

Parliament of Australia
Senate Standing Committee on Legal and Constitutional Affairs
Inquiry into Access to Justice

Submission by the Aboriginal Legal Service (NSW/ACT) Limited

The Aboriginal Legal Service (NSW/ACT) Limited (ALS (NSW/ACT)) acknowledges the critical importance of each of the Senate Inquiry's Terms of Reference. In its submission, however, the ALS (NSW/ACT) wishes to address the following issues identified by those Terms of Reference as being of especial relevance in meeting its commitment to serve Aboriginal people and communities in NSW and the ACT:

- the ability of Aboriginal people to access legal representation
- the adequacy of funding and resource arrangements for community legal services, including Aboriginal legal aid services

For the reasons stated below, the ALS (NSW/ACT) submits that these factors are fundamental in promotion of the ability of Aboriginal people to access justice.

A culturally appropriate legal aid service for Aboriginal people

The ability of Aboriginal people to access justice is immediately dependent on their ability to access appropriate legal advice and representation. It is fundamental that Aboriginal people are able to access, and rely on, a high quality and culturally sensitive legal aid service. This imperative is recognised by the Commonwealth Attorney-General's Department in its contract for services to agencies to provide Aboriginal legal aid services (Recital A of the Department's contract for service providers).

Aboriginal communities have consistently maintained that such an appropriate service must be a community based agency, directed by Aboriginal people in consultation with those communities. This is of especial importance in regional and remote areas.

Although less than 2% of NSW's population overall, approximately 11% of the population in North West NSW identify as Aboriginal and approximately 8% in Far West NSW. In these areas in particular, Aboriginal communities look to an Aboriginal agency to provide a legal aid service.

Access to appropriate justice for Aboriginal people

The aspiration of the ALS (NSW/ACT) is to advance the legal rights of Aboriginal people in NSW and the ACT and to work towards a culturally appropriate justice. The primary step towards realising this goal and improving access to justice for Aboriginal people is to ensure the adequate resourcing of Aboriginal and Torres

Strait Islander Legal Services to deliver Aboriginal legal aid services.

Inadequate resourcing of Aboriginal legal aid services

Yet the funding allocated to Aboriginal and Torres Strait Islander Legal Services has, effectively, been frozen when compared with Commonwealth funding for mainstream legal aid services. In NSW, the State government provides no funds to its Aboriginal Legal Service. As a result, the ALS (NSW/ACT) continues to experience acute difficulty in recruiting and retaining appropriately experienced senior criminal lawyers, in particular in its remote offices in NSW.

As a consequence of the effective reduction in its funding, the ALS (NSW/ACT) has been forced into a position of cutting its services.

Those areas of service to which such cuts have been applied include:

- Family Law Services
- Parole Board Hearings
- Local Court Services in the Sydney Metropolitan Area (including Parramatta), Campbelltown, Wollongong, and Regional Centres.

The ALS (NSW/ACT) had also been forced to consider ceasing operations of its Custody Notification Service, although additional funding for this vital service enabled the ALS (NSW/ACT) to continue its operations for a further twelve months. However, that additional funding will end on 30 June 2009.

(The ALS (NSW/ACT) Custody Notification Service provides an Aboriginal person who is arrested telephone access to an ALS (NSW/ACT) lawyer on a dedicated telephone line on a 24 hour/7 day basis (see Appendix for a description of the operation of this service).

Unequal resourcing of Aboriginal and mainstream legal aid services

The ALS (NSW/ACT) is perplexed by repeated assurances that it is not the Attorney-General Department's intention either to impair the ALS's continuing capability to provide a high quality and culturally sensitive legal service or to force Aboriginal people into relying on mainstream -less culturally appropriate- legal services.

Yet each will be the result of what has been, effectively, a reduction in funding levels, together with a consequent loss of confidence by Aboriginal people in the commitment of the Australian government to improve access to justice for Aboriginal communities.

Despite such assurances, the funding allocation proposed for Aboriginal legal aid service providers contradicts the current government's pledge -given while in opposition- to properly consider the increase in costs to legal services¹, to strengthen funding to Aboriginal legal aid organisations² and to ensure an equitable level of remuneration to all staff working in Aboriginal legal aid agencies.

Recommendation

The ALS (NSW/ACT) thus recommends the funding of Aboriginal and Torres Strait Islander Legal Services to provide Aboriginal legal aid services on a parity with mainstream legal aid services, so as to promote access to justice for Australia's Aboriginal peoples and to implement the Labor Government's policy commitment.

1 National Labor Party Platform, Chapter 12, "Access to Justice", para 31

2 Ibid, para 35

Appendix

Aboriginal Legal Service (NSW/ACT) Limited Custody Notification Service

Description of Service

A State or Territory -wide 24 hour/ 7 day custody notification service that enables an Aboriginal or Torres Strait Islander person who is arrested or detained by the police to access a solicitor employed by the relevant Aboriginal and Torres Strait Islander Legal Service (ATSILS) immediately upon their detention at a police station.

Purpose of Service

To ensure that any Aboriginal person who is arrested or detained is able to speak to a solicitor trained in the criminal law and experienced in representing Aboriginal people. That solicitor will provide the Aboriginal accused with legal advice specific to their circumstances and will also inquire as to their health, so as to ensure that they are not at risk of self-harm or suicide or, if they are at such risk, that appropriate medical assistance is provided.

Benefits

In addition to addressing the above concerns, such a service, complemented by relevant Legislation and Regulations, Departmental Guidelines or Memorandum of Understanding would promote:

- Prompt legal advice to an Aboriginal or Torres Strait Islander person detained or arrested, together with a check as to their physical and mental well-being, by an ATSILS
- Culturally appropriate justice
- Increased community satisfaction
- Improved use of public resources.

Background and Rationale

Recommendation 224 of the 1991 Royal Commission into Aboriginal Deaths in Custody (RCIADIC) states:

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

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

The ALS (NSW/ACT)'s Custody Notification Service is supported by the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 131 and *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) cl 18-20, cl 24, cl 33, Sch 2, Part 2, which requires the NSW Police Service to immediately contact the ALS (NSW/ACT) upon arrest of an Aboriginal person.

In the recent case of *Campbell & 4 Ors v DPP (NSW)* [2008] NSWSC 1284, the Supreme Court of NSW set aside convictions based on evidence of records of interviews with Aboriginal accused persons when notification of their arrest was not given to the ALS (NSW/ACT), as the evidence was obtained in breach of *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) and should not have been admitted.

It is to enable such immediate contact that the ALS (NSW/ACT) operates a dedicated line with a solicitor on a 24 hour/ 7 day basis.
