

Mr Bob Charles MP
Chairman
Joint Committee of Public Accounts and Audit
The Commonwealth Parliament
Parliament House
CANBERRA ACT 2600

Indigenous Law and Justice Inquiry

Dear Mr Charles

Attached for your consideration is a submission from Aboriginal and Torres Strait Islander Services (ATSIS) to the Joint Committee of Public Accounts and Audit's Indigenous Law and Justice Inquiry.

The Inquiry's Terms of Reference focus specifically on ATSIS' Law and Justice Program and comes at a time when the Government has recently announced the introduction of significant changes to the delivery of its programs and services to Aboriginal and Torres Strait Islander peoples.

I trust that the attached submission provides a useful contribution to the Committee's deliberations.

Should you have any questions regarding this matter, please contact Mr John Boersig, Manager, Law and Justice Branch (telephone: 02 6121 4695).

Yours sincerely

R B Yates
Deputy Chief Executive Officer

2 June 2004

Submission by
Aboriginal and Torres Strait Islander Services (ATSIS)
to the
Joint Committee of Public Accounts and Audit
Review of Audit Report No 13, 2003-2004
ATSIS Law and Justice Program

May 2004

**ATSIS Submission to the
Joint Committee of Public Accounts and Audit
Review of Audit Report No 13, 2003-2004
ATSIS Law and Justice Program**

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Terms of Reference

As part of its statutory responsibility to examine reports from the Auditor-General, the Joint Committee of Public Accounts and Audit is expanding its review of Audit Report No 13, 2003-2004, ATSIS Law and Justice Program – including its four components of Legal Aid; Law and Justice Advocacy; Family Violence Prevention; and Prevention, Diversion and Rehabilitation – to inquire into and report on issues including:

- (a) the distribution of Aboriginal and Torres Strait Islander Legal Services resources among criminal, family and civil cases;
- (b) the coordination of Aboriginal and Torres Strait Islander Legal Services with Legal Aid Commissions through measures such as memoranda of understanding (MOU);
- (c) the access for Indigenous women to Indigenous-specific legal services; and
- (d) the ability of Law and Justice Program components to recruit and retain expert staff.

The Committee will take into account the 2004 tender for Indigenous legal aid services.



INTRODUCTION

This submission from Aboriginal and Torres Strait Islander Services (ATSIS) responds to the review by the Joint Committee of Public Accounts and Audit of the Australian National Audit Office (ANAO) Audit Report No 13.

In Audit Report No 13, seven (7) recommendations were made to ATSIS for improvements to its Law and Justice Program. These recommendations arose following the ANAO conclusion that there was 'a need for considerable improvement in the management of the Law and Justice Program', noting concern with planning processes, ill-definition of the roles of national and regional offices and program monitoring. In particular, deficits were identified in the ability to assure ATSIS of the quality of the services being provided. The recommendations were that ATSIS should:

- develop a strategic plan, a business plan and a risk assessment for the Law and Justice Program;
- clarification of the roles and responsibilities of its National and Regional Offices;
- review funding arrangements under the Law and Justice Program;
- review its processes to monitor grantee performance;
- systematically monitor the performance of the Law and Justice Program;
- develop guidelines for program evaluation; and
- review its data collection system.

All seven recommendations were agreed to by ATSIS, and a process for responding to the issues raised by these recommendations was commenced under the Law and Justice Program.

ATSIS is an Executive Agency of the Australian Government within the Indigenous Affairs Portfolio. It commenced operation on 1 July 2003 and administers a range of Australian Government programs for Aboriginal and Torres Strait Islander peoples. On its commencement, the then Minister for Immigration and Multicultural and Indigenous Affairs, the Hon Philip Ruddock MP, issued Ministerial Directions to the ATSIS Chief Executive Officer on the delivery of these programs. The Directions, attached as **Appendix A**, includes instructions that the choice of, and relationship with, individual service providers should be based on best practice, including:

- outcome-based funding and performance-based contracts for service delivery;
- market testing and competitive tendering wherever appropriate;
- assessments based on comparative efficiency and effectiveness, including demonstrated capacity to deliver; and
- management structures that reflect principles of sound governance and leadership by fit and proper individuals with a record of effective management.

Reform of the Law and Justice Program received support from both the Aboriginal and Torres Strait Islander Commission (ATSIC) and the Australian Government. On

16-17 June 2003, the ATSIC Board of Commissioners agreed to a number of reform measures in relation to the Law and Justice Program, including expedition of the tendering process for the provision of legal services to Aboriginal and Torres Strait Islander peoples.

The Law and Justice Program is administered within ATSIS by the Law and Justice Branch. The issues above, together with the findings and recommendations of the ANAO Report, entailed a comprehensive restructuring of the Law and Justice Branch. The ANAO recommendations are being implemented at an administrative level through targeted policy development and the proposal to *Tender For The Delivery Of Indigenous Legal Aid Services* (the Tender Project). The Tender Project, which is subject to a final decision by Government, is due to be implemented by 1 January 2005 (more information of the Tender Project can be found under Section 3 of this submission) As part of the Tender Project, the Government released an Exposure Draft on the tendering process for comment. A copy of the Exposure Draft is at **Appendix B**. The reforms to the Law and Justice Branch and Program are aimed at ensuring the best outcomes for on-the-ground service delivery of legal aid services and related initiatives.

On 15 April 2004, the Australian Government announced new service delivery arrangements for programs within Indigenous affairs. It is the Government's intention to abolish ATSIS, and to devolve relevant programs to mainstream departments. Under these new arrangements, it is anticipated that from 1 July 2004 the Law and Justice Program function and the Family Violence Prevention Legal Services (FVPLS) function will transfer to the Attorney-General's Department (AGD). The AGD currently has responsibility for managing the Australian Government's funding assistance to Legal Aid Commissions and Community Legal Centres.

The Minister for Immigration and Multicultural and Indigenous Affairs, Senator Amanda Vanstone, announced on 28 May 2004 that a Ministerial Taskforce on Indigenous Affairs has been established as part of the new arrangements. The Taskforce will be supported by a Secretaries' Group and independent mechanisms of review and evaluation will also have an important role to play. The focus of these new measures is on improving service delivery to Indigenous people and achieving better outcomes across Indigenous affairs.

In addition to the above, in the course of implementing the changes associated with the Law and Justice Program and the administrative structure that supports the program (including the ANAO recommendations), ATSIS has been guided by Government policy directions that seek to ensure that service priority is given to those Indigenous people in most need.

FORMAT OF SUBMISSION

This submission is divided into several parts. In the first section, the organisational restructure of the Law and Justice Branch is described. The second section sets out ATSIS's response to each of the Joint Committee's Terms of Reference (TOR), and

the third section outlines the Australian Government's proposal to *Tender For The Delivery Of Indigenous Legal Aid Services* (the Tender Project).

SECTION 1

NEW LAW AND JUSTICE ORGANISATIONAL STRUCTURE

A new organisational structure for ATSIS's Law and Justice Branch came into operation in March 2004. The new structure addresses priorities flowing from:

- the Ministerial Directions of 1 July 2003;
- decisions by the Aboriginal and Torres Strait Islander Commission (ATSIC) Board;
- the ANAO Report No 13; and
- the relationship of the Law and Justice Program function to the activities of the AGD.

The organisational restructure of the Law and Justice Branch created three sections with key and distinct responsibilities. This followed a move of the Branch from Sydney to Canberra in the latter half of 2003. This clarified the role of staff within each area, avoided duplication of tasks and focused resources on priority issues. Notwithstanding the demarcation of roles and responsibilities, there is room for the transfer of expertise and cross-flow of information across the Branch, to ensure a synergy between programs and policy development. The three sections are described in detail below.

Law and Justice Services

The focus of the Law and Justice Services Section is program management. The Section is responsible for the overall day-to-day management of the Law and Justice Program, and has carriage of the Program's Legal Aid (LEGA) and Prevention, Diversion and Rehabilitation (PDRE) outputs. At this time, this Section manages the Government's delivery of Indigenous-specific legal aid services by providing funding assistance to a network of 25 Aboriginal and Torres Strait Islander Legal Services (ATSILS) through the LEGA output. It also manages the delivery of a number of preventative and rehabilitation initiatives through the PDRE output.

Program management is a core function of the Law and Justice Branch. The Branch has ultimate responsibility for all ATSIS Law and Justice Services. Under current arrangements, initial responsibility for administering program funding rests with ATSIS's Regional Offices. However, the Law and Justice Branch manages funds at the national level, provides essential policy and program support and monitors and reports on all activities under the Law and Justice Program. In order to give a clearer division of tasks, improve lines of communication and optimize limited resources, the Section's work program have been rationalised to link expertise with the work required. Staff in the Law and Justice Services Section have particular financial expertise and experience in program management at national and regional levels.

The Section provides administrative support to the whole Branch and is responsible for the internal management of the Law and Justice Program and administrative

budgets. The Section is responsible for developing a range of information and promotional material on the Law and Justice Program including the formulation of the Branch's Business and Operational Plans and service delivery agreements, which aim to clarify the roles and responsibilities of officials at the national and regional levels. These measures respond directly to a number of recommendations from the ANAO Report.

A copy of ATSIIS's 2002-2003 Annual Report is at **Appendix C**. A full list of ATSIIS and FVPLS, including their locations, is provided in the updated list included with **Appendix C**. A discussion of the Law and Justice Program including a list of projects funded under the Prevention, Diversion and Rehabilitation (PDRE) and Law and Justice Advocacy (LJAD) outputs, can be found in the Annual Report on pages 180-193.

Law and Justice Development

The Law and Justice Development Section is responsible for implementing the Tender Project, which includes implementing relevant ATSIIS Board decisions directing the tendering of legal services as consistent with, and following from, the Ministerial Directions to ATSIIS. Successfully delivering the Tender Project is a major objective for the Law and Justice Branch and is the main focus of this Section. The Tender Project demands a complete review of the mechanisms of legal service delivery that also address ways to monitor and report on issues at the State and Territory and regional levels, especially given the Government's recent decision to implement new national arrangements for the delivery of programs and services to Indigenous Australians. The Tender Project also addresses ways to monitor and report on issues at the State and Territory and regional levels.

The work of the Law and Justice Development Section on the Tendering Project provides an opportunity for ATSIIS to reconfigure the provision of legal aid services to all Indigenous Australians. The Tender Project is expected to result in significant improvements in the delivery of accessible and culturally sensitive high quality services, including through reformed funding arrangements.

The development of the draft request for tendering documents has also provided a tool for ATSIIS to address the issues raised in the ANAO report. The tender documents embody the Government's commitment to improving the delivery of legal services to Aboriginal and Torres Strait Islander people, within finite resources and the need to ensure value for money.

Key work currently being undertaken by this Section includes:

1. developing the tender documents (Contract, means test and mapping);
2. creating an audit process for evaluating the work of legal service providers; and
3. formulating a funding allocation model.

The development of this material is a direct response to the recommendations of the ANAO Report. This material will include mechanisms to monitor the performance of successful tenderers and the Law and Justice Program overall; to gather relevant and reliable data; and to evaluate the effectiveness of the system.

In order to ensure the integrity of the Tender Project, staff in this Section are maintaining the highest levels of probity, in line with the directions of the Australian Government Solicitor (AGS). A copy of the probity protocols is at page 104 of **Appendix B**.

Law and Justice Policy and Advocacy

The Policy and Advocacy Section is responsible for developing strategic policy on Aboriginal and Torres Strait Islander related justice issues and for managing the Law and Justice Advocacy program component, which includes the provision of funding assistance for test cases and Indigenous advocacy groups. Importantly, this Section is responsible for developing policy with a systemic emphasis. A systemic approach to policy development maximises resources and adds value to the Law and Justice Program. This Section is developing a set of core documents that can be used for both internal review and external publications.

Managing the relationship between policy development and program management is a central issue for the Law and Justice Branch. Program management can overwhelm policy development. While the organisational restructure made a deliberate move to separate these two functions in order to avoid this problem, it also ensures that essential synergies remain between program administration and policy development. Staff of this Section will have limited program management responsibilities, ensuring a clear focus on identifiable policy development goals. Those program related activities that remain within the Section, such as test cases and advocacy projects, will provide an opportunity for the development of systemic solutions to policy issues.

ANAO Recommendations and TOR

The organisational restructure of the Law and Justice Branch provides an appropriate framework to focus on relevant outputs. The new structure ensures clear lines of communication and responsibility for outcome delivery. A new Business Plan has been developed so that the roles and responsibilities of staff link clearly to Branch outputs. Furthermore, a draft intradepartmental service agreement has been prepared to clarify the relationship between National and Regional offices (**Appendix D**). In this way, the new structure is relevant to all four of the TOR and all seven of the ANAO recommendations.

The restructure has generated cohesive teams within the Branch, which are able to focus on achieving their own set of related outcomes. The Law and Justice Development Section has completed the collection of submissions to the Tender Project's exposure draft and is finalising an analysis of this material. This Section is also developing risk assessment and mitigation strategies for the Tender Project through consultation with the various stakeholders.

The Tender Project explicitly links to ongoing program management, currently undertaken through the Services Section. Key synergies in data recovery and program management have been engendered by regular liaison. The development of an

appropriate request for tender has been informed by the issues and management challenges presented to ATSIS in both ATSILS and PDRE programs.

While cooperating with the Development Section on a number of research issues, the Policy and Advocacy Section has been able to concentrate on its own set of related tasks including submissions on juvenile justice issues to the Northern Territory and Western Australian governments and the preparation of this Submission. At the same time, Law and Justice Services has been able to continue to provide services to Aboriginal and Torres Strait Islander peoples and to support the delivery of outcomes across the Branch.

SECTION 2

SPECIFIC TERMS OF REFERENCE

A detailed response to each of the specific issues in the Joint Committee's TOR is provided below. Within this discussion, there is further information identifying the range of measures being adopted by ATSIS in response to issues raised in the ANAO Report.

1. The distribution of Aboriginal and Torres Strait Islander Legal Services (ATSILS) resources among criminal, family and civil cases

In 2003-2004, ATSIS will provide approximately \$46 million to 25 ATSILS to deliver legal aid services to Aboriginal and Torres Strait Islander people in 96 locations.

ATSIS is a supplementary service provider. Consequently, the best allocation of resources to Indigenous Australians cannot be achieved by ATSIS in isolation and entirely from within its limited program resources. In the past, ATSIC has advocated for a co-operative service delivery framework with all legal aid service providers. Such a system requires the support and cooperation of legal aid agencies at the State and Territory level, and would avoid duplication to ensure that Indigenous clients have equitable access to all services.

Historically, ATSIC has also maintained that the best distribution of resources to case type depends on the actual needs of clients in different localities/communities and that Indigenous legal aid resources should be distributed on a balanced assessment of need. Government has reiterated this consideration, together with a need to foster a holistic approach to Indigenous issues, in its decision to implement new national arrangements for the delivery of programs and services to Aboriginal and Torres Strait Islander peoples. The Law and Justice Branch continues to explore opportunities to pursue cooperative arrangements with other stakeholders in the delivery of its legal services program.

The proposed tendering arrangements under the Tender Project, which are subject to final decision by Government, include timing, criteria and priorities for legal assistance as set out in ATSIS' *Policy Directions for the Delivery of Legal Aid Services to Indigenous Australians* (see page 55 of **Appendix B**). Successful tenderers will be required to identify intended services across the categories of criminal, civil and family law in their proposals. The *contract* arrangements will have specified requirements of service providers to meet industry service standards and performance targets that will be reviewed at set periods.

A number of issues have arisen by way of feedback in relation to the release of the Exposure Draft of the arrangements for the Tender Project. Particular issues arising relate to:

- the effect that the transfer of resources from one type of legal matter to another will have on clients;
- who the potential providers of legal aid services to Aboriginal and Torres Strait Islander peoples are; and
- the place of other mainstream legal aid service providers.

The Tender Project is expected to focus resources to people in priority need categories. In preparing to manage this change, ATSIS has met with current providers and legal aid commissions to obtain feedback about possible implications. Furthermore, the Tender Project has involved, through issuing an exposure draft, a feedback process to identify and take account of stakeholders' views on all aspects of the Tender. The Government will consider these views and issues arising from the feedback process before making a final decision on the terms of the Tender Project.

The provision of appropriate legal aid services to Aboriginal and Torres Strait Islander peoples is a key aspect of the Law and Justice Program. However, the Government recognises that other law and justice-related issues also affect Aboriginal and Torres Strait Islander peoples. Consequently, the Government, through ATSIS funds 13 FVPLS across the country and supports a range of preventative, rehabilitation (PDRE) and advocacy initiatives. The role of ATSILS is complementary to FVPLS, and each of these services have had links to various PDRE and advocacy initiatives. The diversity of PDRE and advocacy initiatives supported through the Law and Justice Program is apparent in the fact that the policy directions and goals of the Program has led to the funding of over 150 projects. A short account of some of the more representative and innovative measures that have not been detailed so far in this Submission follows.

Indigenous Women

- ATSIS will provide approximately \$4.7million to 13 FVPLS in 2003-2004. Government has allocated an additional \$22.7 million over the coming four years to double the number of FVPLS to 26. It is anticipated that the majority of the additional services will be operational by March 2005. The FVPLS are located predominately in rural and remote areas of Australia and are usually, but not always, under the auspices of an ATSILS. The FVPLS assist and counsel victims of violence and sexual assault and, where appropriate, works with families and communities affected by violence. Although the FVPLS provide a range of services including counselling and education, a primary function of the FVPLS is the provision of legal assistance. Further information on FVPLS is provided under TOR three below.
- In addition to the anticipated linkages with FVPLS ATSIS, through the Law and Justice Program supports other initiatives that relate to justice issues for Indigenous women. ATSIS provides operational funding assistance to the National Network of Indigenous Women's Legal Services (NNIWLS). In April 2004, ATSIS provided additional funds to enable NNIWLS to research and develop a three-year business plan for its service provision in rural, remote and metropolitan areas across Australia.
- The Institute of Labour Studies at Flinders University is currently producing a discussion paper on employment opportunities for women in organisations providing legal services to Indigenous Australians.

- A consultant in concert with the Women’s Legal Centre, ACT has been contracted to prepare a national information booklet titled ‘Legal Services for Women.’

Indigenous Youth

- In May 2004, the Law and Justice Branch made a submission on Aboriginal and Torres Strait Islander Juvenile Justice Issues to the Northern Territory Government Review of the *Juvenile Justice Act* (NT).
- Also, in 2002-2003, 44 justice-related programs specifically for young Indigenous people were supported under the Law and Justice Program. The Program continues to support such initiatives. For example, in 2003-2004, funding was provided to produce a video that shows the effects of substance abuse on young people in the Gunbalanya community. A more substantial grant was provided to an activity in the West Kimberley where young people ‘at risk’ are taught traditional bush skills to help them learn about their cultural heritage.
- In Tamworth, in 2003-2004, NSW Police is running a program, partly funded through the Law and Justice Program, called ‘Ride-4-Respect’. The project aims to build relationships and respect between police, young people and the community as a whole, with the ultimate objective of reducing crime.

Victims of Crime Support

- In 2003-2004, the Law and Justice Branch provided funds to the Dumbartung Aboriginal Corporation for a project called Kootamiara (Strong Healthy). The aim of the project was to create a safe and protected area for Nyoongah people who have suffered child sexual abuse trauma to disclose information with others.

Crime Prevention

- In 2002-2003, 45 Night Patrols services were supported. Night Patrols services operating in 2003-2004 include a number of youth specific patrols. A review of these patrols was recently funded by ATSIC in conjunction with AGD, see *An Overview of Night Patrol Services in Australia* (AGD 2003). According to this review, night patrol services provide “non-coercive community intervention, or order maintenance, and services designed to prevent or stop harm, and maintain community peace, security and safety”.
- In 2002-2003, two prisoner support services were supported under the Program, together with 40 activities funded by ATSIC Regional Councils in prisoner support, post release and diversionary areas. In 2003-2004, the Law and Justice Branch continues to support prisoner support initiatives. For example, funds were provided to cover the salary and operational costs of a Prisoner Support Officer to provide support to Indigenous prisoners and their families within the Bogong, Umbara and Canberra Wards in the ATSIC Queanbeyan Region. A similar project was supported in Adelaide where the primary objective was to reduce the rate of recidivism among prisoners. It aims to do this by presenting clients with a variety of options in pre and post release support programs to assist them in making better decisions about their future.

Policy Development and Legal Rights Promotion

- The Law and Justice Branch continue to provide funds to two Aboriginal Justice Advisory Committees (AJACs) and two Deaths in Custody Watch Committees. These organisations provide valuable data for use in monitoring and advocating on Aboriginal and Torres Strait Islander justice related issues.
- The Law and Justice Branch also provides Test Case funding to projects that promote the review of discriminatory laws and administrative practices and the recognition of Indigenous peoples' rights through the conduct of litigation. In 2003-2004, the Law and Justice Branch has supported a number of cases that challenge particular aspects of the law including those in areas such as family law and civil rights.
- The Centre for Judicial Studies has been contracted to develop a national Continuing Legal Education (CLE) framework for providers of legal services to Indigenous peoples.
- A consultancy has been established for a wide ranging review of the contact that people with cognitive disabilities, including mental illness, have with the justice system. This will include issues of prevalence, diversionary programs, court support and support services.
- A Consultant has also been engaged to develop a template for auditing and reviewing Indigenous legal services provision. It is aimed at assessing both financial management and service outcomes.
- The Indigenous Law Centre at the University of NSW is performing preliminary work on a survey of legal needs of Indigenous Australians.

Funding Allocation Method (FAM)

Further to the initiatives described above, the Law and Justice Branch engaged the Australian Institute of Criminology to develop a revised funding formula for the distribution of financial resources earmarked for the provision of Indigenous legal aid services. The aim is to ensure an equitable distribution of funding keeping in mind the limited resources available and relative legal need of particular Indigenous Peoples.

The Institute developed a model, which can provide a valuable template for funding distribution in the forthcoming financial years. ATSIS is working to implement the model and prepare proposals for further research and data collection. ATSIS is also working with the Commonwealth Grants Commission to cross-check the application of the FAM, and has consulted with the AGD about the model.

2. The coordination of Aboriginal and Torres Strait Islander Legal Services with Legal Aid Commissions through measures such as memoranda of understanding (MOU)

In New South Wales a cooperative arrangement between the State's Legal Aid Commission (LAC) and NSW ATSILS has been in place for a number of years. In April 2001, the LAC of NSW and the Coalition of Aboriginal Legal Services of NSW (COALS) signed a *Statement of Cooperation* agreeing to work cooperatively on issues relating to the legal needs of Indigenous people. ATSIS recognises that its program resources are sufficient to meet only part of the overall need for Indigenous legal services and that cooperation with other providers is essential. Under current administrative arrangements, the Law and Justice Branch is seeking to develop a systemic approach to this co-operation in service delivery by:

- developing a Business Plan for the Branch (**Appendix E**) and a compliance and risk management analysis;
- undertaking risk assessment process, as part of a Culture, Rights and Justice Group strategy to manage the transition period;
- engaging the services of consultants to review existing legal aid service providers' assessment, monitoring and evaluation procedures with a view to developing a template of good practise; and
- ensuring that the Tender Project is subject to the oversight of a probity auditor and the tender process has a formal risk management component.

Under existing arrangements it is a priority for the Law and Justice Branch to strengthen its partnerships with other government agencies and to negotiate co-operation across all types of legal needs and all geographical localities. There are a number of areas within ATSIS and the AGD that have responsibility for key policy advice and the delivery of programs relevant to Indigenous law and justice issues. The Law and Justice Branch has actively working to develop better linkages with these areas including:

- ATSIS's Social and Physical Wellbeing Group, which provides funding to 13 FVPLS. As noted above, the FVPLS provide a range of legal aid, counselling and victim support services to predominately Indigenous women and their families. The Law and Justice Branch is negotiating an internal MOU with the Social and Physical Wellbeing Group to work together on relevant policy issues including the targeting of services to those in need;
- AGD's Family Law and Legal Assistance Division (FLLAD), which administers the Government's assistance to Legal Aid Commissions at the State and Territory level. The Law and Justice Branch has had an MOU with FLLAD for over two years and has been negotiating enhancements to the MOU to improve cooperation around Indigenous peoples' access to legal aid services particularly on family law issues; and
- AGD's Community Safety and Justice Branch (CSJB), which provides advice to Government on a range of Indigenous justice-related issues including matters relating to crime prevention and early intervention initiatives. The Law and Justice Branch is negotiating a 'letter of cooperation' with CSJB to work

together on crime prevention and early intervention issues as they relate to Indigenous peoples.

As noted earlier it is anticipated that, as of 1 July 2004, the Law and Justice Program function together with the FVPLS function will be transferred to AGD under the Government's new delivery arrangements for Indigenous programs and services. The consolidation of these various program elements under one department is likely to lead to improvements in program delivery and enhance the Government's ability to facilitate cooperation between the providers of legal aid services.

One example of the way ATSIS is pursuing cooperative arrangements with relevant stakeholders is evident in Victoria. The Law and Justice Branch is negotiating an MOU with the Victorian Department of Justice to conduct a joint *Review of Indigenous Peoples' Access to Legal Assistance in Victoria*. Also, at the legal aid services provider level, it is a requirement of the Tender Project that potential service providers have the capacity to establish cooperation and relationships with other legal aid service providers and key stakeholder groups .

In 1997, the Government hosted a Ministerial Summit on Indigenous Deaths in Custody, which led to a national framework of bi-lateral agreements and plans on Indigenous justice being developed. So far:

- there are agreements or plans in place in Queensland and Victoria;
- in Western Australia, development of a new agreement is currently underway;
- New South Wales has an interim plan and consultation on a final agreement has been in process for some time;
- a "Justice Strategy" is being considered by the government in the Australian Capital Territory; and
- in the Northern Territory, negotiations are continuing on an agreement.

ATSIS maintains an active interest in these agreements and plans and will continue to work within relevant structures to strengthen the level of coordination and cooperation on Indigenous justice issues, including the provision of legal aid services. There are often a number of Indigenous representative groups involved in these agreements and plans including ATSIC and Aboriginal Justice Advisory Committees (AJACs). ATSIS is continuing to work closely with these groups on relevant matters.

3. The access for Indigenous women to Indigenous-specific legal services

The improvement of Indigenous women's access to law and justice services is a high priority for ATSIS. Given the disproportionate over-representation of Indigenous women in the criminal justice system, and their general difficulty in accessing legal services, the Law and Justice Branch has, within its Business Plan, the objective to improve women's access to all of its law and justice services.

The adverse contact of Indigenous women with the criminal justice system, in comparison to Indigenous men and otherwise, is an increasing concern. From 1991 to 2001 the number of Australian women in custody increased by 147 percent (Indigenous women included), the corresponding increase for Indigenous women alone was 255.8 percent. Incarceration levels for men also increased over this time period both Indigenous and non-Indigenous but at much lower rates (ATSIC Social Justice Report, 2002 pg 136ff). Recent research which reports that: "Aboriginal people constitute 16% of all prisoners in New South Wales. Aboriginal men constitute 18% of all male prisoners and Aboriginal women constitute 31% of all female prisoners. Aboriginal young people can make up at any given time 40% of the detention population, and it is usually a higher rate for younger Aboriginal women" (Lawrie, R, 2003, Speak Out Speak Strong, Aboriginal Women in Custody AJAC).

The need to address this problem is reflected in the work undertaken by the Law and Justice Branch. The improvement of women's access is also seen as critical to more beneficial outcomes for children and families as a whole. Current policy guidelines recognize this issue, and place in high category risks to a person's physical safety or where their cultural or personal being is a risk for legal assistance (**Appendix F**).

The distribution of ATSILS legal services to Indigenous women and young people in the year 2002 – 2003 is as follows:

- 17 percent of matters involve clients aged 4 to 17 years old;
- 30 percent involve clients aged 18 to 24 years old; and
- 24.7 percent of clients were women.

In addition to the services provided by ATSILS the FVPLS program was created from the legal aid services program in 1998 to give emphasis to women's legal needs and maintain women's access to legal support connected with family violence. The Government has announced a significant increase in funding for FVPLS and it is expected that the network of FVPLS will double from 13 to 26.

The FVPLS work to prevent family violence using four main strategies. They are:

1. Legal Assistance: This is the main concern of FVPLS, it is particularly important because ATSILS often represent male perpetrators of family violence and therefore cannot offer legal aid to Indigenous Women.
2. Referral and Support: In addition to providing counseling, the FVPLS have referral networks. Indigenous women's access to a wide range of services is increased by the use of these networks.

3. Local Solutions: Each of the FVPLS work towards delivering the most relevant service possible by relying on the advice of a committee in their locality when delivering services.
4. Raising Awareness: It is important that families and communities understand the legal, social and physical wellbeing consequences of family violence. With such awareness comes an increase in the ability of Indigenous people to identify family violence and to recognize the need for change. FVPLS deliver relevant awareness raising educational programs.

The FVPLS Program Operational Framework is in **Appendix G**, a list of service names and locations is in **Appendix C**. A Report of the 2003 ATSIS National FVPLS Workshop is in **Appendix H**.

The Law and Justice Branch is pursuing close working relationships with the Social and Physical Wellbeing Group on the FVPLS to improve the position of Aboriginal and Torres Strait Islander women and has developed a proposal for an internal MOU with this Group. The co-location, during the transition period, of this program function within the Law and Justice Branch will further increase the capacity of the Branch to promote services for Indigenous women across all of its functions.

In the past ATSIC advocated for improvement in women's access to all legal and preventative services and has consistently highlighted the need for a comprehensive study to be undertaken on Indigenous women's legal needs and the development of a strategy to address them. With an emphasis on maximising service delivery, this comprehensive study has been beyond ATSIC's or ATSIS's resources to date, but measures are being put into place to move forward on this issue. In this context, ATSIS has engaged consultants to develop a discussion paper on the 'Employment of Women within Indigenous legal services', which will examine issues relating to the employment of Indigenous women in the area of legal aid services.

ATSIC has established a Section 13 Women's Advisory Committee (Kungkala Wakai, which is chaired by Commissioner Allison Anderson) to advise on appropriate policy development including policy affecting Law and Justice Programs. Consistent with the Ministerial Directions of 1 July 2003, the Law and Justice Branch is continuing to explore opportunities to reflect ATSIC's policy priorities into its activities. For example, the Law and Justice Branch provides funding assistance to the National Network of Indigenous Women's Legal Services (NNIWLS). The NNIWLS is an Australia-wide network that undertakes a research and advocacy role in respect to Indigenous women's legal needs and support to legal services. It has a strong relationship with the FVPLS, particularly through its membership base.

As part of the Tender Project, the policy framework governing the delivery of Indigenous legal aid services has been comprehensively reviewed and changed in some important respects. For example, priorities for access to legal aid services are much more sharply defined, maintaining emphasis on those cases in which the safety or welfare of a child, or the personal safety of the applicant or a person in the applicant's care, is at risk. It is expected that Indigenous women and children will benefit significantly from this approach. The Tender Project provides for inclusion of the risk categories in the data set to allow monitoring of this system.

ATSIC, assisted by ATSIS, has consulted with the AGD on issues affecting Aboriginal and Torres Strait Islander peoples in connection with the Family Law Pathways process and, more recently, the Senate Community Affairs Reference Committee Inquiry into Children in Institutional Care. In the course of these consultations, ATSIS has promoted better access for Indigenous women to services and the rights of Indigenous families.

4. The ability of Law and Justice Program components to recruit and retain expert staff

ATSIS is committed to developing professional work environments within program components and ensuring the best possible services are delivered on-the-ground. To achieve this goal, ATSIS needs to build strong program management practices within national and regional offices so that optimal support can be given to service providers.

Branch Support to Service Providers

Continuing support for high standards of service to Aboriginal and Torres Strait Islander peoples remains a key objective within the ongoing process of reforms to the Law and Justice Program. This includes the ongoing monitoring and evaluation of the Program. Within the limited resources of the Branch, there will be some capacity building in program provision to ensure appropriate support of service providers. Should the Government decide to proceed with the Tender Project, the Branch has planned for State/Territory and regional level training on all aspects of the Tender Project. ATSIS is currently finalising the development of a range of material to assist officials and others in the delivery of law and justice programs and services to Indigenous peoples. Currently, these materials include:

- an information leaflet on the Law and Justice Program;
- Law and Justice Program user manuals;
- an intra-departmental service agreement for the delivery of the Law and Justice Program; and
- a strategy for Continuing Legal Education (CLE) for those service providers receiving funds under the Law and Justice Program.

Identify Professional Service Providers

The Tender Project seeks to identify providers who meet all relevant legal practice regulatory requirements in their respective jurisdictions, particularly in relation to their staff of legal practitioners. In order to encourage successful tenderers to employ high quality staff, their planned staffing profiles; planned quality assurance arrangements; and proposed professional, ethical and service delivery standards will be factors in the selection of tenders. The outcomes achieved by the successful tenderers will be monitored over the term of the tender to ensure that these performance levels are maintained.

Provided a tenderer is achieving the relevant outcomes under their contract, the tenderers' work will be deemed satisfactory to ATSIS. However, should a tenderer not achieve these outcomes at the appropriate level, ATSIS will be able to take remedial action. It will be unlikely for a tenderer that has a very high staff turnover to meet all of the relevant outcomes. In this way, ATSIS is encouraging tenderers to develop employee policies that will lead to good staff retention within the challenging context of service delivery to Aboriginal and Torres Strait Islander peoples.

The Tender Project is designed to assist better targeting of legal aid resources to ensure best possible access by Indigenous Australians to high quality and culturally appropriate legal services that expert staff can provide. A related consequence of effective funds targeting will be to increase funding opportunities for tenderers in the least hospitable work environments, thereby contributing to better salary packages and better staff retention. Another important measure in the Tender Project, designed to attract and retain staff by improving job security, is the increase of contract terms to three years (instead of current 12 month grants).

A significant consideration in developing the Tender Project has been to ensure that the best staff are employed in legal service provision. This will help to ensure that work environments are both positive and stable.

SECTION 3

TENDERING FOR THE DELIVERY OF INDIGENOUS LEGAL AID SERVICES

A national contestability policy for ATSILS was adopted by the ATSIC Board of Commissioners in April 2001. In June 2003, the ATSIC Board affirmed a contestability policy for the provision of legal services to indigenous Australians, and the momentum for tendering and contracting has been accelerated.

The release of a draft request for tender of legal services (the Exposure Draft) is a further milestone in the Government's endeavour to ensure high quality and culturally appropriate legal services are available to all Indigenous Australians. This is part of an ongoing process of reform of Indigenous legal aid services that has involved the development and benchmarking of professional standards and the adoption of contestability principles.

The objective of these measures is to assess whether ATSILS structure and locations are best placed to meet the future demands for services, the elimination of duplication of administrative costs and to ensure savings are redirected to areas of most need. There are advantages in moving to a more specific purchaser/provider arrangement in terms of ensuring value for money, efficiency and better targeting of services to client needs, which is best achieved through the purchase of services under contractual arrangements rather than through grants.

Proposed Request for Tender

The Tender Project provides a mechanism for identifying the best way to deliver legal services to Indigenous Australians. It also provides a direct response to the recommendations of the ANAO Report. The emphasis is upon targeting services to need, and specifying services to be provided according to a strategic plan, and ensuring quality and clear data to measure performance.

This proposal is part of a wider Australian Government policy on procurement that has a central focus upon competitive and contestable contracting with the aim of promoting efficient and effective service delivery, accountability and fairness. The proposed draft guidelines for tender contained within the Exposure Draft also foreshadow a change from the current grant-based funding arrangements to formal contract (purchaser/provider arrangements) that provides the Australian Government with a key opportunity to target legal aid funding.

Overall, the focus of the Tender Project is on achieving good outcomes for Aboriginal and Torres Strait Islander peoples. The focus on outcomes is being implemented by the Tender Project in two ways. First, it demands that tenderers provide evidence that they can achieve outcomes with reference to past performance. Second, to be a successful tenderer, they must be able to provide reliable performance data to the relevant funding agency so that outcomes can be monitored and measured.

The Australian Government is committed to providing culturally appropriate legal services to Aboriginal and Torres Strait Islander peoples. Whilst there has been some concern about the Tender Project being open to non-Indigenous organisations, the opportunity to tender is open to the existing ATSILS and the selection process for service providers will include a range of criteria. The proposed selection criteria will emphasise Indigenous leadership as a major factor in determining whether a tenderer will be successfully able to demonstrate sufficient cultural awareness.

Purpose of tendering

The changes proposed are the latest step in a process of reforms of Indigenous legal aid services with the objective of ensuring that Indigenous Australians have equitable access to high quality services in all areas of need. In the past ATSIC has advocated for a fairer system for distributing legal aid funds, so that those Indigenous Australians with the most need receive better services. This involves considering changes to the priority funding areas, and a stronger emphasis on the needs of women and children.

The Tender Project also includes a simple means test that aims to identify those most in need of legal aid without imposing an onerous administrative burden. There is also a determination to ensure that public monies are properly managed and accounted for by legal aid service providers.

The tender process is intended to result in more efficient use of available funds. For example, the simple means test that will be introduced will be similar to that used by Legal Aid Commissions in determining access to mainstream services. (An applicant who is a CDEP participant or in receipt of a Centrelink benefit will automatically pass the means test). The aim is to ensure that the distribution of limited resources is made to those persons most at need of Government funded legal services.

The tendering reforms are consistent with the Ministerial Directions issued to the ATSIS CEO on 1 July 2003. The proposed changes also build upon decisions by the ATSIC Board of Commissioners in April 2001 to approve a contestability policy for the tendering of legal aid services, which they again endorsed in June 2003. The Government wants legal services to go to tender in a competitive environment in an endeavour to ensure that Indigenous Australians receive value for money.

In March 2004, ATSIS released an exposure draft for the Tender Project seeking comment and feedback on the proposal. The feedback process has elicited considerable interest, in the form of 46 submissions, over 1200 hits on the website and over 200 questions submitted (which have been answered on the Tender Project website, www.atsis.gov.au/LegalTender). This process has been highly successful in gaining views of the market place, identifying issues of concern and enabling an appropriate risk assessment. A risk assessment plan is being developed as part of the Tender Project and the whole process is subject to the oversight of a Probity Auditor. ATSIS is undertaking a detailed analysis of the issues, to ensure that the terms of the tender provide for high quality professional and culturally appropriate legal services.

Timeframe

The current proposed timetable for tender introduction is that the new contracts will commence on 1 January 2005, but this date is subject to the Government's consideration of the issues raised during the publication of the Exposure Draft. An indicative timetable for the tender process is set out below.

Indicative Timetable

4 March 2004	Exposure Draft released
16 April 2004	Closing date for submissions on the Exposure Draft
late May 2004	Release of Request for Tender
to be advised in final RFT	Tender Information sessions
mid July 2004	Closing date and time for submission of tenders
late August 2004	Notification to all tenderers leading to execution of Contracts with successful tenderers
31 December 2004	Current grant funding expires
1 January 2005	Start date for Contract Period
31 December 2007	End date for Contract Period

Summary: ANAO Recommendations and TOR

The reforms contained within the Tender Project address the ANAO recommendations. The Tender Project is also a powerful means to direct legal service activity with a view to:

- creating an appropriate balance between the distribution of resources to criminal, family and civil law cases;
- encouraging cooperation with Legal Aid Commissions;
- promoting access to services for Indigenous women and families; and
- recruiting and retaining expert staff.

CONCLUSION

ATSIS has moved forward in a number of areas to enable it to respond effectively to issues surrounding the provision of legal aid and related programs and services to Aboriginal and Torres Strait Islander peoples, including priorities arising from:

- the Ministerial Directions of 1 July 2003;
- relevant past decisions by the ATSI Board;
- the ANAO Report No 13; and
- the impending transfer of the Law and Justice Program function and the FVPLS function to the Attorney-General's Department.

The Law and Justice Branch is consolidated as a discrete unit within ATSIS's national office in Canberra and officers are working on measures to ensure the smooth transfer of the Branch and the Law and Justice Program to AGD. A fundamental aim is to facilitate a seamless continuity in the delivery of Program outputs, and to ensure continuity and certainty in the provision of services on-the-ground to Indigenous Australians. The Branch continues to monitor and work with ATSI.

The Branch's organisational structure matches resources and expertise to key functions and priorities. The Business and Operational plans clearly articulate the Branch's objectives including key result areas, strategies and performance monitoring and evaluation mechanisms for the effective delivery of the Law and Justice Program. Importantly, these plans are consistent with the Ministerial Directions of 1 July 2003 and have a strong emphasis on measuring outcomes. The Branch is also finalising the development of a range of resource material to assist officers at the national and regional level to effectively deliver the Law and Justice Program across the country. This material includes:

- an information leaflet on the Law and Justice Program;
- Law and Justice Program user manuals;
- an intra-departmental service agreement for the delivery of the Law and Justice Program; and
- a strategy for Continuing Legal Education (CLE) for those service providers receiving funds under the Law and Justice Program (to be in place by 30 June 2004).

As part of its Business Plan, the Branch is pursuing mechanisms to enhance working arrangements with a range of key stakeholders. The impending transfer of the Branch and its program function to AGD will contribute significantly to this objective. Under current arrangements, the Branch will continue to develop strategic alliances with key stakeholders and will look to develop strong working relationships to a range of bodies including, in particular, Indigenous representative groups working in the area of justice, such as the National Aboriginal Justice Advisory Committee (NAJAC).

A major activity for the Branch is the delivery of the Government's policy through the Tender Project. This provides the Australian Government with an opportunity to

target legal aid funding to areas of most need. The Law and Justice Branch conducted information sessions on the Tender Project in a number of locations around Australia and developed a risk assessment plan based on feedback from interested groups and individuals. This information will be used to inform Government deliberations on how best to deliver legal services to Indigenous Australians.

The reforms outlined in this Submission represent a comprehensive response to: the issues raised by the ANAO Report No 13; to the priorities of ATSIS and the Government to move towards competitive contestability; and importantly, the need to provide quality legal aid services and other Law and Justice initiatives to Aboriginal and Torres Strait Islander peoples.

ATSIS

May 2004

APPENDICES INDEX

Appendix A: Ministerial Directions to the CEO of ATSIS, IPS 045/2003.

Appendix B: Exposure Draft Purchasing Arrangements.

Appendix C: Annual Report 2002-2003: Aboriginal and Torres Strait Islander Commission. Updated list of ATSILS and FVPLS.

Appendix D: Intra-Departmental Service Agreement: Draft Service Agreement between Law and Justice Branch and the ATSIS Regional Offices.

Appendix E: Law & Justice Business Plan.

Appendix F: Policy Framework for Targeting Assistance Provided by Aboriginal and Torres Strait Islander Legal Services July 2003.

Appendix G: FVPLS Program Operational Framework.

Appendix H: A Report of the 2003 ATSIS National FVPLS Workshop.