

29 April 2004

The Secretary
Joint Committee of Public Accounts and Audit
Parliament House
CANBERRA ACT 2600

Dear Secretary,

**Re: Submissions by Western Aboriginal Legal Service
Indigenous Law and Justice Inquiry**

The issues we address in these submissions are relevant to all the terms of reference of your inquiry.

1. ATSI'S' Preference for one Provider in each State and Territory.

At one time there was only one ATSI'S in New South Wales the Aboriginal Legal Service at Redfern which, despite the best efforts of many of those involved was, unable to provide a satisfactory and professional service across New South Wales. As such the Redfern ALS tended to be Sydney-centric and the more remote communities in New South Wales tended to be overlooked in the delivery of services. This was one of the reasons for which the Western Aboriginal Legal Service came into being in 1978. It was also one of the reasons that the Redfern ALS was de-funded and wound up in 1996.

The current ATSI'S policy guidelines state as their objective,

“Commitment to a strong, community based, high quality, accountable and properly funded Legal Service fits closely with key ATSI'S policy and is an effective response to the profound disadvantages of Indigenous Australians.”

Royal Commission into Aboriginal Deaths in Custody Recommendations 106 and 107 emphasised the importance of community based legal services.

Recommendation 106 provides, inter alia,

“That Aboriginal Legal Services recognise the need for maintaining close contact with the Aboriginal communities which they serve....”

Recommendation 107 provides,

“That in order that Aboriginal Legal Services may maintain close contact with, and efficiently serve Aboriginal communities, weight should be attached to community wishes for autonomous regional services or for the regional location of solicitors and field officers.”

The creation of five ATSILS out of the area previously covered by the Redfern ALS can be seen as an attempt by ATSIC to create “community based” ATSILS. They are loosely based on ATSIC Regions.

The area covered by WALs covers the whole of the Murdi Paaki ATSIC Region and part of the Binnaal Billa Region. WALs is a company limited by guarantee registered under the ***Corporations Act 2001*** (originally under the repealed ***Companies Act 1961***).

WALS directors are elected at the AGM of the company from the membership of the company by the membership of the company. One director is able to be elected to represent each of the following 12 districts,

Bourke
Brewarrina
Broken Hill
Coonamble
Dareton
Dubbo
Gulgandra
Menindee
Nyngan
Walgett
Wellington
Wilcannia.

Under these arrangements no one community from one town or district can gain control of the board of directors and accordingly each community served by WALs has an equal voice in the running of the organisation.

WALS maintains offices and staff in Bourke Broken Hill, Dubbo, and Walgett. In our submission notwithstanding the huge area covered by WALs, it can be seen that WALs is nevertheless a community based organisation.

The Draft Policy Directions make no mention of ***“community based legal services”*** and it is clear in our respectful submission that the preference for a single ATSILS in New South Wales represents an abandonment of these principles.

An attempt by a statewide organisation to maintain a community base would in our respectful submission be totally unworkable. We would doubt that such an organisation could afford to maintain the offices in remote areas currently maintained by WALs and other ATSILS, and a board of directors, or managing committee representing local communities eg on the WALs model,

would run to dozens of members and be totally unwieldy and unmanageable. It would more resemble a parliament than a managing committee.

While we acknowledge that units smaller than the current six ATSILS in New South Wales might not be financially viable or conducive to achieving economies of scale, the current arrangements in New South Wales achieve both ends of serving local communities and financial viability with economies of scale.

2. Who may tender

The only restriction on eligibility to tender are set out in paragraph 1.6 on page 14, which precludes employees and agents of ATSIC and ATSSIS.

Therefore it may be assumed that anyone may tender and there is no requirement that a tenderer be an Aboriginal person or organisation. A tender could be made by the Legal Aid Commission, or a large private firm of solicitors, or a consortium of solicitors.

The requirement that legal aid services are to be delivered in a culturally sensitive and appropriate way does not of itself require that the service deliverer be an Aboriginal organisation, and this represents a significant departure from the concept of a community based legal service as previously required by ATSIC/ATSSIS.

In our respectful submission in order to effectively deliver a service to Aboriginal people there needs to be not only cultural sensitivity but cultural affinity with the Aboriginal communities the organisation is asked to serve which in turn gives Aboriginal people a faith and a confidence in those providing the service.

ATSILS achieve an affinity with the culture of the Aboriginal communities they are serving by firstly having staff who work in those communities and very often live in those communities and by employing Aboriginal staff (field officers and administrative staff, and where possible, solicitors) who are most likely to be members of the communities in which the ATSSIS works.

By way of example WALIS operates four offices, at Dubbo, Walgett, Bourke and Broken Hill. There are 8 solicitors based in Dubbo, Two Aboriginal field officers and an administrative staff of five of whom four are Aboriginal people. The Aboriginal staff members are all from communities serviced our Dubbo office.

Our Walgett office is staffed by two solicitors an Aboriginal field officer and an Aboriginal secretary, all of whom reside in Walgett. The Aboriginal staff members are members of the Walgett community.

Our Bourke office is staffed by an Aboriginal field officer who is a member of the Bourke community. From the beginning of May WALs will have a solicitor based full time in Bourke and she will reside in Bourke.

Our Broken Hill office is staffed by two solicitors, an Aboriginal field officer and an Aboriginal secretary all of whom reside in Broken Hill. The Aboriginal staff members are both members of Aboriginal communities serviced by WALs.

A non-Aboriginal organisation is unlikely to have that cultural affinity with the Aboriginal communities it is serving and this will make service delivery all the harder and inevitably lead to a drift of clients away from that organisation. A non-Aboriginal organisation is unlikely to achieve a presence on the ground and in Aboriginal communities that an ATsILs is likely to achieve, and would have difficulty winning the confidence of the communities and clients. One could imagine such a scenario leading to an increase in non-appearances by Aboriginal people at Court, and many legal problems which Aboriginal people have, going unaddressed.

3. Funding Arrangements

Pages 20 and 21 of the draft indicate that under the new arrangements, total funding nationwide will fall by approximately \$2.4m. In our respectful submission it will be extremely difficult for any successful tenderer to maintain the quality legal service which ATsIS seeks by reducing funding annually by \$2.4m.

Further, on page 20 it is stated that Fringe Benefits Tax Supplementation will be withdrawn on 30 June 2005. This is apparently worth \$2.39m.

While we appreciate that ATsIS is in no way responsible for the withdrawal of fringe benefit supplementation, the removal of the supplementation will remove any ability we had to come anywhere close to offering salary packages competitive with the Legal Aid Commission.

In our respectful submission, the overall funding allocation under the proposed arrangements be increased by an amount equal to the value of the fringe benefit supplementation to be removed.

The Exposure Draft proposes an establishment payment, one month's payment in advance and then 35 monthly payments in arrears. Why is it proposed to drip feed funds in this way? What will it achieve for ATsIS? We would be interested to know whether any other organisations are funded by the Federal Government by this method.

Monthly payments in arrears will make both day to day operations of an ATsILs difficult and could well leave the organisation short of funds particularly in months when the ATsILs has large lumps sum payments to

make, e.g. funding our arrangements with the Public Defenders, paying professional indemnity insurance, paying a private barrister for a long trial.

Some of these problems may be overcome by paying some debts by monthly instalments if creditors are prepared to accept payment on this basis. But this then creates an accounting nightmare for our Accountant and the organisations with whom we are contracting. It also sends the wrong message to creditors about our financial viability. Debtors who have to pay their debts by instalments are generally not regarded as good financial risks by their creditors.

Further there have been occasions in the past, not infrequent, when we have been left waiting for up to a month into a new quarter for a quarterly instalment from ATSIC and ATSSIS, which from time to time has caused us needless financial embarrassment. If we are operating from month to month the margins get tighter and any delay by ATSSIS in payment could severely embarrass us.

Finally, monthly payments in arrears makes forward financial planning extremely difficult and represents a probable disincentive to innovative and creative thinking and planning in relation to general and legal practice management.

We would strongly urge ATSSIS to reconsider this proposal and at the very least re-instate the current funding arrangements with the payment of funding by quarterly instalments.

4. Double Funding

The provisions relating to double funding (p36) would appear to rule out WALs arrangements with the Legal Aid Commission under which we receive grants of legal aid (Federal money) in family law matters. If ATSSIS is going to simply take the moneys from us, why should we bother to go to all the trouble, and it is a lot of trouble, to prepare and lodge applications for grants of legal aid?

In our respectful submission, if an ATSSILS is able to raise moneys from such sources, the ATSSILS should be able to keep those moneys and apply them in the provision of legal assistance.

5. The Means Test

We can understand the philosophy behind the decision to introduce means testing, and we take no issue with it.

While we do not anticipate that many of our clients would not satisfy the basic means test, the administration of the means test will add to the cost of delivering services and occupy a solicitor's valuable time questioning clients

about their financial circumstances and assisting clients to complete the necessary forms.

Arrangements for the collection of contributions will greatly increase the duties of the accountants employed in each ATSILS and will occupy the valuable time of solicitors and field officers which should properly be spent undertaking professional duties.

The Exposure Draft does not spell out whether an ATSILS will be expected to pursue clients for contributions and to what extent. Nor does it spell out what an ATSILS should do in the event that a client fails to pay a contribution. It is anticipated that litigation could be delayed while an ATSILS awaited payment of a contribution by a client.

The Exposure Draft does not make it clear to whom a contribution paid belongs once it is paid (see eg Clause 6.10). Does it vest in the ATSILS immediately and unconditionally, or, until such time as the client's litigation has been finalised, does the client retain property in the moneys with the right to withdraw the moneys at any time should the client decide to take his business elsewhere.

If the latter is the case, then the ATSILS will hold the moneys in trust for the client until the ATSILS has fulfilled its part of the contract of retainer. If the latter is the case I would anticipate that the Law Society of New South Wales would require each ATSILS to open and operate a trust account into which such contributions would need to be paid and held until the conclusion of the litigation. At the conclusion of the litigation the ATSILS would then need to properly acquit those funds by rendering a statement to the client. The operation of a trust account will also necessitate annual inspections by the Law Society's trust account inspectors.

The operation of a trust account will in turn lead to an increase in expenses including payment of contributions to the Law Society's fidelity fund, and we would expect a significant increase in our professional indemnity insurance premiums.

If the former is the case, and the contributions vest in the ATSILS upon payment, then this should be made clear in both the Policy Directions document and in a document the client is asked to sign at the time the contribution is made. The prior approval of the Law Society of New South Wales for these arrangements should also be sought by ATSIS so there can be no doubt as to the status of the contributions paid by clients.

In our respectful submission, the instituting of a means test would become a case of throwing good money after bad, with the costs of and associated with the administration of a means test and the collecting of client contributions greatly outweighing any likely financial gains.

6. The New Priority Categories

The new priority categories represent a major departure from the priorities stated in every set of Guidelines published since the reforms of 1996-1999.

In all previous Guidelines including the current one for the 2003-2004 financial year the first priority has been to ***“clients who may be detained in custody.”*** This has been understood to mean that ATSILS should concentrate their energies in providing representation for those charged with criminal offences and who are at risk of being refused bail or receiving a custodial sentence.

The reason for this category being the Number 1 priority of ATSILS in past years is succinctly stated in the commentary on page 62 to Priority Category (c). At the present time, according to New South Wales Department of Corrective Services statistics, Aboriginal offenders represent 19.2% of the adult gaol population in New South Wales

WALS and we are sure all other ATSILS in New South Wales were established and have operated on the basis that their principal objective was to assist such people in the criminal justice system. In our case eleven of our thirteen solicitors are engaged in assisting clients in criminal matters, and two are engaged in providing assistance in civil law and family law matters. Criminal law matters represent about 90% of our work.

This type of legal assistance has now been relegated to third place behind,

- (a) Cases where the safety or welfare of a child is at risk, and
- (b) cases where the personal safety of the applicant, or a person in the applicant's care, is at risk.

The Exposure Draft provides no assistance in defining what these terms mean.

In our respectful submission, when the Request for Tender is released in May, an attempt should be made to define these terms or at the very least, provide some examples of what type of legal assistance is envisaged. At the present time all the Policy Directions really say in each instance is

“The form of assistance provided in these cases may take a variety of forms, depending on the circumstances of the case.”

Apart from representing children in criminal proceedings, it is hard to see how priority categories 1 and 2 can fall into the traditional practice of a criminal lawyer of representing defendants before the courts.

Further, assisting clients in matters falling into categories 1 and 2 has the potential to give rise to a direct conflict with providing legal assistance in matters falling within priority category 3 with the likely result that an increasing

number of clients in criminal matters will need to be assigned to the Legal Aid Commission.

7. Representing Repeat Offenders

We are concerned with the terms of Clause 3.10 of the Policy Directions within the Exposure Draft giving ATSILS the opportunity of declining assistance to certain classes of repeat offenders.

It should be said at the outset that the vast majority of the clients we represent in the criminal courts are repeat offenders.

In our respectful submission these are the very people who need the assistance of an ATSILS as they are the clients most likely to fall within priority category 3 being at most risk of being detained in custody, both by being refused bail and by suffering a custodial sentence, whereas a first offender is unlikely or less likely to be at risk of being detained in custody.

In our respectful submission ATSILS perform an additional valuable role in relation to repeat offenders. These are the clients who are most likely to be either suffering from a mental disorder or who are suffering from a drug or alcohol addiction.

In the former case an ATSILS may well arrange to have the client assessed by a psychologist or psychiatrist thereby ascertaining what the problem is and how it should be treated, and in the latter case arranging for clients to gain admission to detoxification units and long term residential rehabilitation programmes to which they might not otherwise have known to access.

We see this role of the ATSILS as potentially reducing the likelihood of further repeat offending by identifying problems and facilitating appropriate treatment.

In many instances an ATSILS involvement has meant that clients have learnt for the first time that they have a particular problem or that treatment is available for a problem.

Similarly an involvement by an ATSILS has facilitated a client deciding to address an alcohol or drug problem for the first time. Happily many of these clients do not return to the criminal justice system.

8. Legal Service Involvement in Law Reform

Previous ATSIC/ATSIS Guidelines have emphasised that one of the objectives of funding ATSILS is to provide information and education about legal issues and provide research and input on law reform and other law related issues.

The Guidelines for the current financial year states at 2.1

“ATSILS must use grant funds:

(a) to strive to:

.....

v. promote the review of legislation and other practices which discriminate against Indigenous Australians.”

(b) by

(i) providing legal aid and legal aid related services to Indigenous Australians;.....”

And at 2.2,

“Legal aid and legal aid related services means:

(a) information, education and advice about legal issues, legal rights and responsibilities:...

(d) research and input on law reform and other law related issues.

Mr Wayne Gibbons' Forward to the Exposure Draft states

“other services such as preventative, information and education services and input on law reform and law related issues are not part of the tender proposal.”

Royal Commission into Aboriginal Deaths in Custody Recommendation 105 emphasised the important role of ATSILS in research into areas of law reform. It provided,

“That in providing funding to Aboriginal Legal Services governments should recognise that Aboriginal Legal Services have a wider role to perform than their immediate task of ensuring the representation and provision of legal advice to Aboriginal persons. The role of the Aboriginal Legal Services includes investigation and research into areas of law reform in both criminal and civil fields which relate to the involvement of Aboriginal people in the system of justice in Australia, In fulfilling this role Aboriginal Legal Services require access to, and the opportunity to conduct, research.”

We at WALs have regularly over the years made submission to government, opposition parties, the Law Reform Commission, the Law Society of NSW, Law Council of Australia etc on proposed legislative changes and on the effects of legislation or its implementation on the administration of justice.

ATSILS as the providers of a grass roots legal service can, and have in the past made a valuable contribution in such matters which have resulted in legislation being reviewed and amended.

It would be counterproductive in our respectful submission if ATSILS were now not to be permitted to fulfil this valuable role in the community and in the criminal justice system. And we would ask that ATSIIS advise who it is now anticipated will fulfil this valuable role.

9. Legal Service Involvement in Test Cases

There is now also a prohibition on our undertaking “test cases” without ATSIIS’ prior approval, which represents a significant fetter on the role and responsibilities of ATSILS.

Presumably, under these rules, an ATSILS could not now take an appeal from a magistrate to the Supreme Court (or even to the District Court) on an issue highly relevant to our general advocacy work, such as seeking to define police powers or to proscribe certain police practices or to interpret a piece of legislation.

And should the Director of Public Prosecutions decide to take a “test case to the Supreme Court and maybe on to the Court of Appeal, will an ATSILS be required to obtain ATSIIS’ approval before appearing for the respondent to the appeal?

While there will be cases where an ATSILS would need to apply for special funding to pursue a “test case” eg to the High Court of Australia, this should not mean that as a general principle prior approval should be sought before **any** so called “test case “ litigation is pursued.

10. Transitional Arrangements

To a large extent because the proposed contract will operate on calendar years rather than financial years, the uncertainty of not knowing whether we will be a successful tenderer will create extraordinary uncertainty in our operations.

Firstly, come September we may need to advise clients we are unable to represent them into 2005 and similarly we may need to enter into provisional discussions with the LAC in relation to the possibility of their having to take over our work in the new year.

Secondly many of our insurances and leasing arrangements are renewable at the commencement of each financial year. What are we to tell them and what terms should we commit to?

Potentially, an unsuccessful ATSILS will need to continue to trade for up to four months following notification that it has not been successful.

Arguably if the ATSILS continued to trade after notification that it had not been successful, the directors of the ATSILS could find themselves personally responsible for the liabilities of the organisation under for example the provisions of Section 588G et seq. of the **Corporations Act 2001**.

In our respectful submission, if an ATSILS is unsuccessful in the tendering process, ATSI should consider agreeing to indemnify directors and staff for any liability or potential liability which may arise from the ATSILS continuing to trade following notification of that decision.

We would anticipate that the same problems will arise towards the conclusion of the contract term on 31 December 2007.

11. Community Consultations

There is no provision in the exposure draft for consultations with the Aboriginal communities throughout Australia either before the tendering process commences in May or afterwards. In the term "community" I also mean community based organisations such as ATSI Regional Councils, Land Councils CDEPs etc

Aboriginal people and organisations around New South Wales are key stakeholders in the maintenance of competent professionally run ATSILS and in our respectful submission ought to be included in a consultation process so that ATSI can find out what type of ATSILS Aboriginal people want to represent them.

Nor is there provision for any consultation with other stakeholders in our operations including the Legal Aid Commission, Public Defenders, Community Legal Centres, the Law Society of New South Wales, representing the State's solicitors, the New South Wales Bar Association, representing barristers, the NSW Attorney General's Department, AJAC, Director of Public Prosecutions and Police and Departments of Juvenile Justice, Community Services and Corrective Services.

We are sure that even the New South Wales Police these days would readily acknowledge that their job is made easier administratively by having community based ATSILS to deal with particularly those who, like WALs, have a solicitor on call 24 hours a day 365 days of the year.

ATSILS are not insignificant players in the criminal justice system in New South Wales and changes as significant as those proposed will have serious and potentially detrimental flow-on effects for some of the organisations listed, most notably the Legal Aid Commission.

The change in priorities, the drop in funding levels, the discouragement of ATSILS from providing legal representation to repeat offenders will have a dramatic and potentially disastrous effect on the workload and funding needs

of the Legal Aid Commission in New South Wales and no doubt in other states and territories.

Yours faithfully,

Western Aboriginal Legal Service

Lorraine Wright
General Manager

Richard Davies
Principal Solicitor