SUBMISSION

SUMMARY The plan to tender out Aboriginal legal services is said by the Government to be about acquiring quality legal services that are culturally appropriate, that fosters creativity and offers value for money. We say the proposal will effectively dismantle the Aboriginal legal services' structure if pursued, and will prove harmful to the Aboriginal people for whom legal services are meant to provide. Rather than make the existing services better the plan will produce reduced access, isolate the Aboriginal communities from the new services, and undermine the advances made by existing services. The proposal by the Commonwealth to tender out legal services represents a dangerous step backwards.

Claims in favour of tendering

Ministerial policy

In her statement dated 19th April 2004, Minister Vanstone said the purpose of tendering was to get the "best service possible", but did not say what was wrong with the existing arrangements. It is an exercise, she says, because ALS's are "being put to the test".

ATSIS

The general manager of Network – ATSIS, John Kelly, wrote to organisations on the 16th December 2003 making sweeping claims that previous funds to organisations "were based on amounts needed to keep the organisations functioning instead of outcomes". We dispute the claim.

This legal service monitors the imprisonment and detention rates of adult and juvenile Aborigines within Tasmania. Our policy and practice in criminal proceedings is to fund defences to charges where there is a reasonable prospect of success. More particularly, we grant aid in criminal matters where:

- adverse consequences to an Aboriginal can be severe or cause hardship;
- the prosecution of an Aboriginal may be unfair eg assaults or abusive language arising from provocation through racial slurs;
- prosecution of one or more Aborigines can have a significant detrimental impact on the broader Aboriginal community eg prosecution arising out of conflict between a law and an unrecognised Aboriginal right such as taking of wildlife, or camping on ancestral lands that conflicts with local laws.

We have deliberately funded fully-fledged defences to relatively minor offences committed by youth for the purpose of minimising the number of convictions Aboriginal youth will acquire during their most vulnerable growing up period. Simply pleading youth guilty to a range of petty offences in Children's Court proceedings will not necessarily lead to detention. But having a string of prior convictions acquired during teenage years increases the likelihood of gaol later on if there are convictions in adult courts.

One example of the success of our scrutiny of youth proceedings approach was when a 16 year old had allegedly confessed before a senior police officer to stealing but without the ALS being notified or present. Contesting the admissibility of the alleged confession by the ALS resulted in the court ruling against the confession being admitted into evidence, and the case was thrown out. To our knowledge that youth took advantage of the result and, with a clean sheet, has gone on to lead a productive life.

Of course there are many other instances of a stance being made by the legal service, some with good results, some not. But the point is that monitoring of police and court processes by a legal service can foster changes, especially where the personal legal representation in court proceedings is influence by broader policy considerations. An independent private legal firm providing personal service only is unlikely to get the same results.

Challenging the admissibility of evidence, even in seemingly lost-cause cases, also puts police and the courts on notice that the vulnerability of Aboriginal youth in the hands of investigating police requires Aboriginal legal service presence when questioning occurs. Providing alternatives such as diversionary projects aids the courts in minimising the over representation of Aborigines in detention. This organisation can hardly be said to be ignoring the focus on outcomes and substituting an employment-based need for resources, as claimed by the Government.

Yet an ATSIC Quality Assurance Check of the TAC legal service in 1996 was critical of any function whereby the legal service's advice to Aboriginal clients frustrated police attempts to gain convictions.

NARROWING THE SCOPE OF LEGAL ASSISTANCE THROUGH TENDERING

The detail of the proposed changes is outlined in the Exposure Draft released by ATSIS. That document shows the new plan is to seek new deliverers of "legal aid", defined as advice, duty lawyer assistance and representation in criminal, civil and family law matters (Scope p17), but excluding "preventative, information and education services and input on law reform and law related issues". (Foreword p9)

From the statements made by the Government and its bureaucracy the proposed changes are aimed at either shaking up ALS's because they have not delivered, or limiting the scope of Aboriginal legal aid because of some unstated policy.

The stated reasons for tendering out squarely raises the issue of whether ALS's are best placed to provide quality legal services to Aborigines. Providing access to legal representation, the scope of the representation and the attitude of the beneficiaries are central to this discussion.

The 1980 *House of Representatives Standing Committee's Report* on *Aboriginal Legal Aid* (the "Standing Committee") (para 108) recognised that the Aboriginal Legal Services have had a major influence on the relationship of Aboriginals with the legal system and their effectiveness, within the current limits of available funds, was specifically attributable to their accessibility and acceptability to the Aboriginal people. The Standing Committee emphasised the importance of the community based structure, and the specialised nature of the Legal Services provided which it saw as fulfilling the function of providing a service to the Aboriginal community without threatening the values or culture of that community.

The claim by the Federal Government is that the proposal is not to stop legal aid to Aborigines, but simply to change who delivers it (see Foreword). The justification for the change is expressed as "...to better prioritise and target...resources, to ensure that services are responsive to...priorities and community needs, and to provide the best quality of service to individual clients". (Intro p57,58)

The clear inference is that existing ALS's have failed in focusing resources where Aboriginal legal needs are greatest. Apart from the bald assertion, no support for such a claim is given.

The most obvious area of demand and priority for services is in the criminal field. The ANAO audit noted that criminal work takes up 90% of Legal Services' efforts. (ANAO 1.6 p12) With Aboriginal imprisonment rates 16 times higher than for others in Australia, the priority for assistance in criminal matters is justifiably high.

The ANAO report acknowledges the pressure ALS's operate under to provide representation in criminal proceedings. The ANAO Report states that, despite increasing demands for Aboriginal legal aid, there have not been any substantial funding increases to meet the demands. (1.7 and 1.8 p12) The Federal Government's claim that current services do not meet the demands becomes a self-fulfilling prophecy: the Government fails to supply the necessary resources then seizes on any consequent and understandable gaps in services as a basis for tendering out. The Government's spin on its reasons for tendering ignores the need for greater resources being allocated to existing ALS's to better provide for Aboriginal needs and to fill any gaps in service.

During the mid to late 1990's, our monitoring of detention rates of Aboriginal juveniles showed 1/3 of all juveniles in State care in Tasmania were Aboriginals. The Aboriginal population in Tasmania (6,000) is a bit over 1% of the general population.

The legal service embarked on a program to reduce the numbers of Aboriginal juveniles being placed in detention. The features of this program involved:

- Building a stronger relationship between the department of community services and the legal service, the result of which was an agreed position that the numbers of Aboriginal juveniles detained should be reduced;

- Variation to the daily duties of the legal service workers enabled them personally, as well as other community people brought into the program, to act as carers for the Aboriginal juveniles;

- The establishment of a diversionary program on Aboriginal owned islands, first at Badger and then at lungtalanana (Clarke Island), as an alternative to institutionalised detention;

- Promotion within the Aboriginal community of the existence of the alternative Aboriginal youth program that resulted in many youths

whose circumstances were likely to lead them to detention, being directed away from detention as a result of being on the island program;

- Co-ordination with lawyers representing Aboriginal youth to educate the courts about the alternatives, particularly on bail applications and sentencing.

None of these initiatives could be carried out under the Government's tendering out process. Without the concerted effort of this organisation, the 30 times greater detention rates for Aboriginal juveniles in Tasmania could be reached again. The Tasmanian experience highlights the possibility that the Government's revamped approach is likely to have disastrous consequences.

ROLE AND FUNCTION OF ABORIGINAL LEGAL SERVICES

Greater Aboriginal contact with police, coupled with the vulnerability of many Aborigines when questioned by authorities, are the reasons Aboriginal Legal Services' focus on providing legal assistance to Aborigines in the criminal sphere. This primary role was noted by the Standing Committee (para 136).

In *Dietrich* (1992) 64 A CRIM R176 the High Court referred to its inherent right to stay the prosecution of criminal proceedings where the accused is unrepresented. Such lack of representation could lead to an unfair trial. That principle is of general application and is aimed at ensuring each individual has a fair trial in the Australian criminal legal system.

Dietrich has an even more profound application to the cases of Aborigines where the imprisonment rate is so much higher than for other sections of the community. The task from this discussion is how to guarantee greater access by Aboriginals to legal representation, not less.

The Standing Committee also saw the importance of the Aboriginal Legal Services in a broader context. The Committee noted that Legal Services had raised the morale within the Aboriginal community through providing legal advice and assistance in a way that enabled Aboriginals to gain certain control over their lives. Furthermore, the Legal Services had had, according to the Standing Committee, an impact on the courts and judiciary by creating an atmosphere within the judiciary of far greater sensitivity towards the problems of Aboriginals. This has led to a greater preparedness for the

courts to consider matters Aboriginals see as important, but which are seen as unimportant or irrelevant to the non-Aboriginal community. This was an illustration of the Aboriginal Legal Services' making Australian law more responsive to the interests of Aborigines.

Some 20 years later the experience in Tasmania at least provides further examples of the Standing Committee's impressions. Here the Aboriginal Legal Service has had meetings with the Senior Magistrate and a Supreme Court Judge about gaining agreement among the magistracy for granting bail to Aboriginal children, and enabling Aboriginal youth under sentence to be placed in the care of the Aboriginal community's youth program, run by this organisation. A day long meeting was held on Aboriginal land at Risdon Cove where Tasmania's Supreme Court Judges attended in order to hear views of the Aboriginal community generally and to bridge the gap between the judiciary and Aboriginal people.

Aboriginal community initiatives aimed at diverting Aborigines, especially youth, away from institutionalisation has required a co-ordinated approach between Aboriginal staff and the in-house lawyers. Providing easy access for lawyers to Aboriginal community thinking and aspirations means the lawyers can promote, within the court system, alternatives to the normally harsh sentencing arrangements. Complementing the approach of the lawyers within the courts, the Aboriginal Legal Service has publicised the need for reform, met with Government at the highest level and met with both the judiciary and police to encourage a more positive response to Aborigines being dealt with by the criminal justice system.

SOME EXAMPLES OF THE BROADER APPROACH

1. Legal Service lobbying resulted in the Tasmanian Government amending the Police Offences Act in 199??? to decriminalise public drunkenness.

2. Negotiations with Tasmania Police resulted in the Commissioner changing the Standing Orders for arrest procedures for Aboriginals. The Commissioner issued Standing Orders aimed at preventing Police from using the trifecta charges against Aborigines arising out of a single incident, and deterring police from arresting Aborigines at Aboriginal cultural functions.

3. Further law reform activities by the Aboriginal Legal Service resulted in a greater recognition of Aboriginal interests that had previously been

neglected, and as a consequence lessened the likelihood of Aborigines being in conflict with the law. Examples are Living Marine (Resource and Management) Act that now recognises an Aboriginal cultural fishing right without the need for a licence. The National Parks and Wildlife Act 1975 was amended to enable Aborigines to take wildlife on Aboriginal owned land. The Coroners Act was amended to recognise the right of Aboriginal people to deal with remains uncovered from Aboriginal burial sites. And the Burials Act now provides for Aborigines to carry out traditional burials.

4. More broadly, the Aboriginal Legal Service has had some influence on Government policy as it effects Aboriginal people, and Aboriginal issues. The Tasmanian Aboriginal Centre lobbied for the return of lands and Liberal Premier Ray Groom passed Legislation in 1995 returning 12 parcels of lands to Aboriginal people. The effect of the change in Government policy recognised Aboriginal interests and rights in land, and gave Aboriginal people a sense of justice. It provided the land base for Aboriginal people wanting to move back to traditional areas. The land returns provided a rural basis for Aboriginal programs as well as employment rehabilitating the land.

5. Government policy towards the needs of Aboriginal youth became more responsive as a result of the Aboriginal Legal Service scrutiny of detention practices. The Ashley Detention Centre at Deloraine has been the subject of criticism of its treatment of Aboriginal detainees, and consequently many practices were altered. There remains a long way to go on this issue.

6. The State Government provided funds to establish an Aboriginal alternative to imprisonment scheme at Clarke Island, an island that is soon to be returned in ownership to Aboriginal people.

7. The Youth Justice Act and the Young Persons and Their Families Act both provide for a greater role of Aboriginal representatives in dealing with Aboriginal youth.

8. Aboriginal Legal Services throughout the country, including here in Tasmania, have had direct input into the development of the Declaration of the Rights of Indigenous Peoples. This human rights document is neither international nor domestic law at present. In its current draft form it is, however, an aspirational document. The

Australian Government's involvement in the development of the declaration is a positive statement by the Executive Government of Australia to the world and the Australian people that the Executive Government says it will act according to the standards raised by the Draft Declaration it has helped to develop.

9. The direct involvement of the Aboriginal Legal Service in specific legislative reforms has often influenced public attitudes. The TAC's legal service has been at the forefront of a long campaign for recognition of Aboriginal rights. The campaign has contributed to reconciliation, a national and state process important to fostering mutual respect between the two peoples.

THE ISSUE OF ACCESS TO LEGAL ASSISTANCE

The terms of reference given to the *House of Representatives Standing Committee on Aboriginal Affairs* by then Minister Fred E Cheney, required the Committee to consider the specific question of access of Aboriginals to legal aid. As part of that reference the Committee were to look at "the extent to which the legal needs and demands of Aboriginals are being met by Aboriginal Legal Aid Services and other legal and counselling agencies".

The Report of that Committee is relevant to this Joint Committee's own enquiry because the issue of access has been squarely raised by the government as a reason to tender out.

According to the Standing Committee's Report (para 166) Aboriginal Legal Services were most effective in meeting the needs and demands of Aboriginals for legal aid, especially in the urban environment. Citing examples of the location of offices in proximity to the Aboriginal populations, being available at nights and weekends for the giving of advice and the fact that Legal Services were run by Aboriginals led to the conclusion that these were the reasons legal aid was so accessible to Aboriginals.

Although that Report was published over 20 years ago there have not been any significant changes to the manner of operation of Aboriginal Legal Services since then. The findings of the Standing Committee are as relevant now as they were then.

CONCLUSION

While imprisonment rates of Aborigines have been reduced because of the work of the legal services, much more needs to be done. Further improvements require an expansion of the legal services operations. Positive participation by governments can help ring the changes needed.

State and Territory governments have publicly stated their opposition to the Federal Government's proposal and given support to the continuation of the Aboriginal legal services. These governments have primary responsibility for the criminal justice systems that are responsible for processing so many Aborigines into gaol and detention centres. Yet the chief law officers in each of the States and Territories have acknowledged the importance of maintaining and supporting ALS's to protect Aborigines from the harshness of the criminal justice systems. A decline in representation of those worst off undermines the credibility of a legal system purporting to reflect the values and protect all interests within society.

The onus is cast upon the Federal Government to review its decisions to go to tender, and to limit the availability of legal assistance to Aborigines. Recommendations that positively provide the method by which the Federal Government can be more supportive will assist this process.

The key approach to better use of Commonwealth resources aimed at reducing Aboriginal incarceration rates must be effectiveness, not privatisation or economics. Privatising legal representation will not work, and the experiment will end up costing the Government more money in the long run, and heartache for Aboriginal people. While financial constraints are important, policy should apply funding to those bodies that have the support of their people and who get the job done.

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