Submission for the Incarceration Rates of Aboriginal and Torres Straight Islander Australians Inquiry

I *Abstract*

I, Dayna Lazarides, am in my last semester of my Bachelor of Laws degree. In the first years of my degree, I studied areas of law which focused on the law itself. The demand for access to justice was never part of the discussion. However, this year through working as a law student in a Community Legal Centre, I have realised the apposite need for legal aid support, nationwide. Continual access to justice is, unfortunately, not as procurable to all Australians as one may think. This is especially relevant where the law is represented through Lady Justice, a symbol highlighting the law’s objectivity, impartiality and balancing act. Legal services admirably provide legal aid to hundreds of thousands of Australians every year. However unmet legal assistance produces disadvantage and challenges for Indigenous and Torres Straight Islander Australians. Australian legal practitioners have strict ethical obligations, which is not different to the obligations set out in the *Legal Aid Commission Act 1976*. The strict conduct rules lawyers follow can create barriers for persons to access justice. The laws of the *Legal Aid Commission Act 1976*, focusing on section 61(2)(c)(i), need to be amended to ensure legal practitioners have flexibility within their practices in regional communities. This is vital in the aim of providing access to justice to all Indigenous Australians. This submission will focus on how the conflict of interest rule, coupled with the strict conducts rules lawyers are bound to, may contribute to the incarceration of Indigenous and Torres Straight Islander Australians.

II *The Legislation*

Section 61(2)(c)(i) of the *Legal Aid Commission Act 1976* states that practitioners or staff follow the ‘…same rules and standards of professional conduct and ethics as those that a private practitioner is, by law or the custom of the legal profession, required to observe in the practice of his profession.’ Whilst it is important that all legal practitioners are held to the same standards, the inflexibility in the rules may hinder the legal practitioner’s ability to represent Aboriginal and Torres Straight Islander Australians, in regional areas. This is evident through the conflict of interest rule.[[1]](#footnote-1)

III *Conflict of Interest Rule*

A conflict of interest arises where the duty to the client or former client, conflicts with the lawyer’s other duties.[[2]](#footnote-2) The conflict may occur in three primary ways; a lawyer’s duty to the court, to another client, or between the client and lawyer’s interest.[[3]](#footnote-3) When a conflict of interest arises, the lawyer must maintain their reputation and duty to the court; there is little alternative to the rule, other than the client to seek other representation.[[4]](#footnote-4) This may prove problematic for regional communities constrained to one legal provider.

The challenges associated with the conflict of interest rule is outlined in the report, *The Aboriginal and Torres Straight Islander Experience of Law Enforcement and Justice Services*, where it is stated that ‘…conflicts of interests may prevent Aboriginal and Torres Straight Islander people being able to access legal assistance services.’[[5]](#footnote-5) To highlight the problem, Legal Aid has stated the conflict of issue is a ‘significant issue for service delivery…where the Aboriginal Legal Service is precluded from providing representation and there are few alternative legal practitioners available to act on behalf of those Aboriginal clients.’[[6]](#footnote-6)

A Legal Aid representative stated that conflict of interests occur ‘all the time’ in small communities, particularly in criminal law.[[7]](#footnote-7) This impacts Indigenous Australians as approximately 21.3 per cent live in remote or very remote communities.[[8]](#footnote-8) It is recognised that legal services help persons to find other legal services when the conflict rule arises.[[9]](#footnote-9) Furthermore, an increase in civil and family law outreach services improved gaining advice and minor assistance.[[10]](#footnote-10) However, specific to remote New South Wales communities, there is a ‘…clear dearth in the availability of quality representation and case work for Aboriginal and Torres Straight Islander Australians…’[[11]](#footnote-11) The Family Violence Prevention Legal Service Program is funded by the Government in assisting Indigenous Australian women effected by family violence.[[12]](#footnote-12) It has been opined that the program is not sufficiently funded, and is ‘seriously flawed’ because of the minimal time and resources provided.[[13]](#footnote-13) Some believe that Aboriginal Legal Services are not adequate in supporting victims,[[14]](#footnote-14) as a result of conflict of interests. These studies highlight the imbalance between the level of demand of legal services and their resources in regional communities.

IV *The Rule of Law*

The Australian democratic system follows the rule of law.[[15]](#footnote-15) The rule of law can be defined as a process, ‘…by which the laws are enacted, administered, and enforced is accessible, fair, and efficient.’[[16]](#footnote-16) Essentially the rule of law can be interpreted to mean that ‘…every person, regardless of who they are, is subject to the same law and has access to the same legal and judicial processes.’[[17]](#footnote-17) While all Australians have the right of accessing the legal system, this is different to all Australians having equal opportunity to access the legal system. The Australian government has responded to the barriers to accessing justice by funding legal aid centres for persons most vulnerable in Australia. From the National Legal Aid alone, 65,138 applications were received in the past year from Aboriginal and Torres Straight Islander Australians seeking legal aid for civil, criminal or family law matters.[[18]](#footnote-18) Institutions such as Legal Aid, Community Legal Centres and Aboriginal Legal Centres do crucial work in advocating for Indigenous Australians. However, funding and geographic constraints, coupled with the challenges that arise where there is a conflict of interest, provokes a question; is Australia implementing legislation that will best represent Indigenous Australians and the rule of law, so to avoid convictions or incarceration?

Section 61(2)(c)(i) adopts the rule of law in two primary ways. [[19]](#footnote-19) Firstly, the law obliges practitioners to act in the same way, regardless of where they practice. This upholds the rule of law because it maintains equality and fairness for all legal practitioners. In turn, consistent legal representation can help to provide a fair justice system for Indigenous Australians. Secondly, section 61(2)(c)(i) is contained in an Act, which was established for the purpose of legal aid aims.[[20]](#footnote-20) The rule of law is maintained because the purpose of the legislation as a whole, seeks to ensure Australians have access to the same legal processes. Consequentially, the Act attempts to evade the barriers to accessing justice, which Indigenous Australians may face.

Not all Indigenous Australians that request legal aid are provided with legal assistance.[[21]](#footnote-21) It may be argued the rule of law is not followed to an extent, as not every person has access to judicial processes. However it is acknowledged that the application of case management does not allow for every claim to enter litigation.[[22]](#footnote-22) The conflict of interest rule and the limited resources in regional Australia are also reasons for why cases may be rejected by legal practitioners.[[23]](#footnote-23)

 V *The Legislation’s Connection to the Incarceration of Aboriginal and Torres Straight Islander Australians*

The Senate Committee stated that Indigenous Australians are the ‘…most socially and economically disadvantaged members of the Australian community.’[[24]](#footnote-24) The disadvantage, ‘coupled with the prohibitive cost of private services, means that Indigenous people are highly reliant on community legal support.’[[25]](#footnote-25) It has been observed that communities ‘most affected by these issues have the highest proportions of Aboriginal people in NSW, in particular, younger Aboriginal people.[[26]](#footnote-26) Where legal services cannot assist Indigenous Australians because of the conflict rule, and lawyers are required to act as any other lawyer would by not representing the client; this situation may lead to Indigenous Australians offending or entering incarceration.

There are a few situations that may lead to Indigenous Australians offending where the conflict of interest rule is prevalent. Firstly, if persons cannot afford legal costs, the conflict of interest rule may mean they are excluded from the proximate legal centre. Further, Indigenous Australians may be dissuaded from a referral to another legal provider if it is not an Aboriginal Legal Centre; evidence has shown that Indigenous women particularly are discouraged from being assisted by mainstream legal services.[[27]](#footnote-27) Reasons for this include language barriers and the perceived lack of cultural awareness. [[28]](#footnote-28) In circumstances where Indigenous Australians are unable to viably attain legal aid, or choose not to as a result of cultural reasons, they may be without knowledge of the law. Having legal advice may be what prevents someone from ‘taking justice into their own hands’ and possibly committing an offence. If someone is unaware of the legal consequences, their actions could amount to an offence, or disadvantage the individual in legal proceedings.

In the situation a person advocates on their own behalf, the outcome of their success in the legal system may be hindered without sufficient knowledge of the law. This is evident where a person has no legal representation and is convicted. Where a lawyer handles the case in the same circumstances, potentially the person may have been convicted to a lesser sentencing, or have avoided entering incarceration all together.

VI *Conclusion and Recommendations*

Section 61(2)(c)(i) follows the rule of law in ensuring equality among legal practitioners.[[29]](#footnote-29) However it is acknowledged that laws with exceptions for certain individuals, can benefit those most vulnerable.[[30]](#footnote-30) Discrepancies in rules may enforce the rule of law more effectively, than a law applied consistently to every person.

It is important in preserving the administration of justice, that legal practitioners do not work on behalf of a client, where there is a conflict of interest. Therefore it is recommended that only in strict exceptions, a legal practitioner be allowed to advise a client in a regional community. Such circumstances may include a former client who has not been present in the community for a significant period of time, and the client and a legal authority have given consent to the lawyer to work with the current client.

It is strongly recommended that additional Aboriginal Legal Centres be provided. This would help reduce the number of persons who cannot be represented from a legal provider in the community, as a result of a conflict of interest. Prominently, it would create more opportunities allowing Indigenous Australians to seek legal advice in the preferred and culturally aware legal provider.

It is important to remember that, ‘Despite the fundamental importance of access to justice to any fair and democratic society, deep inequality exists between Indigenous and non-Indigenous Australians.’[[31]](#footnote-31) While legal aid centres already provide a significant amount of legal assistance in remote Indigenous communities, all Australians should strive to ‘close the gap’ and improve circumstances for those marginalised.[[32]](#footnote-32) This can begin in Australian laws.

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3. Ibid. [↑](#footnote-ref-3)
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