

Coordination of Legal Aid Services to Indigenous Australians

- 5.1 With the very limited resources available to Indigenous legal services, the coordination of ATSILSs and FVPLSs with mainstream providers of legal services, such as LACs and CLCs, should be a high priority. The clear determination of specific objectives to improve coordination of legal services needs to be addressed.
- 5.2 Recommendation 1 of ANAO's *Audit Report No. 13, 2003-04* stated:
- that in order to maximise the efficient and effective use of program resources ATSIIS should develop strategic and business plans, including risk management, for the Law and Justice Program. Planning should take account of:
- the need to promote a whole-of-government approach, determined in consultation with relevant State and Commonwealth agencies, to achieve equitable access to legal aid services by Indigenous Australians; [and] ...
 - the roles of LACs and CLCs, and the potential for them to deliver services to Indigenous Australians.¹
- 5.3 At an administrative and funding level AGD informed the Committee that:
- on 1 December [2004], we had a restructure within our department. As a result of that, the Indigenous Law and Justice Branch is now co-located with the Legal Assistance Branch ... The Legal Assistance Branch deals with mainstream legal aid issues, financial assistance from the

1 ANAO, *ATSIIS Law and Justice Program, Audit Report No. 13, 2003-04*, Para. 2.54, p. 48.

Commonwealth directly and the operation of community legal services ... we have done that in order to maximise the interaction between the Indigenous and mainstream legal aid program management...²

Commonwealth-State Funding Divide

5.4 LACs complained about the prevailing situation in which:

since 1997 the Commonwealth have insisted that Commonwealth money be spent on what they call Commonwealth matters ... [This situation makes it difficult] for us ... to be a little bit proactive to introduce new initiatives when we are dealing with state buckets of money and Commonwealth buckets of money.³

5.5 NTLAC echoed the concerns of NSWLAC:

The Commonwealth imposes ... a commonwealth-state funding divide on the Legal Aid Commissions which makes it very difficult for the Commission here to expand its services to Indigenous people, particularly Indigenous women in domestic violence matters.⁴

5.6 NSWLAC provided an example of the way in which the tying of Commonwealth funding to Commonwealth matters did not reflect the reality of discrete cases:

You ... have a female presenting for advice. The advice will range from Commonwealth family law to State domestic violence law and perhaps to State crime. There might be social security involved.⁵

5.7 The tying of Commonwealth funding belied a trend in the overall proportion of LAC funds received from the Commonwealth in New South Wales:

Before 1997-98, when there was not this Commonwealth-state divide, the Commonwealth provided 55 percent of funds for [LACs] and the state provided 45 percent. The public purpose

2 AGD, *Transcript*, 17 March 2005, p. 2.

3 NSWLAC, *Transcript*, 13 July 2004, pp. 75-6.

4 NTLAC, *Transcript*, 21 July 2004, p. 38.

5 NSWLAC, *Transcript*, 13 July 2004, p. 76.

fund contribution was included in that 45 percent. I think the switch now in New South Wales is about 70 to 30: 70 percent state and public purpose fund and 30 per cent Commonwealth.⁶

5.8 AGD stated that the Commonwealth:

recently entered into new funding agreements with all states and territories for the provision of legal aid in Commonwealth law matters until December 2008 ... the Australian Government will provide funding of \$599 million over four years...⁷

Coordination of Indigenous Specific with Mainstream Legal Services

5.9 The working relationships between Indigenous specific and mainstream legal service providers to Indigenous Australians appeared to be well established at a local, informal level. The relation between ALSWA and CLCs in Western Australia appeared to be typical of relationships between legal service providers in most of the areas visited by the Committee:

We have no formal coordinating role. There are community legal centres both in the city and country. We work well with them. We work well with legal aid, and legal aid work well with all of us...⁸

Aboriginal and Torres Strait Islander Legal Services and Legal Aid Commissions

Aboriginal and Torres Strait Islander Legal Services: Integral or Supplementary Providers

5.10 The Committee received conflicting views on the status and function of ATSILSs in the justice system.

5.11 An on-going source of complaint from ATSILSs was that they were funded as providers of services that were supplementary to

6 NSWLAC, *Transcript*, 13 July 2004, p. 76.

7 AGD, *Submission No. 44*, p. 4.

8 Mark Cuomo, *Transcript*, 31 March 2005, p. 10

mainstream legal aid providers, however state and territory governments viewed Indigenous affairs as a Commonwealth responsibility.⁹

- 5.12 The Law Society of South Australia explained how the indeterminate position of ATSILSs in relation to the justice system had resulted in them receiving inadequate funding: that:

ATSIS and ATSIC were referring to themselves as being 'supplementary funders' of Aboriginal Legal Services, without making any provision whatsoever via the Commonwealth to get the state to assist ATSILSs ... If the Commonwealth is going to call itself a supplementary funder then we say that they ought to be actually making arrangements with the states to make that supplementation happen. It is hardly for the ATSILSs or the Law Society to be doing these high-powered political manoeuvres as between the Commonwealth and states on what is essentially a federal issue.¹⁰

- 5.13 AGD confirmed that no approaches to the states and territories had been made by the Commonwealth to contribute to the work of ATSILSs.¹¹

- 5.14 MRALS suggested that LACs were simply not equipped at the organisational level to service Indigenous communities. For LACs to expect to provide services that were as accessible to Indigenous people as those provided by ATSILSs:

There would ... need to be some serious addressing within [LACs] of the issue of having Aboriginal field officers. There would need to be some real Aboriginal control over what happens - in other words, more than token places on the board of the commissions.¹²

- 5.15 ANAO cited OEA findings that ATSILSs provided 89 percent of Indigenous legal aid cases and LACs provided 11 percent in 2000-01.¹³

- 5.16 NTLAC stated that:

⁹ For instance, ALRM, *Transcript*, 19 August 2004, p. 33.

¹⁰ ALRM, *Transcript*, 19 August 2004, p. 3.

¹¹ AGD, *Submission No. 44*, p. 8.

¹² MRALS, *Transcript*, 13 July 2004, p. 52.

¹³ ANAO, *Audit Report No. 13, 2003-2004*, Para. 2.46, p. 46.

19 percent of applications received in the last financial year were from Indigenous people seeking services ...

A fairly small percentage of Indigenous people choose to come to [NTLAC] - where perhaps they may have family working at the Aboriginal Legal Services, or for some reason like that, may not want to go to the Aboriginal Legal Services - and would come to us as a second choice because of conflict problems or because of the lack of resources of those services.¹⁴

- 5.17 WALAC stated that 17 percent of their overall clientele were Indigenous¹⁵ and went so far as to say that:

We would consider ourselves supplementary service providers to the Aboriginal Legal Service ... I think [Indigenous people's] first choice if you could generalise would be to use the Aboriginal Legal Service.¹⁶

- 5.18 In commenting on the OEA *Evaluation of the Legal and Preventative Services Program*, AGD stated:

the Commonwealth provides funding for ATSILS to provide legal aid services for indigenous people and ... legal aid commissions are supplementary service providers for indigenous clients.¹⁷

- 5.19 This view provides little indication of AGD's view of the position of ATSILSs in the provision of publicly funded legal aid within the overall justice system.

- 5.20 In the most unequivocal statement of its view of the position of ATSILSs, AGD confirmed ATSILSs reports that the Commonwealth considered them as supplementary providers of legal services:

The funding of Indigenous legal aid provides supplementary support to the equitable provision of legal aid to all Australians.¹⁸

¹⁴ NTLAC, *Transcript*, 21 July 2004, pp. 38-9.

¹⁵ WALAC, *Transcript*, 31 March 2005, p. 16.

¹⁶ WALAC, *Transcript*, 31 March 2005, pp. 15 & 24.

¹⁷ ATSIC OEA *Evaluation of the Legal and Preventative Services Program*, 2003, p. 141.

¹⁸ AGD, *Submission No. 44*, p. 4.

Memoranda of Understanding

- 5.21 Memoranda of understanding between service providers can lend a degree of formality to cooperative arrangements. AT SIS stated that:

there are memorandums of understanding between ATSILSs and Legal Aid Commissions, for example, in New South Wales, that encourage cooperation in a landscape where there is a great need and where each organisation has some particular expertise.¹⁹

- 5.22 ANAO clarified the effectiveness of extant memoranda of understanding:

while ... there are partnership arrangements between LACs and ATSILS [in some states] the usefulness of these arrangements in developing constructive relationships is limited.²⁰

- 5.23 An example of how memoranda of understanding might operate or fail to do so was provided in New South Wales where NSWLAC has established memoranda of understanding with SRACLS, WAL S and the Kamilaroi Aboriginal Legal Service (KALS):

which is designed to increase the ability of those legal services to do family law work.²¹

- 5.24 NSWLAC stated that the implementation of the memoranda fell within a range of outcomes. At the top end of a spectrum of usefulness SRACLS provided an example of constructive cooperation which extended civil and family law services to Indigenous people:

At the present time, we have [LAC] solicitors come to our office and provide civil advice to people from the Aboriginal community. They always feel more comfortable in the Aboriginal Legal Service.²²

- 5.25 In regards to family law services, SRACLS:

have come to an arrangement with the Legal Aid Commission where we can get grants for legal aid to fund some of our Aboriginal clients within the service.²³

19 AT SIS, *Transcript*, 9 June 2004, p. 19.

20 ANAO, *Audit Report No. 13, 2003-2004*, Para. 2.51, p. 47

21 NSWLAC, *Transcript*, 13 July 2004, p. 81

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

23 SRACLS, *Transcript*, 13 July 2004, pp. 66-7.

- 5.26 The cooperative relationship between NSWLAC SRACLS extended to the provision of advice:

the New South Wales Legal Aid Commission ... [have] said 'We've got some money to spend on civil law for Indigenous women held in prison', but they come to us to get ideas on what programs might work.²⁴

- 5.27 However, NSWLAC stated that memoranda of understanding between the Commission and the New South Wales regional ATSILSs, KALS and WALs, had not been as successful as the relationship with SRACLS.²⁵

- 5.28 The Dubbo regional office of NSWLAC confirmed the lack of success of the memorandum of understanding with WALs and explained:

It has not been highly successful, though, I must say, because there is a perception ... that the ALS could not get involved because it would be perceived to be taking sides. Even though the Commission, technically, would be funding both sides, a commission solicitor would be appearing for one side of the family law dispute and the ALS for the other. The ALS did not want to get involved because of the perception that it would be taking sides.

I made a submission to the board of WALs about this, to try to say that this is not how we would operate it. The response was, 'No, the perception would be divisive' ...²⁶

- 5.29 A less formal arrangement existed between NTLAC and ATSILSs in the Northern Territory. NTLAC described instances where a person is referred from an ATSILSs:

we have a number of protocols to try and encourage the client service officer from the Aboriginal Legal Service to bring the client over, to assist taking instructions and ... to make the person feel more comfortable.²⁷

24 SRACLS, *Transcript*, 13 July 2004, p. 63.

25 NSWLAC, *Transcript*, 13 July 2004, p. 81.

26 NSWLAC, *Transcript*, 30 March 2005, pp. 65-6.

27 NTLAC, *Transcript*, 21 July 2004, p. 44.

5.30 On a different matter, however, NAALAS stated that:

We have ... an agreement ... with [NTLAC] where more complex matters are briefed to them. We have never briefed any to them; we try to deal with them in-house.²⁸

Family Violence Prevention Legal Services and Community Legal Centres

5.31 Many of the issues confronting the position of ATSILSs in the criminal justice system and the coordination of these services with other mainstream providers also occur for FVPLSs. Of particular interest was the coordination of services provided by FVPLSs with CLCs, some of which run Indigenous Women's Projects.

5.32 In addition to the \$22.7 million over the next four years for the expansion of FVPLS programs, AGD referred to:

\$4.4m [that] was provided [in 2003–04] to specialist women's, rural women's and Indigenous women's services through the Commonwealth Community Legal Services Program. Of that amount, \$2.9m was provided to 11 centres to provide specialist women's legal services, nine centres received a total of \$594,699 to provide specialist rural women's legal services and there were eight centres which received a total of \$930,548 to provide specialist legal services to Indigenous women. Both the women's legal services and rural women's legal services programs also provide legal information and assistance to female Indigenous clients.²⁹

5.33 NACLCL informed the Committee that four percent of its clients on an Australia-wide basis were Indigenous and of those, 75 percent were Indigenous women.³⁰

5.34 The only FVPLS in South Australia operated out of Port Augusta where a Rural Women's Outreach Program run by WLS South Australia was also located. However:

those two services are not enough to cope with the level of family violence in that area. The Aboriginal Family Violence Service is funded to provide a service in Port Augusta and the

28 NAALAS, *Transcript*, 21 July 2004, p. 5.

29 AGD, *Submission No. 44*, p. 9.

30 NACLCL, *Transcript*, 13 July 2004, p. 2.

Davenport community only. We are funded to work with all women in South Australia.³¹

Committee Comment and Recommendations

- 5.35 The Committee applauds the increased coordination between areas responsible for legal aid funding to mainstream and Indigenous specific providers within AGD. However coordination at this level must be followed through:
- at the level of service providers; and
 - between Commonwealth and state and territory agencies responsible for funding providers of legal aid.
- 5.36 To take the second of these coordination issues first, the argument of whether the Commonwealth or states and territories are responsible for a particular service often occurs in federal systems of government. The Committee is of the view that in regards to the provision of legal services to Indigenous people, this issue needs to be resolved as a matter of urgency and that it should not be left for ATSILSs, LACs or Law Societies to push for this resolution.
- 5.37 ATSILSs, and increasingly FVPLSs, are the primary providers of legal services to Indigenous Australians. In 2003 Indigenous Australians constituted 21 percent of the national prison population and thus they constitute a significant proportion of criminal justice business.³² In the view of the Committee this context makes it difficult to sustain an argument that ATSILSs and FVPLSs are supplementary legal services.
- 5.38 State and territory governments should acknowledge that insufficient support for the work of ATSILSs and FVPLSs is likely to result in greater Indigenous prison populations and consequently a greater cost to state tax payers.

31 WLS South Australia, *Transcript*, 19 August 2004, p. 25.

32 Australian Bureau of Statistics 1994-2004, *Prisoners in Australia*, cat no4517.0.

Recommendation 11

- 5.39 **That the Attorney-General raise the matter of Commonwealth and state/territory funding for providers of services currently delivered by Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Services with his state and territory counterparts with a view to gaining some level of state/territory contribution for these services.**
- 5.40 Moving to the first of the above matters, while AGD has taken steps to coordinate the administration of funding between mainstream and Indigenous legal service providers, it appears that coordination of the service providers on the ground has not been formally facilitated or required.
- 5.41 The coordination of all providers of legal services to Indigenous people is of vital importance, particularly the coordination of Indigenous specific and mainstream providers of similar types of law services – that is providers that are primarily criminal or family and civil services.
- 5.42 ATSILSs and LACs are primarily providers of criminal law services to Indigenous people FVPLSs and CLCs are primarily providers of family and civil law services.
- 5.43 While the Committee is aware of memoranda of understanding between ATSILSs and LACs in New South Wales, Victoria and Western Australia and operational protocols between ATSILSs and LACs in the Northern Territory and South Australia, the arrangements appear to be varied and to work with various degrees of success. AGD needs to assure itself that ATSILSs and LACs have the highest levels of cooperation in place.

Recommendation 12

- 5.44 **That the Attorney-General's Department, in consultation with National Legal Aid and the National Aboriginal and Torres Strait Islander Legal Services Secretariat, develop and require providers of services currently delivered by Aboriginal and Torres Strait Islander Legal Services (ATSILSs) to implement a memorandum of understanding between**

them and Legal Aid Commissions (LACs) that includes:

- sharing each others duty solicitors;
- the provision of representation and advice by one organisation to the other's clients;
- the use of office space and facilities in ATSILSs by LAC solicitors for Indigenous clients when these clients are referred from ATSILSs to LACs;
- protocols requiring ATSILSs solicitors to introduce clients to LAC solicitors in the event that clients are referred from ATSILSs to LACs;
- access of ATSILSs solicitors to LAC technology, such as video-conferencing, in order to facilitate remote client contact;
- access of LAC solicitors to Aboriginal Field Officers employed with ATSILSs when required to communicate with clients;
- mutual sharing of vehicles for remote travel; and
- access of ATSILSs and LAC staff to in-house training programs run by the other organisation.

5.45 The Committee was concerned at the myriad of programs and services that provide legal services to Indigenous women. Perhaps the most apparent area for potential overlap is the FVPLSs and the Indigenous Women's Projects run out of designated CLCs.

Recommendation 13

5.46 **That the Attorney-General's Department rationalise funding of Indigenous legal services by incorporating Indigenous Women's Projects, that are currently administered through mainstream Community Legal Centres, into the Family Violence Prevention Legal Services program.**