

Submission to the Joint Committee of Public Accounts and Audit

Indigenous Law and Justice Inquiry

Aboriginal and Torres Strait Islander Legal Services prefer the
description:

“Skilled, Specialist Service Provider” to
“Separatist and apartheid”

*From: The Victorian Aboriginal Legal Service Cooperative Limited and
National Aboriginal and Torres Strait Islander Legal Services Secretariat*

“How societies deal with ‘otherness’ and ‘sameness’ will impact on their ability to allow individuals freedom from oppression and enough scope for the exercise of liberty...The experience of Indigenous people, their tenacity in the face of racist and assimilationist policies, is testament to the fundamental and central role identity plays in our lives.” **Larissa Behrendt**

ATSILS prefer the description “Skilled, Specialist Service Provider” to “separatist and apartheid”

What can this inquiry achieve?

VALS and NAILSS believes that if the tendering of Aboriginal and Torres Strait Islander Legal Services (ATSILS) proceeds that the scope for the Committee’s Inquiry to have any impact on the delivery of and quality of services will be close to zero.

VALS has already written to the Chair of the Committee expressing this view and urging the amendment of the tender timeline to enable the Senate inquiry and this Inquiry to complete its work and for this work to be considered by the community and the Government.

Some of the matters raised in the Inquiry terms of reference have not been raised before in relation to ATSILS or mainstream legal services. This highlights the scarcity of policy development on legal aid and the additional scrutiny that faces Indigenous organizations. Some of the terms of reference are vital to being able to make informed decisions in the future and VALS and NAILSS welcomes the opportunity to address these issues.

This Inquiry can assess:

- the value and capacity that ATSILS represent
- the rationale and merit of tendering services
- the merit of policies which will stop ATSILS from doing prevention, education, policy analysis, law reform submissions and test cases.

This Inquiry will we hope, accept our proposal that an opportunity exists to build on the strengths of ATSILS, other Indigenous legal services and other legal aid providers to build a more effective service system that builds better justice outcomes. That opportunity would be easier to realize if political parties recognized the benefit of partnerships and an integrated approach in working with Indigenous organisations and communities.

VALS and NAILSS Approach in this submission

VALS and NAILSS will address the issues in the Inquiry first by making some general points about the policy and program context that we are operating in. Second, we will provide responses to the issues outlined in the Committee’s terms of reference. We provide responses in the reverse order eg tendering first then issue d) staffing c) gender balance b) coordination and a) Civil, criminal and family case balance. Although all these issues are interconnected we believe this structure will minimize the need to repeat information as we are moving from big picture to smaller subsets of the issues using this approach.

General Comments

There is no valid policy, economic or practice basis for the proposed changes to ATSILS outlined in the Exposure Draft of a Request for Tender for the Purchase of Legal Services for Indigenous Australians. VALS and NAILSS do not believe that a case has been made for these dramatic changes to ATSILS nor do we believe a valid case can be made. We are concerned that in the current policy climate there is a great danger that the consideration of facts and evidence, indeed the real capacity and value of Indigenous legal services will be overlooked.

Reports provided by Government agencies, such as the Australian National Audit Office Review of Law and Justice Program provide some clear evidence that ATSILS are delivering valuable services on a shoe string.

The Review of the Law and Justice Program provides the following overview of ATSILS:

- Services provided have increased dramatically
- Funding has been static since 1991
- Demand has and is likely to increase
- Services require between \$12.5 and \$25 million extra
- They are the primary provider of legal services providing approximately 89% of all services. (Pg. 25-6,46 Australian National Audit Office, 2003)

ATSILS have been operating in a climate of uncertainty for the eight years following the 1996 Productivity Commission recommendation that ATSILS be mainstreamed. This uncertainty has become more debilitating since June 2003 when ATSIIS was created. Since that date ATSILS have been on six monthly or less funding periods. To a program which is acknowledged to be under funded and have difficulty retaining staff the move to shorter funding periods is at best an example of careless and incompetent program management and at worst part of an agenda of destroying Indigenous organizations.

The Royal Commission into Aboriginal Deaths in Custody (RCIADIC 1996) recommended simplification of funding accountability requirements and three year funding. This did not occur. Instead Organisations have been subject to:

- continual uncertainty about funding
- ongoing evaluations and reviews
- erratic policy changes
- a decline in funding levels
- increased demand
- expanding population numbers
- Continued expansion of the prison population and high over representation rates of indigenous people
- poor or non existent support from ATSIIS and
- an increasingly hostile policy environment for Aboriginal organisations.

The Exposure Draft announced in March 2004 revealed that the default policy setting was to mainstream ATSILS. A policy of keeping ATSILS constantly on their toes has been replaced by one premised on cutting services off at the knees.

ATSILS in Action

Last week we had a case where the Field Officer gave evidence about customary law in a case. The magistrate said the he would probably have recommended a prison term but the information from the Field Officer convinced him that there was a more appropriate alternative. ***Mt Isa Aboriginal and Torres Strait Islander Corporation for Legal Aid***

Critical Assessment of Government self determination policy two years ago prophetic

The 2002 Social Justice Commission Report reported on the Government's approach to Aboriginal self determination-raising the question: is the governments approach a stylistic or language change or something more substantive. The Commissioner concludes that the Government's approach is far more substantive than semantics. He then lists five main concerns:

“..the Government's reliance upon inflammatory, provocative untruths to reject Indigenous self determination.....

..the failure or perhaps refusal of the Government to accept that any consequences flow from recognizing the unique, distinct status of Indigenous peoples in this country....

..no underlying basis, no guiding principles, for relations between governments and Indigenous peoples.....

.....the Government's current framework is oppositional in its approach and sets up Indigenous people as competitors of Government...it is a strange almost paranoiac view of partnership.....

...no general acceptance by the Government of the legitimacy of Indigenous peoples being the primary decision makers on matters that effect their daily lives....(Pg47-52 Human Rights and Equal Opportunity Commission ATSI Commissioner, 2002)

Since that report, the proposed tender of ATSILS, the unilateral abolition of ATSIC and the mainstreaming of services, indicate that the Social Justice Commissioner's concerns were well founded. The labelling of Indigenous specific services as a form of apartheid indicates how far Government's respect for Indigenous organisations has deteriorated. The logic of this enthusiasm for mainstreaming if extended to other groups would see the abolition of multicultural organizations funding, women's policy, veteran affairs and youth services to name but a few.

Royal Commission into Aboriginal Deaths in Custody progress has been undermined by other big picture policies

There are some useful reforms occurring as a result of State Governments working with Indigenous communities to implement “Royal Commission” recommendations. However there have been other trends at a State and Commonwealth level which in many cases have undermined the progress made. Since the release of the Royal Commission recommendations there has been a national increase in the number of prisoners. This has affected all States but Queensland was one of the worst affected states.

ATSILS in Action

ALS provides a bus for Aboriginal youths to get home at night. Businesses in town were so impressed they have donated walkie-talkies. They are gradually lowering crime rates, getting kids off the streets, run programs to encourage kids to go home, not hang around the street. The local Magistrate is very concerned about what will happen if there is no ALS, as they are the only service that turns up for call-overs, Legal Aid often calls for help of the ALS solicitor to attend their clients too, emergency field officers – agreement with police to contact ALS re people in custody, legal Aid not available after hours, ALS available 24 hours. ***South East Queensland Aboriginal Corporation for Legal Services – Toowoomba, Qld 2004.***

Facing a potential trebling of their prison population in a decade the Queensland Government commissioned some research in 1998. The research by the Criminal Justice Commission identified a series of factors which had contributed to the increase. Interestingly higher crime rates were not a significant cause.

“The increase in prisoner numbers since 1993 cannot be explained on the basis of pre-1993 trends and exceeds anything that might be explained by population growth”.

“These data graphically demonstrate the extent to which the rise in prisoner numbers is a system-wide issue. The increase in convictions resulting in imprisonment points to the impact of police activities and court practices. The increase in the number of prisoners on hand over the rate of admissions points to the potential role of correctional practices. Importantly, all these factors are framed by the broader legislative and regulatory context determined by the Queensland Parliament”. (Criminal Justice Commission, 2000 , p. xi)

“The post-1993 increase in prisoner numbers is largely a result of the uncoordinated operational agenda of the key justice system agencies. Any substantial change in the size of the prisoner population, therefore, will require a whole-of-government commitment to major policy changes across the broader criminal justice system”. (Criminal Justice Commission ,2000 p. xiv)

Professor Arie Frieberg who has conducted a review of sentencing for the Victorian Government has attributed the increase in prison numbers across Australia largely to a shift to more punitive attitudes to prisoners and a reduction in rehabilitative programs and policies. “As society turns from rehabilitative and deterrent notions to punitive and preventive ones, prison sentences may become fewer, but considerably longer. Notions of selective and collective incapacitation may replace the moral and ethical grounds for punishment. Unfortunately, the empirical basis of these incapacitative strategies has yet to be established.”(Pg 14, Frieberg, 1999)

Frieberg in his review of Victorian sentencing highlights that sentencing rates are increasing ahead of crime rates. “In Australia, as possibly elsewhere, there is little evidence that increasing imprisonment rates have significantly affected crime rates. Victoria’s crime rate over the last decade, which has shown small annual increases for the most part, appears to be unrelated to the numbers in prisons. Victoria’s prison population has grown from 2,250 in 1992 to 3,464 in November 2001, of which 2,890 were sentenced prisoners.” (Pg 41 Frieberg 2002)

Nevertheless there has been significant media and state government attention on being “tough” on crime. This has often meant higher minimum sentences, new laws, limits on judicial discretion and building more prisons. This is an expensive way to mislead the public into thinking something constructive is being done about the problem. The dominance of tougher sentencing policies has meant that the over representation rate of Indigenous people has continued to be unacceptably high, around 14 times the non Indigenous rate and the total number of Indigenous prisoners has skyrocketed. Tough sentencing policies have largely been pursued at the expense of smart sentencing. The public and in many cases the government have not been made aware of the costs and ineffectiveness of increasingly punitive sentencing policies. In 1991 Indigenous people constituted 13% of the prison population, since 1999 the proportion has been approximately 20%. (Human Rights and Equal Opportunity Commission ,2004)

The recent Indigenous Justice discussion paper from the Commonwealth Attorney General's Department continues to ignore the criminological facts when it talks about sentencing. It states that the need to reduce imprisonment rates and sentence lengths has to be balanced against the need to protect the community. While media stories about "light sentences and "early release" may support this false dichotomy the criminology evidence is that heavier sentencing is not a solution to community safety fears or an effective way to reduce crime rates.

There is a pressing need to put evidence before the public to dissuade people from pursuing more punitive sentencing in the mistaken belief that it is a solution. It is in fact part of the problem. While some politicians have made political capital out of this ignorance there is a need to contest and inform the community about the real causes of crime and an appropriate mix of responses. Public opinion which in many cases is not well informed on this issue needs to be better informed. It is unacceptable to walk away from the issue and say, "Oh well the public wants us to be tough on crime."

According to Frieberg, "Public confidence is best addressed by improving the public's knowledge of the system and making the process more transparent. Research into public opinion and sentencing consistently finds that the more information that is provided to respondents the less punitive are their responses, especially when the polling takes the form of sentencing vignettes or simulated sentencing exercises." (Pg 42, Frieberg 2002)

In the past societies believed that the earth was flat, that women should not vote and that witches should be burnt but we have moved beyond these understandings and that needs to be the objective in relation to sentencing policies.

Practical Reconciliation

Apart from sentencing the emphasis on practical reconciliation has also had some unfortunate effects on the capacity to deal with justice issues. Altman and Hunter(2003) monitor the impact of "practical" reconciliation by reviewing changes in the socioeconomic status of Indigenous Australians during the decade 1991-2001, a period that closely matches the 'reconciliation decade'. The authors state, "It is of particular concern that some of the relative gains made between 1991 and 1996 appear to have been offset by the relatively poor performance of Indigenous outcomes between 1996 and 2001." (pg v ,2003).

ATSILS in Action

Field Officers actually represent clients in court, they are all Indigenous people, they also interface between clients and non-Indigenous staff, eg, in Family Law matters they liaise with non-Indigenous staff to make sure they are aware of indigenous issues, heavily involved in law reform (eg, parental responsibilities and family relationships, re grandparents), train Child Support Agency staff on Indigenous issues, sit on Family Law Practitioners Association Law Reform Committee. *Aboriginal Legal Service of Western Australia 2004.*

The review also highlights limitations in the idea of ‘practical’ reconciliation such as:

- Advocates of practical reconciliation often ignore the fact that physical and psycho-emotional needs must be satisfied simultaneously.
- Practical reconciliation fails to recognise that many of its practical outcomes are driven by social, cultural and spiritual needs.
- The current policy agenda ignores the interdependencies between many of the dimensions of Indigenous disadvantage, particularly how social and historical factors can influence contemporary Indigenous practical outcomes.

Indigenous lawyer and academic Larissa Behrendt has argued that practical reconciliation should not be seen as a replacement for a rights focus. Instead she argues that practical reconciliation will fail if it is not linked to a rights framework. “Practical reconciliation does not attack the systemic and institutionalized aspects of impediments to socio-economic development.” (pg 11,2003)

Positive Policies

The COAG regional pilot projects aimed at improved whole of government approaches to more effective indigenous service provision and planning are one of the last remaining Commonwealth Government initiatives which recognises a sense of partnership and valuing of Indigenous input and participation.

The proposed tender of ATSILS

Summary responses to the questions put by the Committee

Q. Do you think there was sufficient consultation in the development of the tender conditions?

A. No. There was no consultation with anyone to our knowledge. The ANAO report No 13 recommended that such consultation should occur. We have asked ATSILS but received no reply as to whether there was a cost benefit analysis of the changes.

Q. Are the policy directions accompanying the tender an improvement over the old ATSILS policy framework?

A. No. The policies devalue Indigenous participation and control, limit core services to reactive case work and proscribe advocacy, law reform and prevention programs. The policies delete important priorities such as “where cultural and personal well being is at risk” or “public interest cases”.

Q. What will be the impact of tendering particularly in remote areas?

A. The services will cost more to run as a result of means testing and the tendering regime. The role of ATSILS will become narrower than any other legal aid provider. Their capacity to be proactive or contribute to systemic improvements will be removed. Hence services will become less effective and less attractive to Indigenous clients.

In states with multiple ATSILS there is likely to be loss of social capital and organizational capacity as result of forced amalgamations or totally new providers. In states with an existing provider there is likely to be either total loss of social capital and organizational capacity if there is a new provider or partial loss and increased fragmentation if there are several providers funded.

Overview of Issues about the proposed tender of ATSILS

VALS with the support of law firm Arnold Bloch Leibler made a detailed submission to ATSIS on the limitations of the Exposure Draft Purchasing Arrangements in relation to ATSILS. This is included as an attachment. There are three parts to our comments in this section in relation to the tender:

- An outline of the tasks of Indigenous Field Officers which are essential to effective ATSILS
- A section which highlights prevention, policy and law reform activities of ATSILS
- A section which discusses the rationale for the tender and some key issues with it.

Windows on the vital role of Field Officers (Client Service Officers in Victoria) and the work they undertake within ATSILS.

Under the proposed tender, Field Officers and their roles are virtually overlooked. There is no requirement to employ any Indigenous staff. This section will include details about the work of Field Officers which can provide a picture of the realities of the work they undertake at ground level.

If a Koorie person chooses not to use VALS and instead uses a mainstream law firm or Victoria legal aid, the staff of that law firm will often utilize the expertise of VALS Field Officers ...these services recognise the important role Field Officers can play in assisting Koorie people with legal problems. VALS Clients Service Officer (Field Officer)

VALS Client Service Officer (Field Officer)

Field Officers, or Client Service Officers as they are titled in Victoria, hold a role that is part para legal, part welfare/social worker part ambassador or advocate and part mentor and coach. Field Officer roles vary slightly from area to area but they essentially bridge the gap between the white legal system and the Indigenous person's experience and culture.

Below are some examples from Victoria and other States of the work Field officers do. These examples illustrate far better than policy and statistics the reality of the work that is done and is needed to ensure justice for Indigenous Australians.

Field Officers:

- **Are in Touch with Aboriginal and mainstream organisations** - VALS Client Service Officers (CSO) are closely connected with key Aboriginal organizations and service providers in the area. These include: the Regional Aboriginal Justice Advisory Committee, The Child Care Service (a child protection service), the Aboriginal Cooperatives, the Community Justice Panels, Koori Community Trusts, mainstream legal services and youth services, the Sheriffs Office, police and corrections staff.

- **Meet demands for assistance 24:7** - Mainstream and alternative service providers are open from 9.00am to 5.00pm. In contrast, Field Officers take their jobs home with them as they are on call. When the mainstream and alternative service providers close for the day, the Field officers become drug and alcohol workers, social workers, housing worker, mental health workers etc. Field officers pick up the need for services after 5.00pm. This is significant as a lot of crimes occur after 5.00pm. Field Officers never stop, as they are on morning, afternoon and night shifts.
- **Interpreter, Mentor and Support:** If it were not for Field Officers, the Aboriginal community would be nowhere. Solicitors would also be lost without Field Officers. Field Officers are the most important link in the chain for legal service delivery. If this link disappears problems are certain to arise. Field Officers interview clients, gather information on clients, including background (ie: health problems, family structure, underlying issues and anything that will help in court etc).

“...come with me to the police station to have your warrant executed, it will make it easier for you. “

- Field Officers are called by the police about outstanding warrants to arrest. Field Officers make arrangements for the client to attend at the police station with the Field Officers to have the warrant executed. There are advantages attached to a person attending a police station on their own accord, such as being more likely to be re-bailed than a person who is required to be taken to the police station by police.
- **Visit clients in police cells** - Field Officers make arrangements for clients, such as taking a bankcard away and give it to spouse to take money out from the bank whilst the client is detained in custody;

“...keep your bail sheet on the fridge so that you will be reminded of your court date”

- **Have the trust of the Indigenous community**
Field Officers break down what solicitors tell the clients (eg. jargon) and have the trust of the clients. When a solicitor is talking to a client, the client will often look to the Field Officers for support and to see what the Field Officer thinks about the situation. Indigenous people feel safer going to their own people.
- Arrange for the client and solicitor to talk;
- Sit in on interviews;
- Provide an extra source of support within the court room;
- Follow up clients if they do not turn up to court
- After the court case, inquire as to how the client thought the proceedings went;
- Tell clients of their options in recognition of the fact that many clients will not read pamphlets and dispense information where appropriate;

- Help people who have had a traumatic experience to open up, such as adolescents;
- Reinforce what solicitor tells client;
- Organise travel for clients who have court matters in other areas;
- Give character evidence on behalf of clients when able;
- Organise accommodation for Indigenous people who are arrested whilst passing through the area;
- Field Officers steer clients in the right direction and refer them on to other agencies. For instance, helping clients fill out Crimes Compensation forms;
- Be of assistance to police in domestic violence situations.
- **Are exposed to needs for law reform** - Field Officers observe how the law works in practice on Indigenous people and are in a position to tell the relevant authorities of any problems they come across. Field Officers speak to the VALS CEO, solicitors and research staff about potential law reform issues after reflecting on everyday experiences;
- **Education and Prevention** - Help involve Aboriginal people in preventative educational measures, such as those listed below.
- Have talks with Magistrates;
- Distribute educational information;

ATSILS in Action

All Field Officers are trained through the National Indigenous Legal Advocacy (NILA) course or its predecessor the National Indigenous Legal Studies course. NILA is the only nationally accredited program for the training of Field Officers. They operate a return home scheme in conjunction with Correctional Services, instigated courts to run District Court sentencing in Cape Community, provide educational programs, re legal rights and provide mentors for juveniles. *Tharpuntoo, Cape York Legal Service Aboriginal Corporation 2004.*

- **Talk to police** - A police officer, in referring to a group of Aboriginal people congregated in a park, remarked that he hoped that they would not get into any trouble. The police officer lacked knowledge of why Aboriginal people congregate in public places (ie; housing issues, low income). When Field Officers talk to police officers about beliefs such as that above, they continue and supplement the cultural training the officers receive before leaving the police force.

- Take part in cross cultural programs;
- Take adolescents to Melbourne to meet academics at the University of Melbourne to make them aware of possibilities open to them;
- Organise some camps as a preventative program for kids and police;
- Try to intervene before an arrest, such as Field Offices sometimes receive calls from police to assist a drunk before trouble starts;
- At Koorie Open Door Education (KODE) schools, a Field Officer is called to respond to incidents before the police are called, which is a sign of respect for the role of Field Officers;
- Assist in obtaining Community Based Work orders for clients that have been handed down by Magistrates and Judges.

The list of activities performed by Field Officers highlights the importance of their role and some of the needs that ATSILS clients have. The failure of the Exposure Draft to ensure that there are Indigenous staff to perform roles that meet the needs of Indigenous Australians, and the clear intention to encourage mainstreaming of legal services, underlines the threat to service effectiveness that the tender proposal represents.

ATSILS in action

We have daily incidents that may seem very minor to someone like Government where our Field Officers are called upon by the solicitor at court to ‘gain’ the confidence and faith of a client – particularly someone older or shy or first time offender or someone who is just paranoid of the system. *Many Rivers Aboriginal Legal Service 2004.*

The Vital Role of Prevention and Proactive System Improvement which are dismissed in the proposed tender

“Those who are often treated as outsiders or even as threats to the dominant culture can actually deliver a great gift to the dominant culture; they can provide different values, different perspectives and therefore different starting points from which to consider concepts such as equality, fairness and democracy. They can also provide alternative starting points for institutional change. Indigenous people, as perennial outsiders, can offer Australians a different perspective on their institutions”. **Larissa Behrendt**

The proposed tender no longer includes prevention, education, diversion, policy analysis, law reform or test case work as core services. This work is a function of Legal Aid Commissions

and Community Legal Centres and it is not clear why ATSILS should have this function taken away. Below are some examples of this work from Northern Territory, NSW and Victoria.

Victorian Aboriginal Legal Service - Policy, Law Reform and Networking

- In the last six months VALS:
- research about improving diversion for young people has resulted in approval for pilot projects in two areas
- submission to the Victorian Law Reform Commission about changes to the Bail Act has led to draft legislation which will enable circumstances of Indigenous people to be considered more fully
- continues to coordinate the quarterly Indigenous Womens Justice Forums
- obtained agreement in a protocol (about new Chroming laws) that police would notify VALS when they had to take a young person who had been chroming to a police station
- has negotiated a Memorandum of Understanding with the Equal Opportunity Commission
- has made a submission about proposed changes to regulation of Gas and Electricity utilities which will threaten the safety and wellbeing of disadvantaged consumers.
- has made a submission to the Law Reform Commission on Defences to Homicide
- has made a submission about a review to Child Protection policies
- continues to participate in Corrections Stakeholder meetings, steering Committee on Systemic racism research, Juvenile Justice Ministerial Round Table meetings, Department of Justice Aboriginal Justice Forum meetings, metropolitan and five Regional Aboriginal Justice Advisory Committees, Victoria Police Aboriginal Policy Reference Group meetings, Department of Human Services Consultation about Child Protection, Victoria Legal Aid Community Consultative Committee and the Federation of Community Legal Centres.

An Example from the Western Aboriginal Legal Service Dubbo, New South Wales

In 2003 a petition spear headed by a local radio performer was signed by 11,000 concerned citizens. The petition sought to introduce a curfew for young people on the street at night in Dubbo. This led to an acrimonious debate about whether young people should be locked up or looked after. The Western Aboriginal Legal Service worked with other Indigenous and non Indigenous groups to set up a youth forum to help consult with young people and identify solutions. The service has now linked in with Juvenile Justice staff, the Legal Aid staff and Community Legal Centre staff to develop a Legal Awareness program to inform young people about their rights and obligations. This program will be run in schools and also be provided to young people who are not at school.

An Example from Northern Australian Aboriginal Legal Aid Service (NALAS) Darwin, Northern Territory

- *Input on law reform and law related issues* – this has been another area where input by dedicated specialists has provided outstanding results. NAALAS is fully engaged in pursuing the rights of Aboriginal people through law and policy reform. This year we have participated in a number of fora including:

- Working Party to review the Anti Discrimination
- Aboriginal Customary Law Inquiry
- Itinerants Working Party
- NT Indigenous Justice Agreement
- Reintegration After Prison Reference Group
- Prison Court Appearances Working Group
- Darwin Regional Crime Prevention Council and Steering Committee

Further as a member of the Aboriginal Justice Advocacy Committee (AJAC) we led the fight to successfully overturn the Mandatory Sentencing legislation. Most recently we have played a major role in the current moves to develop circle sentencing ('Koori Court') in the NT and other alternatives to the way courts do business. NALAS (2004)

If the proposed new AT SIS tendering policies go ahead **none** of these sorts of initiatives will be done by AT SILS in the future.

The Rationale for the Tender and its Scope

The last time AT SIC enforced a tender regime it was in NSW in 1996. AT SIC decided that there should be eight Services Providers and they would be Indigenous controlled. Due to lack of appropriate bids there were six Services Providers contracted to provide legal services in their respective regions. . Eight years later, the new plan is that Indigenous control is irrelevant and that there should be one Service Provider per state. (but more than one Service would be considered.)The fact that AT SIS policy can vary so dramatically in a relatively short period highlights the shifting sands of AT SIS policy, and a lack of adequate research and consultation that underlies these two proposals .

Minister Vanstone has stated in a radio interview that the tender proposal is about getting value for money. The Office of Evaluation and Audit Report of 2003 indicated that the Government was already receiving excellent value for money. The report's costings indicated that AT SILS were on average 60% cheaper than Legal Aid Commissions.(OEA,2003)

The Minister also said that there are some well performing Services who can expect to be funded and some poor performing Services that will not. This implies that the tender specifications are not the main selection criteria that will be used to select the new AT SILS but provider's track record will be the key. It also indicates that the Government has been ineffective at ensuring Services are operating effectively. VALS and NAILSS are not aware that there has been any evidence provided for these assessments of 'performers' and 'non performers'. VALS and NAILSS are not aware that AT SILS have been told where they stand on the performance ladder or the criteria used for this assessment.

Minister Vanstone in an answer to a question about an ongoing fraud inquiry involving an indigenous person included a reference to the tendering of AT SILS implying that it was a solution to a problem affecting AT SILS. This link by the Minister was quoted in the ABC "7.30 Report" about the proposed tender. There is no basis for making this link. The ANAO review of the administration of the Law and Justice Program had a long list of criticisms of AT SIS program management but it was positive about financial management in relation to

ATSILS. VALS and NAILSS do not believe it is valid or fair for the Minister to imply that ATSILS are not adequately financially managed.

The proposed tender is about much more than value for money. The tender proposes cultural accessibility criteria which are so minimalist they can only have been designed to encourage mainstream providers. The tender specifications restrict the range of core services and tries to lock ATSILS into a much narrower role. The introduction of a means test will be an administrative burden which will not be cost effective. ATSSIS know this already as a result of piloting such a scheme (Keys Young 2001).

There are four types of Legal Aid Provider: the ATSILS, private law firms, Legal Aid Commissions and Community Legal Centres. ATSILS are the only ones being subject to tendering.

The proposed tender has put child welfare and personal safety as case priorities ahead of crime. Previous priority areas were not listed in priority order. More Child welfare and personal safety matters mean that there will be more cases where there is a conflict of interest. By mainstreaming ATSILS the government will be reducing the choice of providers at the very time they are proposing casework priorities which will require maintenance of a range of providers.

The Review of the tendering of NSW ATSILS (OEA,1999) recommended against any watering down of the Cultural Accessibility standards. The Office of Evaluation and Audit had no doubts about the limitations of tendering ATSILS.

In implementing its present contestability policy, ATSSIC should be cognizant of the demonstrated and unwarranted costs of using services of other than non-profit legal providers. Recommendation 9 OEA (ATSSIC) 2003

The ATSSIS policy on contestability until March 2004 was to use tendering as a last resort for non performing services and that tenders should be to Indigenous organisations. These and other policies have been mysteriously ignored and replaced.

There has been no consultation with ATSILS or other stakeholders about the changes to contestability, core services, priorities and operating procedures. There appears to be no account taken of widespread concern and extensive critiques of the effectiveness of tendering.

Competition policy does not claim that all groups will be better off. It claims that there will be long term gains to the whole economy which will mean the pain of some groups will be outweighed by the gains of the majority. The estimate of the benefit of competition policy to the Australian economy over ten years was 23 billion dollars or a 5.46% gain according to proponents of the policy. Ranald and Thorowgood (Public Interest Advocacy Centre) quote Economist John Quigan who criticises the National Competition Policy figures. He claims that they have failed to consider the costs and exaggerated the scale of the benefits. He estimates that the benefits are more likely to be in the vicinity of \$2 billion or 0.48% of GDP.

If there is benefit then it is likely to be far lower than first estimated and those benefits do not necessarily flow evenly to all groups or flow to some groups at all.

The Competition Principles Agreement contains a list of matters which governments may take into account “where relevant when assessing costs and benefits in relation to all aspects of National Competition policy.” These include:

- Social welfare and equity considerations, including community service obligations
- The interests of consumers or classes of consumers

The Senate Inquiry into Competition policy raised questions about the appropriateness of extending competition policy to areas of social welfare provision. The Public interest test should be applied when considering whether to tender Aboriginal Legal Services. There is ample evidence that the services are poorly funded and working with disadvantaged communities. There is also evidence from the Office of Evaluation and Audit (ATSIC 2003) report that supports this and argues that competitive tendering will not lead to benefit.

In the UK a study of mainstream legal service providers which sought to compare the quality, cost and access of legal and non legal service providers was conducted by Richard Moorhead (2001, pg 276). Moorhead concludes “As a result the assumption that value for money will be enhanced by competition is questionable, or at least competition has to be carefully restrained and structured if it is to promote value for money in legal services.

If there is this level of uncertainty about how to use competition policy in relation to mainstream legal services how much more uncertainty must there be about applying the policy to Aboriginal Legal Services the most disadvantaged legal aid providers in this country.

Victoria which embraced tendering during the mid nineties has pulled back in significant areas. Local Government no longer has to tender out 50% or more of services The State has introduced a policy called Best Value which provides a form of annual audit of services. In the area of prisons where private providers were the big winners of new contracts in Victoria the new focus is on greater cooperation between providers. The conclusion reached was that in a mixed system there were benefits in trying to achieve more cooperation in pursuit of achieving more consistent and higher standards. Ironically the new head of Corrections driving this policy used to manage a private prison.

In the ABC 7.30 Report on the proposed tender of ATSILS it was reported that no state governments, no Legal Aid providers and no Directors of Public prosecution had been consulted about the proposed tender. The ANAO (2003) report recommended that consultation with existing providers, stakeholders and potential providers needed to occur prior to moving to tender. ATSI ignored this advice.

**The ability of Law and Justice Program components to recruit and retain expert staff.
(Indigenous Law and Justice Inquiry term of reference d)**

Summary

Q. Are Indigenous legal aid workers overworked, under resourced or under paid.

A. Yes

Q. If so how does it affect their ability to serve the Indigenous community?

A. It means that the time available per matter is very restricted and it means that there is a high level of staff turnover.

Q. If the legal aid services are losing people what can be done to keep them?

A. Salaries comparable to what staff of Legal Aid Commissions are receiving, Salary structures comparable to LACs, improved infra structure and staff involvement in strategic planning and work load monitoring.

Q. What changes would enable legal aid staff to better help their clients

A. See answer above plus: improved staff training and education.

The Office of Evaluation and Audit (2003) report about the Legal and Preventative Services Program makes it clear that staff recruitment and retention is a major challenge for ATSIILS. The ANAO (2003) report makes it clear why this is the case. A summary of characteristics they identify was listed above but deserves repeating.

The Review of the Law and Justice Program provides the following overview of ATSIILS:

- Services provided have increased dramatically
- Funding has been static since 1991
- Demand has and is likely to increase
- Services require between \$12.5 million and \$25 million extra
- They are the primary provider of legal services providing approximately 89% of all services. (Australian National Audit Office, 2003)

Experienced private practitioners who do a lot of Legal Aid work have become less common and “juniorisation” has been increasing.(Pg. 39 Law Council of Australia 2004) These people are usually at the very bottom of the income scale in private practice terms. Salary levels in Legal Aid Commissions are generally below this. Community Legal Centres are generally below this. With very few exceptions ATSIILS would be at or below the level of Community Legal Centres staff in terms of pay level.

The work often involves considerable travel and clients often have multiple legal problems and a range of disadvantages which make contacting and getting instructions and making a defence challenging.

ATSIILS in Action

Earlier this year, a regional Client Service Officer was dealing with another matter when a client attempted to hang himself in a police cell. It was more good luck rather than good management that the client is alive today. The CSO attended the police station soon after the incident. The presence of the CSO meant that the incident could not be swept under the carpet. VALS has written to Police and the Department of Justice seeking policy and training improvements. *VALS 2004.*

Access for Indigenous women to Indigenous Specific Legal Services. (Indigenous Law and Justice Inquiry term of reference c)

Q. Do you feel your organisation is able to provide adequate legal services to Indigenous Women?

A. Yes given existing resources and policies.

Q. What are the main obstacles which prevent your organisation from helping Indigenous women?

A. Lack of ATSILS funding, Lack of Legal Aid funding more generally Commonwealth Government practice of funding mainstream or non ATSILS Indigenous providers to reach Indigenous women has made an integrated community approach to some problems more difficult, belief by some members of the community that ATSILS won't assist women.

Q. What do you think are the most pressing legal issues confronting Indigenous women?

A. Knowledge about how the legal system works and how to utilize it, better access to education and employment, access to criminal, civil and family law advice, referral and case work

Q. What would enable your organisation to help Indigenous women more effectively?

A. More money. Policy that aimed to increase the capacity of ATSILS to do prevention work and civil and family law.

This term of reference is closely linked to the issue of what mix of work ATSILS do. ATSILS across Australia vary in some respects in the exact number and type of case undertaken. The common fact is that the majority of cases are criminal and the proportion of criminal matters for males is around 75%. However the number of female offenders has been increasing as has the number of women in prison. The one strike and you are out proposal in relation to repeat violence offenders in the draft tender would not dramatically change the percentage of male to female offenders dealt with. VALS figures indicate that it would effect similar percentages of male and female offenders. The reality is that unless you radically cut back the amount of criminal cases conducted and do family and civil the percentage of male clients will be considerably higher than female. Criminal cases on average take much less time than civil and family cases and there is a much larger number of these cases than civil and family cases. As long as ATSILS have a significant proportion of criminal cases their case numbers are going to be skewed to servicing male clients.

However the number of cases is not the only indicator that should be considered in relation to male female balance. The average time per civil and family case is considerably higher than that spent on criminal matters. Women are more likely to seek assistance in these matters than in criminal matters. A break down of lawyer time across all case matters will indicate a higher proportion of time provided to women than will the less sophisticated indicator of percentage of all cases. The figures below highlight this.

26% of VALS criminal law matters are for female clients. Over 50% of the civil and family clients are female. As criminal matters are far more common than civil and family cases this means 27% of all cases are for women. However due to the higher time required to do civil and family matters over 37% of lawyer time is allocated to female clients.

VALS recognizes the need to improve access to services by Indigenous women. After initiating a quarterly Indigenous Women's Justice Forum VALS was successful in obtaining funds for an Indigenous Women's Forum Project Support worker. VALS for several years sought funds to establish a Women's Annex with a separate legal practice and premises but infrastructure support from VALS. This was based on the model used in Kempsey. These submissions were unsuccessful. Subsequently a stand alone service to cover the whole state was established. No other Indigenous Family Violence Prevention Service uses this model. There was no consultation with VALS about the development of the Indigenous Family Violence Prevention Service.

It is interesting that ATSSIS are convinced that there are significant savings in forcing ATSILS services to amalgamate particularly in Queensland whilst at the same time refusing to

consider the potential for any collaboration or infrastructure savings between Family violence prevention services or between those services and ATSILS.

The Commonwealth Government over the last eight years has opted to meet Indigenous women's legal needs by providing:

- a) new funds to mainstream services eg Women's Community Legal Centres were funded to provide Indigenous Women's services and
- b) Indigenous Family Violence Prevention Services were funded.

There are clear arguments for a stand alone service to meet the needs of women as some women will see ATSILS as mens services and in some cases there will be conflicts of interest. If the Commonwealth were serious about Indigenous community legal needs they would have also increased funds to ATSILS to expand their civil law and family law capacity. Family law matters can often involve child protection and family violence issues but they are not labelled that way on a statistics sheet.

The Office of Evaluation and Audit report (Pg 111,OEA, 2003) stated that there was more unmet need for civil and family law than family violence services but this was rejected by ATSIS with no explanation in their response to the report.

In the last budget the Government announced that the Indigenous family Violence Prevention Services program would receive a 100% increase eg there would be double the number of services. We are not aware of whether this is the best way to expand the program or whether there has been any discussion with existing services about how best to utilize new money.

When the Indigenous Women's Legal Service ceased operation some years ago. Victoria Legal Aid invited VALS to apply but later informed us that the Commonwealth Government would not allow VALS to receive the funds as the funds were to provide an alternative to Aboriginal Legal services.

Family violence is a serious problem but it is not always a problem that women wish to use the criminal justice system to remedy. In relation to Family Violence matters VALS believes there is a tension between getting tough on Family Violence matters and getting smart. This tension is particularly difficult for Indigenous communities. The Victorian Indigenous Family Violence Strategy advocates a community strengthening approach rather than one based primarily on a criminal justice approach. Another direction in Victoria and some other areas is to emphasise police being more pro prosecution and pro arrest. In the first instance obtaining interim orders to stop Family Violence is not technically difficult. However as the process involves dealing with police and courts for many Indigenous people this is a difficulty.

Many women who want an intervention order are seeking short term safety not punishment and conviction of a partner. The more the system moves to a more punitive approach the less likely many Indigenous women will be to seek help. A balance needs to be made between ensuring support and assistance for women who want to see prosecution for an assault and those women who want police assistance to deal with family violence as a safety issue. A policy approach that relies solely on legal casework provision will ignore prevention and community strengthening approaches. ATSILS, Family Violence Prevention Units and other Indigenous services need to work more closely on the development of community awareness, support services and community strengthening as well as more accessible legislation, policing and court processes.

The Department of Human Services Child Protection staff are often reported to advise Indigenous women who are subject to investigation where family violence is an issue that they should take out an Intervention order against their partner if they want to avoid further action by Child Protection. This is not necessarily an optimal form of intervention and may simply create unnecessary demand for criminal law and family law case work

**Coordination of Aboriginal and Torres Strait Islander Legal Services with Legal Aid Commissions through measures such as memoranda of understanding.
(Indigenous Law and Justice Inquiry term of reference b)**

Summary

Q. How can mainstream legal aid services better help Indigenous people?

A. By continuing to respect and support the primary role that Indigenous organisations have in providing legal aid services to Indigenous people; continuing to communicate and where possible collaborate on policy, prevention and funding issues and by developing cultural awareness training for staff who play a complementary role in service provision.

Q. What kinds of measures have Indigenous legal aid services undertaken to improve cooperation with mainstream providers?

A. There are different arrangements in place in different states. In Victoria VALS has a Memorandum of Understanding with Victoria Legal Aid, legal aid is provided for barristers in higher court cases, assistance is provided with community legal education projects, secondment of a family law solicitor is continuing, Legal Aid regional office staff meetings with VALS staff as an in service and support to advocate against the proposed tender. VALS is a member of the Federation of Community Legal centres and works collaboratively with other centres.

Q. How have the mainstream services responded?

A. See above

Q. What prevents Indigenous people from seeking the services of mainstream Legal Aid Commissions.

A. Most Indigenous people prefer to use an Indigenous service provider.

Q. What prevents Legal Aid Commissions from helping Indigenous Australians?

A. Legal Aid Commissions do help Indigenous Australians both directly and via assisting ATSILS. ATSIS appears to have the view that if a Legal Aid Commission in a particular state provides some additional level of assistance greater than in another state this is a basis for concluding the state Commonwealth can reduce their contribution. This ATSIS assumption is not only a disincentive to Legal Aid Commissions to fund any new initiatives it is a threat to the continuation of existing initiatives.

Q. How do community groups and Indigenous Legal Aid providers work together? How can they better help each other?

A. There is a range of ways that this occurs. If the narrowing of role and function proposed in the ATSILS tender goes ahead the scope for cooperative action will be reduced to almost nothing.

**The Distribution of ATSILS resources among criminal, civil and family cases.
(Indigenous Law and Justice Inquiry term of reference a)**

Summary

Q. What needs to be done to ensure a fair distribution of Indigenous Legal Services

A. In geographic terms ATSSIS should release for discussion the study which was done almost a year ago to provide a new funding formula; acknowledge that redistributing the existing funds is counter productive; acknowledge the primary role of ATSILS and oppose the restrictive and secondary role proposed in the tender document. Don't penalise States which receive assistance from Legal Aid Commissions as this is a disincentive for Commissions to provide assistance.

In terms of types of cases there should be sufficient funding to ensure that criminal civil and family law capacity exists in each state and that cooperation between ATSILS and Indigenous Family violence protection services is encouraged.

Q. Do you feel that certain types of cases are not receiving the attention they deserve?

A. All cases suffer from the level of funding available. Although there are some major problems with the OEA analysis of this issue there is some basis for arguing that civil and family law matters should receive increased funding.

Q. Do you feel that changes to funding priorities are needed?

A. No. The proposed tender priorities were a strait jacket. ATSILS Boards should have flexibility to ensure that an appropriate balance of all three cases is achieved. In the case of some smaller ATSILS this will be difficult to achieve and cooperative arrangements with other providers will be necessary.

Q. Have you been prevented from reaching and adequately serving clients by time and cost involved in travelling long distances.

A. The service budgets to ensure the clients can be assisted across the state. As mentioned previously the amount of time per client and the turnover of staff are factors which affect the adequacy of service. The priority given to criminal matters in ATSILS means that males will out number females in terms of number of cases conducted.. Resources devoted to civil and family matters are more likely to be utilised by women. However as the average time per case is higher with these cases there will still be significantly more male clients than female unless the number of criminal cases was cut dramatically. It is worth reflecting that in the area of mainstream Legal Aid the Commonwealth Government has resolved this question of civil versus criminal or family law by stating that Commonwealth Legal Aid dollars can only be spent on Commonwealth legal matters. This effectively means that the Commonwealth funds family law but not civil or criminal or family violence. This narrow approach by the Commonwealth Government has been and continues to be strongly criticised by other Legal Aid providers as inflexible and inequitable. The Commonwealth has not extended this unfortunate practice to Community Legal centres or ATSILS so far. It is problematic that the Commonwealth Government can achieve any real benefit from this level of intervention in priority setting.

ATSILS in Action

Teenager accused of stealing a mobile phone was assaulted by several police officers. The Ombudsman (Police Complaints) and the Victoria Police Ethical Standards Department dismissed the young man's complaint. After four years, VALS won a civil case against Police, the young man was awarded \$66500. ***VALS May 2004. (If the tender goes ahead, this sort of case would not be undertaken)***

The only attempt to analyse the balance of different cases that we have seen is in the Evaluation of the Legal and Preventative Services Program OEA report (Pg 46-49, OEA 2003). It does an analysis of need based on a 1994 ABS Survey of Indigenous People. The OEA report argues that there is too little family and civil law, too much crime and about the right level of Family Violence work. The OEA report acknowledges that Family violence may be underreported. On the other hand that assessment was prior to the recent doubling of funds for Indigenous Family Violence Prevention. It is also not the case that all people reporting an incident of family violence would seek a criminal justice service to deal with it.

In relation to criminal matters there is also likely to be an under reporting of crime to the people doing the survey. The OEA analysis also neglects to distinguish between number of people requiring criminal law assistance and the number of separate matters that they require assistance with. Research published by VALS in 1998 indicated that although there were only approximately 2000 individuals assisted but there were over 3000 matters dealt with. The under reporting and the individuals who have been arrested on multiple occasions are likely to result in criminal law demand which is double that estimated by OEA.

It is likely that lack of familiarity with civil law and lack of confidence utilising the law will mean that surveys would also underestimate the need for this assistance. VALS believes for the reasons above that the OEA analysis almost certainly underestimates the level of need and the demand for criminal law however the analysis is probably also right about the need for higher levels of civil and family law assistance. Whether this need is expressed as demand in all jurisdictions is another matter. People being unaware or unconfident of the law and the process may result in needs not being expressed as demand.

The issue of an appropriate balance of cases is a complex issue. The smaller an ATSIL is, the more difficult it will be to cover all these bases all the time. That is not an argument against smaller services but a recognition that how to achieve a balance of cases is going to require some flexibility and some time to develop and will take effect differently in different states. A one size fits all approach will be costly and ineffective.

If the guidelines are too prescriptive state and regional differences in resources and services, and differences in supply and demand will not be accommodated and the move to providing a balance of services will be handicapped. There also needs to be some scope for the Board of an ATSILS to fine tune the balance between various priorities. Once again the issue of adequate and appropriate funding is a key factor.

Other Issues

Indigenous Population Increase

Over the last twelve years while funding has been shrinking in real terms the Indigenous population has been growing at a faster rate than the mainstream population. Between 1991 and 1996 the Indigenous Population grew by 33% while the Australian population grew by 6%. The Indigenous Victorian population has increased by 16.8% between the 1996 and 2001 Census. (From 21,465 to 25,061.)

“There were significant overall increases in Indigenous population in much of Victoria between 1996 and 2001. Most of the major increases were recorded in the large regional

Victorian population and employment centres. These gains were matched by outer and fringe metropolitan municipalities.”(I.D. Consultants 2003)

The population increase in itself is an argument for increased funding of ATSILS. The youth of the population means there is a large number of young people (57% of the Victorian Indigenous population is under 25 compared to 34.3% of the total population). at an age when criminal offending is at it's highest

Defunding the National Aboriginal and Torres Strait Islander Legal Services Secretariat, the peak ATSILS body

Defunding National Aboriginal and Torres Strait Islander Legal Service Secretariat, the peak ATSILS body, has several unfortunate consequences. It reduces the capacity of ATSILS to coordinate, consolidate and articulate the issues they have to deal with, it deprives Australia of a Non-Government National and International voice, it makes cooperation on policy, training and system development matters much more difficult. It also makes it very difficult to achieve cost savings by for example purchasing things such as Professional Indemnity Insurance. The ANAO report stated that purchasing group insurance was a possible way for services to save money. A tender approach to funding undermines the capacity to achieve savings from cooperative approaches. The approach taken by ATSIS to ATSILS is arrogant and dismissive and wasteful when compared to the Commonwealth Attorney-General's Department approach to Community Legal Centres. While it is far from perfect the Attorney General's department consults the Community Legal Centres peak body regularly in relation to policy development and policy implementation.

The peak body should be refunded as the work it can do will benefit the Indigenous Community, ATSILS other legal aid providers and the Government.

An Opportunity to build a better system of Legal Aid provision

ATSILS are the primary provider of Legal Aid services to Indigenous people. They are a vital part of the existing mixed system of legal aid provision which consists of four suppliers-the private profession, legal aid commissions, community legal centres and ATSILS. Changes to one part of the system often have flow on effects to the other providers. All Legal Aid providers are experiencing difficulty but ATSILS with static funding, increased and rapidly increasing population to serve and a widely dispersed and disadvantaged clientele face special challenges.

The existing ATSILS can and do leverage considerable resources and support via their links agreements and networks with main stream and Indigenous organisations. They have the capacity to aid crime prevention and crime prevention programs; they can and do assist the establishment of restorative justice approaches and alternatives to adversarial problem solving, they provide valuable links to drug and alcohol services and family violence services where they exist.; they help keep other parts of the legal aid system, the legal system and State and Commonwealth government departments in touch with the needs and views of Indigenous people. It is ironic that governments will spend large sums of money on consultants to write reports for them on the other hand they are willing to abolish ATSILS who have wide ranging knowledge about the law and legal system impact on Indigenous people. ATSILS in many cases provide this expertise in the course of a years work at a fraction of the cost.

The existing relationships between legal aid providers are professional, pragmatic and collaborative. ATSILS are a cost effective service. There is some level of shared commitment to delivering services and building a better system. The Commonwealth Government since 1996 has withdrawn from the partnership it had with the states in providing Legal Aid. If the Commonwealth proceeds to mainstream and privatise ATSILS this will have a negative effect on Indigenous people and create new pressures on other legal aid providers. It will be seen for many years as removing a valuable pillar in the Legal Aid structure. It is fanciful to imagine that privatising ATSILS will not have a range of damaging effects on the effectiveness of these services and the communities they serve.

If there are weaknesses or problems with ATSILS then these should be analysed with ATSILS and strategies for improvement developed and implemented. There is no basis for the radical scepticism that presently exists about the value and effectiveness of Aboriginal organisations. There is a huge resource in terms of the social capital that ATSILS enjoy; there is enormous capacity to do more if funding was improved to a sensible level and Government policy was long term and based on capacity building not capacity shedding.

References

Aboriginal and Torres Strait Islander Commissioner, 2002 *ATSIC Commissioner Report 2002* Human rights and Equal Opportunity Commission.

Allen Consulting, 1999, Tendering NSW Aboriginal Legal Services report (NSW report).

Australian National Audit Office, 2003 Report Number 13; Review of the Law and Justice program.

ATSIS, 2004, EDPA document: Purchasing Arrangements for Aboriginal and Torres Strait Legal Services.

Behrendt, Larissa 'Achieving Social Justice: Indigenous Rights and Australia's Future' (2003).

Commonwealth Grants Commission, 2001, Inquiry into Indigenous Funding.

Criminal Justice Commission: Research and Prevention Division (March 2000) 'Prisoner Numbers in Queensland: An examination of population trends in Queensland's Correctional Institutions', p. xi

Erosion of Legal Representation in the Australian Justice System (February 2004)

Fleming, D, 2001 *Australian Legal Aid Under the First Howard Government* British Columbia Law Review.

Frieberg, A, 1999 Explaining Increases in Imprisonment Rates. Paper delivered at Third National Outlook Symposium on Crime, Australian Institute of Criminology

Frieberg, A, 2002, Pathways to Justice Sentencing Review, Department of Justice, Victoria
Human Rights and Equal Opportunity Commission, Submission to ATSIS, 2004.

Johnston, E 1991. National Report 5 Vols, Royal Commission into Aboriginal Deaths in Custody, AGPS.

Keys Young Consultants 'Improved Targeting of ATSILS' (1999)

Moorhouse, R, The Rise of Non Lawyers: Experience from England and Wales Lawyers, Non Lawyers and Professional Service in a Contested Domain

Office of Evaluation and Audit OEA (ATSIC)., 2003, Evaluation of the Legal and Preventative Services Program.

Ranald,P and Thorogood, 2001, Public Interest Advocacy Centre

Victorian Aboriginal Legal Service, 1998, Justice Gone Walkabout



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***Submission to ATSIIS – Response to “Exposure Draft of a Request for Tender
for the purchase of Legal Services for Indigenous Australians”***

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RECOMMENDATIONS

- A That the Minister acknowledge and take account of the primary role that the Victorian Aboriginal Legal Service (“**VALS**”) has in providing legal services to Indigenous people in Victoria.
- B That the Minister acknowledge the important role presently played by Aboriginal and Torres Strait Legal Services (“**ATSILS**”) such as VALS, which is recognised by other Legal Aid providers. That the Minister commit to a careful analysis before making far reaching changes to the current program of Aboriginal legal service delivery through the Aboriginal and Torres Strait Islander Services (“**ATSIS**”) Law and Justice Program.
- C That the Minister recognise the interdependence of the various legal aid providers and ensure that effective consultation occurs in the future prior to the initiation of substantial policy changes. This was a recommendation of the Australian National Audit Report Number 13.
- D That the purposes of the Aboriginal legal service program include the following:
- (a) to play a leading role in promoting and protecting the rights and interests of Indigenous Australians, including being involved in the important welfare roles related to legal activities;
 - (b) to promote legal justice and reduce the disproportionate involvement of Indigenous Australians in the criminal justice system;
 - (c) to promote the review of legislation and other practices which discriminate against Indigenous Australians.
- E That the list of core services in the Policy Framework for Targeting Assistance Provided by ATSILS (2003) be adopted by ATSIS. There is no effectiveness or efficiency or policy argument for excising any of these core services from the services provided by ATSILS. The list includes:
- (a) preventative, information and education services;
 - (b) initial legal advice, minor assistance and referral;
 - (c) duty lawyer assistance;
 - (d) legal casework assistance in criminal civil and family law matters;
 - (e) input on law reform and law related issues to promote social justice for Indigenous Australians; and
 - (f) outreach support and other legal aid related services.
- F That the tendering process cease and a cost benefit analysis be done that compares tendering with other purchaser provider options, taking into account more collaborative approaches to enhanced effectiveness and the value of existing social capital.
- G That in performing a cost benefit analysis ATSIS consider the Competition Principals Agreement (“**CPA**”). The CPA sets out a (non-exhaustive) list of 'public interest' factors that governments should consider when assessing the costs and benefits of a particular policy or course of action [Clause 1(3)]. Relatedly, ATSIS should be required to consider whether the provision of legal services to Indigenous Australians, such as those provided by VALS, falls within the public interest exception to the National Competition Policy (“**NCP**”).

- H That the tender should only be employed in circumstances where ATSILS are under-performing and it should be open to “not for profit” Indigenous organisations only.
- I That the priority categories be reassessed or re-categorised to be less rigid.
- J That plans to introduce mandatory means testing be abandoned.
- K That the “one strike and you’re out” policy be abandoned.

1 General comments and overview

- 1.1 This submission analyses key features of the “Exposure Draft of a Request for Tender for the purchase of Legal Services for Indigenous Australians” (“**EDPA document**”). The submission has been prepared by the Victorian Aboriginal Legal Service (VALS) with advice from and the support of Arnold Bloch Leibler, Lawyers and Advisers (ABL).
- 1.2 VALS strongly objects to and opposes the proposal to tender out Aboriginal legal services as presently proposed for the reasons set out in this joint submission. VALS requests urgent discussions with Aboriginal and Torres Strait Islander Services (ATSIS) on the matters set out in this submission.
- 1.3 The EDPA document fails to acknowledge or take account of the present *primary* position that ATSILS like VALS hold in the provision of legal services and legal aid related services to Indigenous communities in Australia. In this respect Aboriginal and Torres Strait Islander Legal Services (ATSILS) are unlike most other ATSIS funded services which are supplementary to main stream providers. This means that the proposed dramatic changes to ATSILS will have major impacts on Indigenous people’s access to justice, the operation of the legal aid system and the court and corrections systems.
- 1.4 Rather than recognize the vital role of ATSILS and seek to build on the considerable strength and capacity of ATSILS, the EDPA document assumes that ATSILS should be restricted to a narrow supplementary role; in doing this the EDPA document unfairly discounts the existing social capital contribution of ATSILS such as VALS.
- 1.5 The contestability policy within the EDPA document is a significant departure from previous policy positions of the Aboriginal and Torres Strait Islander Commission (ATSIC) and ATSIS, as the proposed tendering model appears designed to tender a narrower range of services than current ATSILS provide. The EDPA document does this by changing the definition of core services and the structure and content of service priorities and introducing means testing. The EDPA document is also a significant departure from ATSIC and ATSIS policy because it encourages non-Indigenous providers to take over some or all of the provision of legal services to Aboriginal people.
- 1.6 The EDPA document, as drafted, does not encourage the provision of effective, efficient and culturally sensitive legal services to Indigenous Australians. To the contrary, Indigenous Australians’ access to culturally sensitive legal advice is at risk of being considerably reduced by the EDPA document. Aboriginal people seeking access to a legal service will be disadvantaged by the EDPA document.
- 1.7 The EDPA document minimises the legal services targeted specifically to Indigenous Australians, creating an environment in which many Indigenous Australians will be forced to seek advice and help from mainstream Legal Aid Offices and other forums, with limited if any cultural sensitivity and cross-cultural expertise. It is recognised that this shift decreases the Commonwealth Government’s responsibility for providing and funding Aboriginal legal services and attempts to increase the responsibility of the States and Territories for such services.

2 Policy

The new contestability policy to narrow services provided by ATSILS

- 2.1 The ATSI 2004 contestability policy, including new policies on ATSILS, is contained in the EDPA document. The EDPA document ignores the findings quoted most recently in the 2003 Australian National Audit Office Review that “the potential for finding a market of non-Indigenous tenderers was highly restricted and in many cases non-existent”¹. It also ignores the recommendation in the Office of Evaluation and Audit review, which states, “In implementing its present contestability policy ATSI should be cognisant of the demonstrated unwarranted costs of using the services of other than non-profit legal providers”².
- 2.2 The 2001 ATSI contestability policy was framed to use tendering where existing providers were not performing adequately. The policy was also one of seeking tenders from Indigenous organizations only. ATSILS were aware in June 2003 that funds for service provision were going to be tendered when they were informed that they were receiving only six months funding. It was only in March 2004 that it became clear to VALS that the tenders were open to non-Indigenous and “for-profit” services. It was only in March 2004 that it became clear to VALS that there were major policy changes to the ATSILS policy guidelines. Compared with the existing ATSILS Policy Framework for Targeting Assistance Provided to Aboriginal and Torres Strait Islanders, issued in July 2003, the EDPA document proposes a substantial narrowing of the purpose of legal services. The EDPA document redefines and narrows the core services to be provided and sets out policy prescriptions which are more inflexible than those in the existing Policy Framework.

3 Type of services to be provided

- 3.1 The scope of services that ATSI wants to purchase through a tendering process is considerably narrower than the services ATSI provide at present. The EDPA document outlines the services to be purchased as follows:
- (a) Information, initial legal advice, minor assistance and referral delivered in the most appropriate form including:
 - (i) Face to face contact on a provider's premises;
 - (ii) Telephone using a 1800 reverse charge number; and/or
 - (iii) Outreach arrangements including field officers;
 - (b) Duty lawyer assistance; and
 - (c) Legal casework including representation and assistance covering criminal, civil and family law matters.
- 3.2 These services will be delivered in accordance with the requirements, priorities and procedures set out in the Policy Directions³.
- 3.3 ATSILS, including VALS, provide a broader range of core services, as is defined by the ATSILS Policy Framework (2003). They include:
- (a) preventative, information and education services;

¹ Australian National Audit Office, Report Number 13 (2003), Para 212, Page 38

² Office of Evaluation and Audit OEA (ATSI 2003), Recommendation 9, Pg109

³ ATSI EDPA document 2004, Appendix A, para 2.3 pg 17

- (b) initial legal advice, minor assistance and referral;
 - (c) duty lawyer assistance;
 - (d) legal casework assistance in criminal civil and family law matters;
 - (e) input on law reform and law related issues to promote social justice for Indigenous Australians; and
 - (f) outreach support and other legal aid related services.
- 3.4 Of great concern is the fact that the EDPA document does not include the core services referred to in paragraph 3.3 (a), (e) and (f) above. This omission implies that such services are not core services. If the omitted services are to be funded separately, the EDPA document does not explain how or why it is advantageous to excise some services from others. The omitted services are intrinsically connected to and inter-relate with the provision of legal aid and should continue to be a core service of ATSILS.
- 3.5 **It is requested that ATSIIS advise as a matter of urgency why it believes it is more effective to separate these core services.**
- 3.6 **It is requested that ATSIIS provide clarification, again as a matter of urgency, on the types of services that are required to be provided and in what priority they should be provided.**

4 Purpose and objectives of services

- 4.1 The introduction of the EDPA document makes reference to Indigenous Australian's higher incarceration rates and lower scores on measures of socio-economic status and well being. It states that the ATSIIS Law and Justice Program has a number of interrelated programs (pg 17 EDPA document). The EDPA document does not explain what the interrelationship with other Law and Justice programs will be or how tendering legal services out will advance these interrelationships.
- 4.2 The EDPA document does not mention that ATSIIS are to "play a leading role in promoting and protecting the rights and interests of Indigenous Australians" or mention "important welfare roles related to these legal activities".⁴ The EDPA document also does not make any mention of ATSIIS "...promoting social justice...reducing the disproportionate involvement of Indigenous Australians in the Criminal Justice system...(or) promoting the review of legislation and other practices which discriminate against Indigenous Australians".⁵
- 4.3 The EDPA document results in the narrowing of the role of ATSIIS because it omits fundamental policies about legal rights and interests of Indigenous Australians and leads to the reduction of Indigenous involvement in the criminal justice system. These omissions contrast greatly with the present ATSIIS arrangements. The services provided by ATSIIS currently center around key concepts of empowerment, prevention (through the running of test cases and law reform activities) and involvement in community and education.
- 4.4 The EDPA document does not allow for the provision of such important projects as the provision of diversion programs for young people and the coordination of community forums and groups. The EDPA document also does not allow for the drafting of submissions on draft legislation and other community issues. The above activities are currently undertaken by VALS and many, if not all, other ATSIIS. If the tender is not amended to allow for a greater breadth in the services provided by eventual contractors for the provision of legal services, then these types of initiatives will not be carried out by

⁴ Policy Framework for Targeting Assistance Provided by ATSIIS (2003) Para 1.2 pg 3

⁵ Ibid Policy Framework for Targeting Assistance Provided by ATSIIS (2003) Para 2.1 pg 4

the service providers of legal aid for Indigenous Australians in the future. This occurrence will be to the detriment of all Indigenous and non-Indigenous Australians.

- 4.5 The EDPA document does not contain any recognition that ATSILS occupy a different place to many other Indigenous services in that ATSILS are the *primary* provider of Indigenous services in the legal sector. The primacy of ATSILS was recognised in 2003 in the Australian National Audit Office report (“**ANAO report**”) as follows:

“In many ATSSIS programs, the ATSSIS role is intended to be that of a supplementary funding body. In the case of legal aid to Indigenous Australians 89 per cent of legal aid cases were handled by ATSILS in 2000-2001 and 11 per cent were provided by LACs. Accordingly, ATSSIS through its Law and Justice program is effectively the primary funding body for legal aid to Indigenous Australians”.⁶

- 4.6 The proposed ATSSIS contestability policy fails to acknowledge the *primary* role played by ATSILS in the delivery of legal services to Indigenous people. Allowing the continuation of the present range of core services, especially in the areas of education, policy and law reform, would enable the experiences of the new service providers’ clients to be developed into more effective policies and laws.
- 4.7 **It is urgently requested that ATSSIS provide reasons on how the more narrow definition of service provision in the EDPA document accords with the Commonwealth Procurement Guidelines (“CPG”) that seek efficient and effective outcomes.**

5 Priority categories

- 5.1 The new priority categories (in order of priority) are:
- (a) where the safety or welfare of the child is at risk;
 - (b) where the personal safety of the applicant, or a person in the applicant’s care, is at risk;
 - (c) where an applicant is at risk of being detained in custody; and
 - (d) where a family member of a person who dies in custody seeks representation at an inquiry into the death.⁷
- 5.2 Other categories of legal practice may be dealt with only when all demand of applicants in the priority categories has been satisfied. Priority is also to be given to people in an area not serviced by a Legal Aid Commission (LAC).
- 5.3 The EDPA document incorporates two orders of priority. Firstly, it differentiates between applicants who satisfy one of the priority categories, as opposed to an applicant within a non-priority category. Secondly, the EDPA document seeks to prioritise between the priority categories, such that top priority be given when the safety or welfare of the child is at risk, and least priority to where a family member of a person who dies in custody seeks representation at an inquiry into the death.
- 5.4 The policy priorities in order of priority have the effect of narrowing the core services that legal services providers offer. The priority categories in the EDPA document should also include the following categories:
- (a) where cultural or personal well being is at risk;
 - (b) where circumstances of public interest exist;

⁶ Australian National Audit Office Report 13 (2003) Pg. 46, 27

⁷ ATSSIS EDPA document 2004, Pg 62-63

- (c) where the provision of aid is likely to substantially benefit the Indigenous Australian community or Indigenous Australians generally; and
 - (d) where the client would be significantly disadvantaged if assistance is not provided.
- 5.5 Does ATSI expect that demand in Priority Category 1 must be exhausted before Priority Category 2 cases can be addressed? Are the priority categories to be reflected in staff levels and expertise?
- 5.6 **VALS urgently seeks further clarification from ATSI on how demand in various priority categories is to be managed.**
- 5.7 VALS acknowledges the importance of child safety and personal safety. Governments, through Child Protection and Police departments, have the primary responsibility for these matters. Legal and legal aid related remedies are sometimes appropriate to secure assistance in these matters and should be provided by ATSI.
- 5.8 For VALS and equally for its constituency, all the identified priorities are important areas of service provision, especially the newly included first priority category. These are positive developments. However, the inclusion of this new category has not been accompanied by further funding. Consequently, the ability of the new service provider to adequately provide services to those Indigenous Australians who seek it will be severely reduced.
- 5.9 The new priorities will have the effect of making it less likely that family law will be provided. Intervention orders, which are comparatively low cost cases compared with family law cases, will be likely to be prioritized by providers in order to get high case numbers. It also appears that the only way to qualify for family law assistance is by alleging violence is occurring.
- 5.10 In Victoria, VALS currently provides the majority of its assistance in the area of criminal law. The policy changes will disadvantage Aboriginal people by exposing them to unnecessary risks of imprisonment. It is foreseeable that the reduction of criminal law assistance to priority three will ultimately lead to:
- (a) An increase in unrepresented or self-represented men and women, especially those who have committed minor offences or are recidivists in violence offences. Representation in less serious matters is important for Aboriginal people.
 - (b) Increased number of defendants failing to appear at court.
 - (c) More defendants experiencing pressure to plead guilty.
 - (d) Longer sentences and a higher population of Aboriginal people within the prison system. This is especially the case for recidivists who are not represented, as leniency is not extended to repeat offenders.⁸ The further detention and increased incarceration of Aboriginal people is a major concern in light of the critical findings of the Royal Commission into Aboriginal Deaths in Custody (“**RCIADIC**”, 1991))⁹, in relation to the overrepresentation of Aboriginal people in the justice system and rate of death.
 - (e) Increased pressures on the court system, due to a combination of the above factors.
- 5.11 The policy priorities will have a significant impact on the practice of civil law. Civil law is not listed as a priority and the demand for civil law is likely only to be met once the first four priorities have been satisfied.

⁸ ‘Australian Legal Assistance Forum – Exposure Draft Purchasing Arrangements: Legal services Contact 2004-2007 for Legal aid services for Indigenous Australians’ p3

⁹ Royal Commission Into Aboriginal Deaths In Custody (1991)

- 5.12 It is a concern that the shift in the emphasis of the priorities will compound the inability of legal services to meet needs of Indigenous Australians. Many applicants seeking assistance for less-serious crimes will be ineligible for assistance from the new service provider and therefore denied culturally sensitive assistance, which VALS (like other ATSILS) is expert at providing. The EDPA document fails to examine the means by which the other legal service providers can be objectively judged as being capable of providing assistance to those who would be ineligible for assistance under the new system.

6 The “one strike and you’re out” policy

- 6.1 Apart from the four priorities mentioned above there are also additional policies which appear aimed at reducing access to criminal law services. For example, section 3.10 of the EDPA document states:

*“Where a Provider has previously represented an applicant charged with a criminal offence involving violence, assault or the breach of a restraining order and the circumstances of the two cases are the same or similar, the Provider may refuse to represent the applicant and refer the applicant instead to a service providing appropriate counselling and support (where such a service is available and reasonably accessible)”.*¹⁰

- 6.2 The “one strike and you’re out” policy would exclude a significant number of ATSILS clients. This policy encourages a provider to refuse legal services to persons who are repeat offenders in violence matters, and is much more restrictive than LAC policies. There is no rationale provided for this new policy, which is a major change from existing policy. This policy would be likely to have the effect of funnelling clients to mainstream legal aid offices and private solicitors and shift the cost of service provision from the Commonwealth Government to the State and Territory Governments. The “one strike and you’re out” policy is unacceptable because it encourages discrimination against repeat offenders.

7 Interrelationships with other programs

- 7.1 The new role of a provider will be narrower than the role of both Community Legal Centres (CLC) and mainstream legal aid offices. The EDPA document assumes that mainstream legal aid services will absorb the clients that the new service providers will not be able to service, especially in metropolitan and regional areas. Applicants residing in an area where a legal aid service exists are, according to the EDPA document, expected to go to a legal aid service rather than the new service provider. This assumption is based on a premise that legal aid services will be able to provide effective assistance to Indigenous clients. Further, for those applicants that are neither able to access the new service providers, nor legal aid services, the EDPA document assumes that CLCs are capable of helping Indigenous clients.
- 7.2 The above assumptions have been made without any consultation with and the informed consent of those experienced and expert in the unique requirements of servicing Indigenous clients (ie. ATSILS, including VALS and Indigenous community organisations). There has also been no consultation with legal aid services and CLCs as to either their capacity for additional workload or their capacity to assist Indigenous clients “in a culturally and sensitive way”.

¹⁰ ATSSIS EDPA document 2004Pg 64

- 7.3 **It is strongly recommended that ATSiS further consults with the appropriate organisations as to the division of work prior to proceeding any further on the tender. Further, it is suggested that a re-categorisation of priorities occurs so that Indigenous clients are able to access justice from the new service providers in a greater range and number of cases.**
- 7.4 The EDPA document needs to more accurately and explicitly outline what services will be preferentially provided by the chosen legal providers, and what services should (post-tender) be provided by LACS. In reaching this decision, ATSiS should have regard to the benefits associated with Indigenous-focused legal aid. ATSiS should remain the prime funding body, and the provision of legal services to Indigenous Australians should not be further supplemented by non-Indigenous-specific legal aid providers.
- 7.5 **As a matter of urgency, it is requested that ATSiS provide further clarification on what the inter-related programs are and how the legal service providers should co-ordinate with them.**

8 Service providers

8.1 Selection Criteria Service Providers Need To Meet

- (a) The ATSiS policy not only narrows the core services that Aboriginal legal services are to provide, but opens up the possibility of such restricted services no longer being supplied by Indigenous organisations with Aboriginal staff, but mainstream providers. The way in which the EDPA document is framed opens up the possibility of control over Aboriginal legal services being transferred from Indigenous organisations. For instance, arguably, the selection criteria in the EDPA document are geared towards mainstream service provision. The selection criteria are as follows:
- (i) demonstrated capacity to deliver high quality and efficient legal aid services in accordance with applicable professional and ethical standards (40%);
 - (ii) capacity to provide an accessible and culturally sensitive service to Indigenous Australians (30%);
 - (iii) capacity to achieve the priorities set out in the Policy Directions for the Delivery of Legal Aid Services for Indigenous Australians (30%); and
 - (iv) cooperation with other service providers (10%).

8.2 Cultural Specificity – Selection criteria B

- (a) The second criteria, “accessibility and cultural sensitivity” is detailed in the Service Standards section of the EDPA document.¹¹ The wording of the Service Standards makes it clear that the determination of the successful tenders will be done in a culturally insensitive way. The EDPA document contains no requirement that the legal service provider be in any way linked to an Indigenous community of peoples - whether that be through an Indigenously owned or managed entity or through an employer of Indigenous Australians. This omission ignores the recommendations of the Allens Group’s “Final Report to the Office of Evaluation and Audit, Tendering of Aboriginal and Torres Strait Islander Legal Services in New South Wales: Initial Assessment and Future Options” (“The Allens Group report”, 1999)), which stated that a provider of Indigenous legal services should be controlled by Indigenous peoples and represent Indigenous communities.

¹¹ ATSiS EDPA document 2004 Pg 87

- (b) The EDPA document does not limit the potential service providers to “not-for-profit” organisations. In this critical area, the EDPA document has not implemented the recommendations of the Office of Evaluation and Audit, that ATSI be “cognisant of the demonstrated unwarranted costs of using the services of other than non-profit legal providers”¹².

9 Strong cultural requirements versus contestability

- 9.1 The Allens Group Report highlights the trade off between cultural specificity in the tender document and contestability. Unlike the NSW tender specifications, the EDPA document does not include a requirement that the registrant should have, “[a]n organisational structure which maximizes Aboriginal Community control”.¹³ In its present form, the EDPA document may very well result in some ATSI being replaced by non-Indigenous providers. This is a concern given the present use of ATSI by Indigenous Australians indicates that a very high proportion of Indigenous Australians favour Indigenous service providers.
- 9.2 The Allens Group report quotes a range of arguments and reports in support of strong cultural requirements being imposed on a service provider, as opposed to weak cultural requirements that are a consequence of a trade off between cultural specificity and contestability at the expense of the former. For instance, the 1980 House of Representatives report on Aboriginal Legal Aid, which was chaired by Phillip Ruddock, supports strong cultural requirements (refer to Schedule 1).
- 9.3 Of major concern to VALS, as it is to all ATSI, is the very real possibility that replacing Indigenous providers with non-Indigenous providers will reduce the numbers of Indigenous Australians who seek assistance, which would be a tragic result. It is significant that selection criteria B links cultural sensitivity to accessibility. If the cultural sensitivity of a service is limited, Indigenous access to that service is also limited. Lack of access to legal services is a very real possibility because the EDPA document appears to have discounted the need for strong cultural requirements of a legal service provider by drafting the guidelines to maximise the chances that private law firms will tender for the funds in a competitive environment.

10 Contestability policies that increase the competitiveness of private law firms

- 10.1 There are several obvious measures which have been adopted by ATSI to encourage private law firms to tender for Aboriginal legal services. These include:
- (a) **Cultural Inaccessibility**
- (i) Removal of references to Indigenous management or control.
 - (ii) Attachment of a weighting to the selection criteria for “..accessible and culturally sensitive service..” of only 30%¹⁴.
 - (iii) Writing the standard for accessible and cultural sensitivity in terms which make it clear that employing Indigenous staff is not a prerequisite¹⁵.

¹² Australian National Audit Office Report 13 (2003) Recommendation 9, pg 109

¹³ Allen Consulting “Final Report to the Office of Evaluation and Audit, Tendering of Aboriginal and Torres Strait Islander Legal Services in New South Wales: Initial Assessment and Future Options” (1999) p.40

¹⁴ ATSI EPDA document 200 4p 51

¹⁵ ATSI EPDA document 2004 p 87

(b) Abolishing holistic service provision

The abolition of holistic service provision means that the EDPA document includes only the core ATSILS services which private firms are likely to be familiar with, for example information, duty work and casework¹⁶.

(c) Absence of a Geographic Focus for the tender

ATSIS have previously made it clear that it believes there are economies of scale to be achieved by reducing the number of separate service providers and that this would be achieved by tendering for the provision of legal services of an entire State.¹⁷ At the same time, in the EDPA document, ATSIS has indicated a willingness to consider tenders for only part of a State or for more than one State. These conflicting positions provide a window of opportunity for private law firms to put in a bid that would take over two or smaller ATSILS areas, or fragment State coverage by one ATSIL.

(d) Means testing

Private practitioners are experienced in administering a means test to obtain legal aid. The proposed means test appears to be inconsistent with the research by consultants Keys Young, Improved Targeting of ATSILS 1999 ("the Keys Young report"), for the Commonwealth Government, which reviewed a three centre pilot project assessing the operation of a simple means test. The research demonstrated that means testing is not a cost effective measure. As a result, the Keys Young report proposed that a means test to apply only to expensive cases. In the late 1990s, Victoria Legal Aid introduced a requirement that a \$20 fee be paid by clients. This was eventually withdrawn in the face of evidence from the private profession that it cost considerably more to collect the fee than the amount received.

(e) Conflict of Interest

Providers are encouraged to set up "chinese walls" to overcome conflicts of interest. Again this is something that will be easier for very large legal organisations than for smaller community based ones.

(f) Consultation

- (i) ATSIS has failed to enter into consultations with Aboriginal communities, organisations and peoples. Without consultation ATSIS have assumed that the provision of Aboriginal legal services by non-Indigenous organisations is suitable.
- (ii) The lack of consultation is in breach of a number of recommendations (including the RCIADIC recommendations, the Commonwealth Grants Commission Inquiry into Indigenous Funding (CGC), 2001) and the ANAO Review (2003), which state that ATSIS should consult with the ATSIC Board, Regional Councils, ATSILS and other Indigenous organisations. The ANAO report stated that ATSIS should conduct extensive consultation with stakeholders and potential tenderers prior to proceeding with the tender.
- (iii) VALS, as with other ATSILS and Indigenous organisations, had a legitimate expectation that they would be consulted prior to the decision to competitively tender being made. The level of consultation to date on the EDPA document has fallen far short of these recommendations.

¹⁶ ATSIS EPDA document 2004 p 9

¹⁷ Australian National Audit Office Report 13 (2003) para, 2.30 Pg.23

11 Contestability policies which make ATSILS less competitive

- 11.1 There are other measures which appear designed to make ATSILS less likely to secure tenders. These include:
- (a) *The requirement to have adequate financial viability including operating funds to deliver a service.*¹⁸ As most independent community organisations will be almost totally dependent on Government funding to operate, the requirement for tenderers to have cash reserves equal to one or two months anticipated cash expenditure, to facilitate the arrears payment system, is likely to represent a significant handicap to most not-for-profit providers.¹⁹
 - (b) *The requirement to meet selection criteria C (“capacity to achieve the priorities”).* As ATSILS have traditionally focused on criminal law, ATSILS will be burdened by the need to accommodate to the new policy priorities which introduce the concept of ‘priority in order of priority’ and rank criminal law as priority three. The low rating to crime will put most existing ATSILS at a disadvantage.
 - (c) *An assumption that ATSILS are supplementary providers to legal aid providers rather than primary providers.* The report implies that Indigenous people in cities do not need Indigenous legal services and states that ATSILS should prioritise rural areas where there is no legal aid office.²⁰
 - (d) *A new policy which recommends people with a prior charge that involves violence be refused assistance and be referred to counselling.*²¹ This will lead to VALS being unable to help a significant proportion of their clients, resulting in their clients seeking help elsewhere, representing themselves or failing to appear.
 - (e) *There appears to be no recognition of the valuable organisational knowledge and skill that is likely to be lost in this process.*

12 Discrimination against VALS

- 12.1 The NSW experience in competitive tendering indicates that not-for-profit organisations are inexperienced at competitive tendering. The Allens Group report reported that four of the eight regions had no “suitable” registrant because the majority of registrants were, for the most part, non-profit organizations that appear to have been “relatively inexperienced in openly competitive tenders”.²² Whilst ATSIS will not address the difficulties “not-for-profit” organisations will face in the interests of maintaining the probity of the tendering process, at the same time ATSIS has not established a level playing field in the EDPA document.
- 12.2 Private law firms, with no proven links to, work experience with or support of Indigenous Australians, should be ineligible to tender. Otherwise, Indigenous Australians’ capacity for self determination is significantly reduced. The ATSIS decision to shift from an approach of tendering as a last resort to a broad tendering approach open to mainstream organisations is likely to disadvantage ATSILS.

¹⁸ ATSIS EPDA document 2004, section 3.2.3, pg 23

¹⁹ ATSIS EPDA document 2004, section 3.5.4 pg 33

²⁰ ATSIS EPDA document 2004, pg. 63

²¹ ATSIS EPDA document 2004, pg 64

²² Allen Consulting “Final Report to the Office of Evaluation and Audit, Tendering of Aboriginal and Torres Strait Islander Legal Services in New South Wales: Initial Assessment and Future Options” (1999) Pg 25

13 Broader policy issues

13.1 Self determination, self management and effective partnerships

- (a) The EDPA document does not accord with many of the recommendations of the RCIADIC. It is specifically inconsistent with recommendations 84, 105, 106, and 107.
- (b) The implementation of the EDPA document has the potential to increase the imprisonment rates of Aboriginal people. ATSIIS notes in the EDPA document that Aboriginal and Torres Strait Islander people are incarcerated at significantly higher rates than non-Indigenous people in line with the RCIADIC, but does not increase the chances that more Aboriginal people will receive representation. This is because the definition of Aboriginal legal services has been narrowed and more money for representation is not made available.
- (c) A key theme in the RCIADIC is the importance of Aboriginal self determination. Recommendation 188 states:

“That Governments negotiate with appropriate Aboriginal organisations and communities to determine guidelines as to the procedures and processes which should be followed to ensure that the self-determination principle is applied in the design and implementation of any policy or program or the substantial modification of any policy or program which will particularly affect Aboriginal people. Refer to Appendix B for a list of the RCIADIC Recommendations relevant to the issue of self determination.”
(Refer to Schedule 2)

- (d) The Commonwealth Government prefers the term self management to self determination. Whatever term is used, the lack of consultation about significant policy changes to ATSIIS certainly ignores the letter and the spirit of the RCIADIC recommendations. The Commonwealth Grants Commission Report on Indigenous Funding (2001) (“**CGC Report**”), released eleven years after the RCIADIC, uses different language but makes some similar recommendations about how Government should deal with Indigenous organisations.
- (e) The CGC Report states that:

“There are important principles and key areas for action that should guide efforts to promote a better alignment of funding with needs. These include:

- (i) *the full and effective participation of Indigenous people in decisions affecting funding distribution and service delivery;*
- (ii) *ensuring a long term perspective to the design and implementation of programs and services, thus providing a secure context for setting goals;*
- (iii) *recognising the importance of capacity building within Indigenous communities.”*

“Effective partnerships between service funders, service providers and Indigenous people will better direct services towards Indigenous disadvantage. Some essential features of such partnerships are that there is:

- (i) *the involvement of all relevant spheres of government, with across-functional perspective;*
- (ii) *a financial stake for all parties, so that Indigenous representatives do not feel dominated by the fund-holding agencies;*

- (iii) *full and equal access to policy and service delivery information for all parties; and*
- (iv) *Indigenous control of, or strong influence over, service delivery expenditure”*

For those communities where capacity building is lacking, a higher initial investment of resources will need to be made to provide a framework for the effective delivery of services and sustainable outcomes”²³.

- (f) ATSYS in designing the EDPA document appears to have not taken into account the above recommendations and focused instead only on recommendations about increased targeting of services. An audit is necessary to ascertain the consistency of the EDPA document with the RCIADIC Recommendations.

13.2 Commonwealth Grants Commission Report (2001)

- (a) The CGC Report focused on health, housing, infrastructure and education. In this context it described Indigenous specific services as being aimed at supplementing mainstream services. This is clearly not the case with ATSILS, which provide 89% of legal service to Indigenous people. ATSILS are different to many other Indigenous service providers as ATSILS are the primary provider of services, not a secondary service or a supplementary service. This primary role of ATSILS is recognised clearly in recent reports to Government.²⁴ This is also something recognised and acknowledged by LACs.
- (b) Some of the recommendations of the CGC Report about mainstream providers taking more responsibility and Indigenous services being a supplementary service which targets the most disadvantaged clearly do not fit the ATSILS context. However, some of the language and ideas of the EDPA document appear to have been influenced by the CGC Report (eg. targeting and the idea of Indigenous services being supplementary). Unfortunately, the EDPA document ignores the CGC emphasis on the importance of Indigenous involvement and control and ignores the significance of ATSILS being primary providers of services.

13.3 Funds Available for Purchase of Services

- (a) There has been no substantial injection of new money into the ATSILS program since 1992. Under current funding levels ATSILS are experiencing increasing costs and difficulty in attracting and retaining professional staff.²⁵
- (b) The present level of annual funding for ATSILS is \$42.9 million. \$2.4 million of this is temporary supplementation for Fringe Benefits Tax transition arrangements which ends in June 2005. There is no indication that this will be replaced with increases to core funding. The Office of Evaluation and Audit (ATSIC) report in March 2003 indicated that ATSILS required an additional \$25 million to achieve funding levels similar to LACs. In 2003 the Australian National Audit Office report stated:

“other reports on the provision of legal services by ATSILS have referred to ‘shortfalls’ in ATSIC funding for legal aid of either \$12.4 million or \$25.6 million”²⁶.
- (c) Although ATSYS suggests in the EDPA document that the funds available for legal services during 2004-2007 are indicative only, it is concerning that there is no suggestion of any increase in this document. It appears that for two and half

²³ Commonwealth Grants Commission, 2001, Inquiry into Indigenous Funding. Pg xvii-xix

²⁴ Australian National Audit Office Report 13 (2003), para 2.46 pg 27

²⁵ Australian National Audit Office Report 13 (2003) Internal ATSIC paper 21st January 2003 Quoted on Pg. 40

²⁶ Australian National Audit Office Report 13 (2003) pg 23

years of the next three years the funds available will be \$40.46 million, a decline of \$2.4 million nationally²⁷.

- (d) It is clear from the ANAO report that cost shifting to the States is part of the new contestability policy. It is stated in the report that:

*"[w]ith the proposal to move to tendering and contract arrangements, ATSIIS will need to assure itself as to how, in the future, legal aid services that are required, but not provided by ATSIIS because of constrained funding, will be provided by alternative providers such as LACs"*²⁸

*".... 89% of case and duty matters in 2001-2002 were for criminal matters which if unfunded by ATSIIS would place "far greater funding pressures on the LACs in particular (i.e. most criminal law matters) funded by the State".*²⁹

14 Responsibility of Commonwealth

14.1 Section 51(xxvi) of the Australian Constitution empowers the Commonwealth Government to make laws with respect to Indigenous Australians. By seeking to increase the number of Indigenous Australians who seek assistance from State or Territory run legal service providers, the EDPA document suggests a shifting of some of the responsibility and cost for the provision of these services to the States and Territories. If the development of policy is consequently divided between States/Territories and Commonwealth, a consistent approach to the support and empowerment of Indigenous Australians will be difficult, if not impossible.

14.2 The CGC Report highlighted the problem of cost shifting in the following terms:

"18. Australia's federal system of government blurs service delivery responsibility between governments and has complex funding arrangements. It results in citizens generally having a limited understanding of the responsibilities of the different spheres of government. It also results in some responsibility and cost shifting between governments. The overall result, for Indigenous people, is that they generally distrust government agencies and do not believe all the funding reaches the intended goals.

19. Lack of clarity on the allocation of responsibility among the spheres of government in Australia can create opportunities for cost shifting between levels of governments and between agencies at the same level of government. From an Indigenous perspective, the detrimental aspects of cost shifting arise when services are not provided because one party has 'vacated the field'."

14.3 The ATSIIS tendering proposal appears to be squarely aimed at cost shifting. The last major example of the Commonwealth Government cost shifting in relation to legal aid was the 1996 funding cut, which was accompanied by a new restriction that Commonwealth legal aid is provided for Commonwealth matters only. This cost cutting has had the effect of reducing the supply of funds for family law and State criminal matters. The effects of changes to legal aid have been extensive and damaging. Such changes have been characterised as a policy reversal that fragments the system and in policy terms takes Australia back to the fifties³⁰. It has also led to a range of damaging flow on effects such as "juniorisation" of lawyers doing legal aid, a dramatic rise in

²⁷ ATSIIS EDPA document 2004 Pg 20-21

²⁸ Australian National Audit Office Report 13 (2003), Pg 49

²⁹ Australian National Audit Office Report 13 (2003), Pg 47

³⁰ Fleming, D, 2001 Australian Legal Aid Under the First Howard Government British Columbia Law Review.

unrepresented litigants and reducing numbers of lawyers who do legal aid work. Such erosion of legal representation is discussed in detail in a recent Law Council of Australia report titled, 'Erosion of Legal Representation in the Australian Justice System' (2004). Refer to Schedule 3).

15 Cost effectiveness

- 15.1 The cost effectiveness of current ATSILS, including VALS, when compared to the potential competitive tenders of "profit" organisations, is excellent as instanced by the OEA 2003 report. The report provides evidence that the private sector could not provide a more cost efficient and effective legal service than ATSILS. For instance, it is noted that ALSWA was funded for \$5.85 million with the private sector service equivalent being \$24.21 million. Cost effectiveness is a relevant consideration that must be, but to date has not been, adequately considered in the decision to tender Aboriginal legal services.
- 15.2 In some cases Aboriginal legal services might not be functioning at an optimal level. However, the vast majority of ATSILS provide economic, efficient and effective services. Most problems with ATSILS service delivery stem from inadequate funding levels³¹.
- 15.3 The introduction of a means test in the EDPA document ignores the conclusions of consultants Keys Young that a simple means test is not a cost effective measure³². It would heighten administrative costs with, in most cases, little return. In accordance with the priorities of "value for money", any means test should only be applied to expensive cases.

16 National Competition Policy ("NCP")

- 16.1 The provision of legal services to Indigenous Australians clearly falls within the public interest exception to the NCP. Clause 1(3) of the Competition Principals Agreement ("CPA") sets out a (non-exhaustive) list of "public interest" factors that governments should consider when assessing the benefits and costs of a particular policy or course of action. Relevant considerations include "social welfare and equity considerations, including community service obligations,... the interests of consumers generally or a class of consumers,... (and) the efficient allocation of resources". These are highly relevant considerations which ATSI, in drafting the EPDA document, should have considered, but have not.
- 16.2 If the interests of Indigenous Australians are given due and proper regard, the tender should be limited to not-for-profit organisations with the strongest available links to Indigenous communities. In any event, more weighting and more substantive criteria must be given in the selection criteria on the ability of the service provider to deliver a culturally empathetic service geared towards Indigenous communities.

17 Commonwealth Procurement Guidelines

- 17.1 ATSI is a "prescribed agency" under schedule 1 of the *Financial Management and Accountability Regulations 1997* (Cth) ("FMAR"). As such, Schedule 8 of the FMAR provides that an official performing duties in relation to the procurement of property or services must have regard to the Commonwealth Procurement Guidelines ("Guidelines").

³¹ 'Australian Legal Assistance Forum – Exposure Draft Purchasing Arrangements: Legal services Contact 2004-2007 for Legal aid services for Indigenous Australians' , p5

³² Keys Young Consultants 'Improved Targeting of ATSILS' (1999)

The Guidelines state that “value for money is the core principal governing Commonwealth procurement”. This core principal is underpinned by four supporting principals:

- (a) Efficiency and Effectiveness;
- (b) Accountability and Transparency;
- (c) Ethics; and
- (d) Industry Development.

Efficiency and Effectiveness

- 17.2 The Guidelines recognise that no single purchasing method suits all situations, stating that “buyers must consider the requirements and existing market conditions of each procurement”. AT SIS has not properly considered the requirements and existing market conditions of the procurement of legal services for Indigenous Australians.

Accountability and Transparency

- 17.3 The Guidelines state that “transparency through internal and external scrutiny is an essential element of accountability and should be an inherent characteristic of all processes, procedures, plans, actions or decisions relating to procurement.” The EDPA document states that information sessions and questions will be taken during the consultative period and answers posted on the AT SIS website. The information sessions were inadequate and the delay in giving answers to questions (answers did not appear on the relevant website until 2 April 2004 has compromised VALS’ ability to effectively respond to the EDPA document. Further, answers when they appeared, were brief and non-substantive. This lack of transparency is particularly inadequate, especially given the Guidelines’ statement that “fundamental to all Commonwealth procurement is that it is sufficiently transparent to allow Government, Parliament and the public to have the utmost confidence in the procurement process...”.
- 17.4 Both in relation to the CPA and the CPG, VALS had a legitimate expectation that the Guidelines would be followed in the conduct of the tender for provision of legal services. This legitimate expectation has not been met by AT SIS and VALS reserves its legal rights as a consequence.

18 Conclusion

- 18.1 By limiting the new service provider to the provision of legal services in their narrowest form and by cutting back core services and introducing policy priorities in order of priority, the benefits currently provided by AT SILS, the primary provider of Aboriginal legal services, will not be available to Aboriginal people.
- 18.2 The EDPA document not only narrows legal services to be provided to Aboriginal people by reducing core services and shifting priority emphasis, but also alters who will provide the narrower version of Aboriginal legal services. The EDPA document has been drafted to maximise the chances of attracting competitors and in particular private law firms. The new narrower and less flexible AT SIS proposed policy directions mean the very idea of AT SILS has been downsized. The new post-contestability service envisaged by the EDPA document will no longer be holistic. It will no longer need Aboriginal staff or management. And it will no longer be a primary service provider but a service to supplement Legal Aid.
- 18.3 The EDPA document represents an attempt to reposition AT SILS as a supplement to Legal Aid. It attempts to make providers as similar in appearance to Legal Aid as possible by encouraging private lawyers to become the main providers. The EDPA document provides no clarity about how the providers will be structured geographically.

- 18.4 The EPDA document seeks to deconstruct ATSILS by removing some of their core functions. It seeks to set city people against country people. It seeks to set women and children's issues against criminal issues. And it seeks to shift responsibility for criminal law matters from the Commonwealth Government to the State government.
- 18.5 The CGC Report about other Aboriginal services highlights the deficiencies of an approach which turns its back on Aboriginal organizations and seeks to rearrange an appallingly under-funded sector using complicated redistribution formulae.
- 18.6 Indigenous people in all regions have high needs relative to the non-Indigenous population. An important question is whether new methods of distribution should be applied to existing programs and funds. Any change in methods of distributing existing resources means that some regions would lose funding and others would gain. Redistributions risk losing the benefits of investments made over long periods of time, including those in developing organisational capacity and people.³³

³³ Commonwealth Grants Commission, 2001, Inquiry into Indigenous Funding

SCHEDULE 1 - THE NEED FOR SEPARATE ATSILS

The 1980 Aboriginal Legal Aid report, chaired by the now Attorney General Phillip Ruddock, produced a comprehensive list of reasons why separate ATSILS were a useful policy initiative and program. After discussing the arguments against separate legal services (para 87-92) the report strongly recommended that ATSILS should continue to be separate from their mainstream legal aid counterparts.

The Standing Committee outlined a number of key arguments to support this recommendation:

- Lower costs (para 95) – the report found after consultation that separate Indigenous legal services are more cost effective. One argument made was that salaries paid to Aboriginal legal service staff are less than those paid to Legal Aid employees. Legal Aid employees are paid according to public service regulations.
- Accessibility (para 96-97) – ATSILS create a unique relationship of trust and cultural understanding with their clients that simply could not be emulated by a larger mainstream Legal Aid service. This relationship means that Aboriginal people are more confident with the legal system, and therefore more likely to access legal representation when they need it.
- Community based services (para 98) – because they are specific to Aboriginal communities, ATSILS form close bonds with the communities they represent and are more likely to represent the needs of these communities.
- Community development (para 99-102) – as well as the central role of legal representation for Indigenous people, ATSILS play an important part in other key related areas of community development. These areas, among other things, include housing, Aboriginal-police relations, law reform and welfare.
- Need for specialisation – separate ATSILS mean that legal practitioners are better skilled and more culturally aware in dealing with the particular legal issues that confront Aboriginal people.
- Competing interests – by retaining separate ATSILS, conflict is avoided between the competing needs of the Aboriginal community and the rest of the community. (1980, pg 29-35)

All these reasons were the justification given by the Committee to the House of Representatives Standing Committee on Aboriginal Affairs for retaining ATSILS. It is clear that these justifications still have striking resonance today.

SCHEDULE 2 - ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY SELF DETERMINATION RECOMMENDATIONS

188. That governments negotiate with appropriate Aboriginal organisations and communities to determine guidelines as to the procedures and processes which should be followed to ensure that the self-determination principle is applied in the design and implementation of any policy or program or the substantial modification of any policy or program which will particularly affect Aboriginal people. (4:7)
189. That the Commonwealth Government give consideration to constituting ATSIC as an employing authority independent of the Australian Public Service. (4:12)
190. That the Commonwealth Government, in conjunction with the State and Territory Governments, develop proposals for implementing a system of block grant funding of Aboriginal communities and organisations and also implement a system whereby Aboriginal communities and organisations are provided with a minimum level of funding on a triennial basis. (4:4.21)
191. That the Commonwealth Government, in conjunction with the State and Territory Governments, develop means by which all sources of funds provided for or identified as being available to Aboriginal communities or organisations wherever possible be allocated through a single source with one set of audit and financial requirements but with the maximum devolution of power to the communities and organisations to determine the priorities for the allocation of such funds. (4:21)
192. That in the implementation of any policy or program which will particularly affect Aboriginal people the delivery of the program should, as a matter of preference, be made by such Aboriginal organisations as are appropriate to deliver services pursuant to the policy or program on a contractual basis. Where no appropriate Aboriginal organisation is available to provide such service then any agency of government delivering the service should, in consultation with appropriate Aboriginal organisations and communities, ensure that the processes to be adopted by the agency in the delivery of services are appropriate to the needs of the Aboriginal people and communities receiving such services. Particular emphasis should be given to the employment of Aboriginal people by the agency in the delivery of such services and in the design and management of the process adopted by the agency. (4:28)
193. That the Commonwealth Government, in negotiation with appropriate Aboriginal organisations, devise a procedure which will enable Aboriginal communities and organisations to properly account to government for funding but which will be least onerous and as convenient and simple as possible for the Aboriginal organisations and communities to operate. The Commission further recommends that State and Territory Governments adopt the same procedure, once agreed, and with as few modifications as may be essential for implementation, in programs funded by those governments.
194. That Commonwealth, State and Territory Governments, in negotiation with appropriate Aboriginal communities and organisations, agree upon appropriate performance indicators for programs relevant to Aboriginal communities and organisations. The

Commission further recommends that governments fund Aboriginal organisations and communities to enable the appropriate level of infrastructure and training as is required to develop, apply and monitor performance indicators. (4:29)

195. That, subject to appropriate provision to ensure accountability to government for funds received, payments by government to Aboriginal organisations and communities be made on the basis of triennial rather than annual or quarterly funding. (4:30)
196. That whilst governments are entitled to require a proper system for accounting of funds provided to Aboriginal organisations and communities, those organisations and communities are equally entitled to receive a full explanation of the funding processes which are adopted by governments. The Commission recommends that governments ensure that Aboriginal communities and organisations are given prompt advice, in writing and in plain English or, where appropriate, in Aboriginal languages, as to decisions concerning funding applications and as to financial and other matters relevant to the assessment of applications for funding made by those organisations and communities so as to enable those organisations and communities to make appropriate planning decisions. (4:30)
197. That ATSIC Councillors and Commissioners at an early stage be encouraged to consult with Aboriginal organisations and communities to develop a program for training staff of Aboriginal organisations and communities in appropriate management and accounting procedures to ensure the efficiency and integrity of the organisations which are culturally appropriate. In particular, there should be a commitment to devising management procedures which provide rules for the relationship, obligations and rights, both individually and as between each other, of directors, managers and staff of Aboriginal organisations. (4:30)
198. That governments commit themselves to achieving the objective that Aboriginal people are not discriminated against in the delivery of essential services and, in particular, are not disadvantaged by the fact that the low levels of income received by Aboriginal people reduce their ability to contribute to the provision of such services to the same extent as would be possible by non-Aboriginal Australians living in similar circumstances and locations. (4:38)
199. That governments recognise that a variety of organisational structures have developed or been adapted by Aboriginal people to deliver services, including local government type services to Aboriginal communities. These structures include community councils recognised as local government authorities, outstation resource centres, Aboriginal land councils and co-operatives and other bodies incorporated under Commonwealth, State and Territory legislation as councils or associations. Organisational structures which have received acceptance within an Aboriginal community are particularly important, not only because they deliver services in a manner which makes them accountable to the Aboriginal communities concerned but also because acceptance of the role of such organisations recognises the principle of Aboriginal self-determination. The Commission recommends that government should recognise such diversity in organisational structures and that funding for the delivery of services should not be dependent upon the structure of organisation which is adopted by Aboriginal communities for the delivery of such services. (4:38)

SCHEDULE 3 - EROSION OF LEGAL REPRESENTATION IN THE AUSTRALIAN JUSTICE SYSTEM

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*“[T]here has been an erosion in the level of legal representation and that this has had a detrimental impact on the legal system and the delivery of justice”.*³⁴

The finding of the *Erosion of Legal Representation in the Australian Justice System Report* is that the erosion of legal representation has been an issue since 1994. The cause of such erosion is the “reduced availability of legal aid funding” as a result of “cuts to funding and changes made to policy and procedural guidelines which tightened the availability of legal aid”.³⁵ The consequences of such erosion are as follows:

Rise in number of self-represented litigants

Inequity in access to legal representation has resulted in an increase in the number of self-represented litigants³⁶. It is recommended in the report that that urgent attention is given to increasing public funding to reverse the trend of self-represented litigants in court.

Costs of self-representation

The report quotes the Honourable Chief Justice Murray Gleeson: “[p]roviding legal aid is costly. So is not providing legal aid”³⁷. It is noted that cutting back on publicly funded representation could, in effect, be a false economy because it imposes extra costs on the court and other government funded bodies.³⁸ The report suggests that a greater investment in the public funding of legal representation is likely to result in cost savings to the court system and to the justice system as a whole.

The rise in self representation has the following detrimental effect on the court system:

- Rising cost, prolonged cases and delays;
- Increased demands on judicial officers as the burden of ensuring that the necessary work of the litigant in person is done falls on the court administration or the court itself³⁹; and

34 Erosion of Legal Representation in the Australian Justice System (February 2004), para 3

35 Erosion of Legal Representation in the Australian Justice System (February 2004), para 199

³⁶ Legal Support Fails Justice: LCA Lawyers Weekly, Issue 179, 20 February 2004, p.1

37 (Hon Chief Justice Murray Gleeson of the High Court of Australia, State of the Judicature Speech Australian

Legal Convention Canberra 10th October 1999 as cited in Erosion of Legal Representation in the Australian Justice System (February 2004), para 13

38(Law Reform Commission of Western Australia Review of the Criminal and Civil Justice System in Western Australia Project 92 LRCWA Perth September 1999 para 18.3 at ALRC:304) as cited in Erosion of Legal Representation in the Australian Justice System (February 2004), para 247

39 Erosion of Legal Representation in the Australian Justice System (February 2004), para 35

- The impartiality of the court is compromised which can lead to an injustice. When a party is self represented the court experiences a tension between the desire to see justice done, and the need to remain impartial in the delivery of justice.⁴⁰

A self represented party will be disadvantaged in the following manner because of their lack of representation:

- pressure to plead guilty or abandon case;
- inability to properly put their interests to the court⁴¹; and
- less likelihood of success in comparison to represented parties.⁴²

Lack of Access

The lack of public funding and the erosion of the legal representation have resulted in inequity in access to representation.

Diminution of legal rights

The lack of public funding and the erosion of the legal representation have diminished the ability of people to enforce their legal rights.

Significant withdrawal of experienced lawyers from publicly funded legal work Leading

Cuts to legal aid funding have led to a “diminution in the numbers of skilled and specialised lawyers undertaking legal aid work.” (ALRC 2000:301)⁴³

Some diminution in the quality of publicly funded legal representation;

Cuts to legal aid funding, leading to a significant withdrawal of experienced lawyers, means that junior counsel are more likely to take on legally aided matters. This process is termed ‘juniorisation’ and leads to some diminution in the quality of legal representatives available to publicly funded parties.⁴⁴

⁴⁰ Legal Support Fails Justice: LCA Lawyers Weekly, Issue 179, 20 February 2004, p.4

⁴¹ Legal Support Fails Justice: LCA Lawyers Weekly, Issue 179, 20 February 2004, p.4

⁴² Erosion of Legal Representation in the Australian Justice System (February 2004), para 52

⁴³ Erosion of Legal Representation in the Australian Justice System (February 2004), para 31

⁴⁴ Erosion of Legal Representation in the Australian Justice System (February 2004), para 23

19 References

- 19.1 Aboriginal and Torres Strait Islander Commissioner, 2002 *ATSIC Commissioner Report 2002* Human rights and Equal Opportunity Commission.
- 19.2 Allen Consulting, 1999, Tendering NSW Aboriginal Legal Services report (NSW report).
- 19.3 Australian National Audit Office, 2003 Report Number 13; Review of the Law and ATSI, 2003, Policy Guidelines for ATSI.
- 19.4 ATSI, 2004, EDPA document: Purchasing Arrangements for Aboriginal and Torres Strait Legal Services.
- 19.5 Commonwealth Grants Commission, 2001, Inquiry into Indigenous Funding.
- 19.6 Erosion of Legal Representation in the Australian Justice System (February 2004)
- 19.7 Fleming, D, 2001 *Australian Legal Aid Under the First Howard Government* British Columbia Law Review.
- 19.8 Justice Program.
- 19.9 Johnston, E 1991. National report 5 Vols, Royal Commission into Aboriginal Deaths in Custody, AGPS.
- 19.10 Keys Young Consultants 'Improved Targeting of ATSI' (1999)
- 19.11 Office of Evaluation and Audit OEA (ATSIC), 2003, Evaluation of the Legal and Preventative Services Program.