SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION

Question No. 94

Senator Ludwig asked the following question:

Aboriginal and Torres Strait Islanders Social Justice Commissioner

- Are you aware of the proposed new Tender process for Aboriginal and Torres Strait Islander Legal Services (ATSILS)?
- What concerns do you have about the restrictions imposed in the tender, and their implications for access to legal assistance?
- In particular, how do the new provisions that limit access to people with prior convictions, accord with Australia's obligations to provide access to justice for indigenous people?
- How do the directions of the new ATSILS accord with recommendations from the deaths in custody inquiry?
- What will be the impact if the successful tenderers for the new services are not indigenous controlled, or employ indigenous people (neither of these are requirements under the tender brief)?
- What do you see as the impact on indigenous communities if the existing ATSILS are forced to close down?

I am advised that the answer to the honourable Senator's question is as follows:

In response to the first part of the question, the Social Justice Commissioner is aware of the proposed tender process for ATSILS and associated reforms, and has addressed issues of concern to him in correspondence dated 7 May 2004 with the Manager of the Law and Justice Branch, Aboriginal and Torres Strait Islander Services (ATSIS) ('Attachment A'). On 21 May 2004, the Commissioner also provided these comments as a submission to the Joint Committee of Public Accounts and Audit in relation to their review of *Audit Report 13, 2003 – 2004, ATSIS Law and Justice Program*. The Commissioner's opening statement to the Committee is also attached ('Attachment B').

In response to the second and third part of the question, the Commissioner's concerns are set out in detail in the Commissioner's correspondence with the Manager of the Law and Justice Branch, ATSIS attached to this answer.

In response to the fourth part of the question, the Social Justice Commissioner is concerned that the proposed reforms may not accord with a number of recommendations

of the *Royal Commission into Aboriginal Deaths in Custody* (1991) (RCIADIC). The RCIADIC advocated that the ATSILS play a central role in:

- Preventing Aboriginal people, particularly juveniles, coming into contact with the criminal justice system;
- Providing assistance to as many Aboriginal people as possible once they had been in contact with the criminal justice system;
- Supporting Aboriginal people in prison;
- Supporting governments and the judiciary to deal more effectively with Aboriginal people, particularly in relation to the criminal justice system.

The Commissioner is concerned that the proposed reforms may not accord with these principles elaborated in the RCIADIC. The Commissioner has three main concerns:

- That what were broadly ‘legal services’ – with preventative, liaison and advocacy functions – are being restricted to narrowly conceived ‘legal aid services’. The RCIADIC identified the importance of a broader role for ATSILS in recommendations 105, 242-3, 277 and 330. This issue is also addressed in the correspondence with ATSIS;
- That services targeting women and children at risk from domestic violence are being prioritised at the expense of services targeting people at risk of incarceration. Instead, services to women and children at risk (which the Commissioner has advocated for some time) should be provided for with additional (and quarantined) funding, so that services to people at risk of incarceration remain unaffected;
- That matching funding to the level of legal need is not being addressed in the reforms as per recommendations 108, 226g and 234.

In response to the fifth part of the question, the Commissioner notes that:

- ATSILS are well placed to deliver culturally appropriate and accessible legal services to Indigenous people. There are insufficient provisions in the tender proposals for ensuring such culturally accessible service delivery (this point is addressed in the correspondence with ATSIS).
- Indigenous clients present unique challenges to legal aid services and this must be acknowledged in the design of legal services. Concerns regarding this issue are set out in the Commissioner’s correspondence with ATSIS.
- It is easier to establish accountability between Indigenous controlled organisations and the communities they serve. Existing ATSILS are directly accountable to their communities.
- ATSILS are significant employers of Indigenous people. In South Australia, for example, they are the single biggest employer of Indigenous persons.

In his response to the sixth part of the question, the Commissioner refers to the correspondence with the Manager of the Law and Justice Branch, ATSIS. The Commissioner also notes the following concerns:

- That ATSILS have existed, in some cases, for over 30 years. Over this lengthy period of time, ATSILS have developed culturally appropriate models of service delivery for Indigenous peoples. The loss of ATSILS' corporate memory would be a great set-back to Indigenous people.
- The ATSILS are a significant and representative voice of Indigenous people. ATSILS are ideally placed to advise governments in relation to Indigenous people and the law and have been actively involved in developments in this area. ATSILS also act as community representatives and advocates in addressing issues such as public drunkenness and responses to it, petrol sniffing, substance abuse and family violence and so on.
- The 2003 review of ATSIC's Legal and Preventative Services Program found that ATSILS are the 'legal aid of choice' for Indigenous people in Australia with 89% of all Indigenous matters being handled by them in 2000-01.
- The risk of failure of new services is high, potentially causing even more disruption to Indigenous communities.

Finally, the Commissioner notes that closing the ATSILS down will only distract from what he perceives as the real issue of concern in relation to Indigenous legal services: the identified shortfalls in funding. He notes that the 2003 review of ATSIC's law and justice branch estimated the shortfall in funding to be in the order of $25.6 million nationally. Significantly, there has been little real increase in funding for ATSILS in the past six years despite the unacceptably high rates of over-representation of Indigenous peoples in the criminal justice system and lack of progress in reducing this.

Attachment A – Correspondence with the Manager of the Law and Justice Branch, Aboriginal and Torres Strait Islander Services (ATSIS) dated 7 May 2004

7 May 2004

Mr John Boersig
Manager, Law and Justice Branch
Aboriginal and Torres Strait Islander Services
PO Box 17
Woden ACT 2606

By Fax: 02 6282 9353

Dear Mr Boersig

Re: Tendering of Aboriginal and Torres Strait Islander Legal Services

I refer to Aboriginal and Torres Strait Islander Services' (ATSIS) request for comments on the proposed reforms to the Government's provision of Indigenous legal services as set out in the *Exposure Draft Purchasing Arrangements, Legal Services Contract 2005 – 2007 for Legal Aid Services for Indigenous Australians* (Exposure Draft), including revised *Policy Directions for the Delivery of Legal Aid Services to Indigenous Australians* (Policy Directions).

I am concerned at a number of proposals contained within the Exposure Draft and Policy Directions. My concerns relate broadly to two issues. First, that certain provisions of the Exposure Draft may breach the prohibition of racial discrimination in the *Racial Discrimination Act 1975* (Cth). Second, that the tendering process does not address longstanding difficulties in the provision of legal services to Indigenous peoples and that aspects of the tendering process may in fact further disadvantage Indigenous peoples in the provision of legal services.

Compliance with the *Racial Discrimination Act 1975* (Cth)

The first concern I have with the tendering process is that certain provisions of the Exposure Draft may breach the prohibition of racial discrimination in the *Racial Discrimination Act 1975* (Cth) (herein RDA). This Act makes direct and indirect discrimination based on race unlawful.

Section 9(1) of the RDA prohibits direct racial discrimination:

> It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

This section makes unlawful a wide range of acts in a wide range of situations. It does not require an intention or motive to discriminate[1]. Section 9(1A) of the RDA also prohibits indirect discrimination:

> Where:
> a. a person requires another person to comply with a term, condition or requirement which is not reasonable having regard to the circumstances of the case; and
> b. the other person does not or cannot comply with the term, condition or requirement; and
> c. the requirement to comply has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, by persons of the same race, colour, descent or national or ethnic origin as the other person, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life;
>
> the act of requiring such compliance is to be treated, for the purposes of this Part, as an act involving a distinction based on, or an act done by reason of, the other person's race, colour, descent or national or ethnic origin.

Only a discriminatory effect needs to be proven to show indirect discrimination, as opposed to discrimination 'based on' race in s 9(1). The RDA also specifically prohibits discrimination in the provision of services in section 13 of the Act.

Two of the stated priorities in the Policy Directions may give rise to breaches of the RDA. These priorities are:

> 3.9 Although judgements should be made in the circumstances of the individual applicant and the particular case, it would be the exception rather than the rule that criminal representation and casework assistance should be provided to persons charged with offences such as minor traffic offences or public drunkenness.
>
> 3.10 Where a Provider has previously represented an applicant charged with a criminal offence involving violence, assault or the breach of a restraining order, and the circumstances of the two cases are the same or similar, the Provider may refuse to represent the applicant and refer the applicant instead to a service providing appropriate counselling and support (where such a service is available and reasonably accessible).

It should be noted that paragraphs 3.9 and 3.10 have been chosen as examples to illustrate the possible application of the RDA and there may be other aspects of the Exposure Draft that raise similar issues.

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1 *Australian Medical Council v Wilson* (1996) 68 FCR 46; *Macedonian Teachers' Association of Victoria Inc v Human Rights and Equal Opportunities Commission* (1998) 91 FCR 8, 34, 40-1.

If the criteria in paragraphs 3.9 and 3.10 of the Policy Directions are imposed by the Commonwealth only in relation to the provision of legal services to Indigenous people and not, for example, to non-Indigenous people under other Commonwealth legal aid (or similar) schemes, they may breach s 9(1) of the RDA. By applying such criteria only to Indigenous people, a distinction is made, based on race, and which may impair the equal enjoyment of Indigenous people to the rights to a fair trial and access to legal advice and assistance.

It is relevant to note that the criterion set out in paragraph 3.10 of the Policy Directions applies to people who have previously been *charged*, but not necessarily convicted, of a criminal offence involving violence, assault or the breach of a restraining order. Therefore, a Provider would be acting in accordance with the Policy Directions by refusing to provide legal services to an Indigenous person even though a previous charge against that person was not proceeded with, or was proceeded with and the accused person was found not guilty of the offence. I question whether such a result would have been intended.

It is also possible that in circumstances where a Provider provides legal services to both Indigenous and non-Indigenous people and applies these criteria only to Indigenous clients in accordance with the *Legal Services Contract*, then the Provider may be at risk of contravening s 9(1) of the RDA. In these circumstances, the Commonwealth may also be liable under s 17 of the RDA which makes it unlawful to incite, assist or promote (whether by financial assistance or otherwise) the doing of an act that is unlawful under the RDA.

If the criteria in paragraphs 3.9 and 3.10 are imposed by the Commonwealth uniformly to Indigenous and non-Indigenous people, for example by Commonwealth legal aid, (or similar) schemes or in accordance with paragraph 2.2 of the Policy Directions, this may still give rise to a breach of the indirect discrimination provisions contained in section 9(1A) of the RDA.

Paragraph 3.9, for example, may have the practical effect of imposing a requirement that an Indigenous person charged with an offence such as a minor traffic offence or public drunkenness be required to represent him or herself, or self-fund their legal defence. Whether or not this a reasonable requirement requires weighing of the nature and extent of the discriminatory effect, on the one hand, against the reasons advanced in favour of the requirement or condition on the other and all of the circumstances of the case must be taken into account[2].

However, some factors relevant to this weighing exercise could include the generally high levels of educational, health, social, economic and/or language disadvantage experienced by Indigenous people, particularly in relation to those in contact with the legal system. Other factors, such as the reasons relied on by a respondent for the imposition of such a requirement, will also be relevant.

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2 *Styles v Secretary Department of Foreign Affairs and Trade* (1988) 84 ALR 408, 429.

Many Indigenous people may not be able to practically and effectively comply with such a requirement. The result of this is an interference again with the rights to a fair trial and access to legal advice and assistance.

Statistical evidence suggests that restrictions on legal services being provided to people charged with minor traffic offences or public drunkenness will have a significant (and disparate) impact on Indigenous peoples. For example:

- New South Wales Local Criminal Court Statistics show that in 2000 the top three proven offence categories for Aboriginal people in NSW were:
    - assault, (20.7% of total Indigenous offences in contrast to 10.7% non-Indigenous offences);
    - public order offences (13% of total Indigenous offences in contrast to 7.2% of non-Indigenous offences), and;
    - road traffic/ motor vehicle regulator offences (22.8% of total Indigenous offences in contrast to 32.8% of non-Indigenous offences).[3]
- In 2002, the ABS *Prisoners in Australia* survey reported 6.2% of Indigenous prisoners were serving sentences of approximately 9 months on average for 'driving licence offences' and 'regulatory driving offences'[4]. The question of what is meant by 'minor driving offences' in the Exposure Draft needs to be clarified to ensure this group are not left unable to be represented by Aboriginal legal services or unrepresented.

Similarly, restrictions on the provision of legal services based on a client having previously been represented on a similar charge (in the limited circumstances set out in para 3.10 of the Policy Directions) may disproportionately impact on Indigenous peoples. The NSW Bureau of Crime Statistics and Research shows that among Aboriginal people who appeared in court, only a small minority (17% of Aboriginal male defendants and 27% of Aboriginal female defendants) had no previous court appearances.[5] This statistics relates to all offending and not solely offences of a violent nature. Nonetheless it suggests that the proposed tender arrangement may have the consequence of disproportionately impacting on Indigenous people in the provision of legal services.

In light of the concerns expressed in relation to the RDA, I recommend the following:

Recommendation 1: That provisions that may potentially breach the *Racial Discrimination Act* 1975 (Cth), including paragraphs 3.9 and 3.10 of the Policy Directions, be removed from the final tender document.

Recommendation 2: That the Policy Directions ensure that funded legal services for Indigenous peoples assist all applicants regardless of their previous history of representation or criminal record.

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3 Cuneen, C, *NSW Aboriginal Justice Plan, Discussion Paper,* Aboriginal Justice Advocacy Council, Sydney, 2002, p 16 -17. Table 3.1.1http://www.lawlink.nsw.gov.au/ajac.nsf/pages/reports

4 Australian Bureau of Statistics, *Prisoners in Australia - 30 June 2002*, *op.cit*, p 27, table 12.

5 Aboriginal Justice Advocacy Council, *E News*, No 51. October 2003. http://www.lawlink.nsw.gov.au/ajac

I note that Part 3 of the Exposure Draft explicitly identifies that successful tenderers must comply with the provisions of a range of commonwealth laws, such as the *Privacy Act 1988*. I am concerned, however, that the tender documents do not explicitly identify compliance with the RDA and other federal anti-discrimination laws in Part 3 of the Exposure Draft.

In light of the concerns expressed above and the importance of ensuring culturally appropriate service delivery to Indigenous peoples, I consider it would be most appropriate that the tender documents explicitly identified the obligation of service providers to comply with the RDA, *Sex Discrimination Act 1983* (Cth), *Disability Discrimination Act 1992* (Cth) and other relevant laws.

Recommendation 3: That the tender documents explicitly identify compliance with all federal anti-discrimination laws, including the *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1983* (Cth) and *Disability Discrimination Act 1992* (Cth).

The tender process may further disadvantage Indigenous people in the delivery of legal services to them

The second main set of concerns that I have about the proposed reforms is that they do not address longstanding difficulties in the provision of legal services to Indigenous peoples and that aspects of the tendering process may ultimately further disadvantage Indigenous peoples.

In considering the proposals contained within the Exposure Draft and Policy Directions, I have paid particular attention to the current situation experienced by Indigenous peoples in the provision of legal services and contact with the legal system.

The following matters must form the basis of any proposed reform to the delivery of legal services to Indigenous peoples:

- acknowledgement of the inequality experienced by Indigenous peoples as reflected through legal processes;
- the existence of legal obligations to remedy such inequality through the adoption of special measures;
- the recognition of the existence of significant cultural issues that must be addressed to ensure that the delivery of legal services is culturally appropriate and accessible; and
- acknowledgement of the development over thirty plus years of specific Indigenous legal services and modes of service delivery that address these issues.

The context in which legal services are delivered to Indigenous peoples is one in which Indigenous peoples continue to experience significantly higher rates of contact with criminal justice processes than other Australians. Efforts to address this situation have been under-funded for at least the past decade. The under-resourcing of criminal matters has also impacted on Indigenous peoples through a lack of availability of legal services in civil matters, such as family law, consumer law and discrimination. It has also limited the ability of Aboriginal and Torres Strait Islander Legal Services to undertake preventative and educative activities in Indigenous communities.
The appropriate starting point for any reform to processes for the provision of legal services to Indigenous peoples must be an acknowledgement of the extent of the disadvantage experienced by Indigenous peoples in relation to legal services. It must be acknowledged, for example, that:

- The rate of incarceration of Aborigines and Torres Strait Islanders remains unacceptably high. Since 1999 Indigenous peoples have constituted approximately 20% of the prison population compared to 14% in 1991 (at the time of the Royal Commission into Aboriginal Deaths in Custody).
- Since 1997, Indigenous juveniles have also consistently constituted 42% of all juveniles in detention nationally despite comprising less than four per cent of the total juvenile population.
- There has also been an increase of approximately 250% over the past decade in the imprisonment of Indigenous women, who were incarcerated at a rate 19.3 times that of non-Indigenous women in June 2003.
- A recent study in New South Wales demonstrates the extent of contact of Indigenous people with criminal justice processes. Between 1997 and 2001, about 25,000 Indigenous people appeared in a NSW Court charged with a criminal offence. This constitutes 28.6% of the total NSW Indigenous population. In the year 2001 alone, nearly one in five Indigenous males in NSW appeared in Court charged with a criminal offence. For Indigenous males aged 20-24 years, this rate increased to over 40%.[6]
- There are also significant concerns at the present lack of availability of legal services for Indigenous women, particularly relating to issues of family violence.
- Indigenous children continue to be over-represented in care and protection matters, with rates of over-representation increasing as the seriousness of the intervention needed increases.[7]

These factors indicate the existence of significant inequality experienced by Indigenous peoples.

The ongoing failure to remedy this inequality constitutes a violation of Australia's human rights obligations. This was noted in the concluding observations of the United Nations

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6 Weatherburn, D, Lind, B, and Hua, J, *'Contact with the New South Wales court and prison systems: The influence of age, Indigenous status and gender'* 78 Crime and Justice Bulletin (NSW Bureau of Crime Statistics and Research) 1, 2003, pp 4-5, www.lawlink.nsw.gov.au/bocsar1.nsf/pages/cjb78text.

7 For an overview of contact of Indigenous peoples with criminal justice systems see: Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2003*, HREOC Sydney 2003, Chapter 5 and Appendix 1.

Committee on the Elimination Racial Discrimination, Human Rights Committee, Committee on Economic, Social and Cultural Rights, and Committee Against Torture when Australia appeared each committee for the examination of its periodic reports under the relevant treaties in 2000[8].

Australia's international human rights obligations, particularly under the International Convention on the Elimination of All Forms of Racial Discrimination; International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights, require the taking of steps to address these disparities within the shortest possible timeframe and with the commitment of maximum resources.

The taking of such steps would justify the provision of additional measures in the provision of legal services for Indigenous peoples. For example, Article 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination provides that:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups of individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination…

Section 8(1) of the *Racial Discrimination Act 1975* (Cth) confirms that special measures are an exception to the prohibition of racial discrimination.

There are also significant cultural issues that must be acknowledged in the delivery of legal services to Aborigines and Torres Strait Islander peoples.

Aboriginal and Torres Strait Islander Legal Services (ATSILS), some of which have now been in existence for over 30 years, were set up to bridge the gap between Indigenous peoples and a justice system that is often alien in its concepts and operations. ATSILS have adopted particular models of service delivery which address the unique cultural characteristics of Indigenous communities as well as difficulties that are constantly faced by Indigenous peoples.

For example, this ranges from addressing challenges that arise from delivering legal services to people who often experience extreme poverty, may have a low level of education and literacy, who are distrustful of non-Indigenous service providers due to experiences of discrimination and marginalisation, through to circumstances where English is not the first language of the client, and where concepts of the non-Indigenous legal system are alien and not easily transferable to Indigenous culture.

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[8] Committee Against Torture, *Concluding Observations, Australia,*21/11/00 A/56/44, paras 47-53; Committee on Economic, Social and Cultural Rights, *Concluding Observations; Australia* 01/09/22000 E/C.12/1/Add.50 paras 14 -37; Human Rights Committee, *Concluding Observations: Australia.* 24/07/2000. A/55/40,paras.498-528. These reports can be found at the website of the Aboriginal and Torres Strait Islander Social Justice Commissioner at http://www.humanrights.gov.au/social_justice/internat_develop.html.

These present challenges to any provider of legal services. For example, the lack of telephones in many remote communities and Indigenous households may mean that contacting a client for instructions can be protracted and expensive. Similarly, linking up specialists and clients in remote communities for an injury assessment is difficult, and can result in money and time being wasted. Indigenous people's mobility, culturally different concepts of time and, in some cases, drug and alcohol problems may also place clients out of reach. Client literacy may make it unreasonable for legal services to rely on correspondence, demanding appointments instead.

A central feature of their approach has been the reliance on Aboriginal Field Officers. There are no equivalents of Aboriginal Field Officers in Legal Aid Commissions or other legal services. Aboriginal Field officers act as intermediaries between clients and solicitors at ATSILS. Their duties range from obtaining instructions, preparing statements, arranging appointments and visits, to assisting clients upon arrest and in bail applications. Their cultural knowledge and familiarity with their communities make them a unique and valuable resource in the delivery of legal services to Indigenous peoples. There remain, however, long standing issues relating to appropriate support, funding and training for Aboriginal Field Officers.[9]

Over a lengthy period of time, ATSILS have developed culturally appropriate models of service delivery for Indigenous peoples. This is reflected in the reliance of Indigenous peoples on ATSILS for legal services. The 2003 review of ATSIC's Legal and Preventative Services Program found that ATSILS are the 'legal aid of choice' for Indigenous people in Australia with 89% of all Indigenous matters being handled by them in 2000-01.[10]

Any reform of the delivery of legal services to Indigenous peoples must acknowledge the distinct cultural issues faced by Indigenous peoples in the provision of legal services and ensure that services are culturally accessible. Reform must be built on acknowledgement of the substantial role that ATSILS have played in delivering appropriate legal services to Indigenous peoples over a lengthy period of time, and on the unique methods of service delivery that have been developed over a significant period of time.

I have taken these matters into account in formulating my views about the Exposure Draft and Policy Directions. As a consequence, I consider that the tender process raises the following concerns.

- The tender process does not remedy identified shortfalls in funding for legal services for Indigenous peoples.

The 2003 review of ATSIC's law and justice branch estimated the shortfall in funding to be in the order of $25.6 million nationally.[11] Significantly, there has been little real increase in

[9] See for example, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 1997*, Chapter 5 at p 119 -120. The National Indigenous Legal Studies Curriculum and National Indigenous Legal Advocacy Courses have been developed to address many of these concerns. See further: http://www.humanrights.gov.au/social_justice/nilac/index.html

[10] Office of Evaluation and Audit, Aboriginal and Torres Strait Islander Commission, (OEA/ATSIC) *Evaluation of the Legal and Preventative Services Program*, Commonwealth of Australia, Canberra 2003, p 3.

[11] If ATSILS' client representation was costed at a level charged by private practitioners to LAC-outsourced clients

funding for ATSILS in the past six years despite the unacceptably high rates of over-representation of Indigenous peoples in the criminal justice system and lack of progress in reducing this.

A positive aspect of the tender process, however, is the proposal to introduce triennial funding for Indigenous legal services. This remedies a longstanding concern whereby ATSILS have to date operated on annual grants (in contrast to LACs that are funded on 4 year funding cycles). This has retarded the ability of ATSILS to plan long term and offer contracts to employees longer than one year, contributing to a high staff turn over.

- The tender process seeks to re-prioritise the focus of legal services without providing additional funding. This may impact on the delivery of services for criminal matters and significant cost-shifting to other legal service providers

The introduction of the two new priority categories (where the safety or welfare of child at risk and where the personal safety of the applicant or person in applicants care is at risk) is to be welcomed and identifies a longstanding problem in the provision of legal services to Indigenous peoples, especially Indigenous women.

It is of concern that there has been no commitment of additional funding in the tender process to enable Indigenous legal service providers to provide greater attention to the legal needs of these groups, while also continuing to service the existing priority group of people at risk of being detained.

As I stated in the *Social Justice Report 2003*:

> There is an urgent need to ensure appropriate funding levels for ATSILS in order to provide a greater focus on the legal needs of Indigenous women as well as a greater focus on preventative action and community education. At the very least, there is also an urgent need for the federal government to allocate additional, quarantined, funding to expand the Family Violence Prevention Legal Service Program. Such funding needs to be new money as there is clearly no capacity for ATSIS/ATSIC, through its support for ATSILS, to re-allocate existing resources.[12]

It is a matter of great concern that service providers, faced with inadequate resources, will be placed in a situation of having to choose between focusing on child welfare matters and matters involving family violence or providing support to criminal matters where the client risks being detained in custody. As paragraphs 3.9 and 3.10 of the Policy Directions indicate, it is likely that Indigenous people facing minor criminal charges will be turned away from legal services specifically designed to address their situation. This is of particular concern given that Indigenous people are significantly over-represented in minor

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(which was set as a benchmark for the cost of LAC services because 75% of LAC work is so outsourced. OEA/ATSIC *op.cit*, p 107.

12 Aboriginal and Torres Strait Islander Social Justice Commisisoner, *Social Justice Report 2003*, p186.

offence categories and that these often operate as an entry point into the criminal justice system and incarceration.

It is most likely that if implemented, the tender guidelines would result in Indigenous peoples charged with minor criminal offences being without legal representation or referred on to Legal Aid Commissions. The impact of this under-resourcing will be to shift the cost of representation to Legal Aid Commissions.

- The tender process funds services on a reactive rather than proactive basis, with a reduced focus on education, prevention, law reform and advocacy of Indigenous rights.

The tender process suggests that the scope of legal services currently provided, largely by ATSILS, will be reduced should the proposed arrangements come into effect. These changes will have the effect of refocusing legal service delivery from a more proactive approach which includes education, an emphasis on prevention, advocacy and law reform to an almost exclusively responsive framework that reacts to individual cases.

The Exposure Draft deletes important priorities contained in the previous Policy Framework. These include providing services where:

> 4.1.1.c "where cultural and personal wellbeing is at risk";
> 4.1.1.f. "where circumstances of public interest exist and assistance will provide substantial benefit to individuals, their families and Indigenous Australians generally".

Further, under the Exposure Draft, input on law reform and justice advocacy services provided by ATSILS would be discontinued even though they are integral to the objectives of improving the access of Indigenous people to legal aid services and progressing the human rights of Indigenous people in Australia.

These provisions amount to a substantive reduction in legal representation and advocacy for Indigenous peoples.

Recommendation 4: That the tender documents be amended to ensure that the priorities set out in 4.1.1.c and 4.1.1.f. of the present Policy Framework are retained, as well as ensure that service providers maintain the capacity to contribute to law reform and advocacy for Indigenous peoples

- The tender documents do not recognise the integral role of ATSILS in acting as a referral point and assisting Indigenous peoples in identifying legal processes for resolving issues.

The tender documents provide that funded services should not duplicate the work of ombudsmen, consumer affairs departments, small claims courts, the Social Security Appeals Tribunal, disability discrimination services, welfare rights services and tenants right services (in paragraph 4.3, Policy Directions).

ATSILS and other legal services for Indigenous peoples can play an invaluable role in identifying legal options and in assisting Indigenous peoples in using these processes. This restriction on legal services has the potential to significantly impede the ability of Indigenous people to utilise tribunal and other processes due to lack of information and accessibility issues. These restrictions should be removed from the tender documents.

Recommendation 5: That paragraph 4.3 of the Policy Directions is amended to ensure that funded Indigenous legal services are able to provide assistance to clients in relation to ombudsmen, consumer affairs departments, small claims courts, the Social Security Appeals Tribunal, disability discrimination services, welfare rights services and tenants right services.

- The tender documents do not appropriately weight culturally appropriate service delivery and capacity building of Indigenous communities

The tender documents do not place sufficient emphasis on culturally appropriate service delivery or Indigenous community capacity building in the assessment of tenders or contain sufficient safeguards to ensure that tenderers, once successful, deliver services on an ongoing basis in a culturally appropriate manner.

At paragraph 3.6.2 of the Exposure Draft, a 30% weighting is to be given to ‘cultural sensitivity’ in the assessment of tenders. However, there is no indication of what value will be placed on:

- the degree of Indigenous control of organisations tendering;
- a tenderer’s experience of working with Indigenous people;
- a tenderer’s relationships with local Indigenous communities and organisations (in terms of goodwill and established relationships); and
- a tenderer’s Indigenous staff ratios and employment and training of Indigenous people.

The 2003 review of ATSIC’s law and justice program illustrated the practical realities of this issue. It noted that ‘LAC practitioners are far less likely to have had a recent training on Indigenous and cultural awareness issues than ATSILS practitioners’[13] and that only 2% of staff at LACs were Indigenous (compared to 56% at ATSILS)[14].

Existing ATSILS also play a role in the professional education of Indigenous people as

[13] OEA/ATSIC, *op.*cit, p 4.
[14] OEA/ATSIC, *op.cit* , p 3.

lawyers, field officers and in community justice roles and ultimately contribute to the building of capacity in Indigenous communities. A failure to reflect cultural appropriate service delivery and this in the tender process could result in significant loss of capacity in communities.

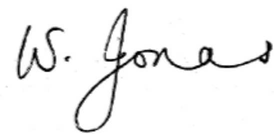
Recommendation 6: That an organisations experience of working with Indigenous people; relationships with local Indigenous communities and organisations, including goodwill and Indigenous staff ratios is formally incorporated into the assessment of its ability to deliver culturally sensitive services at paragraph 3.6.2 of the Exposure Draft.

Overall, my greatest concern about the proposals contained in the tender process is that they do not sufficiently prioritise addressing the crisis of contact of Indigenous peoples with criminal justice systems. Legal services for Indigenous peoples are under-funded and the tender documents place restrictions on service delivery that mitigate against effective and proactive service delivery. The lack of focus and funding for prevention and education is of particular concern.

I thank you for the opportunity to provide these comments and hope that they will be fully considered in reviewing the existing proposal for tendering.

If you have any queries please do not hesitate to contact my office on (02) 9284 9603.

Yours sincerely



Dr William Jonas AM
Aboriginal and Torres Strait Islander Social Justice Commissioner

Attachment B – Opening statement to Joint Committee of Public Accounts and Audit – Inquiry into Indigenous law and justice

Delivered on behalf of Dr William Jonas AM, Aboriginal and Torres Strait Islander Social Justice Commissioner

8 June 2004

Mr Chairman and Committee members,

Thank you for the opportunity for the Human Rights and Equal Opportunity Commission to appear before the committee in relation to this important inquiry.

The Aboriginal and Torres Strait Islander Social Justice Commissioner, Dr Bill Jonas, is unable to be here today as he is recovering from recent surgery. He has asked that the following statement be provided to the committee.

Commissioner Jonas has asked that we identify five key issues relating to the delivery of Indigenous law and justice services.

The **first** is that the Commissioner is deeply concerned at the lack of progress in addressing rates of over-representation of Indigenous people in criminal justice processes in recent years. In 1991, at the time of the Royal Commission, Indigenous people made up 14% of the total prison population. Recent figures show that while Indigenous people comprise approximately 2.4% of the total Australian population they have consistently constituted at least 20% of the adult prison population and over 40% of juveniles in detention since 1997.

This means that since 1991, the Indigenous prison population has grown by an average of 8% per year (compared to 3% per year for non-Indigenous people).

Similarly, over the past decade Indigenous women have suffered the greatest relative increase in incarceration rates. The Indigenous female prison population increased by 262% between 1991 and 1999, with Indigenous women incarcerated at a rate 20 times that of non-Indigenous women in 2002.

Commissioner Jonas has asked that we emphasise that these figures reveal a crisis in the rate of contact of Indigenous peoples with criminal justice systems. Addressing this situation must be a central objective of any review or reconfiguration of law and justice services for Indigenous peoples.

The **second** issue is that of under-funding of legal services for Indigenous peoples over this same timeframe. The Social Justice Commissioner notes that there has been very little, if any, increase in funding in real terms of ATSILS over the past seven years. In other words, at a time when rates of incarceration of Indigenous people have steadily increased and then reached a plateau, there has been no increase in funding to cope with

this situation. ATSIC's Office of Evaluation and Audit identified the shortfall in funding in 2003 to be approximately $25million per annum.

The Social Justice Commissioner considers that this has had two main consequences for the delivery of legal services to Indigenous peoples. First, it has meant that services have become increasingly reactive and demand driven, with less resources being able to be devoted to education and preventative activities. Such activities were envisaged to be a major role of ATSILS but it is clear that long term under-funding has constrained this. Second, the long term impact of this under-funding has been a slow, but continual deterioration of the level of services able to be provided by ATSILS (for example, with an ever-reducing focus on civil, family and discrimination law) and limited professional development within ATSILS.

The **third** issue is that it is Indigenous women who pay the price of this under-funding. ATSIS, and through them ATSILS, face increasing pressure to re-prioritise funding to address particular issues, such as substance abuse or family violence. These are important issues and must be addressed. It is often, however, unrealistic and problematic for ATSILS to redistribute what are already inadequate levels of funding. It is not an either/or situation. As Commissioner Jonas stated in the *Social Justice Report 2003*:

> There is an urgent need to ensure appropriate funding levels for ATSILS in order to provide a greater focus on the legal needs of Indigenous women as well as a greater focus on preventative action and community education. At the very least, there is also an urgent need for the federal government to allocate additional, quarantined, funding to expand the Family Violence Prevention Legal Service Program. Such funding needs to be new money as there is clearly no capacity for ATSIC/ATSIS, through its support for ATSILS, to re-allocate existing resources.

The **fourth** issue is to note that there have been significant developments in recent years in the establishment of community based justice mechanisms in most states and territories, and in the development of justice agreements and partnerships to address Indigenous law and justice issues. ATSILS have played a key role in many of these developments, operating as an agent and representative of Indigenous communities.

While many of these community justice mechanisms are in preliminary stages of their operation, they are generating much optimism. Processes such as community justice groups in Queensland, circle sentencing in NSW, Koori Court and Noongar court in SA and Victoria and the law and justice strategy in communities such as Lajamanu and Ali Curing in the NT offer the hope of breaking the criminal justice cycle for Indigenous people and re-empowering Indigenous communities.

Central to the success of these processes to date is that they are community driven and community owned. It is a form of capacity building of Indigenous communities. ATSILS have an important role to play in these processes and this needs to be recognised as states and territories place increased reliance on these innovative mechanisms and processes.

The **fifth** and final issue that Commissioner Jonas wished to raise in these introductory comments is to express concern at the current proposed process for tendering of Indigenous legal services. A copy of the Commissioners' comments on the tender process has been made available to the Committee. In brief, it expresses two main sets of concerns. First, it expresses the concern that there are aspects of the tender process which may discriminate against Indigenous people in the delivery of legal services. Second, it expresses the concern that the tender process takes a far more limited approach to the delivery of legal services to Indigenous peoples than is currently taken and that this narrower approach may in fact further disadvantage Indigenous peoples in the provision of legal services and mitigate against effective and proactive service delivery.

Mr Chairman, I note that we have also provided you with information about the newly accredited National Indigenous Legal Advocacy Courses – which have been specifically designed to meet the training needs of staff of ATSILS. We would be pleased to address any questions you may have about those courses as well as any other questions that the Committee may have.

We thank you for providing us with the opportunity to record these introductory remarks on behalf of Commissioner Jonas.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION

Question No. 95

Senator Kirk asked the following question at the hearing on 24 May 2004:

Has HREOC considered this case (Young v Australia) in the broader context of same sex discrimination issues that come before HREOC?

The answer to the honourable Senator's question is as follows:

The Commission may in fact have answered the honourable Senator's question in its evidence.

At Hansard page 71, Mr Lenehan said:

> As with all decisions of the Human Rights Committee, that decision has been noted internally within the commission and it certainly informs the commission's work.

Also at Hansard page 71, Mr von Doussa said:

> The view that HREOC takes about all these Human Rights Committee reports is that they add to the international jurisprudence and they are persuasive in their interpretation of international law and international obligations. We have regard to those decisions, both insofar as they are matters emanating from Australia and insofar as they are matters emanating elsewhere. We take them into account in the application and interpretation of international law.

The Commission is, of course, happy to provide any further clarification which might be required.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN SECURITY INTELLIGENCE ORGANISATION

Question No. 96

Senator Ludwig asked the following question at the hearing on 25 May 2004:

In relation to the Department of Foreign Affairs and Trade White Paper on terrorism: Provide the date that the synopsis and draft were provided (to ASIO).

The answer to the honourable senator's question is as follows:

1. ASIO received the synopsis on 7 April.
2. ASIO received the draft chapter outline on 29 April.
3. ASIO received three chapters for comment on 4 May and 6 May.
4. ASIO received the first draft of full text on 19 May.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN SECURITY INTELLIGENCE ORGANISATION

Question No. 97

Senator Ludwig asked the following question at the hearing on 25 May 2004:

Have you or would (ASIO) mind having a subsequent look (at claim made by Department of Immigration) to determine what US State Authority is claimed to have contacted Australia (in relation to the possible interest in the movement of Omar Abdi Mohamed)?

The answer to the honourable senator's question is as follows:

Our understanding is that the US Authority referred to was the State Department.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN FEDERAL POLICE

Question No. 98

Senator Kirk asked the following questions at the hearing on 25 May 2004:

In relation to the pending deployment of AFP trainers to Jordan:

a) Was the request (from the UK in October 2003 to provide AFP police trainers of Iraqi Police in Jordan) the only request made?

b) Were any other countries involved in the request?

c) Do you have any further information as to the budget for this deployment?

The answer to the honourable senator's questions is as follows:

a) On 9 October 2003, the AFP was contacted by the Iraq Task Force (ITF), Department of Foreign Affairs & Trade (DFAT) regarding a request received from the United Kingdom (UK) High Commission for Australian support in the training of Iraqi police in Jordan. This is the only request made to the AFP to provide police trainers for Iraqi Police in Jordan.

b) The AFP was approached by the ITF, DFAT on behalf of the UK High Commission. The AFP is aware that the UK made the request on behalf of Coalition member countries. The Coalition countries as at 6 June 2004 were Albania, Australia, Azerbaijan, Bulgaria, Czech Republic, Denmark, El Salvador, Estonia, Georgia, Hungary, Italy, Japan, Kazakhstan, Korea, Latvia, Lithuania, Macedonia, Moldova, Mongolia, Netherlands, New Zealand, Norway, Philippines, Poland, Portugal, Romania, Singapore, Slovakia, Thailand, Ukraine, United Kingdom and the United States.

c) The funding for the AFP deployment to Jordan is being provided by AusAID. The budget is based on two four month deployments of two personnel consistent with the AFP International Deployment Group terms and conditions. The negotiated budget for these two rotations is $0.4 million ($412,712.86).

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN FEDERAL POLICE

Question No. 100

Senator Ludwig asked the following question at the hearing on 25 May 2004:

In relation to the National Missing Persons Unit (NMPU):

a) What is the annual budget?

b) How much does the AFP provide?

c) Does the AFP measure the performance of the Unit?

d) What is the process within the AFP to monitor the performance of the Unit

The answer to the honourable senator's question is as follows:

a) On transfer from the Attorney-General's Department, the NMPU had an annual budget of $195,000 per annum. This funding lapses in 2004/05.

b) The AFP will be funding the NMPU from AFP appropriations from the 2004-2005 financial year. Budget allocations for the NMPU are still being considered as part of the AFP budgetary process.

c) The AFP intends to report on the activities and outcomes of the NMPU as part of the AFP 2003/04 Annual Report.

d) The NMPU is part of the Economic and Special Operations (ESO) portfolio and reports to the Manager ESO. Performance is monitored along these reporting lines. The National Manager ESO, as a member of the AFP National Managers Group is responsible for the performance of the unit. The National Managers Group has been briefed on the NMPU and is currently examining further methods of measurement to ensure the NMPU is fulfilling government and community expectations. As stated, the AFP intends to report on the activities and outcomes of the NMPU as part of the AFP 2003/04 Annual Report.