

19 May 2004.

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

Re:- Submission to Indigenous Law and Justice Inquiry.

SEALS thanks the Commonwealth Parliament Joint Committee of Public Accounts and Audit for undertaking this Inquiry at this critical time for Aboriginal and Torres Strait Islander Legal Services.

Our attached submission consists of :-

1. An overview of the Audit Report.
2. Answers to your discussion points.
3. SEALS reply to the Draft Tender Document.

We look forward to having the opportunity to meet with the Committee on 9 June 2004.

Yours faithfully,

Gerry Moore
Chief Executive Officer

Gary Pudney
Principal Solicitor

SEALS SUBMISSION to INDIGENOUS LAW AND JUSTICE INQUIRY.

1. OVERVIEW

Clearly, SEALS is extremely concerned with the possibility that legal services to Aboriginal people may be delivered by private, profit making organizations without any Aboriginal involvement, management or staff.

The open tendering process is the most serious threat that the ALSs have faced. We cannot stress enough that if there is no Aboriginal involvement, ownership or employment then the greatest loss will be to our present and future clients. The clients will not be as connected to the Criminal Justice system as they are with the present skilled, dedicated, “go the extra mile service” provided by the present ALSs. The second major loser will be the Criminal Justice system as it will have to deal with more Aboriginal defendants who are not appearing at court, are poorly represented and feel outside the system.

The end result will be Aboriginal people in jail. This connection with the system is vital at this time when one looks at the age structures of the Aboriginal community and the total community. In the Social Justice Report 2003 at page 198, the table shows that 38.9% of the Indigenous population is under 14 compared to 20% of the Non-Indigenous population, and 67.3% under 24 compared to 33.6% of the Non-Indigenous population.

We find it nearly impossible to understand why the Government would want to destroy in N.S.W. the Aboriginal Legal Services that are delivering an excellent, culturally appropriate service to the most disadvantaged people in our society. All the tables in the Social Justice Report 2003 highlight the disadvantages. One only has to talk to the judiciary, prosecutors, public defenders, police, corrective services to appreciate the unique role that ALSs in N.S.W. play in the Criminal Justice system.

Why throw out the Services that are working on the basis of a flawed concept of tendering for welfare services. The fact that it is a fixed price tender (the Government will not save money- but some profit focused provider may be able to make a good profit by not employing Aboriginal staff and cost-shifting a huge number of matters to the state Legal Aid Commissions.), the fact that the Draft Tender Document suggests that tendering may not be required in three years time at the completion of the contract (the contracts may be extended at the discretion of ATSI) and the findings in a number of reports that the quality service that is delivered at present is on the basis of overworked and underpaid staff.

Our first points relate to the Audit Office report that was the trigger for this Inquiry.

The Inquiry clearly highlights the difficult circumstances under which the ALSs have been providing an increased workload to an increasing client base. This being achieved “ ..on the basis of the efforts of individuals working within those organizations.’ (para. 26), and that “ATSILS are considered to rely heavily on staff dedication, with staff operating in poor working conditions.” (para 2.50)

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

The work is being done on an annual funding basis rather than triennial funding “The ANAO notes that there have been a number of recommendations previously that proposed triennial funding instead of annual funding...” (para 4.15) The report asserts all the problems for ATSI under annual funding.

We fully endorse the point made at para 4.20 that “Particular consideration should be given to multi-year funding where the delivery of services has been undertaken by the one organization over a period of time and, in the opinion of ATSI, is likely to continue.”

The work is being done under an ad hoc and confused process of evaluation and program monitoring. 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 ATSI/ATSI in this important area. In fact the large amounts of funds spent on the ALSIS reporting program has not produced the required results.

We feel that the Audit Report No. 13 shows the reality that ALSs have been providing an expanding, quality service whilst being handicapped by the shortcomings of ATSIC/ATSIS National Office and the regional offices.

The O.E.A. report of January 2003 also details the excellent work undertaken by ATSILS in a number of states.

We wish to stress again the obvious central point stated in the report at 2.12 “In developing this policy ATSIS trialled a tender selection process for ATSILS in NSW. A consultant engaged by ATSIS to examine the most effective, efficient and accountable process for the selection of ATSILS, determined that an alternative market of non Indigenous service providers that could provide culturally sensitive and stable services was highly restricted, and in many cases non existent.”

2. ANSWERS TO DISCUSSION ISSUES.

- (a) Distribution of resources among criminal, family and civil cases.

The first area to look at in the distribution of resources is the distribution between states. The present formula which is to be changed in the Tender document is unsatisfactory. Some states are over funded and some states (including N.S.W.) are under funded. This is a result of the incompetence of the Legal and Preventive branch of ATSIC and ATSIIS over the past five years.

ATSIC in 1999 developed an interim funding formula that was to consider a number of factors to allow for the distribution of funds between states and between services. That interim formula was to be reviewed to assess the effectiveness of the formula and whether changes were required. Sections 2.34 to 2.37 of the Audit report discuss the slow progress in devising a proper funding allocation.

The Audit report states that funding is distributed on a historical basis and not a proper formula. As a consequence Services within Australia and specifically in N.S.W. have been under funded.

At a local level SEALS devotes most of its resources to the provision of a high quality, culturally appropriate, efficient, effective, compassionate criminal legal defence service.

WHY – on one level because of the unacceptable huge over-representation of Aboriginal people in all stages of the Criminal Justice system, especially in jails and detention centers; the Royal Commission findings and recommendations that are still extremely relevant in 2004;
the potential for the Aboriginal figures to deteriorate when one considers the age structure and socio-economic status of Aboriginal people as outlined by Social Justice Report 2003;
the shifting paradigm of tough on crime by all political parties, tabloid press etc which has resulted in mandatory sentencing (often by another name – eg standard non-parole periods; minimum

disqualifications); longer sentences; greater difficulty in obtaining bail etc.

On a second level the Aboriginal community members and the SEALS Board see working on behalf of our clients who are in jail, maybe going to jail or the first steps towards jail as being our highest priority. This is because nearly all Aboriginal families have had or do have somebody in jail or in conflict with the law. They all know that due to socio-economic factors, unemployment, stolen generation issues, life expectancy rates, lack of role models, racism etc how close many community members are to be in trouble with the legal system. As a consequence that see the critical need for a criminal defence service as the first and foremost priority.

On a third level, and probably for each employee of an ALS (both Aboriginal and non-Aboriginal) the most important level is the individual and his/her family whom we represent. These are the reasons why we do the difficult work – they need and deserve expert, compassionate, non-judgmental assistance. We get to know the person, their problems and their worries. We try and understand each individual and try and address both their criminal issues and their life issues. Often, in neither area can we really change things, but we keep trying and if we do not succeed we reduce the impact. We understand their fears and concerns about going to jail- we understand their families concern about them going to jail- we understand how horrendous jail is in 2004. At this level the community knowledge and connections with the Aboriginal communities that is provided by our Aboriginal field staff is of enormous value.

For all the reasons above SEALS focuses most of our resources on criminal defence matters. We would like to be in a position that we could offer a quality, culturally appropriate family and civil service to the Aboriginal people in our area. But to achieve that goal we would need a large increase in our funding.

At present SEALS offers a general legal advice service to anybody who attends our offices or telephones our offices. We can either give them advice, maybe make a phone call or write a letter on their behalf or refer them to an appropriate service. Unfortunately we cannot take

it any further on their behalf, although most of the clients want us to be involved.

As a consequence, the mix of whom ALSs represent is unbalanced. Many of the clients seeking non-criminal assistance are female and of all ages. We do not have the resources to assist them. This contrasts with the fact that the vast majority of our clients with criminal matters are male and aged between 15 and 25. We would like to expand the mix of the Aboriginal population whom we represent.

We find that in many criminal matters, especially domestic violence matters, that there is often underlying issues related to family law conflicts and occasionally civil matters. If SEALS was funded to provide full legal assistance in family law and civil matters, then these underlying issues may be addressed earlier and hopefully avoid conflict and criminal charges.

(b) Co-ordination with Legal Aid Commissions.

The N.S.W Coalition of Aboriginal Legal Services (COALS) has a M.O.U. with the N.S.W. Legal Aid Commission. The M.O.U. is an indication of the excellent working relationship ALSs have with the L.A.C.

SEALS also covers the A.C.T. and although we do not have a M.O.U. with the A.C.T. Legal Aid Office there is a close and excellent relationship between the management and employees of both organizations.

A number of our clients are represented by the L.A.C. and duty solicitors in N.S.W. As well, a number of Aboriginal defendants use private solicitors who receive a grant of legal aid from the Legal Aid Commission.

In country N.S.W. where there are no Legal Aid Commission offices local solicitors provide a duty solicitor service to defendants in criminal matters who meet a strict means test. The L.A.C. pays the

duty solicitors for their work. The quality of these solicitors (who are often young solicitors or the older solicitors) is extremely variable. This creates difficulties for ALSs who have conflict matters and seek to have one or both parties use a Legal Aid Commission grant.

Whilst the L.A.C. solicitors may undertake cultural awareness training and have a good understanding of dealing with disadvantaged and difficult clients this is not the case with vast majority of duty solicitors. Most duty solicitors do not have any cultural training or do they have the time or ability to understand disadvantaged and difficult clients. Unfortunately this is mostly true for private solicitors who appear for Aboriginal clients (mostly in higher court work) on a grant of legal aid.

With the focus of criminal work now being on the front end of the process, the ability to devote time and resources to the early stages of a matter is critical in obtaining the best result for clients. The need for early work is due to a number of factors including :- 1. The guideline judgment which indicates reductions in sentences of up to 25% for earliest pleas of guilty; 2. The strict timetables set by Chief Judges and Magistrates to seek to get matters dealt with expediently; 3. The increasing difficulties in obtaining bail as the Governments changes the Bail Act to place greater hurdles on defendants seeking bail. ; 4. the important work required in placing clients into rehabilitation centers and the resultant benefits on sentence; 5 The difficulty in having committal hearings; 6. The extensive work and discussions needed in ensuring that if matters are dealt with the higher courts that everything has been undertaken at the Local Court level. This may involve extensive preparation and involvement of barristers. The aim is to ensure that matters are either dealt with at the Local Court level if possible or only go to the higher courts when all avenues have been exhausted at the Local Court level.

The duty solicitor roster and many private solicitors who receive a legal aid grant for Aboriginal clients may not do the necessary work up front to get the best result for the client.

These concerns are then aggravated by the difficulties that Aboriginal clients have accessing mainstream organizations. As one of our Board members said “our mob won’t use them.”

(c.) Access for Indigenous women.

This is always a difficult area for ALSs as there is the widely held view that ALSs do not assist Aboriginal women. This view is based on the fact that as a criminal defence service we only represent defendants and that of the defendants about 90-95% male. Yet this overlooks the fact that we do represent a large number of Aboriginal women and that an increasing number of Aboriginal women are being charged with offences that result in a jail sentence.

The perception is also not correct in that most of the male defendants, especially juveniles, have female support when they come to court. The female supporters are mostly extremely concerned if the male defendant goes to jail –that appreciate the effect on the client of being in jail and the consequences for his family whilst he is in jail.

But the most critical point it overlooks is that the real need for Aboriginal women is access to culturally appropriate, expert legal assistance in the areas of family law and civil law. SEALS has traditionally given legal advice and minor assistance on non-criminal matters. The majority of the clients we assist in non-criminal matters are Aboriginal women of all ages. The greatest difficulty we have is that we do not have the resources to provide a service that would allow SEALS to commence and finish matters in these areas. We offer basic assistance or we refer the clients to the best possible service provider in the geographical area. Unfortunately, sometimes, especially in the rural areas there are no appropriate other services.

The most unfortunate mis-interpretation of the facts concerns the claim that ALSs do not assist the female victims of domestic violence. We want to make two points :- 1. in N.S.W. victims of domestic violence have the support of the NSW Police Service and community domestic violence workers. At court they are assisted by the Police Prosecutor, D.V. Liason officer and often a community worker. These individuals also assist the women before and after court. As well, in

NSW Police will often video-tape an interview with the victim immediately after a domestic violence offence. That creates difficulties in defending matters. Magistrates are also more likely now to order that a warrant be issued for a victim who does not attend court. D.V. orders are issued by the courts, even against the wishes of the victims some time, and breaches are prosecuted and heavy penalties generally flow. In all these circumstances we feel that victims are now well supported by the state and that there is no role for ALSs.

2. Domestic violence matters are the most difficult area for solicitors of ALSs. Often both parties come to the legal service office together straight after the offence or they attend court together. Due to our intimate knowledge of the local communities we often know both parties very well. In the cool clear light of day after the parties often have a different view of what occurred. They often seek the same outcomes– they do not want the defendant to go to jail. They often want him (or both of them) to address their alcohol, drug, anger, relationship, psychological problems. However, if the victim does not want the offender back, ALSs attempt to impress on our clients the victims wishes and then stress the consequences of further offences. All solicitors must be very wary of talking to the victim as what they say may be misinterpreted and may lead to criminal or professional prosecutions.

In conclusion, the only way to better assist Aboriginal women is to provide further funds for non-criminal assistance.

(d) ability to recruit and retain expert staff.

There are numerous reports and anecdotal material on the difference between the salaries paid to ALS staff and other comparable workers. The differential is greatest for solicitors, but the difference between what ALS field, office and management staff are paid is also substantially different to similar workers in government employment.

This lack of a satisfactory pay rate is further exacerbated by the on going difficulties within ATSIC/ATSIS and the whole process of

annual funding and now the tendering regime. Management and all staff feel under constant pressure of reviews and reform.

The ALSs in N.S.W. have been undertaking a reform process since 1997. The organizations and their staff have been constantly assessed, evaluated, audited, reformed over the past seven years. The pressure and uncertainty has been a heavy load for most staff. Each time a hurdle is cleared another one is put in place.

The whole tendering process is a distressing matter for all staff and clients. Especially our Aboriginal staff who would not be required under the tender documents. They would probably not obtain other employment in country areas.

For a number of years ALSs were able to be competitive with salaries with other employers with the benefit of the old salary sacrifice scheme that was in place until March 2002. Up till then ALSs could offer salary sacrifices of about 50%. That is employees only paid tax on 50% of their salaries. This also had benefits in relation to family allowances, medicare levy etc. and staff had a reasonable take home pay. The present salary sacrifice scheme does not assist ALSs to the same extent, and it appears that the compensation payments made by the Treasury for loss of the old sacrifice is to stop with the new tendering process.

ALSs are not funded to back fill positions.

ALSs are not funded to provide annual pay increases.

ALSs are not funded to have a pay scale related to experience and years of service.

As a result some staff have not had pay increases for ten years. In fact with, the loss of the salary sacrifice a number of staff have had major reductions in salary. Some staff are still paying moneys to the Government for over payments on family allowances and underpayment of Medicare levy from 2001-2003.

The difficulty is created because the budget is for a fixed amount then the financial and management staff use any possible spare money for

providing critical items for our clients, such as psychological, psychiatric assessments, specialist reports, eg fingerprint, blood splatter. As well, we have a burgeoning brief out budget as more and more matters are dealt with in the higher courts as the heavier sentences are forced on the judiciary.

Any slack in the budget is spent on client services and not back filling positions or pay increases.

All Services would have numerous anecdotes about the changes in Court result or improvements in life style that have been affected on clients by the tremendous work done by ALS staff, both solicitors and field staff. It can not be understated how central to a matter is the input of the Aboriginal field staff.

As well ALSs in N.S.W. cannot provide a career structure as the other employers can provide. For example in the NSW L.A.C. they have a number of levels of pay scales and a hierarchy of positions. They then have positions for trial advocates at an appropriate level of remuneration so that solicitors do not have to leave the become barristers or seek outside employment. These are the best and most experienced who are at the point that they are the most productive for the Commission. The Director of Public Prosecutions in N.S.W. also have a similar career structure and pay structure.

NSW ALSs do not have these options. We are restricted to employing staff on a starting salary and being unable generally to offer pay increases (even C.P.I.) or a career structure. The only real career structure is from solicitor to Principal Solicitor. But that position involves mainly a management / leadership role and a reduction in advocacy. We need a position for excellent solicitors who do want to manage but develop their advocacy.

The turn over of staff results in difficulties for clients. Some clients who may have a huge number of problems may develop an excellent rapport with a solicitor or field staff. Once that staff member moves on to a better offer, the client may suffer due to their loss of confidence and support.

There is an enormous amount of training, skill development and cultural awareness put in by each ALS into each new staff member. It is an enormous learning curve, especially if we can only attract inexperienced solicitors. After all the resources put into the development of each newly admitted solicitor they often need to move on to obtain a satisfactory salary. Most have no trouble obtain a higher pay and conditions. But they move at the time when they are at their most productive and have acquired sufficient skills to be of a great benefit to each ALS and our clients.

As well, each ALS must balance between ensuring proper representation and limited resources. Sometimes the pressure to use an inexperienced solicitor is unavoidable as senior staff are either not available or non-existent. This is a continuing concern for all Principal Solicitors

The tendering process.

Please see the attached submission SEALS made To ATSSIS in reply to the Draft Tender Documents.

SEALS still has a major problem with the concept of fixed price tendering for welfare services. On one hand we find it hard to understand how any other provider could provide a better service on the allocated funds then SEALS can at present. On the other hand a profit making provider would only make a profit by reducing services or cost shifting services to the Legal Aid Commission.