

Dear Madam/Sir

Pls see attached a submission from NAALAS for the Joint Committee of Public Accounts and Audit from the North Australian Aboriginal Legal Aid Service. The lateness of our submission was signalled by the NT Legal Aid Commission on Thursday last and we thank the Joint Committee for that and for allowing us the opportunity to provide the comments herein.

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Director
NAALAS

Submission to the Joint Committee of Public Accounts and Audit – Indigenous Law and Justice Program

The North Australian Aboriginal Legal Aid Service (NAALAS) is the current provider of legal services for Aboriginal & Torres Strait Islander people in the Top End of the Northern Territory. Despite a well-documented lack of funds, we have performed this service for over thirty years and built a level of trust and expertise within in the communities that we serve. We provide court representation in the following:

Darwin Supreme Court
Darwin Magistrates Court
Family Court
Wadeye Magistrates Court
Daly River Magistrates Court
Jabiru Magistrates Court
Maningrida Magistrates Court
Oenpelli Magistrates Court
TIWI Magistrates Court
Mental Health Tribunal

Unlike the majority of other ATSI funded services which are supplementary to mainstream providers, NAALAS provides a primary service to Aboriginal people. In providing this service we are also fully engaged in pursuing the rights of Aboriginal people through law and policy reform and have participated in a number of forums including in the past year:

- Working party to the review of the Anti- Discrimination Act
- Aboriginal Customary Law Inquiry
- Itinerants Working Party
- Northern Territory Indigenous Justice Agreement working party
- Reintegration After Prison Reference Group
- Prison Court Appearances Working Group
- Darwin Regional Crime Prevention Council & Steering Committee

NAALAS also lobbies the Northern Territory Government and its agencies direct through correspondence and meetings in relation to a number of matters including circle sentencing, community patrols, prison reform and policing. We believe therefore that we provide a thorough, broad-based service that caters to the widest possible range of needs of Aboriginal people in the Top End within the limited budget we operate under.

When laws are made that apply to ‘everyone’ but in practise have a disproportionately negative impact on one group there needs to be systemic change to the way that the law operates. Police too often single out Aboriginal people for special treatment – for instance in the NT it is common

to see police approach and intimidate a group of Aboriginal people sitting in a park, confiscating alcohol while a group of non-Indigenous people sit not more than fifty metres away consuming alcohol with impunity.

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

What needs to be done to ensure a fair distribution of Indigenous legal services?

A number of factors need to be considered when distributing funding to Legal Services rather than merely allocating according to population size. For instance, although client numbers may be relatively small, travel to Bush Courts is expensive and requires chartered air travel during the 'wet' and to the Tiwi Islands. During the dry, while we are able to use the roads, many are unsealed and our one 4wd vehicle is constantly in use. The wear and tear means expensive repairs or regular replacement of the vehicle, which must also be fitted out with safety equipment such as a satellite phone.

Also many of our clients do not speak English or have a fixed address and require special efforts to ensure they understand their lawful position. NAALAS Client Service Officers must find suitable interpreters or accommodation for itinerants ('long grassers') who are granted bail and/or arrange for travel back to their communities, another time consuming and expensive exercise.

A further added cost we encounter is the need to offer attractive salaries to experienced lawyers to entice them to work in the remote outback areas. While Darwin is not a remote community, it is considerable distance from the south eastern centres where most lawyers reside. Our ability to do this has been undermined by the recent changes to the Fringe Benefit Tax 'salary sacrifice' arrangement that we have used to top up low pay rates. (Note that our staff have not had a pay increase since 1998, while our funding has decreased in real terms with our workload increasing by over 50% since that time.)

Funding should at least be equitable to that provided to the Legal Aid Commissions. For instance in the Top End, NAALAS received \$2.25m and dealt with over 3,000 matters in the 2002-2003 financial year, while the NT Legal Aid Commission received over \$4m for around 1,100 matters. This did not include the funding from the Commonwealth for family law matters.

Are certain kinds of cases not receiving the attention they deserve?

All cases receive the attention they deserve *to the best of our ability* given the paucity of funds provided and the constraints of legal practise rules. Legal

services and law firms operate on a 'next cab off the rank' approach, i.e. whichever client walks through the door seeking assistance receives attention, and NAALAS is no exception.

Our already stretched resources as identified by the ATSI Office of Evaluation and Audit Report and the ANAO however do inhibit us from providing the service that staff would like to provide. Problems with potential conflicts of interest where NAALAS has previously represented one party have also inhibited our ability to assist some clients. We are currently establishing a 'Chinese Wall' arrangement which would alleviate some of these concerns however and enable us to assist those clients who have been turned away in the past.

Other types of cases including domestic violence are not dealt with by NAALAS as there are a number of other agencies who specialise in such matters. These include the Domestic Violence Legal Service administered by the NTLAC for all women in the NT and the Top End Women's Legal Service which provides advice and advocacy for Indigenous women in the region.

NAALAS like many other ATSI has been criticised for concentrating on criminal law cases although these represent the vast majority of matters that assistance is sought for. As the law has historically been used as a means of social control over a colonised people, it would be inappropriate to withdraw funding from criminal matters leaving Aboriginal people even more vulnerable to the whims of the State and its agents. The relationship between police and court officials also warrants investigation. The tactical moves that such an alliance produces, thwarts the efforts of law reformers to keep Aboriginal people out of criminal justice system.

Criminal activity by Aboriginal people demands an unbiased interpretation. Some Aboriginal people have been left traumatised and bitter by the experience of colonisation will resort to anti-social behaviours – substance abuse and violence to name two of the most common. Now as much as ever Aboriginal Legal Services are needed to represent all our people, not just the types of cases that the government considers deserving of attention.

What changes if any to funding priorities are needed?

The most immediate change required is to comply with the Reports of the Australian National Audit Office and the ATSI Office of Evaluation and Audit where significant increases to funding were recommended. This would enable us to begin to meet the enormous workload that we currently have and which continues to grow as policing powers and categories of crime grow. (For instance, NAALAS experienced a 36% increase in criminal matters last financial year and despite numerous submissions to the Federal and Territory governments for additional funds to meet the increase, no extra funding was provided.)

b) The coordination of ATSILS with LACs through such measures as MOUs

How can mainstream legal aid services better help Indigenous people?

There are a number of factors that inhibit mainstream services helping Indigenous people. In some cases, it is their restrictive guidelines for assistance that prevent many Aboriginal people from accessing the services. In others, it is an upfront charge (of \$55) which is problematic, given that most of our clients are Centrelink payment or welfare recipients and \$55 can pay their grocery bill for the week. An additional factor is the alienation caused by the lack of cultural awareness, which a two hour course is not going to address.

What kinds of measures have legal services undertaken to improve cooperation with mainstream legal services?

NAALAS does work very closely with the NT Legal Aid Commission (NTLAC) and other agencies such as the Top End Women's Legal Service (TEWLS) to ensure that Aboriginal people in the Top End receive advice and representation. We have Memoranda of Understanding with these agencies so that services are not duplicated or where there are conflicts with potential clients.

In the latter situation, where NAALAS is unable to assist and clients are referred to the NTLAC, they are assisted by NAALAS Client Service Officers when they indicate that they would not be comfortable attending the mainstream service. This assistance includes accompanying clients to interviews, interpreting legal jargon into 'Aboriginal English' or arranging for interpreters from a particular language group, as mainstream services usually do not know which language is being spoken.

NAALAS has in place or is developing Agreements and Memoranda of Understanding with organisations and agencies that deliver legal aid and rehabilitation services, including:

- Top End Women's Legal Service – delivery of family violence prevention and advocacy initiatives for remote and urban areas.
- FORWAARD – assessment and placement procedures for NAALAS clients to attend rehabilitation programs.
- NT Legal Aid Commission – conflict of interest matters, family law referrals, indictable matters, domestic violence matters
- Miwatj Legal Service – representation of Miwatj clients appearing in Darwin Magistrate or Supreme Courts and/or incarcerated in Darwin Correctional Facility or Don Dale Juvenile Detention Centre.

We also have agreements or MOUs with the other ATSILS in the NT to assist each other when necessary. This can include where matters from one area are being heard in Darwin or to provide prison visits if clients of the other ATSILS are incarcerated in Darwin. We also have established MOUs with Correctional Services for video link up facilities and other forms of contact with inmates.

Other more informal arrangements see us sharing costs for travel with the NTLAC, taking instructions from their clients at Bush Courts (i.e. we save them the cost of sending a lawyer out when there is only one or two clients), or their using NAALAS' facilities in remote communities. Our close working relationship with the NTLAC and other organisations means that we support each other on an ad hoc basis as issues arise.

What prevents Indigenous people from seeking the services of mainstream Legal Aid Commissions?

Notwithstanding all these arrangements, however there is no escaping the simple truth that Aboriginal people prefer to deal with Aboriginal organisations. This is particularly true when there is little understanding of English or mistrust of the motives of mainstream agencies generally based on previous experience where Aboriginal people have been made to feel very unwelcome or uncomfortable.

Mainstream services such as the Community Legal Centre, the NT Legal Aid Commission and Domestic Violence Legal Service freely acknowledge that they are not utilised by Aboriginal people. Furthermore they admit that they do not possess the experience or expertise required to assist Aboriginal clients. This includes not having the ties to the community which is very important to Aboriginal people, particularly in a relationship of trust such as between lawyer and client.

In 2001, the Commonwealth Grants Commission found that Aboriginal people access mainstream services at a much lower rate. Moreover, as the appallingly low education retention rates and poor health of Aboriginal people show, Indigenous programs administered by mainstream agencies do not work. While there are a number of reasons for this, the most obvious is the racist attitudes that the majority of Australians have towards Aboriginal people. One only has to read the local 'newspaper' to see how widespread these attitudes are in the NT and strongly how they are promoted. Aboriginal people see the articles and hear the comments, and understand just how much they are hated by 'whites' – the ones who make the comments and those who stand by and do nothing.

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

Do you feel that your organisation is able to provide adequate legal services to women?

NAALAS administers the grant for the Top End Women's Legal Service which caters solely for Indigenous women. We have informal agreements in place about how the two organisations are able to provide the best possible service for women and are currently developing MOUs to formalise our arrangements. By targeting women as a specific group requiring assistance, NAALAS would be duplicating the services provided by TEWLS.

What are the main obstacles that prevent your organisation from helping women?

The main obstacle that prevents us assisting women is the law itself. As for women generally, Aboriginal women find the 'western law' very intimidating and confronting and tend not use it as a way of resolving conflict. Broadly speaking, non-Indigenous women represent less than 20% of all matters within the legal system. At around 15% - 18% of our matters being women, NAALAS is merely reflecting the norm that western legal systems are designed by and for (mostly 'white') men. Women understand that there are better and more just ways of dealing with conflict, particularly as the outcomes provided by the legal system do not work (as the increasing arrest and imprisonment rates in this country demonstrate).

Further, the majority of matters we handle are criminal law matters, which are overwhelmingly committed by men (Aboriginal *and* non-Aboriginal). Therefore the fact that we do not represent women to the same degree as men should be considered a positive thing.

What are the most pressing issues for women?

The most pressing issues for women are often touted as the welfare of their children and as victims of family violence. Other less publicised but equally pressing matters from a legal perspective are convictions for welfare fraud, possession of cannabis and other minor drug matters that in the NT can result in them losing their homes (by being declared a 'drug house') and harassment of their children by police. Petty theft matters such as shoplifting for food and/or clothing are also pressing for those who live so far below the poverty line.

The reality however is that the most pressing issues are socio-economic with the solutions for their concerns to be found in that domain. The law is really the last resort and an admission that society and governments have failed them by the inadequate physical and emotional regime they are forced to endure.

d) The ability of L & J Program components to recruit and retain expert staff.

Are legal aid workers overworked, under-resourced or underpaid?

The short answer to the question posed here is 'yes', 'yes' and 'yes'. For instance in comparison to other legal aid agencies, our staff have workloads some fifty per cent greater and receive about two-thirds or half the amount of pay that staff in the other agencies receive. Our staff regularly work more than fifty hours per week with no paid overtime. While we do offer days off in lieu, many do not avail themselves of the offer, preferring to get the job done, even to the extent of coming in on weekends and during their annual leave. We discourage this as it places too much physical and mental stress on workers.

How does this affect the ability of Legal Services to keep their skilled and committed staff?

The ability of NAALAS to recruit and retain expert staff is highly constrained by the insufficient funding and lack of adequate resources. This includes our ability to recruit and retain staff in remote locations or adequately service the 'Bush Court' circuit with Field Officers from their own communities who speak local languages and understand the law. Insufficient funds mean that we are unable to properly train those we are able to recruit.

The increases to our workload with no additional funding to recruit (and house) more staff, have resulted in extremely high turnovers in the past couple of years as existing staff become frustrated and burned out trying to cope with the extra demands. We have consistently but unsuccessfully sought additional funds from governments and even the private sector to address this chronic need (as experienced by all ATSILS).

The proposed tendering process has further compromised our ability to recruit and retain staff. Staff are wondering what they have to do apart from working more than fifty hours at salary rates far less than any other legal service or law firm in Australia, to receive any kind of recognition for the incredible job they do. They have been unfairly attacked by the government implying they do not give value for money, as well as the additional worries for their clients and their own futures.

What can be done to keep Legal Service staff?

Better pay, adequate resources including a decent work environment, recognition of the incredible work they do (including the incredible workloads) and certainty of employment. Our treatment by funding agencies, such as six monthly releases, onerous reporting conditions, bureaucratic pettiness and inefficiency and no promise of further funding, has an extremely deleterious

effect on all staff, from the CEO who is unable to provide the surety and conditions that staff are entitled to, the lawyers who work with broken old furniture and outdated equipment to the receptionist who is expected to appear smiling and happy no matter what.

e) Tendering of legal services

NAALAS would first like to refute evidence given by ATSIC Commissioners to the Senate Inquiry into the Provision of Legal Services (4 February 2004). Specifically we refute their assertion that Aboriginal Legal Services are to blame for the over-representation of Aboriginal people in this country. We would argue that the over-representation is primarily due to the criminal law being used as a means of controlling a colonised people. Until the fundamental racism of Australian society, which permeates all its structures, is addressed, Aborigines will continue to be 'objects of policing'.

Further we would challenge their claims that tendering out all legal services will provide a better service. This is based on the experience in the Northern Territory, where the Domestic Violence Legal Services were subject to a tender process. The successful tender who won the contract, based on the claims in their very well-written documents about the service they expected to provide, was unable to deliver on their promises. In order to make the most profit from the venture, one junior solicitor was given the task of handling all matters. The result was a shambles, with complaints about the inexperience of the solicitor, the lack of proper representation and the poor outcomes for clients, so much that the government was forced to approach the Legal Aid Commission to take over the contract. The additional expense and waste of time, to say nothing of the confusion and misery caused to clients demonstrates the problems of allowing those with a profit driven agenda to deliver such services. (In an ironic post script, the law firm which made such a fiasco of the Domestic Violence legal service (Whithnall Mailee) is intending to put in a tender for the provision of legal services to Aboriginal people.)

What will be the impact on the quality and availability of Legal Services particularly in the remote areas?

Legal Services were set up over thirty years ago based on the real need to provide adequate representation to Aboriginal people. Around twenty years ago, a review of Aboriginal Legal Services chaired by the current Commonwealth Attorney General strongly recommended that ATSILS should continue to be separate from their mainstream counterparts. Over ten years ago, the Royal Commission into Aboriginal Deaths in Custody likewise strongly recommended support for community organisations such as ATSILS. The rationale for those recommendations and decision are still as relevant today.

Aboriginal people in remote communities are faced with even greater difficulties than those in the urban setting including a lack of a voice when their basic rights are being denied, cost and availability of transport to attend court or visit relatives in prison, and having someone who appreciates their situation and is willing to travel to their communities to educate and inform. Their inability to understand 'white man's law' that allows stealing their land while locking them up for stealing a packet of biscuits, requires sensitivity and understanding that only someone from a similar background can provide. When the NT Chief Magistrate castigates a young Aboriginal person from a remote community who regularly communicates in some six languages, for 'not speaking the language of this country', we know the problems of ignorance continue and Indigenous specific measures are more necessary than ever.

Are the policy directions accompanying the tender document an improvement over the ATSILS policy framework?

The policy directions accompanying the exposure draft of tender document indicate that its writers have little understanding of the way that the law is administered in this country. For instance having the welfare of children as a priority seems to suppose that law firms or legal services have power to intervene in family situations or arbitrarily remove children. NAALAS could be charged with an offence if we as an agency were to undertake such actions, as only the police or family service agency officers have such authority.

It should also be noted that as a service agency we already have the welfare of children as a priority. Decisions about whether or not to represent or brief out a particular matter are always based on the best interests of the child. NAALAS is able to draw together more detailed or undisclosed information because of our close connection to the community, which in turn enables us to make better informed decisions about such matters. This can include knowledge of family situations where children are being 'neglected' or others where extended family members provide childcare although the parents may not do so.

General Comment

It is pertinent at this point to consider the history of Aboriginal Legal Services and particularly the reasons for their establishment. As Professor Greta Bird in her book "The Civilising Mission: Race and the Construction of Crime", the law in this country is used as a form of social control. Far from being neutral or 'value free' in its application, the bias against Aboriginal people underpins the interaction between the state and the traditional owners of this country. By subjecting Aboriginal people to a harsh and punitive desocialisation regime, the guilty are free to continue their colonising agenda.

In a study conducted in 1996, Professor Chris Cuneen found that Aboriginal people were more likely to be arrested, more likely to be charged, more likely to receive a guilty verdict and more likely to receive a harsher penalty than any other group in the Territory. The statistical evidence would suggest that in the eight years since the study, the situation has not changed. Indeed prison rates have gone from 80% to 90% since the study, indicating that the situation has gotten worse.

As Greta Bird demonstrates, 'statistics give no indication of whether or not the arrest was due to discrimination, or whether the sentence was the result of the defendant's inability to understand the court process, or the racism/class prejudice of the Bench. Yet these matters are central to a concern about the construction of crime.' They are also central to the reasons why Aboriginal Legal Services are necessary to defend and protect the interests of the most vulnerable group in the country.

By feeding the ignorance and racism of Australian society, the government provides fertile ground for the criminalisation of Aboriginal people to continue unabated, without fear of retribution. In a recent exercise to assess the State police's 'counter terrorism' programs, a senior police officer remarked when driving past a group of young Aboriginal women waiting at a bus stop 'look at that dressed up trash'. He was confident that his despicable remarks would not be challenged and so it proved to be, not one other occupant in the car (senior public servants) took issue at this callousness. This demonstrates not only the real problems that Aboriginal people face in terms of over policing, but the underlying perceptions that shape the conduct of police.

Earlier this year the Australian Bureau of Statistics (ABS) released figures that reveal that Aboriginal people in the NT are 11 times more likely to go to jail than non-Aboriginal people. We stand out head and shoulders as the most policed, the most prosecuted, the most convicted and the most imprisoned group in the country if not the world, according to these statistics. As the Royal Commission into Aboriginal Deaths in Custody found even at the height of apartheid in South Africa, the arrest and imprisonment rates of Aboriginal Australians were higher than black South Africans. While this is not surprising, given that this country taught the South Africans how to use the law as a means of social control, it is surprising that we as a nation have not moved beyond apartheid as they have in South Africa.