom policy making affects to be fundamental in the design, delivery, and evaluation of that policy.

5. Case Study: Inquest into the 13 Deaths of Children and Young Persons in the Kimberley Region

From 2017-2019 the WA State Coroner held an Inquest into the deaths of 13 children and young persons in the Kimberley. This was 10 years after a similar inquest held by Coroner Alistair Hope. Without explicitly stating it, the new Inquest was investigating suicide by young Aboriginal people in the Kimberley and was evaluating the service delivery affecting mental health and young people.

The WA coronial jurisdiction is established by the *Coroners Act 1996* (WA). When a reportable death occurs, a coroner attains jurisdiction to investigate that death. Whilst most coronial inquests in WA examine individual deaths, the *Coroners Act* provides for the holding of inquests into multiple deaths. The holding of joint inquests has the potential to bring public health or safety concerns surrounding a series of deaths. Through the inquest, the coroner must make certain findings, such as how death occurred and the cause of death and may comment on any matter connected with the death including public health or safety or the administration of justice.

KCLS, together with the Aboriginal Legal Services of Western Australia (ALSWA), were independently approached by a number of families of the deceased persons, the subject of this Inquest, shortly after their deaths. These families requested representation if, and when, an inquest were held. Subsequent to being granted leave, KCLS approached the families of the other young people the subject of this Inquest, and asked if they wished to be represented. Consequently, KCLS acted as counsel for 8 families, and jointly with ALSWA for another 4 families of the deceased. At every stage of the coronial process the principle of self-determination was not given effect meaningfully and genuinely.

After the deaths of the 13 young people there was no ongoing contact with the families of the deceased to suggest that their family member would be the subject of an inquest. Information came informally from the Coroner's Court to legal representatives that had relationships with the Court that a joint inquest was intended for a range of young people who had died in the Kimberley in the preceding years. This seemed to be instigated from the death of a young girl in Looma in 2016 that sparked national attention. There was no indication as to why those particular people were selected, and not others. Families found

this out via their relationship with the legal services, and in the majority of cases, only after the Inquest had been commenced.

Significantly, Counsel Assisting the Coroner had been preparing a brief of evidence for the Inquest without consulting with the families of the deceased persons. This ultimately had the effect of preferencing of accounts of government agencies over the voices of the people and the communities who had long-standing relationships with the deceased. There was no apparent thought given to what evidence the family wanted examined and what evidence the family wanted included in the briefs. Throughout the Inquest and up to the end of the hearing, lawyers acting for the families of the deceased were preparing statements to be treated as parted of the evidence to form part of the Inquest. For example, KCLS tendered statements from five families of the deceased.

When KCLS was requested by the State Coroner to approach the other families, little consideration had been given about the amount of time that was required to engage with families on what was an incredibly sensitive subject. Additionally, given that the families were only approached after the Inquest commenced, they were rightly suspicious and sceptical about the process.

Initially there was no consideration given to whether an interpreter or cultural liaison was required to assist the Coroner to understand the proceedings. When KCLS made submissions on this issue, the Coroner then asked KCLS and ALSWA to seek instructions about which families required an Interpreter. The families did not respond because consultation was again after the fact and not genuinely attuned to their cultural needs. Further, it was predicated on the need for the family's voices to be interpreted, rather than the Coroner's need to understand the linguistic barriers and cultural context.

There was no consultation about the location of the Inquest. The Coroner decided to hold the Inquest in Perth primarily. All of the deceased persons has died in the Kimberley, thousands of kilometres from Perth. There were additional hearing dates in Broome and Kununurra. KCLS received instructions from some families that they wanted hearing dates in Halls Creek, which was the town that was closest to certain families. The Coroner rejected this submission, and after continued submissions, finally agreed to sitting dates in Fitzroy Crossing, 290kms from Halls Creek, and to video-conference to Halls Creek.

The Inquest itself considered evidence that was widely outside of its remit. For example, it considered the operation of the Cashless Debit Card, which was not in operation at the time of any of the deaths of the deceased.[4] To this extent, it lacked rigour and relevance, and loosely examining many policies relating to Aboriginal people without a clear link to the deaths of the deceased persons.

Further, it is relevant to consider the legal and ethical duties of counsel assisting the coroner and counsel for the state. The state's interests relate to the good governance of all its subjects, and counsel assisting the coroner has a responsibility to conduct the case assisting the Coroner fairly. Both made submissions, for example, in support of the Cashless Debit Card, and the counsel for the state made submissions about it being a choice for Aboriginal people to live on country, repeating sentiments that had been made by the former Prime Minister Tony Abbott. Both counsel should ostensibly in their remit have been acting with regard to the principle of self-determination. In Fitzroy Crossing a number of Aboriginal witnesses who are senior leaders in the Kimberley and had been asked to provide evidence on systemic issues were distressed by the tone of both counsel as being paternalistic and offensive.

5.1. Case Study Discussion

The purpose of discussing this case study is to highlight how a government evaluation process such as an Inquest does not meaningfully operate within a framework of self-determination. In fact, it operated in the inverse way, disempowering the community in the instances the community engaged in the process.

To attempt to address these issues in the Inquest KCLS focused on centring our clients' voices and preferencing of Aboriginal experts who gave evidence. KCLS obtained the evidence noted above, including, for example, a video of young people in the Kimberley talking about mental health. KCLS also facilitated a smoking ceremony for the Coroner's hearing on Yawuru country. Point 4 of KCLS's submission was that:

[4] Coroner's Court of Western Australia, *Inquest into the Deaths of 13 Children and Young Persons in the Kimberley Region* (Inquest Findings, 7 February 2019) 324-326.

> *A holistic, whole-of-government approach is essential to address the underlying issues that place young Aboriginal people in the region at risk of suicide. Such an approach must engage Aboriginal communities and organisations as partners in determining the solutions. The need to promote cultural continuity and empower Aboriginal communities and organisations to drive solutions to this issue were consistently highlighted in evidence before the Inquest, with Aboriginal witnesses expressing frustration at the failure of governments to give due weight and regard to these matters.* [5]

With respect to self-determination the KCLS submission submitted at point 93:

> *The capacity to exercise self-determination and enable cultural continuity was identified by Chandler and Lalonde (2008) as a significant protective factor against suicide amongst young Indigenous people in Canada.*[6] *The authors refer to cultural continuity as Indigenous control over aspects of culture and identify several markers of cultural continuity. These markers include self-determination and self-government, progression of native title and land claims, control over health, education and social services, influence over police and justice services, control over children's services, community engagement in the preservation of culture, knowledge of Indigenous languages, and women in leadership and governance roles. Those communities with the greatest number of markers were found to have significantly less suicides, whereas, communities displaying none of these protective markers tended to have higher youth suicide rates.* [7]

These submissions are relevant in the context of this project also.

6. Consultation, participation, and free-prior and informed consent

The United Nations Declaration on the Rights of Indigenous peoples states at Article 19 that:

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[5] Kimberley Community Legal Service, Submission to Coroner's Court of Western Australia*, Inquest into the Deaths of 13 Children and Young Persons in the Kimberley Region*.

[6] Michael J. Chandler, Christopher E. Lalonde, 'Culture Continuity as a Protective Factor Against Suicide in First Nations Youth' (2008)10(1) *Horizons* 1.

[7] Kimberley Community Legal Service, Submission to Coroner's Court of Western Australia*, Inquest into the Deaths of 13 Children and Young Persons in the Kimberley Region*.

States shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them. [8]

This Article gives voice to requirements for policy making in relation to legislative and administrative measures that may affect Aboriginal people. Aboriginal people must be consulted when policies are being proposed that may affect them, but more importantly, genuine self-determination would have local Aboriginal people decide how they wanted their programs designed and evaluated. In relation to the case study above, the KCLS submission at point 98 stated:

> *The importance of community led and driven solutions were consistently highlighted in evidence by Aboriginal witnesses. Brenda Garstone stressed the need for Aboriginal communities to be empowered to use their knowledge and skills to identify solutions to address the issues contributing to poor social and emotional well-being in their communities: 'It is important that Aboriginal people are supported to develop culturally appropriate systems to incorporate our values and practices to empower our people to take responsibility over themselves.' This should involve strength based strategies that recognise and build on the existing strengths of Aboriginal communities and enable Aboriginal people and organisations to be meaningfully engaged in the design and delivery of culturally relevant programs to address these issues.*[9]

7. Respect Aboriginal systems of knowledge

KCLS draws attention to the submission of the National Family Violence Prevention Legal Services Forum which states:

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[8] *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) art 19.

[9] Kimberley Community Legal Service, Submission to Coroner's Court of Western Australia*, Inquest into the Deaths of 13 Children and Young Persons in the Kimberley Region*.

> *Indigenous Data Sovereignty (IDS), Indigenous Data Governance (IDG) and the importance of data for the advancement of self-determination should feature strongly in the conversation about an Indigenous evaluation strategy.*[10]

KCLS supports their submission and considers it fundamental to any Indigenous Evaluation Strategy.

A good example of respecting an Aboriginal system of evaluation and knowledge keeping is the Mayi Kuwayu Study[11], which looks at how Aboriginal and Torres Strait Islander wellbeing is linked to connection to country, cultural practices, spirituality and language use. This is the first longitudinal study of its kind in Australia, and it is the first time a national study will provide an evidence base to allow for the creation of better policies and programs. This study has been created by and for Aboriginal and Torres Strait Islander people. It is an Aboriginal and Torres Strait Islander controlled research resource.

KCLS supports evaluations such as Mayi Kuwayu that are framed by Aboriginal knowledge systems.

8. Deep listening, allowing time and space for dissenting and diverse views

Self-determination as a framework requires a genuine willingness to listen – much of the literature coming from Aboriginal leaders in this space discusses and refers to "deep listening".[12] Professor Judith Atkinson, Aboriginal academic and trauma expert, describes the process in the following way:

> *"for me time stood still; I listened, listened, trying to quieten myself. Just to hold and witness her story, knowing that I was crying, but unable to stop, as I came to hear and understand the multiplicity of the grief and complex trauma of her life.*

[10] National Family Violence Prevention Legal Services Forum, Submission to the Productivity Commission, *Indigenous Evaluation Strategy* (August 2019) 7, provided to KCLS by NFVPLS on 23 August 2019.
[11] For further details about the study, refer to its website at https://mkstudy.com.au/
[12] See for example J Atkinson, 'The Value of Deep Listening- The Aboriginal Gift to the Nation', *TedX Event Sydney* on 1 August 2017, available at: https://www.youtube.com/watch?v=L6wiBKClHqY

> *Finally she came back to the room, saw me, in the doctor's surgery, sitting in front of her, and she reached out and wiped a tear from my cheek, took a deep breath and said, "thank you…I've never told anyone this story before. Thank you for listening."*[13]

With respect to the case study above of the Inquest, deep listening required a willingness to engage and not look for pre-determined outcomes, or ask questions (or adduce evidence etc) in ways that were foreign to people. It required time for people to sit with the process; it required the possibility for people to have dissenting views, and those dissenting views needed to be considered genuinely and in good faith by decision makers. This was not the process that occurred. In WA, the State Coroner recognises it is the 'role of the Coroner's Court…to speak for the dead and to protect the living.'[14] Ironically, if the Coroner's Court were to abide by its role, deep listening would form a necessary part of its practice.

Dr Atkinson states:

> *"This is the beginning of healing. These are the stories that are pushed down and are stories that need to be told and we need to listen to them. But with listening comes responsibility. It forces us to listen to ourself."* [15]

Deep listening is good policy making.

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30 August 2019

[13] See note above, at 5:40-6:15
[14] Office of the State Coroner for Western Australia, *Annual Report 2015-2016* (2016), 5.
[15] See note above, at 6:40-6:55