

Report 403

Access of Indigenous Australians to Law and Justice Services

Joint Committee of Public Accounts and Audit

June 2005
Canberra

Commonwealth of Australia 2005
ISBN 0 642 78640 2



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Foreword

The Committee's inquiry into the provision of law and justice services to Indigenous Australians was adopted and commenced during the Fortieth Parliament when the Committee was under the capable stewardship of the then Chairman, Mr Bob Charles MP and Deputy Chair, Ms Tanya Plibersek MP.

I acknowledge the valuable and useful evidence gathered during this time and also the two on-going members of the Sectional Committee, the current Deputy Chair, Ms Sharon Grierson MP and Senator John Hogg who have provided an important continuity to the inquiry.

The Committee received 44 submissions and 51 exhibits from all sectors involved in the provision of legal services to Indigenous Australians. I would extend my appreciation to all of those who provided insight, from various perspectives, into the issues of the delivery of quality services in, at times, difficult circumstances.

The Committee took evidence in Canberra, Sydney, Darwin, Alice Springs, Adelaide, Dubbo, Yuendumu and Perth over the eight months of the inquiry. On behalf of the committee I thank those people who appeared for their time and the valuable insight into the issues.

On re-adopting the inquiry the new Sectional Committee undertook a brief but extensive program of evidence gathering that took us across Australia visiting metropolitan, regional and remote locations. This provided an opportunity for me, and other Committee members new to the inquiry to acquaint ourselves with issues raised by the terms of reference. The Committee felt it important to have heard the concerns in face to face forums with users of legal services as well as the providers at the coal face.

In particular, taking evidence enabled the Committee to explore community based responses to problems of Indigenous access to the law and justice system to a level not previously investigated.

As Chair of the Joint Committee of Public Accounts and Audit I take this opportunity to express my sincere appreciation to the community at Yuendumu who hosted a Committee visit. I was personally inspired by the determination of the community to sustain principles of customary law while acknowledging and operating within a common law framework. The outcomes achieved by the community, stand as a testament to the co-operation of the two systems.

I also thank the people who travelled from Ali-Curung to speak with the Committee during our visit to Yuendumu, officers of the Northern Territory Department of Justice who facilitated the Committee's visit and the Northern Territory Attorney-General the Hon Peter Toyne MLA who attended.


Hearing evidence on matters such as the death of a young person in custody or specific instances of family violence was difficult for members and we appreciate the courage and candour of witnesses who related these tragic events. While stories relating personal tragedy are the most difficult evidence to receive, it is this evidence that serves to recall to us the importance of accessible law and justice services.

As a result of this inquiry into the provision of law and justice services to Indigenous Australians there are 17 recommendations for the government to consider. During the conduct of the inquiry and in the compilation of this report there were a diversity of views expressed by members of the committee, but it is important to note there was a consensus in the concerns raised in the recommendations of the committee.

Finally, I thank members of the secretariat, in particular Glenn Worthington, who sustained the inquiry across the two Parliaments

A handwritten signature in blue ink, appearing to read 'Bob Baldwin', with a long horizontal flourish extending to the right.

Bob Baldwin MP
Chair



Membership of the Committee (Fortieth Parliament)

Chair Mr Bob Charles MP

Deputy Chair Ms Tanya Plibersek MP

Members	Senator Richard Colbatch (from 14/02/02, until 25/05/03)	Mr Steven Ciobo MP
	Senator Stephen Conroy (from 5/02/03, until 10/09/03)	Mr John Cobb MP
	Senator John Hogg (until 5/02/03, from 10/09/03)	Mr Petro Georgiou MP
	Senator Gary Humphries (from 25/02/03)	Ms Sharon Grierson MP
	Senator Kate Lundy (from 19/11/02, until 1/04/04)	Mr Alan Griffin MP
	Senator Claire Moore (from 1/07/02, until 19/11/02 and from 1/04/04)	Ms Catherine King MP
	Senator Andrew Murray	Mr Peter King MP
	Senator Nigel Scullion	The Hon Alex Somlyay MP
	Senator John Watson	

Members of the Sectional Committee (Fortieth Parliament)

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Deputy Chair Ms Tanya Plibersek MP

Members Senator John Hogg

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		Mr Ken Ticehurst MP

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Committee Secretariat (Forty First Parliament)

Secretary Mr Russell Chafer

Inquiry Secretary Dr Glenn Worthington

Administrative Officer Ms Penne Humphries



Terms of reference

As part of its statutory responsibility to examine reports from the Auditor-General, the Joint Committee of Public Accounts and Audit is expanding its review of *Audit Report No. 13, 2003-2004, AT SIS Law and Justice Program* – including its four components of Legal Aid; Law and Justice Advocacy; Family Violence Prevention; and Prevention, Diversion and Rehabilitation – to inquire and report on issues including:

- 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.

The Committee will take into account the 2004 tender for Indigenous legal aid services.



List of abbreviations

AGD	Attorney-General's Department
ALRM	Aboriginal Legal Rights Movement
ALSWA	Aboriginal Legal service of Western Australia
ANAO	Australian National Audit Office
ATSIC	Aboriginal and Torres Strait Islander Commission
ATSILS	Aboriginal and Torres Strait Islander Legal Service
ATSI	Aboriginal and Torres Strait Islander Services
CAALAS	Central Australian Aboriginal Legal Aid Service
CAAFLU	Central Australian Aboriginal Family Legal Unit
CAWLS	Central Australian Women's Legal Service
CLC	Community Legal Centre
DIMIA	Department of Immigration and Multicultural Affairs and Indigenous Affairs
FaCS	Department of Family and Community Services
FVPLS	Family Violence Prevention Legal Service
KALS	Kamilaroi Aboriginal Legal Service

LAC	Legal Aid Commission
LCA	Law Council of Australia
LSC	Legal Services Commission
MRALS	Many Rivers Aboriginal Legal Service
NAALAS	Northern Australian Aboriginal Legal Aid service
NACLCLC	National association of Community Legal Centres
NPY	Ngaanyatjarra Pitjantjatjara Yankunytjattjara
NSWLAC	Legal Aid Commission of New South Wales
NTLAC	Northern Territory Legal Aid Commission
OEA	Office of Evaluation and Audit
PBS	Portfolio Budget Statement
SEALS	South Eastern Aboriginal Legal Service
SRACLS	Sydney Regional Aboriginal Corporation Legal Service
TEWLS	Top End Women's Legal Service
VALS	Victorian Aboriginal Legal Service
WALAC	Legal Aid Commission of Western Australia
WALS	Western Aboriginal Legal Service
Warndu	Warndu Wathilli-Carri Ngura Aboriginal Family Violence Legal Service
WLS	Women's Legal Service



List of recommendations

Introduction

Recommendation 1

That the Attorney-General's Department put in place measures to ensure that questions taken on notice to the Joint Committee of Public Accounts and Audit are either responded to within requested timeframes or that reasons are provided showing why responses will be delayed together with a proposed alternative date by which responses will be received by the Committee. (Para. 1.27)

Funding and Distribution of Resources in Aboriginal and Torres Strait Islander Legal Services by Case Type

Recommendation 2

That based on available data and need, all future contracts between the Attorney-General's Department and providers of services that are currently delivered by Aboriginal and Torres Strait Islander Legal Services designate specific requirements of family, civil and criminal case loadings and provide adequate funding to meet these requirements. (Para 2.47)

Indigenous Women and Access to Legal Services

Recommendation 3

That the Attorney-General's Department ensure that Family Violence Prevention Legal Services focus on the provision of family and civil law services to Indigenous Australians, *particularly through the legal representation of clients*. (Para. 3.85)

Recommendation 4

That the Attorney-General's Department acknowledge that urban Indigenous populations also require family violence, family and civil law services and locate Family Violence Prevention Legal Services accordingly. (Para 3.87)

Recommendation 5

That the Attorney-General's Department ensure that Indigenous men are provided full access to all Family Violence Prevention Legal Services. (Para. 3.93)

Retention of Expert Staff

Recommendations 6

That the Attorney-General's Department, in consultation with National Legal Aid and the National Aboriginal and Torres Strait Islander Legal Services Secretariat, develop a comparative scale of remuneration between Aboriginal and Torres Strait Islander Legal Services (ATSILSs) and Legal Aid Commissions and review funding of providers of services currently delivered by ATSILSs as appropriate. (Para. 4.54)

Recommendation 7

That the Department of Treasury grant Fringe Benefit Tax supplementation to Family Violence Prevention Legal Services. (Para. 4.56)

Recommendation 8

That the Attorney-General's Department, in consultation with the National Aboriginal and Torres Strait Islander Legal Services Secretariat and National Legal Aid, develop and implement a formal exchange program whereby solicitors from providers of services that are currently delivered by Aboriginal and Torres Strait Islander Legal Services and Legal Aid Commissions are afforded opportunities to work, for a specified period, within the other organisation. (Para. 4.59)

Recommendation 9

That the Department of Education, Science and Training, in consultation with the Attorney-General's Department, the National Aboriginal and Torres Strait Islander Service Secretariat and the National Network of Indigenous Women's Legal Services, explore the feasibility of implementing a system of bonded scholarships where successful applicants on being accepted to the bar are required to provide a specified period of service to a designated provider of services currently delivered by Aboriginal and Torres Strait Islander Legal Services or Family Violence Prevention Legal Services. (Para. 4.62)

Recommendation 10

That the Department of Education, Science and Training ensure that places are available for the training and development of paralegal community support workers who are employed with providers of services that are currently delivered by Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Services. (Para. 4.64)

Coordination of Legal Aid Services to Indigenous Australians**Recommendation 11**

That the Attorney-General raise the matter of Commonwealth and state/territory funding for providers of services currently delivered by Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Services with his state and territory counterparts with a view to gaining some level of state/territory contribution for these services. (Para. 5.39)

Recommendation 12

That the Attorney-General's Department, in consultation with National Legal Aid and the National Aboriginal and Torres Strait Islander Legal Services Secretariat, develop and require providers of services currently delivered by Aboriginal and Torres Strait Islander Legal Services (ATSILSs) to implement a memorandum of understanding between them and Legal Aid Commissions (LACs) that includes:

- sharing each others duty solicitors;
- the provision of representation and advice by one organisation to the other's clients;
- the use of office space and facilities in ATSILSs by LAC solicitors for Indigenous clients when these clients are referred from ATSILSs to LACs;

- protocols requiring ATSILSs solicitors to introduce clients to LAC solicitors in the event that clients are referred from ATSILSs to LACs;
- access of ATSILSs solicitors to LAC technology, such as video-conferencing, in order to facilitate remote client contact;
- access of LAC solicitors to Aboriginal Field Officers employed with ATSILSs when required to communicate with clients;
- mutual sharing of vehicles for remote travel; and
- access of ATSILSs and LAC staff to in-house training programs run by the other organisation. (Para. 5.44)

Recommendation 13

That the Attorney-General's Department rationalise funding of Indigenous legal services by incorporating Indigenous Women's Projects, that are currently administered through mainstream Community Legal Centres, into the Family Violence Prevention Legal Services program. (Para. 5.46)

Tendering Out of Aboriginal and Torres Strait Islander Legal Services

Recommendation 14

That in centralising providers of services that are currently delivered by Aboriginal and Torres Strait Islander Legal Services, the Attorney-General's Department ensures that these services establish and maintain governance mechanisms that allow representation of and responsiveness to the views of the communities in their service area. (Para. 6.63)

Recommendation 15

That in awarding tender bids, the Attorney-General's Department ensure that the current levels of paralegal community legal workers employed by Aboriginal and Torres Strait Islander Legal Services is not diminished. (Para 6.65)

Recommendation 16

That the Australian National Audit Office conduct a performance audit of those areas of the Attorney-General Department's responsible for funding of Family Violence Prevention Legal Services and Community Legal Centres with regard to the same matters covered in the *Audit Report No. 13, 2003-2004*. (Para. 6.67)

Recommendation 17

That the Australian National Audit Office conduct a performance audit of the Indigenous Law and Justice Branch of the Attorney-General's Department at the mid way point of the tender contracts in each jurisdiction with a view to identifying difficulties and recommending improvements in administration and service delivery. (Para. 6.70)



Executive summary

Introduction (Chapter 1)

Indigenous Australians receive legal services through an array of publicly funded mainstream (Legal Aid Commissions (LACs) and Community Legal Centres (CLCs)) and Indigenous specific organisations (Aboriginal and Torres Strait Islander Legal Services (ATSILSs) and Family Violence Prevention Legal Services (FVPLSs)).

From 1 July 2003 the Aboriginal and Torres Strait Islander Services (ATSIS) took over responsibility for administering the Law and Justice Program, which funded ATSILSs and FVPLSs, from the Aboriginal and Torres Strait Islander Commission. On 1 July 2004 responsibility for administering the functions of the ATSIS Law and Justice Program was transferred to the newly established Indigenous Law and Justice Branch in the Attorney-General's Department (AGD). AGD also administers the Commonwealth components of funding for LACs and CLCs.

The inquiry examined the adequacy of access that Indigenous Australians have to legal services. While acknowledging the high level of need for criminal law services in the Indigenous community, the Committee focused on issues of access to family and civil law services particularly by persons in danger of harm.

Distribution of Aboriginal and Torres Strait Islander Legal Services Resources by Case Type (Chapter Two)

ATSILSs operate in a climate of effectively static funding and increasing demand. Evidence suggested that ATSILSs have prioritised cases where a person is in danger of incarceration because the needs of criminal clients are immediate. The prioritisation of criminal law services is at the expense of providing family and civil law services. Furthermore, the arrangements under which ATSILSs have received funding present significant impediments to them introducing or increasing family and civil law services.

The provision of criminal law services is, by its very nature, an urgent client requirement. However, family and civil law services should be available through Indigenous specific providers. This may require a reconsideration of the form in which funding is provided to ATSILSs. Rather than providing funding in blocks where the provider is left to determine the distribution of criminal, family and civil law services, the expected level of services delivered in each service area should be specified and funds dedicated specifically to each area.

ATSILSs' prioritisation of services to persons at risk of detention has impacted in a particularly acute way upon women and children who are often the persons at risk of physical harm as the result of criminal acts.

Indigenous Women and Access to legal Services (Chapter Three)

The immediate legal requirements of persons in danger of detention means that ATSILSs are often restricted in providing family or civil law services (beyond referrals) to persons in danger of harm because they are already representing the alleged offender and thus find themselves in a conflict situation.

The Committee acknowledges the importance and high quality of the work done by ATSILSs in criminal representation of persons in danger of incarceration, whether men or women. However, it is of the view that within the overall provision of legal aid the rights of accused parties should not be focused upon to the extent that they exclude the rights and safety of persons in danger of violence or the rights of injured parties to compensation.

The primary instrument for ensuring access to legal services of Indigenous persons in danger of harm is through FVPLSs. FVPLSs provide support and legal services. The Committee accepts the importance of treating family violence holistically but is concerned to ensure that the primary character and function of FVPLSs is the provision of legal services.

The provision of legal services by FVPLSs should be complemented through clear lines of communication between these services and providers of victim support services under the Indigenous Family Violence Partnership Program and Family Violence Regional Activities Program administered by the Department of Family and Community Services.

The Committee has not suggested that FVPLSs withdraw from providing support services such as counselling for victims of family violence but rather that the focus of these organisations as providers of legal services be affirmed and acknowledged in their funding and required outputs.

As providers of legal services to Indigenous people whose safety is at threat, FVPLSs should not be confined to regional and remote Australia but rather, like ATSILSs, be located in all areas of significant need. Furthermore, FVPLSs should

not be identified as gender specific legal services but be available to all Indigenous people in danger of harm.

Retention of Expert Staff (Chapter Four)

In order to maintain the highest possible quality of service in an environment of effectively static funding and increasing demand, Indigenous specific legal services must have the capacity to retain expert staff. The Committee is concerned that alleged poor rates of remuneration together with the limited career paths available in ATSILSs in comparison to LACs are creating a crisis in the ability of ATSILSs to retain expert staff.

It is imperative to establish the relative rates of remuneration between legal and management staff in ATSILSs and LACs and to review the remuneration of ATSILSs staff accordingly.

In terms of developing career paths with greater opportunities for professional development, the Committee believes that there is potential for the development and implementation of an exchange program between staff of ATSILSs and LACs at a national level. Such a program would benefit both types of organisations.

The Committee affirms the importance of Aboriginal Field and Court Officers and Community Legal Workers in providing the nexus between the legal staff of ATSILSs and FVPLSs and the clients they service. These networks of support officers enable Indigenous specific legal services to provide accessible services in a way that mainstream providers cannot.

Aboriginal Field Officers need to be supported and encouraged in gaining training and opportunities to professional development.

While it is of little consolation to ATSILSs, it should be acknowledged that Indigenous organisations do provide a very valuable training for solicitors who pass through them. These solicitors are not lost to the justice system and should be acknowledged as resources in the provision of legal services to Indigenous people regardless of their current employer.

Coordination of Legal Aid Services to Indigenous Australians (Chapter Five)

Another strategy to increase the capacity of Indigenous specific providers is ensuring adequate levels of coordination and cooperation between these providers and their mainstream counterparts.

The coordination of all providers of legal services to Indigenous people is of vital importance, particularly the coordination of Indigenous specific and mainstream providers of similar types of law services – that is providers that are primarily criminal or family and civil law services.

ATSILSs and LACs are primarily providers of criminal law services to Indigenous people, and FVPLSs and CLCs are primarily providers of family and civil law services.

While the Committee is aware of memoranda of understanding between ATSILSs and LACs in New South Wales, Victoria and Western Australia and operational protocols between ATSILSs and LACs in the Northern Territory and South Australia, the arrangements appear to be varied and to work with various degrees of effectiveness.

The development on a national scale of a set of areas in which coordination and cooperation between Indigenous specific and mainstream providers of legal services is required would contribute to the provision of services to Indigenous Australians.

The Committee was concerned at the myriad of programs and services that provide legal services to Indigenous women. Perhaps the most apparent area for potential overlap is the FVPLSs and the Indigenous Women's Projects run out of designated CLCs.

Tendering Out of Aboriginal and Torres Strait Islander Legal Services (Chapter Six)

The Committee acknowledges that moving from a grants based funding regime to a contractual output focused funding arrangement for the provision of legal services to Indigenous Australians is desirable. A tendering out process is one method of achieving this aim.

However, the Committee has reservations in relation to the way in which the tendering out process was developed, particularly the concern and frustration among ATSILSs and other providers of legal services to Indigenous Australians, such as LACs, which appears to have been generated by a lack of responsiveness and information from ATSIIS to these service providers.

On the strength of figures provided by AGD, the Committee is not convinced that proposed savings on service overheads will be a significant outcome of the proposed minimisation of legal service providers under the terms of the tender.

While the stated preference for a single provider may be appropriate in Victoria and Western Australia (where there was previously only one provider per state), in jurisdictions where there are other arrangements and different circumstances, a centralisation of providers may cause significant disruption to services. The results of the Queensland tender and the level of services delivered by a significantly smaller number of providers should be taken into account before multiple centralisation is required in other jurisdictions.

The importance of services that are owned by and embedded in the communities they service is demonstrated by the great successes that Indigenous organisations such as ATSIILs and, more recently FVPLs, have had in making the justice system more accessible to Indigenous Australians.

An essential part of the services provided by ATSIILs involves community based paralegal staff who provide support for clients. The Committee expects that a functional network of Aboriginal Field and Court Officers would be an essential part of a successful tender bid.

Future Directions: Community Based Prevention and Diversion Initiatives (Chapter Seven)

Community based prevention and diversion responses empower communities by providing:

- a voice in the criminal justice proceedings which would otherwise be completely foreign to the communities and individuals who are subject to them; and
- an opportunity for communities to develop and implement strategies for dealing with problems themselves.

Preventative and diversionary programs are essential components of the provision of legal services to a sector of the Australian community that suffers such a disproportionate incarceration rate as the Indigenous population.

Community based initiatives are, by their very nature, various rather than uniform. The success of one or a particular combination of initiatives will work very successfully in some communities but when the same arrangements are implemented elsewhere they could actually hinder the objective.

Evidence indicated that an essential factor in successfully implementing community based initiatives is a strong foundation of community consultation. The importance of community consultation and acting on the information gathered was nowhere more apparent than in the efforts of the governments of Western Australia and the Northern Territory to implement community based justice initiatives.

The Committee supports the circle sentencing, community law and justice committee and community policing initiatives that it encountered and encourages all stakeholders, government departments and agencies, legal service providers and indeed the communities themselves, to continue to explore the possibilities that lie in this direction.

While the Committee is aware of the importance of tailoring community justice initiatives to the local requirements and practices of each community, there is a very real need to ensure that the community decision making procedures, such as

circles and community law and justice committees, properly reflect the views of the entire community.

Although it is a matter for state and territory governments, the Committee believes that the evidence it has received does not support the extension of circle sentencing procedures to matters involving family violence or sexual assault.