### WOMEN'S LEGAL SERVICE



### COMMENTS TO: 'INDIGENOUS LAW AND JUSTICE INQUIRY' Joint Committee of Public Accounts and Audit

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15<sup>th</sup> June 2004

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The Secretary Joint Committee of Public Accounts and Audit Parliament House CANBERRA ACT 2600

### Dear Secretary Re: Submission by Women's Legal Service (SA) Inc.

The following submission by the Women's Legal Service (SA) Inc addresses a few of the many complex questions raised by the Indigenous Law and justice Inquiry.

### Introduction

The Women's Legal Service SA Inc, (WLS) provides a free and confidential service to women in South Australia. WLS aims to empower women to achieve justice at an individual, community and political level. We recognise that women's legal problems occur in a context of social, political, cultural and economic disadvantage and that without addressing such disadvantage experienced by Indigenous Australians then minor reforms to legal assistance or any redistribution of legal aid will fail to redress the gross inequality and injustice faced by Aboriginal and Torres Strait women in rural and remote communities in particular.

WLS believes in the right of women to justice and equality before the law. We therefore practice in ways that understand and validate the experiences of women, value and accept women as individuals, promote safety and respect for women as individuals and empowers women to make choices and take control over their lives. In so doing, the legal issues that WLS addresses are those affecting women and children and include domestic and family violence, sexual assault, property issues and issues of contact and residence of children. This philosophy sits well with our belief that self determination in Aboriginal communities is crucial to the well being of communities and society as a whole.

We are pleased to have this opportunity to make a submission to the 'Indigenous Law and Justice Inquiry' because we believe that the lack of available legal resources for Indigenous communities and for Aboriginal women in particular is an area of utmost concern for us. We make this submission, knowing full well that the best people to ask and advise on the issues are those women in Aboriginal communities themselves. We do however make a submission based on our work with Aboriginal women as clients, co-workers, advice from our Indigenous Women's Subcommittee, and work with communities.

We say that the correct questions to solving the problem of access to justice for Indigenous Australians are not whether funding priorities are right or whether the process used to distribute legal dollars is correct but whether the necessary commitment by government, alongside community, to address the underlying causes for the many and varied problems that impacts on the ability of Indigenous Australians to access the justice system take precedence. We fear that in redistributing the legal dollar through a tendering process that may disadvantage (once again) Aboriginal organisations and therefore community, that Indigenous people will fail to access legal services, and will more likely be denied legal services, that non- Indigenous Australians may take for granted.

WLS, made submissions to the Senate Legal and Constitutional Committee Inquiry into Legal Aid

and Access to Justice regarding the inadequate level of legal aid funding. We raised the lack of adequate resources allocated to rural and remote areas and to Aboriginal and Torres Strait Islander people in particular living in urban, rural and remote areas.

WLS as a member of the South Australian Council of Community Legal Centres (SACCLS) endorsed the position of our National Association (NACLC) to their comment on the ATSIS Exposure Draft for Tender for Legal Services.

WLS agrees with our peak body that the Exposure Draft, if implemented, will not provide improved access to justice arrangements for Aboriginal Australians. Submissions to the Legal Aid Inquiry highlighted the fact that the area of greatest need in South Australia is the lack of resources directed to Indigenous services to address the needs of the most vulnerable citizens, Aboriginal women and children in particular. Funding allocation to Indigenous Legal Services is inadequate to provide the range of services required where clients present with multiple issues.

We are concerned that the call to tender appears to aim for an outcome to mainstream Aboriginal services. The House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (HORSCATSIA) report *We Can Do It*!<sup>1</sup> stated that "mainstream services do not meet the needs of Indigenous people to the same extent as they meet the needs of non-Indigenous people". Indigenous specialist services are essential to overcome social disadvantage and access to such services, whether health, access to legal rights, or housing. These are basic human rights and must be maintained, established and expanded via a commitment to improving conditions for Indigenous Australians.<sup>2</sup> We would see that areas of Family Violence, child abuse, sexual abuse and Family Law issues would not be addressed by mainstream organisations. The WLS (through specialist workers) and Aboriginal Family Violence Legal Services, along with Aboriginal Legal Services are well placed to provide services to Aboriginal women and the Government should commit to providing better resources to do so over the long term.

We do not believe that private law firms are well placed to address the legal needs of Indigenous Australians and this will result in services that are less accessible. This is also true of mainstream legal aid services who are not well placed to address disadvantage faced by indigenous Australians. Access to justice will therefore be further restricted with the concomitant problems that arise.

Aboriginal Legal Services have established good will in the community. Aboriginal Legal Rights Movement has been in existence for 31 years in Adelaide and South Australian rural areas and the community is well aware of where to go for their legal needs. Where gaps remain in service extra funding is required to fill the gaps rather than any approach which removes indigenous services.

Aboriginal Legal Services, like Community Legal Services provide many services including preventative education and law reform. Aboriginal people are best placed to understand and contribute in these areas through Indigenous Legal Services. They provide these services with the assistance of Aboriginal and Torres Strait Islander leaders and community members, many of whom volunteer their time and knowledge. A system claiming to work in the interests of indigenous people while not including the right to self determination will fail.

Tendering can be more expensive and less transparent.

<sup>&</sup>lt;sup>1</sup> We Can Do It!, The needs of urban dwelling Aboriginal and Torres Strait Islander peoples, HORSCATSIA, 2001, p43.

<sup>&</sup>lt;sup>2</sup> See also David Wilkinson Unhealthy Encounters: Legacies and Challenges for the Health Status of Settler and Aboriginal Communities Hawke Institute, University of SA, 2002. Hawke Institute Working Paper Series No 17.

WLS is also concerned about the failure of the tender process when lives and liberty are at issue. We recognise the high rate of incarceration, the extreme level of family violence and child abuse in Indigenous communities and any withdrawal of funding to Aboriginal Legal Services is likely to exacerbate the difficulties faced by the community. We believe that consideration should be given to providing additional funds to Indigenous legal services to fill any gaps in service provision and extra funding be allocated to ensure that all Indigenous Australians are provided with access to legal services rather than removing services that are already functioning and have existing infrastructure to provide legal services to the community.

We believe that any changes made to the existing framework of Indigenous legal services should confirm the strengths of the present system and continue to build on these strengths while addressing the inherent weaknesses caused by an absence of resources directed at particular areas, (eg Family Law, Family Violence, amongst others) over generations.

## A. The Distribution of Aboriginal and Torres Strait Islander Legal Services resources among criminal, family and civil cases.

Recent events within both the Federal and State arena in South Australia in relation to Indigenous issues have highlighted the inadequacies of the current system of distribution of Aboriginal and Torres Strait Islander Legal Aid services across a diverse range of areas of law with the most notable being criminal and family law.

Moves by the Federal government to scrap Aboriginal Legal Rights Services and open this specialist area for tender to the lowest bidder, has demonstrated quite clearly to those who work in the community legal service sector that decision makers have little comprehension of the services provided by the Aboriginal Legal Services and community legal services for Indigenous clients across the nation on very limited budgets.

Opening up the system for tender will not ensure the greatest and fairest distribution of access to justice for Indigenous clients in their area of greatest needs.

In the short term, the process will create disruption and confusion among Indigenous clients, and disrupt the spirit of cooperation amongst the various community legal services operating within the general community. In the long term it will only serve to perpetuate and continue the very problems that the system was devised to solve.

If there is a serious concern by the community to ensure access to justice then what is needed is a critical and transparent evaluation of the current system. Currently many community legal services, including Aboriginal & Torres Strait Islander Legal Rights Services are clearly underfunded for the amount of work that they are required to undertake. Demand for these services far outstrips available resources.

WLS for example, is funded by the Federal Government to run a Rural Women's Outreach Program (RWOP) in Port Augusta. This program was created to provide a service to women in the North and West of the state which covers many thousands of kilometers. The RWOP has a solicitor and an Indigenous Community Worker providing legal advice and representation, provide outreach services, community education and others. It is the only specialist women's legal service to provide

this kind of assistance to women living in this region of the state.

The service provides legal services to both Indigenous and non-Indigenous women in areas of law of utmost importance to the women in the region. These areas are domestic/family violence and family law (children's issues). This choice of priority areas compliments the services provided by Aboriginal Legal Rights Movement which primarily focuses on criminal law because of the appalling rate of incarceration amongst Indigenous men and women and Warndu Watlhilli-Carri Ngura Aboriginal Family Violence Legal Service which is funded to assist clients who are victims of family violence in Port Augusta only, leaving a gap for women living remotely.

The RWOP and Warndu Watlhilli-Carri Ngura have been in operation since October 2000 only. The latter service was initially auspiced by the WLS and incorporated in its own right some months later. This was the appropriate community response. Given adequate resources the above organisations, ALRM, RWOP and Warndu Watlhilli-Carri Ngura have adequately gauged community need in Port Augusta and surrounds and respond to that need in areas of their expertise. For example, RWOP has women approach our service for legal help in Family Law and family violence matters. There may be a conflict with other agencies because the other party has previously been represented by that organisation. This is typical in rural areas. Prior to RWOP and Warndu Watlhilli-Carri Ngura women in the area did not have access to legal advice.

RWOP is only allocated a budget each year sufficient to employ one worker, and the remainder of the funds are insufficient to regularly provide a service to women living in remote areas despite frequent requests from these women and in particular Indigenous women who for sensitive matters like to use the services of an all female legal service.

The critical area of need that we would like to address is for women in remote areas. The RWOP solicitor and community worker travel on an irregular basis (due to resource restrictions) to areas such as Coober Pedy and Oodnadatta. Part of our work entails Community Legal Education and sessions to highlight women's rights, particularly regarding safety issues for women and children. While our workers are on outreach, the office in Port Augusta is closed, thus restricting access to women who are able to call the Adelaide office via telephone. This is not always appropriate for Indigenous women in crisis. Services are continually stressed to find ways of meeting the greatest needs within the community / communities.

The Ngaanyatjarra Pitjantjatjara Yankunytjatjara (NPY) Women's Council based in Alice Springs provides a cross border program that provides women with court support (on circuit) and assistance in family violence matters. Such programs are critical to ensuring women are given safe options and assistance with dealing with court processes. NPY covers WA, SA and the NT. Speaking from the perspective of SA the service is inadequately funded to cover the area. The Anangu Pitjantjatjara Lands (AP Lands) covers an area of 160,000 square kilometers in the far north of SA. A gap exists in providing support, legal services to women living on both the Lands and in the entire area North and West SA. Either funding should be increased for this service or another service, including preventative measures, in areas with an unmet need. We believe a suitably resourced service based in Port Augusta could appropriately fill the gaps in areas such as the AP Lands and North West of South Australia in conjunction with other appropriate services.

The RWOP program has been prevented from reaching and adequately serving clients by the time and costs involved in travelling to some remote areas . Although we have a freecall number if clients do not have access to telephones it is difficult making contact urgently and many clients are in this situation. A client in Marree for example was able to access the local hospital to receive telephone calls however the flexibility depends on the goodwill of community members. Clients in remote areas may therefore wait to contact a legal service when a crisis situation develops. Any Family Court matter means that numerous contacts are made with the client. ATSI women may require interpreters and are disadvantaged by a lack of face to face contact. Many women fear the family Court for example, as they see it as another place where the children are taken away. As a consequence women are unsure of their rights when a family member takes the children. The most preceious resource a CLC or ATSILS have is community workers with time to explain the exact nature of processes and potential outcomes to clients. It would be advisable to provide Community Legal Education sessions on an ongoing basis and consistent Court circuit attendance to represent women affected by violence.

Changing funding priorities based on a tender system that valorizes non Aboriginal organisations and penalizes those that are currently working to meet the needs of the Indigenous community is indeed questionable. The Federal Government should not be adopting a policy of redirecting resources from criminal representation for example, to other areas where Indigenous services become pitted against each other for scarce resources. Both criminal and family orientated legal services for Indigenous communities should be adequately resourced to meet the demand. Both areas are a high priority and communities should not be disadvantaged and compromised by a play off of service against service and legal issue against legal issue.

The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) Recommendations and the Social Justice Report 2003 (Report of the Aboriginal & Torres Strait Islander Social Justice Commissioner) highlight the multiple issues faced by Indigenous people and communities. It is timely to ensure that basic rights such as access to justice, among others, is addressed in an appropriate way with self determination a major priority. This means that equal weight be given to what is ostensibly a human rights issue, that is access to justice in areas of need such as Family Law, Criminal Law and Civil Law that affect people's lives in various other ways.

# **B.** The coordination of Aboriginal and Torres Strait Islander Legal Services with legal Aid Commissions through measures such as memoranda of understanding.

The difficulties for many Indigenous people in accessing mainstream services should be accurately considered before any Memoranda of Understanding is considered between ATSILS and LACS.

Mainstream services can and some do have some capacity to provide appropriate legal services to some Indigenous people but as with all things, it requires dedication by each individual staff and the organisation to foster a culture of understanding. Some ways that mainstream services can attempt to achieve this are by hiring Indigenous staff, and by giving members of the Indigenous community input into the operation and service delivery of their service. Compulsory cultural training for all staff and management is another way that this culture of understanding can be fostered

Having said this, it cannot simply be implied that mainstreaming Indigenous Legal Services is appropriate. This is because the nature of disadvantages faced by Indigenous communities within Australia are particular to their history of invasion, oppression and the endemic systematic institutionalised racism that continues to manifest. This history is not shared by any other minority group in Australia but it is similar to the stories of other Indigenous groups around the world like the First Nation people and Moaris of New Zealand who have experienced similar disadvantage and discrimination. Indigenous people should be given the choice as to whether to use Indigenous-specific legal services or mainstream service. Indigenous people have struggled and worked hard to obtain the specialist services that they currently have and these should not be compromised. Women's Legal Service SA Inc, firmly believes that it is patronising and further, a policy of assimilation, for government to force Indigenous people to use mainstream services that don't cater for their needs or understand their history and culture.

Aboriginal and Torres Strait Islander Legal Services must remain autonomous to effectively provide legal services to their clients. LAC's can assist in providing duty solicitors to remote areas while ATSILS can assist with training of those solicitors for example, however it is imperative that Indigenous people have access to an appropriate service that can provide a skilled and specialist service that is culturally appropriate. ATSILS are able to advocate on the behalf of clients where there are multiple issues and in a way that LACS are unable to.

Indigenous people are more likely to seek assistance from ATSILS and some trusted solicitors who generally have built up a client base by working as "bush solicitors" in communities. The bureaucracy of LACS and the fee can be prohibitive to many Indigenous people and the special needs of Indigenous people, especially women, are unlikely to be taken into account.

Legal Services Commission in SA (LSC) have strict guidelines to accept a client on the merit of the case at the time. Aboriginal women are more likely to be excluded by failing to adequately account their story (Refer, R & Kina) and thus fail the test. They are less likely to appeal a decision of refusal in the first instance by LSC. Aboriginal people in remote areas especially may find it difficult keeping timely appointments with their solicitor and for urban solicitors this may be a reason to cease acting. Indigenous community workers attached to ATSILS, such as ALRM in SA provide support and encouragement to assist in navigating the legal system. Community knowledge is crucial to provide communications links where clients do not have telephones or where a client does not have a fixed address. Mainstream services are unable to cope with these situations with the expertise that community workers have.

### C. The access for Indigenous women to Indigenous-specific legal services.

Access to the legal system has often been one of obstruction and obfuscation for many Indigenous women.

Aboriginal and Torres Strait Islander women endure discrimination on the one hand for being Indigenous, and on the other as women. Aboriginal women are amongst the most disadvantaged group in society. One would need to examine the cultural and patriarchal norms that underpin so much of the legal system to adequately assess the obstacles to Aboriginal women in gaining access to justice via both Indigenous and non Indigenous legal services. We know that past and present oppression plays heavily on the destruction of Aboriginal society because the racism continues to occur. One woman asks; "I have never had trouble getting a restraining order but my sisters who are dark skinned do."

Women in rural and remote areas are again disadvantaged by a lack of any legal service in their area. In recognition of this fact Indigenous specific services such as the Aboriginal Family Violence Legal Services and the NPY Women's Council Aboriginal Domestic Violence Legal Service have come about. Some WLS's also have specific Indigenous Women's Programs and RWOP's to prioritize these areas of greatest need. From the perspective of the WLS the effectiveness of

services that have as their priority a woman centred approach is high when compared to services that do not. This merely reinforces the need for a diversity of services and Indigenous specific legal services along with Indigenous women's legal services.

The provision of Aboriginal Women's Legal Services in each state and territory would address a very felt need to provide women with a specialist service that deals primarily with and has expertise in Family Law and violence issues. This would solve the problem of conflicts arising with ATSILS and provide another avenue for Indigenous women to deal with women's business in a safe setting.

In South Australia there is no Indigenous-specific Legal Service for women which is probably a reflection of the need for the government to address the underfunding of the whole community legal service sector. The majority of the clients in the Women's Legal Service SA Inc, Port Augusta office are Indigenous women who often seek assistance in relation to children's issues and restraining orders. It would seem from the number of women requesting assistance that these would be their most pressing areas of need. Our service though has identified other areas of concern on the occasions when outreaches have been taken to areas such as Coober Pedy and Oodnadatta. Indigenous women from these remote areas also need information and assistance in regards to receiving Centrelink benefits and consumer credit issues.

Anecdotal evidence provided to us by clients coming from the North-west areas of the state point to the retention of key cards and pin numbers by shop owners in remote communities. In these instances the owners of the key cards must pay to withdraw money from their own accounts and they are not given a record of how much they owe or how much they have paid off their debt. This system invariably leads to some clients getting into debt and restricts their choice when it comes to purchasing food or other general items. Movement is likewise restricted. One woman had to leave the community urgently because of violence and she did not have the means or capacity to do so on short notice and without money because her key card was in the possession of the store.

In regards to the Centrelink benefits anecdotal evidence from clients would suggest that a significant percentage of Indigenous women in remote communities are not receiving accurate information about Centrelink entitlements or in some cases are not even receiving Centrelink benefits. The implications of this are far reaching. In cases where there is family violence it may make it harder for some Indigenous women to leave because of their economic dependency on their partner.

It is evident that Indigenous women require a service that does not replicate the very power structures causing the violence. This is why Indigenous women must be part of and involved in the process and provision of service and why an Indigenous Women's Legal Service is essential.

WLS recognizes that Indigenous concepts of violence are much broader than mainstream concepts of violence just as Indigenous families are much broader in terms of connectedness and relationships, often despite the forced removals, incarceration levels and high mortality rates and effects of colonization. "Family" covers a diverse range of obligations and mutual support distinct from nuclear family arrangements in mainstream society. Therefore an Indigenous culturally based perspective must be maintained, identified and supported in the provision of multifaceted legal services to Indigenous people.

## **D.** The ability of Law and Justice Program components to recruit and retain expert staff.

Across the whole community legal service and legal aid sector, there is a crisis because many services are under-resources, overworked and underpaid. As has been mentioned previously in this submission in this sector demand each year is far outstripping available resources in terms of human capabilities, infrastructure and financial resources. Each year Women's Legal Service SA Inc, turns away more women and has to prioritize who is the most neediest from among the needy, which at times seems like an impossible task. It is our experience, that it is crucial for women, especially Indigenous women, to be able to access legal services from a community focused specialized service. In rural and remote areas there is a disturbing lack of legal services.

One of the most pressing problem for most community legal services and Indigenous Legal Services is the recruitment of staff and retention of staff. The staff within this sector have always been severely underpaid by comparison to their counterparts within the private and government sector. The low wages and uncertainty of funding have had ramifications in many aspects of service delivery because some centers have vacancies for skilled positions that remain unfilled for lengthy periods of time thus reducing the level of service provided to the community. Trained staff are then often lost to the government and private sector who afford a substantial remuneration (often double) for a less stressful workload.

Solicitors who work in the community legal sector often do so for ideological reasons and to advance human rights and discrimination issues. A lack of support and funding then result in a loss of committed, experienced lawyers.

It is crucial that women solicitors be available in rural and remote areas to afford Indigenous women and children the opportunity to obtain representation on issues such as violence, Family Law, sexual assault, among others.

Indigenous solicitors are under enormous pressure when working in the area.

Costs associated with living remotely and travel, are prohibitive. ATSILS and CLC's do not have the resources and guaranteed funding to adequately compensate legal staff, especially if they are required to relocate.

There may be a lack of adequate supervision for first year solicitors in remote areas and a lack of colleagues in the area.

These issues have been ongoing and a persistent problem for many legal community services but there has been a lack of political will to tackle the hard facts concerning the recruitment and retention of staff in this sector.

### E. Tendering of Indigenous Legal Services.

The Women's Legal Service SA Inc, firmly believe that tendering of Indigenous Legal Services will not address the supposed inadequacies of the current system. We have provided a brief outline of our concerns in regards to the tendering process because we have previously provided a submission in regards to the new tender process and we support the position adopted by our National Association. Our reasons for not supporting the proposed new venture are as follows:

• competitive tendering is a divisive method of resource allocation which undermines the

spirit of cooperation amongst service providers;

- competitive tendering does not deliver a more just and equitable distribution of resources but instead serves to cultivate a culture of cost-cutting and potentially profit maximisation in regards to private firms, which invariably leads to poor standards in service delivery;
- and in this climate the needs of Indigenous communities and in particular Indigenous women would be subjected to market forces that dictate that providing services to them is not economically rational because of economies of scale;
- the current structure of tender provides for no method of having Indigenous in put into the delivery of the various services;
- the narrow focus areas provided in the tender document to do not accurately reflect the areas in which there is the greatest need as 20 per cent of all male prisoners and 25 per cent of all female prisoners in some Australia prisons, more in the Northern Territory, are Indigenous. Young Indigenous people are 19 times more likely to be detained than non-Indigenous young people. These statistics clearly point to a need to still fund criminal legal services whilst at the same time funding other services to address needs such as Indigenous people in being nearly six times more likely to be victims of domestic-related assault and sixty percent of Aboriginal households identify family violence as a common problem;
- and lastly the new process does not make Community Legal Education a priority area. This is a major failing as the only way to effectively redress the statistics mentioned above is to undertake preventative measures such as education and community strengthening activities.

These problems reflect the inherent and fundamental flaw of the new tender process which is that there has been insufficient consultation with the relevant stakeholder groups such as Indigenous Communities, Aboriginal Legal Services, Legal Aid, Community Legal Centres, the legal fraternity and other welfare groups.

Women's Legal Service believes that an ABC 7.30 Report on the 25<sup>th</sup> of May 2004 could not find any person including the relevant Federal Minister to speak in favour of the proposed changes is reflective of the general sentiments that this tender proposal was conducted in a manner that was not consultative and indeed reflects the unfairness and historical disregard for Indigenous people. It also raised the issue that ATSILS are indeed more cost effective. Redfern Legal Centre for example quoted the cost for their service for each client as around \$60 and the LAC at around \$300.

### **CONCLUSION**

Women's Legal Service SA Inc, firmly believes that the new system of tendering proposed would only serve to further exacerbate current problems. This would ultimately result in the effective marginalisation of the Indigenous community from the rest of society and unfortunately the one's to suffer most are Indigenous women living in remote areas, who already miss out on much needed legal resources in the current climate.

In conclusion, we submit the following;

1.We call on the Government to provide increases in funding to vital services to enable a fair and just system of access to justice for Indigenous people. This would include increased funding to Community Legal Centres, Women's Legal Services, Aboriginal Family Violence Legal Services, Aboriginal & Torres Strait Islander Legal Services, Legal Aid Commissions, women's shelters/ safe houses – especially in remote and rural regions.

- 2.We also support the establishment of Indigenous Women's Legal Services to cater for the needs of women in relation to wide range of legal matters, with an emphasis on Family Law and family Violence, and to ensure the cultural sensitivity they require with certain issues;
- 3. That the tender process be shelved until an impartial and transparent evaluation of the current system is undertaken.
- 4. That greater community involvement and consultation (especially that of the Indigenous community) is needed when considerations are made to fundamentally restructure a system of service delivery.
- 5. That the myth that private and mainstreaming is efficient, and public and specialized is inefficient (especially as relates to Indigenous Australians) be forthwith debunked.

WLS agrees with the recommendations of the Senate Legal And Constitutional References Committee on Legal Aid and Access to Justice June 2004.

### **REFERENCES**

- ©Community Legal Centres Association Association (WA) 'Response to the Exposure Draft of a Request for Tender for the Purchase of Legal Services for Indigenous Australians' April, 2004.
- **•**Jukes, J & Spencer, P. 'Buying and selling justice: the future of CLCs' *Reform* Issue 73, Spring 1998.
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@ABC, 'Aboriginal Legal Rights Services', 7.30 Report, 25 May 2004.