THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

Aboriginal Legal Aid

House of Representatives
Standing Committee on Aboriginal Affairs
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Recommendations

The Committee recommends that:

Chapter 3 Statistics

1 *the Minister for Aboriginal Affairs and the Treasurer, as the Minister responsible for the Australian Bureau of Statistics, accord priority to developing a co-ordinated approach to securing the identification of Aboriginals in State and Commonwealth Government statistical collections and, particularly, in crime and justice statistics.*

(paragraph 64)

2 *the identification of Aboriginality in the collection of crime and justice statistics be based on the definition of an Aboriginal as a person of Aboriginal descent who identifies as an Aboriginal and is accepted as such by the community with which he is associated.*

(paragraph 65)

3 *the Department of Aboriginal Affairs' chief statistical officer confer with the Aboriginal legal services to ascertain their information requirements for the development of a comprehensive national statistical system.*

(paragraph 70)

4 *the chief statistical officer seek the co-operation of the Commonwealth Legal Aid Commission in the design of an appropriate national statistical system and the agreement of the Aboriginal legal services that the proposed system meets their collective and individual statistical requirements.*

(paragraph 70)

5 *following the introduction of a national statistical system by the Aboriginal legal services, the chief statistical officer provide continuing advice and assistance in the maintenance and, where necessary, the review and adjustment of the statistical system.*

(paragraph 70)

Chapter 5 Why a Separate Aboriginal Legal Service?

6 *the Government continue to support separate Aboriginal legal services through the provision of financial assistance in order to promote the access of Aboriginal people to legal aid.*

(paragraph 110)

Chapter 7 Aboriginal Children and the Law

7 *the Minister for Aboriginal Affairs seek the co-operation of State and Territory Ministers responsible for Aboriginal affairs and the Attorneys-General to provide for the inclusion of an Aboriginal representative in the composition of juvenile aid panels in all cases involving Aboriginal juveniles.*

(paragraph 214)

Chapter 8 Aboriginal–Police Relations

8 *the Government urge those States which have not implemented notification systems to introduce police procedures which require the presence of a 'prisoner's friend' or Aboriginal legal service representative following the arrest of Aboriginals by police for all offences except drunkenness and during interrogation and any other investigative procedures.*

(paragraph 273)

9 *as a matter of urgency the Government seek the co-operation of the State and Territory Governments to establish Aboriginal–police liaison systems, recruit Aboriginal police and police aides, institute training schemes to familiarise police with the special problems of Aboriginals, and review procedures for investigating complaints against police where these measures have not been implemented.*

(paragraph 273)

10 *the Minister for Aboriginal Affairs:*

- *ascertain and keep under review developments which have occurred in the area of Aboriginal–police relations in the States and the Territories;*
- *seek the advice of the Aboriginal legal services on this matter;*
- *report regularly to the Government on the effectiveness of special measures or procedures which have been adopted by the States and Territories to overcome problems which Aboriginals encounter in their dealings with law enforcement agencies; and*
- *in the event of unsatisfactory progress being made by the States in the area of Aboriginal–police relations, recommend to the Commonwealth Government further steps that might be taken to improve Aboriginal–police relations through Commonwealth legislative provision.*

(paragraph 273)

Chapter 9 Aboriginals and the Civil Law

11 *as and when priority needs in the criminal jurisdiction are met, Aboriginal legal services be permitted to provide advice and assistance to Aboriginal people in matters involving the civil jurisdiction both in relation to those cases in which cost recovery is likely and others; and that the Aboriginal legal services be entitled, as funds permit, to pursue matters in the civil jurisdiction which could have long-term advantages for Aboriginal people generally as well as individual litigants.*

(paragraph 320)

12 *where the amount of civil litigation generated by or available to an Aboriginal legal service warrants the employment of a solicitor with expertise in civil law, Commonwealth funds be made available initially for this purpose.*

(paragraph 320)

13 *costs recovered from successful litigation not be subtracted from Aboriginal legal services' future funds but be reallocated within the Aboriginal legal services, enabling them to increase their effectiveness in meeting both the criminal and civil law needs of their clients.*

(paragraph 320)

Chapter 11 Aboriginals and Welfare—The Role of the Aboriginal Legal Services

14 Aboriginal legal services provide advice and assistance in welfare matters where these arise from related legal problems, and particularly in areas where welfare services are not readily available to Aboriginal communities.

(paragraph 372)

15 as a matter of urgency, the Minister for Aboriginal Affairs and the Minister for Social Security investigate the delivery of welfare services to Aboriginals, particularly in rural areas, and that as part of the investigation the Ministers:

- *identify and meaure the welfare needs and demands of Aboriginal people;*
- *assess the extent to which these needs and demands are being met by State welfare departments, Aboriginal community welfare agencies, and other organisations;*
- *evaluate the effectiveness of existing welfare programs in terms of their accessibility and acceptability to Aboriginal people;*
- *assess the most appropriate means of meeting the special welfare needs of Aboriginals; and*
- *seek the views of community-based Aboriginal organisations concerned with the wellbeing of Aboriginal people, including the Aboriginal legal services.*

(paragraph 372)

Chapter 12 Community Legal Education

16 the Government encourage and provide financial support to Aboriginal legal services which take initiatives to develop community legal education materials and promote community legal education programs.

(paragraph 383)

Chapter 13 Alternative Legal Services

17 the Aboriginal legal services enter into special co-operative arrangements with State and Territory legal aid commissions and other legal aid agencies so that legal aid resources can be rationalised, particularly in rural areas and, if necessary, seek the assistance of the Minister for Aboriginals Affairs and the Attorney-General in attaining these objectives.

(paragraph 421)

18 when assistance is sought by the Aboriginal legal services, the Minister for Aboriginal Affairs and the Attorney-General intervene on behalf of the Aboriginal legal services and provide such assistance as is necessary to ensure that co-operative arrangements between the Aboriginal legal services and legal aid commissions and others are established and maintained.

(paragraph 421)

19 the Aboriginal legal services make more effective use of alternative legal aid services by encouraging Aboriginal people to use such services, particularly in metropolitan areas where alternative services are most readily available, and that the Aboriginal legal services direct resources towards meeting currently unmet legal needs of Aboriginal people in rural areas where alternative sources of legal aid are not available.

(paragraph 421)

Chapter 14 Community Participation in the Delivery of Aboriginal Legal Aid

20 *the Department of Aboriginal Affairs consult the Pitjantjatjara Council and Pitjantjatjara people to determine the most appropriate way of organising the separate delivery of legal aid to Aboriginal people in the Pitjantjatjara traditional homeland communities and that it provide necessary assistance to the Pitjantjatjara people for the establishment of a legal service which will provide a full range of legal services to them.*

(paragraph 475)

21 *if and when the need arises for the management and efficiency of an Aboriginal legal service to be reviewed other than as part of regular monitoring procedures, the review be conducted by an independent appointee acceptable to both the Aboriginal legal service and the Minister for Aboriginal Affairs or, in the event of there being a failure to agree, by a person chosen conjointly by the Minister for Aboriginal Affairs or his nominee, the Aboriginal legal service concerned and the President of the relevant Law Society or Law Institute in the State or Territory of the Aboriginal legal service to be investigated (in the case of the Pitjantjatjara Legal Service, the third party be the President of the South Australian Law Society).*

(paragraph 489)

22 *in consultation with the National Aboriginal Employment Development Committee, the Minister for Aboriginal Affairs:*

- *assess the present and future needs of Aboriginal community controlled organisations including the Aboriginal legal services for management training for Aboriginal staff; and*
- *review available management and administration training programs offered by tertiary institutions and other organisations to assess their suitability for Aboriginal people and, where appropriate, investigate the need to negotiate with institutions concerning the introduction of special entrance conditions for Aboriginals and the provision of appropriate support for Aboriginal participants in such programs.*

(paragraph 494)

23 *the Minister for Aboriginal Affairs consult with the Aboriginal Training and Cultural Foundation and the Institute of Aboriginal Development on the development and promotion of special programs to provide suitable management training for Aboriginal legal service management staff and other Aboriginal people.*

(paragraph 495)

Chapter 15 Aboriginal Legal Service Staff and Training

24 *the Government adopt a firm policy of promoting the provision of special educational assistance to Aboriginal people to enable them to undertake university law courses and of promoting the provision of special entrance conditions for Aboriginal students by university law faculties.*

(paragraph 505)

25 *the Government direct the Tertiary Education Commission to implement this policy and make known to university law faculties the special needs of Aboriginal students including their need for extra tuition and support for the duration of their courses.*

(paragraph 505)

26 *the Minister for Aboriginal Affairs, as a matter of priority, develop an appropriate strategy for ensuring that Aboriginals receive maximum assistance and support to qualify as legal practitioners so that Aboriginal legal services can, as soon as possible, operate independently of non-Aboriginal professional legal staff and Aboriginals can assume full responsibility for the delivery of legal aid to their people.*

(paragraph 505)

27 *additional funds be made available to the Aboriginal legal services to enable Aboriginal field officers to participate in training programs and courses and to provide for the employment of relief staff to carry out their duties when necessary so that the delivery of legal services is not disrupted.*

(paragraph 534)

28 *the Minister for Aboriginal Affairs ascertain the present and future requirements of the Aboriginal legal services for field officer training and promote the design and implementation by appropriate legal and educational institutions of suitable formal diploma or certificate courses and training programs for Aboriginal field officers.*

(paragraph 534)

Chapter 16 Funding

29 *the Department of Aboriginal Affairs seek the co-operation of the Aboriginal legal services to design and implement an evaluation program to gauge the accessibility and acceptability of the legal services to the Aboriginal client population, the present and future needs and demands of Aboriginal people in criminal and civil law matters and related non-legal matters, and the effects of legal service activities on Aboriginal community development.*

(paragraph 570)

30 *the advice and assistance of the Commonwealth Legal Aid Commission be sought through the Attorney-General in the design and implementation of an appropriate evaluation framework.*

(paragraph 570)

31 *the Government seek advice on the legality of Aboriginal legal services in all States and the Territories charging fees.*

(paragraph 587)

32 *the Department of Aboriginal Affairs seek the co-operation of the Aboriginal legal services in developing a flexible and informal means test for Aboriginal legal services.*

(paragraph 587)

33 *Aboriginal legal services apply properly means-tested charges for legal services provided to clients.*

(paragraph 587)

34 *revenue from the collection of charges be used to supplement government grants-in-aid and not be deducted from future levels of funding.*

(paragraph 587)

35 *increased levels of financial assistance be made available to the Aboriginal legal services through the Government's Aboriginal legal aid program.*

(paragraph 590)

36 *additional funds allocated to the Aboriginal legal aid program be directed towards meeting the legal needs and demands of Aboriginal people in rural areas.*

(paragraph 591)

Chapter 17 National Co-ordination

37 *Aboriginal legal services seek the co-operation and assistance of the Commonwealth Legal Aid Commission in such matters as the development of statistical collections, the evaluation of legal aid programs, the collection and dissemination of information, the development of community legal education programs, and the conduct of research.*

(paragraph 608)

38 *the Commonwealth Attorney-General direct the Commonwealth Legal Aid Commission to consult and negotiate with Aboriginal legal services in response to initiatives from Aboriginal legal services which express an interest in entering into co-operative arrangements with the Commonwealth Legal Aid Commission and participating in, contributing to and benefiting from activities arising from the Commission's functions.*

(paragraph 608)

Chapter 18 Government Policy on Aboriginal Legal Aid

39 *Aboriginal legal services be required to submit annual reports on their operations and activities to the Minister for Aboriginal Affairs in which proposals for future development and problems relating to the delivery of legal aid and other matters can be drawn to the Minister's attention.*

(paragraph 654)

40 *the Minister for Aboriginal Affairs respond to proposals and grievances raised by the Aboriginal legal services in their annual reports and provide the necessary advice and assistance to the Aboriginal legal services which will enable them to attain their objectives.*

(paragraph 654)

41 *the Department of Aboriginal Affairs employ a full-time senior lawyer who is experienced in legal aid matters and familiar with the special legal needs and problems of Aboriginals to advise both the Aboriginal legal services and the Government on the operation of the Aboriginal legal aid program.*

(paragraph 660)

42 *the Government review the promotion and career structures for Aboriginal people within the Department of Aboriginal Affairs and Aboriginal organisations and that the Department of Aboriginal Affairs, in consultation with the Public Service Board, develop a program for the interchange of Aboriginal and non-Aboriginal staff between the Department of Aboriginal Affairs and Aboriginal organisations.*

(paragraph 666)

43 *the Minister for Aboriginal Affairs seek an inquiry into the present structure, role, composition and future of the Department of Aboriginal Affairs and its interpretation and application of the Government's policy of self-determination.*

(paragraph 666)

44 *the inquiry into the Department of Aboriginal Affairs be conducted by a small group of Aboriginal people and experts drawn from outside the Commonwealth and State Public Service structures who are familiar with Aboriginal affairs and experienced in the organisation and delivery of programs designed to assist disadvantaged people.*

(paragraph 666)

1. Introduction

The Committee

1 The House of Representatives Standing Committee on Aboriginal Affairs is required to inquire into and report on:

(a) the present circumstances of Aboriginal and Torres Strait Island people and the effect of policies and programs on them, and

(b) such other matters relating to the Aboriginal and Torres Strait Island people as are referred to it by—

(i) resolution of the House, or

(ii) the Minister for Aboriginal Affairs.[1]

Terms of reference

2 On 3 January 1979, the Minister for Aboriginal Affairs, Senator the Hon. F. M. Chaney, referred the following matter to the Committee for inquiry and report:

The access of Aboriginals to legal aid with particular reference to:

(1) the special needs and demands of Aboriginals for legal aid;

(2) the extent to which the legal needs and demands of Aboriginals are being met by Aboriginal Legal Aid Services and other legal and counselling agencies.

(3) the costs and benefits (economic and social) of Aboriginal Legal Aid Services; and

(4) the means of meeting the special needs and demands of Aboriginals for legal aid in the future.

Conduct of the inquiry

3 The Committee sought written submissions from the Aboriginal legal services, other Aboriginal organisations, relevant Commonwealth and State Government departments, all State legal aid commissions, law societies and associations, community legal aid organisations, law reform commissions, university and college law faculties and other groups within the community. The Committee also invited submissions from Aboriginal and non-Aboriginal individuals known to be interested in the legal needs of Aboriginal people and the provision of Aboriginal legal aid. The Committee wrote to the editors of over 40 Aboriginal newspapers, newsletters, periodicals and other Aboriginal community publications informing them of the inquiry, and to the editors of publications prepared by law societies, student associations and various organisations concerned with Aboriginal affairs.

4 Sixty-four written submissions were received and considered by the Committee and a large volume of supporting material was also studied. Twenty-two days of public hearings were held in all States, the Northern Territory and Canberra. As part of the inquiry, 186 witnesses, of whom seventy were Aboriginals, appeared before the Committee. A number of witnesses gave evidence on more than one occasion. Witnesses are listed in Appendix 1. The transcript of formal evidence

[1] The House of Representatives Standing Committee on Aboriginal Affairs was first appointed by resolution of the House of Representatives in the 28th Parliament; it was subsequently reappointed in the 29th, 30th and 31st Parliaments.

taken at the public hearings comprises over 4000 pages and is available for inspection at the House of Representatives Committee Office, the Australian National Library, the Commonwealth Parliamentary Library and the Australian Institute of Aboriginal Studies.

5 During the inquiry the Committee was invited by the Central Australian Aboriginal Legal Aid Service to meet members of traditionally-oriented communities in the Northern Territory. At the suggestion of the Legal Service, the Committee held informal discussions with individuals, small groups and large community gatherings at Yuendumu, Warrabri and Tennant Creek. The Committee also visited Ernabella in South Australia and held discussions with the Aboriginal community.

6 The Committee acknowledges the co-operation and assistance provided by all witnesses who gave evidence to the Committee and by other individuals and organisations who contributed to the inquiry. In particular, it records its appreciation of the assistance provided by all the Aboriginal legal services through their constructive and forthright approach to the inquiry and their preparation of comprehensive submissions. At times it perceived among the Aboriginal community certain misgivings about the role of the Committee and the purpose of the inquiry. The Committee therefore endeavoured to convey to Aboriginal individuals and organisations its concern to determine through its investigations the most effective, efficient and appropriate means of meeting the special legal needs and demands of Aboriginal people and of improving their access to legal aid.

Review of the Aboriginal Legal Services' Interim Charter

7 On 28 August 1979, the Minister for Aboriginal Affairs requested that the Committee consider the Aboriginal Legal Services' Interim Charter as part of the inquiry into Aboriginal legal aid. The Interim Charter, which sets out conditions under which the Government will provide finance to the Aboriginal legal services and how those moneys may be applied, was released on 20 August 1979. The broad principles underlying the preparation and implementation of the Interim Charter and the conditions relating to the Aboriginal legal services' scope of activities and casework priorities are discussed in Chapter 18. The financial principles set out in the Interim Charter, including the condition that the Aboriginal legal services levy a standard service fee, are discussed in greater detail in Chapter 16.

Proposed review of the operation of the Aboriginal legal services in New South Wales

8 On 3 December 1979, the Minister for Aboriginal Affairs advised the Committee that Mr Justice Wootten, who had agreed to undertake a review of the operation of the Aboriginal legal services in New South Wales, could not proceed with the review because of other commitments. The Minister asked the Committee to consider extending its inquiry to examine particular issues of concern to New South Wales. The Committee subsequently informed the Minister that it had decided not to extend the inquiry. The Committee had at that stage completed its series of interstate public hearings; it had already sought the views of the Aboriginal legal services in New South Wales; and the Aboriginal Legal Service (N.S.W.) Ltd had appeared before the Committee on three separate occasions. It was considered inappropriate for the Committee to conduct a special

review of Aboriginal legal services in New South Wales within the terms of reference of the present inquiry without conducting similar reviews in other States and the Northern Territory.

9 The Committee advised the Minister, however, that it expected the inquiry would cover most points in the terms of reference of the review of Aboriginal legal services in New South Wales: the Aboriginal legal services' deployment of resources; the determination of priorities between different areas of the law and between urban and rural Aboriginals; and the potential to utilise alternative legal aid agencies in criminal and civil proceedings. The Committee considered it would only be able to provide broad guidelines relating to levels of financial assistance to Aboriginal legal services in New South Wales and the deployment of resources within and between the respective services. The terms of reference of the proposed review of the operation of the Aboriginal legal services in New South Wales are given in Appendix 2.

Submission from Aboriginal prisoners at the Goulburn Training Centre

10 In February 1980, the Minister for Aboriginal Affairs referred to the Committee a letter he had received from thirty-six Aboriginal prisoners at the Goulburn Training Centre in New South Wales concerning the operation of the Aboriginal legal services and the provision of legal representation to Aboriginal offenders in criminal court proceedings. The Committee visited the Goulburn Training Centre on 31 March and took evidence from a delegation of four Aboriginal prisoners. The Committee is grateful to the New South Wales Corrective Services Commission for permitting it to interview the prisoners. Evidence taken on this occasion was of considerable benefit to the Committee in its deliberations.

Definition of Aboriginals

11 Definitions of Aborigines or Aboriginals have been subject to considerable variation over the years. Commonwealth, State and Territory legislation use different definitions to describe Aboriginals and Torres Strait Islanders. The Committee has adopted the definition of Aboriginals most widely used by the Commonwealth Government: an Aboriginal is a person of Aboriginal descent who identifies as an Aboriginal and is accepted as such by the community with which he is associated.

Identification of different groups within the Aboriginal community

12 For the purpose of the inquiry the Committee has identified three different community groups in the Aboriginal population: namely, urban Aboriginals; fringe-dwelling Aboriginals; and traditionally-oriented Aboriginals. Aboriginals living in metropolitan or capital city communities are referred to as 'urban Aboriginals'. The term 'fringe-dwelling Aboriginals' is used to denote Aboriginal persons who live on the fringes of both the Aboriginal and non-Aboriginal cultures but belong fully to neither; in particular, it refers to Aboriginals who live on the outskirts of or within a non-Aboriginal community who have acquired some of the traits or values common to it but who are neither typical of nor accorded the same status as other members of that community. The term 'traditionally-oriented Aboriginals' is used to describe homogeneous Aboriginal communities which live permanently on their own land, reserves, pastoral properties or missions

and whose social organisation, cultural beliefs and patterns of behaviour are strongly influenced by tribal laws and customs. This term is used in preference to the term 'tribal Aboriginal' on the basis of evidence which shows that as a result of contact with the European culture, Aboriginals' physical, social and cultural environments and their adherence to customary beliefs and practices have been modified considerably. The Committee recognises the limitations of attempting to adopt classifications which do not take account of fluctuations in the composition and nature of the different groups nor of the extent to which the groups converge. It also recognises that many of the social, economic, legal and political problems experienced by Aboriginals are common to all Aboriginal people, regardless of the lifestyle they lead or their place of abode. The various groups described are therefore not to be seen as being distinct or exclusive. The terms have been adopted because differences in geographical location, community size and composition, lifestyle and proximity to non-Aboriginal communities are reflected in varying legal needs and demands.

Aboriginal population

13 The Department of Aboriginal Affairs has estimated that on the basis of projections for 1980 using the 1976 National Population and Housing Census, there are 175 400 Aboriginals in Australia of whom 44 900 or 26% are resident in communities within the six State capitals and 130 000 or 74% are resident outside the capital cities of the States and the Territories (see Appendix 3). Figures published by the Department in 1979 relating to the population of non-metropolitan Aboriginal communities in the second half of 1978, indicate that 135 600 Aboriginals were living in non-metropolitan communities. Of those 64% lived in communities within or on the fringes of country towns and 36% lived in remote traditionally-oriented communities (see Appendix 4). The map at the end of this chapter illustrates the estimated population distribution of Aboriginals in 1971. It can be seen that the heaviest concentrations of the Aboriginal population are outside the metropolitan area. This pattern contrasts sharply with that of the non-Aboriginal population. In most States and the Northern Territory it is particularly noticeable that Aboriginals are concentrated in areas remote from major cities and community services including legal services.

Interpretation of legal aid

14 In many respects the term 'legal aid' is an unfortunate one because it has overtones of providing assistance or support for charitable motives to persons who ought to be grateful recipients, rather than providing a service to which all persons should be entitled regardless of their means. Ideally, all citizens have a right to be legally represented. Regardless of their means, all citizens must have access to certain legal services if they are to function effectively within a society and maintain some confidence in its institutions. The provision of legal aid in itself acknowledges the disadvantage before the law of certain individuals and groups and seeks to improve their position by facilitating their access to legal advice and assistance. Legal aid must therefore be viewed in the wider context of social justice and social reform rather than being confined to a narrow definition related to the provision of legal assistance in strictly litigious matters.

15 While the Committee acknowledges that the provision of legal assistance and representation in criminal proceedings where the liberty of the defendant is at stake must be accorded priority in all legal aid schemes, it is also important

that poor and disadvantaged groups within society have access to the courts in other matters, e.g. civil matters, both to protect themselves against injustices and exploitation by more powerful groups in the community and to seek those civil remedies to which they are entitled. Any effective legal aid scheme for Aboriginals must therefore necessarily provide advice and assistance in all matters pertaining to the law and its administration including non-litigious matters and in matters pertaining to administrative decisions, particularly the payment of benefits under income maintenance schemes, where the provision of legal advice and assistance may be required to protect the rights of claimants or appellants.

16 Legal aid policy should also respond to the needs of disadvantaged groups not only through the provision of legal assistance to individual litigants but also through preventive community education programs and law reform. The Committee believes that the legal process should be used as an instrument for reducing inequality and promoting social change by providing for the representation of the economic, social and cultural interests of poor and underprivileged sections of the community and that this is a proper function of legal aid. In this respect, it is important that disadvantaged groups have access to the courts so that they can secure through the legal process recognition of their legal needs and demands, test principles of law and stimulate changes in legislation. The Committee believes the special social, economic and legal problems of Aboriginal people will only be met within a broadly defined legal aid program which can offer them assistance and support with the multiple problems arising from their social circumstances and disadvantaged status within the Australian community.

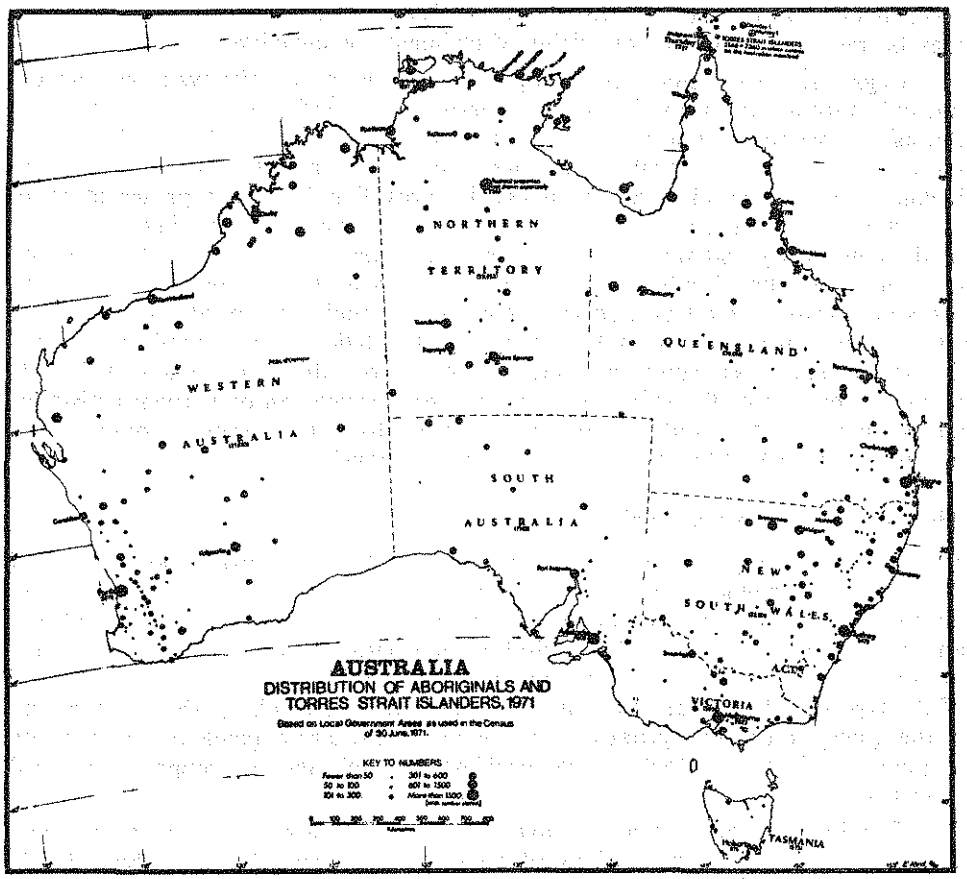
The concept of access to legal aid

17 Because a large proportion of Aboriginals live in remote, rural areas of Australia, geographical isolation is clearly an important factor affecting their access to legal aid. However, access to legal aid is also affected by social, cultural and psychological barriers. The utilisation of a legal aid agency depends on the awareness of the potential client population of the existence of the agency and of the type of activities undertaken by that agency. It depends on the acceptability of the agency to different groups in the community. It also depends on the capacity of potential clients to identify legal problems as such and to recognise the need to seek legal assistance.

18 The location of a legal aid agency affects the access of clients to legal assistance not only in terms of its physical distance from the client but also in terms of its social and cultural remoteness from the client's background or community environment. The general atmosphere of a legal office, its formality or informality, and the attitude of its staff may increase or inhibit access to the service. The accessibility of legal aid also depends on the opening times of a legal service, whether appointments are required for consultations with legal staff and whether legal assistance is available outside normal working hours. Access to legal aid may be impeded by communication problems, whether these arise from the client's inadequate command of the English language, his ignorance of the law, the legal process and the role of the legal aid agency, and his inability to provide proper instructions or from the agency's inability to ensure that the client understands his eligibility for assistance, legal and administrative procedures, his legal rights and obligations and the ramifications of his case.

19 Accessibility must also be viewed in terms of the extent to which the legal needs and demands of the client population may be met in different areas of the

law. This depends on the range of assistance provided by the legal agency and whether the organisation's priorities promote or inhibit access to legal assistance in different areas of the law. Eligibility criteria may also restrict access to legal services. Where eligibility for legal assistance is determined on the basis of a means test or where contributions must be made towards costs, access may be limited by financial considerations.



2. The Special Needs of Aboriginals for Legal Aid

Social background

20 The majority of Aboriginals are caught up in a self-perpetuating cycle of poverty. Their health, housing and education, and their occupational, economic and social status are considered to be lower than those of any other section of the Australian population. There is no doubt that their standard of living is well below the standard of living acceptable to and enjoyed by the rest of the Australian community. The special needs and demands of Aboriginals for legal aid result primarily from a history of conflict, dispossession of land, physical and social deprivation, prejudice and discrimination.

21 The depressed socio-economic circumstances in which many Aboriginals live result in Aboriginals suffering feelings of worthlessness, hopelessness and apathy and in loss of self-respect and self-reliance. The inability of many Aboriginals to gain access to the economic sector is keenly felt by Aboriginal communities, especially in isolated, rural areas which have a high rate of unemployment and where a large proportion of Aboriginals are dependent on social security payments. Aboriginals have been relegated to a socially and geographically marginal lifestyle in environments and circumstances which are often unfamiliar and hostile to them. Such social and economic disadvantages have helped create tensions and conflicts between Aboriginals and the law and have placed major obstacles in the way of their understanding the law and acting to defend and enforce their legal rights.

22 There is little doubt that the commission of offences by Aboriginals is directly related to the depressed physical and socio-economic environments in which they live. As one witness suggested to the Committee, Aboriginals have no power and little pressure with which to lobby, no capital to withdraw, no employment and no labour to withhold—in societies of similar demographic, social and racial structure, what is left as a way of asserting rights is civil disobedience, criminal acts, civil disruption, withdrawing from society, threatening violence or committing it.[1] It is therefore important to bear in mind that it is this background of disadvantage, dislocation and depressed social conditions that provides the context in which Aboriginals must deal with the legal system.

Discrimination within the community

23 It is well documented that large sections of the Australian society hold firm, stereotyped views about Aboriginals and that they discriminate against Aboriginals in significant ways. Reports by the Commissioner for Community Relations since 1976 demonstrate the extent of racial discrimination throughout Australia and highlight the fact that Aboriginal groups in the community are subject to discrimination and prejudice. One-third of the total number of discrimination complaints brought to the notice of the Commissioner under the *Racial Discrimination Act* 1975 have been made by Aboriginals, an extremely high proportion when one considers that there are over 100 ethnic groups in Australia. Complaints from Aboriginals to the Commissioner include complaints of police harassment, discrimination in employment, discrimination in hotels and similar establishments,

[1] Submission by Professor Colin Tatz, Professor of Politics, University of New England, Armidale, N.S.W.

discrimination in tenancy and property matters, derogatory racial references in publications, and discriminatory treatment in gaols.

24 The Commissioner for Community Relations reported that there is ample evidence of discriminatory attitudes by employers and townspeople generally towards the employment of Aboriginals in rural areas and that the level of Aboriginal unemployment in these areas is directly linked to white community attitudes.[2] Most complaints of discrimination in housing relate to efforts by Aboriginal families to secure accommodation. Many complaints relate to lack of housing and other complaints relate to the eviction of Aboriginal families because of their alleged inability to observe the conditions of tenancy agreements with State housing authorities.[3] Discrimination against Aboriginals in hotels and similar establishments continues to be a conspicuous area of discrimination within the community.[4] There is little doubt that these complaints are only the tip of the iceberg and that most instances of discrimination go unreported.

25 The problems of Aboriginals stem from their being an Aboriginal minority within a non-Aboriginal society, entrapped by a long history of discrimination and discriminatory law enforcement. They have been managed, controlled, made the subject of special legislation, and excluded from the Australian community as a whole. While it would be difficult to suggest that in 1980 Aboriginals are still being subjected to the level of overt oppression and persecution that they have suffered during the last 200 years, the disadvantaged position which Aboriginals hold in society reflects this historical pattern. As a group, Aboriginals still cannot participate fully, effectively and equally in the day-to-day life of the community, notwithstanding the fact that changes in the law and social attitudes have occurred. The recent history of Aboriginal people is one of hostile dealings with non-Aboriginals and with policies of governments which have had an extraordinary impact on the Aboriginal people's consciousness. This has helped separate Aboriginals as a group within Australian society. It is reinforced by a common resentment by Aboriginals of past treatment and control by non-Aboriginals and by a lack of trust of authorities including the courts, the police and 'the welfare'.

Discrimination within the legal system

26 Research that has been conducted into the relationship between Aboriginals and the law demonstrates that Aboriginals have had a unique historical association with the law, particularly the criminal justice system. Studies of Aboriginals in Western Australia, South Australia and Victoria by Eggleston,[5] of Aboriginals in the Northern Territory by Kriewaldt and Tatz,[6] and other studies by Rowley, Parker, Daunton-Fear and Frieberg[7] show that Aboriginals have been and

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[2] Commissioner for Community Relations, *Fourth Annual Report*, AGPS, Canberra, 1979. p. 43.

[3] *ibid.*, p. 53.

[4] *ibid.*, p. 57.

[5] E. Eggleston, 'Fear, Favour or Affection: Aborigines and the Criminal Law in Victoria, South Australia and Western Australia', *Aborigines in Australian Society*, vol. 13, ANU Press, Canberra, 1976.

[6] Mr Justice M. C. Kriewaldt, 'The Application of the Criminal Law to the Aborigines of the Northern Territory of Australia', *U.W.A.L. Review* 5, 1960, and C. Tatz, 'Aboriginal Administration in the Northern Territory of Australia, The Criminal Law', Ph.D. thesis, ANU, 1964.

[7] C. D. Rowley, *A Matter of Justice*, ANU Press, Canberra, 1978; D. Parker, 'Social Agents as Generators of Crime. Case Study: Aborigines in W.A.', paper presented to AIAS Conference, Canberra, 1974; and M. W. Daunton-Fear and A. Freiberg, "Gum Tree" Justice: Aborigines and the Courts' in D. Chappell and P. R. Wilson (eds), *The Australian Criminal Justice System*, 2nd edn., Butterworths, Sydney, 1977.

continue to be consistently placed at a serious and systematic disadvantage in their contact with the criminal justice system. This is reflected in high arrest, charge and conviction rates, and a disproportionate rate of committal to gaol.

27 The injustices suffered by Aboriginals in their interaction with the law can be attributed in part to the existence of a centralist legal system which is not designed to recognise the laws and customs of different groups within a pluralist society.[8] It is a system based on characteristically European concepts of justice alien to the indigenous people of Australia and, in the past, has been used almost exclusively to protect the rights of the majority society. The criminal law has been used as an instrument of social control of Aboriginals: it has punished them for offending against the non-Aboriginal community but has rarely protected or promoted their rights. The law is perceived by Aboriginals as part of the white community and culture which has not only alienated them but has also dispossessed and oppressed them.

28 In comparison with the community at large, Aboriginal people are seldom aware of their rights and obligations under the law and the control they have over their own lives in legal matters. Prior to the establishment of the Aboriginal legal services, only limited legal aid facilities were available or accessible to Aboriginal people and no agency assumed responsibility for the legal needs of Aboriginals. There was no community-based organisation equipped to provide competent advice in legal matters, to identify legal matters as such or to assist Aboriginals with the problems they encountered in their contact with the law. There was no accessible source of general information about the functions of the legal system, court proceedings or legal rights and responsibilities. At this time few Aboriginals were aware of the existence of legal aid schemes operating and even fewer were prepared to seek assistance from government-operated agencies which they regarded with both distrust and apprehension and which they perceived as being part of the authority structure and therefore unsympathetic to their interests. Until recently, only a minority of Aboriginal people taken into custody knew of their right to seek legal assistance and even fewer had the confidence to exercise that right.

29 Where representation was provided for Aboriginals it was only available on a piecemeal basis and was often of a low standard. When the Native Affairs Branch (and later the Welfare Branch) of the Northern Territory Administration assumed special responsibility for Aboriginals including the provision of legal support for Aboriginals appearing before the courts, legal advice and assistance were generally provided by patrol officers or welfare officers with no professional legal qualifications. Later, counsel was briefed to appear for defendants charged with more serious indictable offences or when a plea of not guilty was entered. Where representation was available from qualified solicitors, the quality of representation provided must have, in some instances at least, been adversely affected by their limited knowledge and understanding of the Aboriginal culture as well as by problems of communicating effectively with individual clients.

30 Until recently, most Aboriginal defendants appearing in court were unrepresented: usually inarticulate, not conversant with court procedures, and unaware of how to present their cases, they were incapable of conducting their own defence, which in an adversary court system meant that cases were generally decided solely on the basis of material presented by the prosecution. There is

[8] Daunton-Fear and Freiberg, *ibid.*

little doubt that in the past Aboriginal defendants were convicted of a greater number of charges than would have been the case had they been legally represented. It is also reasonable to assume that in the absence of legal representatives who might have made informed pleas on behalf of those convicted, penalties imposed were more severe than might otherwise have been the case. Without legal representation many Aboriginals were, and in some cases still are, technically unfit to plead because they understand neither their legal rights and obligations, the charges brought against them, the court proceedings nor the penalties imposed upon them. The inability of law enforcement agencies, the legal profession and members of the judiciary to communicate effectively with Aboriginals has also contributed to their disadvantage before the law. In these respects, the law has tended to disregard the interests and special needs of Aboriginals and particularly their right to legal representation in criminal court proceedings.

31 It is not suggested that Aboriginal rights are any more important than the rights of other members of the Australian community, nor is it suggested that such ignorance is confined to Aboriginal people; however, the obstacles to Aboriginals achieving an understanding of their legal rights and responsibilities and of the legal process are greater. Despite the presence of Aboriginal legal services in some areas for almost 10 years, the law is still seen by many Aboriginals as a process whereby they are sent to gaol rather than as a means whereby they may defend themselves against unproved charges and assert their rights within the legal system.

32 Aboriginals' perception of the role, purpose and intention of those holding positions of authority within the legal process such as police officers, court officials, or members of the judiciary is often very different from that of other members of the community. In many cases this has been the underlying reason for the inequitable treatment of Aboriginals passing through the court system. The prolonged and persistent management and control of Aboriginal people by outside agencies (governments, missions and pastoral companies) has instilled in Aboriginals a belief that they have no choice but to submit to authority and persons who represent the institutions in which authority is vested. For these reasons, many Aboriginals tend to answer automatically any questions put to them by persons in authority, and to provide answers which they perceive are expected or desired rather than exercising their right to remain silent. Thus, an Aboriginal is more likely to make admissions and confessions than a non-Aboriginal. While the present system of law prevails, its presumption of innocence and the right to silence is of little value to a person under the misapprehension that he is obliged to answer all questions put to him by persons holding positions of authority. Some Aboriginal people find the standard caution bewildering: if they do not have to answer questions then why are the questions being asked? Enforcement agencies and court officials have only recently begun to take these factors into account when dealing with Aboriginal offenders.

33 It has been suggested from many quarters that Aboriginals should not be questioned without a 'prisoner's friend' being present. In particular, the Australian Law Reform Commission recommended that Aboriginals (and Torres Strait Islanders) held in custody for serious offences, or any offences against the person or property, should be entitled to the presence of a 'prisoner's friend' during questioning and other investigative procedures.[9] Although the Law Reform Commission's recommendations have not been implemented in full, a number of States

and the Northern Territory have introduced special rules of interrogation for police, particularly for those dealing with Aboriginals. This matter is discussed further in Chapter 8.

34 Aboriginals have also suffered from conscious or unconscious discrimination by law enforcement agencies. Eggleston observed that in many outback areas with comparatively large Aboriginal populations, cases were heard by justices of the peace whose lack of formal training was reflected in their ignorance of the law, and that some justices (and some magistrates) tended to attach undue weight to police evidence and in some cases exhibited blatant prejudice against Aboriginals.[10] Although the situation has changed since then, largely because cases are more likely to be heard by magistrates on court circuits than by justices of the peace, the Committee was informed of several instances of such prejudice. Only last year a circuit magistrate in New South Wales was transferred from one area to another because of allegations that he made discriminatory comments about an Aboriginal before the Wilcannia Court. While the treatment of Aboriginals by police has improved in recent years, numerous incidents of police harassment of Aboriginals were brought to the attention of the Committee during its inquiry. It should be remembered that for largely historical reasons Aboriginal–police relations have never been good and that this has not always necessarily been the fault of the police. While in recent times there has been a decrease in allegations of police harassment of Aboriginals, relations between police and Aboriginals are, in many instances, still characterised by suspicion and hostility. Relations between Aboriginals and police are discussed further in Chapter 8.

35 In addition to these factors traditionally-oriented Aboriginal people must also contend with and attempt to reconcile two distinct systems of law: one European-based system of which they have little understanding, either of the premises upon which the law is based or of their rights and obligations under it; the other system which is tribally based and in many respects still adhered to but which cannot be used to enforce their rights in the dominant society and which at times fails to cope, within the Aboriginal community itself, with certain types of criminal behaviour arising from Aboriginal contact with the Australian–European culture. Problems arising from the conflict between the Australian legal system and Aboriginal tribal law are discussed in Chapter 10.

Geographical isolation

36 Geographical isolation is a major factor affecting the access of Aboriginals to legal aid. In remote areas, Aboriginals' lack of access to legal assistance can be attributed partly to the absence or limited number of legal practitioners in these areas. In 1979 the most northerly town in Queensland with a practising solicitor was Mossman, 22 kilometres north of Cairns, yet further north in Cape York there are 16 Aboriginal communities not including Torres Strait Islanders. Similarly, there are very few practitioners in country areas in Western Australia. Until the establishment of the Aboriginal Legal Service of Western Australia there were no solicitors at Port Hedland or in the Kimberleys. In South Australia the

[9] The Law Reform Commission, *Criminal Investigation*, Report No. 2, An Interim Report, AGPS, Canberra, 1975.

[10] Eggleston, *op. cit.*, pp. 134–44

Legal Rights Movement's solicitor at Port Augusta is the only solicitor who visits towns north of Port Augusta such as Copley, Leigh Creek, Nepabunna and Oodnadatta on any regular basis. In the Northern Territory few if any private solicitors operate outside the major centres of Darwin and Alice Springs.

37 Remote areas are often poorly serviced by roads. Problems of isolation are compounded by the inadequacy of alternative transport to and from these areas and Aboriginals' lack of access to communication facilities such as telephones. In northern Australia particularly, commercial airline services are limited and may not operate during the wet season. Similarly, areas which are serviced by roads may be inaccessible during such periods when roads become impassable. Many Aboriginal communities are therefore accessible only by the use of chartered aircraft services which is an expensive alternative. The Aborigines and Torres Strait Islanders Legal Service reported high transportation costs as its solicitors are required to travel extensively for clients' court cases in the far north region of Queensland. The Service estimated that the Aboriginal population of this area exceeds 20 000, more than half of which can be found on remote reserves or on the Torres Strait Islands. Most of the Islands have never been visited by the Legal Service and yet the vast majority of defendants appearing in the Thursday Island magistrates' court are of Islander descent. Access is only by aircraft and some of the Islands do not have airstrips and can only be reached by boat.

38 The need for legal advice and assistance in remote areas is compounded by the fact that those police, courts, magistrates and justices of the peace who venture into such areas are less subject to scrutiny by the public and the press in the exercise of their duties than elsewhere. On the other hand, because of isolation and the absence of law enforcement agencies in remote areas the detection of offences against the law tends to be less likely than elsewhere.

Urban Aboriginals

39 Urban Aboriginals are regarded by some as typically lower income residents of a city who as such do not require any more understanding, preference or assistance than other urban dwellers in similar socio-economic circumstances. This is essentially an over-simplification of the real situation. The plight of urban Aboriginals is far more complex than this because, having chosen to live in a predominantly non-Aboriginal community, they are given little assistance to function effectively within it and to cope with the accompaniments of urban life and are not afforded the chance to become community members having status and opportunities equal to those of non-Aboriginals. The urban Aboriginal population is in a continual state of flux with a constant drift of Aboriginal people to the cities. While some Aboriginals may have spent the greater part of their lives within the metropolitan area and are therefore familiar with the urban environment, there are many Aboriginals from rural areas who are unfamiliar with non-Aboriginal values and concepts and may experience major problems in adapting to a new environment and lifestyle. Some may have lived on the fringes of country towns; others may be from more isolated communities and still influenced by traditional customs and practices and bound by strong kinship ties. Problems in urban areas arising from discrimination, unemployment, lack of suitable accommodation and cultural alienation lead to frustration and resentment and create a situation conducive to anti-social and criminal behaviour. In particular, overcrowding in houses presents a special problem for Aboriginals. It arises not only from their poverty and a lack of adequate housing but also

from socio-cultural factors including the obligations of family affiliations and traditional alliances. Gross overcrowding of houses is reflected in poor living conditions and the substandard condition of housing. It also contributes to the many stress-related conditions suffered by Aboriginals.

Fringe-dwelling Aboriginals

40 Problems arising from Aboriginals' contact with the law and law enforcement agencies tend to be more glaring and more readily identifiable amongst Aboriginals living in country towns than in any other group. The legal needs and demands of Aboriginals in such areas reflect the poor physical and social environments in which the majority of Aboriginals live and include problems associated with housing and the provision of basic amenities, unemployment, racial discrimination, police harassment, and other problems resulting from their low socio-economic status and alienation within the community. Fringe-dwelling Aboriginals are generally given little assistance to make the transition to town life and experience particular social and cultural problems in their efforts to function effectively within the new community.

Traditionally-oriented Aboriginals

41 Most traditionally-oriented Aboriginals live in isolated rural communities and have had limited contact with the European law and the institutions which administer it. Not only do they have a limited understanding of the legal system and the concepts on which it is based but because of linguistic and cultural barriers they are at a severe disadvantage in any legal proceedings. Their extreme geographical isolation also limits their access to legal advice and assistance. Generally, fewer offenders are brought to the attention of the courts in traditionally-oriented communities and offences tend to be less serious than elsewhere. These communities may also experience less conflict and social tension in their relationship with the police and other non-Aboriginals. Some communities have no resident police and are visited only weekly; distant homeland communities are visited less frequently. For practical reasons, there is often little point in police arresting offenders as there will inevitably be a delay (sometimes as long as four months) before their cases are heard. As a rule offenders are proceeded against by summons and granted bail. The holding of a person in custody for up to several months awaiting trial can only be justified in exceptional circumstances. Many offences are not brought to the attention of courts sitting in isolated Aboriginal communities because they are dealt with by the community itself. Tribal authority is effective in remote communities which have minimal contact with the non-Aboriginal society. In outlying communities and outstations Aboriginal traditional customs are adhered to and authority structures respected. Aboriginal communities have their own complex rules relating to tribal membership, initiation, marriage and responsibility and those who choose to remain within the community are subject to traditional laws in most matters of personal behaviour. While Aboriginal authority structures are able to resolve many problems arising in tribal communities, some problems cannot be solved without recourse to the European legal system.

42 The traditional lifestyle of Aboriginal communities has been influenced to some extent through their exposure to the Australian–European culture. Inevitably, Aboriginals have been influenced by and to some degree become dependent upon the Australian economy and technology. They must therefore deal with the laws

and institutions which form part of that economy, particularly in civil and commercial matters. Because practices and notions of civil law had no place in traditional Aboriginal society and are alien to most Aboriginals, tribal authority is unable to cope with legal problems arising from them. Nor is tribal authority able to cope with problems associated with the consumption of alcohol, petrol sniffing and disrespectful and anti-social behaviour by juveniles. It is matters arising from these problems which are generally brought to the attention of the courts in tribal areas. Unlike urban and fringe-dwelling Aboriginals, Aboriginals living in isolated areas may also have special legal problems associated with land rights matters such as prospecting and mining on Aboriginal land. They may require other legal assistance in arranging for unemployment benefits to be paid directly to communities in lump sums rather than to individuals; preparing contracts between their communities and non-Aboriginal employees and contractors; conducting negotiations for the sale of artefacts; and protecting against interference with their sacred sites and the publication of tribal secrets.

Aboriginal women

43 While the needs and demands of Aboriginal women for legal assistance, particularly those in tribal communities, are as great as those of other sections of the Aboriginal population, it is difficult to estimate the scope of their needs and the extent to which they are being met. This is partly because most research has been conducted by men and findings have reflected the views of Aboriginal men, rarely taking account of matters specifically affecting women. It can also be attributed to Aboriginal women's reluctance to approach non-Aboriginal or even Aboriginal institutions which are both generally dominated by men. For example, in many Aboriginal communities it is considered inappropriate for Aboriginal women to approach a group of men such as would be found in a legal office.

44 It was suggested to the Committee that what is more important is the related fact that in Australian–European society the principal positions of public authority and power are held by men, not women: the most senior of such positions, among people who come into contact with Aboriginals and/or are believed to make decisions directly affecting them, are visibly occupied by men. Usually, then, Aboriginals confronted with individual male authority figures or groups of such figures are the more ready to believe that the most important public issues are the direct concern of men and should be handled by men. It was also suggested that there is a growing tendency in some regions for Aboriginal men to assert their rights and control over a widening sphere of religious and mundane affairs, and correspondingly to diminish the sphere of rights and control that was traditionally women's.[11]

45 The majority of solicitors employed by the Aboriginal legal services are men. Few women are employed as solicitors or field officers by the services. The Central Australian Aboriginal Legal Aid Service reported that, following the employment of female community workers and a female solicitor, many issues concerning women began to come to the attention of the office which had not been brought to its notice previously. Once the solicitor gained the confidence of the Aboriginal women, particularly the older women, her role in the Legal Service increased appreciably, not only in the delivery of legal assistance but

[11] Dr C. H. Berndt, Lecturer, Department of Anthropology, The University of Western Australia.

also as an adviser to communities. The legal services are now recognising that problems created by the reticence of Aboriginal women and their reluctance to bring matters to the attention of the legal services will only be overcome by the appointment of women to their staff.

46 A report on the special needs and demands of Aboriginal women in Central Australia was recently prepared at the request of the Central Australian Aboriginal Legal Aid Service by anthropologist Diane Bell and the Central Australian Aboriginal Legal Aid Service's solicitor, Pam Ditton.[12] The report raises important issues affecting the position of women in Aboriginal communities, their special needs and demands for legal advice and assistance, their lack of access to legal aid, and the inability of the Australian legal system to accommodate them. Some of these issues are outlined below.

47 The most disruptive force in women's lives is alcohol. The excessive consumption of alcohol leads to disruption of family life, is a drain on finances, and has adverse effects on parental care and control of children. Women living in urban areas risk having their tenancy terminated when property is damaged during drinking sessions. Women living in camps in rural areas may be subject to assault when men return to camp drunk. With the breakdown of traditional relationships in some communities, many women are deprived of support and protection by kin and must alternately seek police protection. Like alcohol, money is an introduced item which can disrupt relationships between people. The dependence of most Aboriginals on social security payments has undermined the position of women in Aboriginal society. Although women are responsible for providing shelter, food and care for children and for ensuring the family's welfare, unemployment benefits are paid to male heads of households. Unemployment benefits are regarded as men's money to spend as they wish and women are expected to meet all family needs from family allowance payments. There is an urgent need for a more equitable distribution of income and it is suggested that this can best be achieved by making the dependant's allowance component of benefits payable to women. Social security legislation also fails to recognise Aboriginal women who take on the responsibility of substitute care of children whose parents have died or are unable to care for them. On the other hand, it has been suggested that the introduction of some social security benefits, e.g. old age pensions, has provided elderly people, including women, who are incapacitated or otherwise no longer active with new prestige; in communities being incorporated in a money-based economy, but without many opportunities for obtaining money, this cash inflow puts its recipients into strategic positions.[13]

48 The researchers concluded from the views expressed to them by Aboriginal women that women's interests and concerns have rarely been adequately represented in decisions affecting communities and that their views have not been sufficiently taken into account prior to the introduction of programs designed to assist Aboriginal communities. The report maintained that women do not have a forum in which they can make their interests and decisions known to authorities and community and welfare support agencies and concluded that this situation points to a need to develop parallel structures for the representation

[12] Law, the Old and the New: Aboriginal Women in Central Australia Speak Out, January 1980 (unpublished).

[13] Dr C. H. Berndt, Lecturer, Department of Anthropology, The University of Western Australia.

of women's views in community affairs. The Committee believes that, while Aboriginals' adherence to traditional beliefs and practices has been modified in varying degrees through their contact with Australian–European culture and traditional authority structures have necessarily been adapted to accommodate changing circumstances, the development of parallel representative structures could be detrimental to traditional authority and disruptive to social cohesion. The Committee acknowledges, however, that women's role in Aboriginal society has been significantly affected through Aboriginals' contact with the non-Aboriginal culture and the western economic system. It considers that greater attention must in future be given to Aboriginal women's position in society, particularly in traditionally-oriented communities, and that they should be encouraged and assisted to become actively concerned participants.

49 If Aboriginal legal services are to be effective in meeting the legal needs of women, it is important that they give priority to the recruitment of women, particularly solicitors and field officers. It is equally important that female staff be sensitive to the special needs of Aboriginal women. Where the legal service is responsible for the delivery of services to traditionally-oriented Aboriginals, they must have a proper appreciation of the social structure and functioning of traditional Aboriginal society. The need for female staff is not, however, confined to legal services. It is equally important that the Department of Aboriginal Affairs and community and support agencies employ female community advisers, field officers, research personnel and, where appropriate, counter staff.

3. Statistics

50 Despite efforts by the Department of Aboriginal Affairs to secure separate identification of Aboriginals in law and justice statistics, there is no systematic identification of Aboriginals in national statistical collections. Representatives of the Australian Institute of Criminology and the Australian Bureau of Statistics stated that national collections of crime and justice statistics are so poor that it is not possible to provide adequate information on the justice system generally let alone to identify special groups affected through its administration.

Commonwealth Government statistical collections

51 The Australian Bureau of Statistics' collection of national crime statistics is limited to a selected crime series identifying seven categories of crimes reported or becoming known to police. The statistics do not provide for the identification of offenders' social background. The Bureau is currently developing a program to collect more comprehensive crime and justice statistics on a national basis, the first stage of which involves negotiating with State and Territory Governments to develop a standard classification of offences. It is expected that this stage will be completed in mid-1981. The next stage will concentrate on identifying the characteristics of offenders. The Department of Aboriginal Affairs reported that the Bureau has recently developed and will be promoting a set of questions, including a racial origin question, to be included in any minimum data collection set of national justice statistics.

52 The Commonwealth Legal Aid Commission is required to collect and publish statistics concerning the operation of schemes for the provision of legal assistance in Australia.[1] However, there is no requirement that the Commission maintain statistics which identify racial origin. The Commission submitted that limited resources would probably preclude the identification of ethnic groups in statistics, at least initially. Different ethnic groups are not identified in statistics of persons to whom legal aid has been provided through the Australian Legal Aid Office.

53 The Department of Aboriginal Affairs collects statistics based on regular surveys of approximately 800 Aboriginal communities carried out by the Department's local staff throughout Australia. These surveys provide quantitative and descriptive information on population, housing, education, employment, facilities, services and utilities and social indicators. The community profile data form the basis of an information system on Aboriginal communities which is used by the Department for the development of aid programs and as a means of assessing the impact of government programs on Aboriginal communities. The Department also acts as a clearing house for the assembly of statistics on Aboriginals from numerous sources including government departments and agencies. This information is published in regular statistical bulletins.

State and Territory Government statistical collections

54 Western Australia is the only State where statistical collections identify racial background. Aboriginal people are identified in police and court records, including children's court records. The identification of a person as Aboriginal is based on the observation of the arresting officer. The Department of Aboriginal Affairs in

[1] *Commonwealth Legal Aid Commission Act* 1977, section 6 (c).

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Western Australia and the Police Department recently agreed to include in statistical forms an indication of whether the person charged was represented in court. The Police Department also collects statistics on convictions recorded against Aboriginals which are forwarded to the Department for Community Welfare. These figures record convictions for disorderly conduct, wilful damage, assault, stealing, drunkenness and various other offences and are collected twice yearly. The information was initially collected at the request of the Commissioner for Native Welfare in 1966; it was then referred to the Department for Community Welfare and latterly has been forwarded to the Department of Aboriginal Affairs, which regards it of minimal value. Consideration is currently being given to discontinuing the collection.

55 Arrest statistics collected by police stations in the Northern Territory also distinguish between Aboriginal and non-Aboriginal offenders. As in Western Australia, the identification of Aboriginals is based on the observation of the arresting officer. The Supreme Court in the Northern Territory maintains statistics of persons indicted and identifies Aboriginals in these collections. Although Aboriginals are not identified in South Australia's police, court and prison statistics, the Office of Crime Statistics, which was established within the Law Department in 1978, identifies Aboriginal offenders in some of its statistical collections and provides analyses of persons appearing before courts of summary jurisdiction. Until recently the New South Wales Police Department collected statistics of Aboriginal arrests. The information was not published and the collection was discontinued due to apparent lack of interest. The New South Wales Government does, however, collect statistics of Aboriginals detained under the Intoxicated Persons Act, 1979.[2]

56 Since its inception in 1971, the New South Wales Bureau of Crime Statistics and Research has produced research and statistical reports on a wide range of criminal justice topics. In particular, it has published comprehensive State court statistics which it has used to make some inferences about Aboriginals and the justice system. Since 1974, the Bureau has in several analyses divided the courts in New South Wales into four categories: city courts, suburban courts, country courts and courts in towns with a high concentration of Aboriginal people (referred to as 'Aboriginal' towns). A description of the Bureau's categorisation of 'Aboriginal' towns is given in Appendix 5, together with a list of New South Wales towns included in the various categories. The New South Wales Bureau's studies have basic shortcomings in that Aboriginals are not identified in the court statistics on which the reports are based. In order to estimate the proportion of cases involving Aboriginal people, the Bureau contacted the clerks of petty sessions in each 'Aboriginal' town, who reported that the vast majority of persons appearing before the courts are of Aboriginal descent. In the absence of more comprehensive and more accurate statistical data concerning Aboriginals and the criminal courts, the Committee has relied on the Bureau's studies to demonstrate general trends and indicators in New South Wales.

Identification of Aboriginals in statistical collections

57 There are many reasons for the lack of statistical data on Aboriginal criminality and Aboriginal involvement in the legal system. Before 1967 when section

[2] Intoxicated Persons Act, 1979, Regulation No. 298, provides that a person is to be regarded as an Aboriginal if the person considers himself or herself to be an Aboriginal.

127 of the Constitution was repealed, Aboriginals were excluded from official statistics.[3] After the referendum in 1967, the Commonwealth Government assumed primary responsibility for Aboriginal people.[4] Until then some States had maintained statistics on Aboriginals but, after the constitutional amendment, State legislation was also amended deleting the States' responsibility for the collection of statistics on Aboriginals.

58 Many argue today that as there is no statutory requirement to collect statistics on Aboriginals it would be discriminatory to enumerate this group of people and not others. It is maintained that everyone is equal before the law and that all should be dealt with in the same way. However, there is a danger that, in the absence of statistics on Aboriginals, authorities may conclude that their interaction with the criminal justice system presents no particular problem and therefore deny their special needs for legal assistance. Others argue against the collection of statistics on Aboriginal offenders because of practical difficulties of enumerating tribal people and defining and identifying Aboriginals. Some people of Aboriginal descent have chosen to conceal their racial identity and others have shown great sensitivity to being identified and enumerated by statistics.

59 The Committee believes Aboriginals are now becoming increasingly disposed to identifying themselves and being identified as such and are developing an awareness of the need for separate statistics especially in such areas as health, welfare and the law. In New South Wales, for example, there was considerable discussion with Aboriginal groups about the desirability of identifying on police forms Aboriginal people detained under the Intoxicated Persons Act, 1979. Representatives of the New South Wales Government suggested to the Committee that Aboriginals are now so concerned about certain problems in their communities that they are prepared to tolerate what five years ago might have been regarded as an intrusion of privacy in order to measure the extent of these problems. In 1978 the National Aboriginal Conference Executive resolved that:

> This Executive supports the principle of separately identifying Aboriginal and Torres Strait Islander people on forms used by the Department of Social Security and other Government departments and agencies, for the sole purpose of producing statistics to be used in assessing the extent and effectiveness of operations of these departments and agencies amongst Aboriginal people.

60 Arguments against identifying Aboriginals in law and justice statistics are outweighed by the benefits to be gained by their identification. Without such statistics, it is impossible to measure levels and patterns of criminality in the Aboriginal community, to assess and quantify Aboriginal needs and demands at all stages of the law enforcement process, to identify problem areas and study trends. Information about Aboriginal criminality and Aboriginals' interaction with the criminal justice system is required to evaluate existing legal services for Aboriginals, to assess the relevance of their programs, to define the needs of future clients, and to determine priorities in their operations. Quantitative data must also be available to monitor the efficiency and cost effectiveness of Aboriginal legal services for funding purposes and to determine future policy planning. The lack of adequate statistical data on Aboriginals' involvement with the law, and particularly the

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[3] Section 127 of the Consitution (*Commonwealth of Australia Constitution Act*) stated: 'In reckoning the number of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.'

[4] As a result of the referendum in 1967, section 51 (xxvi) of the Constitution was altered by the *Constitution Alteration (Aboriginals) Act* 1967 to permit the Parliament to make laws with respect to the people of any race for whom it is deemed necessary to make special laws.

criminal justice system, not only from sources such as police, courts and correctional institutions but also from the legal services themselves, has limited the Department of Aboriginal Affairs' capacity to evaluate the Aboriginal legal aid program.

Government responsibility for statistics on Aboriginals

61 There appears to be conflict between the Department of Aboriginal Affairs and the Australian Bureau of Statistics as to which body is responsible for persuading Commonwealth and State functional agencies to identify Aboriginals within their statistical collections. The reluctance of agencies to modify procedures and administrative systems to provide for the separate identification of Aboriginals or other minority groups in statistical collections arises primarily from the costs involved in implementing changes to administrative processes. The Department of Aboriginal Affairs believes that it is the role of the central statistical authority, i.e. the Australian Bureau of Statistics, to develop collections of national statistics in which Aboriginals are identified. Although the Bureau provides for the identification of Aboriginals in national population censuses, the inclusion of an Aboriginal component in collections of social statistics (which include crime and justice statistics) is accorded low priority in relation to other particular statistics in social and economic collections. Officers of the Australian Bureau of Statistics appearing before the Committee stated that the identification of Aboriginals in what are primarily State areas of responsibility would only be achieved through the Department of Aboriginal Affairs exerting pressure on the States. The Department of Aboriginal Affairs, however, considers that it is the role of the Bureau to negotiate with and persuade functional Commonwealth and State Government authorities to adopt the practice of identifying and recording Aboriginal clients of their services. The Department of Aboriginal Affairs reported that it has encountered difficulties in its own approaches to State authorities. These difficulties primarily related to definitional problems and objections on the grounds that such identification was discriminatory.

62 It was suggested that the primary focus for establishing and recording Aboriginal data should be in the Australian Bureau of Statistics' outposted statistical unit within the Department of Aboriginal Affairs. The Bureau's chief statistical officers outposted to Commonwealth Government departments are responsible for providing technical expertise and advice in statistical projects and for providing a link between departments and the Australian Bureau of Statistics. In the case of the Department of Aboriginal Affairs, the chief statistical officer has the extra responsibility of co-ordinating Aboriginal statistics originating in other departments and agencies. It was questioned whether the chief statistical officer outposted to the Department of Aboriginal Affairs currently has sufficient resources to carry out this additional function.

63 The Committee's immediate concern is directed to the absence or deficiencies of crime and justice statistics relating to Aboriginals which have prevented it from making an objective assessment of the needs and demands of Aboriginals for legal aid and the extent to which the needs are being met. However, the Committee has encountered similar problems resulting from the paucity of statistical data on Aboriginals in other matters which have been referred to it for inquiry and report. In each of its previous reports the Committee has drawn attention to the failure of Commonwealth and State authorities to identify Aboriginals separately in statistical collections. It has become apparent that agencies

are not prepared to allocate resources for the modification of existing statistical collections or the recording of additional information because they consider expenditure in this area cannot be justified by the limited user demand for Aboriginal statistics.

64 In view of the Bureau's reluctance to assume responsibility for securing the identification of Aboriginals in statistical collections and the Department of Aboriginal Affairs' failure to obtain the co-operation of the States and other Commonwealth authorities, the Committee believes it is necessary for the Government to adopt a firm policy on this matter. The Committee therefore recommends that *the Minister for Aboriginal Affairs and the Treasurer, as the Minister responsible for the Australian Bureau of Statistics, accord priority to developing a co-ordinated approach to securing the identification of Aboriginals in State and Commonwealth Government statistical collections and, particularly, in crime and justice statistics.* The Government may consider that it is necessary to amend the *Australian Bureau of Statistics Act* 1975 to require that the Australian Bureau of Statistics include in its social statistics and indicators a component identifying Aboriginals.

Self-identification of Aboriginals

65 The Committee believes that the identification of Aboriginals in crime and justice statistics should be based on self-identification rather than on the observation of law enforcement officers or court officials, as is the case in Western Australia and the Northern Territory. This could be achieved by the posing of a general question asking the person to state his race and would bring the definition of Aboriginality into line with national census procedures. The Committee therefore recommends that *the identification of Aboriginality in the collection of crime and justice statistics be based on the definition of an Aboriginal as a person of Aboriginal descent who identifies as an Aboriginal and is accepted as such by the community with which he is associated.* However, the Committee recognises that the identification of Aboriginals in official records is a matter of some sensitivity. It therefore urges the Attorneys-General of the respective States and the Northern Territory to seek the views of Aboriginal people on this matter and give proper consideration to their views.

Statistics collected by Aboriginal legal services

66 Aboriginal legal services are required to maintain accurate statistics on the nature and frequency of Aboriginal involvement with the law.[5] The extent to which this function has been carried out varies considerably between the legal services. All the Aboriginal legal services stated to the Committee that they have neither the skill, time nor resources to design and institute comprehensive statistical collections. While this is generally true, the fact remains that the legal services, some more than others, are expending a certain proportion of their budgets on the collection of statistics which, in the Committee's opinion, are of minimal value.

67 During the inquiry, the Aboriginal legal services provided the Committee with diverse statistical data relating to client numbers, offences, caseload, outcome of court proceedings, and other legal and non-legal matters. In the majority of cases, the statistical data were neither comprehensive, consistent nor reliable.

[5] *Government Financial Assistance to Aboriginals* 1980–81, *Ministerial Directive and Programming Guidelines*, Department of Aboriginal Affairs and *Interim Charter*, section 9 (c).

There were large gaps in collections and statistics had been recorded on different time scales. Comparisons between the legal services were impossible because of the lack of uniformity in definitions, classifications and statistical recording systems. The accuracy of the statistics was also questionable as, in some instances, statistics provided for the Committee differed significantly from statistics which the legal services had provided to the Department of Aboriginal Affairs. Overall, the statistical information received by the Committee was too fragmented to be used to ascertain patterns of demand for legal aid and the extent to which legal needs of Aboriginals are being met. The unreliability of using statistics provided by the Aboriginal legal services for evaluation purposes and the implications of basing policy and programming decisions on distorted statistical information are discussed in Chapter 16.

68 The collection of statistical data by the legal services requires a systematic and co-ordinated approach. Firstly, it is necessary to clarify the details of clients and cases which should be recorded by all legal services and establish uniform criteria so that the services themselves (and others) are able to monitor their operations, make valid comparisons, evaluate their effectiveness, determine priorities and assess future needs. Secondly, it is necessary to design a recording system that is efficient and suitable to the services' needs. Thirdly, the statistical collections of the Aboriginal legal services should be comparable with information collected by other legal aid agencies.

69 In its Annual Report for 1974–75, the Department of Aboriginal Affairs stated:

> A computer-based statistical system is being established to assist legal services in defining their priorities, and when the first results are available, the Department will be able to gauge more fully the success of the Services. With such information a more accurate picture can be obtained of the number of Aboriginals charged with particular types of offences; whether these are occurring in one area of Australia more than in another; what sort of result is being obtained where representation is available through the Legal Service; the nature of the sentences being given by the courts.[6]

At the beginning of 1980 this system had still not been established. Several Aboriginal legal services have sought advice and assistance to establish statistical systems from the Australian Bureau of Statistics' chief statistical officer attached to the Department of Aboriginal Affairs. The Department of Aboriginal Affairs stated that, in accordance with its policy of self-determination, the development of comprehensive statistical systems is a matter for Aboriginal initiative. It has therefore only provided assistance in this area at the specific request of individual services. While the Committee agrees that any statistical system should be based on the Aboriginal legal services' stated requirements, it is essential to promote a nationally co-ordinated approach to the development of an appropriate system. Because it is important that the Aboriginal legal services' statistics be comparable with statistics collected by other legal aid agencies, the Committee believes the system should be developed in consultation and collaboration with the Commonwealth Legal Aid Commission.

70 The Committee recommends that:

- *the Department of Aboriginal Affairs' chief statistical officer confer with the Aboriginal legal services to ascertain their information requirements for the development of a comprehensive national statistical system;*

[6] Department of Aboriginal Affairs, *Annual Report* 1974–75, AGPS, Canberra, 1975, p. 16.

- *the chief statistical officer seek the co-operation of the Commonwealth Legal Aid Commission in the design of an appropriate national statistical system and the agreement of the Aboriginal legal services that the proposed system meets their collective and individual statistical requirements; and*
- *following the introduction of a national statistical system by the Aboriginal legal services, the chief statistical officer provide continuing advice and assistance in the maintenance and, where necessary, the review and adjustment of the statistical system.*

4. Development of the Aboriginal Legal Services

71 It was not until the early 1970s that Aboriginal people and others sympathetic to their cause took matters into their own hands in an attempt to draw attention to the injustices suffered by Aboriginals in the administration of the law and to their need for access to legal assistance.

72 Initial steps towards the establishment of an Aboriginal legal service were taken in New South Wales in 1970. As a result of police activities allegedly directed against Aboriginals in and around the Sydney suburb of Redfern, a small number of Aboriginals and other concerned members of the community organised themselves into a group with the aim of drawing attention to what they perceived to be repressive police action against the Aboriginal people of New South Wales. As a result of the group's activities, a number of lawyers, academics and students offered to provide legal assistance to the Aboriginal community in Sydney on a voluntary basis. Mr Justice Wootten, then Professor of Law at the University of New South Wales and now Chairman of the New South Wales Law Reform Commission, supported their case and with the aid of the Bar Council and the Law Society enlisted the support of other legal practitioners. This in turn created an awareness among members of the judiciary and others within the legal profession of the injustices to which Aboriginals were being subjected, of their disadvantage in all stages of the criminal legal process, and of the inability of existing legal aid schemes to meet their needs. A group of Aboriginal community leaders, lawyers and academics formed the first council of the Aboriginal Legal Service. The council had 20 members, nine of whom were Aboriginals. The 11 non-Aboriginals included the head of the New South Wales Law Faculty, two other Queen's Counsel and three practising solicitors. The council rostered volunteers to provide a 24-hour legal service at Redfern.

73 At the end of 1970 a submission was lodged by Professor Wootten on behalf of the council to the then Commonwealth Office of Aboriginal Affairs seeking $25 000 to establish a full-time shopfront legal office for Aboriginals in Sydney. In 1971 the Commonwealth Government provided an initial grant of $24 250 to the group to meet the cost of employing one full-time solicitor, one field officer and a secretary. The Aboriginal Legal Service operated from a small shopfront in Redfern with limited resources at its disposal. Most of the Service's work was referred to a panel of solicitors who continued to provide assistance on a voluntary basis. Other legal practitioners provided legal advice and representation on a reduced fee basis. With the change of Government in 1972, the Service's grant was quadrupled, allowing it to expand the referral system, employ full-time solicitors and pay lawyers on the panel for services rendered. In late 1973 the Legal Service voted its first full Aboriginal council into office. Following the experience of the Aboriginal Legal Service in New South Wales, similar organisations were established in the other States and the Northern Territory. Since 1971 the Commonwealth Government has provided financial support to Aboriginal legal services through grants-in-aid administered by the Department of Aboriginal Affairs in an attempt to ensure that Aboriginals have access to legal advice and representation. Funds provided for the 1979–80 financial year amounted to $4 781 000.

74 There are 12 Aboriginal legal services: four in New South Wales, two in the Northern Territory and one in each of the other States. A legal service is also

provided by a solicitor based in Alice Springs for Aboriginal people living in the Pitjantjatjara traditional homeland communities in Central Australia. The areas of jurisdiction of the legal services and the location of their central and branch offices are shown on the map in Appendix 6. Details of staff employed by the services are tabulated in Appendix 7. A table of grants made available to the Aboriginal legal services since 1972 is found in Appendix 8. The Aboriginal population statistics given below are taken from the 1976 Population and Housing Census and 1978–79 figures prepared by the Department of Aboriginal Affairs.

Aboriginal Legal Service (N.S.W.) Limited

75 The Aboriginal Legal Service (N.S.W.) Limited, commonly known as the Redfern Aboriginal Legal Service, was established in New South Wales in 1971 and incorporated in 1975. The head office and Sydney office of the Service are situated in the Sydney suburb of Redfern. The head office is responsible for the administration of the Service and endeavours to remain separate from and operate independently of the Sydney office, although both offices share the same premises. The Service has regional offices in the following New South Wales country towns: Cowra, Wagga Wagga, Walgett, Moree, Grafton, Kempsey and Newcastle. The Aboriginal population within the Service's jursisdiction is estimated at 27 398. The budget for the Service in 1979–80 was $621 900.

Western Aboriginal Legal Service Limited

76 The Western Aboriginal Legal Service Limited was established in November 1977 and incorporated in April the following year. The Service was established to meet the legal needs of Aboriginal people in western New South Wales. The area was previously within the sphere of operations of the Redfern Aboriginal Legal Service. The headquarters of the Service are located in Dubbo, which was chosen as the base for the Service because it has a large Aboriginal population and is readily accessible to Aboriginals from other areas in western New South Wales. Courts of all levels sit regularly in Dubbo and a number of government departments including the Department of Aboriginal Affairs Regional Office are also represented in the town. Branch offices have been established at Broken Hill and Brewarrina. The area covered by the Western Aboriginal Legal Service includes nine of the fourteen towns identified by the New South Wales Bureau of Crime Statistics and Research as 'Aboriginal' towns—Bourke, Brewarrina, Collarenebri, Coonamble, Gulargambone, Lightning Ridge, Peak Hill, Walgett and Wilcannia. The Aboriginal population of the area is 5552. The Service's budget for 1979–80 was $232 200.

South Coast Aboriginal Legal Service Limited

77 The South Coast Aboriginal Legal Service Limited was established in 1975. Legal services had previously been provided to the Aboriginal community on the south coast of New South Wales by a branch office of the Redfern Aboriginal Legal Service operating at Nowra. The South Coast Aboriginal Legal Service provides advice and representation to Aboriginal people in the south coast region of New South Wales. The Service's head office is based at Nowra and it has a branch office at Wollongong staffed by one field officer. The Aboriginal population of the area is 3185. The Service's budget for 1979–80 was $127 000.

St Mary's and Districts Aboriginal Legal Assistance Limited

78 The St Mary's and Districts Aboriginal Legal Assistance Limited was established in January 1978 and incorporated in January 1979. It operates from one office in the outer Sydney metropolitan suburb of St Mary's. Its area of responsibility is the western suburbs of Sydney bounded by Parramatta in the east and the Blue Mountains in the west. The Aboriginal population of the area covered by the Service is 5142. The Service's budget for 1979–80 was $71 400.

Victorian Aboriginal Legal Service Co-operative Limited

79 The Victorian Aboriginal Legal Service Co-operative Limited was established in June 1972. In January 1973 the Service received its first grant from the Commonwealth Government, appointed a permanent administrative secretary and field officer and leased and equipped an office in the Melbourne suburb of Fitzroy. In July of that year the first solicitor was appointed. Before the establishment of the Service, the Aborigines Advancement League arranged legal representation for Aboriginals in a limited number of matters. The League relied on the voluntary assistance of private solicitors and barristers, and the Legal Aid Committee and Public Solicitor in some matters. The Victorian Aboriginal Legal Service's head office is in Fitzroy. It has branch offices at Robinvale and Bairnsdale. The Service is responsible for providing representation to Aboriginals throughout Victoria. The Aboriginal population of Victoria is 14 759; of these 8712 live in Melbourne and 6047 in country areas. Its budget for 1979–80 was $397 200.

Aboriginal Legal Service of Western Australia Incorporated

80 The Aboriginal Legal Service of Western Australia Incorporated was established in Perth in 1973. Prior to its establishment the Justice Committee of the New Era Aboriginal Fellowship, comprising a number of Aboriginals, non-Aboriginal lawyers and others, provided a limited legal service to Aboriginals mainly in the Perth metropolitan area. In December 1975 the Aboriginal Legal Service became an incorporated body. The Service provides advice and representation to Aboriginals throughout Western Australia through ten offices located in Perth (central office), Carnarvon, Derby, Kalgoorlie, Kununurra, Narrogin, Port Hedland, Geraldton, Broome and Leonora. Honorary field officers are employed at Meekatharra, Pinjarra, Onslow, Roebourne, Medina and Mount Barker. The Aboriginal population of Western Australia is 27 000. The Service's budget for 1979–80 was $749 000.

Aborigines and Torres Strait Islanders Legal Service (Qld) Limited

81 The Aborigines and Torres Strait Islanders Legal Service (Qld) Limited was established in 1973 and incorporated in September of that year. It provides legal advice and representation to Aboriginals and Torres Strait Islanders throughout the State. The Legal Service has divided the State into seven operational areas and established ten offices: south-east Queensland (Brisbane), Mackay, Mount Isa, far north Queensland (Cairns, Mareeba, Thursday Island and Innisfail), Rockhampton, south-west Queensland (Roma) and Townsville. The Service's head office is in Townsville. The Aboriginal and Torres Strait Islander population of Queensland is 41 345. The Service's budget for 1979–80 was $1 046 000.

Aboriginal Legal Rights Movement Incorporated

82 The Aboriginal Legal Rights Movement Incorporated was established and incorporated in August 1972. The Movement was established largely as a result of initiatives taken by a group of Aboriginals and concerned solicitors in Adelaide. It engaged its first solicitor in March 1973. The Movement has four offices: a central office in Adelaide, a branch office at Port Augusta, and offices at Ceduna and Murray Bridge which are each staffed by a field officer. It also provides legal representation to Aboriginals in the North-West Reserve area of the State where the magistrates' court sits in three communities for one or two days, three times a year. The Aboriginal population of South Australia is 10 714. The Movement's budget allocation for 1979–80 was $480 000.

Central Australian Aboriginal Legal Aid Service Incorporated

83 The Central Australian Aboriginal Legal Aid Service Incorporated was established in June 1973 and incorporated in October 1973. It has one office located in Alice Springs and has responsibility for providing a legal service in the area extending from the South Australian border to Hooker Creek in the north-west, Borroloola in a north-north-easterly direction and Lake Nash in a east-north-easterly direction. The Aboriginal population of the Northern Territory was estimated at 23 751 in the 1976 Census. The Department of Aboriginal Affairs estimates that the population of the area covered by the Central Australian Aboriginal Legal Aid Service is approximately 12 000. The Service's budget for the financial year 1979–80 was $390 700.

North Australian Aboriginal Legal Aid Service Incorporated

84 The North Australian Aboriginal Legal Aid Service Incorporated was established in June 1973 and incorporated in July 1973. It has a central office in Darwin and a branch office in Katherine. The Service is responsible for the area of the Northern Territory between the Queensland and Western Australian borders as far south as eighteen degrees latitude and north to the coast, including various islands adjoining the coast. The Aboriginal population of this area is estimated at 15 305. The Service's budget for the financial year 1979–80 was $424 500.

Tasmanian Aboriginal Legal Service

85 The Tasmanian Aboriginal Legal Service was established in 1973. The Service was established simultaneously with the Aboriginal Information Service (now called the Tasmanian Aboriginal Centre Incorporated), which is responsible for all matters pertaining to the welfare of Aboriginals in Tasmania. It has two offices: a central office in Hobart and a branch office in Launceston. The Aboriginal population of Tasmania is 2942. The Service's budget for 1979–80 was $111 800.

Pitjantjatjara Legal Service

86 The Pitjantjatjara Legal Service is operated by a single lawyer attached to the Pitjantjatjara Council. The Council consists of representatives of 20-30 tribal communities comprising between 3000 and 4000 people living in the Western Desert region. This area extends from the Stuart Highway in South Australia to Warburton in Western Australia and includes part of the mountainous range

country of Central Australia. Although the communities are mobile and their size and composition fluctuates, their language, culture and traditional law are relatively homogeneous. The Council's legal service commenced operation in January 1979 from an office in Alice Springs made available by the Central Australian Aboriginal Legal Aid Service. It was staffed by one lawyer and an Aboriginal secretary/administrator. A sum of $53 300 was allocated to the Council for its legal service for the financial year 1979–80. The Pitjantjatjara Legal Service has been funded solely for the purpose of providing advice to the Pitjantjatjara people in land rights matters, conducting negotiations with governments, and assisting the Pitjantjatjara Council to administer lands granted to the communities. Unlike other Aboriginal legal services, it is not funded to provide assistance to individual Aboriginals in need of legal advice and representation. The Central Australian Aboriginal Legal Aid Service, the Aboriginal Legal Rights Movement and the Aboriginal Legal Service of Western Australia attempt to meet the individual needs of the Pitjantjatjara people. The provision of legal aid to the Pitjantjatjara people is discussed further in Chapter 14.

5. Why a Separate Aboriginal Legal Service?

The argument for the amalgamation of legal services

87 While all witnesses recognised the needs of Aboriginals for legal assistance, the desirability of providing separate legal services for Aboriginals was questioned by some. It was suggested that the Aboriginal legal services be amalgamated with other legal services in the community. Three arguments were put forward to support this proposal: firstly, that it is discriminatory to provide special separate legal services for Aboriginals which are exclusively available to them; secondly, the existence of such special services may lead to an increase in criminal behaviour; and thirdly, inefficiency and duplication arise from multiple services.

The principle of discrimination

88 It was suggested that organisations such as the Aboriginal legal services cause a 'white backlash', that they lead to a growing resentment against Aboriginal people for receiving preferential treatment, a heightening of racial divisions within the community and accusations of 'apartheid'. It was argued that because there are many non-Aboriginals who are poor and similarly handicapped and who suffer injustices through lack of access to the private legal profession, the access of Aboriginals to legal aid should not be facilitated through the provision of separate legal services.

89 An inherent shortcoming in most legal aid schemes is that they tend to benefit the middle or lower middle group in society, that is those people who are normally capable of fitting into society but whose means are limited, but do not cater for the extremely poor or disadvantaged. In particular, people who are disadvantaged not only through lack of means but also through lack of influence tend to be neglected. The Aboriginal people, as an underprivileged minority group in a predominantly non-Aboriginal society, are in a unique position in Australia. They have been inhibited from exerting any social, economic or political pressure on the dominant society and have therefore had no power to protect their interests and enforce their basic rights.

90 While the Committee believes that ideally all disadvantaged groups within the community should have ready access to legal services, a compelling case can be put for recognising the extraordinary disadvantages endured by Aboriginals and for providing them with a publicly funded specialist legal service. Accepting that since the establishment of the Aboriginal legal services and subject to the shortcomings outlined in this report, Aboriginals do generally have access to legal services possibly denied other disadvantaged sections of the community, it must be remembered that their problems and their needs for legal advice and assistance are greater. No other section of the Australian community has suffered the effects of such prolonged and consistent contact with courts, the police, institutions and gaols. The provision of legal services for Aboriginals has not suddenly transformed the wider environment in which they live. The problem of establishing an identity within an often overtly hostile society remains; so, too, do the problems of finding work and accommodation, and of ensuring a better future for Aboriginal people.

Increase in criminality

91 There have been suggestions that the establishment of Aboriginal legal services has led to an increase in criminal behaviour. The suggestion is that some

people are more likely to commit crimes if they know they will be represented in court should they be apprehended. Such an argument, if accepted, would apply to all legal advice and representation provided to those charged with offences. Few, if any, would support such a view. Whatever the combination of circumstances and reasons for prompting a person to offend, that person is still entitled to a court hearing in which the prosecution's evidence is tested and in which the circumstances of the offence and an account of the defendant's background are presented.

Inefficiency and duplication

92 The argument for the integration of Aboriginal legal services within State legal aid commissions and other legal assistance schemes is based on the benefits of greater efficiency flowing from rationalisation of resources and the principle of non-discrimination whereby all groups within the community have equal access to legal aid. The Western Australian Government is the only government to advocate the amalgamation of Aboriginal legal services with other legal aid schemes. Two reasons were given for amalgamating the services: savings in administrative costs and the elimination of present alleged antipathy between Aboriginals and non-Aboriginals. The Western Australian Government's attitude is that Aboriginal people are entitled to the same services that are available to the rest of the community and that there should not be a need for a separate legal service for Aboriginals. It recommended that steps be taken to combine the administration of the Aboriginal legal services and the legal aid commissions; that all legal aid services be funded from a common fund; and that, if any reorganisation results, it be on the basis of a general proposition that no one applicant for legal aid should be regarded as being more disadvantaged than another for racial reasons. The Government acknowledged, however, that irrespective of any fusion of the two services, some provision would need to be made to recognise and give special attention to the particular problems of Aboriginals.

The argument for separate Aboriginal legal services

93 All other governments, legal aid commissions, law societies and members of the legal profession who contributed to the inquiry supported the existence of separate Aboriginal legal services and recognised a continuing need for separate specialist services to cater for the legal needs and demands of Aboriginals. It was suggested that the merging of legal services could lead to a decrease in Aboriginal willingness to utilise the services, a neglect of Aboriginal interests, competition for time and resources between Aboriginals and other groups, and resentment and antagonism between Aboriginals and other sectors of the community.

94 Officers of the Department of Aboriginal Affairs who appeared before the Committee stated that they do not believe the existence of a separate legal service for Aboriginals is divisive. The Department believes it is a necessary service and most appropriate to the legal needs of Aboriginal people at the present time. Although the legal needs of Aboriginals may diminish with changing circumstances, the Department considers there will be a need for a separate, special service conducted and controlled by Aboriginals for some time to come. The report of the Commission of Inquiry into Poverty stated that:

> . . . the special legal and social problems of Aboriginals, brought about by a long history of oppression and neglect, require legal aid schemes that go further in the range of assistance provided and activities undertaken than more conventional services. Moreover, the experience of Aboriginals with other legal aid bodies

before the creation of the Aboriginal legal services shows that schemes serving Aboriginals must be responsive to the needs of Aboriginal people and must be identified closely with Aboriginal communities.[1]

Several organisations providing community legal services stated that they would not be able to meet the legal needs of Aboriginal people as effectively as the Aboriginal legal services even if a special section within their organisation was specifically funded, staffed and devoted to Aboriginal legal aid.

Lower costs of Aboriginal legal services

95 The South Australian Legal Services Commission admitted that it was unlikely that it could ever operate at a cost per case as low as that of the South Australian Aboriginal Legal Rights Movement. The fees paid by the Legal Services Commission to private practitioners are generally higher than those paid by the Movement, and the amount of voluntary work contributed by lawyers is much less. Moreover, salaries paid by the Movement to legal and other staff are lower than equivalent rates within the Legal Services Commission which is bound to employ on the terms and conditions laid down in the public service regulations. If the Legal Services Commission were given responsibility for providing legal aid for Aboriginals, the full staff, structure and administrative services now provided by the Aboriginal Legal Rights Movement would have to be incorporated within the Commission to meet the special needs of Aboriginals. This would involve a substantial increase in expenditure.

Accessibility

96 It was suggested that Aboriginals' access to legal services would be reduced if the Aboriginal legal services became part of a wider community service such as a legal aid commission. The Aboriginal legal services' unique relationship with their clients would almost certainly be lost. The cultural and racial barrier between the Aboriginal client and services administered by and generally for the non-Aboriginal community has in the past resulted in a lack of confidence and trust by the Aboriginal clients and a failure by the services to take account of Aboriginals' special legal needs. The accessibility of most legal agencies to Aboriginals is inhibited by the bureaucratic processes which inevitably influence the methods of operation of such organisations. At a time when Aboriginals are gaining confidence in the legal process, any decision which effectively reduces their access to legal services would be counterproductive.

97 Aboriginal legal services have endeavoured to ensure that they are readily accessible to their clients, both physically and psychologically. The effectiveness of their operation is increased by their philosophy of taking services to the people and seeking out problems rather than simply opening offices and making their services available to those who happen to approach them. Whenever and wherever possible, staff visit Aboriginal communities, particularly those in country areas, with the express purpose of ascertaining people's problems and encouraging them to use the organisation. The establishment of country offices has allowed people in many remote areas more ready access to legal advice and assistance. The whole structural organisation, philosophy and indeed physical presentation of the Aboriginal legal services appear to be in harmony with the cultural values and lifestyle of the Aboriginal client community. In effect, demands of Aboriginals have shaped the way in which the organisations deliver their services. This is as much a product

[1] Commission of Inquiry into Poverty (Second Main Report, Professor R. Sackville, Commissioner), *Law and Poverty in Australia*, AGPS, Canberra, 1975, p. 287.

of identification of the staff with the client as it is of the client with the Aboriginal legal services.

Community-based service

98 The Aboriginal legal services are amongst the first community-based legal services in Australia. They illustrate the possibilities of bringing legal advice and assistance to individuals and groups whose legal needs have not been met by conventional legal services. Aboriginal legal services have been accepted by Aboriginal people because they are seen as Aboriginal organisations operating outside the mainstream of government agencies. Although they are government funded, Aboriginal legal services are autonomous organisations, managed and controlled by Aboriginal people who are responsible to the Aboriginal community. Their constitutions and memoranda and articles of association allow Aboriginal community representatives to participate in decision making and influence the priorities, operation and staffing of the organisations. The Director of the South Australian Legal Services Commission considered that all legal aid agencies should have closer links with the communities they serve and that members of the local community should be involved in running legal services. The Commission believes this is an area in which other legal agencies, especially more conventional agencies, can learn from the Aboriginal legal services.

Community development

99 One of the major strengths of the Aboriginal legal services has been their ability to contribute to community development. While the legal services' primary concern is to provide representation in litigation they are also openly and partisanly committed to dealing with other legal issues which arise as a result of Aboriginals' special social problems or cultural differences, such as the welfare of Aboriginal children, Aboriginal–police relations, housing, law reform, land rights, and protection of Aboriginal community interests. If the Aboriginal legal services were subsumed under a wider community legal service, this partisan commitment would be lost.

100 The South Australian Legal Services Commission stated that:

> . . . because it must represent people from every type of background and with every possible shade of opinion, it cannot therefore allow itself or its staff to be partisan, or to express or imply a commitment to the advancement of one group or opinion above another which would absolutely preclude the Commission or its staff from participating, even indirectly, in the sort of community development activities which have characterised and indeed been the strength of the Aboriginal legal services.

Further, unlike the Aboriginal legal services, a legal aid commission cannot select its staff on the basis of their understanding of and commitment to the Aboriginal community, nor can it foster an awareness of social and cultural differences which is important in dealing with Aboriginal clients. Because it deals with clients from all sections of the community, it would be inappropriate for a legal aid commission to give preference to a particular section of the community in the appointment of staff. Such an organisation is therefore not in a position to provide for the employment of Aboriginal staff to the same extent as an Aboriginal organisation and, in this respect, its capacity to deal effectively with the problems of Aboriginal clients would be limited.

101 The Aboriginal legal services have played an important part in redefining the consciousness of Aboriginals and have brought about changes within

Aboriginal communities which have facilitated their participation in and control of their own affairs. Aboriginals play a major part in the management and operation of the legal services. The importance of the resultant development of leadership and management qualities and skills cannot be over-estimated. It has been documented elsewhere that there have been few opportunities for Aboriginals to develop such skills. In the seasonal work in which most adult Aboriginals have been employed, unions have played little part; hence Aboriginals have not had the experience in union affairs that often equips those with working-class backgrounds to make a contribution in public life.[2] Until recently, Aboriginals have generally never owned or managed land, nor have they gained experience as leaders through managing autonomous organisations. Through the legal services, Aboriginals have the opportunity to manage an organisation, to hire and fire staff, to plan priorities, and to acquire skills to negotiate on behalf of Aboriginal people. The legal services have also fostered among Aboriginal people an increasing readiness and ability to deal with the dominant society on its own terms and, through access to legal aid services, the Aboriginal community has acquired identity and status within the wider Australian community.

102 The Aboriginal legal services provide employment opportunities for Aboriginals. More importantly, those filling the positions provide valuable role models for other Aboriginals. Employment in the legal services is sought after: there are numerous applications from Aboriginals when a field officer's or secretary's position falls vacant. Positions within the organisations offer the chance to do something positive for other Aboriginals. For younger Aboriginals, images of 'success' in the white world may lack relevance; images involving unemployment and alcohol abuse may be more real. In these circumstances, the legal services play a significant part in helping to define an identity for younger Aboriginals who see Aboriginals working in community organisations such as the legal services, providing tangible services for other Aboriginal people.

Need for specialisation

103 Other reasons were advanced against the amalgamation of the Aboriginal legal services with other legal aid agencies. The special legal needs of Aboriginals require particular approaches, procedures and priorities which differ from those appropriate for the rest of the community. For example, because of its limited funds the South Australian Legal Services Commission is placing emphasis on community legal education and self-help programs such as do-it-yourself divorce classes. Aboriginals are the group in the community who are probably least able to take advantage of such an approach and who generally require the assistance and intervention of legal representatives even in matters where the law is uncomplicated and comparatively well known. It is only by providing legal advice and assistance to Aboriginals that legal services can build up the necessary knowledge and expertise to enable them to respond to the special legal needs and problems of Aboriginal people.

104 The ability of Aboriginal legal services to provide a specialised service arises from their accessibility and acceptability to the Aboriginal people, their understanding of the Aboriginal's position in Australian society and his disadvantage in the legal system, and a knowledge of and familiarity with Aboriginals' way of

[2] W. E. H. Stanner, *After the Dreaming, Black and White Australians—An Anthropologist's View, The Boyer Lectures* 1968, ABC, 1972; and D. Barwick, A Little More Than Kin: Regional Affiliations and Group Identity among Aboriginal Migrants in Melbourne, Ph.D. thesis, ANU, 1963.

life. It is this specialised knowledge which allows the Aboriginal legal services to provide effective legal representation for their clients, to apply pressure to the courts through legal argument and evidence and to effect a recognition both in the courts and in the wider community of the special legal problems of Aboriginals, of traditional Aboriginal beliefs and practices which may influence the background of an offender or an offence. It also allows the services to draw attention to those matters in which Aboriginal customary law and Australian law are not congruent and to the need to develop sentencing policies which are considered appropriate by both the Aboriginal community and the wider Australian community.

Competing interests

105 While a legal aid commission may increase its accessibility to disadvantaged sections of the community through regional expansion, it is unlikely that offices will be established in areas with significant Aboriginal population since priority is generally given to expanding legal services in areas of high population growth where Aboriginals are rarely found. It was suggested that conflict between the competing needs of Aboriginals and the rest of the community may even result in some deterioration in race relations if one agency is made responsible for meeting the needs of both groups. Inevitably, when priorities are set either the particular needs of Aboriginals would become submerged in the needs of the larger community or the needs of Aboriginals would be met at the expense of other groups. If legal aid commissions assumed responsibility for providing legal aid to Aboriginals, they would either have to provide preferential services for one small group of their clients or refuse Aboriginals a service which they clearly need and are now receiving.

Benefits of a diversity of legal services

106 Overseas developments in the delivery of legal services to disadvantaged groups illustrate that recognition is now being given to the benefits of diversity in the provision of services. There is a growing belief that the provision of legal services by a single centralised structure is not in the best interests of disadvantaged people generally and far less in the interests of specific groups. This trend can be seen in the establishment of community neighbourhood poverty law agencies in England and America and now here in Australia. This view is also supported in the Second Main Report of the Commission of Inquiry into Poverty:

> . . . it is also desirable that people experiencing legal problems have a variety of agencies from which they can seek assistance, including salaried services, voluntary agencies and Law Society schemes. A proliferation of agencies, each with different characteristics and appealing to a rather different clientele, increases the chances that people in need will obtain the legal aid they require.[3]

The need for special legal assistance for indigenous peoples has been recognised internationally. At the international Conference on Legal Aid held in London in 1975, a motion was passed acknowledging the need for the Aboriginal legal services and expressing the hope that the Australian Government would continue to assist the services by providing adequate funds to meet their task.

Government policy

107 Since the establishment of the first comprehensive Commonwealth-funded legal aid scheme provided through the Australian Legal Aid Office in 1973,

[3] Sackville, *Law and Poverty in Australia*, p. 33.

recognition has been given by successive Commonwealth Governments to the need for separate services for Aboriginals. The present Liberal–National Country Party Coalition Government is committed to the existence of Aboriginal legal services. As part of its policy of Aboriginal self-management set out in its Aboriginal affairs platform policy statement of November 1975, the Government has advocated the maintenance and, where appropriate, expansion of Aboriginal-managed enterprises and services such as Aboriginal legal services. It has also recognised that Aboriginal people must play a significant role in their affairs including:

(a) setting the long-term goals and objectives which the Government should pursue and the programs it should adopt in such areas as legal aid;
(b) setting the priorities for expenditure on Aboriginal affairs within the context of overall budget allocations; and
(c) evaluating existing programs and formulating new ones.

In 1977 the *Commonwealth Legal Aid Commission Act* 1977 came into effect. While the Act provides for the establishment of a comprehensive legal aid scheme in Australia, the Government envisaged that the Aboriginal legal services would continue to operate separately outside the framework of the State and Territory legal aid commissions.

Conclusion

108 Although no formal evaluation has been undertaken of the effectiveness of Aboriginal legal services in meeting the needs of Aboriginal people for legal aid, the Committee believes that the Aboriginal legal services have had a major influence on the relationship of Aboriginals with the legal system in the short time since their inception. Their effectiveness in meeting the legal needs and demands of Aboriginal people within the current limits of available funds is specifically attributable to their accessibility and acceptability to the Aboriginal people, their community-based structure, and the specialised nature of the legal service they provide. Moreover, the Aboriginal legal services fulfil their function of providing a service to the Aboriginal community without threatening the values or culture of that community. They have contributed to raising morale within the Aboriginal community and, through the provision of legal advice and assistance, have enabled Aboriginals to assert more control over their lives. The impact of the legal services on the courts and judiciary has also been significant. There is now far greater sensitivity towards the problems of Aboriginals and a greater preparedness to consider matters that Aboriginals see as important but which are unimportant or irrelevant to the non-Aboriginal community. In this respect, the Aboriginal legal services have made the law more responsive to the interests of Aboriginals.

109 The achievements of the Aboriginal legal services have been considerable, particularly in light of the fact that the majority of Aboriginal personnel are not formally trained in the law or in managing uniquely complex, professional legal organisations. In spite of this they have responded with firmness and initiative to the many challenges and difficulties that have appeared at various times and through their efforts have bridged much misunderstanding between the Aboriginal community and the non-Aboriginal community and its institutions.

110 The Committee recommends that *the Government continue to support separate Aboriginal legal services through the provision of financial assistance in order to promote the access of Aboriginal people to legal assistance and advice.*

6. Aboriginals and the Criminal Law

Needs of Aboriginals in the criminal jurisdiction

111 The extent to which Aboriginals are subjected to enforcement of the law in the criminal justice system is reflected in available official arrest and prison statistics. Studies have shown that Aboriginal arrest rates are significantly higher than those of non-Aboriginals; that Aboriginals are less likely to be released on bail than non-Aboriginals; that the conviction rate for Aboriginals is higher than that for non-Aboriginal defendants; that non-Aboriginal defendants are either acquitted or have charges dismissed in a higher proportion of cases than Aboriginal defendants; and that Aboriginals are subject to imprisonment proportionately more often than non-Aboriginal offenders. Whatever explanation one accepts for the disproportionate numbers of Aboriginals in all stages of the criminal justice system, the fact remains that Aboriginal people have an urgent and continuing need for legal assistance in the area of criminal law.

Arrest rates

112 Arrest rates for the Northern Territory and New South Wales given in the following tables show that Aboriginal arrest rates are disproportionate to arrest rates for the rest of the community. In the Northern Territory Aboriginals comprise 25% of the population; however, 78% of those arrested in 1977 and 1978 were Aboriginals.

Northern Territory arrests: 1 January 1977 to 31 December 1978

	Population	*Indictable offences*	*Summary offences*	*Protective custody*
Aboriginal	25 000	1 964	5 798	21 838
European	75 000	1 421	4 644	2 431
Total	**100 000**	**3 385**	**10 442**	**24 269**

Source: Northern Territory Government submission

If the number of drunkenness offences or protective custody arrests for both Aboriginals and non-Aboriginals is extracted from the table above the number of Aboriginal arrests is still very high, comprising 56% of all those arrested for indictable and summary offences.

113 The following figures compiled by the New South Wales Bureau of Crime Statistics and Research show that the number of arrests in 'Aboriginal' towns in New South Wales far exceeds the number of arrests elsewhere.

Frequency of arrests by area, 1978

	Number of arrests	*Population*	*Number of arrests per 1000 population*
Inner city	24 462	284 238	8.6
Suburban	8 645	2 364 962	3.7
'Aboriginal' towns	6 738	43 497	154.9
Rest of State	10 542	2 084 411	5.1
Total	**50 387**	**4 777 108**	..

Source: New South Wales Government submission.

114 Many more Aboriginals than non-Aboriginals are proceeded against by arrest rather than by summons. It is therefore more common for Aboriginals to be held in custody pending the hearing of their cases, unless bail is granted. Further, offenders in isolated areas may be subjected to longer periods of pre-trial detention than offenders in metropolitan areas because higher courts sit infrequently in remote areas. While this occurrence is not confined to Aboriginal offenders, they are more likely to be affected than non-Aboriginals because of the high concentration of Aboriginals in remote areas. In these circumstances, it appears more appropriate to proceed against offenders by summons. In 1979 the South Australian Office of Crime Statistics found that while 52% of court appearances by non-Aboriginal juveniles were preceded by a summons, 70% of Aboriginals appearing in juvenile courts had been arrested.[1]

Bail

115 Dr Eggleston showed that prior to the advent of Aboriginal legal aid, a greater percentage of non-Aboriginal offenders were released on bail than Aboriginal offenders; that amounts of bail required for the release of Aboriginals were often unnecessarily high, particularly for minor offences, and that there was a discrepancy between amounts of bail set for Aboriginals and non-Aboriginals committing similar offences. Aboriginals were more likely to be held in custody before trial than non-Aboriginals and were often detained for considerable periods of time. In some instances, periods of custody exceeded the penalty imposed by the justice or magistrate when the case was finally heard. On those occasions when police, justices of the peace or courts granted bail signifying that defendants ought to go free pending the hearing of their cases, those defendants were often forced to remain in custody through lack of means.

116 In 1976, the New South Wales Bail Review Committee and the New South Wales Bureau of Crime Statistics and Research conducted a survey of court records of magistrates' bail decisions on defendants' first appearances in court after arrest between November 1975 and May 1976.[2] Eleven courts were surveyed, including two towns with appreciable Aboriginal populations, Moree and Brewarrina. A second study was undertaken based on a census of all persons being held on remand in New South Wales on a certain day. The survey revealed that one in four defendants in respect of whom a bail decision is made leaves the court in custody, either because he is refused bail or cannot meet bail conditions. It found that factors affecting the determination of bail decisions are legal representation, a person's occupation, and whether police contest the bail application. The study based on the census showed that half the Aboriginal people on remand were being held because they could not afford bail whereas less than a third of non-Aboriginals were being held for that reason. This discrepancy was attributed to the poverty of Aboriginals and to the fact that Aboriginals have higher bail set, for example, for drunkenness offences.

117 The Bureau considered that the large proportion of unemployed persons in the bail census population reflects the disadvantages to which unemployed persons are subjected in a bail system centred on money. The main reasons that those granted bail are not freed are their inability to find the bail money and their inability to contact friends and relatives who could provide the money or

[1] *Crime and Justice in South Australia*, Quarterly Report for the period ending 31 March 1979, Series 1, Vol. 1, No. 2, Law Department Office of Crime Statistics.

[2] *Bail*, Research Report 1, May 1977, Department of the Attorney-General and of Justice New South Wales Bureau of Crime Statistics and Research.

stand surety for them. The Bureau concluded that the present bail system discriminates not only against the specific groups, juveniles and Aboriginals, but against the poor generally.

Penalties

118 Evidence has shown that Aboriginals generally receive more severe sentences than non-Aboriginals. In 1974 the New South Wales Bureau of Crime Statistics and Research found that Aboriginals living in country towns with substantial Aboriginal populations were more heavily penalised than Aboriginals living in other country areas or in Sydney. For example, courts in 'Aboriginal' towns were more likely to penalise unseemly words and offensive behaviour offences with short prison sentences than courts in other country towns and in Sydney. For drunkenness offences, the penalty of fine with a period of 24 to 48 hours imprisonment in default was much more common in 'Aboriginal' towns. In 1978 the Bureau found that the pattern of sentencing in the courts continued to differ in 'Aboriginal' towns. For example, less than 0.5% of offenders appearing in the city and suburban courts received fines with prison alternatives, whereas 17% of offenders in the 'Aboriginal' towns did so (see Appendix 12). The Bureau's figures suggest that imprisonment is a more common outcome for convicted Aboriginals than for others. Fines, though frequently used, are more often an alternative penalty for non-Aboriginals than for Aboriginal people.

Imprisonment rates

119 Statistics collected by the Western Australian Department of Corrections show that in 1974 Aboriginals comprised 34.5% of the total prison population in Western Australia. This is an alarming figure considering Aboriginals constitute less than 2.5% of the State population. The following table of prison populations shows a similar rate of Aboriginal imprisonment in other years.

Prisoners in Gaol in Western Australia

Census of all prisons and police gaols	*Number of Aboriginals*	*Percentage of total persons*
On night of 30 June 1971	442	32.9
On night of 31 October 1974	325	34.5
On night of 30 June 1976	322	33.6
On night of 30 June 1977*	389	34.3
On night of 30 June 1978	400	32.3

*Appendix 13 provides a more detailed breakdown of Aboriginal and non-Aboriginal prisoners in gaols on the night of 30 June 1977, including details of sentences.

Source: Aboriginal Legal Service of Western Australia submission.

The proportion of Aboriginals imprisoned in 1977–78 was an estimated 4% of the total Aboriginal population of this State. The proportion of non-Aboriginals, however, was only 0.1% of the total population.

120 In its report for the three-month period ended 31 December 1978, the South Australian Office of Crime Statistics concluded that 30% of all individuals received into custody under sentence in South Australia were Aboriginals. The figure was 28% for the period ended 31 March 1979. Aboriginals constitute less than 1% of the total population in South Australia. Statistics collected by the

Department of Correctional Services in South Australia show that on 30 June 1976 Aboriginals comprised 16.3% of the prison population (see Appendix 14).

121 In New South Wales the Bureau of Crime Statistics and Research found that the rate of Aboriginal males in custody per 1000 of the New South Wales Aboriginal male population in 1973 was nineteen times the rate of non-Aboriginals. The respective figures for 1974 and 1976 were seventeen times and twenty-two times.

Comparative rates of prisoners in custody on 27 September 1973, 14 November 1974 and 10 June 1976 per 1 000 in the New South Wales general population

	Numbers in Custody			*Numbers in the New South Wales population *(aged 18 years and over)*	*Rate per 1 000 of the New South Wales population*		
	27 September 1973	*14 November 1974*	*10 June 1976*		*27 September 1973*	*14 November 1974*	*10 June 1976*
Aborigines—							
Males	217	187	250	4 234	41.6	35.73	47.76
Females	11	6	4	5 164	2.13	1.16	0.77
Non-Aborigines—							
Males	3 421	3 162	3 322	1 531 413	2.23	2.06	2.17
Females	73	65	93	1 555 779	0.05	0.04	0.06

* Figures calculated from Census of Population and Housing 1971—Australian Bureau of Statistics.
Source: Department of Aboriginal Affairs New South Wales Regional Office submission.

In 1979 the Bureau concluded that Aboriginals comprised between 6% and 9% of the New South Wales prison population. Bearing in mind that the percentage of Aboriginals in the total population is only 0.8 (1976 Census) this imprisonment rate is very high. The Bureau's studies also indicate that, in comparison with the non-Aboriginal population, Aboriginals are consistently under-represented in work release programs; are significantly younger; are more disadvantaged in their educational background; are more likely to identify their occupation as semi-skilled or unskilled work; and are more likely to have been previously committed to juvenile institutions.

122 Although the daily average prison censuses provided for New South Wales and Western Australia give a surprisingly consistent account of Aboriginal imprisonment over the years, such statistics can be misleading. In any one year a prison will deal with a large number of inmates serving short sentences and a comparatively small group of inmates serving long sentences. On any one day, however, a cross-section of the prison population will display only a small sample of short-term prisoners, but a larger sample of long-term prisoners. This point is particularly relevant when looking at Aboriginal offenders for whom sentence length has frequently been shown to be short. For example, although Aboriginals accounted for 33% of the daily average prison population in Western Australia in 1977–78, they comprised 56% of all prisoners received in gaols throughout the State. These prison statistics also fail to take account of the high proportion of Aboriginals held in police gaols in remote areas. The proportion of Aboriginals in custody may therefore be substantially higher than the figures indicate. The Mitchell Committee found that in country areas sentences of up to twenty-eight days and up to fourteen days respectively were likely to be served in police prisons and lock-ups and that the great majority of prisoners in this category were Aboriginals.[3]

[3] Criminal Law and Penal Methods Reform Committee of South Australia, First Report, *Sentencing and Corrections*, (Chairman: The Hon. Justice Mitchell), July 1973, p. 204.

123 While the above statistical information is incomplete and does not allow comparisons on a national or State-by-State basis, it does reflect certain aspects of Aboriginals' interaction with the criminal justice system in Australia and highlights the special legal needs of Aboriginal people. The Committee is concerned that, in comparison with non-Aboriginals, Aboriginals continue to be over-represented in the criminal justice system. They are more likely to be charged with offences, more likely to be arrested than proceeded against by summons, less likely to be granted bail, more likely to be found guilty, and more likely to be sentenced to imprisonment than given an alternative penalty.

Nature of Aboriginal offences

124 The majority of Aboriginals come into contact with the law having committed minor criminal offences which are dealt with in lower courts and are punishable by a small fine or short term of imprisonment. Apart from dealing with summary offences the lower courts may also deal with some indictable offences of a comparatively trivial kind which are, in certain circumstances, triable summarily, at the option of the accused. Serious indictable offences account for a lesser proportion of Aboriginal offences and are dealt with in intermediate courts or Supreme Courts. Cases undertaken by the Aboriginal legal services include such offences against good order as drunkenness, obscene language, resisting arrest, vagrancy and disorderly conduct; offences against property such as breaking and entering, stealing, wilful destruction and unlawful usage; traffic offences such as driving under the influence of alcohol, driving without a licence and dangerous driving; offences against the person such as assault; and sexual offences such as rape.

125 Although arrest and imprisonment figures indicate that a large number of Aboriginals are offending against the law, many cases resulting in arrest and imprisonment involve minor offences such as drunkenness, disorderly behaviour, and use of indecent language which, if committed by non-Aboriginals, are less likely to result in arrest and imprisonment. In many respects the imbalance between Aboriginal and non-Aboriginal criminality can be attributed to the visibility of Aboriginal behaviour, particularly drunkenness. For various socio-economic reasons Aboriginal people have less opportunity to drink in private than non-Aboriginals and tend to gather in groups in hotels or other public places such as streets, parks and vacant lots where their behaviour is visible and subject to the attention of the police. As Professor Sackville[4] observed, the relatively secluded and spacious conditions under which more affluent people usually live shield many of their activities from the public gaze and from the law enforcement machinery; for the poor and socially disadvantaged, life is more public and many activities take place in the presence of others or within hearing or in view of the street. The implications of this go beyond discriminatory enforcement of the law, since certain kinds of behaviour are criminal only if they occur in a public place.

The offence of drunkenness

126 In 1978 the New South Wales Bureau of Crime Statistics and Research found that 76% of appearances in courts in 'Aboriginal' towns in New South Wales were for drunkenness charges (see Appendix 9, Criminal charges, N.S.W., 1975 and 1978, Table 1, 'Appearances in "Aboriginal" towns'). The Bureau also found that while there was an overall reduction in the number of convictions

[4] Sackville, *Law and Poverty in Australia*, pp. 252–3 and 267.

for public drunkenness in New South Wales in 1977, there was a significant increase in the number of drunkenness cases in courts in 'Aboriginal' towns. In 1975 and 1978, 'Aboriginal' towns in New South Wales had the highest proportion of females arrested for drunkenness, 12.2% and 14.1% respectively (see Appendix 9, Criminal charges, N.S.W., 1975 and 1978, Table 2, 'Sex of drunkenness offenders by area').

127 In 1976 61% of persons arrested and charged with drunkenness in Western Australia were Aboriginals. In the same year 90% of persons imprisoned for drunkenness were Aboriginals (see Appendix 10, Charges proceeded with and decided in Magistrates' Courts, Western Australia, December 1973 to 1976). As can be seen from these figures, drunkenness has become an almost exclusively Aboriginal offence in Western Australia. The Aboriginal Legal Service of Western Australia stated that it is unable to provide representation for Aboriginals charged with drunkenness in any systematic way and has virtually been forced to adopt a policy of not representing such offenders.

128 Many have questioned the appropriateness of sentencing people for drunkenness and related offences and of the criminal justice system to deal with such trivial and prevalent offences, and have advocated the decriminalisation of drunkenness as an offence. Advocates maintain that alcohol abuse is a social and medical problem which cannot be cured by legal sanctions. This point arose for consideration by the Western Australian Full Court of the Supreme Court in three appeals heard together, *Murphy, Davidson and Ward* v. *Watson*.[5] Each of the three women appellants had been sentenced to six months imprisonment after being convicted of disorderly conduct and contended that the sentence was excessive. In each case the defendant had been shouting obscenities in a street near a hotel while intoxicated and, having been warned by police, continued to scream obscenities. The three appellants had records for numerous offences associated with excessive consumption of alcohol. The court held that each appellant had become addicted to alcohol and that no sentence within the limits of section 54 of the *Police Act* 1892–1979 would lead to the rehabilitation of an alcoholic or deter offenders who were addicted to alcohol from drinking. In the absence of alcoholism treatment facilities for women, the only courses open to the court were imprisonment or a fine. A custodial sentence in a prison or a gaol, as distinct from an institution within which treatment could be obtained, was considered inappropriate. The court concluded that the cases were systematic of a deep and serious social problem, the solution to which must be found outside the criminal law. The appeals were allowed and in each case the custodial sentence was set aside and a fine of $10 substituted.

129 The inappropriateness of sentencing people for drunkenness was raised in *Gollan's* case.[6] In this case conducted by the South Australian Aboriginal Legal Rights Movement, the defendant was convicted for the offence of being drunk in a public place and sentenced to six weeks imprisonment. He had 386 previous convictions mainly for the same offence. The appeal was essentially based on the grounds that the sentence was manifestly excessive. It was also maintained that a sentence of imprisonment was wrong in principle. In his judgment, Mr Justice Bright said:

> . . . it is reasonable to accept that sentences of imprisonment have no rehabilitative effect upon alcoholics. As alcoholism becomes more widely accepted

[5] *Murphy, Davidson and Ward* v. *Watson* (1975) WAR 23.
[6] *Gollan* v. *Samuels* (1973) 6 SASR 452.

as a disease it becomes increasingly repugnant to punish a person on the ground that he has this particular disease . . . I would regard a long list of convictions as evidence of addiction and not as evidence of contumacy.

He also stated that he could see no good purpose in imposing fines which are so large that they probably will not be paid and that the court might as well impose a sentence of imprisonment in the first place. The sentence was overruled and a fine of $15, in default three days imprisonment and six weeks to pay, imposed.

130 The ineffectiveness of legal remedies for drunkenness offences is illustrated by the following case history:

Criminal history of one Western Australian Aboriginal (born 1930)[7]

Date	Offence Charged	Result
1953	Drunk	Cautioned
27 June 1955	Drunk	7 days' imprisonment
27 June 1955	Native receive liquor	1 month's imprisonment
1957	Native receive liquor	Fine $2
1959	Drunk	Fine $2
1959	Drunk	$4 bail estreated
7 March 1960	Drunk	Fine $6
4 March 1961	Create disturbance	Fine $10
30 March 1961	Native receive liquor	Fine $10
1961	Drunk	Fine $10
1961	Drunk	Fine $10
1962	Drunk	$2 bail estreated
1962	Drunk	Fine $4
1962	Drunk	Fine $10
1962	Drunk	21 days' imprisonment
1962	Drunk	14 days' imprisonment
1962	Habitual drunkenness	3 months' imprisonment
1963	Drunk	Fine $2
16 April 1963	Native receive liquor	1 month's imprisonment
16 April 1963	Drunk	21 days' imprisonment (cumulative)
1963	Drunk	21 days' imprisonment
1963	Drunk	Fine $4
1963	Drunk	Fine $2
1963	Native receive liquor	7 days' imprisonment
1964	Drunk	2 days' imprisonment
1964	Drunk	Fine $2
12 April 1965	Drunk	Cautioned
26 July 1965	Drunk	$2 bail estreated
18 October 1965	Drunk	Fine $4
6 November 1965	Drunk	Fine $6
15 November 1965	Drunk	7 days' imprisonment
26 November 1965	Drunk	7 days' imprisonment
20 December 1965	Drunk	Fine $4
23 December 1965	Drunk	7 day's imprisonment
29 January 1966	Drunk	Fine $10
14 March 1966	Drunk	Fine $10
21 November 1966	Drunk	Fine $5
15 December 1966	Drunk	Fine $4
14 January 1967	Drunk	Fine $5

Note: It is not known how many of the fines imposed were paid or how many gaol terms were served in default of payment of fines.

[7] Eggleston, *op. cit.*, Appendix 15.

131 In 1976 and 1977 the Standing Committee on Aboriginal Affairs examined the impact of alcohol on Aboriginal communities and made a number of positive suggestions aimed at assisting Aboriginal communities to overcome problems associated with the excessive use of alcohol.[8] The recommendations were pertinent then and this Committee believes they are equally so today. While it can be acknowledged that the consumption of alcohol is a major contributing factor to the incidence of crime amongst Aboriginals it is not possible to reach a conclusive position on the relationship between the consumption of alcohol and the rate of crime amongst Aboriginals. However, the Committee considers that reduced alcohol consumption would have a significant effect on the present state of Aboriginal crime statistics.

Decriminalisation of drunkenness

132 In October 1974 the offence of drunkenness was abolished in the Northern Territory by amendment to the *Police and Police Offences Act* 1923–1978. However, section 33A of the amended Act makes provision for the apprehension of drunken persons without warrant and their detention in custody for a limited period. Sub-section (1) of Section 33A provides that:

> Where a member of the Police Force has reasonable grounds for believing that a person is intoxicated with alcohol or a drug and that that person is—
>
> (a) in a public place, or trespassing on private property; and
>
> (b) because of his intoxicated condition, likely to—
>
> (i) commit an offence;
> (ii) use physical force against another person;
> (iii) cause damage to the property of another person;
> (iv) intimidate, alarm or cause substantial annoyance to another person;
> (v) unreasonably disrupt the privacy of another person;
> (vi) cause bodily harm to himself or expose himself to bodily harm;
> (vii) expose himself to having an offence committed upon or against him; or
> (viii) be unable to adequately care for himself and is not likely to be adequately cared for by any other person,
>
> the member may, without warrant, apprehend and take that person into custody.

Section 33A also provides that a person who has been apprehended may be held in custody only for so long as it reasonably appears to the police that he remains intoxicated. If the person is not released after a period of six hours he must be brought before a justice. A person taken into custody after midnight may be held until 7.30 in the morning notwithstanding that he is no longer intoxicated. The Northern Territory Government stated that 90% of people arrested between 1977 and 1978 pursuant to Section 33A of the *Police and Police Offences Act* 1923-1978 were Aboriginal.

133 It was expected that with the decriminalisation of drunkenness there would be a reduction in the demands made on Aboriginal legal services in the Northern Territory enabling them to pursue other matters and a reduction in Aboriginal imprisonment rates. Although the legal services in the Northern Territory no longer act for Aboriginals who have committed drunkenness offences and have been held in custody under Section 33A and are rarely approached for assistance

[8] House of Representatives Standing Committee on Aboriginal Affairs, *Alcohol Problems of Aboriginals, Interim Report* (1976) and *Final Report* (1977), AGPS, Canberra.

in such matters, the demands on the legal services have not been reduced by the decriminalisation of drunkenness. It has been claimed that as they are no longer charged with the offence of public drunkenness, Aboriginals under the influence of alcohol are charged with other criminal offences. A study of the Central Australian Aboriginal Legal Aid Service undertaken by the Department of Aboriginal Affairs' Chief Statistical Officer in 1979 revealed that while the number of offences in the drunkenness and disorderly conduct category dropped dramatically after drunkenness was decriminalised, the caseload of the Service has increased steadily since 1976. The study also showed that the number of clients charged in other offence categories has increased in recent years. The changing patterns of offences can be seen in Appendix 11, 'Cases finalised by the Central Australian Aboriginal Legal Aid Service by nature of matter, 1973 to mid-1979'.

134 The Australian Institute of Criminology suggested to the Committee that it suspected a view was developing amongst Aboriginals in the Northern Territory which in effect has led them into the misbelief that because it is no longer unlawful to be drunk it is also no longer unlawful to commit other offences while drunk. However, apart from resulting in an increase in charges for various street offences, the Institute suggested that Aboriginals previously charged with drunkenness are now being charged with much more serious offences such as assault, rape and attempted murder and that this trend is being reflected in an increase in serious crime and longer sentences of imprisonment. In its reports on the alcohol problems of Aboriginals, the Committee commented on the decriminalisation of drunkenness in the Northern Territory and found that there was insufficient data available to assess the impact of the change in the law. The exact effect of the decriminalisation of drunkenness in the Northern Territory is still unknown at this stage. However, reactions to it have been mixed. While some believe decriminalisation of drunkenness has eliminated enforcement difficulties and saved the time of the police and courts, others maintain that it gives wider discretionary powers to the police, is open to abuse and deprives persons taken into protective custody of their liberty without access to legal advice.

135 Last year the New South Wales Government enacted the Intoxicated Persons Act, 1979 which came into effect early this year. The Act provides that a person who is found intoxicated in a public place and is behaving in a disorderly manner, behaving in a manner likely to cause injury to himself or another person or damage to property, or is in need of physical protection because of his incapacity due to his being intoxicated, may be detained and taken to a proclaimed place (a police station or rehabilitation centre approved and gazetted by the government) by a member of the police force or a specifically authorised person for a period of up to eight hours. As a result of the Act public drunkenness ceased to be an offence in New South Wales.

Role and effectiveness of Aboriginal legal services

136 The principal objective of the Aboriginal legal services is to provide legal representation for Aboriginals in criminal matters. The need to provide Aboriginals with access to appropriate legal advice and representation, particularly in criminal cases in the courts, was the primary reason for the establishment of the Aboriginal legal services. There is no doubt that the legal needs of Aboriginals for representation were largely unmet prior to the advent of the Aboriginal legal services. The role of the legal services in providing legal aid in criminal cases is still regarded

by Aboriginals as their primary role and any shortcomings in fulfilling this role are heavily criticised by them.

Proceedings in which Aboriginal legal services provide assistance

137 The Aboriginal legal services attempt to provide assistance in all proceedings and in all courts in their State or region, limited primarily by the availability of staff and resources and by the distribution of the client population over a wide area. There are a number of exceptions. The Victorian Aboriginal Legal Service will not normally provide aid for drunk and disorderly cases. The Aborigines and Torres Strait Islanders Legal Service and the Aboriginal Legal Service of Western Australia will not ordinarily grant aid for committal proceedings or to defend a charge of drunkenness although aid is granted for a charge of habitual drunkenness. The Aborigines and Torres Strait Islanders Legal Service also does not always grant aid for minor traffic offences. Other Aboriginal legal services make aid available in all defended proceedings including committal proceedings and for the offence of drunkenness. Legal aid is not ordinarily available in Aboriginal courts in Queensland.

138 Some witnesses questioned the need for Aboriginal legal services to provide legal representation in all cases. It was suggested that in some instances where a client pleads guilty, representation will not affect the outcome of the case, particularly in drunkenness offences. Others suggested that while the appeal system provides a safeguard against injustices such as unnecessarily harsh sentences, representation is not always necessary. Others, principally the Aboriginal legal services, argued against this proposition. They considered that representation is warranted in the majority of cases, even in the first instance when solicitors are seeking an adjournment, if only to ensure that there is no duress on the Aboriginal client.

139 Unfortunately, many Aboriginals tend to accept charges automatically and plead guilty, either because of their fear of authority or in the belief that if they have been charged they must be guilty of the offence, when with legal assistance their plea could legitimately be different. During the early years the Aboriginal legal services attempted to dispel this attitude amongst Aboriginals. Their efforts in this area gave rise to allegations that some legal services were defending clients on principle rather than entering a plea of guilty, therefore wasting funds and courts' time, and not necessarily acting in clients' best interests.

140 The services are mainly involved in the petty sessions field, an area which has tended to be ignored in the past by conventional legal aid organisations. For the most part, Aboriginal legal services appear for clients as defendants although where clients take criminal action against others, legal service solicitors will also prosecute on their behalf. The services generally do not provide representation in matters where the plaintiff and defendant are both Aboriginal and normally refer such cases to other legal aid agencies. The Redfern Aboriginal Legal Service said that it has adopted this policy because it would be contrary to the Service's basic concept to act in a way which would have a divisive influence on the Aboriginal community. The Service refers such matters to independent private solicitors who act for the respective parties; it pays the costs of both parties. However, separate Aboriginal legal service solicitors will act for co-defendants in criminal matters against the Crown, providing the co-accused do not have conflicting interests and there is no breach of legal ethics.

Assistance provided following arrest

141 Where possible, Aboriginal legal services operate a 24-hour duty lawyer and field officer telephone service from their offices. Staff lawyers attend courts of petty sessions and children's courts daily. Field officers also appear where leave is granted by the courts, as in Queensland and Western Australia. Where possible, the legal services make daily telephone inquiries to police stations and lock-ups to ascertain whether potential clients have been charged or are being held in custody. In some areas the police contact the legal services when Aboriginals are charged with offences and held pending court hearings.

142 Aboriginal prisoners in the Goulburn Training Centre alleged that the Aboriginal legal services in New South Wales no longer contact the prisons, police gaols and lock-ups to ascertain whether Aboriginals have been arrested or remanded in custody. Some Aboriginal prisoners who gave evidence to the Committee said that while the legal services had been notified of their arrest, there was a considerable delay before they saw a legal service representative. Others had arranged legal aid from the prison where they were being held on remand. While they considered that police should notify the Aboriginal legal services when Aboriginals are arrested and held in custody, they believed Aboriginal legal service field officers should contact police lock-ups and gaols regularly to ascertain whether any Aboriginals are being held on remand and require legal representation. The prisoners also stated that, while most Aboriginals knew of their right to legal representation in court proceedings, some were unaware of the existence of special legal aid services for Aboriginals. It was not until they were committed to gaol on remand that they were made aware of this facility by other Aboriginal prisoners or when they sought assistance through alternative channels.

143 In remote areas, access to legal aid is limited by additional factors. Because the Aboriginal population is dispersed over a wide area, it is generally impossible for an Aboriginal legal service representative to be present when most needed, for example, when Aboriginal people are taken into custody. This may result in clients making admissions without legal advice and allowing their cases to be heard without representation which they might otherwise have requested. While some branch offices have been established in country towns and field officers are located in others, the office must often be left unattended for lengthy periods while the solicitor or field officer is attending court or travelling to outlying areas in the region. Aboriginal clients seeking assistance may then become frustrated because they are unable to contact the legal service representative.

Bail

144 Since the establishment of the Aboriginal legal services, the courts have been able to grant bail and to release offenders on recognizance knowing that the Aboriginal legal services will do their best to ensure that bail conditions are applied and understood. The basic principle behind granting bail is that in a legal system in which a defendant is presumed innocent until proved guilty in a properly constituted court, he should not be deprived of his freedom while awaiting trial. In practice, release on bail is largely dependent on the ability to provide a financial guarantee that the defendant will appear in court. In the past, the poverty of most Aboriginals apprehended prevented them from furnishing either cash or a surety. The granting or refusal of bail is at the discretion of the police or the courts, as is the amount at which bail is set.

145 Several legal services have set up bail funds from money provided by the Aboriginal community through donations and other fund-raising activities. The bail funds provide a means whereby clients can deposit a cash bail or obtain a surety as to a stipulated amount where this is required by courts granting bail. The Victorian Aboriginal Legal Service estimated that in the first 3½ years of operation, its bail fund of approximately $3500 had been 're-cycled' to provide cash bail exceeding $44 000. Because the majority of Aboriginals belong to a low income group in the community, they generally do not have the resources to raise bail. Further, they are often charged with offences and appear in court distant from their closest relatives who might otherwise assist them. The Committee considers that community sponsored bails are desirable and that the establishment of bail funds by Aboriginal legal services is important to ensure Aboriginal clients who are granted bail are not deprived of their freedom while awaiting trial. It therefore suggests that those legal services which do not have this source of bail, provide a bail fund modelled on that established by the Victorian Aboriginal Legal Service.

Effects of legal representation on penalties

146 In 1973 the New South Wales Bureau of Crime Statistics and Research found that persons who were represented by a lawyer in the lower courts had a six and a half times better chance of being acquitted than those who were unrepresented. Those who were unrepresented were three times more likely to be sent to prison. The Bureau analysed court statistics from New South Wales courts of petty sessions for the calendar year 1974 to assess whether legal representation affects the outcome of cases and whether the introduction of Aboriginal legal aid has been accompanied by changes in penalties imposed for offences such as unseemly words and offensive behaviour. Two court circuits in north-western New South Wales with substantial Aboriginal populations were studied on a 'before' and 'after' basis. In circuit A legal representation had not previously been available through the Aboriginal legal service. In circuit B, where the Aboriginal legal service already operated, it had increased its activities. The two circuits in which the Aboriginal legal service operated exclusively were compared with a third 'control' circuit in which the service was not operating.

147 Legal representation of defendants on charges of unseemly words or offensive behaviour before courts in circuit A rose from 6.9% in 1973 to 27.6% in 1974. The increase was from 19.7% to 37.8% in circuit B. However, representation of those charged with unseemly words or offensive behaviour increased by only 3.6% in the control circuit. These changes in representation coincided with marked changes in sentencing patterns within circuit A and parallel but less dramatic changes in circuit B. In circuit A there was a six-fold increase in the use of bonds as a penalty compared with a two-thirds reduction in their use by courts within the control circuit. The use of terms of imprisonment of more than 14 days decreased by more than two-thirds while figures from the control circuit remained unaltered. There was a significant change in penalties imposed in circuit A courts in 1973 and 1974 but no significant change in the level of penalties imposed in the control courts. The contrast between circuit B and the control circuit was not as marked—possibly because the level of representation of defendants in circuit B at the time the Aboriginal legal service was established was already comparatively high.[9]

[9] *Court Statistics 1974*, Statistical Report 6, Series 2, December 1974, Department of the Attorney-General and of Justice New South Wales Bureau of Crime Statistics and Research.

Appeals

148 The Committee was informed that Aboriginal offenders, with the assistance of the Aboriginal legal services, often appeal successfully against the imposition of high sentences. The Victorian Government stated that it has invariably found that on appeal Aboriginal offenders who appeared unrepresented in the first instance, succeeded in having their sentences varied or reduced or they were acquitted. This not only reflects apparently unnecessarily harsh sentencing of Aboriginals but also reveals the advantages of legal representation. The Aboriginal Legal Service of Western Australia stated that in the first two years of its operation on a full-time basis (1973 and 1974), the number of appeals brought against the imposition of excessive sentences by justices of the peace for trivial offences doubled from 35 a year to in excess of 70 a year. This was disputed by representatives of the Western Australian Crown Law Department who stated that, as far as could be ascertained from the records of the Crown Law Department, from 1973 to 31 December 1978 there were only 89 successful appeals from justices in which the Crown Solicitor appealed. Nevertheless, in 1975 the then Chief Justice of Western Australia stated at a conference of magistrates held in Perth that the 'considerable increase in the number of appeals under the *Justices Act, 1902-1979*, including appeals from the decisions of country Justices, . . . could be partly put down to the energy and industry of the Aboriginal Legal Service'.

149 The Aboriginal Legal Service considered that while there has been a reduction in the severity of sentences imposed on Aboriginals in Western Australia at all levels of the criminal justice system, Aboriginals are still over-represented in the correctional system and there are still cases where excessive sentences are being given for trivial offences. For example, in 1979 a 26 year old Aboriginal with no prior convictions received a penalty of four months' imprisonment from two justices of the peace for his participation in the stealing of two sheep valued at $35. An appeal against this decision was successful.[10]

Assistance provided to prisoners

150 The Redfern Legal Service stated that wherever possible it endeavours to maintain contact with Aboriginal people sentenced to imprisonment. It often acts as a go-between for the prisoner and his family, particularly if the family lives a considerable distance from the institution where the prisoner is being held. It considers the Aboriginal inmate is particularly susceptible to depression if he is totally isolated from his community. The Service stated that solicitors and field officers visit the gaols as regularly as possible although its limited number of staff and the pressures of court appearances prevent staff from visiting the gaols as often as it would like.

151 Aboriginal prisoners in the Goulburn Training Centre stated that representatives of the Aboriginal legal services no longer visit New South Wales gaols on a regular basis. While the Aboriginal legal services would visit prisoners if specifically requested to assist with legal matters of a private nature or where there was a question of an appeal, the prisoners considered it important that an Aboriginal legal service representative visit gaols frequently and on a regular basis to ascertain whether the prisoners had any particular problems with which the legal services could assist. The prisoners' complaint was not directed at a particular Aboriginal legal service; rather, it indicated that this is a State-wide problem. The prisoners

[10] *Hansen* v. *Schaper*, Supreme Court of Western Australia, Appeal No. 23 of 1979, unreported.

suggested that legal service officers should visit the maximum security prisons which are located within the boundaries of the respective Aboriginal legal services in New South Wales.

152 Some Goulburn prisoners who appeared before the Committee considered that the failure of the Aboriginal legal services to visit the gaols regularly reflected lack of interest in the prisoners and lack of concern for their welfare. The Committee does not believe that this is the case but rather that because of their limited resources and staffing capacity, the legal services have been concerned to give priority to Aboriginals in the courts where the provision of legal advice and representation can affect the imposition of custodial penalties and the severity of sentences.

153 The Redfern Legal Service stated that the demands of court work on staff often prevent the Service from visiting gaols during set visiting hours. Problems also arise because prison authorities may not allow field officers to enter prisons to interview clients when they are not accompanied by a solicitor. Some members of staff have criminal records but, the Service claimed, it is difficult to find an Aboriginal person in Australia who is active in promoting the welfare of his people who does not have some form of prior record. The Service believes there is a need to employ additional staff solely for its work in the gaols; however, this is not possible within its present financial resources. Over the last three years the Redfern Legal Service has also sought to establish a 'half-way house' for inmates following their release from prison to provide temporary accommodation until employment and alternative accommodation become available.

Approaches to the delivery of legal aid

154 In small Aboriginal communities long distances from regional offices it is often more economical for the Aboriginal legal services to brief minor matters to a local private practitioner if one is available. For example, the Aboriginal Legal Service of Western Australia has attempted to overcome the problem of isolation by establishing a network of private practitioners in country areas who have open briefs to provide advice and representation to Aboriginals in relation to pleas in mitigation for offences. The solicitors are normally required to refer defended matters to the Aboriginal Legal Service of Western Australia in Perth which authorises them to proceed or not depending on the circumstances of the case. These solicitors receive payment for each matter from the Legal Service; as a rule charges for services rendered are lower than those normally made by private solicitors.

155 The Aboriginal Legal Service of Western Australia has also instituted a system of 'honorary' field officers who are appointed in various towns and paid approximately $500 a year to act as communicators to the Legal Service's nearest branch office, to inform it of the people arrested and charged with offences in their area. The branch office then assesses the need to provide representation and depending on the charge and the speed with which the local court deals with the case, the Legal Service will organise representation. Six 'honorary' field officers have been appointed in Western Australia.

156 In Queensland, the Aborigines and Torres Strait Islanders Legal Service has adopted the practice whereby, if legal representation cannot be provided, a field officer attends the court to check that all relevant circumstances are brought to its attention. This procedure is used when the facts of a case are assessed by a solicitor and no defence is evident and the client wishes to plead guilty. Some

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on-the-job training is provided for the field officers to carry out this function which is performed only with advice from or under the supervision of a solicitor.

157 While the majority of routine and minor matters and some appeals and sentencing matters in district courts are dealt with effectively by the Aboriginal legal services, problems may arise in respect of more serious or complicated cases that require representation in courts of higher jurisdiction. It is often necessary and desirable for Aboriginal legal services to brief senior counsel. In some cases the most effective way of representing Aboriginal clients in more serious criminal matters is by seeking the assistance of barristers who are both capable advocates and who have an appreciation of the special legal needs of Aboriginals. This arrangement works to the benefit of Aboriginal clients not only because of the greater expertise of the barristers but also because of the unique professional relationship which exists between barristers and members of the Bench in the conduct of criminal cases.

158 The Aborigines and Torres Strait Islanders Legal Service stated that it is unable to offer a comprehensive legal service in the higher courts and that it is customary for all serious criminal cases to be referred to the Public Defender after the case has proceeded through the magistrates' court level. The disadvantage of this arrangement is that communication problems tend to arise between solicitors in the Public Defender's office and Aboriginal clients. The New South Wales South Coast Aboriginal Legal Service stated that in its experience clients were often unwilling to see their cases pass out of the hands of the Aboriginal Legal Service into those of the Public Defender for similar reasons. Consequently, the use of private solicitors was preferred but this was an expensive option.

159 The Redfern Aboriginal Legal Service considered that the most economical way of providing an effective service in this area is through the appointment of suitably experienced and qualified solicitors to the staff of the Service. Prior to 1976 the Redfern Service regularly briefed counsel to appear in the district courts and Supreme Court. Since 1976 this practice has ceased and the Service has employed three full-time solicitors experienced in appearing in the higher courts. The solicitors are based in the Legal Service's Sydney office as the majority of appearances in the higher courts take place in Sydney. Although indictable matters which arise in country areas are often transferred to the courts sitting in Sydney for trial, the solicitors also attend country courts when necessary. The solicitors represent clients in most matters in the higher courts with the exception of the serious crimes of murder and manslaughter when counsel is generally, although not always, briefed. Although the Service's country branch solicitors and other solicitors employed in the Sydney office sometimes appear in district courts on sentencing matters or on appeals when they have appeared on behalf of clients in the lower courts, the Redfern Legal Service generally delegates such matters in the higher courts to one of its three senior solicitors.

160 The Redfern Legal Service maintains that the financial savings that accrue to it by adopting this procedure are considerable and that it is the cheapest way of providing assistance in this area. It suggested that in any particular case the weekly wages of one of the Service's senior solicitors could be less than the brief fee paid to a member of the Bar for appearing in a similar matter for a single day. However, the potential amount of major criminal casework arising in areas covered by the smaller Aboriginal legal services, such as the South Coast Aboriginal Legal Service and St Mary's and Districts Aboriginal Legal Assistance, would not warrant the cost of employing a senior solicitor.

Complaints by prisoners

161 The Redfern Legal Service stated that it is now able to accept more indictable work than it did previously and claimed that Aboriginal people charged with indictable matters now have confidence that the Service can properly represent them even on very serious charges. This claim was not supported by evidence received from Aboriginal prisoners in the Goulburn Training Centre who expressed their dissatisfaction with the operation of the Aboriginal legal services in New South Wales. Criticism was not specifically directed at the Redfern Legal Service although some prisoners were clients or would-be clients of that Service; in fact the cases brought to the Committee's attention indicated that dissatisfaction with the availability and quality of representation applied to all four Aboriginal legal services in New South Wales.

162 The prisoners complained that many Aboriginals in gaol had not been represented in court. They were particularly concerned that these included some first offenders whom they considered might have been released on bonds had they been represented in court. The prisoners stated that they were subject to long periods of remand because solicitors failed to appear at court on the day the case was listed for hearing. While they were entitled to ask for further remand if they had no legal representation, they adopted an attitude that they might as well get the matter over with and therefore appeared in court unrepresented. They added that few Aboriginals have the financial means to raise bail and are compelled to return to gaol until the case is heard. There is also no guarantee that the length of a sentence of imprisonment will be reduced by the period already spent in gaol on remand. The prisoners stated:

> We go to court hoping that someone is there to represent us, but most of the time we are not. So the next best thing we can do is get a remand until such time the Aboriginal legal service represents us. Which most of the time they don't. We also get tired of sitting around in Gaol waiting for court, so we give up on the Aboriginal legal service, and we get it over and done with, without anybody representing us at all.

163 Some prisoners also considered that Aboriginal legal service solicitors do not provide as high a standard of representation as privately engaged solicitors or barristers. They based this view on the premise that, because Aboriginal legal service solicitors are employed on a fixed salary, they will be paid regardless of the outcome of a case, and believed that privately engaged solicitors have a greater incentive to speak on behalf of clients because otherwise they will not be paid. They considered that Aboriginal legal service solicitors are young and inexperienced and that they do not care about Aboriginal people. They also alleged that they had been wrongly advised by solicitors; in particular, the prisoners' comments reflected a belief that solicitors' advice to plead guilty or not to bring an appeal is based on the solicitors' lack of interest in the case or concern for the client rather than on his professional judgement.

164 The Committee was concerned to learn of these attitudes towards the Aboriginal legal services. The accuracy or otherwise of the allegations is in itself a matter for concern but more so is the Aboriginal prisoners' belief that the Aboriginal legal services are not concerned to promote their welfare and protect their legal rights. The Committee believes the attitudes not only reflect a lack of understanding of the operation of legal aid schemes, of the legal profession and of the professional ethics by which legal practitioners are bound, but also demonstrates the high (and often unrealistic) expectations which Aboriginal

clients have of their legal services. The Committee also appreciates that criticisms of the legal services which are justified, such as repeated adjournments of hearings, are a source of frustration to them. One reason these problems may not be adequately resolved is because of budget restraints; another may be because clients' demands are beyond the services' capacity to fulfill. It also recognises the significant problems facing the Aboriginal legal services when unjustified criticisms arising from ignorance or misinformation are levelled against them by Aboriginal people.

Effectiveness in metropolitan and rural areas

165 The extent to which the legal needs of Aboriginals in the criminal jurisdiction are met varies between the Aboriginal legal services and, within each legal service, between the different communities, namely, the urban communities, fringe-dwelling communities in country areas, and isolated traditionally-oriented Aboriginal communities. However, factors which limit the legal service's effectiveness in the delivery of legal assistance in any one area are not always exclusive or peculiar to that area.

Metropolitan areas

166 The needs and demands of Aboriginals for legal aid in all areas of the law are most effectively met by the Aboriginal legal services in the capital cities. This is in part because most of the Aboriginal legal services are based in the capital cities and are readily accessible to Aboriginals: their offices are centrally located and legal assistance is available at all times for urgent and unusual cases, including after hours and at weekends. In addition, the urban Aboriginal population is usually highly concentrated in defined areas in the cities. Aboriginal legal services may be more responsive to the legal needs and demands of urban Aboriginals because their needs are clearly visible whereas the legal services' physical remoteness from the non-metropolitan Aboriginal population may render them less sensitive to the needs of Aboriginals in rural areas. It is also significant that most legal service councils tend to be dominated by urban Aboriginals. This has, intentionally or unintentionally, resulted in greater emphasis being placed on the delivery of legal aid to Aboriginals in metropolitan areas. Urban Aboriginals are not only articulate and able to make their needs known but are also more familiar with the range of services provided by the Aboriginal legal services and more inclined to approach them for assistance. It is also easier for the legal services to recruit and retain staff (particularly solicitors) in metropolitan areas.

167 While Aboriginal legal services maintained that they are able to meet the immediate needs of urban Aboriginals for representation in criminal matters and that it is unusual for Aboriginal people not to be represented in court, they drew the Committee's attention to certain problems encountered in meeting these needs. One of the main problems faced by solicitors operating in the metropolitan area is that there are so many local courts in which their clients can appear. For example, the Victorian Aboriginal Legal Service stated that it must provide assistance at more than 20 magistrates' courts throughout Melbourne in addition to the Supreme Court, the county court, children's courts, family courts and tribunals. The Redfern Aboriginal Legal Service stated that with over 15 courts available in the Central Court of Petty Sessions, a number of which may be sitting at any one time, it is often necessary for more than one solicitor to attend the Court on a given day in order to provide proper representation for several

clients, particularly if at least one matter is listed for hearing. Apart from attending the Central Court of Petty Sessions, solicitors may also be required to appear at local courts of petty sessions in the metropolitan area. The appearance of clients in these courts often follows closely upon their arrest so that the Legal Service has short notice of their pending appearance. As with other practitioners, it is not unusual for Aboriginal legal service solicitors to appear at several local courts of petty sessions on the one day. Travel between metropolitan courts is time-consuming and a great deal of organisation and co-ordination is therefore required on the part of the Service's city offices to ensure that solicitors appear for all clients listed to attend court each day. Aboriginal legal services in metropolitan areas also reported problems in locating witnesses and offenders released on bail. These problems arise largely because the Aboriginal population in urban areas, although concentrated in certain areas, is highly mobile.

168 It was suggested that the Aboriginal legal services in metropolitan areas should rely more heavily on the services of alternative legal agencies such as the State legal aid commissions and duty solicitor schemes and develop suitable co-operative arrangements with these agencies. If such arrangements were made the Aboriginal legal services could adopt a diminishing role in providing legal services for urban Aboriginals and devote more time and resources to providing more adequate assistance to Aboriginal people in areas where alternative services are not available. It was also suggested that the availability of separate Aboriginal legal services not only promotes dependency by Aboriginals on a separate service but also inhibits developments in conventional legal services to meet the needs and demands of Aboriginals. The Aboriginal legal services argued that alternative services are often not provided in all of the metropolitan courts and that their clients are reluctant to use such services. Chapter 13 discusses the access of Aboriginals to alternative legal aid agencies and the ability of alternative services to cater for the special needs of Aboriginals.

Rural areas

169 The Aboriginal legal services' coverage is least effective in isolated areas and all the Aboriginal legal services reported difficulties in meeting the legal needs and demands of Aboriginals in such areas. In certain cases, particularly in remote parts of Western Australia, Queensland and South Australia, the Aboriginal legal services are often unable to provide legal assistance at all. Although courts in country areas do not sit continuously as they do in the metropolitan areas and solicitors and field officers can follow the local magistrate's circuit, the demands placed on Aboriginal legal service staff are considerable. Not only must they be available to represent clients at all court sittings in their area, but they are also required to travel long distances to meet the needs of their clients. The legal services are normally able to provide legal assistance for Aboriginal defendants in circuit courts but where courts of summary jurisdiction sit more frequently in country areas, they are often unable to attend. While they attempt to provide assistance to all Aboriginals who wish to plead not guilty to charges heard in lower courts, they are unable to meet other needs of Aboriginals in all the courts within their jurisdictions particularly courts conducting summary proceedings which have large numbers of Aboriginal defendants appearing before them.

170 The Aboriginal Legal Service of Western Australia has one solicitor and one field officer to cover 26 courts in the south-west of the State, most of which sit daily and at least half of which have Aboriginal defendants appearing

regularly before them. It was suggested that in Western Australia up to 40% of Aboriginals in country courts currently appear unrepresented. Although a large proportion of these offenders are charged with drunkenness, many others are charged with a full range of matters up to the limit of the petty sessional jurisdiction which may include defended matters. The Aborigines and Torres Strait Islanders Legal Service stated that a client in a remote part of the State such as the far north or south-west might not be represented although his case might well have priority over that of a client living in a more accessible area. The Service would generally only visit outback areas to provide representation in minor cases when the number of cases made the trip viable. The Service maintained that while it spent two days travelling to and from such a distant location, 20 or 30 people might have been provided with legal assistance in a less remote area. Nevertheless, representation is always provided for clients in isolated areas who are charged with serious offences.

171 The North Australian Aboriginal Legal Aid Service reported that it is currently able to meet the basic needs of Aboriginals within the criminal jurisdiction but that in order to do so it must organise its visits to communities with regular court sittings to coincide with the visits of magistrates. The Service was doubtful whether it would be able to provide adequate assistance and representation if the Northern Territory Government increased the number or frequency of court sittings in outlying regions with predominantly Aboriginal populations.

172 All the Aboriginal legal services maintained that the demands of travelling long distances to service country areas were considerable. The Western Aboriginal Legal Service stated that while staff might be able to complete their legal business in four to five hours, travelling time might take three to four hours in each direction. The solicitor from the Redfern Legal Service's Cowra office stated that when appearing at courts in 11 of the 37 towns in his area, it was necessary for him to depart from Cowra before 6 a.m. in order that he might consult clients and others concerned with a case before the court sat. The solicitor at Moree estimated that he travelled an average of approximately 1500 km a week covering over 18 towns with significant Aboriginal populations. Some Aboriginal legal service solicitors were required to travel to courts and take instructions the evening before the court hearing.

173 A special problem inhibiting the effectiveness of legal services in remote areas which is experienced by the North Australian Aboriginal Legal Aid Service, the South Australian Aboriginal Legal Rights Movement and the Aboriginal Legal Service of Western Australia arises from the practice of Aboriginal legal service representatives travelling to remote areas with the court and prosecution. For example, of the 27 major communities covered by the North Australian Aboriginal Legal Aid Service, 14 are accessible only by aircraft. The remaining communities are accessible by road; however, during the wet season the roads remain closed for considerable periods of time. As available commercial air services to towns are irregular and many outlying court locations are not serviced by airlines, aircraft are chartered to reach these areas. The Aboriginal legal services are forced to defray the expense by sharing flights with the presiding magistrate, the court staff and the police prosecutor. The legal services are conscious of the danger of being identified in the eyes of the Aboriginal communities as an extension of the authority structure rather than as an independent Aboriginal organisation.

174 The day-to-day operations of the legal services in isolated areas are restricted and complicated in many ways by factors reflecting the disadvantaged social

position and physical environment in which many Aboriginals live. Aboriginal legal service clients' access to assistance is limited by the lack of facilities often taken for granted by others such as the availability of telephones. In these circumstances clients or their relatives must wait until a legal service representative visits the area for court sittings before discussing their legal problems. For example, within the North Australian Aboriginal Legal Aid Service's area only three of the 27 communities covered by the Service have a telephone operated through the exchange in Darwin; the remainder have radio telephones which frequently cause long delays and on occasions weather conditions make contact impossible.

175 The isolation of communities and the absence of satisfactory communications present difficulties for the legal services in preparing and following up cases. There is invariably insufficient time to obtain proper instructions from clients, to hear the community's views about cases listed or to prepare the case. Witnesses are usually interviewed and briefed at the courthouse along with clients; statements are taken in great haste and with little privacy before the court commences and while it is in progress; frequently there is no documentation. Due to pressure of time, lack of understanding on the part of defendants, and failure of legal service officers to recognise people, there have been occasions when clients have been present outside the courthouse but have never appeared before the court and have then been fined for failure to appear. Solicitors are also unable to devote time after the sittings to explain the outcome of cases to clients and/or the community. While the Committee is concerned about the quality of representation that Aboriginal legal service solicitors are able to provide within such time constraints, it acknowledges that legal service staff servicing remote areas experience considerable frustration in attempting to meet their clients' needs under these circumstances.

176 In certain country centres pressure of time not only prevents Aboriginal legal service solicitors from obtaining adequate instructions from clients but also affects the court's ability to deal properly with all cases. It is not uncommon for one magistrate, one Aboriginal legal service solicitor and one prosecutor to deal with as many as 100 defendants in two to three days. The tight schedule and pressures from courts, clients and communities which impede the ability of Aboriginal legal services to provide an acceptable standard of representation have been the subject of criticism from the Bench in various States and the Northern Territory. The Chief Magistrate of the Northern Territory suggested courts outside Darwin and Alice Springs were being inconvenienced as a result of the workload undertaken by the Aboriginal legal services in the Northern Territory. However, he believed that this was not the fault of the Aboriginal legal services but was due to other factors.

177 A constant complaint from both Aboriginal communities and the Aboriginal legal services was that the legal services have neither the time nor the financial resources to visit communities on a regular basis, particularly in remote areas of the Northern Territory, Queensland, Western Australia and South Australia.

178 In Queensland, the extent to which Aboriginal legal needs and demands are met is further affected by the existence of special Aboriginal courts. The Queensland *Aborigines Act* 1971–1979 and the *Torres Strait Islanders Act* 1971–1979 provide for the establishment of Aboriginal courts in Aboriginal communities. Regulations provide for the courts to be constituted by two or more Aboriginals who are justices of the peace or by at least three members of the Aboriginal council. The courts have the power to hear and determine complaints

for offences against the regulations or by-laws of the community and may impose penalties. The Aborigines and Torres Strait Islanders Legal Service made the following comments on the representation of Aboriginals in these courts:

> At present the Service is unable to make any significant effort towards the provision of representation to people in Community Courts. There have been some complaints about some of the Community Courts with respect to bias and severity of sentence. According to the Queensland Aborigines Act a defendant was only entitled to representation by leave of the Court. Because of the obviously very sensitive nature of the issue the Service has not pushed for the right of appearance in Aboriginal Courts, nor has it positively encouraged Aboriginal defendants to ask for representation. With the passing of the Aboriginal and Islander Queensland Discriminatory Law Bill through the Federal Parliament defendants now have the same rights, including that the residents of Aboriginal communities should know they have these rights and that the Legal Service should provide representation when it is requested. It is impossible to complete statistics which indicate accurately the number of people facing charges before Aboriginal Courts. Samples indicate that the number could be considerable. Almost all are in remote areas and are poorly serviced by transport. It is believed that at the very least, those who plead not guilty would require representation, where it is available.

The Committee foreshadows that demands on Aboriginal legal services to provide legal advice and assistance in remote areas, particularly to tribal communities, will be further increased if the Australian Law Reform Commission recommends the acceptance and recognition of Aboriginal customary law.

Studies of Aboriginal legal services' effectiveness

179 Since the establishment of the Aboriginal legal services two studies have been conducted which have attempted to assess the legal services' effectiveness in terms of workload in criminal matters. These studies have limitations as they are based on small samples, but there are limitations to any analysis based on estimates of the workload of a legal service. Further, the studies limit themselves to information contained in files and do not take account of the considerable amount of work undertaken by the legal services which is not recorded on files but which nevertheless comprises a significant component of Aboriginal legal services' workload; that is, the studies should be regarded as caseload indicators rather than workload indicators. It is also necessary to make the distinction between caseload and workload because the amount of time spent on different kinds of legal matters varies considerably. In spite of these limitations, it is possible to draw a number of conclusions from the studies and to identify trends about the size and nature of the legal services' workload.

Victorian Aboriginal Legal Service

180 A study of the Victorian Aboriginal Legal Service was completed in November 1976. The study was based on a sample group of Victorian Aboriginal Legal Service clients who had consulted the Service during the period from January 1973 (when the Victorian Aboriginal Legal Service was founded) to the end of June 1976. The sample group of 316 clients comprised every tenth client listed in the alphabetical card filing system. The files relating to each client during the relevant period which formed a file sample group of 611 files were then examined.

181 Prior to the establishment of the Victorian Aboriginal Legal Service, an average of 300 criminal matters involving Aboriginals was reported to the Victorian Director of Aboriginal Affairs each year. In 1974 the *Aboriginal Affairs*

Act 1967 was repealed by the *Aboriginal Affairs (Transfer of Functions) Act* 1974 and the requirement of courts to inform the Victorian Director of Aboriginal Affairs of criminal proceedings involving Aboriginals no longer applied. The Victorian study revealed that between 1973 and 1976 the Victorian Aboriginal Legal Service dealt with an average of 800 criminal cases each year. The study also found that the Service responded to an increasing demand each year which showed new clients were using the Service. Within a year of commencing operations, the Victorian Service's file load increased 100 per cent and increased each subsequent year although at a reduced rate. The study found that the majority of clients came from country areas. Considering the majority of Aboriginals in Victoria live in the metropolitan area of Melbourne, this finding indicated that the needs of Aboriginals in country areas were considerable and pointed to the need for the Service to increase its accessibility to this sector of the Aboriginal population. Two of the areas which showed a relative decrease in their demands on the resources of the Service were inner metropolitan. Although the reason for this was not clear, it was significant that clients in these two areas had greater access to the Victorian Aboriginal Legal Service than clients elsewhere. Considering the overall growth of the Service, it is surprising that two areas where the Aboriginal population is concentrated began to contribute proportionately less to the caseload of the Service than they did immediately following its establishment. This raises the question of whether accessibility and close proximity to an Aboriginal legal service result in a reduction in the legal needs and demands of a particular community over a period of time. Further examination of this aspect of delivering legal aid services is required.

182 The study also found that clients returned to the Victorian Aboriginal Legal Service on numerous occasions for different and unrelated matters: 40% of all clients returned to the Service at least twice; 11% at least four times; and 1% returned at least 15 times. Forty-three per cent of Aboriginals charged had more than one charge laid against them; 59% of clients were male and 37% female; and children represented 20% of the Service's clientele. In 1973 criminal matters accounted for 51% of all matters, whereas in 1975 this had dropped to 44%. The proportion of cases dealt with by the Legal Service itself rather than through referral to outside solicitors increased from 41% to 74% in 1976.

Central Australian Aboriginal Legal Aid Service

183 A study of the Central Australian Aboriginal Legal Aid Service was completed in September 1979. The study was based on a random sample of the Service's files of individual clients and their dealings with the Service from the time it was founded in 1973 to 1979. The sample which was small referred to 408 cases in 259 files out of a total of 4485 files held at the time in the Service's central filing system.

184 In 1978 the Central Australian Aboriginal Legal Aid Service served a greater number of new clients than it had done in the previous two years: overall, two out of three of the Service's clients were new clients. It was suggested that the high proportion of new clients using the Service reflected the breadth of its coverage and acceptance in the Central Australian area. Nevertheless, cases of clients whom the service had previously represented still accounted for a large proportion of the work of the Service. Forty-nine per cent of matters handled during the 1973 to 1979 period concerned clients who were represented more than once, and 12% of cases concerned clients who were represented more than four times (see Appendix 15, Table 1).

185 Apart from residents of the Alice Springs town area, multiple case clients were drawn from a relatively small number of major communities—Hermannsburg, Papunya, Warrabri and Yuendumu. It can be seen that these five communities, plus Lajamanu and Tennant Creek, provide most of the Central Australian Aboriginal Legal Aid Service's clients. Other communities such as Amoonguna, Areyonga, Docker River, Haasts Bluff, Santa Teresa, Utopia and the township of Finke, were represented less often (see Appendix 15, Table 2). For Papunya, the Central Australian Aboriginal Legal Aid Service's clients amounted to 20% of the total population of the community each year. For four other large communities—Hermannsburg, Lajamanu, Tennant Creek and Warrabri—the Service's clients amounted to 10% of the Aboriginal community population each year. Two-thirds of the Central Australian Aboriginal Legal Aid Service's clients whose ages were recorded were aged less than 25 years and one-third was in the 15-19 years age group (see Appendix 15, Table 3).

Study of 'Aboriginal' towns in New South Wales[11]

186 While the Aboriginal legal services in New South Wales maintained that they were able to provide comprehensive representation in criminal matters for clients within their areas of operation, the findings of the New South Wales Bureau of Crime Statistics and Research do not support this claim. The Bureau's figures for 1978 indicate that only 61% of defendants in 'Aboriginal' towns were legally represented in final court appearances. The study has basic shortcomings in that Aboriginals are not identified in the court statistics on which the figures are based and it is therefore not possible to identify the number of Aboriginals within the survey who in fact did receive legal assistance. It was suggested, however, that in towns with substantial Aboriginal populations where the majority of offenders are Aboriginal, a relative proportion of those who were not legally represented would have been Aboriginals. It is possible that some Aboriginals may have chosen not to be represented by the Aboriginal legal services either because they did not want to be identified as Aboriginal, because they were familiar with court procedure and saw no need for representation, or they may have inadvertently appeared in court unrepresented.

187 The Bureau's study shows that legal representation of defendants at final appearances in courts in 'Aboriginal' towns has steadily increased from 30.4% in 1974 to 48.1% in 1976 and 60.8% in 1978. As can be seen in the table below, the increase in the rate of legal representation in 'Aboriginal' towns in 1978 was 12.7% which is slightly above the average increase of 12.1% for the State. While there is little doubt that the increase in legal representation has been primarily due to the work of the Aboriginal legal services, coverage of non-metropolitan areas may be considerably less than the legal services claim.

[11] A description of the New South Wales Bureau of Crime Statistics and Research's categorisation of 'Aboriginal' towns is given in Appendix 5, together with a list of the towns included in the various categories.

Percentage of final appearances where defendant was legally represented[12]

Area of court	*1976*	*1978*	*Increase*
	%	%	%
City	43.6	47.8	4.2
Suburban	32.6	49.9	17.3
Wollongong/Newcastle	50.1	63.9	13.8
'Aboriginal' towns*	48.1	60.8	12.7
Other country towns	47.7	59.6	11.9
	41.1	53.2	12.1

*Preliminary figures excluded Warren.

188 The Department of Aboriginal Affairs is currently funding two projects relating to Aboriginals and the law which should provide further information on the extent and effectiveness of legal representation by Aboriginal legal services in criminal matters: a research project concerning Aboriginals and the prison system, and an evaluation study of the Victorian Aboriginal Legal Service.

Effect of Aboriginal legal aid on the law and its administration

189 Since their establishment, Aboriginal legal services have undertaken a considerable number of major criminal cases which have not only benefited individual litigants but have had ramifications for the community as a whole. Many significant changes in both the law and its administration have resulted from cases undertaken by Aboriginal legal services. The Committee has relied on the following cases in the Northern Territory and South Australia to illustrate this point but is aware of other cases undertaken by the legal services elsewhere which have been of equal importance to the application of the law, its interpretation by the courts and the modification of legal procedures in the criminal justice system.

190 In 1976 and 1977 the Central Australian Aboriginal Legal Aid Service acted in two cases where it was alleged police had assaulted Aboriginals.[13] Although the cases did not succeed, police procedures were severely criticised and an important principle of administrative procedural reform was won. During the cases the Central Australian Aboriginal Legal Aid Service expressed concern at the process whereby police investigated police in such cases. As a result of these cases the Northern Territory Commissioner of Police can now be requested to investigate such matters and if his report is unsatisfactory the matter can be referred to the Ombudsman.

191 The significance and effectiveness of the role played by Aboriginal legal services as an instrument of reform are evident in what is known as the *Paula Sweet* case. [14] In essence, two Aboriginals were acquitted of murder and four were found guilty of assault with intent to rape. The murder acquittals rested on the discrediting and exclusion of police records of interview which formed the basis

[12] *Aboriginal people and the N.S.W. Criminal Justice System: A review of existing information* Statistical Bulletin, No. 3, November 1979, N.S.W. Department of the Attorney-General and of Justice Bureau of Crime Statistics and Research.

[13] *Jamba Jimba* v. *Davis*, Northern Territory Supreme Court, No. 611 of 1976, delivered 23 August 1978, unreported. *Liddle* v. *Owen*, Northern Territory Supreme Court, No. 702 of 1977, delivered 17 August 1978, unreported.

[14] *R.* v. *Angus Anunga, Sandy Ajax, Clancy Ajax, Tjingunya, Nari Wheeler and Frankie Jagamara*, Northern Territory Supreme Court, Nos. 207–208 of 1975, delivered 30 April 1976, unreported.

of the Crown's case. In his judgment, Mr Justice Forster enunciated the now famous 'Forster's Rules' (in which Justices Muirhead and Ward concurred), namely, the rules by which and under which Aboriginal suspects may be questioned and interrogated by the police. They were not designed to be 'unduly paternal' but 'simply to remove or obviate some of the disadvantages from which Aboriginal people suffer in their dealings with the police . . . These guidelines are not absolute rules, departure from which will necessarily lead to statements being excluded, but police officers who depart from them without reason may find statements excluded.' These rules provided for protection of the Aboriginal accused in the Territory for the first time and have been of major significance in numerous cases since. 'Forster's Rules' are set out in Appendix 16 and discussed in Chapter 8.

192 In 1979 the Huckitta[15] murder trials in Alice Springs which lasted eight to nine weeks were taken up almost entirely with irregularities of police procedures in the investigation of the case and the admissibility of statements by the accused in terms of 'Forster's Rules'. By using these special 'rules' as a minimum yardstick of police procedure and action, the Aboriginal legal services in the Northern Territory have created an awareness of irregularities and illegalities against the accused Aboriginal and have as a consequence improved the position of Aboriginal people within the legal system. Other aspects of the Huckitta trials are discussed in Chapter 7.

193 In 1973 the South Australian Aboriginal Legal Rights Movement undertook a major case, *R.* v. *Gibson*[16] which led to the development of a code of police conduct to be followed when interviewing Aboriginal offenders. In this case, Justice Bright formulated a set of suggestions and principles concerning police conduct in the arrest, charging, questioning of Aboriginals, administering of cautions, and access to legal advice and assistance. Shortly after this case, the South Australian Police Commissioner issued a circular relating to interrogation of Aboriginals, treatment of Aboriginal prisoners, and the position and status of Aboriginal field officers. The circular dated 24 March 1975 is entitled 'Aboriginal Legal Rights Movement—Field Officers and Police Liaison Officers' and is included in Appendix 17. Other cases conducted by the Aboriginal Legal Rights Movement in South Australia have highlighted aspects of the law and legal procedure and have shown how the Aboriginal legal services can contribute significantly to the reform of the legal process.[17] Other cases which have led to changes in police procedures are discussed in Chapter 8.[18]

[15] *R.* v. *Collins, Stuart, Williams and Woods*, 1980, Federal Court of Australia, unreported.
[16] Supreme Court of South Australia, 12 November 1973, unreported.
[17] *Lang* v. *Warner* (1975), 10 SASR 289; *Gollan* v. *Samuels* (1973), 6 SASR 452; and *Power* v. *Huffa* (1976), 14 SASR 337.
[18] *R.* v. *Williams* (1976), 14 SASR 1; *Walker* v. *Marklew* (1976), 14 SASR 463; and *Furnell* v. *Betts* (1978), 20 SASR 300.

7. Aboriginal Children and the Law

194 During the course of the inquiry, the Committee's attention was drawn to the special needs and demands of Aboriginal children and young persons for legal aid, to problems which the Aboriginal legal services have encountered in their efforts to improve the situation of juvenile offenders before the law, and to injustices suffered by young Aboriginals within the judicial and administrative systems.

Jurisdiction of the children's court

195 The age at which a child or young person may be charged before a juvenile court varies from State to State. In most jurisdictions, the minimum age of criminal responsibility is either seven or eight years; in South Australia it is ten years. The maximum age at which young persons may appear before a juvenile court is either 17 or 18 years, depending on the jurisdiction. Children's courts deal summarily with most criminal offences with the exception of very serious offences such as murder which are tried in ordinary criminal courts. Apart from covering juvenile offenders, the jurisdiction of the children's court also extends to official intervention to provide for the care and protection of 'neglected' or 'uncontrollable' children. The application of the law in respect of these children can result in various court orders including wardship whereby children may be placed with foster parents or committed to institutions. The appropriateness of applying legal definitions expressed in chronological terms to juvenile offenders in traditionally-oriented Aboriginal communities where initiation marks the transition from childhood to adulthood is discussed in Chapter 10.

Over-representation of Aboriginal juveniles in institutions

196 In its submission to the Queensland Government concerning the review of the *Children's Services Act* 1965–1979, the Aborigines and Torres Strait Islanders Legal Service commented that institutionalisation has become a way of life for the majority of Aboriginals. Institutionalisation has historically been used as a means of 'civilising' young Aboriginal children and the situation is little different today, the approach adopted by institutions being one of enforced integration. The removal of young Aboriginals from their cultural and familial setting to institutions threatens to destroy any possibility of their future adjustment to Aboriginal or non-Aboriginal society.

197 Aboriginal juveniles are more likely to be charged, convicted and remanded to institutions than non-Aboriginals. In Western Australia, 26% of those appearing in court are Aboriginals, 52% of those committed are Aboriginals and 70% (estimated) of those in institutions are Aboriginals.[1] Statistics compiled by the Law Department of the South Australian Office of Crime Statistics[2] show that 10% of all juvenile court appearances are by Aboriginal offenders and that approximately 50% of juvenile court appearances by non-Aboriginals are preceded by summons, while 70% of Aboriginals appearing in court are arrested. The percentage of Aboriginal juveniles in corrective institutions relative to the

[1] E. Sommerlad, *Aboriginal Juveniles in Custody*, Report of the National Symposium on the Care and Treatment of Aboriginal Juveniles in State Corrective Institutions, June 1977, ANU Centre for Continuing Education, Canberra.

[2] *Crime and Justice in South Australia*, Quarterly Report for the Period ending 31 March 1979, Series 1, Vol. 1, No. 2, Law Department Office of Crime Statistics.

Aboriginal population is significantly higher than the comparative figures for non-Aboriginals in all States and Territories. In New South Wales, Aboriginals comprise 6.6% of the total number of juveniles in shelters and training schools while representing only 0.5% of the population.[3] In Queensland 25% of children in care and protection in institutions are of Aboriginal or Islander descent although Aboriginals only represent 1.7% of the State's population (1971 Census).[4] Over 30% of boys passing through Westbrook Training Centre (the main juvenile detention centre in Queensland) are of Aboriginal or Islander descent; and approximately 15% of girls resident at the Wilson Youth Hospital are of Aboriginal or Islander descent.[5]

198 A substantial number of Aboriginal juvenile offenders do not have homes to go to after their release from corrective institutions and are transferred to other institutions or placed in foster care as wards of the State. Recidivism rates for Aboriginal juveniles are very high. For example, in Victoria the Malmsbury Youth Training Centre claims a 60% success rate with non-Aboriginal youth, compared with a 10% success rate with Aboriginal youth.[6] Recidivism is fostered by unemployment, lack of income, family breakdown and lack of support. Young Aboriginals' employment opportunities are further reduced by criminal records which may be substantial when offences have been recorded against them from an early age. The special problem of recidivism amongst juvenile offenders in traditionally-oriented Aboriginal communities is discussed in Chapter 10.

The problem of child neglect

199 Unfortunately, government policies have superimposed on Aboriginal people a subculture and a system of child care which is alien to the Aboriginal extended family structure and which has undermined the Aboriginal child care system amongst traditionally-oriented Aboriginals. This has been detrimental to the ability of Aboriginal families to care for their children and, when exacerbated by other problems such as extreme poverty, unemployment and especially alcoholism, contributes to family breakdown and the neglect and inadequate control of children.

Activities of the Aboriginal legal services

200 Aboriginal communities are deeply concerned about the impact of the judicial and administrative systems on their young people. Because of their community-based structure and the special relationship they have established with the Aboriginal client population, Aboriginal legal services have been able to convey to the courts the concern of the Aboriginal people. To this end, they have placed a high priority on juvenile matters. Together with Aboriginal child care agencies, the Aboriginal legal services have succeeded in alleviating many of the disadvantages suffered by Aboriginal children. They have encouraged a growing awareness by juvenile courts and government agencies of the need for more effective liaison with Aboriginal people and a recognition of the special needs and requirements of Aboriginal children. They have presented the courts with alternatives to institutionalisation of young offenders and have attempted to maintain

[3] Sommerlad, *op. cit.*
[4] J. Bonner, Children of Aboriginal Descent in Care and Protection Institutions, unpublished thesis, University of Queensland.
[5] Aborigines and Torres Strait Islanders Legal Service (Qld) Ltd submission.
[6] Sommerlad, *op. cit.*

Aboriginal children within their family or community environment by arguing for the placement of children at risk with secure and stable Aboriginal families.

Juvenile offenders

Criminal cases involving juveniles

201 The decisions of the court in some juvenile criminal cases conducted by the Aboriginal legal services have had far-reaching consequences for the criminal justice system. In a case in Alice Springs,[7] Nari Andy Jabaltjari, a 14 year old Aboriginal, appealed to the Supreme Court of the Northern Territory against sentences of imprisonment imposed by the Alice Springs Children's Court for three motor vehicle and driving offences in court proceedings lasting six minutes. In his judgment, Mr Justice Muirhead referred to the jailing of the boy in an adult prison as an appalling indictment of the system of justice as applied to Aboriginal children in the Territory. He also said:

> . . . in dealing with aboriginal children one must not overlook the tremendous social problems they face. They are growing up in an environment of confusion. They see many of their people beset by the problems of alcohol, they sense conflict and dilemma when they find the strict but community based cultural traditions of their people, their customs and philosophies set in competition with the more tempting short-term inducements of our society. In short, the young aboriginal is a child who requires tremendous care and attention, much thought, much consideration. Seldom is anything solved by putting him in prison . . . in the Northern Territory, history, neglect, geography, bureaucracy and no doubt other causes have combined in such a way that the facilities for treatment for young people in this Territory can only be termed as woefully deficient or in most areas as totally non-existent.

With the concurrence of Forster, C. J. and Ward J. he laid down a philosophy and approach for dealing with Aboriginal juvenile offenders. The appeal as to the sentence was allowed and the defendant was released on a bond and certain other conditions including a condition that he should undergo traditional discipline and training administered by the Papunya Council.

202 In the *Huckitta*[8] cases three Aboriginal juveniles and a 24 year old Aboriginal woman were found guilty of murder after the shooting on 1 January 1979 of a station owner at "Huckitta", a cattle station east of Alice Springs. Each was sentenced to nine years two months jail by Mr Justice Gallop of the Northern Territory Supreme Court with a four year non-parole period. In passing sentence the judge commented on the absence of proper legislative provision in the Northern Territory for the imprisonment of juveniles and asked the Government to take steps to ensure that the children did not have to serve their sentences in an adults' gaol. However, because there are no prison facilities for children in the Northern Territory and the provisions of the social welfare legislation do not allow the children to be removed from the Territory, the children were sent to the adult gaol in Alice Springs. They all appealed and, in preliminary hearings, an application was made that they be placed under strict control in a juvenile institution (Giles House) in Alice Springs pending the hearing of their appeals on the murder convictions. The three Federal Court judges agreed and granted bail. The Full Bench of the Federal Court refused an application by the Crown seeking to set aside bail granted to the three children. The appeal against

[7] *Jabaltjari* v. *Hammersley* (1977), 15 ALR 94.

[8] *R.* v. *Collins, Stuart, Williams and Woods*, 1980, Northern Territory Supreme Court, and Federal Court of Australia, unreported.

the original sentence was heard by the Full Bench of the Federal Court on 26 February 1980. On 6 March, the appeal hearing was completed. Two Federal Court judges dismissed the appeals against conviction, with a third dissenting. Since this decision was handed down, the three children and the woman have lodged High Court appeals against the convictions for murder. Since the *Huckitta* case bail decision, the Northern Territory Government has passed legislation which provides for the transfer of prisoners under the age of 17 from a prison to a juvenile institution which has adequate facilities for the custody and control of such prisoners.[9]

203 In South Australia, in *Walker's* case[10] an Aboriginal juvenile while in police custody on a breaking and entering charge who had not been brought before a justice of the peace as required, volunteered a confession with regard to an alleged rape. On this confession he was duly convicted of rape. On appeal to the Supreme Court, Bray, C.J. and King J. held that the trial judge 'had acted upon too narrow a view of the extent of his discretion to exclude the confession from evidence, and that the conviction should be quashed and a new trial ordered'; further that any new trial on the same evidence should exclude the confession from such evidence. The Chief Justice said:

> The confession therefore was obtained from an exhausted and probably apprehensive juvenile of aboriginal race who had been and was being illegally detained and in disregard of the Commissioner's instructions, and without the presence of any parent, guardian, solicitor or officer of the various bodies which exist for the protection and guidance of aborigines, and while those with legitimate interest in protecting him had been asking that he be not interrogated in the absence of their solicitor or representative.

Special support programs for Aboriginal juvenile offenders

204 In October 1975 the former Victorian Department of Social Welfare (now the Community Welfare Services Department) established the Aboriginal Youth Support Unit with a grant from the Department of Aboriginal Affairs to employ two community youth welfare workers, one Aboriginal and one non-Aboriginal. A supervised residential hostel, the Bert Williams Hostel, was established at the same time. The hostel and the services offered by the Support Unit enable the Victorian Aboriginal Legal Service to place before the courts an alternative to committing Aboriginal juveniles to gaol or a youth training centre. The Aboriginal Youth Support Unit is concerned with the welfare of Aboriginals between 14 and 18 years of age who are described as delinquents or at risk. The Unit ensures that all Aboriginal juvenile offenders admitted on remand or sentence to the State's two reception centres have the opportunity to receive legal advice, access to bail and court representation by the Victorian Aboriginal Legal Service, which is the only organisation contacted to obtain legal assistance for young Aboriginals. In almost all cases Aboriginal juveniles remanded in custody are represented by the Victorian Aboriginal Legal Service. Occasions have occurred when offenders have appeared in court without legal aid being arranged. If it is judged that the youth has been unduly discriminated against as a result of lack of representation at his hearing, the Unit contacts the Victorian Aboriginal Legal Service to counsel the youth on the feasibility of an appeal. When appeals have been brought experience shows that legal representation results in a modified and often significantly reduced sentence.

[9] *Prisons Act* 1979.

[10] *Walker* v. *Marklew* (1976) 14 SASR 463.

205 The Community Welfare Services Department stated in the Victorian Government's submission that the positive relationship between the Victorian Aboriginal Legal Service and the Department has enabled young Aboriginal offenders to receive maximum support and has ensured that their rights are protected and that they are no longer disadvantaged through lack of access to information and legal aid. The Committee considers that the initiatives taken by the Victorian Aboriginal Legal Service and the Community Welfare Services Department to establish the Aboriginal Youth Support Unit are commendable. The Legal Service's activities in this area also demonstrate that in many respects the legal and welfare needs of Aboriginals are inextricable and that there are distinct advantages to be gained from adopting a broad approach to legal aid. The Victorian Aboriginal Legal Service has also promoted responsiveness on the part of police, children's courts and community and welfare agencies to indications of maladjustment in young Aboriginals and greater sensitivity to the influence of socio-cultural factors on Aboriginal juvenile offenders.

206 In 1978 the Aborigines and Torres Strait Islanders Legal Service sought funds for the establishment of a Juvenile Assistance Program. The proposal was rejected by the Department of Aboriginal Affairs. The Service stressed to the Committee the need for an intervention program to reduce the number of Aboriginal and Islander juvenile offenders appearing in children's courts; to reduce the number of juvenile offenders remanded to correctional institutions; and to minimise recidivism. The establishment of a juvenile aid service would allow the Aboriginal and Islander community to assume responsibility for their children. It would be complemented by the employment of solicitors, social workers and field officers to meet needs for counselling, liaison with other welfare bodies, preparation of court reports and pre-sentence reports, representation at all court hearings, and a follow-up service to prevent recidivism.

207 The Department's rejection of the Aborigines and Torres Strait Islanders Legal Service's proposal to establish a juvenile assistance program is inconsistent with its statement that it is seeking to promote systems designed to divert Aboriginal juveniles from the court process. The Committee believes this proposal warrants reconsideration by the Department, whether it is supported through the Legal Service, through another community-based Aboriginal organisation or through a State body. It is significant that a Young Offenders Program is currently being set up by the South Australian Department for Community Welfare with assistance from the Department of Aboriginal Affairs. Special support programs for Aboriginal juvenile offenders such as those established in Victoria and South Australia and proposed by the Aborigines and Torres Strait Islanders Legal Service in Queensland are vitally important to the welfare of Aboriginals and the Committee is concerned that similar programs have not been established in other States and the Northern Territory.

Juvenile aid panels

208 In many countries increasing numbers of juvenile offenders are being diverted from the criminal justice system and formal court appearances through the establishment of alternative procedures such as juvenile aid panels. The panel system was introduced in Australia by South Australia in 1972. The New South Wales Government is currently considering a proposal to establish a panel system in that State. In South Australia juvenile offenders may appear before a juvenile aid panel comprising a senior police officer and social worker. The police are responsible for determining whether a child should appear before the panel.

209 In its review of the Aboriginal Legal Rights Movement, the South Australian Regional Office of the Department of Aboriginal Affairs criticised the Movement's attitude to the panels. The juvenile aid panel does not provide for legal representation of juvenile offenders during hearings, and it was alleged that when representatives of the Movement have participated in assessment panels, they have tended to assert themselves in a legal representational role rather than as participants in an information gathering exercise. The Regional Office also alleged that the Movement directly or indirectly encourages juvenile offenders to deny offences. In this case, the panel has no option but to refer the matter to the juvenile court where the Movement can exercise its right to provide legal representation. The practice of defending juvenile offenders is often not in the best interests of the child, particularly when the unnecessary protraction of cases and requests for adjournment result in defendants being remanded in custody for excessive periods. The Regional Office commented that it is the belief of solicitors and staff of the Movement that police duress and threats of violence on Aboriginal child offenders induce them to admit guilt to accusations. It acknowledged, however, that if this is the case, the Movement's 'defend at any cost' approach has some validity. It was also alleged that the Movement's practice of providing a defence for regular juvenile offenders promotes antagonism to the Aboriginal community and fosters criminality or delinquency amongst Aboriginal juvenile offenders. While this may be the case, the Committee considers it is reasonable to assume that the Aboriginal Legal Rights Movement's desire to provide representation for juvenile offenders stems largely from their concern to ensure that the rights and interests of offenders are protected.

210 The Redfern Aboriginal Legal Service has expressed concern about aspects of the proposed panel system in New South Wales.[11] It considers that if the decision whether children appear before a panel or before the court rests with the police, as is proposed in the Government's legislation, this will give police wide discretionary powers. The Service argues that the power could be wrongly exercised and juveniles could be intimidated into making admissions of guilt against the threat that non-co-operation will result in their being denied access to the panel. Further, if a juvenile must admit all the elements of an offence before he can have the benefit of the panel, does this mean that the juvenile must not only plead guilty but also must not dispute any of the police facts? The consequences of this for young people may be very important, even though there are limits on the extent to which such convictions may form part of a prejudicial record.

211 Concern has also been expressed about the composition of juvenile aid panels. The view has been put that departmental officers and police officers are not adequately equipped to relate to and understand the special needs of Aboriginal children. The Committee supports this view and considers it important that provision be made for the inclusion of an Aboriginal representative on the assessment panel in all cases involving Aboriginal offenders. Professor Sackville has observed that:

> the panels have no direct coercive powers, but may 'warn or counsel the child and his parents or guardians' or 'request' the child or his parents to undertake in writing to comply with directions as to training or rehabilitative programs. . . . In practice children and parents must comply with the panel's 'request' to avoid going to

[11] Submission to the New South Wales Government relating to the Government's Green Paper on Proposed Child and Community Welfare Legislation, February 1979.

court . . . Presumably because the panels lack the legal power to make an enforceable order there is no provision for an appeal from their determination.[12]

212 Wherever possible, it is preferable for Aboriginal juvenile offenders to be dealt with outside the court system. However, because of their past poor relationship with the police and 'the welfare', Aboriginal people, including Aboriginal juveniles, may perceive the panels as another prosecuting apparatus. While the panel system has the advantage of not subjecting juvenile offenders to the trauma of formal court proceedings, it has the disadvantage of denying them the protections and safeguards which legal representation in court proceedings affords them.

213 The Committee considers that the provision of legal representation for juvenile offenders appearing before juvenile aid panels is inappropriate and contrary to the objective of the panel system to avert juvenile offenders from the adversary court system. However, it believes that the effectiveness of the panel system and its acceptability to the Aboriginal people would be considerably increased by the inclusion of an Aboriginal representative in the composition of the panel. This role could be fulfilled, for example, by an Aboriginal legal service field officer or social worker or a representative of another Aboriginal community organisation.

214 The Committee recommends that *the Minister for Aboriginal Affairs seek the co-operation of State and Territory Ministers responsible for Aboriginal affairs and the Attorneys-General to provide for the inclusion of an Aboriginal representative in the composition of juvenile aid panels in all cases involving Aboriginal juveniles.*

The placement of children in care and protection

Need for legal representation

215 The Aborigines and Torres Strait Islanders Legal Service expressed its concern about the wide-ranging discretionary powers of the Queensland Director of Children's Services in relation to the placement of Aboriginal children and the fact that decisions which have direct bearing on the liberty of Aboriginal children are made in a non-judicial way by departmental staff. The Service stated that many Aboriginal children are still unrepresented in children's courts. Where legal representation is provided, it can only play a minor part in determining what action will be taken in respect to juvenile offenders because they are commonly placed in the care of the Director of Children's Services. Decisions concerning children's committal to institutions or placement in care are then made by officers of the Children's Services Department. There are no Aboriginal child care officers in the Department and decisions concerning the care and custody of Aboriginal children are made not only without the benefit of a court hearing but often also with very little information on children's background or on reasons behind the offence.

216 The Aborigines and Torres Strait Islanders Legal Service stated that because the ability of children to represent their own interests in such matters is very limited, there is an urgent legal and social need for children to have access to effective representation when decisions affecting their liberty and future are made. While this need arises in the case of all children, it is particularly acute in the case of Aboriginal children because of their over-representation in juvenile

[12] Sackville, *Law and Poverty in Australia*, p. 299.

courts and institutions. The Service is therefore concerned to ensure that the rights of Aboriginal children are protected and that no action is taken which may be detrimental to their best interest.

217 The Service stated that recommendations of the Demack Commission of Inquiry into Youth[13] and of the Lucas Committee of Inquiry[14] which relate to Aboriginals have not been implemented. The Queensland *Children's Services Act* 1965–1979 is now under review. The Legal Service urged that these earlier recommendations be implemented and recommended *inter alia* that:

- statistics be kept of the number of Aboriginal and Islander children under the authority of the Director of Children's Services;
- a hostel or half-way house for Aboriginal juveniles be established, to be run by the Aboriginal community;
- the Aboriginal community be given responsibility for foster placements of Aboriginal children;
- the Department of Children's Services train and employ Aboriginals as child welfare officers;
- a case review tribunal be established to allow for review of departmental decisions concerning the placement of children; and
- guidelines be issued to police to be followed in questioning child suspects.

Placement of children within the Aboriginal community

218 The Redfern Aboriginal Legal Service has established a close relationship with the New South Wales Aboriginal Children's Service enabling the Aboriginal community to present before the children's courts an alternative approach to the placement of Aboriginal children in care. Until recently, in cases of neglect the child or young person would be almost automatically committed to the care of the Minister as a ward of the State. It became clear to the two Aboriginal services that this action by the courts was not benefiting Aboriginal children and resulted in subsequent personality conflicts and identity crises. If the child was placed in the foster care of non-Aboriginal parents, when the question of his or her Aboriginality arose an identity conflict between the child's background and present situation would develop.

219 In 1978 the two services launched a concerted campaign to bring this problem to the attention of the children's courts. It was argued before the court that this method of dealing with neglected Aboriginal children was unsatisfactory and that Aboriginal children should instead be placed in the care and custody of an Aboriginal person approved by the Aboriginal Children's Service who would care for the child under the supervision of that Service. The arguments were accepted by the children's court and appropriate orders made for the children to be placed in the care of Aboriginal families where their cultural background would continue to be fostered. The Legal Service believes that the Department of Youth and Community Services has now decided to accept this procedure as the appropriate course of action for Aboriginal children brought before the courts charged with neglect and has directed its officials accordingly. The Legal Service further claims that none of the children subject to these new orders has since reappeared at the children's courts charged with other offences. The Committee was unable to substantiate this claim.

[13] Commission of Inquiry into the Nature and Extent of the Problems Confronting Youth in Queensland, *Report*, (Chairman: His Honour A.G. Demack), 1975, Government Printer, Brisbane, 1975.

[14] *Committee of Inquiry into the Enforcement of Criminal Law in Queensland Report* (Chairman: The Hon. G.A.G. Lucas), 1977, Government Printer, Brisbane, 1977.

Disadvantages of non-Aboriginal foster care

220 The Victorian Aboriginal Legal Service has also drawn attention to the disadvantages of placing Aboriginal children in foster care with non-Aboriginal foster parents.[15] The Service claimed that 90% of Aboriginal children placed in white foster care are ultimately returned to State care and placed in institutions. This was attributed to the fact that children who can relate neither to the Aboriginal community nor the non-Aboriginal community become resentful of their Aboriginality. Their resentment is in turn manifested in anti-social behaviour which leads to appearances in children's courts for criminal offences and then to imprisonment or institutionalisation. For these reasons, Aboriginal children should not be removed from their kinship system; rather, they should be placed with Aboriginal foster parents or in Aboriginal group home environments located in their area of origin and kinship familiarity.

221 The Victorial Aboriginal Legal Service also expressed its concern about the informal (and illegal) placement of Aboriginal children at risk by well-meaning people in the community. When parents request the return of their children, some cannot be traced. Identification of the children is also made difficult if 'foster parents' change the child's name. The Service considered that if all Aboriginal children in Victoria removed from their families for any reason were registered with the Aboriginal Child Care Agency, it would be possible to ensure that continuing contact was maintained with parents and kin and that children could be traced.

Alternative placement of children in Victoria

222 The Victorian Aboriginal Legal Service has demonstrated a long-standing concern for the problem of Aboriginal juveniles. From November 1975 until December 1976 the Service operated a hostel which provided alternative placement to institutional care for Aboriginals who would otherwise have been made wards of the State, remanded to youth training centres or imprisoned. The hostel also provided emergency accommodation. It was funded by Aboriginal Hostels Ltd, the Victorian Department of Social Welfare and the Victorian Aboriginal Legal Service. The hostel fulfilled an important socio-legal need by providing care and protection in an environment which was conducive to the juveniles' eventual rehabilitation. It was suggested to the Committee that the effectiveness of the Victorian Aboriginal Legal Service was reduced by its closure.

223 In 1976 the Victorian Aboriginal Child Placement Agency (later called the Aboriginal Child Care Agency) was established by the Victorian Aboriginal Legal Service as a means of assisting the Social Welfare Department in placement decisions affecting Aboriginal children. The Agency is funded through the (Commonwealth) Office of Child Care and its staff currently includes an Aboriginal social worker, a welfare officer and a field officer. The Victorian Aboriginal Legal Service stated that its close liaison with welfare authorities and the police has led to a greater understanding of the needs of Aboriginal children and their families and has reduced the rate of admission to wardship. It believes that the program will contribute significantly to the future welfare of Aboriginal children. The following table shows a significant reduction in the number of Aboriginal children committed to State care in Victoria which can be largely attributed to the existence of the alternative placement facilities.

[15] *Submission to the Department of Aboriginal Affairs concerning the Aboriginal Child Care Agency.*

Number of Aboriginal children committed to State care in Victoria 1974 to 1979

1974–75	31	
1975–76	11	(Victorian Aboriginal Legal Service's hostel established)
1976–77	24	(19 admitted 6 months after closure of hostel)
1977–78	7	(Aboriginal Child Care Agency
1978–79	5	established)

224 Through their own efforts and through co-operation with State authorities and other agencies, the Victorian Aboriginal Legal Service and the Redfern Aboriginal Legal Service have been highly effective in providing assistance to Aboriginal juvenile offenders and 'neglected' children and removing some of the disadvantages they suffer. Their success in this area can be attributed to the provision of sympathetic and effective legal representation; their influence on court decisions and processes; their efforts to foster awareness of the special problems of Aboriginals; and their direct participation in welfare activities and support of Aboriginal welfare and community groups.

Proposals by the Department of Aboriginal Affairs

225 In May 1977 the Department of Aboriginal Affairs sponsored a National Symposium on the Care and Treatment of Aboriginal Juveniles in Corrective Institutions. The Department stated that the Symposium endorsed the principle of greater Aboriginal management and participation in corrective care.[16] The Department also undertook an assessment of the nature and effectiveness of the special protections available to Aboriginal juveniles with a view to developing guidelines for use by State and Territory authorities. In particular, the Department of Aboriginal Affairs is seeking to promote uniform and adequate protection for Aboriginal juveniles with provision for:

- notification to the juvenile's parent, or guardian, to a government agency or the Aboriginal Legal Service, when an Aboriginal juvenile is being interviewed or has been arrested by police;
- the presence of a parent, guardian, lawyer, field officer of an Aboriginal Legal Service, or officer of a government department or agency during the police interview;
- notification to a parent, guardian, government agency, or Aboriginal Legal Service when proceedings in court or welfare action are being taken in respect of an Aboriginal juvenile;
- preparation and presentation to the Court of social welfare reports on Aboriginal juveniles coming before the courts;
- systems designed to divert Aboriginal juveniles from the Court process, for example, by police caution, juvenile panel or referral to an Aboriginal agency.[17]

226 The Committee is concerned that the provisions as stated above may not ensure the adequate protection of Aboriginal juvenile offenders. This report has already drawn attention to the special needs of adult Aboriginal offenders for legal advice and assistance at all stages of the criminal legal process and particularly during the police investigation stage. While the Committee agrees that a juvenile offender's parent or guardian should be notified when an Aboriginal

[16] Department of Aboriginal Affairs *Annual Report* 1976–77, AGPS, Canberra, 1977, p. 31.
[17] Department of Aboriginal Affairs *Annual Report* 1977–78, AGPS, Canberra, 1978, p. 35.

juvenile has been arrested by police and should be present during the police interview, it considers that the notification and presence of a parent or guardian does not, in itself, provide an adequate safeguard for the juvenile. Many Aboriginal parents are unable to protect their children's basic rights and might well be as vulnerable as their children in such situations. Their knowledge of legal rights and obligations is liable to be limited, and their command of English may be insufficient to guard against police obtaining admissions improperly. The Committee therefore considers that provision should be made for the notification and presence of the parent or guardian *and* an Aboriginal legal service representative when an Aboriginal juvenile has been arrested and *before* the juvenile is interviewed by police. Where an Aboriginal legal representative is not available, it is suggested that a representative of another Aboriginal community organisation who understands the nature and implications of the interview procedure be asked to attend.

227 The Committee believes that the provision listed by the Department of Aboriginal Affairs concerning the preparation and presentation of social welfare reports on Aboriginal juveniles coming before the courts requires qualification. Because background reports presented to children's courts may have considerable influence on court decisions, it is important that such reports provide an accurate representation of the child's family situation and community environment. In the case of juvenile offenders, reports should seek to clarify the circumstances under which the offence was committed and ascertain any other factors which contributed to his behaviour. In the case of children charged with being neglected, reports should not only examine the situation of the parents but should also seek to inform the court of kinship ties and extended family relationships so that the court can assess the feasibility of placing the child in the care and protection of his own community. Welfare authorities who are generally responsible for the preparation of such reports may not be able to provide comprehensive information of this nature because of their limited access to Aboriginal communities. Such reports should be prepared by Aboriginal organisations who are familiar with Aboriginal kinship affiliations and family structures and who, through their direct access to Aboriginal communities, can present the Aboriginal community's view on appropriate punishment for a juvenile offender or suggest alternative placement for a child in need of care and protection. The Committee believes the preparation and presentation of comprehensive background reports is essential if Aboriginal legal services are to improve the situation of Aboriginal juvenile offenders before the law.

228 The Committee considers that most of the credit for improvement in the situation of young Aboriginals before the law and in associated welfare matters must go to the Aboriginal legal services and that the legal services' efforts to introduce appropriate preventive measures and promote new approaches to the treatment of juveniles within judicial and administrative systems are commendable. In particular, it believes that their initiatives to provide alternatives to institutionalisation for Aboriginal juvenile offenders and to promote Aboriginal responsibility for the placement of Aboriginal children in need of care and protection are deserving of support.

8. Aboriginal—Police Relations

229 For largely historical reasons, Aboriginal–police relations have never been good and this has not necessarily always been the fault of the police. The Redfern Aboriginal Legal Service acknowledged that as the result of a long history of conflict, an attitude of 'us and them' has developed between the police and the Aboriginal people and that this has been the cause of considerable Aboriginal–police confrontation. In certain areas, police treatment of Aboriginals also reflects the prejudicial attitudes and discriminatory behaviour prevalent in some sections of the Australian community.

230 The Law Reform Commission found that many complaints regarding police conduct by Aboriginal and other minority groups are directed not so much at misconduct of individual police officers as at systematic patterns of behaviour that lead to improper treatment of the complainant's group. The Commission considered that often such patterns of behaviour are a product of a failure to understand the values of the largely alien group with whom police are required to deal.[1] Other reports which have given recognition to the systematic disadvantage suffered by Aboriginals in their contact with law enforcement agencies include the Law Reform Commission's report on Criminal Investigation,[2] the Lucas Inquiry into Law Enforcement in Queensland,[3] the Murray report on police interrogation in Victoria[4] and the Sackville report on Law and Poverty in Australia. Complaints of discrimination by police against Aboriginals are reported each year to the Commissioner for Community Relations. In 1979 the Commissioner reported that, while improvements in Aboriginal–police relations have occurred, complaints against police by Aboriginals continue to constitute an area of concern.[5]

231 The unsatisfactory relationship between police and Aboriginals has contributed significantly to the disadvantages and injustices suffered by Aboriginals in their contact with the law and the legal process. The first Aboriginal legal service was established primarily as a result of alleged discriminatory behaviour by police towards Aboriginals in the inner Sydney suburb of Redfern. The subsequent establishment of Aboriginal legal services throughout Australia has focussed attention on Aboriginal–police relations and resulted in some improvement in the treatment of Aboriginals by police. There is evidence, however, that harassment, discrimination, maltreatment and abuse of legal rights by police are still widespread and that in many areas Aboriginal–police relations are characterised by distrust and tension, if not open conflict and hostility.

Allegations of police misconduct

232 Allegations concerning police misconduct have provoked demands for official inquiries into specific breaches of justice and into the whole field of Aboriginal–police relations. Incidents involving Aboriginals and police in the Northern

[1] Law Reform Commission, Report No. 9, *Complaints Against Police*, Supplementary Report, AGPS, Canberra, 1978, p. 45.

[2] Law Reform Commission, Report No. 2, *Criminal Investigation*, An Interim Report, AGPS, Canberra, 1975.

[3] Committee of Inquiry into the Enforcement of Criminal Law in Queensland, *Report* (Chairman: The Hon. G.A.G. Lucas), Government Printer, Brisbane, 1977.

[4] B. L. Murray, Memorandum to the Victorian Attorney-General, 'Procedure on the Interrogation of Suspected Persons by the Police', 1965.

[5] Commissioner for Community Relations, *Fourth Annual Report*, 1979, AGPS, Canberra, 1979, p. 63.

Territory in 1974 and 1975 prompted calls for a commission of inquiry into Aboriginal–police relations in the Territory. Again, in 1980 there have been calls for an inquiry in the Northern Territory. In 1975 the Victorian Aboriginal Legal Service's concern about police behaviour towards Aboriginals was expressed in a petition calling on the Federal Government to establish a royal commission to inquire into Aboriginals and the administration of justice, Aboriginals and the police, and Aboriginals and corrective services. In these instances the Government declined to set up a commission of inquiry, preferring to reduce tension between Aboriginals and police through consultation and administrative change.

233 However, in 1975 a royal commission was established by the Western Australian Government at the request of the Federal Government to inquire into events which occurred in the Eastern Goldfields of Western Australia between December 1974 and January 1975 (the Laverton Royal Commission). The inquiry dealt with two separate situations. The first concerned excessive drinking and violence in the town of Laverton for some weeks in December and the first few days of January. The second concerned an incident at Skull Creek in which alcohol played no part. The Commission found that in the first situation the police had acted reasonably in difficult circumstances. It said that the immediate cause of the trouble was excessive drinking, but pointed to far more complex underlying causes. In relation to the incident at Skull Creek the Commission found that police had arrested and imprisoned Aboriginals without due cause and had fabricated charges against them.[6] The Minister for Aboriginal Affairs, commenting on this aspect of the report, stated that 'by any standards of conduct . . . this constitutes the most deliberate attempt to pervert the administration of justice'.[7]

234 The report of the Laverton Royal Commission recommended that tension and conflict between police and Aboriginals could be reduced through the appointment of Aboriginal justices of the peace; the appointment of Aboriginal police officers; the improvement of police training; and the establishment of a form of consultation involving Aboriginals, anthropologists and government representatives with the aim of advising government authorities on Aboriginal–police relations.

235 The Committee itself received reports of hostility on the part of some police towards Aboriginals and towards Aboriginal legal service employees. The Victorian Aboriginal Legal Service stated that Aboriginals are frequently subjected to police harassment. In particular, they are often stopped and questioned by police on the off chance that they may be sought for non-payment of fines or may have committed some offence. In addition, the Victorian Legal Service has lodged a number of complaints with the Chief Commissioner of Police concerning allegations of improper police behaviour and in at least one case initiated by the Service, a member of the police force has been convicted of assaulting an Aboriginal. Other allegations of misconduct by police towards Aboriginals were reported to the Committee by most of the Aboriginal legal services; specific allegations were made by the South Coast Aboriginal Legal Service, the Aboriginal Legal Service of Western Australia and the Redfern Aboriginal Legal Service.

236 The Redfern Legal Service claimed that in New South Wales police continue to arrest and charge Aboriginal people indiscriminately. The Service maintained that while an awareness of the existence of the Aboriginal legal services as a watchdog has caused some members of the police force to act in a less discriminatory manner, it has also produced a counter-reaction which is no less

[6] *Report of the Laverton Royal Commission*, 1975–76, Government Printer, Perth, 1976.
[7] Department of Aboriginal Affairs, *Annual Report* 1975–76, AGPS, Canberra, 1976, pp. 44–45.

dangerous. The Service alleged that in many areas the police have become far more cautious in their treatment of Aboriginal people. However, it suggested that in many instances this only means that police officers plan in advance their acts of discrimination and organise themselves more efficiently when making arrests. Allegations were made that police are now aware that they will be questioned in court as to their activities and so take more time in memorising their evidence speeches and that the police 'verbal' has perhaps become more widespread now that many Aboriginal people know that they are not required to answer police questions or to make handwritten statements of confession. The Service claimed that some members of the police force openly resent the access Aboriginals now have to legal aid and there is a tendency for police officers to get an Aboriginal person 'all signed up' before the Legal Service can appear to assist him.

237 The Service alleged that police have lied in a number of criminal charges; that obstacles are placed in the way of Aboriginals held in custody who wish to seek legal advice; and that Legal Service staff, including solicitors, are denied access to Aboriginals held in custody. Examples of some of these incidents were provided to the Committee by the Service. The Service also claimed that certain Aboriginal people are kept under surveillance; that police have deliberately fabricated evidence to ensure that certain Aboriginal people receive criminal records; and that dossiers on Aboriginal people are collected by the New South Wales Police Department. The Chairman of Directors of the Redfern Legal Service made available to the Committee papers which he claimed to be special branch dossiers on himself and a number of other Aboriginals. The Service stated that it has lodged submissions on these matters with the police and the New South Wales Attorney-General but claimed that despite this little improvement has occurred.

238 In response to the Redfern Aboriginal Legal Services's allegations that Aboriginals are kept under inordinate police surveillance and have special dossiers kept on them, the New South Wales Government informed the Committee of the Commissioner of Police's advice that the documents tabled before the Committee were in fact 'special circulars' prepared by members of the Criminal Investigation Branch to assist police investigations into the murder of an Aboriginal at Redfern in 1975. The Government informed the Committee that the circumstances surrounding the issue of the circulars have been subject to thorough investigation by the Criminal Investigation Branch and the New South Wales Privacy Committee. The Privacy Committee has informed members of the Aboriginal Legal Service that the publication of these documents was justified in the circumstances. The Privacy Committee has further indicated that there was not and has not been any special branch involvement in the issue of the documents.

239 In small country towns relations between Aboriginals and police are often aggravated because the policeman has a multiplicity of functions. As Eggleston pointed out, in many areas the police officer and the local justice of the peace are the only representatives of the legal system with whom Aboriginals have any dealings.[8] Often contact with the police is intense and prolonged. In addition to their normal duties, police are often required to perform other functions. In some cases they act as gaoler, prosecutor, witness and clerk of the court, as well as making decisions concerning the granting or refusal of bail. It is significant that in many country towns with substantial Aboriginal populations which the

[8] Eggleston, *op. cit.*, p. 17.

New South Wales Bureau of Crime Statistics and Research identified as 'Aboriginal' towns, there are more police officers per head of population than in other parts of the State.

Government strategy for improving Aboriginal–police relations

240 In 1977 the then Minister for Aboriginal Affairs developed a framework for a strategy to improve Aboriginal–police relations. This encompassed the following measures:

- establishment of Aboriginal–police liaison systems;
- institution of training schemes to assist police in recognising the particular needs of Aboriginals;
- recruitment of Aboriginal police and police aides;
- improvement in police complaints procedures; and
- procedural reforms relating to the detention and interrogation of Aboriginals.

Aboriginal–police liaison systems

241 The Committee supports the Department of Aboriginal Affairs' view that the establishment of an Aboriginal–police liaison system offers the greatest potential for improving Aboriginal–police relations. Consultation between Aboriginals and police would be most effective within the framework of a liaison committee comprising representatives of various Aboriginal organisations, relevant functional State or Territory government agencies, the Department of Aboriginal Affairs, police, legal and educational institutions, and the judiciary. The Aboriginal legal services, however, have expressed reservations about the effectiveness of such liaison systems.

242 The Redfern Aboriginal Legal Service stated that when the Service was initially established an Aboriginal–police liaison committee was set up. It operated reasonably well at the time because most negotiations were carried out on behalf of the Service by the non-Aboriginal professionals associated with it. As soon as Aboriginals assumed full control of the Service, Aboriginal–police relations deteriorated. The Aborigines and Torres Strait Islanders Legal Service stated that it would not expect to effect any improvement in Aboriginal–police relations by negotiating directly with the police and that the support of other parties would be necessary to establish an effective liaison committee. The Victorian Aboriginal Legal Service maintained that any improvements in Aboriginal–police relations in Victoria had occurred because it persistently made use of legal channels. It consistently represented Aboriginals in court and was always ready to visit Aboriginals held for questioning in police stations. It has also lodged a number of complaints with the Chief Commissioner of Police concerning allegations of improper police behaviour.

243 Aboriginal–police liaison committees have been established in Western Australia and South Australia. The Western Australian Aboriginal–Police Relations Cabinet Sub-committee was established in 1976 following the Report of the Laverton Royal Commission in an attempt to improve Aboriginal–police relations in that State. The Sub-committee comprises representatives of the Aboriginal Legal Service of Western Australia, the Department of Aboriginal Affairs, the State Departments of Community Welfare and Education, and the police. It meets regularly in Perth and undertakes visits to outlying areas when necessary. The Sub-committee presents its views to the Commissioner of Police and the Minister

for Police. While the establishment of the Sub-committee recognises the need for improvement in this area, it has achieved little in concrete terms. Although it provides a forum in which Aboriginal people can express their views, it is confined to an advisory role and the Police Department is under no compulsion to implement its recommendations. In this respect it has been less effective than the liaison committee established in South Australia.

244 The South Australian Aboriginal–Police Steering Committee was established in 1972 and has met regularly in its present form since 1974. The following organisations are represented on the Committee: the Department of Aboriginal Affairs, the Prisoners' Aid Association, the Aboriginal Community Centre, the Port Adelaide Co-ordinating Committee, the National Aboriginal Conference, the Aboriginal Community College, the Aboriginal Task Force, the Aboriginal Legal Rights Movement, and the South Australian Police Department. The Committee may comprise up to three members of the police force and an indeterminate number of people representing the Aboriginal organisations. In practice Aboriginals are represented by four or five members of the Aboriginal Legal Rights Movement. The Officer-in-Charge of the Community Affairs and Information Service of the Police Department is the Police Department's representative on the Steering Committee. He represents the Commissioner of Police in Aboriginal–Police affairs throughout the State in his capacity as the Aboriginal –Police Liaison Officer.

245 The Steering Committee has had some success in securing changes in police attitudes and methods. Its achievements include the introduction of a general Aboriginal–police liaison system, the inclusion of a component on Aboriginal affairs in police training courses, the issuing of a statement by the Police Department of its policy regarding Aboriginals, recognition of the role of Aboriginal field officers, and the introduction of procedural instructions relating to the detention and interrogation of Aboriginal suspects. A general liaison system designed to maintain communication between the Aboriginal community and the police was established in 1975. As part of this system, an Aboriginal–Police Field Liaison Officer is responsible for research and field work concerning Aboriginal–police relations throughout South Australia and is assisted by a constable. Thirteen members of the police force are designated Police District Liaison Officers. They are responsible for maintaining liaison with the Aboriginal community and are the nominated contacts for local police officers and the Aboriginal Legal Rights Movement's field officers when problems affecting Aboriginal–police relations arise.

246 The Committee sees merit in liaison committees and systems and regrets that similar schemes have not been implemented elsewhere. While such committees and systems are important and necessary, relations between Aboriginals and police will only improve when there is a change in attitude and a sincere commitment to proper liaison on the part of both the police and Aboriginals.

Police training

247 Tension, misunderstanding and conflict in Aboriginal–police relations can be attributed in part to lack of awareness of socio-cultural differences between Aboriginal and non-Aboriginal communities and lack of formal training to assist police in dealing with Aboriginals. The Laverton Royal Commission recommended 'that a unit be established within the Police Department capable of giving expert and intensive instruction in Aboriginal society and culture and the economic and

social problems Aboriginals commonly face'.[9] It was suggested that the unit should provide instruction for officers in the field as well as cadets and that it could be staffed by police officers experienced in Aboriginal affairs and in police work amongst Aboriginal communities. It further recommended 'that suitably qualified Aboriginals should play a part in any training programs that may be introduced in the Police Department'.[10] The Committee supports these recommendations. Police training programs should include explanation of the special problems of urban, fringe-dwelling and traditionally-oriented Aboriginals and of their social, cultural and economic position in Australian society; instruction on traditional Aboriginal social organisation, authority structures, and customary beliefs and practices; explanation of Aboriginals' vulnerability and disadvantage before the law and in all stages of the legal process; and information on the objectives and operation of Aboriginal organisations.

248 In recent years some police training courses have included a component relating to Aboriginal culture and the disadvantages experienced by Aboriginals in the legal system. The North Australian Aboriginal Legal Aid Service, the Aboriginal Legal Rights Movement and other Aboriginal legal services have on occasion given lectures to police cadets. Training programs and seminars for South Australian police include some instruction in Aboriginal affairs. A number of South Australian police officers have also undertaken short intensive studies in the Pitjantjatjara language. The New South Wales Government informed the Committee that there is 'a significant amount of information and advice concerning the special problem of Aboriginals in the overall training programs for police'. The Government also stated that it is 'constantly re-appraising the existing training schemes and, with expert advice, preparing additional training programs, due to the importance of police/Aboriginal relationships'.

249 *Police training procedures designed to familiarise police with the special* problems of dealing with Aboriginal offenders should not necessarily be confined to formal training programs. The Committee was informed that initiatives have been taken by police in Central Australia to adopt a more preventive role in their interaction with Aboriginal people. Young policemen are being selected to work among young Aboriginals, particularly in the Gap area of Alice Springs, and are directed to concentrate on the prevention of crime rather than the apprehension of offenders. While this scheme is still in its early stages and it is difficult to forecast its effectiveness, it does indicate the recognition by police of the need to adopt a different approach in dealing with Aboriginals.

Recruitment of Aboriginal police and police aides

250 There are few Aboriginal members of the police force. This has the unfortunate effect of reinforcing the segregation of police and Aboriginals and reflects the segregation of the minority Aboriginal group from the dominant non-Aboriginal group in the wider society. The lack of representation of Aboriginal people in the police force itself inhibits an understanding by police of the Aboriginal people, their culture and their position in the community. The recruitment of Aboriginals to the police force would result in a better understanding by police of the values, attitudes and circumstances of Aboriginals and in an improvement in Aboriginal–police relations. Where Aboriginals do not meet normal recruitment standards, it is suggested that initially they be appointed as police aides.

[9] *Report of the Laverton Royal Commission*, p. 208.
[10] *ibid.*, p. 209.

251 This view is supported by the Laverton Royal Commission which recommended that the practicability of appointing police aides at Laverton should be investigated and if possible put into effect as a matter of some urgency.[11] It considered that the appointment of police aides should lessen discriminatory practices and foster racial harmony. At the present time there are thirty-two Aboriginal police aides in Western Australia. They are appointed in remote areas, particularly in localities where relations between Aboriginals and police have been strained. The appointment of police aides does, however, have some disadvantages. An Aboriginal police aide who is a member of one tribe may not be accepted in another area. It is also difficult to guarantee the impartiality of Aboriginal police aides in disputes involving persons to whom they are bound by kinship obligations or the observance of other relationship laws.

252 The Northern Territory Police Force employs Aboriginal liaison assistants whose role is to ensure that Aboriginals in police custody or under interrogation understand the charges laid, to provide advice to Aboriginals who approach a police station and to act as interpreters where necessary. There are three Aboriginal liaison assistants in Darwin, two in Alice Springs, and one in Hooker Creek, Katherine and Nhulunbuy respectively. In 1977 seven Aboriginal police aides graduated from a seven week training course in Darwin. They have been specially trained in coastal surveillance and at present this is their main function. While they are part of the Northern Territory Police Force, they do not have police powers of arrest. The Northern Territory Police suggested that they may in future be given powers of arrest for certain offences in particular communities.

253 Aboriginal police employed in the 14 Aboriginal community reserves in Queensland are empowered to enforce council by-laws and bring offenders before community reserve courts. They are under the charge of a State police officer outside the reservation who can be called to intervene in disputes when necessary. The Chairman of the Aboriginal and Islander Commission and Aboriginal Advisory Council stated that members of the Aboriginal communities respect the Aboriginal police and that Aboriginal police generally have a good working relationship with State police officers.

254 In the north-west of South Australia, police have adopted the practice of dealing with a particular member of each Aboriginal community whenever they have reason to visit that community. These contacts initially acted as intermediaries between the police and the community but the police later conferred on them the role of lay policemen. More recently, the relationship between the police and each community was formalised when Aboriginal community councils appointed these community members as 'police wardens'. The Committee was informed that no antagonism is borne by the communities towards the wardens; rather, they are respected members of the community and are often council members. The wardens have no police powers of arrest and are not paid by the Police Department.

255 The requirement for Aboriginals to meet normal recruiting standards may prove a short-term barrier to the effective recruitment of Aboriginal police. Initiatives such as those discussed above are worthwhile but since Aboriginality would obviously be valuable for police operating in certain areas, it might be appropriate to revise recruitment criteria to include Aboriginality as a qualification for eligibility for standard police duties in these areas. The Northern Territory Police Force recently introduced a two-year police cadet training scheme.

[11] *ibid.*, p. 207.

The scheme will include Aboriginals. A spokesman for the Force said the training scheme was seen as a way of encouraging Aboriginals to join the Police Force.[12]

Complaints against police

256 Many witnesses who appeared before the Committee expressed concern that in most States there are no effective procedures for the proper investigation of complaints of police malpractice. Because police authorities have failed to take appropriate action on a number of occasions, Aboriginal legal services have instituted legal proceedings on behalf of clients against police. It was suggested that the need to prosecute police officers in order that Aboriginals might gain redress for injuries suffered is in itself justification for the existence of the Aboriginal legal services.

257 The Central Australian Aboriginal Legal Aid Service has undertaken two cases[13] against police officers involving alleged assaults of Aboriginals. Although unsuccessful, police procedures came in for severe criticism and the cases constituted a warning to police officers of the risk of such proceedings for improper conduct. The Central Australian Aboriginal Legal Aid Service expressed its concern at a system whereby complaints against police are generally investigated by police, and commented that such a system is open to allegations of 'whitewash' procedures. A procedure has now been instituted whereby the Legal Service can request that the Commissioner of Police conduct an investigation and, if not satisfied with his report, refer the matter to the Northern Territory Ombudsman for review.

258 In February 1980 the Australian Legal Aid Office and eight Aboriginal organisations in Alice Springs including the Central Australian Aboriginal Legal Aid Service, the Central Australian Aboriginal Congress, and the Central Land Council issued a statement asking the Chief Minister to establish a commission of inquiry into the operation of the Northern Territory Police Force. The call for an inquiry was supported by the Lawyers' Association in Alice Springs. It was claimed that police violence towards Aboriginals and non-Aboriginals has increased markedly in recent months and that lawyers are frequently receiving complaints from clients of harassment and assaults by police.

259 The Committee is concerned that the Aboriginal legal services find it necessary to institute legal proceedings as a result of complaints against police. The proceedings themselves constitute further confrontation and are unlikely to result in an improvement in Aboriginal–police relations. It further believes that the prosecution of police officers on isolated occasions is not an effective means of influencing patterns of police behaviour and attitude. The institution of such proceedings is also costly and time-consuming.

260 While the establishment of Aboriginal–police liaison committees would provide a suitable channel for airing complaints and referring matters to police authorities for investigation where warranted, there is also a need to introduce more acceptable procedures for the investigation of complaints against police. The machinery proposed by the Law Reform Commission for the investigation

[12] *Aboriginal Newsletter*, No. 42, 19 October 1979.

[13] *Jamba Jimba* v. *Davies*, Northern Territory Supreme Court No. 611 of 1976, delivered 23 August 1978, unreported; and *Liddle* v. *Owen*, Northern Territory Supreme Court No. 702 of 1977, delivered 17 August 1978, unreported.

of complaints against the Australia Police[14] could well be adapted to other police jurisdictions. The Law Reform Commission proposed:

- initial notification of all complaints by members of the public to the Ombudsman;
- introduction of a special internal discipline branch of the police to conduct investigations;
- establishment of an independent tribunal constituted by legally qualified persons for determining serious complaints; and
- oversight of the investigation by the Ombudsman.

Procedural reforms relating to interrogation and detention of Aboriginals

261 A notification system under which police inform the Aboriginal legal services of Aboriginal arrests has been implemented in the Northern Territory, Victoria and the Australian Capital Territory. A feature of this system is the requirement for the presence of a 'prisoner's friend' during interrogation, that is, someone selected by the Aboriginal person held in custody to advise and support him during and after interrogation. The introduction of such a requirement has been advocated by various commissions of inquiry and members of the judiciary. The Commission of Inquiry into Poverty recommended that 'If "unsophisticated" Aboriginals of a tribal or semi-tribal background continue to be subject to the orthodox criminal law they should not be interrogated without a "prisoner's friend" being present wherever possible. The "prisoner's friend" should be a person with whom he can identify, such as a Field Officer of an Aboriginal Legal Service. The duties of a "prisoner's friend" and interpreter should not be performed by the same person.'[15] The Law Reform Commission also recommended that 'Aboriginals and Torres Strait Islanders, when in custody for serious offences, or any offences against the person or property, should be entitled to the presence during any questioning or other investigative procedures of a "prisoner's friend" '.[16]

262 On 30 April 1976 Mr Justice Forster handed down his reasons for rejecting typewritten records of interview in *Anunga's* case[17] and put on record general guidelines for the conduct of police officers when interrogating Aboriginals. On 15 May 1979 the Northern Territory Commissioner of Police issued Circular Memorandum No. 13 of 1979 which laid down rules and procedures for the interrogation of suspects based on these guidelines (Appendix 16).

263 In South Australia, the need for a 'prisoner's friend' was given strong endorsement by the Supreme Court. In *Gibson's* case,[18] Mr Justice Bright said that 'assistance should be arranged for indigenous persons who not only have a limited command of English but whose culture differs radically from the white culture'. He said that assistance should be provided by a 'prisoner's friend', i.e. 'somebody who can act as the friend of the person being accused, somebody familiar with Australian legal principles, able to converse with the person questioned in that person's own language and able to ensure that if he makes a statement that statement is made with a full realisation of the possible consequences'.

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[14] Law Reform Commission, *Complaints Against Police*, Report No. 1, May 1975, AGPS, Canberra, 1976.
[15] Sackville, *Law and Poverty in Australia*, pp. 289.
[16] *Criminal Investigation*, Report No. 2, An Interim Report, p. 121.
[17] *R.* v. *Angus Anunga* and others.
[18] *R.* v. *Gibson* (1973), Supreme Court of South Australia, unreported.

264 After the establishment of the Aboriginal–Police Steering Committee in 1972, the Aboriginal Legal Rights Movement attempted to secure official police recognition of field officers as the legitimate representatives of the Aboriginal Legal Rights Movement for the purpose of arranging legal assistance and bail. In 1975, after considerable consultation with the Aboriginal Legal Rights Movement, the South Australian Police Commissioner issued Police Circular 354 which lays down specific guidelines and procedures to be followed in the interrogation of Aboriginals. In addition to recognising the disadvantage of Aboriginals in the criminal investigation process, the circular also recognises the importance of the role of field officers of the Aboriginal Legal Rights Movement in performing the function of 'prisoner's friend' (see Appendix 17).

265 The police circular introduced two instructions regarding the interrogation of Aboriginal suspects. A general rule (clause 7) requires that:

> . . . no obstruction should be placed in the way of a field officer attending an interview with a suspected Aboriginal offender in those cases where the suspect declines to answer, except in the presence of a third party.

The rule presupposes that the suspect knows he is entitled to request the attendance of a third party. The provision falls short of the aim of Aboriginal representatives on the Aboriginal–Police Steering Committee who sought to have a field officer present whenever an Aboriginal was being interrogated. The police objected to this proposal on the ground that it is up to the suspect whether he wishes to have a third party present and only where he so requests ought the police be obliged to secure the attendance of that third person. The onus is therefore on the Aboriginal Legal Rights Movement to make all Aboriginals aware of their rights in this situation. In the case of juvenile suspects, however, police are directed 'In the absence of a parent or guardian (to) endeavour to secure the attendance of a field officer at such interview'.

266 The second instruction concerning the interrogation of tribal or semi-tribal Aboriginals (clause 8) is more specific and states that:

> Where such a person, who apparently has an imperfect grasp of the English language or is unfamiliar with our culture, is sought to be questioned in regard to a serious crime, every effort must be made to have an independent third party present at the interview. If practicable, such a party should be either a solicitor or a field officer. Alternatively, if no such person is available, then a representative of the Department for Community Welfare or the Department of Aboriginal Affairs should be obtained. Preferably, he should also be a person who has some understanding of the suspect's native language.

While this instruction provides for the protection of the rights of traditionally-oriented Aboriginals, concern has been expressed about police administering a subjective 'sophistication' test based on their notion of tribalism and their judgment of Aboriginals' comprehension of English. Nevertheless, the importance of the circular has been recognised by a number of judges in recent court cases involving Aboriginals. In the matter of *R.* v. *Williams*,[19] Mr Justice Wells held that the circular should be regarded as being similar to Judges' Rules drawn up for the guidance of police in the interrogation of persons suspected of or charged with an offence or crime. He indicated that a breach of the rules contained in the circular would not by itself lead to exclusion of any resulting confession but is one factor to be considered in the exercise of the judge's discretion to exclude confessional material tendered. In *R.* v. *Ajax and Davey*,[20] Acting Justice White

[19] *R.* v. *Williams* (1976), 14 SASR 1.
[20] *R.* v. *Ajax and Davey* (1977), 17 SASR 88.

excluded a confession principally on the ground that rules in the circular had been breached. Other cases have ruled that, when considering its discretion to exclude the record of interview of a tribal or semi-tribal Aboriginal, the court will take seriously non-compliance with the circular.[21]

267 In 1979 a Rockhampton District Court judge dismissed all charges against five young Aboriginals because the police case was based entirely on alleged confessions.[22] In dismissing the charges the judge admonished the police for failing to observe the Lucas Inquiry's recommendation that children be not overborne during questioning, and pointed out that the rights of disadvantaged children in the community were particularly in need of protection.

268 The Redfern Aboriginal Legal Service expressed its concern that the New South Wales Government has not adopted a notification procedure whereby police inform the Aboriginal Legal Service of arrests of Aboriginal people. In a letter to the Legal Service, the Minister for Police stated that Police Standing Instructions are directed towards ensuring that persons wishing to consult a legal adviser be given every opportunity to do so and require that police afford the same co-operation to solicitors and field officers employed by the Service as to any private solicitor or barrister. The Minister stated, however, that police are not permitted to allow legal practitioners access to all areas of police stations to canvass clients nor are they to act as agents for legal persons or firms. The Commissioner of Police considers that if police were directed to inform the Service of all arrests of Aboriginals, it could be suggested that they were in fact touting for the Service. The Commissioner believes that the Police Standing Instructions adequately cover the provision of legal aid to all persons and he is not in favour of altering the procedure.

269 Where guidelines for the interrogation of Aboriginals have been adopted, the Committee's attention was drawn to instances where such rules have not been complied with. The Victorian Government stated that members of the Victorian Police Force are required to notify the Victorian Aboriginal Legal Service when an Aboriginal is arrested and charged, and that this happens in most cases. However, the Service stated that police rarely contact it before commencing interviews with Aboriginals charged with offences and that, if a request is made for legal assistance, the client is persuaded to answer questions on the basis of an assurance that the Service will be contacted at the end of the interview. Clients rarely insist on seeking legal assistance before answering police questions because they are under the misapprehension that if they co-operate with the police, bail will be forthcoming and otherwise it will not. The Victorian Aboriginal Legal Service also stated that on occasions police have claimed that illiterate or semi-literate Aboriginals have read records of their interview before signing them.

270 Despite these problems, the existence of guidelines and procedures to be followed in the interrogation of Aboriginals by police recognises the special needs of Aboriginals for legal advice and assistance during the criminal investigative process. The Committee is concerned that only one State (Victoria), the Northern Territory and the Australian Capital Territory have introduced procedural reforms whereby police are required to secure the attendance of

[21] *Walker* v. *Marklew* (1976), 14 SASR 463 and *R.* v. *Sundown*, Circuit Court, decision delivered 30 March 1978, unreported.

[22] *R.* v. *H. and others*, District Court, Rockhampton, Judge Shanahan, 22 August 1979, unreported.

an independent third party during the interrogation of Aboriginals. While the South Australian instructions relating to the interrogation and detention of Aboriginals provide increased protection for the rights of Aboriginal suspects, the rules only provide for the notification of the Aboriginal Legal Rights Movement and the presence of an independent third party when tribal or semi-tribal Aboriginals are being interrogated. In the case of other Aboriginal suspects, police are only obliged to secure the attendance of a third party if the suspect so requests. The conclusions of the Law Reform Commission concerning the need for notification systems are significant. The Commission stated that 'Where an Aboriginal, or at least a person who is reasonably believed to be an Aboriginal, is in custody for an offence, police should be required to notify forthwith the appropriate Aboriginal Legal Service of that fact'.[23] The Commission suggested that the effectiveness of the legal services would be increased 'were they to be informed at an earlier stage that Aboriginal persons were in custody or under investigation, and could make the necessary arrangements for their representation, subject of course to the wishes of the Aboriginal in question'.[24] The Committee supports the Commission's views regarding the need for notification systems but, as the Commission also reported, sees a need to dispense with the procedure of notifying an Aboriginal legal service in the case of an Aboriginal person being held in custody who does not wish his name to be given to the legal service.

271 The Committee considers it is important that notification systems be introduced in all States and be applied in respect of all offences for which Aboriginals are taken into custody with the exception of drunkenness. The Committee disputes the argument that notification systems may lead to accusations against police of touting for the legal services. It considers that since police would receive no direct or indirect profit or benefit from referring Aboriginals to the Aboriginal legal services, it is highly improbable that the notification to Aboriginal legal services of Aboriginal arrests would lead to accusations of touting which would bring the police under criticism. Similarly, it believes that it is unreasonable to prohibit Aboriginal legal service representatives from seeking out potential clients. As salaried staff employed by publicly funded organisations, Aboriginal legal service representatives stand to gain no personal advantage from solicitation and the Committee believes that such solicitation which provides a disadvantaged section of the community with access to legal aid would not be viewed with disapproval.

272 While the relationship between some Aboriginal legal services and the police appears to be characterised by confrontation and lack of co-operation, the Committee was informed that in some areas Aboriginal legal services and the police have established a good relationship and that police facilitate Aboriginals' access to legal aid. Several Aboriginal legal services reported, however, that their efforts to maintain a good working relationship were hampered by the high rate of police turnover, particularly in country towns with substantial Aboriginal populations.

273 The Committee recommends that:

- *the Government urge those States which have not implemented notification systems to introduce police procedures which require the presence of a 'prisoner's friend' or Aboriginal legal service representative following the*

[23] *Criminal Investigation*, Report No. 2, An Interim Report, p. 122.
[24] *ibid.*

arrest of Aboriginals by police for all offences except drunkenness and during interrogation and any other investigative procedures;

- *as a matter of urgency the Government seek the co-operation of the State and Territory Governments to establish Aboriginal–police liaison systems, recruit Aboriginal police and police aides, institute training schemes to familiarise police with the special problems of Aboriginals, and review procedures for investigating complaints against police where these measures have not been implemented; and*
- *the Minister for Aboriginal Affairs:*
  - (a) *ascertain and keep under review developments which have occurred in the area of Aboriginal–police relations in the States and the Territories;*
  - (b) *seek the advice of the Aboriginal legal services on this matter;*
  - (c) *report regularly to the Government on the effectiveness of special measures or procedures which have been adopted by the States and Territories to overcome problems which Aboriginals encounter in their dealings with law enforcement agencies; and*
  - (d) *in the event of unsatisfactory progress being made by the States in the area of Aboriginal–police relations, recommend to the Commonwealth Government further steps that might be taken to improve Aboriginal–police relations through Commonwealth legislative provision.*

9. Aboriginals and the Civil Law

274 While arrest and prison rates and court statistics give some indication of the extent to which Aboriginals come into contact with the criminal justice system, it is more difficult to quantify legal needs in the area of civil law, particularly where legal advice is required in relation to matters not involving litigation. Any assessment of the legal needs of Aboriginals in the civil law jurisdiction is further limited by the paucity of civil law statistics. It has been demonstrated, however, that people in the lower socio-economic groups and minority cultural and racial groups are least able to draw upon community resources to assist them in dealing with legal problems arising in the civil area.[1] This is especially true of Aboriginals and the Committee believes this is an area of the law to which Aboriginal people rarely have access and in which they are severely disadvantaged.

Needs of Aboriginals in the civil jurisdiction

275 Problems commonly faced by Aboriginals in the civil area of the law relate to tenancy matters, social security entitlements, consumer protection claims, hire purchase agreements, appeals against administrative actions or decisions, and family law matters. The majority of civil work conducted by the Aboriginal legal services is therefore in the field of so-called poverty law and it is likely that this will be the case for some time to come. It is a matter for concern that Aboriginals are sometimes singled out as a group for particular treatment, whether it is in the area of consumer credit or in relation to housing or employment. Aboriginals are often regarded by unscrupulous individuals and organisations as gullible prey not only because of their disadvantaged position in Australian society but also because of their ignorance of their civil rights and lack of access to civil remedies when those rights have been abused.

276 Other civil cases in which Aboriginal legal services act on behalf of Aboriginals involve claims for wages, workers' compensation claims, personal injury common law claims and fatal injury claims. However, this is an area of the law in which Aboriginals rarely initiate proceedings despite the fact that they can be, and often are, victims in such matters. Generally, these matters only come to the attention of the legal services accidentally, indirectly by referral, or by the services themselves actively seeking out such matters. Many Aboriginal employees receive under-award payments, are wrongfully dismissed or are not paid outstanding wages on the termination of their employment. Aboriginals also tend to be particularly prone to death and injury on the roads and those who are employed, traditionally work in labour intensive and unskilled jobs and as stockmen where there is a high risk of physical injury. The staff of the South Australian Legal Rights Movement's branch office in Port Augusta reported that they only became aware of Aboriginal people who were incapacitated as a result of road accidents or work injuries through a network of contacts established with the regional hospital, local social work organisations and the Royal Flying Doctor Service which has a base nearby.

Tenancy matters

277 Most of the Aboriginal legal services' city-based offices reported that they handled a large number of tenancy matters usually concerning the improper

[1] Commission of Inquiry into Poverty, *Legal Needs of the Poor*, Research Report, Law and Poverty Series, M. Cass and R. Sackville, AGPS, Canberra, 1975.

eviction of tenants from premises and other disputes between Aboriginal tenants and their landlords. It was suggested that property owners take advantage of Aboriginal tenants' poverty and ignorance of their rights under lease agreements. For example, a landlord may attempt to end a tenancy by exerting pressure on the tenants in the belief that the Aboriginal family will not seek legal advice but will simply leave under duress. In these circumstances Aboriginal legal services act for Aboriginal tenants and compel landlords to present their claims for unoccupied possession of premises before a court. With access to legal advice and representation, Aboriginal people are now becoming more aware of their rights under leases. They are becoming aware of the methods whereby landlords endeavour to secure eviction orders and they are no longer such easy prey. They are also learning that landlords have duties and obligations to them which can be enforced by legal action. Disputes between landlords and Aboriginal tenants may also arise from lack of communication and mutual distrust and suspicion. Such difficulties can sometimes be overcome when an Aboriginal legal service is able to intervene between the two parties to a dispute and effect an amicable settlement.

278 Tenancy problems are not confined to disputes between Aboriginals and private owners of residential accommodation. In fact, many requests for legal assistance arise from problems Aboriginals encounter with State housing authorities. The Commissioner for Community Relations reported that many complaints concerning discrimination in housing relate to the eviction of Aboriginal families because of their alleged inability to observe conditions of tenancy agreements with State housing authorities.[2] The Aboriginal Legal Service of Western Australia reported that its clients' problems with the State Housing Commission constitute an important area of its work. The Victorian Aboriginal Legal Service also stated that considerable demands are made on it for assistance in landlord and tenancy matters, especially by housing commission tenants and that it accords high priority to this area of the law.

Loan agreements and consumer protection

279 Aboriginals' unfamiliarity with the economic system and ignorance of the consumer society give rise to numerous problems in the area of consumer credit. Their inexperience in dealing with mechanisms such as the hire purchase system often results in their making financial commitments beyond their means. Their lack of understanding of the processes involved in the purchase and sale of goods and of contractual obligations places them at the mercy of unscrupulous dealers. For example, the Committee received reports of car dealers in the Northern Territory selling motor vehicles to Aboriginals, failing to register sales, and then repossessing vehicles. It was further reported that Aboriginals are often charged excessive amounts for repairs to vehicles and the supply of replacement parts.

280 The Aboriginal legal services also represent clients in debt matters relating to loan agreements and hire purchase agreements. The Aborigines and Torres Strait Islanders Legal Service stated that it provides considerable legal advice and assistance in this field for clients who have been sold faulty goods, appliances and motor vehicles and who have been persuaded to undertake financial commitments well beyond their capabilities. Lending or leasing corporations may also take unfair advantage of Aboriginal clients. The legal services therefore

[2] Commissioner for Community Relations, *Fourth Annual Report*, 1979, AGPS, Canberra, p. 53.

act to ensure that Aboriginals' rights in such matters are properly protected and that, in the case of debt matters, they are not disadvantaged through their ignorance of debt enforcement procedures and laws governing the recovery of debts. Aboriginal legal services also advise Aboriginal people wherever possible of the implications of entering into such lending and leasing contracts and explain the terms and conditions in the contracts. In other civil debt matters the services may intervene successfully on behalf of an Aboriginal client and negotiate settlement with the opposite party or his solicitor.

Family law matters

281 Aboriginal legal services provide legal advice and assistance to clients in matters concerning marriage, divorce, adoption, fostering and guardianship and to deserted wives, neglected children and unmarried mothers. They are also frequently requested to intervene in domestic disputes and provide legal assistance in other matrimonial matters affecting the custody and maintenance of children. The services have acted on behalf of Aboriginal women in numerous custody cases where children have been illegally removed by non-Aboriginal fathers or in appeals where custody has been awarded to the non-Aboriginal father. In March 1979 the North Australian Aboriginal Legal Aid Service successfully applied for a writ of *habeas corpus* in the Northern Territory Supreme Court in the matter of *R.* v. *Wittidong, Mulardy and Maine*.[3] In this case an Aboriginal mother of two infants had placed her children under welfare care in Darwin while she organised her personal life. The unmarried father who had no legal rights to his children under the Northern Territory *Guardianship of Infants Act* 1972–1979 was allowed by the Northern Territory welfare authority to remove the children to a foster parent in Broome, Western Australia. The children were eventually returned to their mother. In another Northern Territory case, the unmarried white father of two Aboriginal children was declared their legal guardian and custodian-to-be.[4] The court order was based solely on the evidence of the father and the local welfare officer. The mother, who was not advised of the proceedings although she was outside the court at all times, was not called to give evidence. Coincidentally, a solicitor from the North Australian Aboriginal Legal Aid Service was outside the court taking instructions on another matter. The Service succeeded in having the order set aside on the ground of the mother's exclusion from the proceedings.

282 The case of *Sanders* v. *Sanders*[5] heard by the Full Court of the Family Court of Australia at Brisbane, involved the custody of a four month old baby boy whose non-Aboriginal father lived in Brisbane and Aboriginal mother lived in Elliott in the Northern Territory. Custody had been awarded to the father. The appeal from the decision in this case was based on the grounds that too little attention was given to the need of a baby to be with its mother rather than a working father and surrogate mother; that the trial judge had attached too much weight to the environment and health issue; and that he had given insufficient weight to the fact that the child was Aboriginal. The majority of the Full Court allowed the appeal and the child was returned to its mother.

283 The Aboriginal legal services also undertake cases on behalf of aggrieved parents whose children have been fostered or placed in care by child welfare

[3] Northern Territory Supreme Court, No. 266 of 1979, unreported.

[4] *In the Matters of Evelyn Joyce Cameron and Joanne Marcia Cameron* (1978), Court of Summary Jurisdiction, Katherine, N.T., unreported.

[5] [1976] FLC 90-078.

agencies. In 1975 the Central Australian Aboriginal Legal Aid Service undertook the unreported case, *In the Matter of Freddie*.[6] An American couple resident in the Northern Territory applied for an order dispensing with the consent of the mother of a child to his adoption by them and for an order for adoption. Freddie's mother was a full-blood tribal Aboriginal; his father was non-Aboriginal. In his judgment Mr Justice Forster referred to the circumstances under which Freddie had been declared a neglected child and criticised the Department of Social Welfare for its actions. A welfare officer had made an application to the Children's Court to have Freddie declared a neglected child, knowing that Freddie's mother was in hospital with a broken leg and had no way of attending the court. In addition, only one day's notice of the hearing had been given. The magistrate had made the order sought and committed Freddie to the care of the Director of Child Welfare. Freddie had been placed in the foster care of the American couple shortly afterwards. Mr Justice Forster said:

> It seems to me that ordinary concepts of justice require that if an allegation is made that a child is under unfit guardianship then the mother or other guardian must be given adequate notice of the Children's Court hearing at which the link between the mother and child is likely to be severed, if not permanently, then for an appreciable time. So far as Aboriginal women are concerned, time and trouble must be taken to ensure that the mother understands what is alleged against her and what the result of the proceedings may be. The assistance of the Aboriginal Legal Aid Service should be enlisted for this purpose.

Mr Justice Forster was unable to find admissible evidence which showed the mother had abandoned or deserted Freddie or that she had persistently neglected him. He also disagreed that the alleged advantages to Freddie of being adopted by the American couple amounted to special circumstances for dispensing with the mother's consent. He found that while the plaintiffs could offer Freddie living conditions and material advantages superior to those which the mother could offer, they would not be able to satisfy his probable wish to make contact with Aboriginal people in general and his own relatives in particular. Mr Justice Forster held that the pressures of white society on the child who was somewhat retarded would affect him and compound the identity problems which he would face later in life.

284 As a general rule, Aboriginal legal services prefer not to provide legal representation to two Aboriginal parties to a dispute and most legal services have adopted a firm policy on this matter. The legal services generally refer one party (or both) to private practitioners or an alternative legal agency. The Committee believes that this policy is unsatisfactory because it fails to give due consideration to the complex matters in Aboriginal custody cases, particularly those involving traditionally-oriented Aboriginals, which should be brought to the court's attention if litigated or considered by those who assist the parties in the conciliation process provided for under the Family Law Act. Under our system of law the *interests of the child are paramount when one is deciding questions of custody* and in a nuclear family society the choice is usually between husband and wife—which one will provide the child with a stable environment, which one will provide the child with the necessities of life. But for the Aboriginal child born into a society based on extended family structures, the question is much more subtle and gives rise to many complex issues. In order to reach a decision in the best interests of the child, a number of special factors arise for consideration in respect of Aboriginals. Is he or she a member of the mother's group or the father's group? Which group provides the child with his identity? In the case of a male child,

[6] Supreme Court of the Northern Territory, No. AC 48, 1975, unreported.

which group will initiate him? In which group does he have land rights? What support are children or their parents likely to receive from various members of their extended families? Difficulties also arise when Australian family law is applied to traditional communities, particularly where lack of recognition of tribal marriage and divorce affects maintenance payments and custody disputes. The Committee notes that a number of questions arising from marriage in traditional Aboriginal society were raised in submissions to the Select Committee on the Family Law Act; questions were also raised relating to the jurisdictions of the Family Law Court to hear disputes in custody matters where parties other than parties to a marriage are involved.

285 These problems are unique to Aboriginal people but this Committee can do no more than raise the issues for the attention of the Minister for Aboriginal Affairs, the Attorney-General and the Government. However, it is evident that only a specialist Aboriginal legal aid service will develop the necessary expertise and familiarity with the community to obtain all the relevant material to enable a decision to be made in the best interests of the child. The Committee appreciates the legal services' concern not to be seen as a divisive influence in the Aboriginal community by accepting cases involving disputes between two Aboriginal parties but believes that a child's interests should not be compromised by this policy.

286 In a report by the Department of Aboriginal Affairs South Australian Regional Office on the Aboriginal Legal Rights Movement, attention was drawn to problems arising from Aboriginal women's lack of legal assistance in matrimonial matters. The report stated that the Movement restricts the provision of legal assistance in matrimonial matters to cases involving a non-Aboriginal party and an Aboriginal party because of its policy of not accepting cases in which both the plaintiff and the defendant are Aboriginal. It was alleged that complaints have been made to the Women's Information Switchboard in relation to the Movement's unwillingness to provide legal assistance in matrimonial matters and that court injunctions have been necessary to protect women in those cases where both husband and wife are Aboriginal. Further, when Aboriginal women approach the South Australian Legal Services Commission seeking alternative assistance, the Commission is loath to assist because the Aboriginal Legal Rights Movement is seen to be the organisation claiming responsibility for all legal issues affecting Aboriginals. The Department of Aboriginal Affairs Regional Office considered the Movement's policy discriminatory on the basis of both race and sex. As matrimonial matters may necessarily involve problems of custody and maintenance, regardless of whether they involve two Aboriginal or Aboriginal and non-Aboriginal parties, the Aboriginal Legal Rights Movement is not complying with the ministerial guidelines whereby projects selected for funding should seek to establish *inter alia* ' the provision of assistance to Aboriginal parents relating to the custody and maintenance of their children'.

Workers' compensation and personal injury claims

287 Aboriginals are often unaware of their rights under State workers' compensation legislation and of compensation schemes and remedies provided by the law. They may also fail to seek civil redress through fear of loss of employment. Rather than claiming compensation for injuries, Aboriginals become recipients of unemployment or sickness benefits. Some employers do not promote awareness of such redress as increases in claims result in higher insurance premiums. Aboriginals involved in accidents at work or elsewhere tend to think of this as bad luck rather than a matter which may have a legitimate civil remedy.

288 Cases undertaken by the Aboriginal legal services illustrate how employers have violated the rights of Aboriginal employees under workers' compensation Acts. During the first two years of operation of its branch in Port Augusta, the South Australian Aboriginal Legal Rights Movement conducted a number of cases on behalf of Aboriginal stockmen. In some cases satisfactory awards for compensation were obtained; in other cases employment was preserved. A specific but typical example concerning a workers' compensation matter related to a client who visited the Legal Rights Movement office in Port Augusta asking to have his signature witnessed. The document requiring his signature was a discharge of his employer's liability under the Workmen's Compensation Act, 1971–1979 for the sum of $800. The client was advised of his rights under the Act and although he was reluctant to initiate proceedings—he felt his employers were treating him well and could be trusted—he eventually instructed the Movement to act and his claim was subsequently settled for an amount in excess of $15 000.[7]

289 In 1977, in *Skinner's* case,[8] the Derby office of the Aboriginal Legal Service of Western Australia acted on behalf of an Aboriginal woman whose *de facto* Aboriginal husband was killed accidentally while working at Jeeda Station. She was denied compensation by the State Government Insurance Office which claimed she was not 'wife' despite an extended definition of that condition in the *Workers' Compensation Act* 1912–1979. The Workers' Compensation Board found she was indeed wife and awarded her the entitlement due.

290 In 1977 the North Australian Aboriginal Legal Aid Service began checking the major hospitals and some Aboriginal communities for civil cases. On the first visit to the paraplegics ward at the Darwin hospital, a 16 year old spastic quadraplegic was discovered who had been there for two years. Inquiries were made to social welfare authorities as to who, if anyone, was looking after his interests. The Service was informed that the relevant third party insurer had offered to pay the patient's medical expenses. The patient was a passenger in a motor vehicle involved in a collision and as such he was entitled to considerable compensation. Further inquiries revealed that two people were killed in the collision and many injured. No claims had been commenced for any of them. They were all Aboriginals.

Access of Aboriginals to the civil law

291 In spite of their increased access to the law and legal aid through the establishment of the Aboriginal legal services, Aboriginals regrettably remain under-represented in civil proceedings. For example, in 1978, 2136 civil actions were commenced in the Darwin local court. Of these, less than 10 were taken out by Aboriginals although Aboriginals represent 25% of the population in the Northern Territory. The proportion was even less in the workers' compensation jurisdiction and the civil jurisdiction of the Northern Territory Supreme Court. By comparison, Aboriginals comprise well over half of the criminal actions taken out in the Northern Territory.

292 While the demands made on the Aboriginal legal services for assistance in civil matters are limited, this is largely because Aboriginal people are unaware of their legal rights in civil matters and of the availability of legal remedies and therefore do not realise they have legitimate civil law claims. On the other hand,

[7] Industrial Court of South Australia, No. 2621 of 1977.

[8] *M. L. Skinner and Others* v. *Jeeda Station*, Workers' Compensation Board of Western Australia, No. 28 of 1977, unreported.

the potential demand is believed to be considerable and certainly no less than that of other groups in the community. One solicitor in the Northern Territory reported that after a field trip to an isolated Aboriginal community of 800 people which had no regular visits by solicitors, he returned to Alice Springs with 40 to 50 new files including workers' compensation matters, wage claims, personal injury cases, pension disputes and a whole range of other non-criminal legal matters.

293 It was suggested to the Committee that civil litigation on behalf of Aboriginals is an untapped area of law which few, if any, conventional agencies serve. The Western Aboriginal Legal Service in New South Wales stated that following its establishment in 1978 it took over a number of civil cases from private solicitors which had not been finalised. One matter was a probate case which was five years old and had been handled by a number of solicitors. Similarly, a number of accident claims involving considerable sums had reached dead ends with private solicitors before being taken over by the Western Aboriginal Legal Service. The failure of the private solicitors to finalise these cases was attributed in part to their lack of access to and unfamiliarity with the Aboriginal community as a whole and with their individual clients in particular.

294 The Aboriginal legal services have, however, found that the demands on them in civil litigation, particularly in claims involving motor vehicle accidents, workers' compensation, landlord and tenant agreements, personal injuries and third party claims as well as family law matters of various kinds, have steadily increased as Aboriginals become aware that assistance is available to them in these matters.

Ability of Aboriginal legal services to meet civil law needs

295 The legal services least able to provide assistance to Aboriginals in the civil area of the law are those in the Northern Territory and the St Mary's and Districts Legal Assistance in New South Wales where the number of civil actions taken out by Aboriginals is negligible. The needs and demands of Aboriginals in this area are being most adequately met by the Aboriginal legal services in Victoria and Western Australia. The Aboriginal Legal Service of Western Australia suggested, however, that because it is attempting to meet needs in the civil area, its effectiveness in other areas may be suffering.

296 The Aboriginal legal services' capacity to meet the legal needs of Aboriginals in the civil area is limited because their solicitors generally do not have the time or expertise to devote to civil work. Because most of the services' time and resources are taken up providing assistance in the criminal jurisdiction, Aboriginal legal service solicitors invariably become experts in the criminal field. Further, because they are required to attend to the day-to-day demands of criminal court commitments which require urgent and immediate attention, they feel they are often unable to do justice to clients who require assistance in prolonged litigation matters within the civil jurisdiction. One Aboriginal legal service expressed concern that the standard of preparation and presentation of civil cases undertaken by the legal service was lower than desirable because of the burdens of criminal court work and that non-critical cases involving civil matters often took longer to finalise than was satisfactory. The Committee believes that the legal services simply do not have the necessary staffing capacity or the resources to meet the needs of the client population in the area of civil law.

297 Aboriginal people who live in small country towns or isolated communities are particularly limited in their access to civil remedies. Representatives of the Aboriginal legal services who visit such areas when the courts sit to attend to criminal matters do not have the time to devote to the community's legal needs in the civil area because the demands of meeting the magistrates' court lists are so heavy. Aboriginal legal services in the Northern Territory, Western Australia and Queensland all maintained that they are often unable to visit communities that are outside the magistrates' circuits. The North Australian Aboriginal Legal Aid Service stated that the number of civil matters dealt with by the Legal Service in remote areas is extremely limited.

298 The legal services' ability to meet Aboriginals' legal needs in the civil area of the law is also limited by lack of resources and facilities required to conduct costly personal injury claims and workers' compensation matters. Few services have trust accounts to hold and disburse moneys on behalf of their clients to meet the costs of obtaining evidentiary material necessary for the preparation of such cases. For example, in the Northern Territory considerable costs have to be met to pay the professional fees, travel and accommodation expenses of specialist doctors to assess claimants' injuries. In certain cases, it may also be necessary to meet the expenses of other experts such as anthropologists if additional reports are required for a case. The expense of locating claimants and/or witnesses must also be added to the costs incurred in gathering evidence.

Referral of civil matters to private solicitors

299 Because of the problems outlined above, most Aboriginals who seek the assistance of Aboriginal legal services in this area, particularly in complex civil matters where cases are likely to be both costly and protracted, are referred to private practitioners who have both the necessary experience in this field and the time to conduct such litigation. Some cases are also referred to publicly funded agencies. The Aboriginal legal services are careful in nominating practitioners who have an understanding of the special legal needs of Aboriginals. Clients are normally referred to private practitioners after the legal service has taken initial instructions, has advised the client of his rights and assessed the validity of the claim.

300 While this practice has the advantage of obtaining suitable counsel for civil cases, it has a number of disadvantages. It is generally believed to be the more costly option because any benefits gained from what can be lucrative work are lost. There is also no guarantee that the client's matter will not be given low priority in the private solicitor's practice. In other respects it is frustrating for the legal services to refer such matters to outside solicitors. Because of their special knowledge and familiarity with the client and his situation, the services are invariably involved in providing detailed information and advice to the private solicitor, arranging witnesses for the case, and so on. In practice, the services find that they are also continually called upon by the client to explain procedures and other matters that affect his case.

Appointment of legal service solicitors for civil work

301 Some legal services employ their own solicitors with appropriate qualifications and experience in civil matters. The amount of civil work that is generated by or available to an Aboriginal legal service will determine whether resources are more efficiently utilised by referring civil matters to private solicitors or other

legal agencies or by employing a solicitor to deal exclusively with such matters. The present and future civil workload of the smaller services may not warrant the employment of a solicitor specialising in civil matters and it may therefore be more economical to refer civil work to private firms. The amount of civil work available to the larger services is considered sufficient to enable one or more solicitors to be employed on a full-time basis to conduct personal injury and industrial accident cases and other recoverable actions with the expectation that in the long run the costs recovered from such case work will at least offset the remuneration paid to the solicitor.

302 In 1979 the Victorian Aboriginal Legal Service engaged a solicitor to concentrate on civil matters. The solicitor is required not only to undertake recoverable actions but also to undertake cases in other civil areas such as debt, landlord and tenancy matters, family law matters and to provide advice on other legal matters. The solicitor's duties are primarily carried out in the office and court work is kept to a minimum. The Service is hopeful that it will generate sufficient income in costs to pay either the salary or part of the salary of the solicitor. It considered, however, that because its civil caseload includes a substantial proportion of civil matters which do not involve recoverable costs (e.g. tenancy, debt matters, etc.) it was highly unlikely that it would be able to do more than cover costs, at least initially. In the short period since the solicitor's appointment, the Service has found the arrangement to be operating successfully and plans to divide the duties of another solicitor between civil and criminal matters.

Desirability of Aboriginal legal services undertaking recoverable actions

303 The question of the extent to which Aboriginal legal services should undertake civil litigation involving recoverable costs is a complex one. There is some uncertainty whether the amount of costs recovered by Aboriginal legal services in successful litigation will be deducted from their future level of funding. If so, this would appear to be a deterrent to the Aboriginal legal services engaging in such matters. It was suggested, however, that if recovered costs are not subtracted from Aboriginal legal services' funds, legal service administrations may be tempted to confine their civil work to cases where the recovery of costs is assured and decline cases which will be expensive to prepare and which might not succeed. This comment may point to a need to ensure that there is provision for Aboriginals who are denied access to the courts on a civil matter to seek the advice of the Minister for Aboriginal Affairs.

304 If the amount of work in recoverable actions available to the Aboriginal legal services is significant, the costs secured should more than compensate the legal service for any expenditure involved in the preparation of cases and should also, within eighteen months to two years, meet the cost of employing one or more solicitors who could be engaged solely in civil matters. This is not to suggest that solicitors employed to handle civil matters should confine their work to cases where costs are likely to be secured because a significant proportion of problems commonly affecting Aboriginals in the civil jurisdiction involve cases such as tenancy matters, loan agreements and family law matters. As legal aid organisations, it is not (and should not be) the aim of Aboriginal legal services to build up lucrative legal practices with a restricted clientele. Nevertheless, by referring civil cases involving costs to private solicitors or other legal agencies, the legal services do not benefit from any of the advantages to be gained by undertaking such actions. Further, it seems unfortunate that legal aid organisations such as

the Aboriginal legal services which are both acceptable and accessible to the Aboriginal people should be unable to provide adequate legal assistance and competent representation to protect and enforce their clients' civil rights.

Aboriginal communities and organisations as clients

305 Apart from providing assistance to individual Aboriginals, the Aboriginal legal services provide general advice and assistance to Aboriginal communities and organisations. For example, the services provide legal assistance for the incorporation of communities and the formation of various co-operatives, associations and self-help organisations. They also provide administrative advice and assistance in the preparation of constitutions for associations, community councils, and other Aboriginal bodies. In several instances, they have acted on behalf of Aboriginal communities in copyright actions and matters concerning the preservation and protection of sacred and secret sites and materials. Communities have approached the Aboriginal legal services for assistance in mounting objections to applications for mineral claims on land reserved for the use and benefit of Aboriginals. Advice is also sought by Aboriginal communities wishing to enter into financial and other arrangements with mining companies for mining on land reserved for Aboriginals or set aside for the use of Aboriginal groups as pastoral leases. Such matters are important to the future economic and social development of the Aboriginal groups concerned and Aboriginal legal services have been able to give support in relation to such matters.

Wider significance of Aboriginal legal services' involvement in the civil jurisdiction

306 In addition to the benefits derived from civil litigation conducted on behalf of Aboriginals resulting in immediate relief and restitution and the payment of just and/or legal entitlements to those injured or disadvantaged within the community, other benefits have been derived by individuals and groups from recourse to civil law processes through the use of prerogative writs and injunctions.

307 Prior to the establishment of the Aboriginal legal services, lack of knowledge of legal rights and lack of access to legal assistance prevented Aboriginal groups and individuals from pursuing civil cases which test principles of the law and its administration and which have implications not only for the particular litigant but for Aboriginal people generally. In the past, Aboriginal administrations with statutory mandates to promote Aboriginals' physical, social and economic well-being did not pursue civil actions on behalf of the Aboriginals for whom they were responsible. However, some major civil cases were undertaken before the establishment of the Aboriginal legal services which illustrated the need for Aboriginal people to have access to legal assistance to draw attention to their rights in the community and to enforce their rights by bringing matters before the courts. In 1969 and 1971 two land rights cases were undertaken on behalf of Aboriginals in the Northern Territory.[9] Although both cases failed they were the stimulus for the appointment of the Land Rights Commission and subsequent land rights legislation.

308. Since the establishment of the Aboriginal legal services, a number of major cases have been undertaken which have had far-reaching consequences. In 1976 the Central Australian Aboriginal Legal Aid Service succeeded in obtaining a Supreme Court injunction on behalf of the Pitjantjatjara Council against the

[9] *Mathaman and Others* v. *Nabalco Pty Ltd* (1969), 14 FLR 10, and *Milirrpum and Others* v. *Nabalco Pty Ltd and Commonwealth of Australia* (1971), 17 FLR 141.

author and publishers of a book entitled *Nomads of the Australian Desert* which prohibited its distribution in the Northern Territory.[10] The court held that the book 'would reveal secrets to those to whom it was always understood such secrets would not be revealed' and that money damages would be irrelevant but that 'there can be no greater threat to any of us than a threat to one's family and social structure'. In many ways this case was a milestone for Aboriginal people and the Central Australian Aboriginal Legal Aid Service.

309 This case was followed by action to prevent the circulation in the Centre of two consecutive editions of PIX magazine. These contained colour photographs of secret Aranda ceremonies which the magazine, unwittingly, bought from an overseas journal which had published material belonging to Professor Strehlow. The Central Australian Aboriginal Legal Aid Service also discovered in Perth recordings made by the American anthropologist, Richard Gould, whose book *Yiwarra: Foragers of the Australian Desert* had earlier given considerable offence and had been withdrawn by its publisher. The Sydney distributor of the discs apologised and returned all the recordings to the people who then ceremonially burned them at Pipalyatjara in northern South Australia.

310 In 1977 the Moree District Court awarded Isabel Coe $100 damages against Malcolm Barber, a hotel licensee, for defamation.[11] Miss Coe claimed that the words 'you are barred' meant that she was 'an inadequate, inferior and disgraceful person, not fit to be served with liquor and food in the presence of other human beings by reasons of (her) colour and her Aboriginal descent'. As reported in the metropolitan press the following day, many local Aboriginals felt the case to be 'historically significant', giving them some confidence in 'white man's justice'.

311 The *Lake Nash* case[12] also illustrated the needs of Aboriginals for legal representation in the civil jurisdiction. Following the Lake Nash Station management's harassment of resident Aboriginals, the Alyawarra people—with the assistance of the Institute for Aboriginal Development, the Central Australian Aboriginal Congress, the Central Land Council and others—obtained an injunction from Mr Justice Toohey on 6 April 1979. The *Crown Lands Act*[13] states that where Aboriginals reside within 2 km of the station homestead, they are entitled to be on the land, to use its natural water, to take or kill natural animals and vegetation, and to use educational, medical and similar facilities until such time as they cease to reside there permanently or until adequate facilities of a similar nature are provided on a site suitable to the Aboriginal group. The injunction specifically required the company—King Ranch of Texas, through Swift Australia Pty Ltd and Queensland and Northern Territory Pastoral Company —to allow the Alyawarra people to exercise these rights and the right to 'the facility of the store'. The company had closed the store to Aboriginals thus denying them access to food, petrol and cash in exchange for welfare cheques. There was subsequent evidence that the management would not provide petrol, would not cash cheques and would provide food once a week solely on a cash purchase basis. On 19 May, following discussions with the Northern Territory Government and Commonwealth officials and threats of application to the court for a further

[10] *Foster and Others* v. *Mountford and Rigby Ltd* (1976), 14 ALR 71.

[11] *Coe* v. *Barber* (1977), N.S.W. District Court, unreported.

[12] *Tommy Turner, Bushranger Jack Mahoney, Frank Toby, Ned Kelly, Marnie Lewis, Digger Cambell, Alec Neal, Billy Tommy, Flash George, Harry Cambell, Ray Rusty* v. *Percy Crumblin, Swift Australia Pty Ltd and Queensland and Northern Territory Pastoral Company* (1979), Northern Territory Supreme Court, unreported.

[13] *Crown Lands Act* (No. 3), 1978, sections 24 (2)–(6).

order or a contempt citation, the company agreed to comply fully with the injunction by allowing Aboriginals access to all goods and services implied by the term 'the facility of the store'. It was only recourse to a civil procedure that made the Federal and the Northern Territory Governments aware that through harassment and withholding essential goods and services, the local management of the property was attempting to remove Aboriginal people from the station.

312 Some legal services are reluctant to undertake major civil casework because they are wary of the adverse criticism which they may receive if they go beyond responding to the immediate needs of their clients. By arguing broader issues involving discrimination or protection of civil liberties the services are forced into the public forum where they may be accused of participating in activities of a 'political' nature. This activity may bring abuse on staff and Aboriginal legal service councillors who sometimes consider it better to avoid this area altogether. While arguments were raised against Aboriginal legal services undertaking expensive and protracted cases because of allegations of wasted resources on civil cases, the Committee received no evidence to suggest that the legal services have been irresponsible in the use of their resources in pursuing such matters. Overall, the amount of work performed by the Aboriginal legal services in this area of the law is minimal, notwithstanding the cases quoted above. By responding to the immediate needs of their clients in the criminal area the services find it difficult to allocate time and resources to cases which have implications and advantages for the Aboriginal people generally as well as individual litigants. This is unfortunate since the Aboriginal legal services are well equipped in other respects to undertake such actions because of their acceptability to Aboriginals and the close co-operation and liaison they have established with Aboriginal communities.

313 Other important benefits have been achieved from major civil casework conducted by the Aboriginal legal services on behalf of their clients. These cases have illustrated the need for law reform and highlighted inadequacies in the existing law and legal processes. Some cases have resulted in changes to the law and its administration or have provided significant precedents. Others have succeeded in terms of raising important issues. Civil actions have also made decision-makers face issues they did not imagine were issues or did not believe they would ever have to face. They have also demonstrated to Aboriginal people that the law is responsive to their needs. Civil law proceedings have been successfully used in many instances as an instrument of social change and a desirable alternative to conflict and confrontation politics. The Committee believes that the access of Aboriginals to civil remedies in such major cases through Aboriginal legal services is essential to Aboriginal advancement and self-management.

Department of Aboriginal Affairs' policy

314 The Interim Charter introduced by the Minister for Aboriginal Affairs in August 1979 sets out the conditions under which finance will be provided to the Aboriginal legal services and how those moneys may be applied. There is considerable confusion about the intention of section 6 of the Interim Charter which relates to Aboriginal legal services' role in civil matters. It stipulates that civil cases, and in particular, conveyancing, divorce, probate, letters of administration and action between two Aboriginal parties may only be undertaken to the extent that adequate provision is made for the priorities relating to criminal, juvenile and custody cases, or where cost recovery makes civil cases self-supporting. Many witnesses expressed concern that section 6 by implication included only

such matters as conveyancing, divorce, probate, etc. in its description of civil cases. They were disturbed that the broad spectrum of cases documented earlier in this chapter would no longer be regarded as being within the Aboriginal legal services' sphere of activity. Section 6 was therefore construed by some to exclude assistance to Aboriginals in tenancy matters and other civil matters commonly found in poverty law practices; assistance to Aboriginal community institutions and associations such as land councils, housing associations and other corporate bodies; representation in wage claims, workers' compensation cases, and personal injury claims unless cost recovery is assured; and test-case litigation.

315 The Department of Aboriginal Affairs stated that a strict reading of the section could well preclude the legal services from being involved in civil matters:

> A service officer might well, reading paragraph 6, feel that to enter into any civil case except where there is full cost recovery, would be an acknowledgement that the service had more than enough money to do in full all the things in paragraph 5. Hence the conclusion would be not to do any civil work.

In response to expressions of concern by the Aboriginal legal services at the low priority given to civil cases, the Minister stated that he agreed 'that actions which could have long term advantages to persons of Aboriginal descent generally as well as the particular litigant, need to be pursued . . . Examples of such litigation are actions which help to establish the rights of Aboriginal occupiers of land against competing interests.'[14] No mention was made, however, of civil actions arising from tenancy matters, consumer protection, hire purchase, debt-related matters, and so on. Further, while provision has been made for the Aboriginal legal services to undertake civil cases 'where cost recovery makes such cases self-supporting', presumably legal assistance is not to be provided in civil cases where there is some doubt about cost recovery. The Department stated that the priorities in the Interim Charter were proper but that it did not envisage them being applied in an unreasonable, rigid fashion whereby deserving and needy people who approached the services with civil problems would be unreasonably neglected.

316 The Committee considers that in all probability the intention of section 6 is to indicate that the specific areas of civil law mentioned should be accorded lowest priority but that this condition does not necessarily exclude all other civil cases nor does it accord them the same low priority. However, the wider interpretation of section 6 by the Minister for Aboriginal Affairs still does not clarify the position in respect of routine civil cases undertaken by the Aboriginal legal services on behalf of individual litigants particularly in cases where there is little or no likelihood that costs will be recovered, such as tenancy matters, hire purchase matters and other consumer cases. In many respects, it is unfortunate that the ambiguity and inadequate definition of the civil law area in section 6 has led to misinterpretation resulting in confusion and frustration amongst those concerned with the delivery of Aboriginal legal aid. If the Aboriginal legal services are going to be required to abide by such conditions as those set out in the Interim Charter, it is essential that the conditions be clearly defined.

317 While civil matters are accorded a low priority for the legal services, the Committee notes that civil matters, and particularly family law matters, predominate in the workload of the legal aid commissions. It is significant that the Western Australian Legal Aid Commission's expenditure on family law matters in 1978–79 was 67% of its budget. The Legal Aid Commission also reported that

[14] Letter from the Minister for Aboriginal Affairs to the South Australian Aboriginal Legal Rights Movement, dated 18 December 1979.

it does not provide as good a coverage in criminal matters as the Aboriginal Legal Service of Western Australia and that it cannot afford to do so. The South Australian Legal Services Commission stated that it spends less than 50% of its total resources on criminal matters. As can be seen from Appendix 18, a breakdown of applications approved by the Australian Legal Aid Office for 1978–79 reflects the same trend with the greatest number of cases handled by the Australian Legal Aid Office falling within the non-criminal area.

Conclusion

318 While Aboriginals are proportionally over-represented in the criminal justice system compared with non-Aboriginals, they are very much under-represented in civil law actions and, although gains have been made by Aboriginal people in the criminal legal system, the exercise of their rights in the civil law has been less consistent and more uncertain. Criminal cases continue to predominate in the workload of Aboriginal legal services whereas such cases form a relatively small part of the workload of private legal practices in the general community.

319 While the Committee considers priority must be given to the legal needs and demands of Aboriginals in the criminal jurisdiction, it acknowledges that the needs and demands of Aboriginals in the civil area of the law are largely unmet, particularly in rural areas, and that without access to legal advice and assistance to pursue their civil remedies in the courts, Aboriginal people will continue to be disadvantaged before the law and within the Australian community. There is also a pressing need for educational programs informing Aboriginal people of the types of situations that commonly give rise to civil law action. The Committee believes that the Aboriginal legal services should be encouraged to extend their activities in this area wherever possible. It considers, however, that legal services should direct their attention towards meeting the legal needs (in both the criminal and civil jurisdictions) of Aboriginals in rural areas where alternative legal services are not available.

320 The Committee recommends that:

- *as and when priority needs in the criminal jurisdiction are met, Aboriginal legal services be permitted to provide advice and assistance to Aboriginal people in matters involving the civil jurisdiction both in relation to those cases in which cost recovery is likely and others; and that the Aboriginal legal services be entitled, as funds permit, to pursue matters in the civil jurisdiction which could have long-term advantages for Aboriginal people generally as well as individual litigants;*
- *where the amount of civil litigation generated by or available to an Aboriginal legal service warrants the employment of a solicitor with expertise in civil law, Commonwealth funds be made available initially for this purpose; and*
- *costs recovered from successful litigation not be subtracted from Aboriginal legal services' future funds but be reallocated within the Aboriginal legal services, enabling them to increase their effectiveness in meeting both the criminal and civil law needs of their clients.*

10. Aboriginal Customary Law and Legal Aid

321 While the efforts of the Aboriginal legal services throughout Australia have brought about some improvements in court proceedings involving Aboriginals, important issues still require attention including the use of Aboriginal languages in court proceedings and the recognition of Aboriginal customary laws. Aboriginal legal services, members of the judiciary and others also drew the attention of the Committee to certain problems affecting the administration of justice in traditionally-oriented communities.

Concepts of appropriate punishment

322 Traditionally-oriented Aboriginals have their own concepts of community authority and responsibility. Elders and councillors arrive at appropriate punishment of an offender by considering the interests of the community and their decision may not coincide with a decision reached through court proceedings. Community interest in court proceedings and their outcome is therefore generally far greater than that found in other Aboriginal communities and certainly in non-Aboriginal commmunities. Traditionally-oriented Aboriginals often form very definite views on what they consider appropriate punishment for an accused and problems arise when the community feels courts have treated offenders either too leniently or too harshly.

323 When individuals who have offended against the community are acquitted or given lighter sentences than the community would have wished, the Aboriginal legal service which has defended the accused in court may lose credibility with and become less acceptable to the community. Occasionally legal services have become unpopular because of the outcome of court proceedings and threats have been made to ban some legal service representatives from communities. This conflict situation arises largely because the European legal system essentially protects the rights of an individual who at times needs protection against the rights of a wider group, perhaps the community itself, and because the defendant has the right to plead not guilty and mount a defence. Aboriginal communities may neither understand nor accept the responsibilities which a solicitor has towards his client as opposed to the wellbeing of the community as a whole. In defending a client to the best of his ability, a legal service representative may in fact be acting contrary to the wishes of the community and thereby doing a disservice to Aboriginals in terms of social cohesion and the totality of their culture. It is particularly unacceptable to the community for solicitors to win a case with technical argument. The community may impose its own tribal sanctions on the offender in any case but if the European legal system consistently fails to reinforce the community's traditional standards there will ultimately be a breakdown in community authority structures.

Double punishment

324 A traditionally-oriented community may impose a harsher penalty upon an offender if it considers he has been penalised insufficiently by the court. Alternatively, an offender may be prepared to submit to his community's wishes and accept its penalty even if he has been acquitted of an offence by the court. In

this case, he is liable to face reprisals such as a period of ostracism or punishment in the form of physical assault such as spearing in the leg. A particularly frustrating problem arises when the sentencing judge or magistrate is aware that whatever penalty he imposes, the defendant's community will exact its own retribution in the form of pay-back. The solicitor, too, is in a difficult position because in accordance with legal principles it is not in the interests of his client to suggest to a court that the defendant be given a harsher penalty so that he is not subjected to the sanctions of his community as well as those imposed by the court. Further problems arise if a court sentences an offender heavily after he has already received tribal sanctions. In both situations the offender is subjected to double jeopardy, i.e. being punished twice for the same offence.

325 It is clear that without an adequate understanding of these matters and the ability to communicate effectively with Aboriginals, preferably in their own language, the judge or magistrate can do justice neither to the individual Aboriginal nor to the Aboriginal community. While some magistrates return offenders, particularly juveniles, to their communities for traditional punishment or discipline as an alternative penalty, at the present time magistrates are not obliged to acknowledge the existence of tribal law nor to ascertain whether a defendant has been or will be punished by his own community. Aboriginals are therefore unable to plead double jeopardy. The Australian Law Reform Commission's inquiry into Aboriginal customary law is of significance in this area.

Relationship between tribal obligations and the commission of offences

326 In traditionally-orientated communities, cultural beliefs and practices and certain aspects of tribal law (sometimes secret) may form the background to matters resulting in Aboriginal appearances in court. The Committee was informed of a recent incident at Hooker Creek following which several Aboriginals were charged with assault. When the Aboriginal legal service spoke to their community councillor, it became apparent that the defendants had been required to act on behalf of another member of the community or risk punishment by the community. In another case, a tribal elder was arrested for assault after taking punitive action against a young man seen with a woman with whom he had an avoidance relationship. (In traditionally-oriented Aboriginal communities certain categories of people stand in avoidance relationships to one another. They may not for instance mention each other's names, make eye contact, converse or otherwise interact directly with one another. These conventions vary from region to region.) In the case of juvenile offenders, it may be almost obligatory for a young Aboriginal to take the blame and punishment for an offence committed by his brother or cousin. Aboriginals may also be unwilling to provide information to or co-operate with legal authorities and legal aid representatives because of kinship obligations, avoidance relationships, restrictions against public reference to certain members of the community, fear of offending community leaders and fear of pay-back. The Aboriginal legal services have played a significant role in bringing to the attention of the courts such aspects of customary law and practice which may form the background to the commission of offences by traditionally-oriented Aboriginals.

Juvenile offenders in traditionally-oriented communities

327 While many problems in traditionally-oriented Aboriginal communities are resolved without recourse to the European legal system, traditional authority

structures are less able to cope with problems arising from contact with the European culture such as excessive consumption of alcohol, petrol-sniffing and motor vehicle offences. It is generally alcohol-related and alcohol-induced offences which are brought to the courts in remote areas and a high proportion of offences are committed by juveniles.

328 It has been suggested that in some remote communities, access to legal aid and representation has fostered recidivism amongst juvenile offenders and that the activities of the Aboriginal legal services have had a disruptive effect in traditionally-oriented communities. It was alleged that the flaunting of deviant behaviour by young Aboriginals is reinforced by an aggressive abuse of legal aid whereby offenders defy their communities to stop them from offending and where legal aid is used as a threat. However, problems of control of juvenile offenders in traditionally-oriented communities may be attributable in part to the exposure of young Aboriginals to European concepts, values and patterns of behaviour. In particular, where juvenile offenders have been remanded to correctional institutions and thus removed from their cultural and familial environment, it seems inevitable that on their return they will be less responsive to tribal attitudes and authority. It is a matter for conjecture whether the number of offences committed by juvenile offenders in traditionally-oriented communities would be significantly reduced if legal representation were not made available to habitual offenders and whether this would in time allow communities to exercise greater control over juveniles' behaviour. This is an area of the legal services' activities which may be affected by the outcome of the Law Reform Commission's inquiry into Aboriginal customary law.

329 In some traditionally-oriented communities, juveniles may commit crimes with the express purpose of avoiding initiation ceremonies through imprisonment. In order to achieve their purpose, the offenders prefer not to be legally represented as there is considerable risk that they might receive a bond instead of being remanded to a correctional institution. On the other hand, the offender's community may request that the Aboriginal legal service represent the offender and seek a non-custodial penalty or, alternatively, if the offender has been remanded to custody, may seek the legal service's assistance to organise his release so he can participate in initiation ceremonies. This obviously places the legal service in a difficult position. In *Jabaltjari's* case,[1] Mr Justice Muirhead said:

> . . . the appellant's people at Papunya are far from pleased with young Nari. It is probable that Nari was aware his initiation was due . . . It is equally probable that Nari left his people's custody to escape the traditional ceremonies and to him gaol was a means of escape. It is, I think, sad but true that to many aboriginal children a term of imprisonment tends to be regarded as a sign of manhood and a much more comfortable experience than those designed over the centuries by their own people as the transition from childhood to manhood.

330 It is also necessary to give some consideration to the status accorded juvenile offenders in the legal system and the appropriateness of applying the European legal definition of juveniles to traditionally-oriented Aboriginals. In Aboriginal communities, age is not measured in chronological terms but is based on social and ceremonial status. Before initiation young Aboriginals are free of the restrictions of manhood imposed by traditional law. The maximum age at which a child or

[1] *Nari Andy Jabaltjari* v. *Ronald Walter Hammersley* (1977), 15 ALR 94.

young person may be charged before a children's court is 17 in Victoria, Queensland, Tasmania and the Northern Territory, and 18 in other jurisdictions. Because this age limit may not necessarily include all young Aboriginals who have not been initiated into manhood, it may be inappropriate to designate as adult offenders uninitiated Aboriginals over the age of 17 or 18 within the respective State and Territory jurisdictions. It was suggested to the Committee that if one accepts an extended definition of Aboriginal juvenile offenders based on the time of their initiation, the extent of juvenile interaction with the justice system may be greater than is indicated by statistics on juvenile offenders. Conversely, it raises the question whether initiated Aboriginals under the maximum age for juvenile offenders defined in European law should be charged and tried as adults. This, too, is a matter for consideration by the Australian Law Reform Commission.

Representation of community views and interests in court proceedings

331 In many respects, it is unfortunate that Aboriginal communities have found it necessary to resort to the Australian law to resolve problems of anti-social or criminal behaviour which cannot be dealt with satisfactorily by tribal authority. Not only must Aboriginal people contend with and attempt to reconcile two systems of law which are not congruent but their traditional authority structures and social cohesion are inevitably weakened by recourse to a system of law and an adjudicative process which often conflict with their own laws and practices. Because this dual system of law operates in many traditionally-oriented communities there is a need for courts to take account of the wider interests of the community and Aboriginal customary law. This is important to strengthen traditional Aboriginal relationships and authority structures and to maintain social cohesion. A number of mechanisms have been developed in Western Australia, South Australia and the Northern Territory by which community views are made known to the courts, namely, through the Aboriginal legal service, through the prosecutor, or by the Bench informing itself in one way or another about such views. Difficulties are encountered in all three approaches. Community views and interests can probably better be represented in court proceedings by seeking pre-sentence reports from a community or through the appointment of Aboriginal justices of the peace.

Representation of community interests by Aboriginal legal services

332 There are problems of professional ethics for the Aboriginal legal service solicitor in this situation as to whether he should be directed by the community which employs him through the legal service body or by the individual client for whom he is providing legal representation. It is difficult for the solicitor to put the community needs and wishes without abrogating his duties to the defendant's needs since more often than not these needs conflict. In many respects the Aboriginal legal service is expected to be the servant of the community, to consult the council and take its wishes into account. This attitude is strongest in the Northern Territory where Aboriginal communities appear to exercise more control over employed solicitors than elsewhere and where the Aboriginal legal services have developed a greater awareness of and sensitivity to the wishes of the community.

333 In the Northern Territory the Aboriginal legal service representatives discuss the listed cases with the community council immediately before the court sits. In this way they can ascertain the community's attitude towards the offences

and the defendant's plea and determine whether the community wishes to have specific information brought to the attention of the court. Following the consultation, legal service representatives either inform the magistrate informally of the wishes and attitudes of the community prior to the hearing of the case, pass the community's views on to the prosecutor, or present all material evidence before the court on behalf of both the community and the defendant.

334 These arrangements are far from satisfactory as the solicitor's position is compromised and his client's case weakened. If one accepts that a solicitor's primary responsibility is to represent and protect the rights of the individual, then he should not be made to compromise his position by taking broader community interests into account. The practice whereby a solicitor purports to act for an individual whose interests are paramount and then presents the Bench with information received from the council which might be seriously disadvantageous to his client's case is necessarily unethical according to accepted standards. Similarly, where counsel meets with community councillors before a matter is heard in court and is sympathetic to their point of view it becomes more difficult for counsel to put the case for the defendant as convincingly as he might otherwise have done. Apart from being limited by ethical considerations, this approach is also limited by time constraints within which Aboriginal legal service solicitors are compelled to operate. They generally have insufficient time to take adequate instructions from individual clients let alone hold lengthy consultations with Aboriginal community councils. Solicitors usually arrive at an Aboriginal community at the same time or immediately prior to the magistrate on the day the court sits to deal with one or two full days' court lists so their time with clients and/or the community is strictly limited.

Representation of community interests through the prosecutor or the Bench

335 It is doubtful whether the prosecutor is qualified to ascertain the community's views since his knowledge of and interest in Aboriginal social and cultural beliefs and practices including tribal authority structures and various aspects of customary law is liable to be limited. Further, he must have access to the community and be accepted by it if he is to obtain the relevant information. When the Bench assumes responsibility for ascertaining the community's interest and attitudes, problems also arise. In the Northern Territory and the Kimberleys in Western Australia, magistrates are attempting to inform themselves of community views and interests. However, if the magistrate discusses a matter with the community council before the court sits, he is open to allegations of bias. The effectiveness with which the prosecutor or members of the Bench can perform this function is also limited by the pressure of time constraints and court schedules.

Pre-sentence reports

336 A more satisfactory approach is being adopted in the Northern Territory where some magistrates are seeking pre-sentence reports from the community relating to plea of guilty cases. If such a plea has been made on the accused's behalf, the magistrate consults elders of the accused's tribe to seek the community's attitudes and advice on what they consider to be an appropriate punishment. The magistrate is also able to consider penalties which are peculiarly Aboriginal and may be more relevant and acceptable to the community than a penalty normally imposed by the court. For example, at Port Keats, Bamyili and Croker Island, community service orders, exclusion from social organisation orders and

tribal punishment have been used as alternative methods of punishment. This procedure also enables the magistrate to ascertain whether an accused has already been punished through the imposition of tribal sanctions. In many respects the practice of seeking pre-sentence reports from the community is an extension of the practice whereby courts obtain reports on offenders from welfare, probation and parole officers before passing sentence. The procedure is also similar to that used in Papua New Guinea and elsewhere where 'assessors' are requested by magistrates and judges to advise them on the background of the offence including questions of act and custom and on any other matters relevant to sentencing. This has the advantage of involving Aboriginals in decision making processes which affect their lives, of reinforcing tribal law and authority structures, and of avoiding problems encountered in determining appropriate penalties for offenders in traditionally-oriented Aboriginal communities.

Aboriginal justices of the peace

337 A further alternative method of overcoming the unresponsiveness of the legal process to traditional Aboriginal laws and attitudes is to make provision to include Aboriginal justices of the peace in the structure of the Bench. Aboriginal justices of the peace have been appointed in several Aboriginal communities in Western Australia and are also being trained in the Northern Territory. Some reservations were expressed to the Committee about the appointment of Aboriginal justices of the peace. It was argued that Aboriginals do not have sufficient comprehension of the European legal system to administer its laws and that European laws are often in conflict with Aboriginal laws. It was further suggested that the impartiality of Aboriginal justices of the peace cannot be guaranteed because they are bound by complex relationship laws and obligations. For example, an Aboriginal justice of the peace might find himself in the position of having to pass judgment on and penalise a member of the community to whom he would be obliged to give his support and protection under traditional tribal law. Further, while the appointment of responsible and respected Aboriginal community members as justices of the peace does build into the European legal structure a certain degree of sensitivity and responsiveness to traditional tribal attitudes and laws, this approach can be construed as an attempt to 'westernise' Aboriginal tribal authority. By conferring official status and delegating legal powers to certain members of the Aboriginal community, there is a danger of weakening rather than reinforcing traditional Aboriginal authority structures. The recognition of customary law would probably render the appointment of Aboriginal justices of the peace a less desirable approach to the administration of law in traditionally-oriented communities.

338 The Committee considers that the procedures for seeking pre-sentence reports being developed by magistrates in the Northern Territory and Western Australia, and the appointment of Aboriginal justices of the peace are, for the time being, the most satisfactory means of informing the court of community views and representing their interests. They also provide a means whereby local people can participate meaningfully in the criminal process. Although these developments do not in themselves recognise Aboriginal customary law they do recognise the need to develop a criminal justice system which is responsive to social realities. They attempt to bridge the gap between the two cultures and demonstrate that recognition of Aboriginal law need not await legislative change.

Recognition of Aboriginal customary law

339 The Australian Law Reform Commission is currently conducting an inquiry into the recognition of Aboriginal customary law. It has been asked to inquire into and report upon:

> whether it would be desirable to apply either in whole or in part Aboriginal customary law to Aborigines, either generally or in particular areas or to those living in tribal conditions only and, in particular:
>
> (a) whether, and in what manner, existing courts dealing with criminal charges against Aborigines should be empowered to apply Aboriginal customary law and practices in the trial and punishment of Aborigines;
>
> (b) to what extent Aboriginal communities should have the power to apply their customary law and practices in the punishment and rehabilitation of Aborigines; and
>
> (c) any other related matter.

It is possible that initiatives arising out of the Law Reform Commission's inquiry may require new and increased efforts by the Aboriginal legal services.

340 The first objective of the Aboriginal legal services is:

> To provide Aboriginals with access to appropriate legal advice and representation, particularly in respect of criminal cases in the courts, and so eliminate disadvantages they may suffer under the existing legal system.[2]

To this end, Aboriginal legal services have employed non-Aboriginal solicitors whose qualifications and expertise equip them to protect Aboriginals from disadvantages they may suffer under the existing legal system. Aboriginal legal service solicitors have built up a good relationship with Aboriginal communities and clients and have had a strong impact on the attitudes and operation of the courts in bringing to the courts' attention the influence of customary law or practice on defendants' background or on the commission of offences. In the case of traditionally-oriented Aboriginals, the Aboriginal legal services' activities have resulted in a recognition by some courts that, in certain cases, traditional punishment will proceed irrespective of the court's decision and sentences are mitigated accordingly. It is questionable, however, whether non-Aboriginal solicitors have an adequate knowledge and comprehension of the nature of Aboriginal customary law, its methods of proof, and its advantages and limitations, to represent clients in Aboriginal communities which apply customary law in the trial and punishment of Aboriginals. While Aboriginal legal service solicitors would certainly be better equipped to do so than other private or public solicitors, the recognition of Aboriginal customary law might require a greater input in court proceedings on the part of Aboriginal staff members of legal services or other non-Aboriginal professionals such as anthropologists, if legal aid is to have a continuing role in this area.

341 The role of the Aboriginal legal services will also be significantly affected in the event that the Law Reform Commission recommends that Aboriginal communities be given the power to apply customary law and practices in the punishment and rehabilitation of Aboriginals. At the present time, where customary law is applied on tribal land, in tribal communities and with regard to tribal offences which are not offences under Australian law, non-Aboriginals have tended not to interfere. However, retribution or pay-back can lead to police intervention

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[2] *Ministerial Directive and Programming Guidelines, Government Financial Assistance to Aboriginals 1980–81*, Department of Aboriginal Affairs, and *Interim Charter*.

when the retaliatory measures are offences against Australian law. This is an area where the Aboriginal legal services have played and will continue to play a significant role. If Aboriginal customary law is applied in cases involving offences against Aboriginal communities which are also offences against Australian law, the division of jurisdiction between the two systems will be significant. At the present time there is no recognition of traditional punishment as a valid punishment to be applied by existing courts dealing with criminal charges against Aboriginals. Australian courts cannot impose penalties which are repugnant to natural justice or morality or which are in conflict with any other laws. This would appear to preclude Australian courts from applying tribal sanctions in the punishment of serious offenders and probably confine Aboriginal communities to dealing with minor offences in the summary jurisdiction.

342 Aboriginal customary law and the Australian justice system are in many respects not congruent. They are different methods of social control based on different social structures. Aboriginal communities attach paramount importance to the right of the community to maintain and where necessary restore social order, whereas the European system is based on the protection of rights of individuals. By allowing Aboriginal communities to apply customary law, there is a danger of subjecting an Aboriginal offender to the tyranny of the group. There is the problem that, in many respects, the adoption of a policy of non-interference by legal authorities in communities regulated by customary law and practices carries with it an abrogation of responsibility for the protection of the rights of the individual.

343 Proposals to introduce a dual system of law (or two separate legal systems) have far-reaching implications not only for legal authorities but also for legal practitioners and particularly for the Aboriginal legal services. Do Aboriginal legal services have a special role to play in Aboriginal communities applying tribal law and sanctions in protecting the rights of the individual or should they be required to recognise customary law and then only take their instructions from the appropriate customary authority? Should Aboriginal offenders be given the option of being tried by Aboriginal tribal authority or Australian courts or would this give rise to a situation whereby offenders could play one system off against the other? While adherence to customary law and practice usually depends on the degree of contact Aboriginals have had with white Australian society, what criteria can be employed to assess the extent of a defendant's adherence to Aboriginal customary law and practices? Should there be provision for appeal from Aboriginal authorities to Australian courts where offenders consider they have been dealt with unreasonably or would this be an unacceptable arrangement because it would undermine Aboriginal authority structures? Should Aboriginal customary law be applied or taken into account when traditionally-oriented Aboriginals are charged with offences and brought to court in non-tribal areas? Should customary law be applied only to Aboriginals in remote communities whose lifestyle is obviously traditionally-oriented and not be applicable in other areas, for example, fringe or urban areas?

344 The recognition of Aboriginal customary law and the manner in which it is applied in existing courts and Aboriginal courts are matters beyond the scope of this inquiry. Nevertheless, they are matters which have far-reaching implications in terms of Aboriginals' interaction with the criminal justice system and which will have a strong impact on the role, structure and operation of Aboriginal legal services.

Traditionally-oriented Aboriginals and civil remedies

345 Aboriginals' access to legal assistance in the civil jurisdiction, though limited, raises new issues especially in personal injury and workers' compensation claims made on behalf of traditionally-oriented Aboriginals. How do those responsible for quantifying a claim for compensation assess the economic capacity of a tribal Aboriginal? How do they arrive at a settlement sum which will recompense the claimant and, in any case, can money recompense the deprivation he suffers? What compensation should be paid an Aboriginal whose injuries prevent him from participating in tribal ceremonies or carrying out his day-to-day duties in his community? Is the claimant's extended family entitled to share the payment? Does the court have a duty to take this possibility into account when determining the amount of compensation? Does the court or any other agency have a role to play in ensuring that a lump sum payment is disbursed in such a way as to protect the claimant's wellbeing in the future? Such questions present major problems for solicitors attempting to quantify claims. The problem is exacerbated by the fact that the Aboriginal legal services which are most familiar with Aboriginal communities and their way of life do not as a rule employ solicitors with expertise in the civil area. The Committee considers that there is a need for comprehensive research in this area by both anthropologists and practitioners experienced in these areas of civil law.

Use of Aboriginal languages in courts

346 It has already been stated that to many Aboriginal people court proceedings are confusing and intimidating. Aboriginals are bewildered by the rituals which take place in courts and confused by the formal language and technicalities used in legal proceedings. It is evident that their comprehension of proceedings is even more limited when English is not their first language. The right of an interpreter is not yet established at law in Australian courts and interpreter services are provided at the discretion of the Bench. Linguistic difficulties which arise in the course of contact between Aboriginals and the justice system are not always solved by translation as they involve questions of conceptual understanding. Many of the concepts crucial to our legal system such as time, property, ownership, notions of land tenure, and so on are not so presupposed by Aboriginals, particularly traditionally-oriented Aboriginals. These differences are recognised by the Aboriginal legal services and where possible interpreters are used. However, the interpreter is too often simply someone who can speak both languages, rather than someone who is thoroughly knowledgeable about both cultures, both languages and is also familiar with Australian law and courtroom practices. While the ideal is to have Aboriginal lawyers working in their own communities or at least non-Aboriginal lawyers fluent in Aboriginal languages, neither of these are realistic short-term goals. There is, however, ample justification for training bi-lingual people, preferably Aboriginals, to provide a broadly based interpreter service for Aboriginal people appearing in court.

347 It is important that interpreter training schemes deal not only with linguistic material but also with courtroom procedures and translation ethics. The matter of translation ethics has been given little attention in the past in Australia because of the failure to recognise problems such as conflict of interest arising in communities where Aboriginal interpreters might be bound by kinship obligations to give their support and assistance to one party. The Committee welcomes steps taken by the Institute for Aboriginal Development in Alice Springs to commence an interpreter training course for Aboriginal people.

11. Aboriginals and Welfare—the Role of the Aboriginal Legal Services

348 Legal problems of the type dealt with by poverty law practices such as the Aboriginal legal services rarely occur in isolation from more general problems affecting Aboriginals, particularly those associated with social and economic hardship. The Aboriginal legal services reported that in the vast majority of cases the legal and social problems of their clients are inextricable. Non-legal problems often result from an initial presenting legal program. For example, socio-legal problems affecting either the offender, his family or both arise when an Aboriginal is charged with an offence or brought before the court. The problems of the family of a man sentenced to gaol can be considerable and appear insurmountable to those directly affected.

Aboriginal legal service involvement in welfare matters

349 Without actively encouraging welfare work, it has become an inevitable component in the work carried out by all Aboriginal legal services and is regarded as an important part of the service they provide to the community. In the case of two legal services at least, solicitors devote approximately 20% of their time to providing non-legal advice and assistance and field officers up to 50% of their time. The degree to which Aboriginal legal services attend to welfare matters depends to some extent on the geographical distribution of their client population. There is a greater need for the Aboriginal legal services to provide assistance in welfare matters in isolated areas where no welfare services are available.

350 The Aboriginal legal services provide advice and assistance in matters concerning social security entitlements; tenancy matters; employment problems; problems relating to discrimination in schools and the welfare of children; alcohol- and drug-related problems; prison and parole matters; and family matters.

351 It has been suggested that the Aboriginal legal services should not devote resources and time to non-legal work at the expense of strictly legal areas. However, the legal services have found it necessary to adopt a broad approach to the provision of legal aid by basing the operation of their services on the manifest needs of their clients rather than a traditional approach to legal aid in which their operations would be confined to litigious matters. In its submission to the inquiry, the Law Council of Australia supported the services' approach to the delivery of legal aid. It is also significant that other community-based legal services such as the Fitzroy Legal Service recognise the need to provide assistance in this area and employ social workers for this purpose.

352 It is important to bear in mind that Aboriginal people are often unable to identify legal matters as such and unable to distinguish between legal and non-legal matters. Further, they are often unaware of what services are available outside the Aboriginal legal service. Because of Aboriginals' special disadvantages, they more than any other group in the community need a legal service which is based on a broad interpretation of legal aid and which takes full account of problems relating to Aboriginals' circumstances and history. The effectiveness of any organisation designed to provide assistance to Aboriginals depends largely on that organisation being accepted and trusted by the Aboriginal community. The legal services considered that if they were to confine their activities to strictly litigious matters, they would run the risk of losing credibility with

Aboriginal people whom they are seeking to encourage to use the law and the legal process and of no longer being regarded as a reliable or effective organisation.

Social security entitlements and administrative decisions

353 Many Aboriginals are subjected to injustices arising from administrative decisions relating to social security entitlements. The Committee believes that disadvantaged persons have a right to receive pensions and benefits to which they are properly entitled under government-funded income maintenance schemes and that it may at times be necessary for such persons to seek legal assistance in asserting or protecting their rights if payments are refused, withheld or interrupted through administrative error or through a claimant's inability to properly present his claim for entitlement. The Aboriginal legal services have played an important part in meeting the needs of clients in this area by providing advice and assistance to Aboriginals submitting claims for social security entitlements and by representing Aboriginal appellants when benefits have been withdrawn or refused without proper justification. Because a large proportion of Aboriginals are dependent upon the payment of pensions and benefits for their economic survival and encounter serious problems if payments are not forthcoming, this has inevitably become a significant area of the services' work. In traditionally-oriented communities Aboriginals may require special assistance where complex family relationships and child support arrangements prevent them from meeting standard eligibility requirements for the payment of pensions and benefits.

354 The Second Main Report of the Commission of Inquiry into Poverty found that 'the traditional protection afforded by the legal system to people affected by administrative errors has been withheld from applicants for social security pensions and benefits'.[1] The report stated that 'the importance of legal representation for appellants is that a system of review or appeal is likely to prove effective only to the extent that the appellant's case is presented in a clear and coherent form'.[2] It also considered that, in the initial application stage, 'some claimants would benefit from legal advice and that where such advice is given the department would also benefit from having claims presented fully and clearly'.[3]

Advantages of Aboriginal legal services providing welfare assistance

355 The provision of assistance in essentially non-legal but law-related matters by the Aboriginal legal services often obviates the need to refer clients elsewhere for assistance. Through the employment of field officers and welfare workers, many problems can be dealt with under one roof or, alternatively, steps taken to seek solutions to legal and associated non-legal problems can be co-ordinated by one office. In many respects, the segmented structure of conventional welfare agencies has proved unsuitable for dealing with the multiple problems which beset Aboriginal clients. For example, a case worker in an education department is responsible for ensuring that a neglected child returns to school but is unable to assist the child or family with other problems because they fall outside his jurisdiction even when the child's neglect possibly came to his attention as a result of these problems. It is then necessary to refer the family to other sections of the agency or other agencies altogether. When Aboriginals attempt to seek assistance from highly compartmentalised conventional government agencies, they become

[1] Sackville, *Law and Poverty in Australia*, p. 3.
[2] *ibid.*, p. 168.
[3] *ibid.*, p. 169.

confused and frustrated when they are shunted from office to office and often fail to pursue matters to their conclusion. Aboriginals are unfamiliar with bureaucratic procedures and dislike dealing with a multitude of agencies. Policies and attitudes of different organisations are often disparate and confusing. The process is not only slow but can also be demeaning for the client.

356 In other circumstances legal matters, and particularly civil law matters which would not otherwise have been identified, may arise out of non-legal welfare-related problems. Attendance to a welfare matter may in fact forestall the occurrence of a legal problem. By intervening on behalf of clients at an early stage, the legal services are often able to resolve problems which might otherwise result in costly litigation. Many non-legal problems faced by Aboriginal legal service clients result from their lack of skill in dealing with the wider Australian society and its institutions. Problems which appear insurmountable to them may in fact be resolved satisfactorily by the Aboriginal legal services with a minimum of time and effort.

357 It was argued that Aboriginal legal services should not become involved in welfare work because other institutions and agencies are designed specifically to provide assistance in this area and that the legal services' activities duplicate the functions of the other agencies. This has not in fact happened. Officers of the Victorian Department of Community Welfare Services stated that the Victorian Aboriginal Legal Service is providing an additional service which the Department is unable to provide and that, rather than duplicating its functions, the Legal Service is reinforcing them. The Victorian Aboriginal Legal Service is directing cases to the Department which would not normally be brought to its attention and is therefore making existing welfare services more effective and responsive to the needs of Aboriginal people. Other State community welfare departments supported this view and commented that not only have Aboriginal legal services fostered an awareness amongst departmental staff of resources existing within the Aboriginal community itself to support Aboriginal clients but that welfare departments and agencies often seek information and advice concerning Aboriginal clients from the legal services.

358 The Victorian Government remarked that the relationship between the Victorian Aboriginal Legal Service and officers of the Department of Community Welfare Services has enabled Aboriginal youth, in particular, to receive maximum support and ensured that their rights are protected. It believes Aboriginal clients relate and communicate more effectively to Aboriginal services, a phenomenon which does not appear to be linked to the level of public education and awareness within Aboriginal communities about services available within conventional legal or welfare facilities, but rather to the intrinsic nature of Aboriginal social development and the social relationship of the Aboriginal community with the non-Aboriginal community in Australian society.

Role of the Aboriginal field officer

359 The Aboriginal legal services' success in this area can be largely attributed to the employment of staff, particularly field officers, who are able to relate effectively to the client population and who understand the multiple problems experienced by Aboriginals and the extent to which such problems affect their lives. It is often the field officer who brings legal problems to the attention of an Aboriginal legal service and it is through him that the legal service makes itself known to the community. As the first point of contact, it is the field officer who attends to extra-legal or non-legal matters.

Role of the social worker

360 The social worker has an important role to play in an Aboriginal legal service, particularly in the areas of child welfare, parole, sentencing and in problems concerning administrative decisions. In many respects a social worker may be able to provide more effective 'legal' assistance for an Aboriginal client than a solicitor through the presentation of social welfare reports. In the case of Aboriginal children, the social worker has the appropriate training and ethical background to act as an advocate for the child and help effect a responsible solution. It is important that welfare reports on Aboriginal juvenile offenders and neglected children appearing before children's courts (or juvenile aid panels) be prepared and presented by a social worker who is able to provide comprehensive information on a child's family situation and his social and cultural background and, where appropriate, provide the court with alternatives to institutionalisation or wardship. This is not possible unless the social worker is familiar with the Aboriginal people and their culture and has ready access to Aboriginal communities to seek the relevant information.

361 Where Aboriginal clients are being sentenced by courts, particularly in plea of guilty cases, a carefully prepared social worker's report may place before the judge a range of social factors which may enable him to impose a less severe sentence than might otherwise have been the case. In the case of a prisoner applying for parole, a social worker employed by an Aboriginal legal service has both the training and the necessary familiarity with the client to put before the parole board the prisoner's background and the circumstances surrounding the the commission of the offence and to facilitate the arrangement of accommodation and employment. In both of the above cases legal rights and personal liberty are at stake, but social work skills and familiarity with available services and institutions provide the more effective form of assistance.

362 In many respects, the present needs of Aboriginals for legal assistance cannot be met simply by lawyers but require a co-ordinated approach by lawyers, field officers and social workers. This does not mean that Aboriginal legal services should or could cover the whole welfare field or that they should necessarily employ social workers, and does not ignore the need for specialised welfare agencies. However, one of the advantages of having ready access to community welfare experts is that maximum use can be made of available support services by referring clients to the right organisations or sections within them: social welfare departments, hostels, employment agencies and other Aboriginal organisations. While some Aboriginal legal services have chosen to employ social workers or community workers to meet the welfare needs of clients, the Committee believes that in certain areas clients' needs may be equally met through the legal services maintaining a close working relationship with community-based Aboriginal welfare organisations, particularly where such organisations operate from premises in close proximity to the legal services' offices.

Attitude of the Department of Aboriginal Affairs

363 The extent to which Aboriginal legal services are able to meet Aboriginals' welfare needs arising from or related to legal matters in turn depends on recognition of these needs and acknowledgment that they should be met by the legal services. This has been strongly resisted by the Department of Aboriginal Affairs which has been reluctant to accept that it may be appropriate for Aboriginal legal services to provide assistance in welfare matters and appoint

social workers to their staff. Only two legal services employ social workers: the Victorian Aboriginal Legal Service and the Aborigines and Torres Strait Islanders Legal Service. The Central Australian Aboriginal Legal Aid Service employs two Aboriginal community workers who provide welfare assistance. The Committee understands the Northern Territory Government is considering providing financial assistance to the Central Australian Aboriginal Legal Aid Service to enable it to retain the community workers. The introduction of such funding arrangements will be seen as recognition of the Legal Service's effectiveness as a broadly based community legal aid agency.

364 The Department of Aboriginal Affairs submitted that it has been reluctant to support the employment of social workers or community workers by the Aboriginal legal services and to endorse the services' involvement in welfare matters on the grounds that the legal services should not be distracted from their primary responsibilities in the field of legal representation and that welfare work is a specialist field and should be carried out by welfare organisations. It acknowledged that 'problems will arise when welfare services are not readily available from other organisations, particularly where the welfare requirements arise from the Aboriginal's problems in the legal area'. However, it feared that 'as legal services are a contact point for Aboriginals on a whole range of issues, once they become involved in quasi-welfare activities it will be hard for them to draw the line'.

365 There was some variance in the views expressed by senior departmental officers who gave evidence to the Committee concerning policy towards the involvement of the legal services in welfare matters. On the one hand, it was stated that the Department has not encouraged, and has in fact discouraged, the legal services' activities in the welfare area. On the other hand, a more moderate view was also put to the Committee indicating that the Department's attitude is moving towards acceptance of the Aboriginal legal services' involvement in the general welfare area, particularly where welfare matters are connected with legal matters. In response to questioning concerning the effectiveness of welfare services provided for Aboriginals, it was suggested by the Department that State welfare agencies in co-operation with Aboriginal welfare groups are playing a significant role in meeting the needs of Aboriginals in the welfare area and that where there is sometimes a shortfall, this is taken up by the Aboriginal legal services. However, it was also felt that no State welfare agency is effectively meeting Aboriginals' social welfare needs. Nevertheless, the Department does not consider there is a role to be played in the welfare field by Aboriginal legal services in the future.

366 The Department of Aboriginal Affairs is also reluctant to accept and fund the Aboriginal legal services' activities in this area because the State Governments are responsible for providing welfare services to Aboriginals. Section 6 (a) of the Ministerial Directive describes categories of government financial responsibility for Aboriginals including:

> State responsibility for Aboriginals who, as citizens of the State, are entitled to receive general community services provided by the State out of its own resources including Commonwealth subventions. Like other disadvantaged groups, Aboriginals should be eligible to benefit from such community services on the principle of need. Because Aboriginal populations in the States are included in general revenue reimbursement calculations, the Commonwealth expects State Governments to provide at least a pro rata share for Aboriginals in their own programs and those supported by the Commonwealth, and to apply the 'priority of need' principle to Aboriginals in all such programs. State authorities should

accordingly be expected to accept their responsibilities for services such as houses, hospitals, water supplies, sewerage, electricity, roads, social welfare, etc.[4]

367 The Committee notes that there are numerous Aboriginal organisations funded by the Commonwealth through the Department of Aboriginal Affairs' grants-in-aid program to provide general welfare services for Aboriginals. In 1979 there were 23 such organisations operating in Queensland, 20 in New South Wales, 13 in Western Australia, 11 in South Australia, 5 in Victoria, 5 in the Northern Territory, and 1 in Tasmania. The Department's estimated expenditure for these organisations for 1979–80 amounted to $2,428,000. The majority of these organisations are small localised agencies often only staffed by one or two full-time or part-time people. They generally provide a limited service to a small clientele. Larger organisations include the Central Australian Aboriginal Congress in Alice Springs which employs seven Aboriginals and two non-Aboriginals. The functions of these organisations vary. Most provide general welfare referral and counselling services. Others are more specialised such as the Prisoners' Aid Associations in Sydney and Adelaide, the Awabatal Co-operative Limited which runs a cultural youth centre in Newcastle, the Born Free Club in Brisbane which provides meals and shelter for homeless Aboriginals, and the New Era Aboriginal Fellowship in Perth which provides welfare, social and cultural initiatives for Aboriginals. The Department of Aboriginal Affairs also provided $1,519,000 in grants to the States in 1979–80 for the provision of welfare-related services to Aboriginals. These grants are mainly provided to fund specific projects such as children's homes, hostels and special units within State welfare departments designed to cater for Aboriginals' welfare needs.

368 Evidence indicates that Aboriginals' welfare needs are not being met effectively by existing welfare agencies and that there is an urgent need to make welfare services more accessible to Aboriginals preferably through community-based Aboriginal organisations. The Department has not conducted any surveys to assess the needs of Aboriginals in welfare matters and the extent to which these needs are being met by State agencies. It did state in its submission, however, that a majority of the Aboriginal population of Australia live in rural or remote areas where community services and, in particular, preventive and after-care services, are generally less available than in centres of major population. It also acknowledged that Aboriginals face disadvantages in the civil area of the law and need general advice on matters such as tenancy problems and social security entitlements.

369 The Committee sees a need to identify and measure the welfare requirements of Aboriginal people; to assess the extent to which these requirements are being met by State welfare departments, Aboriginal community welfare agencies and other organisations; and to evaluate the effectiveness of existing programs in terms of their accessibility and acceptability to Aboriginal people and their appropriateness to meet the special welfare needs of Aboriginals. It is suggested that an evaluation of this nature take into account the delivery and rationalisation of all community services provided for Aboriginal people. Such an investigation should focus on the wider aspects of community development and seek to ensure that the Government's policy of self-determination is applied and realised at community level.

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[4] *Ministerial Directive and Programming Guidelines, Government Financial Assistance to Aboriginals 1980–81*, Department of Aboriginal Affairs.

Legal aid as a welfare function

370 In view of the Department of Aboriginal Affairs' reluctance to support the welfare-related activities of Aboriginal legal services and its directive that the legal services should not become involved in other programs outside the strictly legal area, it is significant that the Commonwealth Legal Aid Commission has stated that legal aid should be regarded as part of the delivery of welfare services. The Commission considered that the inadequate funding of legal aid generally can be attributed to the belief that legal aid should be treated as part of the administrative cost of the Attorney-General's Department rather than as part of the cost of providing for welfare services. The Commission has stated that:

> . . . funding of legal aid is properly to be regarded as part of the Welfare Budget. Its purpose is to assist people who cannot afford to protect themselves or assert their rights at law, just as the purpose of pensions and other welfare benefits is to assist those who are unable to provide for themselves in some other respect. Age pensions, invalidity pensions, supporting benefits and the like are an essential part of welfare but so is assistance to protect one's liberty, one's possessions, one's home, one's livelihood or one's reputation. On this view, legal aid might more appropriately have been made a function of the Department of Social Security but the fact that it has been placed within the administration of the Attorney-General should not be allowed to obscure its real nature as a social service.[5]

Conclusion

371 The Committee considers that since the Aboriginal legal services are trying to encourage Aboriginals to seek information about the law and to make use of legal processes, it would be counter-productive for them to deny legal clients assistance in welfare matters which are of vital importance to them. Because the legal services are essentially poverty law practices, they inevitably encounter welfare-related problems. It is important that when Aboriginal clients are in crisis situations, as is often the case, they have immediate access to assistance with extra-legal problems which are generally inextricable from and closely related to their needs for legal advice and assistance. The Committee believes it is a proper function of Aboriginal legal services to provide advice and assistance in welfare matters where these matters arise from related legal problems and particularly in areas where welfare services are not readily available or accessible to Aboriginal communities. However, it is necessary to ensure that the Aboriginal legal services' participation in welfare-related activities remains ancillary to their principal role of providing legal advice and assistance and that the range of welfare matters undertaken by the services is not so great as to subvert their capacity to provide an effective service in legal matters. The Committee therefore considers it is important that the legal services examine carefully the extent to which their participation in welfare matters may divert staff and resources from the provision of representation in criminal and civil proceedings and that the services ensure that a proper perspective of priorities is maintained.

372 The Committee recommends that *Aboriginal legal services provide advice and assistance in welfare matters where these arise from related legal problems, and particularly in areas where welfare services are not readily available to Aboriginal communities.* The Committee also recommends that *as a matter of urgency, the Minister for Aboriginal Affairs and the Minister for Social Security*

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[5] Commonwealth Legal Aid Commission, *Annual Report* 1978–79, AGPS, Canberra, 1979, p. 16.

investigate the delivery of welfare services to Aboriginals, particularly in rural areas, and that as part of the investigation the Ministers:

- *identify and measure the welfare needs and demands of Aboriginal people;*
- *assess the extent to which these needs and demands are being met by State welfare departments, Aboriginal community welfare agencies, and other organisations;*
- *evaluate the effectiveness of existing welfare programs in terms of their accessibility and acceptability to Aboriginal people;*
- *assess the most appropriate means of meeting the special welfare needs of Aboriginals; and*
- *seek the views of community-based Aboriginal organisations concerned with the wellbeing of Aboriginal people, including the Aboriginal legal services.*

12. Community Legal Education

373 The Aboriginal legal services acknowledge the need to develop comprehensive community legal education programs. At the present time, however, they feel compelled to give priority to the provision of representation and advice to as many clients as possible. While they are attempting to meet the immediate needs and demands of their clients in this area within limited resources, they are unable to undertake constructive long-term preventive programs or focus on the causes underlying Aboriginals' over-representation in the criminal legal system and under-representation in the civil jurisdiction of the law.

Activities of the Aboriginal legal services

374 The Aboriginal legal services' participation in community legal education is generally limited to an indirect and incidental educative role. The very existence of Aboriginal legal services has increased Aboriginals' awareness of their legal rights and obligations and by encouraging people to approach them for advice on a wide range of matters the Aboriginal legal services are playing a preventive role. Clients of Aboriginal legal services who are represented in criminal courts or who seek assistance in civil matters are part of an inevitable and continual educative process. However, for the majority of Aboriginals their contact with the legal services is the only education in the law they receive. It is a poor reflection on community services generally that Aboriginals only acquire knowledge about their rights in the law and its administration through the legal process and particularly through court appearances.

375 Some Aboriginal legal services have attempted to meet the needs of Aboriginals for information on existing laws, legal practices and legal rights. In 1977 the North Australian Aboriginal Legal Aid Service drafted a number of simply illustrated pamphlets explaining basic legal rights and obligations. These were to be distributed amongst the Aboriginal communities within the Legal Service's area of operation. Owing to insufficient resources, the pamphlets were never completed. A paper prepared by the Service comparing Northern Territory and Commonwealth laws on the incorporation of councils and associations was well received by Aboriginal communities. The Service sees this as a forerunner to similar publications on matters of particular importance to Aboriginals living in remote Aboriginal communities including laws relating to driving under the influence of alcohol, police offences and other relevant legislation.

376 Most Aboriginal legal services have prepared and distributed printed advice cards as illustrated below. The cards provide limited information on the rights of arrested persons, advice in dealing with the police and instructions for contacting the legal service for assistance.

Educational needs of Aboriginal people

377 The Committee believes there is a need to provide comprehensive legal education for Aboriginal people and to ensure that they are aware of their basic legal rights and obligations and can identify matters in respect of which there is, or may be, a need to seek legal advice and assistance. Aboriginal communities need education in the range of legal matters and associated non-legal matters that most affect their daily lives. They need to be aware of their rights relating to police arrest, bail, interrogation, legal advice and representation. They also

ABORIGINAL LEGAL SERVICE

OFFICE	STD	TELEPHONES
7 BOTANY ST., REDFERN 2016	02 02	699 1109 699 2513
P.O. BOX 6, COWRA 2794	063	42 2053
120 FITZMAURICE ST. WAGGA 2650	069	21 3539
ROOM 10/48 PRINCE ST., GRAFTON 2460	066	42 5298
P.O. BOX 292, WALGETT 2385	011	364
59 FROME ST., MOREE 2400	067	52 3244
43-45 BELGRAVE ST., KEMPSEY 2440	065	62 6546

LEGAL RIGHTS

IF YOU ARE ARRESTED

DO NOT . . . Resist arrest.

DO NOT . . . Be abusive or disorderly.

DO NOT . . . Answer any questions except to give your name and address.

DO NOT . . . Give a statement.

DO NOT . . . Plead guilty to anything (even if the police tell you to) until you have spoken to a solicitor.

IF YOU ARE ARRESTED

DO . . . Ask why you are being arrested.

DO . . . Give your name and address.

DO . . . Ask the police for a telephone so you can contact the Aboriginal Legal Service.

DO . . . Ask for bail.

need to know about the elements of a contract and contractual obligations, consumer credit, contracts of sale, time payments and hire purchase, problems of default and over-commitment, and repossession of goods. They need to be informed about employment conditions, award wages, union membership, workers' compensation, social security pensions and benefits, and rights of appeal. Most need to know about the rules that govern marriage, divorce, adoption, guardianship, and care and protection applications. In urban areas, Aboriginals need to know about landlord-tenant law, terms of leases, termination of tenancy, and eviction procedures. There is also an important need to provide Aboriginal people with information on the availability of legal aid agencies and welfare services and to promote their awareness of the functions of these organisations including the Aboriginal legal services and the range of services they provide. The lack of knowledge amongst Aboriginal people concerning the management and operation of the Aboriginal legal services and Aboriginals' lack of awareness of their right to participate in legal service meetings and influence the operation of the services through the election of community representatives are also matters of concern.

Development of educational programs

378 *The Committee considers that the Aboriginal legal services are the appropriate* organisations to design and implement comprehensive legal education programs for Aboriginal people. In the first instance they could be instrumental in the preparation and design of legal educational material which takes into account the special legal requirements of different Aboriginal groups and different State and Territory laws and legal procedures. This material could be in the form of pamphlets, brochures, booklets, advertisements and, in remote communities, tape recordings. Where necessary, it could be published or recorded in different Aboriginal languages.

379 The benefits of public legal education have been recognised by the Commonwealth and State legal aid commissions and legal education is regarded by them as an integral part of their legal aid programs. The South Australian Legal Services Commission and the Legal Aid Commission of Western Australia have prepared and published a range of short, easily understood pamphlets designed to inform people of their legal rights and obligations. The pamphlets also provide advice about action that can be taken to avoid legal problems, and information about sources of assistance for those needing help. The pamphlets cover such matters as the role and powers of the police, workers' rights and compensation entitlements, motor vehicle accidents, social security pensions, benefits and appeals, discrimination, and family law matters. The South Australian Legal Services Commission informed the Committee that it believes the increase in the number of people seeking assistance from its offices has resulted from this public education program. The Commission employs one staff member who is responsible for community education programs. The Commission considered that its budget allocation in this area was minimal in terms of its total expenditure on legal aid.

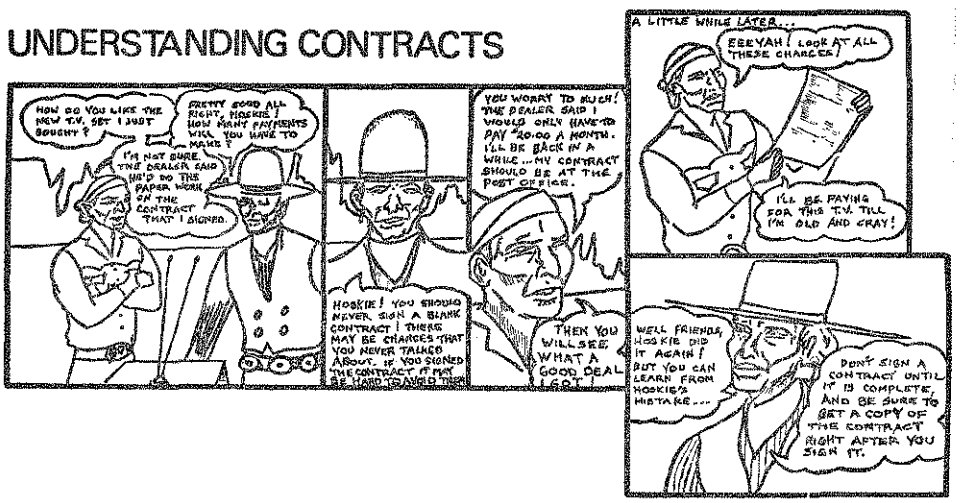
380 The benefits of a co-ordinated educational campaign organised by the Aboriginal legal services could be considerable. Because Aboriginal legal services' funds are limited, it seems reasonable to suggest that wherever practicable educational materials should be prepared jointly. This is an area in which the legal services can co-operate and take initiatives to seek the assistance and advice of the Commonwealth Legal Aid Commission, the Australian Legal Education Council, and the Department of Aboriginal Affairs in the design and production of appropriate material.

Role of the Commonwealth Legal Aid Commission

381 The Commonwealth Legal Aid Commission is required to advise the Attorney-General as to educational programs that would be effective in promoting an understanding by the public or by sections of the public that have special needs in this respect, of their rights, powers, privileges and duties under laws in force in Australia.[1] In 1979 the Commission sponsored a seminar on community legal education in Melbourne. The primary object of the seminar was to gather information utilising diversified specialist interests and experiences in community legal education throughout Australia. The seminar was attended by representatives of the Australian Legal Education Council, the private legal profession, educational institutions, the judiciary, State and Territory legal aid commissions, the Australian Law Reform Commission, the Australian Legal Aid Office, community-based legal services, the media and government departments. One Aboriginal legal service was asked to nominate a representative to attend the seminar and financial assistance was provided by the Commonwealth Legal Aid Commission for this purpose. The information collected at the seminar is to be published and will form the basis for the Commission to make recommendations to the Attorney-General on community legal education programs.

Role of the Department of Aboriginal Affairs

382 The Department of Aboriginal Affairs' role in the promotion of legal education should primarily be one of providing financial assistance although, where requested, it should support and assist the legal services to co-ordinate activities and seek the co-operation of legal education organisations. The American Department of Native Affairs plays a major role in the area of legal education and one of its functions is to produce educational materials directed towards American Indians. An example of their approach to community legal education is set out below.



[1] *Commonwealth Legal Aid Commission Act* 1977, section 6 (h).

383 The Committee recommends that *the Government encourage and provide financial support to Aboriginal legal services which take initiatives to develop community legal education materials and promote community legal education programs.*

Educational role of the Aboriginal legal services in the wider Australian community

384 The Aboriginal legal services have also adopted a converse educative role by drawing the attention of the non-Aboriginal community to the special problems and legal needs of Aboriginal people. They have achieved this not only in the course of court proceedings but also by working closely with non-Aboriginal organisations and agencies which deal directly with Aboriginals including police authorities, child placement agencies, welfare organisations, and rehabilitation services. In this respect the Aboriginal legal services have already achieved a great deal and have made considerable progress towards securing understanding and acceptance of the special legal needs and demands of Aboriginal people. They have highlighted the inadequacies of existing legal and administrative systems and procedures for dealing with Aboriginal people and have been instrumental in implementing positive changes and improvements in many areas of the legal process: Aboriginal-police relations and investigation procedures; the treatment of Aboriginal juvenile offenders by courts and welfare authorities; the attitudes of members of the judiciary and others towards Aboriginals, their socio-cultural background, their vulnerability and disadvantage in the legal system and their special needs for legal assistance; and recognition of the importance and influence of traditional Aboriginal customs and laws.