

Future Directions: The Importance of Community in Prevention and Diversion

- 7.1 The delivery of legal aid to Indigenous Australians is the primary function of ATSILSs and FVPLSs. However, the provision of legal aid does not describe the full role of these services.
- 7.2 Another important function of ATSILSs and FVPLSs has been and continues to be their role in implementing and supporting prevention and diversionary programs.
- 7.3 Besides funding preventative services under the FVPLS program, AGD provided \$5.348 million through its Prevention, Diversion and Rehabilitation programs in 2002-03.¹
- 7.4 The Prevention, Diversion and Rehabilitation output consists of four areas:
- Night patrols;
 - Youth Initiatives;
 - Prisoner Support and Rehabilitation Services; and
 - Restorative Justice Initiatives.²
- 7.5 The importance of ensuring the availability of preventative and diversionary initiatives takes on particular importance in light of the Indigenous demographics. MRALS stated that within its service area:

¹ AGD, *Submission No. 44*, p. 2.

² AGD, *Exhibit No. 44*.

40 percent of the Aboriginal population is under the age of 15. The Indigenous population grew by 29.8 percent between 1996 and 2001 making it the fastest growing ATSI region in the nation.³

- 7.6 The pertinence of this statistic comes to light when it is realised that 29.5 percent of matters dealt with by ATSILs in 2002-03 occurred in the 18 to 24 year group.⁴

Some Community Based Justice Initiatives

- 7.7 During the course of the inquiry, the Committee gathered evidence on an array of community based justice initiatives that emerged in response to the problem of access to the law and justice system by Indigenous Australians. These included the institution of community law and justice committees in the Northern Territory, circle sentencing courts in New South Wales and community policing programs in Western Australia.
- 7.8 These initiatives have generated a framework in which prevention and diversionary programs are delivered to Indigenous Australians. These developments have occurred in large part since the late 1990s.
- 7.9 The Western Australian Government indicated the array of programs it was considering supporting and implementing:

I have had the women from the [Northern Territory] Kurduju [community law and justice] group ... come and present at a forum in WA. There are a couple of Aboriginal sentencing courts in WA that have been set up. There is also an intent to include Aboriginal people in sentencing and disposition of sentencing through community supervision agreements – the way we use bail hostels and juvenile case conferencing – which we are adapting for Aboriginal communities so that Aboriginal elders or responsible people are participating in a kind of mediated process with police, the offender, the offender's family and a representative of justice, which could be an Aboriginal elder.⁵

3 MRALS, *Submission No. 28*, p. 1.

4 ATSI, *Exhibit No. 24*.

5 WA Department of Justice, *Transcript*, 31 March 2005, p. 30.

- 7.10 The Western Australian Government also provided detail on its community policing initiatives in remote discrete communities that are considered later in this chapter.

Community Law and Justice Committees

- 7.11 On 31 March 2005 the Committee visited the remote community of Yuendumu in the Northern Territory. The visit occurred in response to an invitation to inspect some of the operations of community law and justice committees covered by the Kurduju Regional Crime Prevention Committee.⁶
- 7.12 The Kurduju Committee is an umbrella group for community law and justice committees operating at Ali-Curung (since 1997) and Lajamanu (since 1998) as well as Yuendumu (since 2000).⁷ The Kurduju Committee is supported through the Northern Territory Department of Justice.
- 7.13 Each community law and justice committee responds to and springs from the unique situation of its community. It described community law and justice committees as having:
- the primary role in the implementation of strategies arising from the planning process and they act as the interface between the community and the myriad of government agencies involved in the provision of law and justice services.
- 7.14 Besides providing pre-trial advice to magistrates on the circumstances of offenders and cases, the community law and justice committees have responded to problems confronting their communities by implementing men's and women's night patrols, safe houses and youth diversion programs.⁸
- 7.15 Mr Cuomo referred to the need for flexibility in implementing arrangements that were emerging in Western Australia which are similar to the Northern Territory law and justice communities:
- It varies from community to community. Each of the communities has its own way of doing it. It operates at a

6 Kurduju Regional Crime Prevention Committee, *Submission No. 24*, and *Exhibit Nos. 26 and 27*.

7 Kurduju Regional Crime Prevention Committee, *Submission No. 24*, p. 2.

8 For details see Kurduju Regional Crime Prevention Committee, *Submission No. 24*, and *Exhibit Nos. 26 and 27* and Yuendumu Community, *Exhibit No. 47*.

number of levels. You have got the preventative level and the community activities that go along with that – looking after the kids, night patrols and those sorts of things.⁹

- 7.16 The WA Department of Justice stated that community law and justice committees would not work in some communities:

In some of the remote communities [the Northern Territory model] works, but ... it is the senior Aboriginal women who have made that work. In WA, the senior Aboriginal women have not always got the authority or the status to carry it off.¹⁰

Customary Law

- 7.17 The remoteness of the communities that operate community law and justice committees means that customary law and practices can remain strong informers of the communities' sense of justice. CAALAS stated:

our clients do live in two worlds and they are in the main subject to their own laws, and these [community law and justice] groups offer the possibility of a nexus so that there is some juncture, I suppose, from what is happening in the community. Cultural factors and Aboriginal law factors that are applying are not going to be dealt with directly in the courts, but there is a sort of a nexus and feedback from what is happening on the ground in the communities. I think it is positive in that way. On the other hand, we as lawyers have a difficulty in the sense that we are still appearing in our system on behalf of the client, who is an individual. We have to advocate on behalf of the client, which may be at odds with the community view or a view that is coming out of the community...

Also, when different people appear before that panel of people, there is also the problem of whether they are actually related to the people sitting on that panel. Quite often there are difficulties with the elected council. Then there is another council – the council of elders. Quite often the council of elders overrides the elected panel. Where [an ATSILS solicitor] is coming from is from representing his client in the European legal system, whereas this other system is still

9 Mark Cuomo, *Transcript*, 31 March 2005, p. 7.

10 WA Department of Justice, *Transcript*, 31 March 2005, p. 31.

going on regardless of the white system. It has an end result and they will have a result as well. I think it clears the way for people to be dealt with, but they are still going to be dealt with in the other system, regardless of the outcome.¹¹

- 7.18 TEWLS confirmed the importance of traditional law in remote Indigenous communities:

community members respect and fear their own law ... rather than a restraining order, banishment to an outstation may be a deterrent ... women generally wish to receive restraining orders as a last resort. Prior to this, women require support, such as a safe place to stay, mediation through their family and community and assistance...¹²

- 7.19 The significance of customary law together with the community based character of community law and justice committees could lead to views that these committees are instruments of customary law.

- 7.20 Ms Jackie Antoun, Northern Territory Department of Justice, clarified the role of community law and justice committees and their relationship with Australian and customary law:

The work of the justice committee should not be described or equated with the use of customary law, although where customary law is consistent with mainstream law it may be accommodated using the avenues which the justice [committees] have developed.¹³

- 7.21 Ms Antoun's clarification was supported by the Kurduju Committee:

It is important to note that the legal system here described, is not a straightforward revival of customary law although it certainly incorporates many elements of that law. Rather, it is an innovative adaptation of traditional decision making processes to the modern situation.¹⁴

- 7.22 In relation to payback the community law and justice committees have been instrumental in reducing the incidence of uncontrolled payback:

11 CAALAS, *Transcript*, 22 July 2004, p. 41.

12 TEWLS, *Transcript*, 21 July 2004, p. 23.

13 Jackie Antoun, *Correspondence*, 5 April 2005, p. 1

14 Kurduju Regional Crime Prevention Committee, *Exhibit No. 26*, p. 12.

The Kurduju Committee ... have long been concerned that proper and due processes applying to the application of customary law is sometimes being neglected and conducted improperly. In some cases powerful family groups can dominate other smaller groups or individuals, and there is an increasing number of incidents of quick fix and alcohol-fuelled punishment/payback occurring. The consequences of this are far-reaching and horrendous.¹⁵

- 7.23 It should be noted that community law and justice committees do not carry out payback.¹⁶

Circle sentencing

- 7.24 Circle sentencing began with the so-called Nunga Courts in South Australia. Variations on the idea have spread to Queensland as the Murri Court and Victoria where it has recognised in the *Magistrates Court (Koori Court) Act 2002 (Vic)*.

- 7.25 The Darwin based ATSIC Yilli Rreung Regional Council related the development of circle sentencing in the Northern Territory:

Our Regional Council played a role in bringing people from the Koori Courts for us to look at doing business differently so that they could start to get different outcomes...

the Family Court developed the first concept, in relation to its structure, of having seagrass matting and Indigenous artefacts, and Indigenous people actually came to the court.¹⁷

- 7.26 In 2002 circle sentencing was piloted in the Nowra region of New South Wales and has since been expanded to Dubbo, Brewarrina, Bourke and Walgett.¹⁸
- 7.27 Circle sentencing strategies are generally reserved for cases in which the defendant has pleaded guilty, although the Koori Court of Victoria has a category of eligibility where 'Koori defendants ... elect to go to the Koori Court.'¹⁹

15 Kurduju Regional Crime Prevention Committee, *Exhibit No. 27*, p. 22.

16 Kurduju Regional Crime Prevention Committee, *Exhibit No. 27*, p. 22.

17 ATSIC Yilli Rreung Regional Council, *Transcript*, 21 July 2004, p. 17.

18 SEALS, *Exhibit No. 23*. NSWLAC, *Transcript*, 30 March 2005, p. 62.

19 <http://www.magistratescourt.vic.gov.au/CA256CD30010D864/page/Specialist+Court+Jurisdictions-Koori+Court?OpenDocument&1=60-Specialist+Court+Jurisdictions~&2=20-Koori+Court~&3=~>. Accessed 30 May 2005.

- 7.28 The arrangements seek to make the criminal justice system more relevant to the Indigenous communities and individuals that are subject to them and they do this in a number of ways.
- 7.29 Some of the arrangements utilised in circle sentencing include:
- having the magistrate sit around a table with the prosecution, offender, victim and their representatives;
 - allowing community representatives, such as Elders, to address the impact of the crime upon the community and express a community view on the case.
 - using plain English rather than legal jargon in proceedings; and
 - allowing offenders and their representatives to explain why an event has occurred and victims and their representatives to explain the impact of this action with direct dialogue with one another.²⁰

Community Policing

- 7.30 The Western Australia Police Service referred to a 2002 review of policing practices in remote communities:

Our policing practices up until then had been predominantly reactive with, quite frankly, a very base policing service ...

Part of the recommendations of the review suggested that we would be doing this better if we actually provided a policing service, bringing stability and a core service to a community, the premise of that being that the community cannot wake up in the morning with a vision of hope and of a tomorrow without feeling safe and secure.²¹

- 7.31 The review cited current community police practices in the remote communities of Western Australia namely the Warden Scheme and the Aboriginal Police Liaison Officer Scheme. Both schemes involve the nomination of community members to liaise between communities and the Police Service.
- 7.32 The Police Service referred to the Aboriginal Police Liaison Officer Scheme that:

²⁰ For example, SEALS, *Exhibit No. 24*.

²¹ WA Police Service, *Transcript*, 31 March 2005, p. 25. See WA Police Service, *Exhibit No. 41*.

has been in existence for 30 years, and it has evolved into an enforcement capability, as opposed to a cultural advice capability. So we are going back to assess whether our service delivery is actually being met by doing that.²²

7.33 The review emphasised the importance of government support for communities, not only through funding and delegation of decision making, but in delivering coordinated and accessible services.

7.34 To this end, the Western Australian Government is rolling out Multi Agency Facilities in remote communities:

A multifunctional police facility ... will be staffed by police officers and Department for Community Development child protection workers. We are negotiating with the Department of Justice in relation to their delivery of programs and services and making available facilities for their use. There will be a court attached to each one of these facilities.²³

Reservations at Community Based Justice Initiatives

7.35 While strong support was expressed for continued and increasing involvement by Indigenous communities in the justice system, a number of qualifications and reservations were raised.

Resource Intensive Arrangements

7.36 NAALAS warned against viewing community based justice programs as providing an immediate panacea:

Such is the dynamic of Aboriginal arrest and incarceration here in the Territory that there have been lists of 30-plus people in bush courts, and they have tended to increase over the past 10 years and are not going to go away – whether or not community justice panels exist.²⁴

7.37 MRALS offered support for circle sentencing as a proven diversionary strategy but qualified this by referring to the resource intensive nature of these arrangements:

22 WA Police Service, *Transcript*, 31 March 2005, p. 26.

23 WA Police Service, *Transcript*, 31 March 2005, p. 26.

24 NAALAS, *Transcript* 21 July 2004, p. 11.

The Nowra model has been spoken about, and I know that the solicitors there are very supportive of it. But it is hugely resource intensive because suddenly ... instead of an appearance before a magistrate being fairly short and sharp, one charge of malicious damage resulting in a broken window may take up to three, four or five hours. Down the track that may get a much better result; I do not doubt that. I simply make the point that it is a good thing but it is necessary to remember it is very resource intensive.²⁵

- 7.38 The National Network of Indigenous Women's Legal Services accepted the more intensive resources demanded by circle sentencing but put this in context by emphasising the achievements of the strategy:

traditionally when Aboriginal men went to court the majority of time they spent before a magistrate rated between two to seven minutes and often they were found guilty and sentenced to no less than three to six months. Circle sentencing has turned that around in that the offenders now have to confront their wrongdoings in front of their peers and respected and well-regarded elders of their community. For the first time we are looking at substantial case time of two to three hours, but we are also witnessing a remarkable [60 percent] reduction in the types of crimes being committed by Aboriginal men...²⁶

- 7.39 NTLAC supported community based justice initiatives but warned:

it is sometimes an excuse for saying 'We'll leave you to it,' and not provide the resources to do that. If communities are going to come up with their own solutions it is very important that they are supported to do so...²⁷

Accurate Community Representation

- 7.40 NSWLAC stated of circle sentencing programs in western New South Wales:

25 MRALS, *Transcript*, 13 July 2004, pp. 48-9.

26 NNIWLS, *Transcript*, 13 July 2004, p. 33.

27 NTLAC, *Transcript*, 21 July 2004, p. 40.

The difficulty they will have is in finding someone who is accepted by the community as a representative of the community. Even in my relatively short experience in western New South Wales – 11 years or so – I have seen some of the older structures breaking down, where the elders perhaps are not as respected as they traditionally would have been.²⁸

- 7.41 NPY Women's Council raised concerns of adequately ensuring the whole of the communities view was represented:

The magistrate might say, 'I want to hear from the community.' Who is the community? Someone's family member might come in and say, 'I'm a senior member of the community, and I just happen to be this fellow's father,' or uncle or whatever. It can work both ways. The [Women's Council] have put as a whole that [people sitting in court contributing] is not a way they want to have these matters dealt with.²⁹

- 7.42 The Western Australia Police Service confirmed the difficulty of ensuring community views were communicated to authorities:

historically we have actually empowered the offenders and the perpetrators in respect of some of these. I have been aware of justices of the peace that we have nominated – respected elders, allegedly, within the community – that turn out to be the perpetrator but, because of their cultural bearing and position and their intimidation within that particular area, we were not to know that we were actually empowering them until it was too late.³⁰

- 7.43 CAAFLU cited an:

example where a woman might be a strong spokesperson at her community against domestic violence but if her son is involved, her position is, 'That woman is just making trouble for him. He did not break a bone.'³¹

28 NSWLAC, Transcript, 30 March 2005, p. 62.

29 NPY Women's Council, *Transcript*, 22 July 2004, p. 26.

30 WA Police Service, *Transcript*, 31 March 2005, p. 31.

31 CAAFLU, *Transcript*, 22 July 2004, p. 31.

Family Violence and Child Sexual Assault

7.44 The Committee encountered two views on whether community based justice initiatives should be extended to incidence of family violence and sexual assault.

7.45 The Chairperson of the ATSIC Yilli Rreung Regional Council expressed personal support for implementing pilot programs that would allow family violence matters to be dealt with in the circle sentencing arena.³²

7.46 ALRM also raised the possibility of tailoring elements of circle sentencing to allow it to be used in family violence cases:

You have had quite a lot of discussion of the suitability of alternative models in the area of family violence and the problems of bringing victim and perpetrator together in that sort of circle sentencing model. I think it is problematic, but that should not turn us away from looking at alternatives, particularly in light of the problems that the current adversarial system presents for Indigenous peoples.³³

7.47 On the other side, NAALAS raised an instance:

that someone is charged with assault with intent to cause bodily harm, and that that person has a great many prior convictions for previous violence. They would automatically be facing a significant jail term, and no police authority would want to see that simply dealt with in house. No community, to my mind, would want that.³⁴

7.48 The Western Australia Police Service stated:

The overwhelming cry that we are receiving from ... people is that they want the people involved in family violence and child abuse to be arrested.³⁵

7.49 NPY Women's Council agreed stating that:

Australian law should apply to perpetrators of assaults against women and sexual assault offenders...³⁶

32 ATSIC Yilli Rreung ATSIC Regional Council, *Transcript*, 21 July 2004, p. 21.

33 ALRM, *Transcript*, 19 August 2004, p. 41.

34 NAALAS, *Transcript*, 21 July 2004, p. 11.

35 WA Police Service, *Transcript*, 31 March 2005, p. 28.

36 NPY Women's Council, *Transcript*, 22 July 2004, p. 26.

- 7.50 NPY Women's Council raised concerns relating to putting pressure on victims of family violence to carry through a sentencing session:

After ringing the police and reporting the matter to the police, when the time comes to go to court the wife does not want to testify. She will drop the charges every time.³⁷

- 7.51 On inquiring about the appropriate handling of cases involving family violence or sexual assault at Yuendumu, the community was unanimous in expressing the view that such matters were referred to the police.
- 7.52 The women at Yuendumu expressed the strong view that both Indigenous and non-Indigenous legal systems should support one another.

Indigenous Legal Services and Community Justice

- 7.53 The legal aid, preventative and diversionary activities of ATSILSs and FVPLSs have resulted in varying levels of participation in community based justice initiatives.

- 7.54 At a basic legal aid level MRALS stated:

Even in circle sentencing, you still need a representative body such as ours because the accused still needs to have his or her legal counsel with them as they go through that two to three hour process.³⁸

- 7.55 However, ALRM referred to preventative and diversionary activities as following from the community based character of Indigenous specific providers:

There is an important point about the difference between a legal service and a legal aid service: the conventional understanding of legal aid is that you are responding with a bandaid to a perceived problem. The legal service goes to a community, works out what the community needs are and works with the community to solve its problem ... they are proactive, useful things...³⁹

- 7.56 CAAFLU echoed the importance of prevention and diversion by citing the inadequacy of a merely reactive provision of legal aid:

37 NPY Women's Council, *Transcript*, 22 July 2004, p. 25.

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

39 ALRM, *Transcript*, 19 August 2004, p. 33.

it is like we are at the tail end of everything. We do restraining orders when the assault has happened, and also with compensation cases they have been assaulted. So we have focused on going into schools, at Papunya and Yuendumu, and also worked with women at Hermannsburg and given them legal education. We have shown videos about the legal systems – how a restraining order works, if anything should happen.⁴⁰

7.57 CAAFLU's preventative activities focused on community education:

We have gone into the high school at Tenant Creek ... We have also gone to the Anyinginyi Congress in Tenant creek ... and the Tenant Creek hospital ... we have worked closely with the Domestic Violence Counselling Service and had input into town camps up at Tenant Creek. We have also done it here in Alice Springs...

we have had meetings at Hermannsburg ... we are about to set up is a program where women go along and sit down there a few days a week and do painting ... So there is that incidental education where we are not letting everyone know that someone is a victim or that someone wants to know about domestic violence or compensation...

We have had two camps where we have taken ... young people from the town camps of Alice Springs. We took them out of town and had a three-day camp and workshop.⁴¹

7.58 TEWLS stated that:

We try to provide a forum for women in the communities to come together and to provide support for each other. It can be very isolating, and often there are no forums for the women to come together and talk about violence. The other thing is that family violence may not be talked about because it is a very sensitive issue. We try to provide a forum for women to come together to talk about what is happening and to try to come up with solutions and provide power for them in that way.⁴²

40 CAAFLU, *Transcript*, 22 July 2004, p. 36.

41 CAAFLU, *Transcript*, 22 July 2004, pp. 32-3 and 36.

42 TEWLS, *Transcript*, 21 July 2004, p. 27.

- 7.59 Some ATSILSs expressed frustration at the inadequate funding of preventative programs. SEALS stated:

we are the only service that I know of, certainly in New South Wales, probably in the whole country, that has a Young Offenders Program. That Young Offenders Program is actually funded by the ATSIC Regional Council out of the discretionary moneys. That came about from Royal Commission recommendations, and we continued it on because the need was there to look after youth. That equates to having one youth officer in each of the three offices looking after various geographical locations.⁴³

- 7.60 However, the Youth Offenders Program run by SEALS had been cut by the Regional Manager.⁴⁴

- 7.61 WALs also expressed frustration that:

the limited resources we get do not allow for any preventative or real education programs.⁴⁵

- 7.62 In the Northern Territory CAAFLU, which provides family violence prevention services at Yuendumu, related a close involvement in the origin of the community law and justice committee:

It started with Mrs Peggy Brown, who, while I was in court making submissions would tap me on the shoulder and say, 'He should be locked up,' or, 'Give him bail.' The magistrate noticed that she was regularly giving input, and she was then invited to address the court. From there it turned into a situation where input was being given by a group of people who understood the full history of the offenders and of the community. It is invaluable because bush courts like Yuendumu traditionally are extremely busy. It is a process whereby you do not address the court for a particular length of time about someone and you might not know the full story either. These law and justice committees are people living within the community and who are respected within that community, and they have important things to say ... It is certainly an important way for the courts and the people who visit the centre to get a fuller picture of that community and

43 SEALS, *Transcript*, 9 June 2004, p. 32.

44 SEALS, *Transcript*, 9 June 2004, p. 42.

45 WALs, *Transcript* 30 March 2005, p. 6.

its people's roles other than the role of the offender, which places them in the court.⁴⁶

- 7.63 However, community law and justice committees do not always work to the same parameters as legal service providers. CAALAS, which also provides services at Yuendumu, stated:

the [community law and justice] group will meet with stakeholders prior to court and discuss issues and then make recommendations or community feelings known both about types of matters and about individuals. Within that context, we have to appear for the individual to advocate for them in the court and then the magistrate as the sitting tribunal will determine what he takes from what we advocate and the information he has from the community justice group.⁴⁷

Committee Comment

- 7.64 Community based prevention and diversion responses empower communities by providing:

- a voice in the criminal justice proceedings which would otherwise be completely foreign to the communities and individuals who are subject to them; and
- an opportunity for communities to develop and implement strategies for dealing with problems themselves.

- 7.65 Preventative and diversionary programs are essential components of the provision of legal services to a sector of the Australian community that suffers such a disproportionate incarceration rate as the Indigenous population.

- 7.66 Evidence received by the Committee suggests that the community based character of ATSILSs and FVPLSs places them in a particularly strong position to contribute to the delivery preventative and diversionary programs to the communities they service.

- 7.67 Community based initiatives are, by their very nature, various rather than uniform. The success of one or a particular combination of

46 CAAFLU. *Transcript*, 22 July 2004, p. 31.

47 CAALAS, *Transcript*, 22 July 2004, p. 40.

initiatives will work very successfully in some communities but when the same arrangements are implemented elsewhere they could actually hinder the objective.

- 7.68 Evidence indicated that an essential factor in successfully implementing community based initiatives is a strong foundation of community consultation. The importance of community consultation and acting on the information gathered was nowhere more apparent than in the efforts of the governments of Western Australia and the Northern Territory to implement community based justice initiatives.
- 7.69 The Committee supports the circle sentencing, community law and justice committee and community policing initiatives that it encountered and encourages all stakeholders, government departments and agencies, legal service providers and indeed the communities themselves, to continue to explore the possibilities that lie in this direction.
- 7.70 While the Committee is aware of the importance of tailoring community justice initiatives to the local requirements and practices of each community, there is a very real need to ensure that the community decision making procedures, such as circles and community law and justice committees, properly reflect the views of the entire community.
- 7.71 Although it is a matter for state and territory governments, the Committee believes that the evidence it has received does not support the extension of circle sentencing procedures to matters involving family violence or sexual assault. However diversionary programs devised by and for the community must be retained and encouraged.