

Submission to Joint Committee of Public Accounts & Audit - ATSILS

31 May 2004

Joint Committee of Public Accounts and Audit,
Commonwealth Parliament,
Parliament House,
Canberra, ACT, 2600

Dear Sir/Madam,

Re: Indigenous Law and Justice Inquiry

Thank you for the opportunity to make a submission regarding the above inquiry.

Context of service delivery in the NT

In the NT, 25% of the population are indigenous and the vast majority of them live in very small and remote communities. Most of those communities are visited once per month (or less) by courts and legal services. Most of the communities, particularly in the Top End, can only be accessed by plane and the cost of traveling to the communities is very high. Most of the legal services provided to remote communities are provided by ATSILS and in some communities, the services are expected to deal with more than 60 clients in 2 day court sittings and are generally serviced by one lawyer and one field officer. Most of the people appearing before the courts speak English as a second, third or fourth language so there are additional expenses required for interpreters. It is rare that the lawyers, who also have overwhelming numbers of clients to service in the Darwin courts, are able to spend any more time in communities to address any other legal issues in the communities. Even if ATSILS were able to spend a longer time in communities, high levels of conflicts means that they are unable to provide assistance to many people in other areas of law, other than criminal law. Women's legal services and Family Violence Prevention Services visit some of these communities to provide assistance to women in domestic violence and family law, however, their resources do not enable them to provide services in all communities. There is often only one public phone (which is often out of order) and very few private phones so the ability to access services in Darwin by telephone for advice and assistance is limited. There are no private lawyers in any of these communities. 80% of the NT prison population are indigenous.

a) The distribution of Aboriginal and Torres Strait Islander Legal Services resources among criminal, family and civil cases

The majority of work performed by Aboriginal and Torres Strait Islander Legal Services (ATSILS) in the NT is in the area of criminal law rather than family and civil law. However, this is not an indication of service priorities set by the ATSILS but rather a result of the order in which the legal needs are presented to ATSILS and resulting conflicts that prevent ATSILS assisting in other areas of legal need. For example, when an assault occurs by an Aboriginal assailant involving an Aboriginal victim, there are a number of legal actions which may result, ie., criminal charges, an application for a domestic violence restraining order, a family law dispute and an application for crimes compensation. The typical order of events will be that the criminal charges will be laid immediately and the accused will be taken into custody or will be summonsed to appear before the court. The accused will therefore present to the ATSILS with a need for legal assistance with criminal charges before the victim seeks legal assistance for domestic violence, family or civil legal assistance. By the time the victim seeks legal assistance, the ATSILS will generally be conflicted from providing assistance to the victim. In most of these cases, the accused is a man and the victim is a woman.

ATSILS are now investigating establishing “Chinese walls” to overcome conflict problems to enable more work to be kept “inhouse”, however, this can be very difficult in small jurisdictions. Even if a physical separation between legal practices can be achieved, to enable assistance to be provided to both parties to a dispute, the perception that the legal practices are from the same office is difficult to overcome, particularly in remote communities. Establishing “Chinese walls” is also more expensive as not only are lawyers working in completely different practices, but administrative staff and field officers can no longer work between the practices. This reduces the ability of ATSILS to “share” these resources between different sections and practices and requires additional staff to be employed. Additional resources would be required for ATSILS to be able to overcome conflicts that prevent them providing assistance in particular areas of law.

To suggest that ATSILS should do less crime to enable them to reduce conflicts and provide assistance in other areas of law is to ignore the overwhelming needs of indigenous people in criminal law and the need for specialized services to address those needs. Recent prison statistics in the NT show that the level of incarceration of indigenous people has increased. The findings and recommendations of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) are as relevant today as they were then, particularly those relating to the need for specialized ATSILS to deal with criminal matters. This is particularly the case in the NT where a large number of indigenous people speak English as a 3rd or 4th language, many live in very remote communities and there is a long history of distrust of all aspects of the criminal justice system. The fact that ATSILS are identified by indigenous people as services which are run by indigenous community councils and employ indigenous people as lawyers, client service officers and administrative staff goes some way to bridging the divide between indigenous clients and the criminal justice system.

It has sometimes been suggested that ATSILS providing legal assistance to indigenous people in the criminal law area has not reduced the continuing over-

imprisonment rates of indigenous people, however, this suggestion ignores the causes of over-imprisonment rates which is due to a large range of factors, for example, over-policing of indigenous people, alcohol abuse and more extensive criminal histories of indigenous people appearing before the courts. It is in fact arguable that if ATSILS had not been providing legal services to indigenous people in criminal law, that the current crisis would be much worse.

To suggest that ATSILS should refuse to provide legal services to people charged with minor offences where they are not at risk of imprisonment (for the particular charge faced), is to risk an even greater escalation of prior offences for indigenous people which could lead to even greater imprisonment rates in the long term of indigenous people. Research conducted by Chris Cunneen in the NT in 1998 comparing indigenous vs non-indigenous charging rates and imprisonment rates imposed for particular offences, found that prior convictions were the major cause of the differential rate at which indigenous people are imprisoned. The suggestion also ignores the inability of many ATSILS clients to represent themselves in court due to language and cultural barriers.

Instead, greater resources are required to provide legal services to indigenous people. Greater resources are required for specialized indigenous services to enable them to provide services to meet the huge unmet legal needs of indigenous people, particularly indigenous women in remote communities in the area of domestic violence, for example, Family Violence Prevention Services and Women's Legal Services. There are currently 6 major indigenous communities where the NT Courts sit on a regular basis in the NT where these services are unable to attend on a regular basis due to lack of resources.

Similarly, greater resources are required for ATSILS to enable them to provide services in areas where they are not conflicted but where there are unmet legal needs that ATSILS are unable to address due to lack of resources. Civil legal needs of indigenous people in remote communities is one such area that could be addressed by greater resources being provided to ATSILS to enable them to provide civil legal services in remote communities.

There is also a need for ATSILS to be resourced properly to enable them to provide preventative legal services, ie., in the area of community legal education and policy/law reform roles. This would enable ATSILS to provide services to inform indigenous people about the law, through both face to face sessions and through the publication and production of materials which are culturally appropriate and in languages and media that are accessible to indigenous people. It should be noted that indigenous languages are not widely understood when reduced to the written word. Instead, videos and audio-based medium need to be used to deliver complex legal information which again, requires more resources than would be required to produce the same information for non-indigenous people. Specific funding for policy personnel would also enable ATSILS to address systemic legal issues through policy responses which impact disproportionately upon indigenous people. Currently, ATSILS in the NT are not funded to provide these services.

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

The NT Legal Aid Commission now provides services to a large number of indigenous people. The percentage of indigenous clients seeking assistance from the NT Legal Aid Commission has increased from 13.64% of total applicants in 1999/2000 to 19.42% in 2002/2003. This figure has increased further since the NT Legal Aid Commission commenced providing the Domestic Violence Legal Service in Darwin in August 2003 with approximately 25% of clients of that service being indigenous. It should be noted that only \$180,000 per annum is provided for the Domestic Violence Legal Service by the NT Government. Currently, the NT Legal Aid Commission is subsidizing this service out of other resources by approximately \$70,000 per annum. The funding provided means the service is limited to the Darwin area alone and that the Commission is unable to extend this service to remote communities.

There have always been informal arrangements between NT Legal Aid Commission and NT ATSILS to work cooperatively together in terms of conflict referrals, community legal education and policy/law reform responses. However, recently the NT Legal Aid Commission has formalized cooperative service arrangements with several NT ATSILS in some specific areas of law. Currently, the NT Legal Aid Commission has a protocol in place for the referral of conflict matters from NAALAS (based in Darwin) and arrangements for how those referrals will take place. There is also in place a formal arrangement for the referral of certain indictable criminal matters from NAALAS to the NT Legal Aid Commission to overcome NAALAS resource difficulties in briefing senior counsel for serious indictable matters. The Commission also has a formal arrangement with the Miwatj Aboriginal Legal Service based at Nhulunbuy for the referral of indictable criminal matters which are ultimately resolved in the Supreme Court in Darwin. The Commission is also currently developing a further protocol with NAALAS for the referral of family law and domestic violence matters in Darwin to the Commission. Protocols are determined on a service by service and year to year service depending on needs and resourcing levels of both the ATSILS and the Commission. The protocols generally include a provision for ATSILS' client service officers to assist in obtaining instructions and locating clients.

Most indigenous people in the NT refer to ATSILS as "legal aid". ATSILS are managed by indigenous community councils and are staffed predominantly by indigenous people in management, administrative and client service officer positions. ATSILS travel on a regular basis to remote communities, unlike the NT Legal Aid Commission and ATSILS offices are located in buildings and locations which are easily accessible to indigenous people. There is no doubt that for most indigenous people in the NT, ATSILS are the legal service provider of choice. It is clear that when indigenous people are referred to the NT Legal Aid Commission by NAALAS for civil or family law assistance, that often those people will not bother to attend the Commission for advice and assistance. It is understood that this is generally because indigenous people do not feel comfortable accessing Legal Aid Commission offices. Steps are currently being taken to improve this situation but it is acknowledged that this will not overcome the fundamental preference indigenous people have for legal

services to be provided by indigenous managed organizations, employing a majority of indigenous staff. Lack of access to specialized indigenous legal services therefore prevents indigenous people from enforcing their legal rights.

Even in areas where ATSILS are unable to provide legal services for particular indigenous groups due to conflict problems, for example, to provide assistance with domestic violence problems in remote communities, the NT Legal Aid Commission is limited in its ability to provide services due to current funding arrangements imposed by the Commonwealth (see below).

c) The access for Indigenous women to Indigenous-specific legal services

Indigenous women are disproportionately affected by domestic violence, rates of violence are high in many remote communities and the primary need of many Aboriginal women is in the area of protection from violence. Traditional methods of dispute resolution mean that many family law issues that non-Aboriginal people would seek to have resolved in the Family Court are dealt with within indigenous communities without seeking access to the Family Court, for example, child residence and contact issues. Different cultural values and attitudes concerning the raising of children also have an impact on the use of remedies by Indigenous clients available under the Family Law Act. Individual property ownership is a luxury that most indigenous people in remote communities do not have and therefore there are no needs in remote Aboriginal communities to resolve these matters through the Family Court. Therefore the remedies available under the Family Law Act are of limited value to Aboriginal women who seek some legal redress for violence. Other legal remedies, such as criminal proceedings and the use of restraining orders, are more commonly used where women seek legal protection following separation.

Feedback from existing service providers is that remedies available under the Family Law Act are inaccessible for many Indigenous clients due to the lack of Family Court services in remote areas and the difficulties in enforcing family court orders in remote areas where there are limited support services.

Instead assistance is sought from police and existing women's legal services. Even when police are used to seek domestic violence orders, there is a lot of pressure placed on women in small communities to discontinue proceedings in these matters. Perpetrators of violence are generally represented by ATSILS staff and there is a need for the victims of violence to receive support and assistance from alternative service providers. ATSILS cannot provide this service in remote communities due to conflict problems that could not be overcome in small remote communities.

Currently, the Commonwealth provides funding to the NT Legal Aid Commission to provide legal assistance in Commonwealth legal matters. The majority of Commonwealth funding received by the NT Legal Aid Commission is spent on family law matters. Commonwealth funding cannot be used to provide legal assistance in matters arising under NT legislation. Domestic violence restraining orders are obtained through the NT Domestic Violence Act. Commonwealth funds provided to the NT Legal Aid Commission can therefore not be used to provide legal assistance to people requiring assistance with domestic violence.

This is a difficult argument to present to indigenous women in remote communities when the legal services used to defend perpetrators of domestic violence, ie., ATSILS, are funded by the Commonwealth government. The huge expense in providing adequate legal services to indigenous women in remote communities, particularly for those women and children affected by domestic violence, is not something that the NT Legal Aid Commission (or any other legal service provider) could contemplate out of existing resources and would require a significant amount of funding from the Commonwealth and a corresponding recognition of their responsibility to provide this funding. The ability of the NT Government to provide the sort of funds required is limited.

It is the position of the NT Legal Aid Commission that the Commonwealth is abrogating its responsibility to provide family law services to indigenous women by relying on the Commonwealth matters argument to deny services for indigenous women and children affected by domestic violence. The current narrow formulation of family law services effectively discriminates against many Indigenous women and children. Protection from domestic violence is the primary area of family law need for indigenous women in remote communities.

For all of these reasons, there is a need for the Commonwealth to acknowledge that the current position adopted towards Legal Aid Commissions preventing Commonwealth funding being used to fund domestic violence matters is inequitable as it applies to Aboriginal women in remote communities. Aboriginal men may receive legal assistance from the Commonwealth but Aboriginal women cannot.

The existing models for providing assistance to indigenous women in domestic violence matters used by the Top End Women's Legal Service and other family violence centres in the NT are very successful, through the use of part-time indigenous women community legal workers who act as a liaison point between the legal services and the community assisted by regular visits from the lawyers to assist women at court sessions and to provide community legal education. The cost to provide services in this comprehensive manner is approximately \$100,000 per annum to visit each community.

Currently 6 major communities are not receiving services from these services in the NT. Resources provided to women's legal services and family violence prevention services are not enough to provide additional services. The NT Legal Aid Commission is unable to assist because of the Commonwealth matters funding rule and because of inadequate resources provided by the NT Government for this purpose.

d) The ability of Law and Justice program components to recruit and retain expert staff

Some NT ATSILS do have difficulty recruiting and retaining expert staff, particularly those based in remote areas. Some ATSILS also experience difficulty retaining experienced practitioners able to conduct complex and serious matters inhouse, in turn saving resources which do not then have to be spent on private practitioners undertaking this work. Lack of resources and an overwhelming and unrelenting client

demand mean that many staff of ATSILS are overworked and find it difficult to find time to prepare for matters adequately. There are inadequate facilities for taking instructions at bush courts and often solicitors and their clients are required to sit outside in the dirt, taking instructions for 60 matters listed for the 2 day court sitting, in circumstances where no instructions have been received before, the clients speak English as a 3rd or 4th language, interpreters are limited in availability and quality, there is no privacy provided for the taking of instructions and the Magistrate is impatiently waiting for matters to commence. The result is that legal staff working in ATSILS tend to have a limited time span in which they can sustain the workload and pressure. This means that, in some ATSILS, there is a regular turnover of staff which results in less experienced staff being recruited on a regular basis. It also means that there is little corporate memory built up in organizations where there is a high turnover. High costs of advertising nationally for legal staff and relocation costs from southern states to ATSILS in the NT put additional strains on overstretched budgets.

e) Tendering of Indigenous legal services

The proposed tendering of indigenous legal services, as outlined in the Exposure Draft released by ATSIS several months ago is misguided and could result in a severe reduction in the quality of services being provided to indigenous clients, if non-indigenous organizations are awarded contracts for the provision of legal services to indigenous people. It is the view of the NT Legal Aid Commission that, if ATSILS were to be operated on a commercial basis, on the funding available, it would be necessary to reduce the quality and/or quantity of services currently being delivered.

Despite 6 reviews in the NT which have highlighted the need for additional funding to be provided to ATSILS to address unmet legal needs of indigenous people, there is no additional funding being provided under the tender. Instead, the tender seems to be designed to get ATSILS to reduce services to a smaller area of priority services and refer the rest to existing service providers (who will not receive any additional funding either).

1. Priority categories are listed as:

- a. where the safety or welfare of a child is at risk
- b. where the personal safety of the applicant, or a person in the applicant's care is at risk;
- c. where an applicant is at risk of being detained in custody
- d. where a family member of a person who dies in custody seeks representation at an inquiry into the death

The priorities are listed as being an "order of priorities" (unlike Commission guidelines which do not purport to impose an order of priorities, but instead provide a list of priority areas, the order in which they are serviced being left to the discretion of the Commission).

The tender document specifically provides, "where the relative claims of two applicants are judged to be equal on other grounds, a Provider is required to give priority to an applicant resident in an area not serviced by a Legal Aid Commission in preference to an applicant who has a choice of legal aid service providers".

While there is no doubt that there will be a cost-shift to Commissions, the difficulty for Commissions is in ascertaining in which areas of law the increased demands will come. Depending on how the priorities are interpreted by ATSIIS and the tenderers, the increased demands will either be in criminal law or family law, or even both.

a) Increased demands in criminal law

One concern is that if funds are allocated to the first 2 priorities (which would be new ground for ATSIIS in the NT), then there will not be enough funds for the huge criminal needs. Clearly, these matters will fall to the Commission.

Increased demands for criminal representation from indigenous clients for assistance from the Commission will result in a major cost-shift from the Commonwealth to the NT Government. Under the current Commonwealth/NT agreement relating to legal aid, Commonwealth funds provided to Commissions can only be spent on Commonwealth matters. Therefore criminal law is funded by the NT Government. However, ATSIIS currently receive all funding from the Commonwealth Government, through ATSIIS, including for criminal matters. If a criminal matter is referred to a Commission, then this matter will need to be funded by the NT Government.

The priorities do not take account of the fact that some of the priority areas may be covered by existing service providers, for example, domestic violence legal services etc. which may mean the ATSIIS do not need to provide services in these areas. If ATSIIS reads the priorities strictly and insist on providers performing services in these areas, while this may address the unmet needs of indigenous women in rural areas for assistance in domestic violence matters, then ATSIIS will be unable to provide assistance to people charged with criminal offences in domestic violence related matters because of conflict problems. ATSIIS could overcome this problem by establishing Chinese Walls but would then be required to take 2 lawyers (and 2 indigenous client service officers) to each bush court. The resource implications of such an arrangement would be very onerous, particularly for ATSIIS servicing island communities where the travel expenses are already very high. It is possible that, if ATSIIS do undertake domestic violence assistance in remote communities, then Commissions will be required to provide criminal assistance in remote communities in conflict matters. The resources for travel would then need to be found by Commissions.

b) Increased demand in family law

Also, other than welfare of children and domestic violence issues, family law matters are not included in the priorities. There is therefore a real risk that once ATSIIS have provided services for criminal matters, there will be no funding left to provide assistance in family law matters. In the NT, most family law clients of ATSIIS are urban based indigenous people. In light of the requirement to refer clients to Commissions in urban areas where there are other service providers, it is likely that there will be an increase in family law clients being referred to the Commission.

c) Increased demands in civil law

While the tender document provides that ATSILS will be permitted to provide assistance in civil law areas, it is not listed as a priority area and there are unlikely to be enough resources left to provide civil law assistance once the other priority areas are addressed. It is therefore likely that there will be an increase in demand for civil law assistance.

ATSILS are specialist services that have been specifically established to provide services to indigenous people, the most disadvantaged sector of the community. ATSILS employ indigenous client service officers and are governed by indigenous community councils. ATSILS are best placed to understand the greatest areas of legal need for indigenous people and to target services accordingly. While the tender document specifies that one of the selection criteria is that tenderers must have the capacity to provide an accessible and culturally sensitive service to Indigenous Australians, the tender opens the door to a private legal firm winning the tender and it is unlikely that many private firms will have the experience or immediate ability to understand the greatest areas of legal need for indigenous people. It is difficult to understand how these new arrangements will lead to any reduction in the over-imprisonment rates of indigenous people, or address lack of access to justice issues experienced by indigenous people.

The tender requirements are onerous and will require intensive resources to be allocated by ATSILS to prepare a tender bid. It is also questionable as to whether the expertise to prepare the tender documents is currently available in ATSILS and there may be a need for experts to be hired to assist with the tender.

One of the requirements is that tenderers must certify that no existing or previous staff, office bearers or directors (without any time-limit) have “ever been called to account” by any professional, investigating, prosecuting or other authority, or subject of any proceedings, including criminal proceedings, for fraudulent, unethical, improper or inappropriate activities and if so, what was the outcome. In ATSILS where there has been a high turnover of staff, this requirement will be particularly onerous and in some cases, impossible to comply with. It is also difficult to understand the relevance where a person may have been convicted of an offence many years after leaving ATSILS.

There are also some concerns about whether ATSILS will be considered to be financially viable or not. For existing organizations, the tender document provides that ATSIIS will consider historical financial records. If an organization has struggled financially historically, because of inadequate funds provided by ATSIIC, there is some question as to whether that organization will be considered financially viable. The basis upon which financial viability will be determined is not clear.

The purpose of the tender is to encourage Territory wide service provision. The tender documents make it clear that an organization cannot tender for alternative bids, for example, NAALAS couldn't tender to provide services in its own right for the Top End and also tender on the basis of being part of a consortia. If the NT ATSILS choose to tender for specific geographical areas of service provision, they run the risk that private firms will form a NT wide consortia who could win the tender on the

basis of ATSI's preference for a NT wide service. If the NT ATSILS do form a consortia to provide services NT wide, then additional resources will be required to coordinate the activities of the 4 services and to ensure that a breach of tender conditions by one provider does not result in a breach of the tender by the remaining 3 providers. Again, no additional resources are being provided as part of the tender.

A system of means testing will be introduced for ATSILS which will also have resource implications. A simplified system of means testing will be introduced which most NT indigenous people seeking assistance from ATSILS will have no difficulty in passing and will not require intensive resources. However the means test is to be applied to all services provided by the ATSILS which is broader than the means test currently used by Commissions, for example, ATSILS will be required to administer the means test before advice or duty lawyer services are provided. Commissions do not means test these services.

The tender states that services such as "preventative, information and education services and input on law reform and law related issues are not part of the tender proposal. Those services will continue to be funded through other channels". These channels do not appear to exist in the NT as ATSILS are currently not resourced to provide these services.

The funding to ATSILS will continue to be provided on a monthly basis in arrears. This does not enable the provider to collect any interest from the funds or to establish any reserves for contingency purposes. This payment method will be setting providers up to fail.

The proposed guidelines for the delivery of services for the successful tenderer are more prescriptive than guidelines used by Legal Aid Commissions. For example, in the NT Legal Aid Commission guidelines, priority services are to be provided where, because of a particular characteristic of an applicant for legal aid, there is a special need for assistance to be provided, for example, if an applicant has a mental illness, or would be more severely disadvantaged than others, for example, where there are linguistic or cultural difficulties. Similarly in the Commonwealth guidelines applied by all Commissions, a matter can be considered a priority by Commissions where an applicant has a language or literacy problem, an intellectual disability etc. The proposed guidelines under the tender do not have the same clause which would allow ATSILS to provide services to clients with special needs. This will severely disadvantage indigenous clients, many of whom experience language and literacy difficulties. Again, these matters will need to be referred to Commissions.

One of the guidelines also allows a successful tenderer to refuse to provide services to a person who has previously been provided with representation for a similar offence. Instead, the provider can refer such an applicant to a service providing appropriate counseling and support. This guideline contradicts the other guidelines which provide that assistance should be provided in criminal law matters where a person is likely to receive a prison sentence. A person with prior conviction for similar offence is at much greater risk of imprisonment than a person without prior convictions. This particular guideline appears to be a ham fisted attempt to "reform" potential clients by refusing to provide them with assistance. If a previous court appearance has not

“reformed” the clients, refusal of assistance is unlikely to achieve a similar result. Again, these clients will need to be referred to Commissions.

Tendering of ATSILS will not solve inadequacies in legal service provision to indigenous people. Greater resources are required for ATSILS and for other specialized indigenous legal services, for example, Family Violence Prevention Services, to enable those services to meet the many unmet legal needs of indigenous people.

I look forward to the opportunity to provide further evidence to the Committee and hope that the Committee will be hearing evidence in Darwin. It is also respectfully suggested that the Committee should visit a remote indigenous community when the Magistrate Court is sitting to gain an understanding of the conditions that apply to the administration of criminal justice in remote communities in the Northern Territory.

Yours sincerely,

Jenny Hardy,
Deputy Director