



**Aboriginal Legal Service**  
of Western Australia, Inc

**Perth Head Office**  
Piccadilly Square  
7 Aberdeen Street  
Perth WA 6000  
ABN 61 532 930 441

PO Box 8194  
Perth Bus Ctr WA 6849

T 08 9265 6666  
F 08 9221 1767

**Toll Free**  
1800 019 900

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Mr Peter Hallahan  
Committee Secretary  
Senate Standing Committee on Legal and Constitutional Affairs  
Department of the Senate  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

By email:legcon.sen@aph.gov.au and post

Dear Sir,

## **SUBMISSION TO THE INQUIRY INTO ACCESS TO JUSTICE**

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Enclosed you will find the submission from the Aboriginal Legal Service of Western Australia (Inc).

Yours faithfully,

**DENNIS EGGINGTON**  
Chief Executive Officer

## **Introduction**

The Aboriginal Legal Service of Western Australia ("ALSWA") thanks the Senate Standing Committee on Legal and Constitutional Affairs ("the Committee") for the opportunity to make a submission to the 2009 Inquiry into Access to Justice.

We note that the terms of reference for the Inquiry are:

- a. The ability of people to access legal representation;
- b. The adequacy of legal aid;
- c. The cost of delivering justice;
- d. The adequacy of funding and resource arrangements for community legal centres;
- e. The ability of Indigenous people to access justice;
- f. Measures to reduce the length and complexity of litigation;
- g. Alternative means of delivering justice.

Due to our limited resources our organization was unfortunately not able to submit a comprehensive submission that addresses all terms of reference.

The ALSWA is one of the largest community based Indigenous organisations in Australia. It provides legal aid services to Indigenous persons throughout Western Australia ("WA") pursuant to a contract with the Commonwealth Attorney General's Department. ALSWA provides legal advice and representation to Indigenous people in a wide range of practice areas including criminal law, civil law, family law, human rights law as well as policy and law reform. ALSWA has a head office in Perth and offices located in 17 regional areas throughout WA, including Albany, Broome, Bunbury, Carnarvon, Derby, Fitzroy Crossing, Geraldton, Halls Creek, Kalgoorlie, Kununurra, Laverton, Meekatharra, Newman, Northam, Roeboume, South Hedland and Warburton Aboriginal Community.

## **Previous Inquiries and Submissions**

We note the previous Inquiries that have considered issues relating to access to justice for Indigenous people. The Senate Legal and Constitutional Affairs Committee's *Inquiry into Access to Justice and Legal Aid* in June 2004 produced a Report making many recommendations on the provision of legal services related to legal aid and Aboriginal and Torres Strait Islander Services ("ATSILS"). A number of these recommendations were directed specifically at legal services provision to Indigenous people. In addition, the Joint Committee of Public Accounts and Audit's *Inquiry Into Access Of Indigenous Australians to Legal Services*, in June 2005 also made a number of recommendations on the provision of legal services for Indigenous people.

We submit that the priority for this 2009 Inquiry is to take steps to review the implementation progress of the recommendations from the reports referred to

above and to take steps to implement any outstanding recommendations from those previous Inquiries.

ATSILS made submissions to both of the above Inquiries and the main issue being lack of funding has not changed. In our view the funding provided is now even more inadequate due to the increase in the demand for Indigenous legal services. The funding has not increased to meet ALSWA's additional operational expenses of running existing services or to meet the increase in demand for services. The need for additional funding for ATSILS is critical and should be one of the highest priorities for the Australian Government.

## **The Ability of People to Access Legal Representation**

### Culturally Appropriate Legal Service

The provision of a culturally appropriate legal service to Indigenous clients is vital in ensuring that Indigenous people have access to legal representation. As a community based organization, ALSWA's governing body the Executive Committee is comprised of Indigenous people from throughout WA who represent different geographic regions of the State. Each Executive Committee member is elected by his or her local Indigenous community and it is this process that allows for local input by each of the respective communities into how ALSWA delivers its services across the State.

### Court Officers

Court officers play an important role in providing a culturally appropriate legal service. ALSWA employs 26 Indigenous court officers, including a court officer in each of ALSWA's regional offices. In more remote areas, court officers are often the only local permanent legal service dealing with all aspects of the legal system. ALSWA urges the Committee to recognise the special role of court officers in providing an accessible legal representation and to consider additional funding for court officer positions as a strategy to ensure access to justice for Indigenous Australians.

Court officers hold certificates under Section 48 of the *Aboriginal Affairs Planning Authority Act 1974 (WA)*. Section 48 certificates grant court officers a right of appearance in all WA courts when appearing for Indigenous persons, notwithstanding that the court officer is not admitted to practice as a barrister and solicitor. Section 48 certificates therefore provide a unique employment opportunity for Indigenous persons to appear as advocates in WA courts on behalf of Indigenous clients.

ALSWA's court officers appear on a daily basis in Magistrate's and Children's Courts across WA. Court officers present pleas in mitigation, make bail applications and apply for adjournments as well as providing legal advice. Court officers also provide advice to clients in relation to civil and human rights law and

family law matters. They also attend adult custodial institutions and juvenile detention centres to provide advice and assistance to Indigenous clients in custody. Hence, court officers are an invaluable resource for ALSWA and its clients, as well ensuring culturally appropriate representation within the justice system.

Court officers initially participate in a 3 month full time intensive training program in ALSWA's Perth head office. During the program instruction is provided by senior ALSWA lawyers and court officers in all areas of law, with a specific focus on criminal law. At the completion of the program, court officers commence appearing in court under the supervision of a senior ALSWA lawyer.

The employment of additional Indigenous court officers would enhance access to legal representation and justice for the WA Indigenous community. An improvement in the capacity to advise and represent Indigenous persons has the potential to reduce the rates of Indigenous imprisonment in WA, which is amongst the highest in Australia. As at 14 May, 2009, 40% of the adult prison population is Indigenous and 75% of the juvenile detention population is Indigenous. This is in circumstances where Indigenous people comprise 3.49% of the total WA population.

#### More Indigenous Lawyers Needed

The under representation of Indigenous people working in the legal profession reduces the ability of Indigenous people to access culturally appropriate legal representation. The Inquiry should consider ways of increasing the availability of the number of university enrolment places for Indigenous students in law school programs throughout Australia. Additional funding should be made available for ATSILS to provide supportive professional pathways for Indigenous law students and graduates. The additional funding would ensure that ATSILS are able to dedicate resources to provide structured and supervised on the job training of a high standard in order to ensure the professional development of Indigenous lawyers (eg summer clerkships, articled clerkships, restricted practice, community legal education, mentoring, management training).

#### Interpreters

There is no statewide interpreter service available for Indigenous language speakers in WA. The need for and the ability of Indigenous people to access interpreters has been highlighted in a number of reports as an access to justice issue.<sup>1</sup> 17% of Indigenous people speak an Aboriginal language at home. Many Indigenous people do not speak English. This figure rises to 51% in some remote areas. Only 3/4 claim to speak English well<sup>2</sup>. Indigenous people make up 40% of the WA prison population. This demonstrates and imprisonment rate 23 times

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<sup>1</sup> Australian Law Reform Report Evidence (1987); Access To Interpreters In the Australian Legal System (draft report) Commonwealth Attorney General's Department (August 1990); Inquiry Into the Provision of an Interpreter Service in Aboriginal Languages NT Government, Office of the NT Anti-Discrimination Commissioner (1999).

<sup>2</sup> 1996 census Australian Bureau of Statistics at <http://www.abs.gov.au>

greater than the national imprisonment rate<sup>3</sup>. These statistics indicate there is a pressing need for an interpreter service with officially trained interpreters, throughout WA for Indigenous languages. ALSWA submits that the lack of interpreter services is a serious barrier that prevents Indigenous people from accessing and participating in the legal system on an equal footing with other Australians.

#### Customary Law

The issue of customary law and sentencing options also affects the interaction of Indigenous people with the justice system. We support the Law Council of Australia submissions on the *Crimes Amendment (Bail and Sentencing) Bill 2006 and Recognition of Cultural Factors* in sentencing which emphasise the importance of cultural considerations in the exercise of judicial discretion in sentencing.

#### **The Adequacy of Legal Aid**

The majority of ALSWA's funding resources are dedicated to criminal law. Due to the overrepresentation of Indigenous people in prison it has been a focus to represent clients facing incarceration.

Although ALSWA has a Civil/Human Rights Unit and a Family Law Unit the legal services available are limited and based in our head office in Perth. Although over the years ALSWA has experienced an increasing demand for legal assistance in the areas of civil and family law we have been unable to service the additional demand due to lack of funding for an extension of services beyond criminal matters.

The shortfall in funding means that ALSWA has little or no capacity to provide services in remote areas. If extra funding were available it would enable ALSWA to expand its services in civil and family law to regional and remote areas of WA. However, due to the difficulties in the recruitment and retention of professional staff including solicitors in regional and remote areas, funding must be based on real costs associated with providing a high quality legal service.

#### **The Cost Of Delivering Justice**

The costs of delivering justice to Indigenous people are enhanced due to the high and complex needs of Indigenous clients resulting from extreme disadvantage. In addition the ABS statistics show the high concentrations of Indigenous people living in remote areas. The logistics of providing a service at all to remote and regional areas inevitably means increased costs to cover including: capital

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<sup>3</sup> The Mahoney Report, November 2005, p.279 at <http://www.slp.wa.gov.au/publications.nsf/Inquiries+and+Commissions>.

funding (office), establishment of computer technology (and ongoing support), mobile or outreach services, accommodation and travel costs.

It is very difficult to recruit lawyers to service remote communities on what is comparatively poor remuneration. The reality is that if you want to attract appropriately skilled legal staff to work in remote areas there must be financial and other incentives built in to offset the often difficult working conditions.

A large cost of delivering justice is not necessarily a strictly financial cost but an employer cost of enabling employees to perform their duties adequately and supporting them throughout the process both physically and mentally. Employees need to have sufficient time to understand the relevance of the processes that they undertake in their day to day duties. However, in most cases an induction period is not viable due to lack of funding or the need to progress the delivery immediately.

It would be a welcome change to be able to set aside sufficient funds for initial training and support by peers which is generally not accounted for due to the tight constraints of funding categories. In essence, our most valuable resources, our employees, are working harder and longer hours at less pay than those in the for-profit sector because of their commitment to provide a service to disadvantaged Indigenous people. The need to be able to adequately support staff through a myriad of means are unavailable to not-for-profit organisations in general funding applications which impedes our ability to retain staff on a long term basis. The cost therefore is for our employees to bear but ultimately it impacts adversely on the quality of service to our clients.

The financial costs are evident. Funding is often barely adequate to meet the essentials required for the provision of services. When a new service is provided there is also a need to maintain this service over a longer period than initially funded for. Often grants are non-recurrent with an expectation that the funding will be self-generated or other means supported in the long term. This is not always feasible as the need for service provision increases once a service is available to the public, as the service increases through word of mouth and extra staff are required.

### **Alternative Means of Delivering Justice**

The mainstream legal system has little relevance and meaning to most Indigenous Australians and often operates to the disadvantage of Indigenous people. In June 2009 ALSWA prepared a submission to the State Attorney General relating to the Aboriginal Community Courts that have been trialled in Kalgoorlie-Boulder and Norseman. A number of people were interviewed as part of the consultation including Court Co-ordinators, Magistrates, ALSWA staff, panelists, police prosecutors and some staff and panelists from the Koori Court of

Victoria.

The overwhelming response from those that were consulted by ALSWA was that the Aboriginal Community Courts of Kalgoorlie and Norseman had a positive impact on offenders, panelists, Magistrates, the local Indigenous community and the wider community. These positive impacts have resulted in reduced recidivism, increased respect from Indigenous people for the legal system, increased respect for panelists as leaders within their community and improved community relations.

The key objective of the community courts are to redress the overrepresentation of Indigenous people in the criminal justice system; to reduce rates of re-offending amongst Indigenous people; to decrease rates of non-appearance at court which has the effect of reducing bail opportunities; and the to have a positive impact upon the lives of those who appear before the court.<sup>4</sup>

ALSWA believes that the success of the community courts model is that it founded on a legal model that recognises Indigenous peoples as the first owners and custodians of the land and recognises their traditional laws and customs as an alternative means of delivering justice. As the community courts system has more meaning for Indigenous peoples they are more likely to participate in a meaningful way and access justice in a way that is culturally and linguistically sensitive.

ALSWA urges the Inquiry to consider how the community courts model may be developed more fully as an alternative to the mainstream legal system and consider how fully this might increase Indigenous access to justice. As a part of this process ALSWA submits that there is a need for recurrent funding to ATSILS for legal services in order to properly resource participation of Indigenous clients in these community courts.

### **The Adequacy Of Funding and Resource Arrangements For Community Legal Centres**

The inadequacy of funding to ATSILS has been documented far and wide over a number of years by a variety of parliamentary inquiries and evaluations by government agencies, not to mention the submissions by ATSILS to these inquiries and evaluations<sup>5</sup>.

In WA the State Government provides no funds to ALSWA - it is funded solely by the Commonwealth. In essence the funding to ALSWA has been static when

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<sup>4</sup> Auty and Briggs, *Koori Court Victoria: Magistrates Court (Koori Court) Act 2002*, Law Text Culture, Vol 8, 2004 p.19

<sup>5</sup> Office of the Evaluation and Audit (OEA), Aboriginal and Torres Strait Islander Commission, *Evaluation of the Legal and Preventative Services Program, (2003)*; Australian National Audit Office, *ATSIS Law and Justice Program: Aboriginal and Torres Strait Islander Services*, the Auditor General Audit Report No. 13 2003-4 (2003); Parliament of Australia, Senate Legal And Constitutional References Committee, *Legal Aid and Access To Justice*, June 2004; Parliament of Australia, Joint Committee of Public Accounts and Audit (JCPAA), *Access of Indigenous Australians to Law and Justice Services*, Report No. 403, June (2005)

compared with Commonwealth funding for mainstream legal services despite an increase in demand for its services. As a result ALSWA experiences difficulty in recruiting and retaining appropriately experienced staff and lawyers and this in turn has an adverse impact on service delivery.

The ALSWA reports an increasing demand on our services due to changes in government policy, new laws that operate to the disadvantage of Indigenous people and the expansion of a permanent police presence in remote area communities resulting in an increase of contact with the justice system.

The ALSWA refers the Committee to the 2009 article by M. Schwartz and C. Cunneen, *Working Cheaper, Working Harder* that addresses the adequacy of funding available to ATSILS<sup>6</sup>. ALSWA endorses the comments made in that article regarding the disparity between resources allocated to Legal Aid Commission's and ATSILS.

It is an obvious and shameful disparity that must be urgently addressed by the Commonwealth if it is genuinely committed to ensuring access to legal services to Indigenous peoples who represent the most disadvantaged group in the justice system. As a bare minimum starting point, the funding of ATSILS must be on a parity with mainstream legal aid services so as to provide substantive equality and ensure access to justice for Indigenous people.

ALSWA supports recommendation 27 by the *Legal Aid and Access To Justice Report*<sup>7</sup> that the level of funding to ATSILS be increased as a matter of urgency and that issues of language, culture, literacy, remoteness and incarceration rates and the impact of these on the costs of service delivery should be factored into the degree of the increase.

## **The Ability of Indigenous People To Access Justice**

ALSWA submits that dedicated ATSILS are the preferred and most culturally appropriate providers of legal services to Indigenous peoples and play a special role in enabling access to justice. We note that specific issues regarding the ability of Indigenous people to access justice have been canvassed in previous Inquiries and refer the Committee to those Inquiries.

### Indigenous Women

The ALSWA recognises that Indigenous women are the most legally disadvantaged group in Australia and do not have equitable access to legal aid services<sup>8</sup>.

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<sup>6</sup> Schwartz, M and Cunneen, C, *Working Cheaper, Working Harder: Inequity In Funding For Aboriginal And Torres Strait Islander Legal Services*, Indigenous Law Bulletin, Jan/Feb 2009, ILB Volume 7 Issue 10, pp 19-22.

<sup>7</sup> Inquiry Into Legal Aid and Access To Justice 2004:

[http://www.aph.gov.au/senate/Committee/legcon\\_ctte/completed\\_inquiries/2002-2004/legalaidjustice/report/contents.htm](http://www.aph.gov.au/senate/Committee/legcon_ctte/completed_inquiries/2002-2004/legalaidjustice/report/contents.htm)

<sup>8</sup> See Australian Law Reform Commission, *Equality Before The Law: Justice For Women*, Report 69 (1994).



The Australian Law Reform Commission ("ALRC") made a number of recommendations regarding Indigenous Women's needs in their 1994 Inquiry "*Equality before the Law: Justice For Women*"<sup>9</sup>. The ALSWA notes and endorses recommendation 5.2 regarding the establishment of legal services for Indigenous women and the importance of separate legal services staffed and managed by Indigenous women, with the support from the communities intended to be served.

The ALSWA currently auspices the Kalgoorlie and Broome Family Violence Prevention and Legal Service's ("FVPLS's"). The Commonwealth has recently approved of ALSWA auspicing additional FVPLS's in Carnarvon, Kununurra, Port Hedland and Geraldton. Transitional administration arrangements regarding these services have commenced.

ALSWA submits that the Commonwealth should in consultation with FVPLS's, Indigenous people and their communities review the current operation of the FVPLS in WA, including the current auspicing arrangements against those recommendations made by the ALRC in their report.

ALSWA submits that if the FVPLS model is reviewed by the Commonwealth that consideration be given to ensuring that principles and strategies are identified to ensure that Indigenous women are able to access justice from a range of culturally appropriate legal service providers covering a range of areas of law (in addition to family violence and family law).

Often when Indigenous women need legal assistance in relation to matters of family violence and family law their disputes are predominantly with other Indigenous people who live in the same community as they do. Indigenous women may be reluctant to access a particular service provider because of the sensitive nature of their issues and concerns about confidentiality in their communities. Although there may be a FVPLS available, issues surrounding disclosure of abuse to staff who are community members and confidentiality concerns impact on their ability to access justice in their communities.

For these reasons ALSWA believes that Indigenous women should be able to choose from a range of legal service providers to ensure substantive access. Having a range of services where Indigenous women may freely discuss women's business is more likely to increase their overall participation in the legal system and allow for referral and other processes to deal with confidentiality concerns and conflicts of interest.

Thank you

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<sup>9</sup> Ibid, ALRC 69.

