Response to Draft Report – Review of the National Agreement on Closing the Gap

Aboriginal Family Legal Service

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1 Introduction

Aboriginal Family Legal Service (AFLS) welcomes the opportunity to provide a submission to the Productivity Commission's Draft Report – Review of the National Agreement on Closing the Gap.

AFLS is a specialist Aboriginal Community Controlled Organisation (ACCO) operating under the Family Violence Prevention Legal Service (FVPLS) program funded by the Commonwealth Government through the National Indigenous Australians Agency. AFLS provides specialist legal assistance and wrap-around non-legal supports to Aboriginal and Torres Strait Islander people experiencing or at risk of family and domestic violence and/or sexual assault.

AFLS is the largest FVPLS operating in Western Australia, with services delivered to the East and West Kimberley, Gascoyne, Midwest, Goldfields, Pilbara and Perth metropolitan regions. AFLS offices are located in Broome, Kununurra, Carnarvon, Geraldton, Kalgoorlie, Port Hedland and Perth, from which outreach services extend to over 30 remote Aboriginal townships and communities. AFLS has a service delivery area of approximately 1,978,622 square kilometres, with an estimated Aboriginal and Torres Strait Islander population of 72,961 people.

This submission seeks to highlight the experiences of AFLS as an ACCO operating in an environment of restricted funding arrangements and ongoing disadvantage at the hands of State and Commonwealth Government agencies. AFLS has responded only to the information requests that it is well placed to provide a submission on.

2 General Comments

AFLS strongly supports the Productivity Commission's conclusion that the National Agreement on Closing the Gap's reforms have not been prioritised by governments. We note that in Western Australia, AFLS has not been invited to be a member of the Justice Policy Partnership group led by the Department of Justice. This is despite advocacy from a member of the Partnership group, the Aboriginal Legal Service of Western Australia (ALSWA), for our membership and despite our organisation being the largest specialist Family Violence Prevention Legal Service for Aboriginal people experiencing family and domestic violence in the state. We point out that in the specific context of providing government funded legal assistance services to Aboriginal people, it has been our experience that state agencies such as the Department of Justice have pre-determined ideas about how best to service and meet the needs of Aboriginal communities, which they impose on legal assistance service providers. Examples include:

- The Department of Justice allocating funding to ALSWA through the Workplace Sexual Harassment and Vulnerable Women funding streams of the National Legal Assistance Partnership, despite ALSWA not wanting to deliver such programs and advocating for AFLS to receive the funding instead.
- Consistent exclusion of the FVPLS units in Western Australian from any funding distributed by the Department of Justice through the National Legal Assistance Partnership (NLAP), including the Vulnerable Women's funding stream in the 2021-22 financial year. This is despite funding eligibility requirements for such funding including registration as a service provider through Community Legal Western Australia, which the three FVPLS units are members of. The restrictive approach to this funding stream in particular was in our understanding only taken in Western Australia, with advice from other states and territories being that Attorney General's in those jurisdictions made specific allowances for the FVPLS units in their states to attain funds allocated under the Vulnerable Women's stream of the

NLAP, through an exclusive tender process for money portioned off from the NLAP for the FVPLS units.

- The Department of Justice advising the FVPLS units that it is 'in our best interests' to participate in the Department's development of such pieces of work as the Legal Assistance Strategy and Action Plan 2022-2025 and the Legal Assistance Sector Workforce Planning and Development Strategy, despite the FVPLS units not being under the NLAP and ineligible for any funding allocated through the scheme until at least 2025. Resistance against participation is met with opposition from the Department, regardless of the fact that FVPLS participation requires the dedication of significant time and effort from our already stretched and limited resources. With respect to the development of the Workforce Planning Strategy, we note that an external consulting agency has been commissioned by the Department to develop such a strategy at what we presume to be a significant cost, meanwhile the legal assistance service providers have raised consistent, unchanged concerns about what we know to be workforce planning and development issues, over the last decade with little State Government action.
- The Department of Premier and Cabinet commencing a long consultation process on AFLS's intention to appoint Court Advocates (Court Officers) in civil matters in regional and remote communities where staffing recruitment and retention issues have resulted in long term absences of legal staff, despite there being a statutory entitlement for AFLS to do so under Section 48 of the *Aboriginal Affairs Planning Authority Act 1972.* This is despite the Aboriginal Legal Service of Western Australia already delivering Court Officer services in their jurisdiction of law, which the AFLS model will be based on.
- The Attorney General ignoring calls from the collective legal assistance sector for the introduction of a dedicated Commissioner for Aboriginal Children and Young People role to address the specific needs of marginalised and disadvantaged Aboriginal children and young people in Western Australia.
- The Department of Communities' leadership of a Hub in Broome in response to the flooding events at the beginning of 2023, which was culturally unsafe and ill equipped to meet the needs of the Aboriginal community in the aftermath of the disaster event. There was a futile lack of Aboriginal representation in the emergency supports being administered by the State Government through the Hub, including staff members of the Hub not knowing the names of local Aboriginal communities, not knowing where those communities are, and not knowing how to properly communicate with community members seeking assistance due to the absence of trained interpreters to support the response. This is despite feedback from Kimberley based service providers such as AFLS, ALSWA, Legal Aid and Kimberley Community Legal Service on the immediate support and recovery needs of the affected communities.

We fail to see how the elements of shared decision making, strengthening the ACCO sector, transforming government operations and shared access to data articulated in the National Agreement have been put into practice in Western Australia.

3 Priority Reforms

3.1 Information Request 1: Effectiveness of Policy Partnerships

As referred to in the section 2: General Comments, AFLS has not been invited to be a member of the Justice Policy Partnership group in Western Australia. To our knowledge, this reflects a lack of interest from the State Government in genuinely partnering with key Aboriginal stakeholders to achieve progress against justice targets and deliver better outcomes for Aboriginal people in Western Australia. We are unable to comment on the accountability structures and governance of the Justice

Policy Partnership group, but note that ALSWA has continued to advocate for AFLS's membership on the group, with limited positive response from government.

We do note that the state's Annual Report on Closing the Gap from September 2022 lists the Government's work with Commonwealth, State and Territory Governments and the Coalition of Peaks to establish formal policy partnerships relating to adult and youth incarceration, suicide prevention and social and emotional wellbeing, and early childhood care and development as key achievements. This reinforces the Productivity Commission's observation that elements of shared decision making have not been adopted in wider practice beyond formal partnerships, despite the recognition that shared decision making is essential to building trust and paving the way for implementation of all the Priority Reforms.

3.2 Information Request 2: Shifting service delivery to ACCOs

We welcomed the transfer of responsibility for the Family Violence Prevention Legal Service delivered to Aboriginal victims of family violence and/or sexual assault in the Perth metropolitan area from mainstream service providers Women's Legal Western Australia and Relationships Australia to two ACCO FVPLS units, AFLS and Southern Aboriginal Corporation (SAC), in 2022. This transfer of responsibility demonstrated a positive shift in government thinking about best practice service delivery for Aboriginal people. We have seen the benefits of our Aboriginal controlled service delivery apparent in the outcomes of our clients and the demand for our service. Nevertheless, AFLS and SAC were still required to competitively tender against non-Aboriginal organisations for the service, and the contract for the service is only for 3 years. This creates a lack of assurance around the ongoing sustainability of the metropolitan service as it is currently delivered, by two Aboriginal organisations. We additionally note that the performance data and reporting requirements for the metropolitan service are onerous and inconsistent with data and reporting requirements across our other service agreements.

In regard to funding arrangements, we note that core recurrent funding provided to agencies such as AFLS through State and Commonwealth Government agencies rarely includes considerations for CPI and inflation, and rarely covers the full cost of providing our services. This leaves service providers in a tenuous situation where we are required to find money from some other source to ensure we can continue to operate our service at the same levels and standards we have for the last decade. For the FVPLS units across Australia, this funding uncertainty is complicated by the uncertainty around our transition to the National Legal Assistance Partnership, which leaves us unsure of which agency will administer our next funding agreement from 2025. It is impossible to effectively negotiate funding agreements that cover the full cost of providing services and meet our service and client needs when we don't know which funding body we should be negotiating with. This is a pertinent example of the environmental landscape in which ACCOs such as the FVPLS units are operating, which continues to disadvantage Aboriginal controlled service delivery for Aboriginal people.

We were additionally recently disappointed by the Department of Justice's decision to fund three non-Aboriginal organisations to deliver a 'Leave Safe Stay Safe' program to help female prisoners nearing the end of their sentences who have identified as FDV victim-survivors. The $2 million initiative gives prisoners one-on-one social support and legal advice to support them and their families before and after their release from Bandyup Women's Prison and Greenough Regional Prison. The Department of Justice initially consulted on the parameters of the tender, during which AFLS provided substantial information to inform the suitability of the tender request according to the money available from the Department and our experiences of providing regional and prison services to victims of family and domestic violence. AFLS then responded to and was unsuccessful in our application to deliver the

prison program, with the Department of Justice advising that our response did not provide sufficient detail on how our expertise in working with Aboriginal women would be adapted to meet the needs of non-Aboriginal women. We note that it was recognised that the bulk of women receiving services from the Leave Safe Stay Safe program would be Aboriginal, given the overrepresentation of Aboriginal women as victims of family and domestic violence and the disproportionate representation of Aboriginal people in the criminal justice system. This is an example of government advertising their commitments to systemic reform but failing to see this through in practice.

3.3 Information Request 3: Transformation of government organisations

Per the Commission's preference, AFLS will leave this section to be majority informed by individual government organisations.

We do note that in Western Australia, we have seen what we consider to be half hearted efforts by government to genuinely transform their ways of working in respect of service delivery for Aboriginal people. For example, AFLS entered a partnership arrangement with the Department of Justice in 2022 under which AFLS released a senior policy officer 4 days per week for 6 months to develop the Department's Aboriginal Family Safety Strategy. The Department and AFLS, as part of this arrangement, co-convened an Aboriginal Family Safety Strategy Stakeholders Reference Group (SRG) to inform the foundational documents that underlay the development of the Department's Strategy so that it is responsive to the needs of Aboriginal people and communities. The SRG is an advisory body to the Department, co-chaired by the Department and AFLS. While this presents a suitable opportunity for government to transform their ways of working and shift decision making responsibility equally to AFLS as a co-chair of the SRG, the Department remains solely responsible for decisions about the Strategy. Shared decision making is therefore limited to the way in which the SRG operates and the work of the SRG is dictated by the Department. This is a pertinent example of government failing to implement the systemic and structural changes in their work that are critical to improving accountability and responsiveness of the Department to the needs of Aboriginal communities across Western Australia. We see an unwillingness from government to relinquish control over policy decisions and an entrenched commitment to continuing their operations according to their existing structures and decision making processes.

3.4 Information Request 4: Indigenous data sovereignty and Priority Reform 4

Data sovereignty, as it relates to Aboriginal people, is the theory that discusses the rights of Indigenous peoples to control the collection, access, analysis, interpretation, management, dissemination and reuse of Indigenous data.[1] The Maiam nayri Wingara Indigenous Data Sovereignty Collective identified that in Australia, Indigenous peoples have the right to:

1. Exercise control of the data ecosystem including creation, development, stewardship, analysis, dissemination and infrastructure.
2. Data that are contextual and disaggregated (available and accessible at individual, community and First Nations levels).
3. Data that are relevant and empowers sustainable self-determination and effective self-governance.
4. Data structures that are accountable to Indigenous peoples and First Nations.
5. Data that are protective and respects our individual and collective interests.

[1] Maiam nayri Wingara, Indigenous Data Sovereignty Communique Indigenous Data Sovereignty Summit', June 2018, https://www.maiamnayriwingara.org/mnw-principles.

Nevertheless, the principles have not been embedded into such documents as the National Agreement on Closing the Gap, which means that when data is obtained from or about Aboriginal people, agencies and service providers can elect to observe these principles or not. In Western Australia, the Legal Assistance Branch of the Department of Justice is developing a Legal Needs Assessment Data Tool Framework 2023-2025, which is intended to set the strategic direction for the development and enhancement of a Legal Needs Assessment Data Tool and related data informed service components. Part of the development of the data capability of the sector includes establishment of a Legal Assistance Sector Dashboard which displays selected information regarding the entirety of legal assistance service data and estimate legal assistance demand measures. It is acknowledged that there is potential application of this information to provide quantitative evidence to support funding applications; however, the Department of Justice has identified that service provides will not be able to publish or share any data extracted from the Dashboard outside of the organisation, except where a funding application is made to an authorised government agency who provides funding to the sector.

AFLS raised concerns that this approach is not suitable for our service given that our funding streams are not just limited to funding provided through the Department of Justice, and in fact our funding from the Department is minimal. We advised that being unable to share information about our service delivery comparative to other legal assistance service providers in funding proposals and business cases to alternative funding sources sch as philanthropic organisations or through grant funding is inconsistent with the principles of Indigenous data sovereignty and completely inappropriate. The Department responded that access to sector data must be limited to agencies with an understanding of the collection processes and any data limitations, to avoid incorrect understanding of the data. We argue that philanthropic and other non-government organisations could be added to the list of authorised funding bodies and receive the same briefing on data collection processes and how the data can be interpreted as government agencies. This is an example of government advertising their commitments to systemic reform but failing to put those commitments into practice. If the principle of Indigenous data sovereignty was contained as an objective within the National Agreement, it may not give agencies such as the Department of Justice such a continued monopoly over the use and interpretation of data collected about Aboriginal people. It is logical that the data collected about Aboriginal communities belongs to those Aboriginal communities, and that the services that work in and with those communities have control over how that data is used and the stories that it tells.

4 Tracking Progress

4.1 Information Request 6: Characteristics of the organisation to lead data development under the Agreement

Indigenous data governance is about having the decision making power to decide how and when Indigenous data is gathered, analysed, accessed and used. If an organisation were appointed to lead data development work to track progress under the Agreement, it must have the capacity to collect data that reflects Indigenous priorities, values and culture, and reinforce rather than restrict Indigenous community goals and ambitions. The independent organisation must have the skills and capabilities to collect data about progress under the Agreement in a way that protects Indigenous data integrity, supports Indigenous leadership in data decision making, is accountable to Indigenous people on decisions around data collection and use, and recognises Indigenous interests, including collective interests, in relation to data. The organisation should have a governance structure that is built on Indigenous expertise and which is accountable to Indigenous communities across Australia. The NSW Government’s Communities and Justice presentation on Ngaramanala: Aboriginal

Knowledge Program identified that non-Indigenous data governance has led to the 5D (difference, disparity, disadvantage, dysfunction, deprivation) deficit narrative which has harmed Aboriginal people for generations. Examples include government's concluding that:

- 'Educational outcomes for Aboriginal students are significantly lower than for their non-Aboriginal counterparts' rather than 'Australian past policies of excluding Aboriginal people from education has caused harm, which still impacts Aboriginal students today'.
- 'Aboriginal people are more likely to offend and end up in prison than non-Aboriginal people', rather than 'The over surveillance of Aboriginal people leads to higher likelihood of involvement in the criminal justice system'.
- 'Being Aboriginal is a risk factor' rather than 'Protective abilities and strengths are embedded in Aboriginal culture. Belonging to culture creates resilience leading to better social, emotional and physical health outcomes'.
- 'Aboriginal children are better off with non-Aboriginal families' rather than 'Aboriginal children need to be raised with cultural permanency. Wellbeing for Aboriginal children is correlated with cultural connection'.[2]

The independent organisation must have the capabilities to make conclusions informed by data about progress under the National Agreement on Closing the Gap, consistent with this approach of practically applying the principles of Indigenous data sovereignty and data governance. This is essential to ensure that there is Aboriginal governance and oversight; that data is able to be contextualised and disaggregated at local levels that are meaningful to Aboriginal communities; there is consistent, transparent and contextualised reporting and dissemination of data; Aboriginal priorities and community data needs are centred; Aboriginal interpretation of data is applied to ensure that reporting is respectful of Aboriginal people, communities and interests; and Aboriginal data is reported in context.[3]

5 Assigning clearer responsibilities and accountability for driving action within the public sector

We support draft recommendations 2, 3 and 4. We highlight the particular importance of embedding responsibility for improving cultural capability and relationships with Aboriginal people into public sector employment requirements, noting that we recognise there is often impetus from lower level public servants to change ways of working but blocks from executive management to do so. We additionally consider that changes to Cabinet, Budget, funding and contracting arrangements are essential to better supporting the achievement of progress under the Agreement. We would like to see the Western Australian Government adopt a similar approach to the NSW Treasury, which per the Draft Report "worked in partnership with NSW CAPO to develop a framework for evaluating Closing the Gap proposals for the 2022-23 Budget to decide what policies and programs should be funded." Balancing standard evidence based requirements and economic impact considerations with culturally appropriate principles should be at the core of all Cabinet, Budget, funding and contracting processes,

[2] NSW Communities and Justice, 'Ngaramanala: Aboriginal Knowledge Program – Responding to Indigenous Data Sovereignty and Indigenous Data Governance', July 2022, https://www.facs.nsw.gov.au/__data/assets/pdf_file/0006/842388/Responding-to-IDS-and-IDG-slides.pdf.

[3] NSW Communities and Justice, 'Ngaramanala: Aboriginal Knowledge Program – Responding to Indigenous Data Sovereignty and Indigenous Data Governance', July 2022, https://www.facs.nsw.gov.au/__data/assets/pdf_file/0006/842388/Responding-to-IDS-and-IDG-slides.pdf.

so as to privilege Aboriginal perspectives and prioritise greater investments in service delivery for Aboriginal people by Aboriginal people (organisations).

5.1 Information Request 11: Sector-specific accountability mechanisms

We can make particular comments in respect to the Ombudsman WA, which we consider to be an ineffective accountability mechanism for Aboriginal people in Western Australia. We do not consider the Ombudsman to be a suitable, culturally safe or appropriate option for Aboriginal people to use to make complaints about State Government agencies, in particular the Department of Communities and WA Police Force. We consider that there is significant under-reporting of complaints from Aboriginal people in health and community services, especially in the child protection environment, due to fear of retribution if complaints are made, informed by historical experiences of and involvement with government agencies and systems that have disadvantaged and traumatised Aboriginal people.

That is why we have been advocating for the introduction of a dedicated Commissioner for Aboriginal Children and Young People role in Western Australia. The introduction of such a separate independent statutory position dedicated to the advocacy of Aboriginal children and young people is warranted by the complex and entrenched nature of the issues facing Aboriginal children and young people in our state. The role should have discretion to focus on matters directly affecting Aboriginal children and young people, with statutorily entrenched functions related to:

- Advocacy
- Hearing and investigating complaints
- Conducting independent inquiries and formal investigations
- Publishing reports and making recommendations to government
- Monitoring and reviewing laws, policies and practices affecting the wellbeing of Aboriginal children
- Ensuring the state satisfies its international obligations in respect of Aboriginal children, and
- Undertaking or commissioning research into topics related to Aboriginal children.

The introduction of such a mechanism would afford Aboriginal people access to the same level of accountability, focus and expertise on issues facing Aboriginal children and young people that is provided for non-Aboriginal children and young people. Appropriate and independent advocacy of Aboriginal children and young people is crucial to improving self-determination and empowerment for the Aboriginal community, and to keeping government agencies accountable for their practices which to this day continue to disproportionately disadvantage Aboriginal families and their children. The former Commissioner for Children and Young People WA repeatedly advocated for a dedicated Aboriginal Commissioner for Children and Young People role in Western Australia, noting that this was critical to supporting governments, decision makers and the broader community to act in the best interests of the state’s 40,000 Aboriginal children and young people. Designated accountability mechanisms such as the Commissioner, with pure focus on issues such as over-representation of Aboriginal children in youth justice and out-of-home care settings, have a greater chance at knowing how to address these issues and deliver positive outcomes for Aboriginal people.