

Funding and Distribution of Resources in Aboriginal and Torres Strait Islander Legal Services by Case Type

- 2.1 The distribution of ATSILSs' resources between criminal, family and civil law matters lays at the heart of equitable access to legal services by Indigenous Australians, particularly the access of women and children and people living in regional and remote areas.

Aboriginal and Torres Strait Islander Legal Services and Criminal Law Matters

- 2.2 The number of criminal cases dealt with by ATSILSs rose by about 67 percent over the five years – from 68 066 cases in 1997-98 to 113 698 cases in 2002-03.¹ However, ANAO found that 'funding ... for the Legal Aid element [of the Law and Justice Program] has not increased substantially over the last five years.'²
- 2.3 In 2001-02 of the legal aid cases dealt with by ATSILSs, 89 percent were criminal and two percent were family law matters.³ By 2003-04 the proportion of criminal cases dealt with by ATSILSs had risen to 93 percent and the proportion of family law matters had dropped to one percent.⁴

1 ANAO, *ATSIS Law and Justice Program, Audit Report No. 13, 2003-2004*, Para. 1.9, p. 26.

2 ANAO, *ATSIS Law and Justice Program, Audit Report No. 13, 2003-2004*, Para. 1.7, p. 25.

3 ATSIC, *Annual Report 2001-2002*, p. 148.

4 ATSIC, *Annual Report 2003-2004*, p. 125.

- 2.4 ATSILSs expressed a strong view that their primary function is to represent persons in danger of incarceration. This view was supported on a number of grounds.
- 2.5 The preponderance of criminal law matters dealt with by ATSILSs was explained in terms of:
- their very history [they] grew up to deal with the particular point in the legal system where Aboriginal persons charged with criminal offences were coming before courts unrepresented or poorly represented.⁵
- 2.6 The largest ATSILS in New South Wales, the Sydney Regional Aboriginal Corporation Legal Service (SRACLS), supported the view that the primary focus of ATSILSs should be on criminal law by citing the current disproportionate incarceration rates of Indigenous people in relation to the rest of the population:
- There is nothing more alarming than this: we are two percent of the population and we are 20 percent of the gaol population ...⁶
- 2.7 The Western Aboriginal Legal Service (WALS), which services the western area of New South Wales, put the 20 percent figure into context as reflecting an increase in the proportion of Indigenous people represented in the prison population:
- Ten years ago approximately 14 percent of [the gaol population in New South Wales] were Aboriginal people. Today the figure is closer to 20 percent.⁷
- 2.8 WALS explained the reasons for the increase in New South Wales involved:
- the bail laws ... have been greatly tightened [over the last several years] so that more and more Aboriginal people who are classed as repeat offenders are finding it difficult to obtain bail, and they end up in custody. Also the general administration of criminal law over a period of time has resulted in higher and higher sentences.⁸

5 MRALS, *Transcript*, 13 July 2004, p. 46

6 SRACLS, *Transcript*, 13 July 2004, p. 73.

7 WALS, *Transcript*, 30 March 2005, p. 2.

8 WALS, *Transcript*, 30 March 2005, p. 7.

- 2.9 The historical reasons for ATSILSs and the continued and increasing over-representation of Indigenous people in the criminal justice system has resulted in:
- the Aboriginal Legal Service ... remain[ing] at the cutting edge of criminal law. That is where there is this huge wealth of experience...⁹
- 2.10 ATSILSs' view of their primary function is reflected in the Commonwealth's Priority Assistance Categories of the *Policy Framework for Targeting Assistance Provided by Aboriginal and Torres Strait Islander Legal Services*.¹⁰ The Priority Assistance Categories set out criteria for determining priority cases in which ATSILSs should act. The first Priority Assistance Category specifies that providers must give priority to applicants 'where the person may be detained in custody'.¹¹
- 2.11 The conviction with which ATSILSs (and other providers of legal services to Indigenous people) hold their primary responsibility as the provision of criminal law services was evident in the dissatisfaction expressed on the proposed alteration of the Priority Assistance Categories in the *Exposure Draft of the Request for Tender of Indigenous Legal Services*.¹² The Exposure Draft placed 'cases in which personal safety and the safety of a child was at risk' above cases in which 'persons were at risk of detention'.¹³
- 2.12 The requests for tenders to provide Indigenous legal aid services in Victoria and Western Australia and Queensland reiterated the original ordering of Priority Assistance Categories listing the first Priority Assistance Category as 'where the person may be detained in custody'.¹⁴

9 MRALS, *Transcript*, 13 July 2004, p. 53.

10 ATSI, *Exhibit No. 18*.

11 ATSI, *Exhibit No. 18*, Sect. 4.1.

12 ATSI, *Exhibit No. 15*. Instances of ATSILS' concerns at the re-arrangement of Priority Assistance Categories can be found at SEALS, *Exhibit No. 4*, pp. 14-5, VALS, *Exhibit No. 11*, p. 8.

13 ATSI, *Exhibit No. 15*, pp. 62-3.

14 AGD, *Request for Tender No. 04/29 for the Purchase of Legal Aid Services to Indigenous Australians in Victoria and Western Australia*, p. 65 and AGD, *Request for Tender No. 04/01 for the Purchase of Legal Aid Services to Indigenous Australians in Queensland*, p. 67.

- 2.13 Despite the alterations to the order of Priority Assistance Categories, AGD stated that there were no implications of a hierarchy:

All matters listed are given an equal priority.¹⁵

Costs of Increased Incarceration

- 2.14 The Legal Aid Commission of Western Australia (WALAC) summed up the prevailing mood among all providers of legal aid services to Indigenous Australians in criminal matters stating that:

if we were able to provide proper representation for a lot of [Indigenous] people currently being found guilty and being sent to prison, I am sure that we would either reduce the numbers or contribute to a lowering of the sentences that people are being saddled with.¹⁶

- 2.15 Two types of costs accompany increased incarceration rates in the criminal justice system.

- 2.16 The first is the cost to the criminal justice system itself. The fact that the full details of defendants' cases are not before the courts when verdicts and sentences are passed down, undermines the criminal law process.

- 2.17 The second was detailed by the Legal Aid Commission of New South Wales (NSWLAC) as the financial costs of incarceration:

It currently costs \$66,000 to keep an adult in prison for twelve months. The costs jump exponentially when costs for their children are factored in. Children whose parents are in prison run a high risk of being taken into State care or juvenile detention centres. Out of home care can cost as much as \$260,000 a year, while it costs \$216 499 to keep a child in juvenile detention for 12 months.¹⁷

15 AGD, *Submission No. 44*, p. 17.

16 WALAC, *Transcript*, 31 March 2005, p. 19.

17 NSWLAC, *Submission No. 25*, p. 26.

Aboriginal and Torres Strait Islander Legal Services and Family and Civil Law Matters

2.18 The preponderance of criminal law matters dealt with by ATSILSs raises questions of access by Indigenous Australians to legal services in family and civil law matters. People seeking access to family and civil law services are often victims or potential victims of family violence.

Impediments to Provision of Family and Civil Law Services by Aboriginal and Torres Strait Islander Legal Services

2.19 In declaring their primary function as the representation of clients in criminal law matters, ATSILSs also acknowledged the importance of family and civil law services to Indigenous Australians. However, they referred to a range of funding and administrative impediments to establishing and expanding practices and servicing clients in these areas of the law.

2.20 The cost of establishing a civil law practice within the ATSILS funding regime was considered prohibitive. SRACLS, stated:

To set up a civil practice you have to inject maybe \$250,000 or \$300,000 into paying costs out, and you start to get the money back about 18 months later. With our government funding cycle we are just not allowed to do that. We cannot dig that hole in our current budget. So, with the way we are funded at the moment, providing a civil law service is a very tough exercise.¹⁸

2.21 Civil and family law practices were seen as lying even further outside the capabilities of smaller regional ATSILSs. The South Eastern Aboriginal Legal Service (SEALS), which services the south eastern region of New South Wales stated:

We would love to do family law, but the difficulty with family law is that it is a specialised area; it is a paper-driven jurisdiction. To file an application in court, you need affidavits; so you need quality staff who can generate the paperwork to take it to court. We have Aboriginal staff employed and we are developing their skills as secretaries,

18 SRACLS, Transcript, 13 July 2004, p. 63.

but there is a step between what they do and what you would need them to do if you were to run a proper family law practice. If we were properly funded, we would love to do family law and civil matters.¹⁹

2.22 The ability of ATSILSs to develop and retain expert staff is considered at Chapter Four.

2.23 SEALS affirmed the importance of having available family and civil law services, not only in their own terms but in diffusing and diminishing instances in which an event may conclude with a criminal act:

If we could address a custody issue, a contact issue or even a civil matter, say, involving a dispute over a car or a neighbourhood fence, we might not end up dealing with charges...²⁰

2.24 Even were an ATSILS able to establish a civil or family law practice, the lack of acknowledgement from funding bodies of the greater costs involved in undertaking family and civil law cases discouraged involvement in these areas of law. SRACLS stated:

We get \$60 or \$70 a head to do a criminal case, a family law case or a care and protection case ...²¹

2.25 AGD clarified the claims that ATSILSs received the same amount per case regardless of the type of case undertaken:

Each ATSILS currently receives a block funding grant ... They do not receive a per case flat rate ... The issue of disincentive [therefore] does not arise ... The provision of particular services is ultimately a matter for the provider ...²²

2.26 The far greater resources required to conduct civil and family law cases was supported by the National Association of Community Legal Centres (NACLC). NACLC:

estimate that the amount of time needed for civil and family matters is six or seven times greater than that needed for criminal matters.²³

19 SEALS, *Transcript*, 9 June 2004, p. 36.

20 SEALS, *Transcript*, 9 June 2004, p. 36.

21 SRACLS, *Transcript*, 13 July 2004, p. 63.

22 AGD, *Submission No. 44*, p. 3.

23 NACLC, *Transcript*, 13 July 2004, p. 5.

- 2.27 The Aboriginal Legal Rights Movement (ALRM), the sole ATSILS in South Australia, also supported claims that the model used to fund ATSILSs militated against them conducting family and civil law cases:

Assessing the costs of services cannot be on the basis that each type of case is of equal value. There must be a weighting process that reflects resources needed to deliver the service, and one family law matter can sometimes be the equivalent of 50 guilty pleas.²⁴

- 2.28 The inadequacy of family and civil law services to Indigenous Australians is exacerbated by the fact that a significant proportion of the Indigenous population live in regional and remote Australia. Even mainstream providers of legal services such as the NSWLAC found:

there are large pockets throughout the state where we cannot attract private practitioners to family law work at legal aid rates ...

In Commonwealth family law, we pay \$130 an hour. That is way below market rate.²⁵

- 2.29 WALs confirmed the difficulties of obtaining family law services for clients by referral in rural, regional and remote areas:

there is a problem in arranging representation for people in family law matters, because the private profession has, by and large, decided not to continue to do legal and family law work in this area.²⁶

- 2.30 The serious consequences of the paucity of family law services in regional areas was exemplified in:

a case where a woman was in court and the judge said, 'If you don't have a solicitor here next time we are just closing the case.' In this case it was this woman against DOCS, so it was pretty important that she had representation. To the magistrate it looked like she didn't give a damn, and there was no-one there to say she had been exhausting every avenue trying to find a solicitor.²⁷

24 ALRM, *Transcript*, 19 August 2004, p. 29.

25 NSWLAC, *Transcript*, 13 July 2004, p. 80.

26 WALs, *Transcript*, 30 March 2005, p. 5.

27 Grace Cottage, *Transcript*, 30 March 2005, p. 53.

- 2.31 A final major reason for the ATSILSs not taking on family law matters involved conflict issues. Conflict issues are discussed in detail at Chapter Three.

Family and Civil Law Services Provided by Aboriginal and Torres Strait Islander Legal Services

- 2.32 Larger ATSILSs, particularly those with state wide coverage and or operating out of a capital city, tended to offer some level of service in family and civil law matters. The Alice Springs based Central Australian Aboriginal Legal Aid Service (CAALAS) also provides family and civil law services.²⁸
- 2.33 ALRM advised that responding to changing community needs had resulted in:
- a bit more than a quarter but less than a third ... of our resources being channelled towards legal service delivery other than criminal casework delivery.²⁹
- 2.34 CAALAS stated that of nine lawyers, two are full-time civil lawyers and one a full-time family lawyer.³⁰
- 2.35 The former Director, Legal Services of the Aboriginal Legal Service of Western Australia (ALSWA), Mr Mark Cuomo, stated ALSWA:
- has always had a capacity ... for family law and usually has had somewhere between two and four [out of 30] practitioners ... who have been dedicated to family law practice. All of the 11 country solicitors do some family law as well.³¹
- 2.36 SRACLS stated that it had introduced a family law service as the result of successfully lobbying ATSIC for additional resources:
- we have been running a [family law] pilot [of two solicitors out of an overall staff of 26 solicitors] for the past 20 months and building up a practice.³²
- 2.37 Some ATSILSs sought to offset a lack of funding for resource intensive family and civil law matters by entering into agreements

28 CAALAS, *Transcript* 22 July 2004, p. 39.

29 ALRM, *Transcript*, 19 August 2004, p. 34.

30 CAALAS, *Transcript*, 22 July 2004, pp. 39-40.

31 Mark Cuomo, *Transcript*, 31 March 2005, p. 1-2.

32 SRACLS, *Transcript*, 13 July 2004, p. 60.

with LACs.³³ The Commonwealth provides funds to LACs to act in matters of Commonwealth law, which are primarily family law matters.

2.38 The coordination of services between ATSILS and LACs is discussed in detail at Chapter Five.

2.39 Another strategy to provide family law services was the use of pro bono solicitors. SRACLS stated that:

We ... have a ... pro bono scheme which was introduced about two years ago, and ... about 70 barristers ... indicated that they would be prepared to do pro bono work for us.³⁴

Committee Comment and Recommendation

2.40 ATSILSs operate in a climate of effectively static funding and increasing demand. ATSILSs prioritisation of cases where a person is in danger of incarceration is understandable because these needs are immediate. To withhold representation of accused persons in danger of incarceration, Indigenous or otherwise, would constitute a fundamental breach of the principles of our criminal justice system.

2.41 However, the accessibility of family and civil law services to Indigenous people is important in two respects:

- to ensure that Indigenous Australians are aware of and can realise their full entitlement under the law; and
- as a means of resolving issues that might otherwise escalate into future criminal law matters.

2.42 The arrangements under which ATSILSs receive funding present significant impediments to them introducing or increasing family and civil law services.

2.43 AGD needs to resolve the precise character of the legal services it requires to be provided by ATSILSs.

33 WALs, *Submission No. 2*, p. 5.

34 SRACLS, *Transcript*, 13 July 2004, p. 67.

- 2.44 If AGD considers that it is desirable that ATSILSs provide family and civil law services, it needs to put in place funding arrangements that acknowledge the costs of establishing civil law practices and the greater amount of time and resources required of a legal service to conduct family and civil law matters.
- 2.45 Funding for family and civil law practices would have to be on a far more extended cycle than has been the case to date and the block funding across criminal, family and civil law matters must be acknowledged to be manifestly inadequate and inappropriate in encouraging provision of adequate family and civil law services.
- 2.46 The Committee considers that, in the event that AGD considers that ATSILSs should provide family and civil law services, the level of expected services in these areas of the law needs to be specified and funds for the provision of services needs to be dedicated specifically to the provision of these services.

Recommendation 2

- 2.47 **That based on available data and need, all future contracts between the Attorney-General's Department and providers of services that are currently delivered by Aboriginal and Torres Strait Islander Legal Services designate specific requirements of family, civil and criminal case loadings and provide adequate funding to meet these requirements.**
- 2.48 Furthermore, the Committee notes that the incapacity and discouragement to provide family and civil law services in current funding arrangements impacted in a particularly acute way upon smaller regional ATSILSs. The Committee understands that this incapacity supports the Government's stated preference of minimising the number of providers in the tendering out of ATSILSs.
- 2.49 If AGD considers that family and civil law services should be provided to Indigenous Australians by organisations other than ATSILSs, the evidence shows overwhelmingly that the designated providers should be Indigenous owned and that designated providers should be required to maintain a network of Community Legal Workers.