

**INQUIRY INTO COMMENCEMENT OF THE FISHERIES
MANAGEMENT AMENDMENT ACT 2009**

Organisation: Aboriginal Legal Service (NSW/ACT) Limited

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The Hon. Mark Banasiak MLC
Chair, Portfolio Committee No. 4
Water and Agriculture
Parliament House, Macquarie Street, Sydney NSW 2000 / Parliament House, Canberra ACT 2600

By email: PortfolioCommittee4@parliament.nsw.gov.au

Dear Chair,

I write to you on behalf of the Aboriginal Legal Service (NSW/ACT) Limited (ALS) and thank you for the opportunity to provide a submission to Inquiry into the commencement of the *Fisheries Management Amendment Act 2009 (FMA)*.

I. About the ALS

The ALS is a proud Aboriginal community-controlled organisation and the peak legal services provider to Aboriginal and Torres Strait Islander adults and children in NSW and the ACT. Our vision is to achieve social justice and equity for Aboriginal and Torres Strait Islander people, families and communities.

With more than 200 staff and over 20 offices across NSW and the ACT, the ALS assists Aboriginal and Torres Strait Islander people through representation in court, advice and information, as well as providing broader community support programs. We also undertake vital policy and advocacy work to reform the systems that disproportionately impact Aboriginal lives.

The ALS provides legal representation and advice in criminal law, children's care and protection law, and family law; as well as broader work in law reform and wrap-around programs for community wellbeing. We provide the following comments based on our direct experience representing Aboriginal and Torres Strait Islander people who have too often been forced into the quicksand of the criminal legal system.

II. The ALS calls for the immediate commencement of s 21AA of the Fisheries Management Amendment Bill 2009

The ALS strongly urges the NSW Government to immediately commence s 21AA of the FMA. The unjust prosecution of Aboriginal fishers engaging in fishing practices has led to a significant over-representation of Aboriginal people in custody for fisheries offences. Aboriginal people make up 4% of people living on the NSW South Coast, but have accounted for 80% of jail terms for fisheries offences since 2009.¹ In particular,

¹ Janet Hunt (Honorary Associate Professor, CAEPR, Australian National University), The NSW government needs to stop prosecuting Aboriginal fishers if it really wants to Close the Gap, The Conversation, 11 October 2021, <[The NSW government needs to stop prosecuting Aboriginal fishers if it really wants to Close the Gap \(theconversation.com\)](https://www.theconversation.com/australia/125484-the-nsw-government-needs-to-stop-prosecuting-aboriginal-fishers-if-it-really-wants-to-close-the-gap)>.

Aboriginal people are significantly overrepresented among those jailed or convicted in NSW for offences related to abalone fishing.² According to NSW Bureau of Crime Statistics and Research³, between 1996 and 2020, Aboriginal people were subject to the following fisheries prosecutions in NSW:

- 30 Custodial sentences
- 23 Custodial alternatives
- 93 Community-based orders
- 279 Fines

The ALS notes that the penalisation of Aboriginal fishers exercising their native title rights coincides with the decision to increase the take of commercial operators.⁴ Whilst the Department of Primary Industries (the Department) claims that enforcement actions are essential to safeguard the sustainability of the species, it issued an order permitting the industry to harvest the remaining portions of its 2020-2021 quota. Aboriginal people 'are the original custodians of the land and have managed natural systems sustainably for tens of thousands of years.'⁵ The ALS calls out the double standards and unfairness of the Department and note that this is yet another example of systemic racism depriving Aboriginal people of culture and tradition. Pauline Wright, President of the NSW Council for Civil Liberties explained:

"It's clear that there is systemic racism when Aboriginal people, who make up only 4% of the population, account for 80% of jail terms for fisheries offences. If the aim was truly to protect the marine environment, they wouldn't be allowing commercial fishing to expand at the same time as prosecuting Aboriginal fishers."⁶

The FMA took some necessary steps to address the systemic racism and resulting criminalisation of Aboriginal people and cultural fishing practices within the Act, by making it an object of the Act to recognise the 'spiritual, social and customary significance to Aboriginal persons of fisheries resources and to protect and promote Aboriginal cultural fishing.'⁷ The amendment also included a new definition of Aboriginal cultural fishing as 'fishing activities and practices carried out by Aboriginal persons for the purpose of satisfying their personal, domestic or communal needs or for educational, ceremonial or other traditional purposes, and which do not have a commercial purpose.'⁸ The ALS calls on the NSW Government to:

- commence s21AA without delay
- commence S21AA without any further regulation
- further amend the legislation to recognise the inherent cultural rights of Aboriginal people to fish
- introduce an amendment or regulation that exempts Aboriginal Cultural fishers from fishing related restrictions, penalties and prosecution
- to review all fines and prosecutions of Aboriginal people since the FMA.

² Oxfam Australia, Time to respect First Peoples' traditional fishing rights, March 2022, <<https://www.oxfam.org.au/2022/03/time-to-respect-first-peoples-traditional-fishing-rights/>>.

³ Ibid.

⁴ Nature Conservation Council, NSW Government must suspend prosecutions of Aboriginal cultural fishers, October 20, 2021, <https://www.nature.org.au/nsw_government_must_suspend_prosecutions_of_aboriginal_cultural_fishers>.

⁵ New South Wales Council for Civil Liberties, Joint Media Release: NSW Government must recognise Aboriginal cultural fishing in line with parliamentary support, December 02, 2021, <https://www.nswccl.org.au/nsw_government_must_act_on_aboriginal_cultural_fishing>.

⁶ Ibid 4.

⁷ Explanatory Notes, Fisheries Management Amendment Bill 2009 (NSW), 5 <<https://legislation.nsw.gov.au/view/pdf/bill/565951fc-612f-11de-8faf-00144f4fe975>>.

⁸ Explanatory Notes, Fisheries Management Amendment Bill 2009 (NSW), 5 <<https://legislation.nsw.gov.au/view/pdf/bill/565951fc-612f-11de-8faf-00144f4fe975>>.

III. The NSW Government's commitment under the National Agreement on Closing the Gap

The NSW Government, under the National Agreement on Closing the Gap committed to achieving better life opportunities and physical, mental, cultural and spiritual wellbeing for all Aboriginal and Torres Strait Islander people. This commitment to Aboriginal people is encapsulated in the 5 priority reforms and the 17 socio-economic outcome targets of the National Agreement. There are a number of outcomes within the National Agreement that are at odds with the NSW Government's failure to commence the FMA:

- Outcome 10 – Aboriginal and Torres Strait Islander people are not overrepresented in the criminal justice system
- Outcome 15 - Aboriginal and Torres Strait Islander people to maintain a distinctive cultural, spiritual, physical and economic relationship with their land and waters; and
- Outcome 16 – Aboriginal and Torres Strait Islander cultures and languages are strong, supported and flourishing.⁹

As part of the National Agreement on Closing the Gap, the NSW Government has committed to these outcomes and must be held accountable for decisions that are contrary to the spirit of the National Agreement. As a member of the NSW Coalition of Peak Aboriginal Organisations, the ALS is key partner in the implementation of the National Agreement across the NSW law and justice system. However, without comprehensive structural reforms throughout the entire NSW justice system, the Government will fall short of its commitments. Despite ongoing efforts to develop reform initiatives, these outcomes are not on track to be met; and will continue on this path for as long as Aboriginal people's traditional rights are criminalised.¹⁰ According to the NSW Bureau of Crime Statistics and Research, the number of Aboriginal adults incarcerated is projected to continue to increase¹¹.

By failing to commence s.21AA and continuing to prosecute and lock-up Aboriginal cultural fishers, the NSW Government is not making good on commitments to Closing the Gap. If the NSW Government refuses to reform the manifestly unjust practice of prosecuting individuals simply engaging in cultural practices, then it leaves significant doubt as to their willingness to enact other necessary changes required to achieve Target 10 of the National Agreement.

i. Priority Reform Two – Building the Community-Controlled Sector

The Priority Reforms are a foundational element of the National Agreement on Closing the Gap because of they are central to the National Agreement and are purposed to change the way that governments work with Aboriginal and Torres Strait Islander people and communities. The five reforms in NSW are:

- 1) Formal Partnerships and Shared Decision Making
- 2) Building the Community Controlled Sector
- 3) Transforming Government Organisations
- 4) Shared Access to Data and Information at a Regional Level
- 5) Employment, Business Growth and Economic Prosperity

Of particular relevance to this Inquiry is Priority Reform 2 – Building the Community Controlled Sector. Historically, despite the significance of fisheries charges and their impacts on Aboriginal communities, the ALS has been unable to appear in native title defence matters due to resourcing constraints. We strongly assert that in order for the government to adequately meet its commitment under the National Agreement to Closing

⁹ Aboriginal Affairs, Socioeconomic outcome targets, 31 <<https://www.aboriginalaffairs.nsw.gov.au/closingthegap/outcomes/>> .

¹⁰New South Wales Council for Civil Liberties, Submission: Commencement of the Fisheries Management Amendment Act 2009, March 02, 2022 <<https://www.nswccl.org.au/submission-fisheries-management-amendment-2009>>.

¹¹ BOCSAR Closing the Gap Snapshot, Quarterly Update to December 2021.

the Gap, the ALS, as an Aboriginal Community-Controlled Organisation must be strengthened through more adequate resourcing to be able to defend fisheries prosecutions that contribute to the overincarceration of Aboriginal people in the criminal justice system. As an Aboriginal Community Controlled Organisation, the ALS is uniquely placed to offer culturally safe and informed services to those subject to fisheries prosecutions. The resourcing of the ALS to provide this service would certainly be consistent with the reforms and outcomes under the Closing the Gap Agreement and would improve access to justice for Aboriginal and Torres Strait Islander peoples.

The ALS would welcome the opportunity to discuss this submission further. If you have any questions about the attached response, please contact the ALS Policy & Advocacy Manager Denise Wireko-Brobby via email on denise.wireko-brobby@alsnswact.org.au.

Yours sincerely,

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