

## **About me**

I am a barrister in Canberra and until very recently was the principal of Saunders and Company, a specialist criminal law firm. I have also been at the Sydney Bar and when I came to Canberra in 1994 worked in the criminal law section of the ACT Legal Aid Office for several years. Previously, I was Associate to Judge Madgwick (as he then was - on the NSW District Court) and before that was a social worker in child protection in NSW for 10 years. In those 10 years I worked in Walgett as a District Officer and later at the Dubbo regional office as Child Protection consultant for the western region of NSW. In 1997 the ACT Legal Aid Office loaned me to the Law and Justice Section of ATSIC for several months to assist in the development of practice and procedures for the ATSILS. That project was designed to fend off the present proposal to incorporate ATSIL services into the mainstream Legal Aid systems. ATSIC required the services of a practising solicitor to advise on the realities of legal practice and on ethical matters.

## **The matters set out in your document for discussion**

### **A) Distribution of resources**

My area of speciality is the criminal law. I include in that general heading the related issues of domestic and family violence, including protection orders and victims compensation. I also include child welfare matters because the State is the common prosecutor in both criminal and child welfare proceedings.

There is no doubt that criminal cases use up most of the ATSILS' budgets. That is because criminal law is, by its nature, urgent and serious. The deprivation of liberty of a subject is one of the two most serious and invasive powers the State has, the other being the removal of a child from its family. When a person is arrested the ATSILS are required to act immediately - as do the Legal Aid Commissions - in representing the person on a bail application. If the person is refused bail the ATSILS are ever conscious of the possible consequences of keeping the person in custody and they act to encourage the courts to deal with the matter expeditiously. If the person is allowed bail the urgency goes out of the situation but most Aboriginal people are represented by ATSILS for the duration of the case.

Child Welfare proceedings are also carried out, in the main, as urgent and serious court applications. The placement of the child during adjournments and until the matter is finalised is a matter of grave concern to the ATSILS.

The history of Aboriginal deaths in custody and the stolen generation make these two areas extremely important to the staff of the ATSILS. Accordingly, family law and litigation are not accorded priority for the services of the solicitors employed by the ATSILS. I do not see how this can change - unless there is a vast amount of money given to the ATSILS to allow them to become more like the Legal Aid Commissions in the provision of a full legal service.

### **B) Memoranda of Understanding with Legal Aid Commissions**

If the Legal Aid Commissions are to take over the work of the ATSILS they will have to change some of their existing work practices. At the present time the LACs require application forms lodged and processed before acting for a client. If the client does not turn up for appointments or at court the solicitor simply withdraws. That just does not work with indigenous clients. Form filling has to be minimal, if at all, and there has to be a system of getting the client to court. At present the ATSILS do this well, with Field Officers going out to look for clients who fail to appear. Cultural sensitivity is perhaps the most important consideration when appointing solicitors to do this work - and I don't mean understanding Aboriginal traditions or customs but the much more important concepts such as "shame", community politics and a genuine and demonstrable respect for the clients. I do not think many Legal Aid solicitors or other staff have a n understanding of these issues . It is easy, and understandable, when one is a Legal Aid solicitor and with many clients to prefer to deal with clients who are co-operative.

My experience of working with Aboriginal clients at the Legal Aid Office (ACT) is that they are usually people who, for community political reasons do not want or will not be represented by the ATSILS. This could be because the person comes from a family warring with another family who have some involvement in or control of the ATSILS. Where Aboriginal clients come to the LAC they tend to be very shy and wary and difficult to act for. I strongly believe that Aboriginal people do not like dealing with the LACs because it appears too bureaucratic and the solicitors do not understand Aboriginal problems and reticence.

### **C) Access for Aboriginal woman**

In my experience women are the first to be ditched when the ATSILS are setting their priorities. This is probably due to the fact that men are the principal users of the criminal justice services but it is also because women tend not to insist on the provision of services. In my experience women are much more likely to come to a LAC for assistance than a man. In the ACT the Legal Aid Office provides a duty lawyer scheme for Protection Orders and most Aboriginal women needing assistance would use that service. This is due in no small part to the lack of capacity of the ATSILS to provide a service in those matters because of the competing demands to provide a criminal law service. Those demands are not only of an ethical nature (that is, the conflict which arises when a legal service cannot act for both the victim and the offender) but because the ATSILS solicitors are already trying to spread themselves between a number of courts at a time.

### **D) Recruitment of staff**

This is a very vexed question. In my experience the ATSILS - I speak very generally here and there are some very notable exceptions - attract solicitors who are so junior they are (at least at first) of no real use or more senior solicitors who, for one reason or another cannot work in a more conventional legal practice. The latter tend neither to be efficient nor competent enough to run the extremely serious and difficult matters which they are required to - and inevitably the clients suffer. This is no doubt due to the dreadful wages they earn - and the fact that as often as not they are simply not paid at all. Senior practitioners who might be attracted to this very difficult work often cannot afford to do it. It is no doubt a considerable attraction when one is being paid so badly to have the benefits of not answering (professionally, at least) to anyone, being out of contact for long periods of a time from the office, no time recording required and no tedious office rules about accounting for work done or not done and allocation of funds. This is a very harsh view but my time at ATSIC when I dealt with ATSILS all over Australia and my own experiences in Sydney and Canberra have led me to this view. The difficulties are not improved by the over-involvement of management committees who are often highly politicised and make working in an ATSILS very difficult. Several very good lawyers I know who have worked for ATSILS left because of the politics and unreasonable and unprofessional directions from management committees.

### **E) Tendering**

I simply do not think this will work. Remote areas of Australia do not have local firms of solicitors willing or able to do the work presently done by the ATSILS. The LACs are already providing whatever service is necessary and presumably cannot provide more. Why would a private firm want to bid for this sort of work? It would be logistically difficult, hard to find staff wanting to do the work and inevitably the auditing and administrative arrangements would be time consuming and tedious.

In cities and urban areas again the difficulty is in finding firms who want to take on this task - with the attendant bureaucratic requirements. To perform the job adequately firms (or indeed LACs) will need to employ field officers and be able to pay for the costs associated with getting the client to interviews and to court.

## **CONCLUSIONS**

If the ATSILS are to be subsumed into the LACs I beleive they should form a discrete working unit within the LACS which provide advice and representation for Indigenous clients and such a unit should provide services such as those presently provided by the Field Officers. Such a service should also provide Family Law Services and whatever civil litigation services are presently provided to the general population by the ATSILS.