

Retention of Expert Staff

- 4.1 Retention of staff appeared to be a problem that has affected ATSILSs as well as the National Office of ATSIIS.

Retention of Staff in Indigenous Specific Legal Services

- 4.2 Indigenous specific legal service providers complained of a chronic and increasingly acute inability to maintain expert legal staff.
- 4.3 Raw data together with statistical analysis of the length of time that solicitors remained employed by WALIS showed a significant decline in the average number of years solicitors spent with the service between 1978, when the service was established, and the present:

Table 2 Average Time of Employ of Solicitors in Western Aboriginal Legal Service

Years	1978-1990	1990-1999	2000-June 2005
Average Time of Employ of Solicitors	4 years 10 months	2 years 1 month	1 year 5 months

Source *Western NSW Community Legal Centre, Submission No. 42, p.5.*

4.4 WALs stated that the service required nine changes in their staff of 13 solicitors in the preceding year.¹

4.5 WALs specified that:

we have not had trouble attracting solicitors. The trouble has been keeping solicitors ... The salary structures that we offer are not competitive with those offered by comparable organisations ... Another difficulty is that we cannot offer any career structure. The job they get is the job they keep.²

4.6 The problem of retaining legal staff was exacerbated for ATSILSs operating in regional and remote areas:

most of our lawyers come from the coast, or often the big cities, and keeping solicitors out in the back blocks for any long period is difficult.³

4.7 DIMIA agreed that the often remote location of ATSILSs was a reason for a high turnover of staff.⁴

4.8 ATSILSs' inability to retain staff meant that service to clients was compromised:

Because ... we never get a regular solicitor ... one client does not see the same solicitor all the time so the solicitor is not following that person's case the whole time. They have to retell their story and they get frustrated.⁵

Inequities in Remuneration

4.9 ANAO re-iterated a consistent theme that has emerged out of inquiries into ATSILSs. ATSILSs have been found to receive inadequate funding for the services they provide when compared with publicly funded mainstream providers of legal services. ANAO cited reports:

On the provision of legal services by ATSILSs have referred to shortfalls in ATSIC funding for legal aid of either \$12.4 million or \$25.6 million.⁶

1 WALs, *Transcript*, 30 March 2005, p. 9.

2 WALs, *Transcript*, 30 March 2005, p. 9.

3 WALs, *Transcript*, 30 March 2005, p. 9.

4 DIMIA, *Transcript*, 9 June 2004, p. 7.

5 Grace Cottage, *Transcript*, 30 March 2005, p. 53.

6 ANAO, *Audit Report No. 13, 2003-2004*, Para. 2.30, p. 42.

- 4.10 The reports referred to by ANAO are the ATSI Office of Evaluation and Audit (OEA), *Evaluation of the Legal and Preventative Services Program*, 2003 which indicated the \$25.6 million funding shortfall to ATSIILs and the Commonwealth Department of Finance and Administration, *ATSI Output Pricing Review*, December 2000 which estimated the shortfall in funding to be in the order of \$12.4 million.
- 4.11 The Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) qualified the OEA figure of a \$25.6 million comparative shortfall in funding to ATSIILs arguing that:
- What [the OEA review] did was compare the cost of ATSIILs with the highest priced alternative ...
- The highest priced alternative was getting a private practitioner to do it.⁷
- 4.12 In responding to the OEA report, AGD expressed the view that:
- a more obvious comparison between ATSIIL and Legal Aid Commission services would include Commission services provided in-house, thus achieving a more like with like comparison. It is unfortunate that the data needed to underpin such an analysis is not available on a nationally consistent basis.⁸
- 4.13 NTLAC confirmed the absence of comparable data between LACs and ATSIILs and detailed some of the complexities in developing a comparable scale:
- What we classify as a duty lawyer service, for example, is classified by the Aboriginal Legal Services as something else. We have tried a number of times both nationally and in the NT to do that sort of comparative data exercise, and it is really difficult to know...
- When they go out to bush courts, they certainly deal with 60 matters in two days ... If we were forced to do the same thing the Legal Aid Commission would probably be able to, but we do not. Again, it is difficult to compare because it is a different sort of work.⁹
- 4.14 ATSIILs were unequivocal in affirming that their staff across all levels received less remuneration than the equivalent level in a LAC. SRACLS referred to:
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7 DIMIA, *Transcript*, 9 June 2004, p. 27.

8 ATSI OEA, *Evaluation of the Legal and Preventative Services Program*, 2003, p. 142.

9 NTLAC, *Transcript*, 21 July 2004, p. 45.

the gap in Sydney, as to people doing comparable court work. We have looked at it two or three times over the last five years. The best it has ever been was about a 15 per cent difference, and I think now it is getting back up to 25 to 30 per cent.¹⁰

4.15 NAALAS estimated that remuneration levels were about 15 percent less than the amount received by their counterparts in the NTLAC.¹¹

4.16 In terms of raw data, NAALAS stated that:

NAALAS received \$2.25m and dealt with over 3,000 matters in the 2002-2003 financial year, while the NT Legal Aid Commission received over \$4m for around 1,100 matters. This did not include the funding from the Commonwealth for family law matters.¹²

4.17 Furthermore, NAALAS denied that the discrepancy could be justified in terms of greater complexity of cases dealt with by NTLAC.¹³

4.18 Mr Cuomo stated that in Western Australia:

There is a very large wage differential between ALS and Legal Aid and then between Legal Aid and the private profession, with ALS very much being at the bottom of that ... There was an example ... where the manager of criminal law in ALS in Western Australia, who basically manages all these country practitioners and 10 in Perth, was earning \$70,000 a year. At that stage I think Legal Aid were recruiting the equivalent at \$110,000. The government lawyers - the DPP - were getting paid in excess of that. So you are sitting at the bottom of the heap.¹⁴

4.19 AT SIS conceded that Indigenous legal aid services relied upon motives other than financial remuneration to attract staff.¹⁵

4.20 Mr Cuomo agreed with the suggestion that financial remuneration was not the primary reason people were attracted to work with AT SILSs but suggested that at some point these motives were not of themselves sufficient to retain employees:

People do not go [to the ALSs] for the money; they go there for a bundle of other reasons, from experience to the goodness of their

10 SRACLS, *Transcript*, 13 July 2004, p. 65.

11 NAALAS, *Transcript*, 13 July 2004, p. 5.

12 NAALAS, *Submission No. 13*, p. 3.

13 NAALAS, *Transcript*, 13 July 2004, p. 5.

14 Mark Cuomo, *Transcript*, 31 March 2005, p. 3.

15 AT SIS, *Transcript*, 9 June 2004, p. 7.

souls. But it has got to the stage now where the wage differentials have meant that recruiting is very difficult.¹⁶

Fringe Benefits Tax Supplementation

4.21 A proposal to remove a temporary package of assistance which finished in June 2004 would reduce funding for Indigenous legal aid from \$42.97 million in 2002-03 to \$40.46 million in 2005-06.¹⁷

4.22 SEALS stated that the removal of the Fringe Benefits Tax supplementation meant that:

Some people are on the same wage they were on four or five years ago. In fact they have lost it through the FBT.¹⁸

4.23 NAALAS stated that their pay levels had not risen since 1998, yet the workload had increased by 50 percent.¹⁹

4.24 ATSYS stated that:

If the problem that the \$2 million-odd was provided to solve has now passed, then it has done its job and we move on.²⁰

4.25 AGD informed the Committee that as part of the 2005-06 Budget the Government has announced that the supplementation would continue but that FVPLSs do not currently receive the supplementation.²¹

Lack of Career Path and Working Conditions

4.26 ATSYS suggested that ATSILSs that serviced large populations could sustain adequate career paths for their legal practitioners:

There are some career options, and they involve trial and advocacy work internally within the organisation, so you have senior lawyers, deputy principal solicitors and so forth. In the larger organisations - for example, those based in capital cities - there are more options for staff to progress.²²

4.27 The largest ATSILSs in New South Wales, Sydney based SRACLS, disputed this claim:

16 Mark Cuomo, *Transcript*, 31 March 2005, p. 3.

17 ATSYS, *Exhibit No. 15*, p. 20.

18 SEALS, *Transcript*, 9 June 2004, p. 43.

19 NAALAS, *Transcript*, 13 July 2004, p. 6 and NAALAS, *Submission No. 13*, p. 8.

20 ATSYS, *Transcript*, 9 June 2004, p. 6.

21 AGD, *Submission No. 44*, p. 19.

22 ATSYS, *Transcript*, 9 June 2004, p. 8.

we have not got the resources to be able to set a career path for a junior solicitor to become the principal solicitor. So the minute they go up a couple of rungs either we have the private practitioners come along and poach them or they go to the Legal Aid Commission ... what has happened with the legal services over the last 15 years that I have been involved with ... is that we have become a training ground for either the Legal Aid Commission or private firms.²³

- 4.28 The Solicitor in Charge of the NSWLAC Dubbo Office who had previously worked with WALC stated that:

Working for WALC, given the stresses and the time and the distances travelled, was not consistent with family life. Creating a career structure is something that the ALS has failed in doing.²⁴

- 4.29 DIMIA stated that career paths in Indigenous legal services were:

inevitably limited because ... If you are dealing with locally based organisations your career options are more limited than if you are dealing with a state wide or nationally based organisation.²⁵

- 4.30 WALAC confirmed that it had an advantage over ALSWA in staffing regional and remote centres:

For a start, we have what we call critical mass. We do not have an office with less than three lawyers, for example, so that means that you can bring on a quite junior lawyer who has got appropriate supervision. We also promote very heavily our professional development program, so we have been quite successful in getting people out of law school through the articulated clerk program who are really what we would call top shelf. A lot of those people are very keen to embrace the sort of development opportunities they get for, say, a one-year placement in a regional office. In a regional office you have a great mix and variety of work.²⁶

23 SRACLS, *Transcript*, 13 July 2004, p. 64.

24 NSWLAC, *Transcript*, 30 March 2005, p. 60.

25 DIMIA, *Transcript*, 9 June 2004, p. 8.

26 WALAC. *Transcript*, 31 March 2005, p. 18

Induction and Maintaining Expertise

4.31 The Committee explored various strategies for increasing the duration of solicitors' services with legal service providers particularly through the creation of more options for solicitors through cooperation with other service providers.

4.32 The Law Society of South Australia raised the possibility of implementing some sort of incentive scholarship scheme to encourage potential practitioners from rural and remote regions to undertake the study, return to those rural and remote regions and be available to deliver services.²⁷

4.33 However, the Law Society clarified its position in cautioning against attempts to attract relatively inexperienced practitioners into Indigenous legal service providers:

The special needs of the Indigenous community are so extreme that in fact what is needed are experienced people who have been around for a long time and know exactly what they are doing ... Putting people who are fresh out into the country is very much sink or swim and not a suitable response.²⁸

4.34 The Western NSW CLC commented on the difficulties peculiar to regional legal services:

Some Community Legal Centres, particularly in capital cities, have great arrangements with universities and schools in relation to the intake of students. Unfortunately, we have great difficulty in accessing those, because there is no university that teaches legal studies.²⁹

4.35 AGD informed the Committee that:

there is only one situation where there has been a formal secondment, although there may be other arrangements that are less formal. The formal secondment has been between the Victorian Aboriginal Legal Service, VALS, and the Victorian Legal Aid Commission for a family law solicitor to work in VALS. From VALS, we understand that arrangement was successful: that the

27 ALRM, *Transcript*, 19 August 2004, p. 11.

28 ALRM, *Transcript*, 19 August 2004, p. 11.

29 Western NSW Community Legal Centre, *Transcript*, 30 March 2005, p. 28.

solicitor was very well received and its clientele were happy with the arrangement.³⁰

- 4.36 The advantages of having worked with an ATSILS was related by the Solicitor in Charge of the NSWLAC Dubbo Office who previously worked with WALs:

I am finding that members of the Aboriginal community who know me because I have been working in this area for 11 years – in the same field and previously with the ALS – will seek out my services even though I am no longer with the ALS. There is this idea of familiarity with a solicitor whom they know has in the past worked for one of their organisations.³¹

Aboriginal Field Officers and Community Legal Workers

- 4.37 Indigenous specific legal service providers facilitate access to their services through the employment of Aboriginal Field Officers, Court Officers and Community Legal Workers who live in the communities and act as a conduit between providers and clients.
- 4.38 WLS New South Wales, which auspices the Walgett based Walanbaa Yinaar Wharoo Family Violence Prevention Legal Service provided an example of the work of community based staff:

The [local Walgett] women ... say to us, 'It's white law. You deal with the white fella stuff. You deal with the white lawyers, the Canberra bureaucrats and the money, and we will do the community stuff.' So, for example, in our Walgett unit we employ four local Aboriginal women who are basically running it, but we supply the lawyers ... We are supplying that supervision and doing the file work. We are taking back all the legal stuff that needs to be done. We are doing the accounting part in Sydney and we are reporting back and making sure the statistics and everything are done correctly. The four Indigenous women in Walgett are doing all the community work, and we have an advisory group of elder women in Walgett.³²

- 4.39 The ATSIC Yilli Rreung Regional Council provided an example of the practical difference between a solicitor and an Aboriginal Field Worker:
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30 AGD, *Transcript*, 17 March 2005, p. 6.

31 NSWLAC, *Transcript*, 30 March 2005, p. 59

32 WLS New South Wales, *Transcript*, 13 July 2004, pp. 7

When a lawyer is going into bat to get a client out on bail, for instance, the client service officer knows that the capacity of a grandmother to put her hand up for the bail and implications for her are far greater than the lawyer may understand. He finds that she has put her collateral or her resources up at great risk. On occasions the client service officer came back to me saying, 'Listen, I have a real problem with this. I don't think they are considering all the issues. I think we should reconsider the bail application because we're focusing more on the client than the actual community.'³³

4.40 The Law Council of Australia described the function of Aboriginal Field Officers to ATSILSs and FVPLSs:

the reality of the matter is that qualified and appropriately trained legal representatives are not going to be available to be out there in multitudinous communities. What is important is to get a network of people with an understanding of the system who are respected by their communities and to whom individuals in the communities will turn in times of trouble and who can facilitate the provision of whatever is an appropriate service to assist those people.³⁴

4.41 VALS affirmed the centrality of field officers in the strongest of terms:

Solicitors would also be lost without Field Officers. Field Officers are the most important link in the chain for legal service delivery.³⁵

4.42 SEALS supported this view:

We can take some field staff out and employ more solicitors, which some ALSs do. They put the emphasis on solicitors. We put an emphasis on field staff, because that is the real connection.³⁶

4.43 CAAFLU stated:

The level of expertise in a lot of Aboriginal legal aid services rests with the field officers and the local staff with that local knowledge. ... Usually there is more of a turnover of legal staff than non-legal staff. The wealth of knowledge often is in the non-legal staff ... They are constantly educating the lawyers.³⁷

33 ATSIIC Yilli Rreung Regional Council, *Transcript*, 21 July 2004, p. 21.

34 LCA, *Transcript*, 19 August 2004, p. 58.

35 VALS, *Submission No. 15*, p. 9.

36 SEALS, *Transcript*, 9 June 2004, p. 42.

37 CAAFLU, *Transcript*, 22 July 2004, p. 38.

Commonwealth National and Regional Offices

4.44 The Committee received complaints referring to unresponsiveness in the National and Regional Offices of ATSIIS.

4.45 SEALS referred to the consequences for service providers of a lack of expertise in the National Office of ATSIIS:

the original funding formula they talked about the Bureau of Statistics having done with criminal statistics was created in 1997 as part of the reform process. It was to be reviewed in two years and any inequities across the country were to be sorted out. Legal and Preventative refused to address that issue. We kept saying, 'Sort out the problems.' So from 1999, when it should have been reviewed, to 2003 they basically just trod water because everybody was moving all over the place. They then got the Bureau of Statistics involved but it has now been over 12 months since then. We are still on the same funding level that we were in 2000, which was based on a 1996 formula that is very complicated. It goes to about five or six decimal points for loadings for distance from courts, the number of Aboriginal people in the area and the number of Aboriginal people in custody. It is a really difficult formula. That is just an example of how we have had no support or assistance from them.³⁸

4.46 The apparent paralysis in the National Office of ATSIIS, or its refusal to respond to requests for information exacerbated the difficulties for particular legal services that accompanied a climate of severely restricted resources imposed on ATSILSs in general. SEALS stated:

When the formula was first put in place for funding for the Queanbeyan ATSIC region the population statistics for Canberra were not included in the funding formula. So of the 4,000 or 6,000 people that we are looking after in our region at least 2,500 of those people were not even counted. When we continually challenged that they would say, 'No, the formula is right.' But we believe that was because they did not want to admit that they had made a mistake in the funding formula. We have continued to challenge that at regional council level as well as organisational level.³⁹

38 SEALS *Transcript*, 9 June 2004, p. 38.

39 SEALS *Transcript*, 9 June 2004, p. 38.

- 4.47 Disagreements on the level of funding grants between ATSILSs and the Commonwealth were evident in other states. When asked about the size of ALSWA's budget, Mr Cuomo stated:

At the moment, that is subject to argument with representatives of the Attorney-General's Department...

ATSIC did an exercise with a demographer in the late nineties which basically indicated that Western Australia, then under a budget of about \$5½ million, was \$2 million short of its fair share of the pie. For one reason or another, that was never remedied.⁴⁰

- 4.48 NAALAS provided an example of the added strain to an under-resourced organisation that a lack of administrative will could produce in Regional Offices of ATSI:

Some of our furniture was 30 years old. When I first came to the job my desk was falling apart – you could not open the doors etcetera. We had had a half-promise from ATSI that we could have some refurbishment funds, and when we applied for them we knew they had been set aside. They were actually to move to another building but they sat on them for six months, so the lease for the building went elsewhere. We still needed the funds to improve the circumstances we were working in. When we approached the regional office, they took a couple of months to think about it and then I got an email from them saying, 'We've decided that we're going to send this to Canberra to have another look at it. I'll be away for a week so you won't be able to talk to me about it anyway.' I then rang Canberra directly, which apparently you are not allowed to do, and after the tantrum I threw we had the agreement by eight o'clock the next morning. But I know with most managers who would sit there and take it, we could have been sitting there for another six months with the building literally falling down around our ears. As I said, we have now had the money; we got it one month before the end of the financial year and managed to expend it. There is that sort of small mindedness in some cases. It seemed as though people were scared to make decisions at the regional level, and there did not seem to be a clear reporting or a clear method of their going straight to central office to get that kind of permission.⁴¹

40 Mark Cuomo, *Transcript*, 31 March 2005, pp. 4-5.

41 NAALAS, *Transcript*, 21 July 2004, p. 7.

4.49 Poor rates of staff retention in the ATSI National Office were attributed to:

the re-locations of the Branch between Canberra and Sydney in 2000 and 2003. Only one experienced officer moved to Sydney when the Branch relocated in 2000, and it is expected that none of the current Sydney staff will be relocating back to Canberra in the latest move.⁴²

4.50 The move of the Indigenous Law and Justice Branch from ATSI to AGD appears to have been nowhere near as disruptive to staff as the moves between Canberra and Sydney:

51 staff who were working for ATSI moved across to a new Branch in the Department ... Included amongst those 51, were 34 staff who are located in what are now called Indigenous coordination centres located around the country and were formerly ATSI Regional Offices.⁴³

Committee Comment and Recommendations

4.51 The Committee is concerned that the allegedly poor rates of remuneration together with the limited career paths available in ATSI in comparison to LACs are creating a crisis in retention of expert staff for the ATSI.

4.52 The evidence taken in relation to comparative remuneration rates between the staff of ATSI and LACs is inconclusive despite some strong anecdotal evidence of a disadvantage to ATSI.

4.53 The Committee believes that it is imperative to ascertain the relative rates of remuneration between legal and management staff in ATSI and LACs and to ensure that ATSI staff are remunerated at a more competitive rate than currently appears to be the case if these legal services are to remain viable.

Recommendations 6

4.54 **That the Attorney-General's Department, in consultation with National Legal Aid and the National Aboriginal and Torres Strait Islander Legal Services Secretariat, develop a comparative scale of remuneration between Aboriginal and Torres Strait Islander Legal Services (ATSI)**

42 ANAO, *Audit Report No. 13, 2003-2004*, Para. 1.13, p. 27.

43 AGD, *Transcript*, 17 March 2005, p. 1

and Legal Aid Commissions and review funding of providers of services currently delivered by ATSILSs as appropriate.

- 4.55 The Committee was concerned to discover that Family Violence Prevention Legal Services have not had extended to them Fringe Benefit Tax supplementation.

Recommendation 7

- 4.56 **That the Department of Treasury grant Fringe Benefit Tax supplementation to Family Violence Prevention Legal Services.**
- 4.57 The first and most obvious response to the flow of solicitors from ATSILSs would suggest a formal cooperative arrangement between publicly funded legal services such as ATSILSs and LACs. This type of strategy is considered in the wider context of general cooperation between Indigenous and mainstream legal service providers at Chapter Five.
- 4.58 However, a recommendation is called for at this point to address the specific issue of strategies to provide career paths for ATSILSs' lawyers. The Committee was impressed at the possibilities that the secondment of a family law solicitor from the Legal Aid Commission of Victoria to VALS and believes that an exchange program between ATSILSs and LACs at a national level would benefit both types of organisations.

Recommendation 8

- 4.59 **That the Attorney-General's Department, in consultation with the National Aboriginal and Torres Strait Islander Legal Services Secretariat and National Legal Aid, develop and implement a formal exchange program whereby solicitors from providers of services that are currently delivered by Aboriginal and Torres Strait Islander Legal Services and Legal Aid Commissions are afforded opportunities to work, for a specified period, within the other organisation.**
- 4.60 In making the following recommendation the Committee is cognisant that legal work in ATSILSs and FVPLSs requires more experienced solicitors than may be the case in other practices. This is because of the difficulties that arise in clients who are alienated and ignorant of the justice system

before which they are called or to which they appeal as well as cultural sensitivities of which officers of the court are often ignorant.

- 4.61 This said, the Committee believes that one way of lifting the profile of Indigenous specific legal services may be a program of bonded scholarships.

Recommendation 9

- 4.62 **That the Department of Education, Science and Training, in consultation with the Attorney-General's Department, the National Aboriginal and Torres Strait Islander Service Secretariat and the National Network of Indigenous Women's Legal Services, explore the feasibility of implementing a system of bonded scholarships where successful applicants on being accepted to the bar are required to provide a specified period of service to a designated provider of services currently delivered by Aboriginal and Torres Strait Islander Legal Services or Family Violence Prevention Legal Services.**

- 4.63 The Committee affirms the importance of Aboriginal Field and Court Officers and Community Legal Workers in providing the nexus between the legal staff of ATSILSs and FVPLSs and the clients they service. The networks of support officers enable Indigenous specific legal services to provide accessible services in a way that mainstream providers cannot.

Recommendation 10

- 4.64 **That the Department of Education, Science and Training ensure that places are available for the training and development of paralegal community support workers who are employed with providers of services that are currently delivered by Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Services.**

- 4.65 While it is of little consolation to ATSILSs it should be acknowledged that these organisations do provide a very valuable training for solicitors who pass through the organisations. These solicitors are not lost to the justice system and can be seen as resources in the provision of legal services to Indigenous people regardless of the organisation for which they currently work.

