

Tendering Out of Aboriginal and Torres Strait Islander Legal Services

- 6.1 Throughout the Committee's inquiry into the provision of law and justice services to Indigenous Australians, ATSIIS and then AGD were developing and implementing a state by state tendering out of the services provided by ATSILSs. The tender was intended to increase administrative effectiveness in moving funding from a grants based regime to a contractual arrangement that focused on outputs.
- 6.2 The tender was completed in Victoria and Western Australia with the previous state-wide providers, VALS and ALSWA, announced as the successful bids on 1 and 14 April 2005 respectively. The tender contracts are scheduled to commence on 1 July 2005.
- 6.3 The tendering out of services provided by ATSILSs in Queensland was released on 5 March 2005 and closed on 6 April 2005 with a commencement date for the successful provider(s) of 1 July 2005.
- 6.4 Contracts for the provision of legal services to Indigenous Australians in Victoria, Western Australia and Queensland will all expire on 30 June 2008.
- 6.5 The remaining states and the Northern Territory are scheduled to commence arrangements under tenders on 1 July 2006.¹

1 AGD, *Transcript* 17 March 2005, p. 2.

Reasons for the Tender

- 6.6 DIMIA explained why services provided by ATSILSs were put out to tender. The tender:

target[s] two things. One is cost[:] ... rationalisation of the number of providers and reducing overheads ... But the other thing it targets, which you do not get through simple rationalisation, is necessary improvements in the quality of service to make sure you get the best provider, as opposed to simply the cheapest provider.²

- 6.7 NAALAS cited a failed attempt to tender out the Domestic Violence Legal Service in Darwin as contradicting DIMIA's claim that tender processes delivered the best provider:

tender processes often do not give you the best person for the job – they give you the one that writes the best tender document. ... [The Domestic Violence Legal Service] was a three-year contract – the same sort of thing that the federal government is offering – and at the end of one year there were just so many complaints about the lack of service that they revoked the contract and gave it to the Legal Aid Commission...³

- 6.8 NTLAC explained that:

There were some major concerns about [the tender]. One of the issues was that the private firm running the Domestic Violence Legal Service also provided a number of criminal legal services so a fair amount of conflicts arose. Instead of providing funding for a conflicted domestic violence applicant to be sent somewhere else they were simply referred off somewhere else and no-one knew exactly where and no funding was provided to do that. They ran very little community legal education and very little law reform and advocacy services.⁴

Savings

- 6.9 The new arrangements to be implemented were expected to produce savings through the diminution of overheads in states and territories with more than a single provider.

2 DIMIA, *Transcript*, 9 June 2004, p. 13. Cp. ATSIIS, *Transcript*, 9 June 2004, pp. 26-7.

3 NAALAS, *Transcript*, 21 July 2004, p. 9.

4 NTLAC, *Transcript*, 21 July 2004, p. 41.

Table 3 Funding of ATSILSs in Victoria , Western Australia and Queensland 2001-02 to 2007-08

Year	Victoria	Western Australia	Queensland
2001-02	2 228 452	6 695 234	11 568 465
2002-03	2 339 172	6 828 396	11 975 720
2003-04	2 425 938	7 869 185	12 117 663
2004-05	2 410 706	7 127 824	13 494 187
2005-06	2 717 184	8 198 400	*
2006-07	2 809 486	8 811 842	*
2007-08	2 887 856	9 398 198	*

* Indicates figures unavailable because tender and related contract negotiations are currently in train. See Senate, Legal and Constitutional Legislation Committee, *Transcript*, 23 May 2005, p. 41.

Source AGD, *Submission No. 44*, p. 22 and AGD, *Correspondence*, 31 May 2005 and *Correspondence*, 6 June 2005.

6.10 AGD stated that:

Any savings [from the tender] will flow to increased services ... because there is no change in the amount of money by virtue of the tendering process.⁵

Centralisation of Providers

6.11 At a public hearing on 9 June 2004 ATSIIS and DIMIA consistently referred to the situation in Queensland, where 11 of the 25 ATSILSs are located, as exemplifying the need for rationalisation of the services in order to reduce overheads:

In Queensland, for example, there are 11 separate services who would have principal solicitors, auditors where necessary, financial officers and bookkeepers...

There is a contrast between the costs associated with administration for Western Australia, where they have one service for the whole state, and Queensland where there are 11...

The Office of Evaluation and Audit report showed that the per case costs of the Queensland services were much higher than those of other states...

the much higher cost of certain services in some locations than in others, particularly in Queensland, with a very high number of

5 AGD, *Transcript*, 17 March 2005, p. 3.

services and the inevitable costs tied up in the overheads that go with that..⁶

- 6.12 AGD provided a breakdown of approved budgets by ATSILSs for 2004-05.⁷

Table 4 Approved Percentage of ATSILS's Budget on Service Overheads by State/Territory 2004-05

State/Territory	No. of ATSILSs	Overheads (Services)	Total Expenditure	% of Budget
New South Wales/Australian Capital Territory	6	1 402 030	10 552 452	13.3%
Northern Territory	4	870 838	5 821 573	15.0%
Queensland	11	2 398 351	12 873 776	18.6%
South Australia	1	551 328	3 645 882	15.1%
Tasmania	1	101 600	1 046 887	9.7%
Victoria	1	236 400	2 410 706	9.8%
Western Australia	1	1 156 300	7 127 824	16.2%

Source AGD, *Exhibit No. 43*.

- 6.13 On average the 11 Queensland ATSILSs expend the highest proportion of their total budget on service overheads. However, the proportion of funding devoted to service overheads in Queensland is not grossly in excess of other states and territories that contain large service areas with significant remote populations of Indigenous people such as Western Australia, South Australia and the Northern Territory.

- 6.14 The reason for the increased service overheads in ATSILSs expenditure where a significant proportion of the client base is remote is that sub-offices are required to maintain community based accessible services.

- 6.15 Furthermore, expenditure on service overheads appeared particularly efficient in New South Wales with its large service area and six ATSILSs. One reason for this may be the tendency of Indigenous people in this state to live in regional centres rather than remote communities.

- 6.16 It is noteworthy that ATSILSs in New South Wales spend proportionately less on service overheads than the Northern Territory with its four ATSILSs and South Australia and Western Australia where single providers operates.

- 6.17 Mr Cuomo formerly of ALSWA stated that:

6 ATISIS and DIMIA, *Transcript*, 9 June 2004, pp. 12, 13 and 26.

7 AGD, *Exhibit No. 43*.

there are economies of scale with a single state wide service ... you do not have to replicate management too many times; you can run a reasonably lean management and a reasonably flat management structure...⁸

6.18 AGD did not provide a breakdown of the proportion of ATSILSs' budgets spent on management salaries as opposed to the salaries of solicitors and community workers.

6.19 ATSILSs particularly from New South Wales were vocal in their opposition to the stated preference in the Exposure Draft of the Request for Tender document of a single provider of services within each state and territory.⁹

6.20 The regional ATSILSs in New South Wales were established because of the inadequacy of the then single state based Aboriginal Legal Service of New South Wales, otherwise known as the Redfern Aboriginal Legal Service:

The real problem that the ALS faced in the mid-70s was that they used to fly blokes in and out to appear in Walgett and Brewarrina, when they could not get people to go there. Aboriginal Legal Services field officers from those places - Broken hill, Bourke and Brewarrina, - set up an independent legal service to provide representation that worked.¹⁰

6.21 WALs stated that:

people out west and past the Blue Mountains believe that past history shows that they did not get serviced. ... [The] issue needs to be addressed to ensure that the services are on the ground and they are out there ... There are also people on this side of the Blue Mountains.¹¹

6.22 MRALS stated that:

The regionalised model [in New South Wales] allows for direct communication between the decision makers in the ATSILS and community members, especially those members from small and isolated settlements.¹²

6.23 Mr Cuomo stated that during his time at ALSWA he found:

8 Mark Cuomo, *Transcript*, 31 March 2005, p. 8.

9 ATsIS, *Exhibit No. 15*, Sect. 2.4.2, p. 18.

10 Western NSW CLC, *Transcript*, 30 March 2005, p. 24.

11 WALs, *Transcript*, 30 March 2005, p. 9

12 MRALS, *Transcript*, 13 July 2004, p. 46.

You have a very inflexible set of choices, because you do not have too much in the way of discretionary funding ... Some communities get very angry and upset when they do not see their needs being met...¹³

- 6.24 Mr Cuomo speculated that the tender arrangements would not alter the provision of Indigenous legal services in Western Australia:

I think Western Australia is seen as a success because amongst the ATSILS we have done things like maintain our family law presence and some civil presence, which I talked to you about earlier...

To be brutally honest, I do not think the tender is going to change much in Western Australia.¹⁴

- 6.25 The Request for Tender in Victoria and Western Australia reiterated the Commonwealth's preference for a single state provider and the Request for Tender in Queensland allowed the possibility of splitting the state into two zones thus requiring two providers down from the current 11 ATSILSs.¹⁵

- 6.26 AGD maintained that:

The Government's preference is for single service providers, although in some states and the Northern Territory it may consider the option of having two providers based on regional zones...¹⁶

Increases in Accountability

- 6.27 Recommendations Four and Five of ANAO, *ATSIS Law and Justice Program, Audit Report No. 13, 2003-2004*, identified the communication of targets, performance data and evaluation between funding bodies and service providers as areas in need of strengthening in the administration of the Law and Justice Program.

- 6.28 AGD responded that:

The Request for Tender documentation ... sets performance targets ... the scope of services to be provided has been clearly

13 Mark Cuomo, *Transcript*, 31 March 2005, p. 8.

14 Mark Cuomo, *Transcript*, 31 March 2005, pp. 8-9.

15 AGD, *Request for Tender No. 04/29 for the Purchase of Legal Aid Services to Indigenous Australians in Victoria and Western Australia*, Sect. 2.41, p. 19 and AGD, *Request for Tender No. 04/01 for the Purchase of Legal Aid Services to Indigenous Australians in Queensland*, Sect. 2.4.1, p. 20.

16 AGD, *Submission No. 44*, p. 23.

defined as legal assistance and casework, and other activities previously carried out by ... ATSILSs, such as law reform and community education, can be funded through other programs administered by the Department.¹⁷

- 6.29 SEALS complained of the complicated character of the performance reporting data system employed by ATSIIS rendered the system next to useless in providing information to service providers:

There were 65 different classes so they could work out age, sex and charges. They have probably spent \$3 million on ALSs ... over the years. We put information in but we cannot generate stats.¹⁸

- 6.30 ALRM provided an example of how data collection can suffer in a climate of static funding and increasing demand:

our organisation has been running on empty for some time, to the extent that to maintain our existing services level of services ... we have had to transfer our corporate support type service resources into service delivery just to maintain services ... It would be lovely if we could gain [statistical compilation] , but we cannot.¹⁹

- 6.31 The Law Council of Australia supported this view:

One of the things that is of concern is that providing all this information and providing this accountability and so forth cannot be done without cost. Where you have a service that is absolutely cash strapped trying to get coalface services to the communities, there is difficulty about putting aside money to ensure proper audit trails and all that sort of thing.²⁰

Concerns at Possible Results of the Tender

Community Ownership and Embeddedness

- 6.32 Concerns relating to the tender focused on the possibility that a non-Indigenous service provider might make a successful bid for the provision of services currently delivered by ATSILSs. In such an event, it was argued, the provider would be without the networks of Indigenous field

17 AGD, *Submission No. 44*, p. 1.

18 SEALS, *Transcript*, 9 June 2004, p. 40.

19 ALRM, *Transcript*, 19 August 2004, p. 35.

20 Law Council of Australia, *Transcript*, 19 August 2004, p. 57.

officers that have proven so important in providing a conduit between provider and client.²¹ It was also put that a non-Indigenous provider, by definition would not be owned by the community that it serviced and this would further alienate potential clients from seeking assistance.

6.33 The challenge of maintaining the community based character of service providers, so essential in making them accessible to their Indigenous clients, while ensuring the accountability of these providers to the funding agency developed as an issue through the Committee's inquiry.

6.34 DIMIA put the problem from the Commonwealth's side in the following terms:

It is a bit like the difference between local government, state government and federal government in the mainstream system ... The potential for conflicts of interest becomes more focused the more localised the decision making becomes.²²

6.35 ALRM insisted that ATSILSs must be Aboriginal owned and controlled:

There is a sense of ownership and a sense of belonging, The feeling is, 'It is one of our organisations.' This is something that the Indigenous community of South Australia keep on emphasising - the Aboriginal Legal Rights Movement is their organisation. They are the members and they actually own the organisation.²³

6.36 MRALS expanded on the importance of providers belonging to the communities they service:

what in fact happens in a court of law is that more often than not there is an Aboriginal person who is very fearful of the fact that he or she is coming before a very alien process with alien people in it. A very large part of the work of an ATSILS in criminal law practice is to, firstly, win the trust and confidence of that person so that they can give proper instructions and have that case properly presented.²⁴

6.37 WLS New South Wales stated that:

The problem with the tender document ... is that they did not put in anything about employing Indigenous people...²⁵

21 SEALS, *Transcript*, 9 June 2004, p. 45 and WLS New South Wales, *Transcript*, 13 July 2004, p. 12.

22 DIMIA, *Transcript*, 9 June 2004, p. 6.

23 ALRM, *Transcript*, 19 August 2004, p. 36.

24 MRALS, *Transcript*, 13 July 2004, p. 46.

25 WLS New South Wales, *Transcript*, 13 July 2004, p. 12.

- 6.38 NAALAS complained that the Request for Tender provided:
- no quota for Aboriginal field officers ... There is no quota for even a single Aboriginal staff member.²⁶
- 6.39 SEALS stated that it was funded to provide five and a half solicitors but that:
- there is no need for Aboriginal employment in the tender. They say you need cultural awareness training but it does not say whether it is half an hour when the new person starts or what. It is critical for the employment of Aboriginal people. We employ Aboriginal people in Moruya, Nowra and our Canberra office. If the tendering process happened and a mainstream organisation won it, the five white lawyers would all get jobs. The savings the provider would make would mean that they would not need to employ any Aboriginal people and you would therefore lose that direct connection with the community.²⁷
- 6.40 CAAFLU also expressed concern that the impact of the tender on Aboriginal Field Officers:
- I fear that [they] would be lost if things were tendered out ... they would be the ones that perhaps would not be employed if [ATSILSs] were tendered out.²⁸
- 6.41 The Request for Tender Documents raises the possibility of providers utilising Field/Court Officers under a sub-dot point in Selection Criteria 2.²⁹

Access versus Cost

- 6.42 Another concern raised at the possibility of a successful non-Indigenous provider referred to the commercial basis on which large scale law firms run their businesses. It was argued that provision of legal services to Indigenous people within a commercial framework would contribute to deterioration in service levels because of the demand for commercially acceptable profit margins in an environment of severely limited funds.

26 NAALAS, *Transcript*, 21 July 2004, p. 10.

27 SEALS, *Transcript*, 9 June 2004, pp. 42 and 45.

28 CAAFLU, *Transcript*, 22 July 2004, p. 38.

29 AGD, *Request for Tender No. 04/29 for the Purchase of Legal Aid Services to Indigenous Australians in Victoria and Western Australia*, Sect. 4.6.2, p. 54 and AGD, *Request for Tender No. 04/01 for the Purchase of Legal Aid Services to Indigenous Australians in Queensland*, Sect. 4.6.2, p. 57.

- 6.43 The Committee received evidence expressing concern that the tendering out of ATSILSs did not adequately ensure that Indigenous specific legal services would remain geographically accessible to their clients.
- 6.44 NSWLAC speculated that if a commercial law practice was awarded a tender:
- the first thing they would do is take their costs off the top – that is their profit margin. Then you have to look at what is left and how you are going to provide that and how you are going to provide it in locations that are required.³⁰
- 6.45 SEALS expressed concern at possible restriction of access to services:
- One is the balance between access and cost. To appear for one person, ALSs may have to drive 200 kilometres, because that person is important. So we do not balance access versus cost. If we were looking at it on a cost efficiency basis and not as providing a special service, we could probably get a duty solicitor to go to the court at Cooma and the New South Wales legal aid system would pick up that funding ... They also talk about a 1800 number ... Indigenous people have a very poor record of use of 1800 numbers. You can imagine somebody at Wilcannia ringing the 1800 number with all the material from their court case and their references and then taking notes.³¹

Uncertainty of Funding

- 6.46 ATSILSs complained of the disruptive way in which the tendering out process had been implemented particularly the move to six monthly funding cycles. The need to implement six monthly funding cycles appeared to arise as the result of poor management on the part of Commonwealth agencies.
- 6.47 VALS stated that:
- uncertainty has become more debilitating since June 2003 when ATSIIS was created. Since that date ATSIIS have been on six monthly or less funding periods. To a program which is acknowledged to be under funded and have difficulty retaining staff the move to shorter funding periods is at best an example of

30 NSWLAC, *Transcript*, 13 July 2004, p. 83

31 SEALS, *Transcript*, 9 June 2004, p. 37.

careless and incompetent program management and at worst part of an agenda of destroying Indigenous organizations.³²

- 6.48 NAALAS informed the Committee it was on its third six month funding cycle in July of 2004 and related the impact of this funding regime on its work:

The six-monthly reporting conditions are very onerous. The fact that we only get six-monthly releases has prevented us from doing some things. For instance, our cars are over three years old. Normally we would go into another lease arrangement, but we cannot go into anything that is long term at the moment. This has been the third six-monthly release that we have had so far and, as I say, in terms of being able to operate effectively it has been very onerous. Most of our bills for insurance and things like that come in the first six months, so we are struggling at the end of the six months to make our payments. The other thing is that our funding was three weeks late this financial year, so we were not sure how we were going to pay wages. We actually stopped paying creditors' bills for a week in order to pay the wages, and then the money from ATSIC came through. We are subjected to a lot of those small things.³³

- 6.49 MRALS confirmed that it had been put on a six month funding cycle with little information of when this arrangement would conclude beyond a supposition that the tendering out of services would eventually proceed in New South Wales.³⁴

- 6.50 AGD stated that

A 12 month funding cycle was restored for ATSILS in those states and the NT, which are not going to tender in the 2004-05 financial year. Funds in the 2005-06 financial year will be made available for the ATSILS in the NT and SA until new contracts commence on 1 February 2006, and in NSW and Tasmania until 30 June 2005.³⁵

32 VALS, *Submission No. 15*, p. 3.

33 NAALAS, *Transcript*, 21 July 2004, p. 8.

34 MRALS, *Transcript*, 13 July 2004, p. 48

35 AGD, *Submission No. 44*, p. 18.

Other Legal Service Providers

- 6.51 ATSIS stated that the tendering out of services provided by ATSILSs was indicative of a broader trend:

the tender relates also to a broader issue about contracting and entering into contracts. The initiative in relation to ATSILS was part of a broader view that ATSSIS had about the delivery of services. So, in that sense, it was a bit of a forerunner ...

We were progressing a series of reforms across all of our programs, including Family Violence Prevention Legal Services, a move away from grants to outcomes based contracts. So there is a reform process which is also touching on Family Violence Prevention Legal Services. But there is the issue of the use of the tendering process, which could occur in the future, potentially – although there is no decision in that and, of course, any such decision will now rest with the organisation that will be taking over responsibility for those services.³⁶

- 6.52 As the organisation that received responsibility for funding legal services to Indigenous people after the dissolution of ATSSIS, AGD stated that FVPLSs continued to receive grant funding through an annual application process and that these arrangements were unlikely to change.³⁷

- 6.53 AGD explained that:

Due to the sensitive nature of this program, a procurement process was tailored to account for specific requirements, such as the need for culturally appropriate responses and the difficulty in securing service provision and recruitment for remote communities. For these reasons, and because of the difference in scale, a different approach was adopted for the FVPLS program expansion to that adopted for the tender process for the provision of legal aid to Indigenous Australians.³⁸

- 6.54 AGD stated that a grants-based funding arrangement was also employed with CLCs. These services:

originated as a grants-based program and different amounts of funding were provided to different centres ... Current resource levels are based on the amounts originally provided as a result of

36 ATSSIS, *Transcript*, 9 June 2004, p. 20.

37 AGD, *Submission No. 44*, pp. 6-7.

38 AGD, *Submission No. 44*, p. 7.

those funding applications, with indexation increases on those amounts.³⁹

- 6.55 AGD stated that the Prevention, Diversion and Rehabilitation program was funded through open and competitive grants procedures.⁴⁰

Committee Comment and Recommendations

- 6.56 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.
- 6.57 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.
- 6.58 The Committee was disappointed to receive no submissions from Queensland, particularly as the presence of 11 ATSILSs in that state was consistently cited as a reason to fund a smaller number of service providers across all states and the Northern Territory.
- 6.59 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 centralisation of legal service providers under the terms of the tender.
- 6.60 The figures provided by AGD did not include a breakdown of salary expenditure on management as opposed to 'coal face' service provision and thus the Committee can come to no conclusion as to whether the centralisation of service providers, under the terms of the tender, will produce greater resources to 'coal face' services.
- 6.61 While the stated preference for a single provider may be appropriate in Victoria and Western Australia (where there is currently only one provider per state), in jurisdictions where there are other arrangements and different circumstances, the preference for a single provider may cause significant disruption to services. The Committee awaits the results

39 AGD, *Submission No. 44*, p. 3.

40 AGD, *Submission No. 44*, p. 7.

of the Queensland tender and the level of services delivered by a significantly smaller number of providers with interest.

- 6.62 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 ATSILSs and, more recently FVPLSs, have had in making the justice system more accessible to Indigenous Australians.

Recommendation 14

- 6.63 **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.**

- 6.64 The Committee recognises that an essential part of the services provided by ATSILSs is the involvement of community based paralegal staff who provide support for clients. The Committee expects that a functional network of Aboriginal Field and Court Officers should be an essential part of a successful tender bid.

Recommendation 15

- 6.65 **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.**
- 6.66 The Committee is concerned that funding for CLCs and FVPLSs remains grants-based. The historical and grants based character of funding for ATSILSs was found to be inadequate by ANAO and the same may be the case for funding of FVPLS and CLC operations.

Recommendation 16

- 6.67 **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*.

- 6.68 The Committee shares the concerns of AGD that ATSILSs' resources are devoted to the provision of coal face services rather than used in unnecessary replication of management. To this end, the Committee believes that in addition to other categories of performance data that AGD requires of service providers a breakdown of their expenditure on management should also be included.
- 6.69 The Committee is also concerned at statements that on a comparative basis ATSI and AGD had underfunded ATSILSs in some jurisdictions. It would be beneficial if the adequacy of funding on a comparative basis across jurisdictions was conducted.

Recommendation 17

- 6.70 **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.**

