COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

JOINT COMMITTEE OF PUBLIC ACCOUNTS AND AUDIT

Reference: Indigenous Law and Justice inquiry

WEDNESDAY, 9 JUNE 2004

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JOINT COMMITTEE OF PUBLIC ACCOUNTS AND AUDIT

Wednesday, 9 June 2004

Members: Mr Charles *(Chairman)*, Ms Plibersek *(Vice Chair)*, Senators Hogg, Humphries, Lundy, Murray, Scullion and Watson and Mr Ciobo, Mr Cobb, Mr Georgiou, Ms Grierson, Mr Griffin, Ms Catherine King, Mr Peter King and Mr Somlyay

Senators and members in attendance: Mr Charles, Ms Grierson and Ms Plibersek

Terms of reference for the inquiry:

To inquire into and report on:

(a) the distribution of the resources of Indigenous legal aid services between criminal, family and civil cases;

(b) the coordination of Indigenous legal aid services with Legal Aid Commissions through measures such as memoranda of understanding;

(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.

WITNESSES

Committee met at 10.55 a.m.

CHAIRMAN—The Joint Committee of Public Accounts and Audit will now commence taking evidence as provided for by the Public Accounts and Audit Committee Act 1951 for its inquiry into Indigenous law and justice. I welcome everyone here this morning to the committee's first public hearing. The focus of this hearing this morning will be on the funding of legal aid and violence prevention services by Commonwealth government agencies. The committee regards the provision of legal aid to Indigenous Australians as a very important Commonwealth responsibility. The committee is particularly interested in determining whether Indigenous women have adequate access to legal aid. Also we intend examining the service levels to Indigenous Australians in remote areas.

This morning the committee will take evidence from the Commonwealth government agencies responsible for funding legal and violence prevention services to Indigenous Australians. This afternoon we will hear from the South Eastern Aboriginal Legal Service, which is a provider of Indigenous-specific legal services to the south-eastern area of New South Wales, including the Australian Capital Territory. The hearing will conclude with evidence from representatives of the Human Rights and Equal Opportunity Commission. The public hearing phase of the inquiry will continue with hearings scheduled for Sydney, Darwin and Alice Springs.

Before beginning, I advise witnesses that hearings today are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as contempt of parliament. The evidence given today will be recorded by Hansard and will attract parliamentary privilege. Finally, I refer any members of the press who are present to a committee statement about the broadcasting of proceedings. In particular I draw the media's attention to the need to fairly and accurately report the proceedings of the committee. Copies of this committee statement are available from secretariat staff.

[10.58 a.m.]

FARRELLY, Mr Pat, Contractor, Australian National Audit Office

LACK, Mr Steven, Acting Group Executive Director, Australian National Audit Office

BOERSIG, Mr John, Manager, Law and Justice Branch, Aboriginal and Torres Strait Islander Services

TIM, Ms Kerrie, Group Manager Social and Physical Wellbeing, Aboriginal and Torres Strait Islander Services

YATES, Mr Bernard, Deputy Chief Executive Officer, Aboriginal and Torres Strait Islander Services

LYNCH, Ms Philippa, First Assistant Secretary, Family Law and Legal Assistance, Attorney-General's Department

PIDGEON, Ms Susan Joy, Assistant Secretary, Family Pathways Branch, Attorney-General's Department

VAUGHAN, Mr Peter, Executive Coordinator, Office of Aboriginal and Torres Strait Islander Affairs, Department of Immigration and Multicultural and Indigenous Affairs

WEBB, Ms Rosalind, Principal Legal Officer, Legal and International, Office of Aboriginal and Torres Strait Islander Affairs, Department of Immigration and Multicultural and Indigenous Affairs

CHAIRMAN—I welcome representatives from the Aboriginal and Torres Strait Islander Services, the Attorney-General's Department, the Australian National Audit Office, and the Department of Immigration and Multicultural and Indigenous Affairs to today's hearing. Do any of the organisations represented wish to make a very brief opening statement? If not, we will proceed with questions. We understand that ATSIS is currently reviewing the method it uses for determining the relative needs of different states and territories for supply of legal aid services to Indigenous Australians. Could you describe the current formula for distribution?

Mr Boersig—Financial distribution of resources?

CHAIRMAN—Yes. If the number of bodies is different, then please tell us that.

Mr Boersig—The current formula is historically based. It was developed over a number of years—probably going back 10 years in terms of the delivery of services. It was based on requests for assistance and, through that process, assistance was provided to particular organisations. That historically led to certain services being funded with a particular amount of money for those resources. They came back on a regular basis for assistance. In relation to providing those services, there was an assessment in the normal course of events—initially

through regional offices and then ultimately through our national office. About six years ago there was consideration given to the implementation of a funding formula, because there were some concerns raised about accountability and about the distribution of those resources. ATSIC and then ATSIS have been working on that formula since that time.

CHAIRMAN—Is it your view that the historical based funding model is equitable, or does that need to be tested?

Mr Boersig—That needs to be tested, and there are concerns in relation to the way the funds have been distributed. It relates to, for example, the number of services in a particular state and the amount of money that goes to a particular service. The short answer is yes, it needs to be tested, and there is evidence that would suggest that is an appropriate course of action.

CHAIRMAN—Is all of the funding of legal aid services at arms length?

Mr Boersig—The funding decisions are currently made through ATSIS. Previously there was a relationship between ATSIS and ATSIC, and those issues were dealt with some 12 months ago.

CHAIRMAN—How do you mean 'dealt with'?

Mr Yates—Through the institution of a separation of powers between the elected arm of ATSIC and the administrative arm, which is now embodied within ATSIS. So where in the past decisions on funding would have involved members of the elected arm, since July last year that is no longer the case.

CHAIRMAN—On page 46 of audit report No. 13 of this financial year, which started us off in looking at this, ANAO says at paragraph 2.47:

Of the ATSILS case and duty matters, by law type, in 2001-02, 89 per cent were criminal matters and only two per cent were family law matters.

That is taken straight from your annual report. It has not been tested, we understand. Is that correct, Mr Lack—it has not been tested by Audit?

Mr Lack—That is correct.

CHAIRMAN—Would A-G's or ATSIS or somebody like to tell us if those numbers are accurate and if they really reflect the priorities which we find in paragraph 1.20, which lists the priorities that ATSILS should follow in delivering legal aid services to Indigenous communities? That was a long, rambling question. Did you understand the sense of what I am asking?

Mr Boersig—Yes, I think there are basically two questions. As I understand it, the figures arise from the collection of ATSIS data through their normal procedures of data collection. I could not comment further, except to say that those are the figures that are collected by ATSIC and now ATSIS through a database system.

CHAIRMAN—Continuing with the second part of what I asked, do you have a view on whether that 89 per cent figure accurately reflects the importance of each of the guidelines—the priority listing?

Mr Boersig—The issue of need is a matter that has been considered over many years. The demonstrable need in relation to criminal matters is shown in various reports. It has been identified both statistically in terms of academic study and through other reports prepared in the review of the operations of ATSIS. There is a specific need in those areas. The growing need is particularly in relation to women and children because there is a significant demographic increase in the number of young people who are coming before the courts and also the number of women, particularly young women, who are coming before the courts.

CHAIRMAN—You did say that in your submission to us, and page 100 of the audit report shows an increase of actual services versus target for legal matters for women, but we understand that the demand is increasing because the number of charges laid against Aboriginal women has been increasing fairly rapidly. Is that correct?

Mr Boersig—I would have to take that on notice in terms of a specific answer.

Ms PLIBERSEK—The distinction that the chairman is making is that there is not a greater representation of women who are victims of crime; there is a greater representation of women who are perpetrators of crime.

Mr Boersig—That is correct, but that partially depends on the definition of 'victim'. Many of the people who are charged with criminal offences are, in other circumstances, victims—so it is a broader definition in that sense—but, specifically, it is true in terms of representing people charged with criminal offences. Having said that, the government has made significant initiatives in relation to family violence prevention legal services where those other issues are being addressed.

CHAIRMAN—Are they? That is part of what we are inquiring into, so we want to explore that in some depth actually.

Mr Yates—The term 'addressed' means there are services delivered through that alternative mechanism. Whether one would judge them to be adequate to the demand that is, as you have noted, significantly growing is another issue. In fact, I think it is in recognition of the need to expand the family violence prevention legal services that we have now seen a decision in the most recent budget to double the number of services that will be provided. That is a partial answer to your question that what we had in place with around 13 family violence prevention legal services was not meeting the need. We will now see a doubling in the number of services, rolled out progressively over the next financial year

CHAIRMAN—I want to make it clear that we come to this inquiry with no bias of any kind. We simply want to find out what is happening in making the recommendations that we care to make. We even go beyond what audit can do because we can inquire and make recommendations in respect of policy, as you know, which makes us a bit different from our friends the auditors. So, while we examine policy issues, we understand that, as government agencies, you are going to tell us what the agency says rather than your private views.

I am on a very steep learning curve with respect to this inquiry and this issue. I make no apologies for that, but I am. In the press, we have seen some reference to the chairman and deputy chairman of ATSIC and their need of legal services within the system. In respect of legal services is there recognition of the separation of decision making from the executive of ATSIC as a representative Indigenous body?

Mr Yates—That is certainly the case now.

CHAIRMAN—Was it the case before?

Mr Yates—No. With respect to the pre-July 2003 situation, elected representatives, particularly at the regional level, were involved in the decision making for the allocation of funds to ATSILS; they held the delegation for determining funding decisions. That is a separate issue from the legal costs that may need to be met by individual commissioners in respect of court proceedings they may have been drawn into and where they have sought approval by the board of the commission to support them financially for those legal costs.

CHAIRMAN—In your view, did the previous arrangement result in any skewing of funding? I am not being negative; I am simply trying to get to the issue of what the funding is being used for and to address the issue of women and youth. Does anyone have a view that some of the decision making was on the basis of family or community lines rather than absolute need? How you define 'absolute need', other than by an independent observer, I do not know.

Mr Yates—I have not been associated with the program for all that long, but you would have to ask some questions about the number of ATSILS that exist in some states, compared to others, and the basis for the decision-making around that. Whether it reflected factors other than need, and whether it was influenced by the advocacy of certain elected representatives, I think is not able to be verified one way or the other.

CHAIRMAN—Does the Attorney-General's Department have a view on that issue?

Ms Lynch—No. We have not had direct responsibility for the ATSILS program, and I would not be able to comment on individual decisions in respect of funding or the distribution of funding between ATSILS. It is a matter that the Attorney-General's Department has not been involved in to date.

CHAIRMAN—Does the Department of Immigration and Multicultural and Indigenous Affairs have a view?

Mr Vaughan—There are questions in this area. For example: why should a particular ATSIC commissioner have his defamation costs covered by Aboriginal legal aid funding?

CHAIRMAN—At a lower level—for instance, in a remote community as they exist today, not as they existed 30 years ago—is there some view that decision making could have been skewed towards certain hierarchical positions in family or community, rather than on a more rational basis?

Mr Vaughan—I guess lower down you delegate the decision making. It is a bit like the difference between local government, state government and federal government in the mainstream system, isn't it?

CHAIRMAN—That was a clever answer.

Mr Vaughan—The potential for conflicts of interest becomes more focused the more localised the decision making becomes.

CHAIRMAN—Does the Audit Office have a view on this issue?

Mr Lack—It is not an issue that we explored in the audit.

Ms PLIBERSEK—I notice that ATSIS has proposed to reduce funding for Indigenous legal aid from $42.79 million in 2002-03 to $40.46 million in 2005-06. Can you tell us why?

Mr Boersig—That $2½ million reflects fringe benefits tax costs. A number of years ago, the government changed legislation in relation to the charities act. That had a particular impact on the community sector, where a number of employees were salary packaged. Representations were made to government at that time and a temporary package of assistance was provided over a number of years. As I understand it, that package finishes in June of this financial year.

Ms PLIBERSEK—The audit report suggests that the ATSILS have quite a deal of difficulty keeping good staff because the wages differential between an ATSILS and a legal aid commission position of similar responsibility is so great. Isn't this going to cause you further problems with getting in and retaining good staff?

Mr Boersig—That issue in relation to FBT is not something that—

Ms PLIBERSEK—It is a little distracting that noise, isn't it? That is all right. We will make allowances for each other.

CHAIRMAN—It is a lot distracting.

Ms PLIBERSEK—Go on.

Mr Yates—The issue of the specific rationale behind that change in funding level, which was FBT related, is able to be explained in those terms. I think you are asking about a wider issue. If the problem that that $2 million-odd was provided to solve has now passed, then it has done its job and we move on. You are raising a broader question about the adequacy of the overall funding package to enable ATSILS to attract and retain the calibre of people necessary to achieve quality outcomes.

Ms PLIBERSEK—I put it to you that, if you took the money that you were cutting and just raised a few people's wages, you would probably find it a little easier to attract and keep good staff, wouldn't you?

Mr Yates—I understand the point. The money was there temporarily to assist with the resolution of that problem. I think you refer to a bigger issue about whether the overall ATSIS program would produce better quality outcomes if the staff employed by ATSILS were better paid.

Ms PLIBERSEK—Would it?

Mr Yates—The correlations between the level of remuneration received by people in the Australian community and the outputs they achieve is not always strong.

Ms PLIBERSEK—Okay, but if you have two solicitors and one of them is paid half as much as the other one for doing pretty similar work in a reasonably similar structure it does not make a lot of sense, does it?

Mr Yates—Sure. People are motivated by things other than financial rewards, but it is fair to say that you will run into attraction and retention problems if there are very major discrepancies between remuneration packages and conditions compared with those on offer elsewhere.

Ms PLIBERSEK—I am sure a lot of the people who work for these organisations work for them for reasons other than pay—but they would have to, really, wouldn't they? It is plain from the Audit Office report that, in many cases, you are dealing with very dedicated staff. It is hardly fair to take advantage of that by having a rate that is below a comparable position in the legal aid commission, is it?

Mr Yates—The services have to structure their terms and conditions as best they can to attract and retain people and to deliver services. It is a hard call that they need to make in how they balance out those competing considerations in running their services.

Mr Boersig—Some of those issues are being addressed otherwise, through looking at longer term contracts, so that there is more job security and more flexibility within the organisation to move money around to address those particular needs. There are still high turnovers, and that may be an area where better planning can be achieved in the long run in keeping some of those lawyers and field officers as well.

Ms PLIBERSEK—People get similar security of tenure in a legal aid commission position, though, as well. It is good to address the security of tenure issue but it still does not make up for a significant pay differential, does it?

Mr Vaughan—There are a number of factors that impinge on the turnover rate. One of the other ones which is hard to quantify the effect of is that, in the case of ATSILS, you are dealing with a disproportionate number of staff who are located in remote areas. We find in the public sector, and employers generally, that you tend to have a higher staff turnover in a lot of those remote locations than you do in major centres—for domestic reasons and a whole lot of reasons.

Ms PLIBERSEK—Do you think another reason for the staff turnover is that you can be a solicitor or a principal solicitor but, besides those two jobs, there is not much of a career structure?

Mr Vaughan—You cannot become a partner, no.

Ms PLIBERSEK—Legal aid has recognised that they were going to lose good people if they did not give them a bit more career progression, and I think that they have started to address that. Do you think that there is room in ATSILS to do that?

Mr Vaughan—I think it is going to be inevitably limited because the smaller the ATSILS concerned, the more limited the career prospects; therefore, it is a function of the structure of the sector. If you are dealing with locally based organisations your career options are more limited than if you are dealing with a statewide or a nationally based organisation.

Ms PLIBERSEK—Sure, but there is no real recognition of experience, is there? You go from solicitor to principal solicitor, but someone who has got three years of experience would be on pretty much the same sort of package as someone who has got 10 years of experience, unless the 10-year person gets a promotion to principal solicitor. Is that right?

Mr Boersig—No, there are variations within ATSILS structures for staff. Those can be reasonably significant in terms of junior staff as compared with senior staff. There are some career options, and they involve trial and advocacy work internally within the organisation, so you have senior lawyers, deputy principal solicitors and so forth. In the larger organisations—for example, those based in the capital cities—there are more options for staff to progress.

Ms PLIBERSEK—Can you describe the relationships between the Family Violence Prevention Legal Services and ATSILS?

Mr Boersig—The Family Violence Prevention Legal Services and the ATSILS are part of a broader landscape of service provision in relation to Indigenous people. Each has a specialist area, endeavouring to address the particular needs in those areas. The brief in the Family Violence Prevention Legal Services, as I understand it, is that people enter through because of legal issues, but then they are provided with a broader range of services—counselling and so forth—to assist in a more holistic way. They are targeted in particular areas of need that were identified by ATSIC and, of course, ATSIS currently.

Ms PLIBERSEK—Do they provide services for victims of domestic violence and sexual assault?

Ms Tim—They can, and they also provide a referral service as well. So they do deal with women and children who are victims—

Ms PLIBERSEK—What sort of service would they provide for victims of domestic violence or sexual assault?

Ms Tim—If the woman is a victim, they may represent her and then they may also play a role through their other activities by providing counselling services or other referral services to the refuge, if there is a local refuge. So they try as much as possible to play that holistic role, but they do provide that legal support to women and their kids.

Ms PLIBERSEK—I know what you are saying about how the holistic service provision model is very important, but do you think that it kind of confuses the message that sexual assault and domestic violence are serious crimes and that they should not be dealt with in a social work context when someone has been the victim of a serious criminal offence?

Ms Tim—I suppose it does have the potential to confuse it. I do not think anybody involved in any of that process is confused about the seriousness of those issues, but I think you are rasing an important question at the local level anyway. I think that the reason these responses have been developed—both the ATSILS and, since 1998, the Family Violence Prevention Legal Services—is that this is a significant issue in the communities that they are trying to deal with and this is one way we have tried to deal with that. I suppose in some ways I am agreeing with you that there is the potential for that confusion and that the mostly anecdotal advice we get back from communities is that these are serious issues. People want them cleaned up, but people are really struggling because they do not want people ending up in jail as well. This is trying to deal with the issue within the seriousness of the crime itself, and people do need to be dealt with properly within the law. I completely agree with that. Where it does get confusing at the local level from anecdotal evidence I am getting is around the very issue that no-one wants anyone to be locked up. They want this stopped and cleaned up.

Ms PLIBERSEK—I have a brief diversion. If you looked at working class communities 100 years ago, people would also have said, 'We don't want our men taken away by the police, because they won't get a fair trial or fair treatment.' In the non-Aboriginal community, that has not passed completely but I think their legal services do not go out of their way to treat domestic violence, for example, as a crime because of fears that the victims have for the wellbeing of the perpetrators.

Ms Tim—Absolutely. We are trying to make sure that the message is very clear out there that, where this is a crime, it is dealt with as a crime. I think that is a new approach because of community standards around this issue. It has been a completely different approach in the past but, certainly in terms of reforms within the services we have had in this last year, we have been sending out really strong messages and the board in its policy statement last year on violence made it very clear that, where issues of criminal activity are happening, we need to be dealing with them in that way. It is almost like an education program and I think the regional councils in their approach are trying to develop a groundswell at the local level to try and deal with issues of family violence that are not criminal. They are still trying to put out the information so communities know that this is not acceptable behaviour and that, when it is a criminal behaviour, it needs to be dealt with in that way. I think it is a new way of getting people's heads around it and it is an education program, particularly in those communities.

Ms PLIBERSEK—What do you think has led to the change that you have identified?

Ms Tim—I think in the last 10 years it has been dealt with almost like how it has been dealt with in the wider community. It has not been seen as such a serious matter. I think that, as people come to understand it more and more, people understand that it is a serious issue, that it can be stopped and that you can get the support to do that. I do not know whether that awareness has been so out there. Part of that has been the improved advocacy role that a whole lot of people, including the elected arm in this organisation, have taken, including the role of advocacy bodies like women's and other community based bodies, which are pushing it at the local level.

Ms PLIBERSEK—Do you think that the setting up of the Family Violence Prevention Legal Services is basically an admission that the other Aboriginal legal services were not looking after victims of sexual assault, domestic violence and those sorts of crimes well enough?

Mr Yates—There are probably a couple of considerations associated with that. One is the potential conflicts of interest where the ATSILS are representing the alleged perpetrator and have the difficulty of also effectively servicing the alleged victim.

Ms PLIBERSEK—They were not really, were they? You are saying it was a conflict of interest, but they were just refusing to in a lot of cases, weren't they?

Mr Yates—I am not sure that necessarily follows, but clearly the creation of the Family Violence Prevention Legal Services was a recognition that the ATSILS were not able to do or not doing the job adequately and that the type of intervention that would be most valued by women may be a more holistic one to fill the gap with regard to legal service provision. It was also a recognition that the support that they may require should go a bit broader and, as Mr Boersig mentioned, there should be an attempt to have a more holistic approach rather than seeing it solely as a legal issue. The fact that it is contextualised in that broader service setting does not necessarily translate into it being a less important issue, but of course there could be a perception from the way in which it was handled that it was not given the prominence, significance and seriousness that it deserved. That is partly a community attitude thing which we are trying to turn around.

CHAIRMAN—On the same issue, before we go completely off it—Ms Tim, is the new attitude that you spoke about of assessing family violence as a criminal issue uniform across the country and across communities or is it up and down and spotty?

Ms Tim—Most of the information I have about that has really been anecdotal. Some of it has been based on my discussions with people when I have visited services or met with people at conferences and workshops. It strikes me that that groundswell is certainly changing within and across the community. I have seen a groundswell against family violence and other criminal activities in a way that I have not seen in a long time. It almost seems like people have hit the wall and enough is enough, whereas there are probably fewer pockets that I have come across where some people in some communities think that family violence is acceptable behaviour. While that may still be the case in some communities, I would say that overwhelmingly it is not being seen as acceptable. I think some of the reforms that have taken place recently and that will continue no doubt in the future will be driven by that demand and by people's awareness that family violence is not okay and that it needs to be turned around.

Ms PLIBERSEK—If you had a family law matter where—using a purely hypothetical example—the mother in the family wanted to reduce access because she feared that the father was engaging in child sexual abuse, could a family violence prevention legal service help?

Ms Tim—I do not know if they would normally, but I do know that they have.

Ms PLIBERSEK—Who would help someone in a situation like that?

Mr Boersig—The wider landscape is that initial advice may be given by a number of sources, depending on where it was. Initial advice may be given, for example, by an ATSIL, a community legal centre, a legal aid commission or a country lawyer or solicitor.

Ms PLIBERSEK—The figures I have say that 89 per cent of ATSILS work is criminal law matters, and six per cent is family law matters. So it does not fill you with confidence that people who walked into a legal service would get attention in a situation like that.

Mr Boersig—There might be a situation, though, where initial advice and referral might be given, and there are many organisations that would be able to assist in that regard.

Ms PLIBERSEK—But how many of them would be Aboriginal specific?

Mr Boersig—For Aboriginal specific services such as the family violence prevention centre you would be looking at legal aid commissions or private firms for ongoing representation, but that is the same situation for anyone applying to most ATSILS. There is not a lot of family law work being done, because the major needs are in relation to incarceration and incarceration issues.

Ms PLIBERSEK—The decision has been made that the major resources are expended in those areas. There is a difference between a need and a decision about resource expenditure, isn't there?

Mr Boersig—The decision of funding, as we were talking about before, arises for a number of reasons—a lot of them historical—but fundamentally they relate to need. That is well documented in the Royal commission into Aboriginal deaths in custody, for example, and in ongoing imprisonment figures. The need is great, and that is evidenced.

Ms PLIBERSEK—I am absolutely not even suggesting that the need is not great. I think the need is probably a lot greater than there are resources expended for it at the moment. What I am getting at is that keeping someone out of jail might be very important, but protecting a child from exposure to child sexual assault is obviously, in my view, just as important or more important. If you are spending 89 per cent of your money on keeping people out of jail and six per cent on family law matters then I am worried that there are situations where women and children are not being kept safe in the way they should be. That is the point I am making.

Ms Pidgeon—I add that there are some services under the Community Legal Services Program specifically for Indigenous women who we would be able to assist in those situations, although access would be an issue because they are very small programs. If it would help the committee, I do have a list of where they are located. We call them Indigenous women's projects. They are essentially funding usually associated with the women's legal service or a mainstream community legal service. There is one that is stand-alone. They are specifically to assist Indigenous women in a range of circumstances, including the sort of thing you talked about.

Ms PLIBERSEK—Going back to the issue of tendering out services, have there been any studies that show that it is likely that the tendering out process is going to achieve any efficiencies?

Mr Yates—As applied to Indigenous legal services, no, there are no specific studies of that nature. I guess the development of a contestability policy and the testing of the market through a tender process is founded on more general research around the potential that, through using those techniques, can come to attract more efficient and effective outcomes and better quality services. It is hard to tell a priori whether that is actually achieved in particular markets or operating environments ultimately.

Ms PLIBERSEK—I can see the argument you would make for it where there is a marketplace, but where there is not a marketplace—

Mr Yates—We could debate that for a long time, I suppose. For example, with employment services, there did not exist a market in employment services, and we now have a quite healthy one. In this instance—

Ms PLIBERSEK—I do not know that you can say that.

Mr Yates—You can debate the quality of the outcomes, but there is—

Ms PLIBERSEK—We are pumping an awful lot of money into stopping organisations tipping over, but that is a whole other area. Go on.

Mr Yates—There is an extensive array of providers. That is what I am perhaps referring to.

Ms PLIBERSEK—That is true. I would not be buying shares in many of them, though.

Mr Yates—In relation to this, in some states we have a single provider providing services across the entire state. In other states there is a multitude of providers. So this process may identify opportunities for more efficient service delivery—through, say, a rationalisation of providers—as a way of mitigating the overhead costs that are otherwise sunk into a multiplicity of providers. So there is enough variety in the arrangements that already exist with our ATSILS to suggest that there may be options to achieve more efficient arrangements and to plough more of the available dollars into service delivery rather than into overheads.

Ms PLIBERSEK—Can you tell us what proportion of funding is being spent on overheads rather than on legal service delivery?

Mr Boersig—There have been some estimates of that in the past but I would have to take that on notice and find the exact amounts.

Ms PLIBERSEK—Can you give us a ballpark figure?

Mr Boersig—In Queensland, for example, there are 11 separate services who would have principal solicitors, auditors where necessary, financial officers and bookkeepers. For an accurate figure I would prefer to take that question on notice.

Ms PLIBERSEK—Sure. Could you re-order funding so that you had one principal organisation—an auspicing body in each state—which would have the same effect as the tendering process that you are suggesting?

Mr Boersig—In terms of having a single service provider?

Ms PLIBERSEK—Yes, or having a main service provider. Either way: a single service provider or a central service provider that is an auspicing body for other service providers but that takes care of the backroom stuff—the auditing, hiring and firing and other administrative parts of the job.

Mr Boersig—There is a contrast between the costs associated with administration for Western Australia, where they have one service for the whole state, and Queensland where there are 11. I think those differences are demonstrable but I will take the question about the actual figures on notice.

Mr Vaughan—The Office of Evaluation and Audit report showed that the per case costs of the Queensland services were much higher than those of other states, which is possibly one indicator.

Ms PLIBERSEK—You could address that without the tendering process. That is what I am saying: you could move to a model where each state had a central or a main service provider.

Mr Yates—You could effect some rationalisation in the number of providers through simply choosing not to fund some of the existing services and to expand the others. That is true. Those issues of rationalisation have been around in recent times. You could separate the processes. We have adopted a tendering model as a mechanism that can effect rationalisation and, in those areas where there may not necessarily be a benefit in rationalisation, attract providers who can deliver services more effectively than has historically been the case. I think Mr Boersig has alluded to the fact that a lot of the regime grew out of historical factors of advocacy for various services and was not always founded in rational assessments of relative need and the like. We have come late to the need to develop effective performance information and more reliable assessments of need to inform our funding decisions. That is very much part of the reform process that we have been working through in recent times.

Ms PLIBERSEK—They are actually separate issues, aren't they? The funding model that would, say, allocate funding on a needs basis, state by state, does not need to be part of a tendering process.

Mr Yates—That is true.

Mr Vaughan—What the tendering process does target is two things. One is cost, in a sense. As you say, there are a number of ways of attacking cost, and rationalisation of the number of providers and reducing overheads is one of those. But the other thing it targets, which you do not get through simple rationalisation, is necessary improvements in the quality of service to make sure you get the best provider, as opposed to simply the cheapest provider.

Ms PLIBERSEK—But if you look at the history of, for example, information technology tendering out in the Commonwealth, you have not always got the best provider through a tendering process. We have had some very obvious failures in that area. I think what you are saying is that the government has, as a policy decision, asked you to tender out for legal services,

and you are now engaged in the process of doing that. There is no actual logical argument that this is the best way to provide legal services to Indigenous people.

Mr Vaughan—I think the proof of the pudding will be in the eating of it, ultimately. If you look at the OEA report, for example, when it looked at the clients of legal aid commissions versus clients of ATSILS—when I say the clients, access was not given to current clients. They were confined to a survey of prisoner populations—the Indigenous prisoners did not say they noticed a difference in the quality of service between the two groups.

Ms PLIBERSEK—I will bet that if they are in jail they are not happy with the service they got anyway.

Ms GRIERSON—In terms of the new funding model that you are putting in place, and the separation of ATSIC and ATSIS, could you tell me what you hope would be the positive impacts of that separation?

Mr Yates—Of the separation of elected representatives involved in the decision making as against—

Ms GRIERSON—Basically you have got all responsibility now for legal services.

Mr Yates—Yes. It simply enables a selection process that is—both in practice and in perception—impartial.

Ms GRIERSON—So on one level you are hoping a positive impact would be some accountability and some proper processes. Is that what you are suggesting?

Mr Yates—And that the resourcing is based on defensible and objective considerations rather than potentially subjective considerations.

Ms GRIERSON—All right. Do you consider there could be negative impacts of that separation?

Mr Yates—Not in regard to the decision making proper. Clearly there continues to be—and it is reflected in the directions that were given to ATSIS when it was established—due attention to the policies and priorities of the ATSIC board and of regional councils. So those are still part of the mix of considerations that have to be in the background to the overall decision making. In other words, it is not decision making in a vacuum, and you do take due account of the priorities that the elected representatives have articulated. Ms Tim has referred to the very important emphasis that the board of commissioners has given to family violence prevention issues in recent times.

Ms GRIERSON—There has been some comment on geographic distribution of ATSILS. Do you think any new models will influence the location of those services?

Mr Boersig—The models look primarily at need. We have a map here which sets a lot of this out.

Ms GRIERSON—Someone must have analysed that. What do you think it reflects? Availability of services? Geographical places, population density, service need?

Mr Boersig—What we are trying to show is where the services are currently operating and how they correlate with current needs that reflect, for example, where they go to court, where the Family Violence Prevention Legal Service might be set and where other service providers are. So that gives us a better map or a better understanding of the landscape in terms of assessing needs. When you are looking at, say, the criminal index—that is, when and where people are arrested—or what weighting you might give to dispersion factors—that is, how far away a legal service is from its clientele, particularly in rural and remote areas—it gives us a much better way of looking at how to map it and then how to develop a model that reflects those kinds of issues and needs. So ultimately the input into a model should produce a result which is more equitable.

Ms GRIERSON—Do you think the tender document will include those sorts of considerations?

Mr Boersig—In the context of the tender document there has been ongoing development of a funding allocation model and ongoing improvement, and the aim is to ensure that the services—the actual offices—are located where they are most needed. Part of the criteria used in the tender document asks proposed applicants to address how and where they would provide that need, given the priorities and given the resources available.

CHAIRMAN—Could we have a copy of that map?

Ms GRIERSON—The reason we are doing this, arising out of the Australian National Audit Office report, is to look at the integration of policy, need—policy is a reflection of need—and outcomes. The Audit Office have expressed some concerns about the tracking, monitoring and operation of that. As a member of this committee, I think that is something we hear too frequently. However, in this particular provision of legal services—and discussions with Audit would perhaps confirm this—the need is so high, the resources are so low, that that becomes a layer of accountability, administration, that really is very difficult for service providers and people who oversee that service provision to get to, just because of the demand being outstripped by resources. All departments and agencies: do you have a comment on that?

Mr Boersig—We are basing our models on looking at relative need and the distribution of resources to the most needy, so that picks up issues, for example, about placement of offices, size of services, means testing and priority directions. All of those go to trying to address those issues that you have just spoken about in the best way possible, within the context of relative need.

Ms GRIERSON—What about the Attorney-General's Department?

Ms Lynch—I do not think I am in a position to comment on the funding models that have been used by ATSIS up till now.

Ms GRIERSON—But you have a policy area responsibility for family programs and family violence.

Ms Lynch—My division has policy responsibility for the distribution of the legal aid program through legal aid commissions and for family law. The department has not, to this stage, had any direct involvement with the development of the ATSIS funding models. We do our own modelling in respect of legal aid.

Ms GRIERSON—And DIMIA?

Mr Vaughan—I could only agree with the general statement of principle that, when you are dealing with a situation where demand exceeds supply or needs exceed available resources, you must necessarily deal on the basis of relative need.

Ms GRIERSON—In the 2002-03 financial year, Family Violence Prevention Legal Services handled an increase in cases of 67 per cent on the previous financial year. Can someone tell me if there was a funding decision made to respond to that? Did funding for those sorts of services increase in the next year—in the last financial year? And has that continued on?

Mr Yates—Certainly I cannot answer the specifics of how the levels of funding may have changed between the respective financial years and some of the factors that may have driven that. But, as we discussed earlier, I think there has been a recognition that the provision of services from the Family Violence Prevention Legal Services has not kept pace with the growth in demand and, as a result of a number of successful new policy recommendations, the government has actually moved quite comprehensively to expand the availability of those services through a doubling in the number that will operate across the country. So that is I guess the most practical response to your question.

Ms GRIERSON—You might all be pleased to know that funding in this financial year for Family Violence Prevention Legal Services has doubled, but I think the base is probably significantly low. One of the other areas that has been looked at in the audit report is the increase in Indigenous prison populations, particularly for young people. So incarceration levels for our Indigenous youth are not getting any better—and we talk about children, and they are minors of course—but the problems of youth in all populations have certain characteristics but for Indigenous youth those factors are compounding and they are certainly distressing for everybody and it is a particular waste of wonderful human potential. Do you have any reflection of that in this proposed tender? Do you have any reflection of that in your decision making or the provision of services to be proposed? Let me put that into one more context for the benefit of others. Youth population amongst Indigenous people is now so high; it is significantly high. I think in my own region—which is the east coast of New South Wales from Hawkesbury to the border—about 45 per cent are under 24. So we are talking about a significant proportion of the population with a high offence rate, antisocial rate and crime rate.

Mr Vaughan—I would like to make a comment before the other people at the table deal more particularly with your question. My understanding of the data is that, although the number of Indigenous juveniles in detention has increased, that largely reflects an increase in the young Indigenous population. In fact the detention rate, when you take into account the growth in population, has actually declined. The detention rate has also declined for non-Indigenous youth. So the gap or overrepresentation rate has not changed, but the actual rate of Indigenous youth in detention is in decline.

Ms GRIERSON—The HREOC report did not say that. They have had consistent rates of youth incarceration that have not really declined since 1995 or 1996. Perhaps you and I have to look at our resources more quickly.

Mr Vaughan—Yes. The other factor which you need to bear in mind with this data is that most of the available data, including HREOC's, was based on the 1996 census. Once you rebase the figures in light of the 2001 census, where you have a significantly higher base population, the rates are likely to come downwards as well.

Ms GRIERSON—That is true, just because there will be more youth. I think that is an issue we have not heard enough about, so I would like some comment on that. Given the increase in the number of youth in the Indigenous population, do you think you will be able to cope with that? Do you think legal services have to more closely dovetail with prevention services, education services?

Mr Boersig—The information in relation to need is part of the package going out in relation to the tendering process, so those kinds of statistics will certainly be available. Again, in terms of the expectation we would be considering in terms of tenders, they would want to look at how they are going to meet those issues of need, and those are exceedingly important issues that you raise of course. Within the overall law and justice framework of meeting these issues, there are a number of prevention and diversionary programs that have been looked at. There are other ways in which those issues can be addressed—for example, restorative justice, youth conferencing, circle sentencing, Koori courts, the operation of bush courts and so forth. They are being looked at and have been supported over the past year.

Ms GRIERSON—Regarding the difficulties in being tougher on domestic and family violence and having an approach that reflects that this is criminal behaviour, I have to say that I do come to it with prejudice. I have life experiences and anecdotal evidence suggesting that, although there needs to be more response to it, it will remain a social problem. Your example of not wanting to have loved ones and family members put into jail is very important. We see it over and over in our communities: extreme situations and, next week, reconciliation of some kind. But that does not take away the patterns of abuse, or whatever. I suggest that some of the success in elevating that has been due to other programs like alcohol abuse programs, attention to dry communities and those sorts of things, which have had a positive impact. But our crime figures still reflect that we are trying to deal with social and family dysfunction as crime, even though we know that Indigenous communities are taking a tougher stance—and I praise the Indigenous leaders in my area who have basically sworn off the grog and have made sure they are leaders that younger people can look up to.

But I have problems on both sides. I want your comments on how we get tough on the criminal aspects of it—give comfort to women in particular who often do not feel protected, and make sure police responded accordingly—but, at the same time, recognise that there will be a cultural need to help with restitution. Legal services often do not help with restitution for those families. You want to be tough on crime, you want a proper response from authorities and you want legal services to be available that are linked to those crimes. But, somewhere along the line, you will very likely have to build in some restitution processes for families as well. How do you do that? What is your role in that?

Mr Yates—I think we touched earlier on that concept that lies behind family prevention legal services; it is not simply a service that provides a legal recourse for women who want to take that kind of action. Developing a more holistic intervention model would seem to be an important part of addressing the wider set of considerations that may contribute to the initial problem. A lot of what you raise in your question goes to the wider issues confronted by Indigenous people more generally and not just in the remoter environments. That goes to the broader intervention strategies of federal and state governments to try and improve the wellbeing indicators across the board and not just to deal with the outcomes of dysfunction—high levels of alcoholism and so forth.

The legal services are very much dealing with some of the fallout from that, yet you are focusing on what we can do better to work on prevention. Clearly there has been a refocusing on family violence, not only by the federal government but by state governments. A significant initiative was announced in the budget to try and promote stronger partnerships between federal and state governments in the way they go about that issue and on prevention and not simply on resourcing some sort of response after it occurs. But I think your question goes to the heart of how—

Ms GRIERSON—I suppose it is an unfair question in that it is an integration of services but we have two departments and one agency here who have a responsibility for improved outcomes in legal services and the outcomes can only be measured in some areas that reflect social improvement. I will not ask you to pursue that any further at this stage. I would like to move on, though, to the use of legal aid commissions. I guess a Legal Aid Commission service—and, again, this is my prejudice—would not be the desired first option for an Indigenous person. A community service based service, an Indigenous service, would be their first choice, yet we still see built into these memorandums of understanding or your tender some expectation that legal aid commissions will pick up a lot of the problem. Is that fair or unfair? Should that be a different model; should we look at that differently?

Mr Vaughan—We did touch upon this question in passing earlier. The Office of Evaluation and Audit evaluation states on page 108:

An extensive analysis of client satisfaction with lawyer performance across the range of satisfaction indicators did not show any significant difference in client satisfaction between ATSILS clients and LAC clients, the majority of whom are referred to private practitioners funded by the LAC.

Ms GRIERSON—I still find that difficult to relate to reality.

Mr Vaughan—It is a surprising finding, but it is one of the new bits of empirical data we have on this question.

Ms GRIERSON—But we also know that in Victoria and New South Wales the LACs' family law solicitors have been seconded to ATSILS to meet the high demand of Indigenous family law cases. We do not have any data on that, but I would like you to comment on how that secondment is going. Does anyone know how that is going and how well they have been received by Indigenous people?

Mr Boersig—I would have to take that specific question on notice. Generally, there are memorandums of understanding between ATSILS and legal aid commissions, for example, in New South Wales, that encourage cooperation in a landscape where there is great need and where each organisation has some particular expertise. It works better in some places than in others, obviously. Newcastle is one of those places.

Ms GRIERSON—That is true. We do most things better, though, John! What about cultural training for people seconded from the Legal Aid Commission? The programs talk about having cultural training to help them to relate and understand. What form does that take and who judges if it is successful? Do people pull out of these programs; do they stay in?

Mr Boersig—There are a number of cultural programs operating, as I understand it. Many are run by the Legal Aid Commission themselves, and perhaps my colleagues would want to comment further on those details.

Ms GRIERSON—I do not know whether it is a half-hour orientation talk or what form it takes.

Ms Lynch—I am happy to take that question on notice and go back to the commissions. I would not have details of that specificity about the nature of the training they undertake, but I am happy to go back to the commissions and seek further details.

Ms GRIERSON—Thank you.

CHAIRMAN—I have three brief questions. My understanding is that ATSIS has proposed to reduce funding for Indigenous legal aid from $42.79 million in 2002-03 to $40.46 million in 2005-06. Is that correct and why?

Mr Boersig—We talked about it a little earlier.

CHAIRMAN—I missed it then.

Mr Boersig—It relates to fringe benefits tax and a subsidy that was supplied.

CHAIRMAN—Thank you. The request for tender for these legal services was supposed to be out in late May. Where does it stand?

Mr Boersig—The situation currently is that, as you will know, it was an exposure draft calling for comment. Those comments are being analysed and it is currently with government.

CHAIRMAN—Am I right in saying that ATSILS, as an individual organisation, is perfectly free to tender for these services?

Mr Boersig—The proposals put up in the exposure draft welcome tenders broadly. There is nothing at all in the documentation which would stop ATSILS tendering.

CHAIRMAN—So it is entirely possible we could wind up with the same service providers as we have today.

Mr Boersig—That is possible.

CHAIRMAN—Why have ATSILS been put to tender but Family Violence Prevention Legal Services have not?

Mr Boersig—As I understand it, the tender relates also to a broader issue about contracting and entering into contracts. The initiative in relation to ATSILS was part of a broader view that ATSIS had about the delivery of services. So, in that sense, it was a bit of a forerunner.

Mr Yates—There is a history, I think, to the application of the contestability policy and tendering in the legal services area ahead of what is in the pipeline with regard to family violence legal services. There was quite strong support over a number of years by the board of commissioners to go down this path. That was, as it were, given added momentum after the creation of ATSIS by the directions given to ATSIS by the then minister. There was more impetus behind that approach as it relates to legal services generally. We were progressing a series of reforms across all of our programs, including Family Violence Prevention Legal Services, a move away from grants to outcomes based contracts. So there is a reform process which is also touching on Family Violence Prevention Legal Services. But there is the issue of the use of the tendering process, which could occur in the future, potentially—although there is no decision in that and, of course, any such decision will now rest with the organisation that will be taking over responsibility for those services.

CHAIRMAN—From the audit report I read that the principal guidance document in place for legal aid provision is the *Policy framework for targeting assistance provided by Aboriginal and Torres Strait Islander Legal Services* and that has six dot points, starting with custody as a priority. Do you know who developed that policy framework?

Mr Boersig—The policy framework has been in place for many years. It has been developed and adapted over the past six years.

CHAIRMAN—Is anybody looking at those priorities?

Mr Boersig—Yes, those priorities have been constantly reviewed over that time.

CHAIRMAN—Does the request for tender document indicate any reordering of priorities or a change in emphasis?

Mr Boersig—It does.

CHAIRMAN—Could you advise of the extent to which it does? You need not try to answer that through *Hansard*, but if you would like to send us a written statement, we would be delighted to receive it.

Ms PLIBERSEK—It reorders it, doesn't it, to put people who are at risk of violence at the top?

Mr Boersig—Risk is the key feature that distinguishes the priorities as set out in the exposure draft. But it includes risk in relation to incarceration as well, and there are questions about the order in which they are placed.

Ms PLIBERSEK—What do you mean?

Mr Boersig—Questions in the sense that there are differences between the two documents.

Ms PLIBERSEK—The newer ones are—

Mr Boersig—The framework and the policy directions.

Ms PLIBERSEK—One of the submissions we received contained a calculation that, if ATSILS were funded per case in the same way that legal aid commission funding was allocated, it would cost about $25 million extra to provide the same level of legal representation. Is that your understanding?

Mr Yates—There was some earlier work done by the Office of Evaluation and Audit that sought to develop a methodology that gave some estimate of what the comparable costs of some of the things that ATSILS do would be if those services were outsourced to private practitioners. On the basis of that methodology—I think it was a methodology that some would have some queries about—they did attempt to develop some sort of estimate of the comparative differences regarding doing it in ATSILS as against work to be outsourced in that way through private practitioners.

Ms PLIBERSEK—So it was not a comparison with legal aid commission cost structures?

Mr Yates—No.

Ms PLIBERSEK—You still think that, despite that work, the tender process will give you the same amount of legal advice for less money?

Mr Yates—There is a whole range of factors that go to make up the tender. Clearly, as my colleague mentioned earlier, at the end of the day the proof of the pudding is in the eating, but there is a variety of factors whereby cost-effectiveness can be improved, and we discussed some of those earlier. We would hope to see, as a result of the process, better service outcomes from the available envelope of funds that are there.

Ms PLIBERSEK—Do you think it will be easy to find people in the private sector to work for the sort of pay that people work for in Indigenous legal organisations?

Mr Yates—There is a whole host of things that motivate people to work in certain areas. If we can overcome overhead costs, more money can go into salaries. There is a variety of factors that any particular tendering organisation may be able to bring to the table that would enable it to deliver better services than we have historically had on offer.

CHAIRMAN—I understand—and these numbers will not be exactly right—that, prior to 1996, something like 62 per cent of the ACT adult population was employed by government and now it is only 38 per cent.

Mr Yates—It is certainly a minority, I think, Chairman.

Ms PLIBERSEK—If we are going to go beyond the scope of the terms of reference: it is true now that the Commonwealth is spending more on legal advice than ever before because of the tendering out of legal services in the general public service, isn't it? Maybe Attorney-General's can speak to that.

Ms Lynch—It is not quite my area; another part of the department deals with provision of legal services to the Commonwealth. I am happy to take it on notice but it is not one that I would like to comment on because it is slightly outside my bailiwick.

Ms PLIBERSEK—Does the Audit Office have any comments on that?

Mr Lack—I am unsure of the empirical evidence but certainly the case is that more money has been spent recently.

Ms PLIBERSEK—I think we saw in Senate estimates last week that in several cases departmental budgets had doubled, or more than doubled.

Mr Yates—It may be a function of the amount of legislation we have to deal with.

Ms PLIBERSEK—It could be that. It could be that we are all becoming more troublesome!

CHAIRMAN—Some of us are!

Ms PLIBERSEK—I noticed in the exposure draft there is a provision allowing service providers to refuse services to repeat offenders. Can you tell us about the reasoning behind that?

Mr Boersig—The context of that relates to the reorder of priorities. The government is suggesting that, if you are looking to assist a different category of person, there would be a flow-on consequence. That paragraph suggests that you could decline to act in certain circumstances and use your resources in other circumstances. There is a suggestion made in that paragraph about that course of action.

Ms PLIBERSEK—Do legal aid commissions have the ability to refuse service to repeat offenders?

Ms Lynch—Legal aid commissions provide assistance on Commonwealth law matters under guidelines issued by the Commonwealth, and they also provide assistance in state matters. I am not in a position to comment on the particular guidelines that they might act under in relation to state matters. The Commonwealth criminal guidelines relate to assistance to people who are charged with Commonwealth criminal offences. There is no provision like that in the Commonwealth guidelines.

Ms PLIBERSEK—Might it raise legal problems if you have a specific provision for Indigenous offenders that does not apply to non-Indigenous offenders?

Mr Yates—I think it is fair to say that what the exposure draft was looking to do was to recognise that a feature of the practice of ATSILS now is to prioritise their clients. If you talk to them, they will tell you that one of the considerations is the history of the client and that, in the very difficult task of selecting which clients they are able to invest resources in, they will have regard to that history. The exposure draft sought to articulate that consideration in recognising that service providers would be considering such factors. Some have seen that as raising the issue of virtually telling ATSILS or the successful tenderers that they should never deal with a repeat offender. That is not what the tender document envisages occurring.

Ms GRIERSON—So high risk would still override any consideration like repeat offence?

Mr Yates—Yes. We have had feedback on that issue and we are certainly looking at it as part of the finalisation of the tender documents.

Ms PLIBERSEK—You have had the exposure draft out there, you have received people's comments back, you have processed the comments and you have passed that on to government. Is that the stage you are at now?

Mr Yates—Yes.

Ms PLIBERSEK—What were the comments like?

Mr Boersig—Extensive.

Ms PLIBERSEK—Can you give us a range—say, from the most positive to the most negative?

CHAIRMAN—Good grief!

Ms PLIBERSEK—I do not just want to hear the good things that people said.

CHAIRMAN—I understand that, but—

Mr Yates—Short of going into the actual submissions—

Ms PLIBERSEK—Let me be specific. Which was the issue of concern raised most often? Was there an issue of concern that stood out as being raised by a number of respondents?

Mr Yates—I am not sure that we are at liberty to answer that. I do not know that we have counted them up and said, 'The ones most frequently mentioned are the ones that are the most important.' The whole intention of the exposure draft was not to say, 'This is a fait accompli; just give us the big tick.' It was genuinely to consult on quite a notable shift in the way funding and service provision are arranged. There was a desire to engage with all the stakeholders about how that might be best done. We got some very supportive remarks. Indeed, as I indicated earlier, there had been quite a bit of lobbying of the elected arm of ATSIC over some years to go down

this path. There was a lot of applause for finally getting to this stage. Others commented on some of the specific issues that are canvassed in the exposure draft, going to some of the things we have already touched on—ranking, areas of ambiguity, the issue we have just talked about of whether this implies that repeat offenders will not get serviced, and so on. That is the sort of quite useful feedback we have had that we are now taking forward to government in recommending how the document and the approach should be finalised.

Ms PLIBERSEK—In your submission you say that the Australian Institute of Criminology was engaged some time ago to develop a revised funding formula for the distribution of financial resources earmarked for the provision of Indigenous legal aid services, and that the aim was to ensure an equitable distribution of funding, keeping in mind the limited resources available. You say that the institute developed a model which can provide a valuable template for funding distribution in the forthcoming financial years, that ATSIS is working to implement the model and prepare proposals for further research and data collection, and that ATSIS is also working with the Commonwealth Grants Commission to cross-check the application of the FMA and has consulted with the AGD about the model. What is it going to mean in practice? Who is going to get more and who is going to get less?

Mr Boersig—As you have pointed out, the model is intended to be equitable. The actual distribution of funds is still a matter that we are putting to government.

Ms PLIBERSEK—But it will be based on the population of states; it will be based on the number of people having contact with the criminal justice system? What sorts of things will be taken into account?

Mr Boersig—There are a number of factors that are taken into account—population statistics, location of services, dispersion factors. Then there are particular issues about what weightings should be given. Unfortunately, I am not able to say much more about the model, because it is a statistical model. In general terms, it takes into account those issues that we have just discussed.

Ms PLIBERSEK—Would you have any figures on the proportion of Indigenous legal service spending on perpetrators of crime compared with victims of crime, if you take into account both ATSILS and the Family Violence Prevention Legal Services?

Mr Boersig—I will take that on notice and have a look at it.

Ms PLIBERSEK—I would be very interested in that if there were some way of giving us a global figure. I am interested that ATSIS has engaged consultants to develop a discussion paper to examine issues relating to the employment of Indigenous women in the area of legal services. I think that the employment of women in Indigenous legal services is very important, but it is not the same thing as having confidence that women are accessing those services, is it?

Mr Boersig—No, it is separate.

Ms PLIBERSEK—Are you doing any work on finding out whether women are feeling comfortable and confident about accessing those services or whether they themselves subscribe to the view that, basically, legal services represent blokes and women have to look elsewhere for their help?

Mr Boersig—The issues of accountability and client satisfaction are fairly high in terms of the way the tender document is being prepared. The kinds of accountability we are looking for will relate to some of those issues.

Ms PLIBERSEK—But no work has really been done historically on that?

Mr Boersig—I would have to take that on notice.

Mr Yates—Just on the raw figures, I think around a quarter of the clients of ATSILS are female, which indicates that, whatever you might estimate that figure most desirably being—in which case you would have to take account of the services that are available for women—the services are not closed shops against women in need of such services.

Ms PLIBERSEK—Do you think a situation is developing where ATSILS are becoming de facto services for men and the family violence prevention services will become de facto services for women?

Mr Boersig—No, I do not think that will be the case, in the sense that the services are driven by need and that need in relation to criminal work, for example, is increasing and high in relation to women.

Ms PLIBERSEK—Do you see ATSILS as organisations that are predominantly for criminal defence work?

Mr Boersig—The purpose of developing a list of priorities is to try to address those issues in the long term, bearing in mind how services have been historically developed. The major aim is to ensure that need is the driving force, whatever that may be. There are some obvious needs that would seem apparent. Issues in relation to incarceration would seem to be ever present.

Ms PLIBERSEK—Of course that is one need, but it is not the only need, is it?

Mr Boersig—No.

Ms PLIBERSEK—You say in the submission:

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.

Is there any evidence that services so far have not been well targeted? You are talking about better targeting. What is the evidence that resources have not been well targeted?

Mr Boersig—That goes back to the argument about historical delivery of services. I do not think I can say any more than what I have said on that.

Ms PLIBERSEK—They have grown up in a kind of willy-nilly way; that is what you mean by historical delivery. It is possible that the reason they have grown up in particular areas is that the community have identified a need and that the need has been so great. I am not suggesting that that is the case. I do not know; I am not in a position to know. But the opposite is not

necessarily true: the idea that services at the moment are not well targeted. Is there any basis for that assumption?

Mr Yates—I think we touched on earlier the issue of the much higher cost of certain services in some locations than in others, particularly in Queensland, with a very high number of services and the inevitable costs tied up in the overheads that go with that. So it is partly that sort of consideration. I think you are right; it is also that, insofar as the historical evolution of ATSILS was responding to various pressures, some of those real pressures would have been need. In some instances, other factors as well may have resulted in it, and we have simply continued to fund too much solely on the basis of those historical factors. We are trying to bring more objectivity to that task, and the funding models that we have been developing are aimed at shedding better light on that. That is where we are looking to get better targeting than has simply evolved over time.

Ms PLIBERSEK—You say also in your submission that the better targeting of services is best achieved through the purchase of services under contractual arrangements rather than through grants. Surely that depends?

Mr Boersig—The issue there is the nature of how you obtain your services. As I said, this issue is part of a wider concern about how best to deliver services. A contractual arrangement is quite different from a grant arrangement. There are elements of reciprocity, for example, that clearly arise out of a contractual arrangement, and that is the direction that ATSIS has seen as appropriate to take.

Ms PLIBERSEK—But the ANAO, in their report, were more critical of your organisation than of the legal services themselves. I am still a bit perplexed about how you can be so confident that shifting to this new model will make a quantifiable difference in the actual services that people are receiving.

Mr Yates—I think the ANAO did point to some of the limitations of inputs based funding arrangements, which have too often been the historical approach that has underpinned our grant regime.

Ms PLIBERSEK—But you can have an outputs based approach without tendering out. You can write grant parameters differently. You can set in place all sorts of performance measures. You say that by tendering out you can:

> ... increase funding opportunities for tenderers in the least hospitable work environments, thereby contributing to better salary packages and better staff retention.

You say that you are going to ensure the best possible access ‘to high-quality and culturally appropriate legal services’ and that you can increase the contract terms to three years. None of these things are dependent on tendering out. These things can all be done without tendering out.

Mr Yates—You are right insofar as the move from grants to contracts is a distinct shift from the use of tendering as a mechanism to identify potential providers. To that extent, we are involved in a wholesale move away from a grants, input based funding regime towards one where those funding arrangements are to be regulated through contracts. We are making that

move across the board. The use of tendering as a further device or mechanism to assist in identifying best potential service providers is another step again. We are not taking that step across the board. We do not necessarily see it as appropriate in all circumstances. We have had a lot of pressure from our elected arm, who have been close to the action and have said, 'This is a good way of testing whether or not the historical set of providers that has grown up is actually the best that is on offer.' We have had support from government, under the new arrangements from last year, to go down that path. It is not just us inventing some sort of ideological exercise to tender these things; it has grown out of a strong body of support from our elected arm that this was a desirable step to take.

Ms GRIERSON—Given that the OEA, the Office of Evaluation and Audit, suggested in 2003 that, if ATSILS service were costed in the same way as legal aid commission services, there would be a huge shortfall in what they had been funded to do, do you have any qualitative comparative data on the outcomes and services for Indigenous people of ATSILS and the legal aid commission?

Mr Yates—Before I answer that, I should say that the methodology used by the Office of Evaluation and Audit did not quite do what you described it as doing.

Ms GRIERSON—The OEA said:

> The national shortfall in ATSIC funding to ATSILS, if their outputs are costed at the same level as LAC-paid legal work, is $25,605,598.

Mr Yates—'Paid legal work' outsourced to private practitioners. It was not a comparison of costs of the work performed by the legal aid commission—

Ms GRIERSON—But only the legal aid commission outsource in that way, don't they? ATSILS does not, so it is a service delivery model that you have to take as it is if you cost it.

Mr Vaughan—What it did was compare the cost of ATSILS with the highest priced alternative.

Ms GRIERSON—The highest priced alternative is doing a lot of the work.

Mr Vaughan—The highest priced alternative was getting a private practitioner to do it. The debate over that is dealt with quite substantively on pages 141 and 142 of the OEA report. There is a letter there from the Attorney-General's Department where they specifically dispute that methodology as to what it means.

Ms GRIERSON—If there was any data you could give the committee that compares the two provisions of services, not just on costs but on outcomes, I would be really pleased to receive that.

Mr Vaughan—That is dealt with in section 4.3 of the OEA report, on page 108 and what follows. You will find they benchmark the standard of service provision in ATSILS with that in the legal aid commission. It is specifically dealt with there.

Ms GRIERSON—I will have a look at that. The other area I want to ask about is the recommendation that suggests that custody is too often the outcome of legal services, that it does not necessarily solve a problem and that there should be some community-friendly and more acceptable alternatives to custody. Have you got views on that? Are there any programs being developed in that way?

Mr Boersig—The restorative justice programs you were referring to, perhaps?

Ms GRIERSON—I cannot find what I wanted to refer you to, but can you take that on notice and see whether there are any suggested programs that we are not aware of. Also, it is apparent that the Australian Institute of Criminology have developed a funding allocation model which can provide a valuable template, one would think, for funding distribution. That was stated previously. Can you make that model available to us? I am told your 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. Can we see that model, and is that model part of the tender process?

Mr Boersig—Can I take that on notice?

Ms GRIERSON—Yes. Also, our Senate committee report *Legal aid and access to justice* came down yesterday. Have you had time to consider one of the recommendations—that the tender 'should be withdrawn and its underlying policy reconsidered'?

Mr Boersig—No. I have not seen that.

CHAIRMAN—Thank you very much. If we have further questions, we will put them to you on notice. We will do it in writing rather than ask you to come back again.

Proceedings suspended from 12.41 p.m. to 1.36 p.m.

MOORE, Mr Gerry Clive, Chief Executive Officer, South Eastern Aboriginal Legal Service

PUDNEY, Mr Gary Robert, Principal Solicitor, South Eastern Aboriginal Legal Service

CHAIRMAN—Welcome. We have just received a supplementary submission. Will somebody move that it be received as evidence?

Ms PLIBERSEK—I so move.

CHAIRMAN—There being no objection, it is so ordered. I will see if my colleagues can read it quickly enough to ask you any questions about it. Do you have a brief opening statement you want to make?

Mr Pudney—We just have one: we still feel under extreme threat from the tendering process. All staff, especially the Koori staff, are very concerned about the future of ALSs, Aboriginal involvement and Aboriginal employment. At this point in time, SEALS must plan for the possibility that key staff, especially Gerry and I, will be taken off stream to work on the tendering documents during July and August, which is a concern in that we do not have money to backfill positions. Secondly, the Aboriginal staff, if the tendering goes through, may not have employment, so they are very concerned. The main concern for New South Wales is that in the document there is a preference for one service per state and that is where we feel the threat comes from.

CHAIRMAN—You have read our terms of reference so you know the kinds of things that we are interested in inquiring into. We understand that you provided services in your area in Queanbeyan since January 2000, and as the South Coast Aboriginal Legal Service since 1980. How many legal staff do you have?

Mr Moore—We have a staff of about 19.

CHAIRMAN—But how many lawyers?

Mr Moore—We have five lawyers in our legal staff.

CHAIRMAN—What total area do you cover? The South Eastern Aboriginal Legal Service could well cover my electorate in south-east Victoria but I gather it does not.

Mr Pudney—We cover from Gerroa, south of Wollongong, across to Bowral and Moss Vale, across to Goulburn, down to Yass, down to Cooma, across to where the border finishes at Eden and back up the coast.

Mr Moore—Including the ACT.

CHAIRMAN—How many other ATSILS offices are there in New South Wales?

Mr Pudney—There are six.

CHAIRMAN—And each covers a distinct area or region?

Mr Pudney—Yes, they basically equate to the ATSIC regions that were developed 20 years ago. So there is one on the south coast, one on the north coast, one covering Sydney, one north-west, one west and one south-west.

CHAIRMAN—Sydney is the largest?

Mr Pudney—It is the largest.

Mr Moore—Population-wise.

CHAIRMAN—No, I mean the service.

Mr Pudney—Yes, the service as well.

Mr Moore—Our service originally was the first one to break away from the Sydney service some years ago. The reason was because the people on the South Coast did not feel that they were being adequately represented. Therefore they broke away from the Sydney legal service and formed the South Coast Aboriginal Legal Service. Shortly after that, the Western Aboriginal Legal Service broke away, and that started the ball rolling for having separate entities in New South Wales. There were four—St Mary's, the South Coast, WALS and Sydney. There are now six, after a review process that was put in place in 1996, and there ended up being one service for each of the ATSIC regions.

CHAIRMAN—You were both here this morning?

Mr Moore—Yes.

Mr Pudney—Yes.

CHAIRMAN—So you heard the line of questioning that revolved around the issue of the amount of money that ATSIS spends on defence of criminal charges versus any assistance largely to women and children on family violence matters. Could we have your views on those issues?

Mr Pudney—It is addressed partly in our submission. We understand that domestic violence is a crime and there are the different power relationships between males and females—physically, economically and socially. We are trying to battle with those differences, but our prime motivation is always the defence of the person who is charged. I would suggest that in two out of 10 cases, or maybe three out of 10 cases, the victim will come to see us with the perpetrator, or by the time the matter gets to court the victim is back with the perpetrator. So our role then is to try and ensure that there are no further assaults or domestic violence breaches, for two reasons. One is that we do not want the victim assaulted again and the other is that we do not want the perpetrator charged again. As a consequence, we look at anger management,

financial counselling if required and relationship counselling, as part of how we deal with the matter in court.

CHAIRMAN—You were here this morning when we heard from a representative of ATSIS that over the past decade there has been a cultural change in dealing with family violence issues, moving from a prior understanding that these were family or community matters to the position where now, it was said, largely speaking, most—not all, but most—communities and leaders would see these issues as being a part of the criminal justice system. Would you like to comment on your view of what was said?

Mr Moore—I listened with interest this morning. I actually have a regional council hat as well, and I have been a councillor of ATSIC for about the last 12 years. I was actually a commissioner, in the early days, for three years. As part of a regional council process, we just finished a series of family violence workshops around our whole region. It was quite an interesting exercise, in that (1) it was a good exercise for the regional council to get out there and do, but (2) it really gave the community an opportunity to say: 'Hey, what's happening; where's the funding going?' and all these other things. One of the most difficult things in those workshops was getting the community to actually state or acknowledge that domestic violence was a part of the community.

CHAIRMAN—You mean that it was endemic in the community?

Mr Moore—That is right. It did not take long for the community to state that as a fact. Once they felt comfortable with the facilitation of the process and so forth, it did not take long for them to come out and say, 'Yeah, it happens in our community and our mob shouldn't be doing it.' I come from a mission myself. Growing up, I can remember five white administrators or managers. When I was a kid, the gates on the mission that locked us on and off at seven o'clock each night were still standing. Why am I saying this? I guess that there is a big shift for our mob in saying, 'Listen, what our old people told us about domestic violence—that it was other people's business—is not the same as today. We've got to make it so that these sorts of issues aren't warranted, they aren't to be condoned and things do have to be done about them.' I guess, from an organisational point of view, we are looking at it more from a proactive way of dealing with things—the old saying that prevention is better than cure is the way that it can be best dealt with.

CHAIRMAN—You just told us that you are also an ATSIC commissioner as well as—

Mr Moore—I was an ATSIC commissioner in the very early days, yes.

CHAIRMAN—Well, a regional councillor or whatever. Does wearing two hats create a conflict of interest for you in this job, in the procedures we are talking about now?

Mr Moore—No. Let me state that I have other hats. The hat that I am here with today is as CEO of—

CHAIRMAN—I understand that, but do the various hats create a conflict of interest?

Mr Moore—As what, sorry? Can you elaborate?

CHAIRMAN—I do not know—in terms of the role that you have as CEO of the South Eastern Aboriginal Legal Service?

Mr Moore—No. As for any government or non-government person in a board situation, there are pecuniary interest rules, and as long as they are observed as far as funding protocols and decision making are concerned and people absent themselves from the room and so on, there is not a conflict for me.

CHAIRMAN—We were told this morning by ATSIS that in the past—in the past, we were told, not the present or the future—some of the funding decisions for legal services were made on a less than arms-length basis because of family or position in the community. Would you agree with that?

Mr Moore—I would have some sympathies with it. At the national level, where you are divvying up large amounts of dollars and you have portfolio areas that are deciding where funding is going throughout the country, there is a clear conflict of interest, I believe. However, at the regional level, where you are giving the bureaucrats advice—that is, now—there is a separation of powers, so that takes care of that. In the days before the separation of powers at the regional level, I think the pecuniary interest rules and codes of conduct in the majority of cases concerning regional councils were observed and people vacated the room or absented themselves from the voting process. I think that what we have seen of late has been more an issue that has happened at the national level, not necessarily at a regional level.

CHAIRMAN—Do you have one or more legal aid centres in your jurisdiction?

Mr Moore—We have three offices.

CHAIRMAN—In one location?

Mr Moore—We have one in Nowra, one in Moruya and one in Canberra.

CHAIRMAN—Three offices? I thought you said officers. Do you have any degree of cooperation with them with respect to family violence issues and/or women's issues or youth issues?

Mr Moore—Yes. I will start by telling you that we are the only service that I know of, certainly in New South Wales, probably in the whole country, that has a Young Offenders Program. That Young Offenders Program is actually funded by the ATSIC regional council out of the discretionary moneys. That came about from royal commission recommendations, and we continued it on because the need was there to look after youth. That equates to having one youth officer in each of the three offices looking after various geographical locations. As far as family violence issues are concerned, yes, we have field officers who are quite often dealing with victims of domestic violence. There is a way that we deal with our clients in ensuring that they have the right of access to services if in fact we are not representing them ourselves, and that is quite often the case because quite often we represent the perpetrators. But the amount of networking and the amount of work that we do with other agencies to ensure that our women get services is a priority for our service, and we do ensure that they get that good service.

CHAIRMAN—Are there any quantifiable outcomes of your youth program?

Mr Moore—Yes.

CHAIRMAN—To the extent that you can or do measure outcomes from that program, do you have a lower recidivist rate in your area than the next ATSIS area or regional area or whatever?

Mr Moore—We believe we do, because it is tied in with other things like circle sentencing. It is tied in with youth justice counselling. It is tied in with merit programs that are run and with magistrates' early intervention programs for users of illicit drugs and so forth. We are probably one of only a couple of services in the state that utilise elders with police cautioning so that we get the message home loud and strong to young people, when they do front up and they are in a position to be cautioned, that the elders are watching them and so forth. As far as measurement, it is still a young program. It still has teething problems, but the outcomes we have been able to achieve in tying them into programs like Reconnect, which is a federal government program, and doing all sorts of youth activities and so forth mean that we believe we have stemmed the flow—we will never stop it—of youth in our region.

Mr Pudney—In relation to the female issue, we have a field officer in each office and they are all female at this time. One of our three youth officers is a female. The prison support officer working out of our Canberra office is a female. Two out of our five solicitors are female. Of our last board, there were nine members and seven of them were female, including the chairperson. As you work in ALS, you realise that at court on especially kid's court day nine out of 10 parents, grandparents or members of family who come along with a child are female. You have all these grandmothers, mothers and aunts; it is very unusual to see a father or grandfather supporting a child at a children's court. It is not because they are working; it is just because they do not get involved in that area of the control of the kids. In a way, we do not have direct representation of lots and lots of women, but our service has a real connection with the women in our area and they are the ones we work through, especially with our children.

CHAIRMAN—I am interested in this family violence area. Do women relate better to women than they do to men? Do not make a snap judgment.

Mr Pudney—I like to think no. I think I can talk to most female victims as well as male perpetrators, and I can talk on their level and they can understand. But that is a lot of understanding and working with the community. I have seen some lawyers who try and speak to male or female defendants or victims and get nowhere, so it is a lot of training and personality rather than a yes/no answer.

CHAIRMAN—Is it not true though that sometimes it is culture? I have been to remote villages in Tibet, for instance, where we helped fund a community health centre and the staff were all women because the women in the villages will not go to a male doctor, full stop. In another five or 10 years they might, but today they still will not.

Mr Pudney—A few years ago when I was working at Moruya, I was doing a lot of work for an elderly Aboriginal woman to get her grandchild and son back to her. I had been going with her to court for three or four months, and we finally got everything sorted out. We sat down afterwards and she said to me, 'You're Koori, aren't you?' I said 'no' and then she started

laughing and hit me over the head with her handbag and said, 'I've told you things I wouldn't tell non-Koori people.'

CHAIRMAN—Did it hurt?

Mr Pudney—No, she was laughing. But it made me realise that they tell their own kind a lot more than they will tell outsiders and it takes a long time to get the understanding or their faith so they can actually tell you things. Would you agree with that?

Mr Moore—Yes.

CHAIRMAN—Prima facie, I accept that from the experiences I have had in both Tibet and other places.

Ms PLIBERSEK—In your submission, you say that Aboriginal community members and South Eastern Aboriginal Legal Service board members believe that the prevention of incarceration of Aboriginal people should have the highest priority for a legal service provider. Is that in part because of the recommendations in the deaths in custody report?

Mr Moore—I would say in part, but I would say in practice that we have about 145 people in six facilities in our region whom we are looking after in one way or another. Either they have come through a process where we have looked after them before they have got themselves where they are, or they are people from other areas who have been classified and come to us. So our prisoner support officer is also looking after them in various facilities.

Ms PLIBERSEK—One of the main reasons you would be aiming to keep people out of jail is that you worry about what happens when people are in jail. Is that right—you worry about suicides and deaths?

Mr Pudney—Yes. Even that young girl the other day said she would not come out. You do not get blase about it, but you take it on board every time. You work out the level of risk in a person and then inform the authorities of the level of risk. In relation to the need for priority for incarceration, if you sat down with half-a-dozen or 10 Aboriginal elders or community people, you would be stunned by how many of them have in their family either somebody in custody at the present time or somebody who has been in custody. From the outside, they can look like the most wonderful, soft, pleasant person, but somebody in or next to their immediate family will have been in custody or will be looking at going into custody. It is a real issue for them whereas, if you get 10 or 15 people from the pub, you are unlikely to find anybody that has somebody in custody. So there is that real immediacy.

Ms PLIBERSEK—One of the reasons that we try to keep people out of jail is what happens to them in jail. The worst possible outcome is that they end up dying in jail. But the number of deaths in custody would be a fraction of the number of women who die every year from family violence at the hand of their male partner. Your priority is keeping people out of jail, and often the victims of family violence feel that they do not have you in their corner. You say in your submission that they have the New South Wales police and community domestic violence workers to talk to, but a minute ago you were talking about how they are not going to disclose a whole lot of stuff to non-Aboriginal workers. New South Wales police does not have a great

number of Aboriginal police officers for these women to deal with. Domestic violence workers vary a great deal from court to court. Some court support schemes, like the one in Redfern in my electorate, are fantastic but they do not necessarily have Aboriginal workers. The legal aid commission—if that is where they are going for help with domestic violence—does not necessarily have Aboriginal workers. Specific Indigenous women's legal services are not widespread and not well resourced. Do you understand the question I am asking about your priorities?

Mr Pudney—Yes. But one practical thing has happened. Up until, say, six years ago, if there was domestic violence the perpetrator was charged. If the woman did not turn up at court—

Ms PLIBERSEK—Press charges.

Mr Pudney—The charges could go on but, when it can time for a hearing, if the victim did not turn up the matter was thrown out of court. In many ways that was a bad result: it made the woman's position weaker—would she go to the police next time? What has happened over the last four or five years is that, if a matter is set down for hearing and the victim does not turn up, the magistrate—

Ms PLIBERSEK—Will go looking for her.

Mr Pudney—Yes, will issue a warrant for her arrest to bring her along so that she can follow through the process. Secondly, in serious assault matters or even where there is physical violence, the police now take the victim back to a police station and interview them on videotape. So, if the victim does not turn up, there is still evidence of what she said; there are pictures of the damage. That empowers the woman—she does not have to pull out, because the material is there. But it also makes it easier to discuss with the defendant that it is a matter they should plead to, because the evidence is there. That was never there; the perception was always: 'She did not turn up. The matter gets thrown out. I will get home and do it again'—it goes on over and over again.

Ms PLIBERSEK—And perpetrators or their family members would threaten victims to make sure they did not turn up to court, or there would be social pressure not to turn up.

Mr Pudney—Yes. It is changing. Those are two really important things that have empowered the position of women. If there were more Aboriginal police officers and police prosecutors the women would feel comfortable. But, if they come to see us, we make sure they get to see the domestic violence officer. We have a field officer who takes them down there to make sure. We do all we physically can to strengthen their position.

Ms PLIBERSEK—Other than represent them.

Mr Pudney—Yes. There is no real representation of victims, because it is all done by the system. If the system is working properly—and it is, as I said, with warrants and now with records of interview—more and more matters have been pleas of guilty and therefore you can address the underlying issues.

Ms PLIBERSEK—Except in the sense that family law matters often relate to family violence. There are often underlying issues of family violence in custody disputes where people are fighting over who gets the kids or when they will get what access to them and all the rest of it. Violence is often a factor there. But you are not doing any family law, are you?

Mr Pudney—No. We would love to do family law, but the difficulty with family law is that it is a specialised area; it is a paper-driven jurisdiction. To file an application in court, you need affidavits; so you need quality staff who can generate the paperwork to take it to court. We have Aboriginal staff employed and we are developing their skills as secretaries, but there is a step between what they do and what you would need them to do if you were to run a proper family law practice. If we were properly funded, we would love to do family law and civil matters. We agree that a lot of criminal matters arise because of disputes in a family situation. If we could address a custody issue, a contact issue or even a civil matter, say, involving a dispute over a car or a neighbourhood fence, we might not end up dealing with charges and so on. We can send a lawyer along to a court with one little loose-leaf service and they can do the whole week of court work without generating any paperwork. To do the same thing with a family lawyer, you would need to have quality staff, the IT system and the updates. It would take nearly all our money to do family law properly, I think.

Mr Moore—The final comment I would make is that, being the young service that we are, we are building towards those particular skills and those sorts of strategic areas of resourcing and so forth. Ten minutes before we came back here today, we were grabbed by one of our young field officers who had just taken someone along to the women's legal centre. They went there with that person physically, sat down with them until they had an interview and did all of the things that were needed of them to do. She told us how she felt about that. She was not just directing someone to a particular service; she was actually taking them there, supporting them and ensuring that they got the service that they were after and so on. In the absence of having a family law practice and the resourcing to look after these sorts of issues, I think that is almost the very best we can do.

Ms PLIBERSEK—Is that the Women's Legal Resource Centre in Sydney?

Mr Moore—In Canberra. One other point is that we are looking at how we can upskill our staff with accredited training courses such as those being run by the Family Court consultants to help people deal with family law matters and so forth. Training is a big issue and resourcing obviously is a big issue.

Ms PLIBERSEK—Last week I remember hearing a figure quoted in a speech that in one Queensland Aboriginal community—an isolated community—more women died last year at the hands of their partners than there were deaths in custody for the whole of Queensland for that year.

Mr Pudney—We on the South Coast do not have those really serious domestic violence problems that some of the remote communities have.

Ms PLIBERSEK—I bet you do. You have those very serious problems; there might not be as many of them.

Mr Pudney—Not in the same way if you count deaths. You are talking about deaths. We do have serious problems—I am not downplaying that—but not on that level.

Ms PLIBERSEK—When you were talking about the tendering in your submission, you mentioned there was the possibility of cost shifting from the Aboriginal legal services, with whoever wins the tenders cost shifting to state legal aid commissions. What sorts of matters do you think will be fobbed off to the legal aid commissions?

Mr Pudney—There are three areas. One is the balance between access and cost. To appear for one person, ALSs may have to drive 200 kilometres, because that person is important. So we do not balance access versus cost. If we were looking at it on a cost efficiency basis and not as providing a special service, we could probably get a duty solicitor to go to the court at Cooma and the New South Wales legal aid system would pick up that funding. So that is one way. They also talk about a 1800 number as being the be-all and end-all—

Ms PLIBERSEK—They seem to be a solution for an awful lot of things.

Mr Pudney—Yes. I do not know how many non-Indigenous people use them, but Indigenous people have a very poor record of use of 1800 numbers. You can imagine somebody at Wilcannia ringing the 1800 number with all the material from their court case and their references and then taking notes. It just does not work.

Mr Moore—Pressing one for access to a family law counsellor—

Ms PLIBERSEK—Or if you wish to speak to human.

Mr Pudney—The third one is that you do not appear for repeat offenders. They were a bit blase about it this morning, but if you were a provider who was out to make money—as one of our solicitors used to say, 'The people who need us the most are the ones who are the hardest to deal with.' They are the ones who would have difficulty dealing with other mainstream organisations. We have a handful of people who have a great amount of family problems. There is abuse—of us as well. We had a lad who a mental health team had taken an AVO against because he kept turning up and threatening them.

Ms PLIBERSEK—The mental health team did?

Mr Pudney—Yes. He would turn up there to get his ADHD medication. Eventually I had to give him his tablet each day because he could not get it from the venue where he was. If we did not do that, he would not have got his medication and he would have been in jail quicker.

Ms PLIBERSEK—Did he have to take that medication daily and have it dispensed daily?

Mr Pudney—Yes.

Ms PLIBERSEK—Was that because you can overdose on it?

Mr Pudney—It is a sort of speed. Even on weekends we had to give his auntie to take two away and give them to him.

Ms PLIBERSEK—I think I heard that there is a black market in that medication in some schools. In your submission you make the point that the Australian National Audit Office were critical of ATSIS and that they were not actually critical of the legal services' service delivery. You talk about the poor working conditions, and I am sure that there is no question about that. You say:

The work is being done in the face of the major short-comings within ATSIS/ATSIS, especially the Legal and Preventive National Office and the regional offices.

Can you detail what you consider those shortcomings to be?

Mr Pudney—We had a national office that moved from Canberra to Sydney. They lost most of their staff and started again. They then moved from Sydney back to Canberra and lost most of their staff.

Ms PLIBERSEK—Over what period? That is quite a short period, isn't it? Was it a year and a half or something?

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

Mr Moore—I will just go one step further. We have continually challenged the regional, state and national offices on this and they have not come back with any answers whatsoever. When the formula was first put in place for funding for the Queanbeyan ATSIC region the population statistics for Canberra were not included in the funding formula. So of the 4,000 or 6,000 people that we are looking after in our region at least 2,500 of those people were not even counted. When we continually challenged that they would say, 'No, the formula is right.' But we believe that was because they did not want to admit that they had made a mistake in the funding formula. We have continued to challenge that at regional council level as well as organisational level.

Ms PLIBERSEK—And you have had no joy?

Mr Moore—We have had no joy whatsoever. I would like to go back to one other point you mentioned. As I said earlier, I have been a regional councillor for about 12 years. In the regional office that services us I can name a regional manager for every one of those years. There has been no stability in leadership for any length of time.

Ms PLIBERSEK—Why do they go so quickly?

Mr Moore—There is probably a host of reasons for that. Queanbeyan is not the most luxurious place to live or work. There is a school of thought that flotsam and jetsam from the national office at Woden gets jettisoned and then gets caught up in the cyclone fence at Queanbeyan—and that is how we end up with a lot of staff. I am being really critical and I have been critical in regional councils and other forums, so I am not saying anything that I have not said before. When you have this continuous instability in the running of an office or an organisation it equates to disaster out there in the community. Just when you think you have your procedures and processes manual right for the CDEP, the project manager who comes out is different from the one you had for the last 12 months and for the ideas that you thought were great, the new project manager says, 'No, that's not the way I want it done.' It is a similar situation with the management: we have had great instability that has affected the service delivery on the ground.

Ms PLIBERSEK—The other thing that the ANAO recommended—and I think you mentioned it in your submission—is that the annual funding model is a real problem. The ANAO recommended triennial funding. You would have heard the evidence this morning that said you could do that if you were tendering out, but you would make the point, wouldn't you, that you do not need to tender out to do that?

Mr Moore— No. It has been pursued by regional councils for a long time that, to get any stability in the running of an organisation or a business, triennial funding is the only way to go because at least you can give people three-year contracts and you can plan three years out, and those sorts of things. When we are being continuously drip fed, as we are, you cannot plan and there is instability. People will not come and work for you because they know they will only be on a 12-month contract and so on.

Ms PLIBERSEK—In your submission you said:

We agree that performance information and reporting should be standardised and relate to quality as well as quantitative factors. However, there has been no leadership from ATSIC/ATSIS in this important area. In fact the large amounts of funds spent on the ALSIS reporting program has not produced the required results.

Can you tell us a little bit about that reporting program?

Mr Pudney—In 1997, New South Wales started a reform process and the policy guidelines came out of a lot of the work done by Cole and all the ALSs. At that stage WALS had a simple computer system where they counted the number of people and they could print out each month a list of the number of charges and defendants, male and female. It did not go much further than that but that was what was necessary. For some reason the national legal and preventative—

Ms PLIBERSEK—Sorry, who?

Mr Pudney—National legal and preventative section in the head office of ATSIC wanted a bells and whistles information system.

Ms PLIBERSEK—So it would tell you what people were charged with and other things like that?

Mr Pudney—Yes, such as their age. I think in the back of one of the reports there were about 65 different things they wanted.

Ms PLIBERSEK—Is that for each person?

Mr Pudney—There were 65 different classes so they could work out age, sex and charges. They have probably spent $3 million on ALSs—1.1, 1.2, 1.3, 2.1, 2.2—over the years. We put information in but we cannot generate stats.

Ms PLIBERSEK—You cannot extract it?

Mr Pudney—Yes. And if we had kept with the basic WALS one and put that Australia-wide in 1997, we would have saved millions of dollars and would actually have a system that counts things.

Ms PLIBERSEK—Can anyone extract the information? Do you send it off centrally somewhere and someone crunches the numbers, or don't you know?

Mr Moore—We do send it off centrally to ATSIS but only in hard copy. Some services have an agreement that they will send their stats off to a central database, but others will not—the obvious reasons being confidentiality and trust and—

Ms PLIBERSEK—Although, if you take the identifying characteristics out, you should not have confidentiality problems, should you?

Mr Pudney—But the stats say that some people have done negative work, so there is still a problem even though they have had six years to work on it.

Mr Moore—The system is still not right.

Ms PLIBERSEK—But you think there should be some performance information gathered?

Mr Pudney—Yes.

Ms PLIBERSEK—If not this way, how do you think it should be gathered then?

Mr Pudney—Manually is better than what we have, but maybe the old WALS—Western Aboriginal Legal Service—system is better than manual.

Ms PLIBERSEK—How do you ensure that though? The WALS system that you are talking about noted gender and a few basic things like that, but you do want some measure of client satisfaction, don't you?

Mr Pudney—Yes, that is a different thing to just the quantity. We need the quality and we need client assessments, feedback and things like that.

Mr Moore—I think there is still a difficulty in that, when you answer a client, that client might re-offend. You might have more charges and so forth, but it is still counted as only one client, one stat. That does us no good because you are doing certain amounts of court appearances on different matters—charges and whatnot—and you are only getting one stat for it. That one stat equates to 'You must not be seeing many people,' and then the funding agencies look at that with scorn.

Ms GRIERSON—I thought your case scenario was very interesting. Have you ever tried putting commercial building techniques across that sort of scenario?

Mr Pudney—No. As I said at the end, it may not be a happy ending. It may be that that person is having difficulties.

Ms GRIERSON—That is right—it is a proactive approach. Do you think a tender process would ever allow that sort of approach?

Mr Pudney—I cannot get my head around a fixed price tender for this sort of thing. The only way you can do more work is to reduce the quality or quantity you do on each individual matter. It is not like building a bridge where five or six people can tender for it and you get the cheapest, but they are all going to build the same bridge. The difficulty with the tender process is that, if SEALS does not get our area—if there is one provider for the state—then all the ones we do, value-added and above and beyond the call of duty, would fall through the rungs and end up not being addressed properly.

Ms GRIERSON—The chairman suggested that the regional council's position may have some conflict with the legal service's position. As a practising lawyer providing those services, do you ever find that is the case? How do you find that relationship?

Mr Pudney—The regional council are told from national, 'This amount of money goes into your bucket and that money goes straight to the legal service,' so the actual regional council people have no say in the straight ALS budget. They give us some more money for the younger offenders program, but that is in a different category. So we have no real input from the regional council. The board gives us discretion as lawyers to appear in matters. If there is an issue concerning Aboriginality, either through the CEO or the board we discuss whether this person is suitable. So on a day- to-day basis we hardly ever have any conflict situations.

Ms GRIERSON—Looking at it the other way around, because the regional council is there and providing other services, like the youth offender program, do you access those regularly to support your operations?

Mr Pudney—They are in our office.

Mr Moore—We actually get a budget from the regional council to the organisation to run the young offenders program. There is just one anomaly with that; I guess it is another example of inconsistencies. We just got our budget cut for the young offenders program by the regional

manager, who, without consultation, has taken away a significant amount of money from our program. That could result in a position being lost in our region for a young offenders worker. When I asked what the rationale was for it, they said, 'Separation of powers—we can do that.' Whilst I agree that they can do it, surely there is an obligation by the funding body to have some consultation about the impacts of decisions like that, because the impacts are going to be felt out in the community, not just with the organisation.

Ms GRIERSON—You mention also in the submission that duty solicitors generally do not have cultural awareness training. In your region, where would the use of duty solicitors occur, by location and by cases?

Mr Pudney—In New South Wales—I think it might appear in the tender documents—there is only a legal aid office in Wollongong, Wagga Wagga, Dubbo, Sydney, Newcastle and I think Lismore. Every other court in New South Wales is covered by the duty solicitor roster. For example, in Nowra, we have got probably 14 or 15 solicitors who take it in turn to do the duty solicitor roster. Further on down the coast there are five or six. Over New South Wales there are probably 400 to 600 solicitors. None of them have the time, and most of them do not even have the interest, to be involved in any cultural awareness training. They see the legal aid criminal matter as money for jam. We just turn up and do them.

Ms GRIERSON—In your own service are there any female lawyers?

Mr Pudney—Yes, we have two.

Ms GRIERSON—Are there any Aboriginal lawyers?

Mr Pudney—No, we had one but he has gone into private practice because we could not afford to pay him.

Ms GRIERSON—Do you think that, of your staff, there are too many other support staff and not enough lawyers, or do you think there are insufficient numbers of both? What do you think the balance is like?

Mr Moore—The balance will only ever be about what the funding is. We get paid for 5½ solicitors; that is fact and we cannot do anything about it.

Ms GRIERSON—You cannot divert funds from your solicitors to employ other—

Mr Pudney—We can. We can take some field staff out and employ more solicitors, which some ALSs do. They put the emphasis on solicitors. We put an emphasis on field staff, because that is the real connection. It is getting worse, because one important role of ALSs is getting clients to court. The government in New South Wales keeps changing the rules to make it harder and harder for defendants. For example, you now have difficulty getting bail if you have a 'fail to appear' on your record. What happens is that a Supreme Court judge may look through and say, 'You did not appear in court in 1999. You are unlikely to appear today; therefore we will not grant you bail.' We play an important role in making sure that, if a person is not at court, we get an adjournment and go and get them, because those matters affect the position.

Ms GRIERSON—The outcome.

Mr Pudney—Yes.

Mr Moore—And there are huge transport issues.

Ms GRIERSON—Yes. All Aboriginal services have huge transport issues; I understand that. You say that in terms of attracting staff and keeping your staff you cannot backfill; you do not get paid for backfill. If you lose a position, you can still employ someone else?

Mr Pudney—If somebody goes on leave, for example—

Ms GRIERSON—If you get a relief person in, there is no money for them?

Mr Pudney—Yes.

Ms GRIERSON—You are not indexed for any pay rises?

Mr Pudney—No. Some people are on the same wage they were on four or five years ago. In fact, they have lost it through the FBT.

Mr Moore—A comment was made this morning about the FBT from ATSIS. We are able to supplement our staff's pay with that and give salary sacrifice. Once that goes, that will just drop them back to less than what they were getting before, and we will retain no-one.

Ms GRIERSON—From reading your submission and the evidence from across the nation, it would be possible to suggest that support for women in family matters is actively discouraged just because the service cannot respond to it. How would you respond to that?

Mr Pudney—I would strongly deny that. Of the people who call up on the phone or come to our office for non-criminal advice, 85 per cent would be female. We may not be able to help them but we can often make one phone call or write one letter to do something. I had a case where one phone call was made to Radio Rentals. They had been refusing to bring a fridge out. Suddenly a lawyer rang up and they said, 'Sorry. It was a misunderstanding,' and the fridge turned up. We do a lot of that.

As I said, 85 per cent of those clients are women. There was also a case where the Commonwealth Bank was taking out money that was in a woman's super fund. She went to see them three times—for a Koori woman to go to a bank three times is pretty amazing—but they said no. She came in and saw me. Within 12 hours, all the money that had been taken out for three years was back in her account. We do what we can in the non-criminal area. We appear for six per cent of women. I was looking at the legal aid stats. They appear for about 2.3 per cent of Aboriginal women in their civil area and the same in their family law area as well. Not only do we not pick it up but also the legal aid commission do not pick it up because these women do not go to the—

Ms PLIBERSEK—Which makes it worse, doesn't it?

CHAIRMAN—Are you saying the women do not ask for the service? Is that what you are saying?

Mr Pudney—They do not go to our service but they also do not necessarily go to the—

Ms PLIBERSEK—They do not go anywhere.

CHAIRMAN—The service cannot help them if they do not ask.

Mr Pudney—No, but they do not go to a legal aid office. They keep it to themselves and try to sort it out themselves.

Ms GRIERSON—You mentioned the difficulty of entering into family law cases. Of course, it is a formalised process. As you said, the preparation of affidavits has to be of such a high standard. Is there a way that there can be a parallel system for Indigenous people, or would that be legally dangerous?

Mr Pudney—There is a community legal centre in Nowra. Part of its funding basis was to help Aboriginal women. We can refer women to that organisation and they can help them out. I am a bit concerned about the family violence units multiplying in one area. For example, Kempsey—

Ms GRIERSON—That is in my area.

Mr Pudney—has had a family violence unit since 1999 or 2000, which basically just looks at that area. They do education. I am not saying that they do not do the right things; I am just asking: is that going to be there in 10 years time, when people at Port Macquarie, Coffs Harbour and other places do not have that same resource, or could that money be better spent on having it at Coffs Harbour for two years, Kempsey for two years and so on? We have none on the South Coast. Maybe it should not necessarily be tied in with ALSs, because there is a conflict, but maybe a community legal centre should be given this. The money is half of what we will get for ALSs in the next financial year.

Ms GRIERSON—What budget do the family violence units come out of?

Mr Pudney—Out of the legal and preventative budget from ATSIS.

Ms GRIERSON—You mentioned the Kempsey one. You said the situation where families move continuously between two places is not catered for either.

Mr Moore—I will just mention something on that family issue before we move on. Our service looks after two different jurisdictions: the ACT and New South Wales. In fact, we also look after JBT, the Jervis Bay Territory, which has its own anomalies as well. If we have a family law issue and we need to utilise the services of the family law solicitor in Sydney, we can quite easily do that by getting them to ring up and get advice or assisting them with phone calls and all that sort of stuff from New South Wales. If you are in the ACT and the same clients are after the same service, they cannot deliver that, because we are out of state, so there is an anomaly there in not being able to assist them with our one Aboriginal family lawyer in Sydney.

We are lucky enough to have really good networks and so forth so that we can tie in with other mainstream facilities, but then it comes back to the issue that our mob will not necessarily go and use them if you do not fully assist them to do so.

Ms GRIERSON—In your roles, particularly in the legal service delivery, if the tender process of the services you provide went ahead, what would be the one thing that you would see as crucial to that tender process or it would fail? I know it is a hard question but if you were writing that tender process and you did not want it to result in poorer services—

Mr Pudney—The critical thing is that there is no need for Aboriginal employment in the tender. They say you need cultural awareness training but it does not say whether it is half an hour when the new person starts or what. It is critical for the employment of Aboriginal people. We employ Aboriginal people in Moruya, Nowra and our Canberra office. If the tendering process happened and a mainstream organisation won it, the five white lawyers would all get jobs. The savings the provider would make would mean that they would not need to employ any Aboriginal people and you would therefore lose that direct connection with the community.

The people who would lose would be our field staff in Moruya, Queanbeyan et cetera. They would not get any jobs. At the moment, the money they get goes to their family and extended community. Whatever we pay, they are not people who have thousands of dollars left in the bank at the end of every month or every year. It just goes through their community. If they lost that employment, they would not get further employment and not only would the Koori community in Queanbeyan, Nowra and Moruya suffer but the general community would suffer too because there would not be those funds coming in. That sort of balances out the idea that you need one Aboriginal family lawyer for the state. You would be losing people like Gerry, who is a CEO. He is developing skills in leadership and teamwork and he is on the local area health board. They take on all these other roles because they have a job in the community and they can be part of the community. If there were one service for the state—one CEO in Sydney—Gerry might get that position, but he would be a loss to the local community.

Ms GRIERSON—So the value adding that comes out of Indigenous employment is hard to quantify.

Mr Pudney—It is amazing. They are the ones who would lose. We have staff at the moment who have been with us for 20-odd years to whom we are saying, 'At the end of this year you may not have a job.' The white lawyers will get jobs because they will always need criminal defence representatives. But the others are the ones who are really hurting at the moment.

Ms PLIBERSEK—You mentioned that most duty solicitors do not have any cultural training. Do you think that it would be a good idea to insist that they do some cultural training before they get on the drip?

Mr Pudney—Yes, both cultural training and maybe some sort of quality control.

Mr Moore—I have seen our clients sack white lawyers on the spot because of a lack of communication skills, because they have not been able to get across what was being asked of them or because the lawyers were just pigs and would treat our clients as if they were second-

class citizens, as though it was an inconvenience for them to represent them and they could be off earning money writing wills or whatever.

Ms PLIBERSEK—You mentioned that a lot of these solicitors think of the legal aid work as money for jam. What if you say they are not going to get any access to that work before they have done some cultural training?

Mr Pudney—I agree. They should have serious cultural training and understanding before they go on the duty solicitor roster.

Ms PLIBERSEK—You mention in your submission that one of the board members said of mainstream organisations: 'Our mob won't use them.' But that is what you are expecting the Aboriginal women to do, isn't it? In domestic violence cases and so on you are expecting them to use mainstream organisations.

Mr Pudney—Yes.

Mr Moore—I guess with proper linkages, though. Like I said, if we refer someone to a mainstream organisation, we are not just referring them; we are taking them by the hand and getting them there. We know that the moment they walk out the door they might change their mind and say, 'Maybe he won't hit me anymore'—all these other things. We do not know. We have really good, close relationships with the head of legal aid here in Canberra and so too in New South Wales. They are not just words coming from our mouths; they have said, 'We know that your mob won't use us.'

Mr Pudney—With a domestic violence situation, the first port of call is the police attending the premises. They are the ones who should be trained to do a proper job for both Koori and non-Koori women. As I said, there are some steps being taken to do that. Unfortunately, in five to 10 per cent of domestic violence situations it is not the victim who rings the police; it is a neighbour who overhears it or somebody else who is concerned about it. The victim will often come to us with the defendant the next day and say, 'I didn't ring the police. I didn't want him charged.'

Ms PLIBERSEK—I understand that and I understand that victims often have some loyalty to the perpetrators. I understand all that, but you do not help that situation by helping the blokes and not helping the women. What you do is further entrench the notion that this is a personal thing to be sorted out between people privately, not a crime to be dealt with by society.

Mr Pudney—Ninety-five per cent of our matters are pleas of guilty. We, as a legal service, often sit down with both the perpetrator and the victim during the sentencing process or after the sentencing process, and we do not back away from discussing with both parties what the problem is between them. I talk to clients about my view of the power balance and all that. We are only talking about a small percentage where there are pleas of 'not guilty' where the issue may not be properly addressed because the perpetrator will not acknowledge his behaviour. If I am talking to a perpetrator and he pleads guilty, he is acknowledging that he has done something criminal which involves violence on a female. I will explain why the legislation is in place and how the old belief that your house was your kingdom and you could do whatever you wanted has changed. I then try to put both of them in contact with some sort of resources to ensure it does not happen again. I am really concerned about the view that we do not assist women. As I

said, in 95 per cent of cases they are pleas of guilty, which is an indication of an acknowledgment that something criminal has happened.

Ms PLIBERSEK—What about sexual assault?

Mr Pudney—That is a far more difficult matter.

Ms PLIBERSEK—Do you ever represent victims of sexual assault?

Mr Pudney—We do not often represent perpetrators unless they plead guilty, because of the conflict situation. We do not want to be in the situation of cross-examining and downplaying something that is a serious matter.

Ms PLIBERSEK—So you refuse that work and refer them elsewhere if it is, say, an Aboriginal male perpetrator and an Aboriginal female victim?

Mr Pudney—Or a child.

Ms PLIBERSEK—Or a child?

Mr Pudney—Yes.

Ms PLIBERSEK—I am pleased to hear that. You said in your submission that you are a criminal defence service. Is that your own definition or is there a formal definition somewhere that says you are a criminal defence service?

Mr Pudney—Because of the way the funding works, when we employ solicitors we employ people who we think can do criminal defence work, because that is the bulk of our work. We can be lucky: the other female lawyer in Nowra at the moment had a long time with the legal aid commission doing civil matters, so she has been able to help us in some civil areas and we can expand out there. The partner of one female solicitor in Canberra was in the community legal centre, so he was able to help us. At the end of the day, because 90 per cent of our work is criminal defence work, they are the quality of people we need. But I would rather be a specialist legal service with family law and civil law lawyers and, as I said, pick up people, especially females, who the legal aid commission do not pick up.

CHAIRMAN—I do not want to misrepresent you, but I believe you said that you had some difficulty understanding how you could tender out legal services. Do you have any idea of how companies tender out their audit services, and how the two are different?

Mr Pudney—This is fixed price, so ATSIC are going to say: 'This is the amount of money you get—

CHAIRMAN—You have not seen the tender request yet, have you?

Mr Pudney—No.

Ms PLIBERSEK—But you have seen the exposure draft.

Mr Pudney—We have seen the exposure draft and it says that hopefully the new criminal stats will be used, so there will be a redistribution. It says: 'This is the money you are going to get. What services can you provide for that?' That is different to tendering for an audit service in that you want the whole system audited and you are looking for the cheapest one, so they can cut corners and cut costs whereas, for a fixed price tendering service, the only way you can make a profit—which seems difficult to understand—would be to cut services.

CHAIRMAN—Or improve efficiency.

Mr Pudney—You can improve efficiency. In New South Wales we have been at the forefront of the reform process since 1997; we tendered for our services in 1999. The six services were the ones who got the tender. Why should we have to tender again when the tender document says that in 2007, at the discretion of ATSIC, they can give somebody else another three, four or five years?

Ms PLIBERSEK—One thing that is interesting to note is that you say in your supplementary submission that John Boersig was the coordinator of COALS. Is he the fellow now in charge of the tendering process at ATSIS?

Mr Pudney—Yes. He started there on 1 March this year.

Ms PLIBERSEK—So you know each other?

Mr Pudney—Yes. There is a submission that John Boersig put together on behalf of COALS on 24 February 2002, which is a wonderful, extensive and, as always, professional look at the needs and histories of specific legal services.

Ms PLIBERSEK—I do not know whether the secretariat has a copy of that.

Mr Pudney—I do not know whether you have a copy of the review and evaluation of circle sentencing.

CHAIRMAN—No, but you can give both of those to us.

Ms PLIBERSEK—We would love that.

Ms GRIERSON—Do you personally provide legal services to non-Indigenous people?

Mr Pudney—No. But the stats are a bit funny there, because we actually appear for non-Indigenous people who are partners of Indigenous people. Looking at the figures for Aboriginal people in custody, we have appeared for maybe two per cent extra than those, because people generally marry in the same socioeconomic groups. Probably five out of 100 would be non-Indigenous partners or parents of Indigenous people.

CHAIRMAN—Be careful of generalities!

Mr Moore—I would like to make a brief comment in response to a press release that was put out by the Chief Minister of the ACT this week. He said that they were trying to create their own

legal service in the ACT. I would like to put it on record that this particular scenario has been tested both at the regional council level and at the board level at SEALS, and we have representatives from the ACT on our board. There has been no consensus of opinion on this issue about having a separate legal service for the ACT, and I know that they are going to give you their view.

CHAIRMAN—Thank you. If we have further questions, would you mind if we put them in writing and asked you to respond in writing?

Mr Pudney—We would be happy to come across at any time to talk to you.

CHAIRMAN—Thank you very much.

[2.51 p.m.]

DICK, Mr Darren, Director, Aboriginal and Torres Strait Islander Social Justice Unit, Human Rights and Equal Opportunity Commission

HOLLAND, Mr Christopher, Policy Officer, Aboriginal and Torres Strait Islander Social Justice Unit, Human Rights and Equal Opportunity Commission

LENEHAN, Mr Craig Lindsay, Acting Director, Legal Services, Human Rights and Equal Opportunity Commission

CHAIRMAN—I welcome representatives of the Human Rights and Equal Opportunity Commission. Does anyone have an opening statement?

Mr Dick—The Social Justice Commissioner, Bill Jonas, is not able to be here today because he is recovering from surgery he had on Friday. He has provided a statement.

CHAIRMAN—Could we incorporate it in *Hansard*?

Mr Dick—Certainly.

CHAIRMAN—Unless it has new information that we need to know instantly.

Mr Dick—No—it is basically five key points that the commissioner wanted to ensure—

CHAIRMAN—Could you tell us what those key points are?

Mr Dick—Sure. Then I will not read the whole thing. The first point is to express the commissioner's concern at the lack of progress over the past decade in addressing the rates of over-representation of Indigenous people in the criminal justice processes—we are sure you are aware of the figures on that—and to emphasise that the commissioner sees these figures as revealing a crisis in the rate of contact of Indigenous people and that this must be a central objective of any reconfiguration of law and justice services for Indigenous people.

The second point is concern at what we see as the critical underfunding of legal services for Indigenous people that has occurred over the past decade and noting that, at a time when rates of over-representation have been rising, there has been no change in funding in real terms, with the consequence of services becoming increasingly reactive and demand driven, particularly in criminal justice areas, and less devoted to education and prevention. Also, the longer term impact of this underfunding will be deterioration in the level of services able to be provided in civil law, family violence and other areas.

The third issue is that it is often Indigenous women who pay the price of this underfunding in that they are not receiving the services, as the funding does not extend to that. The fourth point to note is that in recent years there have been some very positive developments in community based justice mechanisms. These provide a way out of the ongoing problems of the criminal

justice system. There is a critical role for ATSILS—Aboriginal and Torres Strait Islander legal services—to play in these processes if they are funded to do so. Finally, the Commissioner has a number of concerns about the tendering out process. We have elaborated on those in the materials we have given you.

CHAIRMAN—At great length.

Mr Dick—Yes.

CHAIRMAN—Thank you for that. You point out fairly strongly that the commissioner has concerns about the draft tender document, which resulted in your attachment A and which really is quite substantial. The first criticism was that certain provisions of the exposure draft may breach the prohibition of racial discrimination in the Racial Discrimination Act 1975. You go on to say that there are two straightedged priorities in the policy decision and they give two breaches of the Racial Discrimination Act. If we could deal with those separately, we will look first at 3.9 where it says that essentially you ought to deal with matters other than minor traffic offences or public drunkenness. The policy assumes that you would deal with other matters which are deemed to be more important than those first. You are claiming that will breach the Racial Discrimination Act. You are not nitpicking by any chance, are you?

Mr Dick—No, I do not think we are, not at all.

CHAIRMAN—You would rather that people who are charged with a serious offence and who we might help to stay out of the justice system—that is, to stay out of incarceration and out of jail—are not to be helped because we have got this big caseload of people trying to fight public drunkenness?

Mr Dick—That is not the point we are making at all. Paragraph 3.9—

CHAIRMAN—I did not say you were making that point. I am asking you: is that not reasonable to assume?

Mr Dick—Paragraph 3.9 is saying it should be the exception rather than the rule that there be representation provided to people who are charged with minor offences such as public drunkenness. The concern we have, and Craig will elaborate on this in relation to the RDA, is that if you look through the statistics and royal commission report and other things, then these are offences that are the gateway for Indigenous people into the criminal justice system and establish that pattern of criminalisation, for want of a better word.

There are also areas where there is a large degree of discretion in whether their charges are brought forward, and a whole range of other issues. Accordingly I suppose you could say it is quite dangerous that by providing that it is the exception rather than the rule that there be representation in these issues, you are then opening up the possibility of a greater level of contact of Indigenous peoples than there otherwise would be. I would suggest that this has also been an historic concern for a number of years. For example, the royal commission suggested that all offences of public drunkenness be abolished because of the effect they were having on bringing Indigenous people into that system in the first place. That is where the concern lies. It is not prioritisation that a minor offence should be dealt with rather than a major offence.

CHAIRMAN—Do you accept that there will never be enough public money to do all of the things that you or I or others might like to be done?

Mr Dick—Of course we do.

CHAIRMAN—Do you accept then that somehow there has to be some ordering of priorities and matters. For instance, if a 95-year-old presents at hospital for a million dollar procedure and 10 15-year-olds present for procedures that cost $100,000 each, what does one do?

Mr Dick—Of course we accept that.

Mr Lenehan—That is not the point the commissioner has sought to make.

CHAIRMAN—I missed it then.

Mr Lenehan—In the submission he has suggested that there may—and I emphasise may—be two breaches of the Racial Discrimination Act. The first may arise if the criteria are applied differentially to Indigenous people as opposed to people of other races or ethnic backgrounds. That is popularly referred to as direct discrimination. That is potentially a breach of section 9 of the Racial Discrimination Act, and that is something that the commissioner has suggested should at least be considered.

The other way that the RDA may be relevant, as Mr Dick has suggested, is that it may be that these criteria have a disparate impact on Indigenous people. The act provides for what is popularly referred to as indirect discrimination. Built into the definition of indirect discrimination is the criterion of reasonableness. Reasonableness, if a court came to consider this, would have regard to things you have mentioned, such as financial constraints. It would also look to the potential discriminatory effect on Indigenous people. So there is a balancing exercise there. The commissioner has not suggested that these criteria would necessarily breach the act. He has raised these as matters of concern that should be considered.

CHAIRMAN—The second one, which I thought was of concern, says:

> Where a Provider has previously represented an applicant charged with a criminal offence involving violence, assault or the breach of a restraining order, and the circumstances of the two cases are the same or similar, the Provider may refuse to represent the applicant and refer the applicant instead to a service providing appropriate counselling and support (where such a service is available and reasonably accessible).

The commissioner seems to believe that that may be a violation of the Racial Discrimination Act as well.

Mr Lenehan—Sorry, were you asking a question, Chair?

CHAIRMAN—Yes. Is that right?

Mr Lenehan—That is what is said in the submission, yes—that it may. Do you want me to elaborate as to why?

CHAIRMAN—Do you believe that is a serious concern or is this just a minor matter?

Mr Lenehan—The commissioner takes seriously all potential breaches of the RDA. We would probably take exception to the use of the word 'nitpicking' for acts which may breach the Racial Discrimination Act. Acts which breach the Racial Discrimination Act are unlawful.

CHAIRMAN—In your view.

Mr Lenehan—No.

Ms PLIBERSEK—If they are breaches, they are unlawful.

Mr Lenehan—They are breaches of the law of the land.

Ms PLIBERSEK—I take it that you see that as potentially a breach of the Racial Discrimination Act because if, in similar circumstances, someone were applying to the Legal Aid Commission for help they would not be turned away because it was a repeat offence, so to speak.

Mr Lenehan—That would certainly be the reasoning if a claim of discrimination was brought under section 9, which is the direct discrimination provision. That provision looks to see whether there is, for example, a criterion applied to one group which is defined by reference to race and not applied to another group. I can give you more details as to what sorts of factors a court might take into account, but they are specified in the submission.

Ms PLIBERSEK—I think we get it. In the submission the commissioner talks about the fact that Indigenous women are dissuaded from seeking the legal services provided by ATSILS because of their focus on criminal matters at the expense of family and violence-prevention matters. We have heard a lot of evidence about that today. Your submission says the chief cause of ATSILS' focus on criminal matters is:

... "the first-in, first served nature" of ATSILS work. The lack of alternative service providers in many of the jurisdictions in which ATSILS operate means that even if the victim sought ATSILS assistance first, if refused, they at least have the option of seeking police assistance. However, were the ATSILS to turn away the perpetrator, he would have nowhere else to seek representation.

But you also, in your submission, talk about cultural inhibitions, such as the belief in the sanctity of kinship and fear of community retribution, which discourage and dissuade women from seeking legal support outside. Today we have heard from the South Eastern Aboriginal Legal Service that they agree. They believe that Aboriginal women are unlikely to approach mainstream services. So when you say in your submission that victims might seek police assistance, for example, any sort of realist would understand that that is not likely to happen. In fact, using your definition of indirect discrimination, you would have to say that that was an example of indirect gender discrimination. Just saying that a mainstream service is available for a person who you know is not going to use that service hardly makes up for the fact that the Indigenous-specific service is not available to them, wouldn't you say?

Mr Dick—Yes. The quote you read was an ATSIC quote—us quoting them.

Ms PLIBERSEK—So you are concerned about Indigenous women not having access to legal services for those reasons?

Mr Dick—Absolutely.

Ms PLIBERSEK—What do you think should happen?

Mr Dick—We think that it is tied to issues relating to under-resourcing of legal services, which has been a historic issue as well. There have been changing priorities that are being sought to be imposed on legal services. They are being asked to choose. Someone is about to lose, potentially, subject to a loss of liberty, the supporting family violence cases—those sorts of things—and it is being set up as an either/or situation, when in reality it should not be. The support needs to be there for both. Historically, the under-resourcing that has existed at least since 1992 needs to be addressed in the funding of these services. We know there are not unlimited resources, but we think there are inequalities in the level of resourcing and that there is a significant level of under-resourcing. One of the comments we made in the recent social justice report, which is provided to you, is that there is an urgent need for appropriate funding levels for ATSILS in order to provide a greater focus on the legal needs of Indigenous women, as well as a greater focus on prevention and community education, and an urgent need for additional quarantined funding to expand the Family Violence Prevention Legal Services program as well.

Ms PLIBERSEK—Do you think that the Family Violence Prevention Legal Services will de facto become the services for victims of violence, mainly women, and that the ATSILS will become de facto the services for men, mainly perpetrators?

Mr Dick—Yes, I think that could be an issue.

Ms PLIBERSEK—Do you think that is a problem?

Mr Dick—Potentially it is quite a large problem.

Ms PLIBERSEK—What do you see the problem being, aside from resourcing? It is probably much easier to make an argument for increased legal funding than prevention funding. If you look at the way the funding is distributed at the moment, a lot of it is going to legal services and very little is going to prevention. The Family Violence Prevention Legal Services could become the services for women, but they are identified as preventative services. Obviously you would be worried about whether they have access to the same level of resourcing.

Mr Dick—Yes. You certainly do not want to see a situation where ATSILS become seen as male Indigenous legal services and there is a bifurcation of female legal services—

Ms PLIBERSEK—That they become further seen that way.

Mr Dick—which may well come to be. The Family Violence Prevention Legal Services in many ways appear to be an add-on in the way of remedying an existing problem.

Ms PLIBERSEK—Because the existing Aboriginal legal services do not really want to change, do they?

Mr Dick—That is a possibility in this case.

Ms PLIBERSEK—You welcome the new priority assistance categories for the provision of legal aid, where the safety and welfare of a child is at the top of the list, the personal safety of the applicant is next and keeping people out of jail is a bit further down?

Mr Dick—They are equal, aren't they, I think. There are three priorities. I certainly accept the three priority areas.

Ms PLIBERSEK—Do you think that anything is going to change by changing the six priority areas to those three? Do you think there will be any actual change in the way ATSILS deal with clients?

Mr Dick—One point that we made very much in the latest social justice report around family violence issues is the tendency for those issues to often be described strictly within a Western framework and identified solely as a legal issue. The other priorities around law reform—the more educative and preventative type roles—are important roles as well. One comment we were making in the introductory statements here was around the importance of the development of community based justice mechanisms, such as the Lajamanu and the Ali Curang projects in the Northern Territory—the law and justice strategies—which emerged out of Indigenous women saying, 'We've had enough of this situation,' and seeking to re-empower the community to deal with these issues. It is never strictly a legal issue; it crosses over the whole range of other issues that are there.

Ms PLIBERSEK—People used to say that of family violence in any community. I think that, once you start talking in those terms, you skate dangerously close to saying it is a personal matter for people to sort out within the family.

Mr Dick—No, that is not what I am trying to imply or say. I am saying that the narrowing of the functions of those legal services tends to move away from seeking more innovative solutions to problems and takes us away from looking strictly at this as a victim-offender sort of framework, which a number of Indigenous women say is not the reality. The men go into prison for these offences, they come straight back into the community and there is payback. Nothing has changed for the women and the cycle goes on. That is not to say you should not criminalise it; of course you should.

Ms PLIBERSEK—That is a good reason for not letting people out of jail, if that is what is happening.

Mr Dick—You need a lot of change in those communities. We are seeing that the sorts of processes that seem to be having the most success in breaking that cycle are more these community justice mechanisms to empower communities. Yet we have these sorts of processes which, in a way, are diverting the priorities away from that innovative community based control, I suppose.

Ms PLIBERSEK—Except that, statistically, women are more in danger of violence when their partners are undertaking behaviour modification, anger management or whatever courses. The incidence of violence generally increases at that time. In fact, women are most likely to be

killed just after they leave their violent partners. While I understand what you are saying about investigating other models, I do not think that we can afford to give people excuses for continuing behaviour which is criminal and incredibly damaging to their communities.

Mr Dick—We are not seeking to imply that at all.

Ms PLIBERSEK—No, I did not think you were. I think we need to be very clear when we are on the public record talking about these things.

Mr Dick—Certainly.

Ms PLIBERSEK—You mentioned a few times the need for greater funding. Do you think that doubling the number of family violence prevention legal services is adequate or do you think there needs to be more on top of that?

Mr Dick—We might have to take part of that on notice. Clearly, the comment made by the South Eastern Aboriginal Legal Service was that issues relating to family violence exist in all communities. That is a problem that has to be addressed, and the doubling of services will not result in the additional coverage nationally that is needed, so it is a dilemma.

Ms GRIERSON—You do say in your recommendations that it should be new money. So it definitely needs new spending, but it should be quarantined specifically. Why do you make such a point that the moneys for family violence prevention should be quarantined so it is specifically spent on that? Is there an issue on that at the moment? Is it diverted?

Mr Dick—It is a concern. There are a number of key issues that need to be addressed, including overrepresentation type issues and criminal justice issues. Simply moving the funding away from representation of the people facing charges, ranging from deprivation of liberty to family violence, is also not an acceptable alternative. It should be recognised that, historically, the funding has not been there and it needs to be given a priority. We are not talking huge amounts of money either. For 400,000 Aboriginal people in one of the wealthiest countries in the world, it is not an impossible task.

Ms PLIBERSEK—We are about to spend $100 million on government advertising right before an election campaign. That would go a long way, wouldn't it?

Mr Dick—Yes.

Ms PLIBERSEK—I have one final question in relation to tendering. You are talking about the extra resources that could be spent in the areas of criminal defence or family violence prevention, or whatever. We heard from ATSIS this morning that the tendering-out process was going to free up a whole lot of resources that are currently being used inefficiently in states like Queensland to provide administrative support. We heard later in the day from the South Eastern Aboriginal Legal Service that the sort of support work they do—going the extra mile thing, where they are doing social work, not just legal representation—will not get picked up in a tender. Where do you think the balance of public good lies in an area like that?

Mr Dick—The social justice commissioner has strongly supported there being good corporate governance and efficiency in the delivery of services. I think Aboriginal people expect that as much as non-Aboriginal people.

Ms PLIBERSEK—Do you have to tender out to get that?

Mr Dick—That is what I was going to say. I do not know that the fact of tendering is the way that you get that. The other factor is one that the legal service just spoke about—it is a little bit off your point but it is of equal importance—and that is the role of the field officers. We underline the importance of those field officers to Aboriginal legal services and the fact that there is no equivalent in any other form of legal service delivery. We have given you information about the national Indigenous legal advocacy courses that have been developed to provide basic skills development for those field officers, but a problem that has often come up with NILACs to date has been that, as the legal service said, they do not have the money to backfill. They cannot even offer the training to people. Often these people are taking quite complex tasks and providing assistance with absolutely no training. This extends to appearing in bail applications, getting people who have been arrested out of court houses, dealing with situations of violence—all sorts of things.

It is quite a serious issue, and the sort of professionalisation that is there in the support of Indigenous workers is also a critical issue in terms of efficiency. Obviously you are going to have much greater efficiency with professionally trained staff, which is a real problem. The attempts to deal with that are the fantastic courses that exist. They are there to be used in the VET sector, and they are being used by a number of field officers and legal services, but less so than they would want, because they cannot release people from their jobs. It is such a chronic situation of underfunding that I think it is quite difficult to deal with.

Ms GRIERSON—The commissioner's recommendation that the tender provide for culturally appropriate service delivery does reinforce the SEALS submission that we heard today. The spin-offs of professional and community development—capacity building in the community—should be factored into any tender, and it seems that there is great concern that that will not be so. The commissioner also mentions that there is a need to build prevention and education programs into any legal service operation. One thing that is not specifically said is the need for that in terms of youth. Do you have a comment on youth legal services that might assist us?

Mr Dick—A general comment that I am sure you are aware of is the Indigenous population structure and the fact that so many Indigenous people are young and entering ages where, traditionally, they come into contact with the police and into the need for legal services. So there is almost an explosion in the level of demand that that will be there. Often what happens is that, if someone is arrested or whatever, the legal service gets a call and they have to deal with it. It is an entirely reactive process in that sense, and it makes it a lot more difficult for them to proactively address the problem.

Ms GRIERSON—Do you think the tender document at this stage shows any sign of addressing that specifically—the need for specialised youth services and the growing need for those?

Mr Dick—No, I do not think it does. The comments that SEALS made about the funding formula and other things indicate that it is a fixed amount of money that is there. It is not tied to the legal need that may be there and particularly the legal needs of Indigenous youth.

Ms GRIERSON—I would like you to pass on my best wishes to Dr Jonas for a speedy recovery. He is also a Newcastle man; he is from just north of Newcastle. He is very much loved in our area.

Mr Dick—He is indeed.

Ms GRIERSON—So we do hope that he can one day not just get well but deliver justice for Indigenous people.

Mr Lenehan—I would like to add to my answer to Ms Plibersek, who unfortunately has now left the room. In terms of criterion 3.10, the commissioner's concern is not simply with direct discrimination, which was the topic of Ms Plibersek's question. It is also with indirect discrimination, which is section 9.1A of the act, and the disparate impact that 3.10 would have on Indigenous people. As we have pointed out in the submission, only a small minority—17 per cent of Aboriginal male defendants and 27 per cent of Aboriginal female defendants—have no previous court appearances. For that reason, we think that there is an issue in terms of indirect discrimination as well.

CHAIRMAN—Thank you very much. If we have any further questions we will put them in writing, if you do not mind. I thank the witnesses, my colleagues, the secretariat, observers and Hansard.

Resolved (on motion by **Ms Plibersek**):

That this committee authorises publication, including publication on the parliamentary database, of the proof transcript of the evidence given before it at public hearing this day.

Committee adjourned at 3.21 p.m.