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3 June 2013

Senator Nigel Scullion
Minister for Indigenous Affairs
By email: Senator.Scullion@aph.gov.au

Dear Senator Scullion,

Funding of the Custody Notification Service, Aboriginal Legal Service (NSW & ACT)

Australian Lawyers for Human Rights (**ALHR**) urges you, as the Minister for Indigenous Affairs, to take urgent action to secure Commonwealth funding for the Custody Notification Service (**CNS**) operated by Aboriginal Legal Service (NSW & ACT) Limited (**ALS**).

The ALHR notes that **there have been no deaths in police custody in NSW or the ACT since the phone line began in 2000**. ALHR is urgently calling on the Commonwealth Attorney general and Minister for Indigenous Affairs restore funding for this essential service. We urge you to guarantee the continued operation of the Custody Notification Service which requires:

- 1. Funding of \$526,000 per annum to commence on 1st July 2015;**
- 2. A funding commitment of 2 – 5 years.**

The CNS is a rare example of an extremely successful program that resulted from the Royal Commission into Aboriginal Deaths in Custody. The ALHR submits that the loss of this service would be an enormous step backwards. We have grave fears that adverse outcomes for Aboriginal persons in custody will worsen if the CNS does not exist.

This letter identifies the grounds supporting our call for this funding, by reference to the Royal Commission into Aboriginal Deaths in Custody and international human rights standards.

1. Royal Commission into Aboriginal Deaths in Custody and NSW legislative requirements

Aboriginal peoples in Australia are among the most highly incarcerated peoples in the world, being 15 times more likely than other Australians to be imprisoned.¹ Statistics released by the Australian Bureau of Statistics late last year show that Aboriginal and Torres Strait Islander peoples' imprisonment increased 10% in just one year, contributing to an 86% rise across the last decade in Australia².

¹ Australian Bureau of Statistics *Prisoners in Australia* 11th December 2014
<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0/>

² IBID

Aboriginal women account for more than one-third of females in prison, even though they only make up 2 per cent of the population and young Aboriginal people are 28 times more likely to be detained than other Australian young people.³ Aboriginal people are still more likely than other Australians to die in custody.⁴

The CNS was a Recommendation of the 1991 Royal Commission into Aboriginal Deaths in Custody (RCIADIC). Recommendation 224 states:

...in jurisdictions where legislation, standing orders or instructions do not already so provide, appropriate steps be taken to make it mandatory for Aboriginal Legal Services to be notified upon the arrest or detention of any Aboriginal person other than such arrests or detentions for which it is agreed between the Aboriginal Legal Services and the Police Services that notification is not required.⁵

This recommendation was made in response to two principal concerns. First, it was felt that permitting Aboriginal people to speak with a person highly trained in the criminal law and in representing Aboriginal people would serve to calm an otherwise distressed Aboriginal accused person and prevent self-harm or suicide. Secondly, it was believed that custody notification would permit Aboriginal people to receive legal advice delivered in a culturally sensitive manner at the earliest possible opportunity.⁶

As a result of Recommendation 224, the police must contact the ALS every time they detain an Aboriginal person in a NSW police station.⁷ The CNS plays a vital role in ensuring that any Aboriginal person who is arrested or detained is able to speak to a solicitor trained in the criminal law and experienced in representing Aboriginal people. That solicitor provides the Aboriginal accused with legal advice specific to their circumstances and inquires as to their health, so as to ensure that they are not at risk of self-harm or suicide or, if they are at such risk, that appropriate medical assistance is provided. The police will not be able to comply with cl 33 of the *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) if the CNS ceases to exist.

We also draw your attention to the following further Recommendations of the RCIADIC which in our submission are relevant to the provision of, and need to continue funding for the CNS:

Recommendation 62 concerning young Aboriginal people and the juvenile justice system which states:

That governments and Aboriginal organisations recognise that the problems affecting Aboriginal juveniles are so widespread and have such potentially disastrous repercussions for the future that there is an urgent need for governments and Aboriginal organisations to negotiate together to devise strategies designed to reduce the rate at which Aboriginal juveniles are involved in the welfare and criminal justice systems and, in particular, to reduce

³ Australian Bureau of Statistics *Prisoners in Australia* 11th December 2014
<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0/>

and see also: Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2009* (2009); and Australian Bureau of Statistics, 'Prisoners in Australia', Population Distribution, Aboriginal and Torres Strait Islander Australians (2007).
<http://www.hrlrc.org.au/files/Fact-Sheet-4-ATSI-CP-Rights.pdf>

⁴ Australian Bureau of Statistics *Prisoners in Australia* 11th December 2014
<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0/>

and see also: AHRC, *A Statistical Overview of Aboriginal and Torres Strait Islander Peoples in Australia* (2008).
<http://www.hrlrc.org.au/files/Fact-Sheet-4-ATSI-CP-Rights.pdf>

⁵ 1991 Royal Commission into Aboriginal Deaths in Custody – Recommendations

<http://www.alrm.org.au/information/General%20Information/Royal%20Commission%20into%20Aboriginal%20Deaths%20in%20Custody.pdf>

⁶ *Aboriginal and Torres Strait Islander Legal Services (ATSILS) Custody Notification Service An analysis of the operation of this service by each Aboriginal and Torres Strait Islander Legal Service (ATSILS)* page 1

<http://www.alsnswact.org.au/media/BAhbBIsHQqZmSSJWMjAxMS8wNS8xMS8wNl8xMF8xNV82MTVfQVRTSUxTX0FuYWx5c2lzX29mX0N1c3RvZHIhTm90aWZpY2F0aW9uX1NlcncZpY2VzXzlwMDkucGRmBjoGRVQ>

⁷ *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s.131; *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) cl 18-20, cl 24, cl 33 Sch 2, Part; *Crimes (Forensic Procedures) Act 2000* (NSW) s3; *Crimes (Forensic Procedures) Regulation 2008* (NSW) cl 4.

the rate at which Aboriginal juveniles are separated from their families and communities, whether by being declared to be in need of care, detained, imprisoned or otherwise.

Recommendation 90 concerning diversion from police custody which states:

That in jurisdictions where this is not already the position:

- (a) Where police bail is denied to an Aboriginal person or granted on terms the person cannot meet, the Aboriginal Legal Service, or a person nominated by the Service, be notified of that fact;
- (b) An officer of the Aboriginal Legal Service or such other person as is nominated by the Service, be granted access to a person held in custody without bail; and
- (c) There be a statutory requirement that the officer in charge of a station to whom an arrested person is taken give to that person, in writing, a notification of his/her right to apply for bail and to pursue a review of the decision if bail is refused and of how to exercise those rights.

Recommendation 105 concerning imprisonment as a last resort which states:

That in providing funding to Aboriginal Legal Services governments should recognise that Aboriginal Legal Services have a wider role to perform than their immediate task of ensuring the representation and provision of legal advice to Aboriginal persons. The role of the Aboriginal Legal Services includes investigation and research into areas of law reform in both criminal and civil fields which relate to the involvement of Aboriginal people in the system of justice in Australia. In fulfilling this role Aboriginal Legal Services require access to, and the opportunity to conduct, research.

Recommendation 223 concerning improving the criminal justice system: Aboriginal people and the police, which states:

That Police Services, Aboriginal Legal Services and relevant Aboriginal organisations at a local level should consider agreeing upon a protocol setting out the procedures and rules which should govern areas of interaction between police and Aboriginal people. Protocols, among other matters, should address questions of:

- (a) Notification of the Aboriginal Legal Service when Aboriginal people are arrested or detained;
- (b) The circumstances in which Aboriginal people are taken into protective custody by virtue of intoxication;
- (c) Concerns of the local community about local policing and other matters; and
- (d) Processes which might be adopted to enable discrete Aboriginal communities to participate in decisions as to the placement and conduct of police officers on their communities.

Finally, Recommendation 243 which also concerns improving the criminal justice system: Aboriginal people and the police, which states:

That where an Aboriginal juvenile is taken to a police station for interrogation or as a result of arrest, the officer in charge of the police station at which the juvenile is detained should be required to immediately advise the relevant Aboriginal Legal Service and the parent or person responsible for the care and supervision of the juvenile of the fact of the child being detained at the police station (without prejudice to any obligation to advise any other person).

2. International human rights obligations

In our submission, failure to fund the CNS not only raises issues concerning the implementation of Royal Commission recommendations on custodial health and safety and prison experience, it would also therefore not be consistent with the spirit of **Article 10(1) of the *International Covenant on Civil and Political Rights (ICCPR)* which states that:**

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

We also draw your attention to Article 7 of the ***United Nations Declaration on the Rights of Indigenous Peoples*** which states that:

Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.

As you are aware, Australia is a signatory to the ICCPR, and has also endorsed the UN Declaration on the Rights of Indigenous Peoples.

3. ALHR Submission

The cost of funding the CNS phone line is only \$526,000 per year⁸ whilst the cost of holding a juvenile in detention for one year is more than \$240,000. Without the CNS, more juveniles will end up in detention, costing the government more than if they were to fund the CNS. A single death in custody costs the government significantly more than the annual cost of funding the CNS. The 24 hour phone line will cease to operate on 30th June 2015 unless a funding source is found.

We note that the CNS has a history of being funded via one off grants from the Australian Federal Government.⁹ Most recently the Australian government Attorney-General's department funded the service through a one off grant for a two year period. This funding will cease on 30 June 2015.

In December 2014 the Australian Government through the Indigenous Advancement Strategy funding Round rejected the ALS NSW/ACT application for CNS funding.

ALHR urges you to consider the serious human rights and administration of justice implications for should the CNS cease to operate.

We note that the Supreme Court of NSW has indicated its willingness to exclude from evidence a record of interview with an Aboriginal accused who was not given the opportunity to contact the ALS on the basis that the evidence was obtained in breach of the *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) cl 33 and should not therefore have been admitted.¹¹

We also draw your attention the Second Reading Speech of the *Evidence Amendment (Evidence of Silence) Bill 2013* in which it was stated:¹²

"The bill makes it clear that juveniles and people who are incapable of understanding the consequences of remaining silent are exempt from the provisions. It also removes none of the protections afforded to vulnerable people.

For example, the provisions will not prevent a vulnerable person from being provided with the assistance of a support person during any investigative procedure; nor will they apply to Indigenous people who have exercised their right to speak to the Aboriginal Legal Service over the telephone."¹³

In our submission, acting to ensure the continued funding the CNS at the relatively small cost of \$526,000 per annum is the most efficient way in which the Federal Government can:

- Meet the obligations arising under the abovementioned legislative and regulatory provisions in a proven and cost effective manner;

⁸ 'Operational costs of \$526,000 a year includes the phone line, a rotating roster of 6 intermediate criminal solicitors working day and night, and one part time administration officer; brief out costs and all associated operating costs.': <http://www.alsnswact.org.au/pages/custody-notification> (May 2015).

⁹ From 2007 the CNS was funded via one off grants from the Federal Government. In May 2012 the Australian Government discontinued funding for the CNS. In 2013 The Australian government Attorney-General's department funded the service through a one off grant for a two year period. This funding will cease on 30 June 2015.

¹¹ *Campbell & 4 Ors v DPP (NSW)* [2008] NSWSC 1284.

¹² Uncorrected Hansard Proof, page 85 <http://www.nswbar.asn.au/circulars/2013/mar/2Rsilence.pdf>

¹³ Uncorrected Hansard Proof, page 85 <http://www.nswbar.asn.au/circulars/2013/mar/2Rsilence.pdf>

- Implement Recommendations 62; 90; 105; 223; 224 and 243 of the Royal Commission into Aboriginal Deaths in Custody;
- Ensure the safety of aboriginal persons in custody;
- Continue to provide culturally appropriate access to justice;

We are advised by ALS that through the CNS, trained solicitors take more than 300 calls per week;¹⁵ or more than 15600 calls per year, which on a cost per unit analysis amounts to less than 39 dollars per call. For qualified legal advice, welfare support and court, bail and diversion efficiencies this is not expensive for any government. Another body could not provide the phone line at a comparable cost.

The CNS has played a key role in securing culturally appropriate access to justice and wellbeing checks for some of the most vulnerable members of our society and in so doing we would argue that **the service has been fundamental in preventing any Aboriginal deaths in custody in NSW and the ACT since it commenced in 2000.**

We note that in states where there is no comparable service there have recently been deaths in police cell custody. Tragically, a Northern Territory man died last week and a young Western Australian woman died last year.

If the phone line is not available, the legislative need for notification and right to advice for Aboriginal People in custody will not be met in a practical way that safeguards the arrested person's legal rights, health and family welfare.

As the Minister for Indigenous Affairs you have been an outspoken supporter of the CNS on many occasions and have advocated that it be rolled out in other Australian States and Territories. As you have said the CNS: *"It works, it has worked in NSW, it has led to zero deaths, so that speaks for itself."*¹⁶

ALHR urges the Federal government to continue its commitment to providing culturally appropriate access to justice, particularly as is the case here, to the most vulnerable members of society. As the Minister for Indigenous Affairs we hope that you will understand the particular need to protect people's rights and interests when they are least able to protect them themselves.

Without the CNS Indigenous Australians living in NSW and the ACT are potentially vulnerable to disproportionately high rates of deaths in custody and the Federal Government will have failed in implementing the human rights protections recommended by the Royal Commission into Aboriginal Deaths in Custody.

In the interests of fairness, justice, equality and respect for human rights and Australia's international legal obligations, ALHR is urgently calling on the Federal Government to fund this essential service.

We would like to make this letter available through our website. This is a standard practice for all our work, wherever possible, to increase accountability. If you do not want this letter to be made publically available, please can you advise us within 7 business days of receipt of this letter. We advise that it is our intention to issue a press release in relation to funding of the CNS.

If you have any questions regarding this matter, please contact me on president@alhr.org.au

Yours sincerely,

¹⁵ <http://www.alsnswact.org.au/pages/custody-notification-service>

¹⁶ The Stringer 6 March 2015.

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ALHR was established in 1993 and is a national network of over 2600 Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and a secretariat at La Trobe University Law School in Melbourne. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

