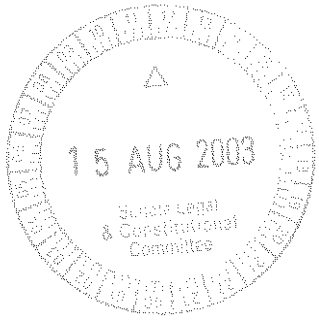
COALS
Coalition of Aboriginal Legal Services NSW

Our Ref: JFB:hne

12 August 2003



The Senate Legal and Constitutional
Committee
Suite S1, 61
Parliament House
CANBERRA ACT 2600

Dear Sir

Re: Inquiry Into Current Legal Aid and Justice Arrangements

I refer to your letter dated 14 July 2003 and now enclose Submission on behalf of the Coalition of Aboriginal Legal Services of New South Wales.

If you require any further assistance please do not hesitate to contact me.

Yours truly

John Boersig
Director

Encl.

A Submission made on behalf of the Coalition of Aboriginal Legal Services of New South Wales (COALS) to the Reference Committee's Inquiry into 'Current Legal Aid and Justice Arrangements'

Terms of Reference

The reassessment will examine and make recommendations to government on how Aboriginal and Torres Strait Islander people can in the future be best represented in the process of the development of Commonwealth policies and programmes to assist them. In doing so the reassessment will consider the capacity of current legal aid and access to justice arrangements to meet the community need for legal assistance, including:

A. the performance of current arrangements in achieving national equity and uniform access to justice across Australia, including in outer-metropolitan, regional, rural and remote areas;
B. the implications of current arrangements in particular types of matters, including criminal law matters, family law matters and civil law matters; and
C. the impact of current arrangements on the wider community, including community legal services, pro bono legal services, court and tribunal services and levels of self-representation.

In particular the reassessment will consider the appropriate role for Regional Councils in ensuring the delivery of appropriate government programmes and services to Indigenous people.

The reassessment will also consider and report on any potential financial implications.

12 August 2003

John Boersig
On behalf of the
Coalition of Aboriginal Legal Services of NSW

Contents

Executive Summary

This submission begins with a discussion of the historical and political factors that have contributed to this over-representation of Indigenous people at all stages of the criminal justice process. This discussion provides the background for the subsequent consideration of the need for the continued operation of specialist Indigenous Legal Services, and for the request made by the New South Wales Coalition of Aboriginal Legal Services (COALS) to the Reference Committee's inquiry on current legal aid and justice arrangements to reinforce three inextricably linked goals: the survival of the Aboriginal and Torres Strait Islander Legal Services, ensuring sustainability of these services, and improving the access to justice for those whom they serve.

The submission itself is divided into three parts. Firstly, the historical context of the Aboriginal and Torres Strait Islander Legal Services is reviewed in the light of the dramatic increase in Aboriginal imprisonment in Australia in recent years. This increase has occurred in contravention of the very first recommendation from the Final Report of the Royal Commission into Aboriginal Deaths in Custody. Previous reports have acknowledged that the most vital dimension of the Aboriginal Legal Services is their genuine accessibility to Aboriginal and Torres Strait Islander people. This submission considers the enduring importance of this fact in the light of four specific recommendations made by the Royal Commission.

Secondly, the contemporary role of ATSILS is evaluated in terms of their basic cultural, legal and social purposes of ensuring that communication of evidence by Aboriginal people is recognised in court; that trial and sentencing of Aboriginal defendants does not miscarry, and that Aboriginal communities do what they can to keep their members from being incarceration, a self-perpetuating cycle.

Thirdly, the enormous workload of ATSILS for the foreseeable future is assessed, with particular attention given to reducing juvenile detention and to the obligations of Governments to ensure real Aboriginal empowerment.

The submission concludes that, in whatever course of action the Government may take in relation to ATSIC, it is essential that ATSILS retain a Regional and community base. It is further suggested that the consideration of the relationship between ATSILS and Regional Councils will encourage community control of service delivery in regional areas.

Overview:

Why do Aboriginal and Torres Strait Islander people need separate Legal Services?

Discussion about the special role of Aboriginal Legal Services in Australia is not new. On various occasions over the past 20 years, suggestions have been made that Aboriginal and Torres Strait Islander Legal Services should be merged with Australian Legal Aid Commission. These suggestions have been made in spite of the fact that few Aborigines actually used Legal Aid before Aboriginal Legal Services were established and that consequently, numerous miscarriages of justice took place.

In 1986, Mr. John Newfong - the first professional Aboriginal journalist in Australia - responded to a call from the Australian Police Federation for an end to funding for Aboriginal Legal Services. He pointed out that a House of Representatives inquiry in 1979 chaired by the current Minister for Immigration and Aboriginal Affairs, Mr. Phillip Ruddock, had concluded that Aboriginal Legal Services were far more cost efficient than other legal aid services. Mr Newfong observed that:

> Where Aboriginal legal services have provided a more comprehensive service than other legal aid agencies it has not been because of unlimited resources in the way of government funding. It has been out of a much greater resourcefulness necessary to meet the greater needs of their client groups. [1]

The resourcefulness required by Aboriginal Legal Services has many dimensions, and the needs of Aboriginal client groups have expanded in the past 12 years. Commitments made by Federal and State Governments in response to the recommendations in 1991 of the Royal Commission into Aboriginal Deaths in Custody included continuing support for the special role of Aboriginal Legal Services. This Submission reviews the situation that currently faces Aboriginal and Torres Strait Islander Legal Services and their clients in 2003, and shows that the need for independent Aboriginal community based specialist criminal law services remain.

Recent research indicates that ATSILS;

> is still the legal aid body of choice for many Indigenous clients, and the vast body of all Indigenous legal cases and duty lawyer matters is still represented by the ATSILS[2]

This choice may be founded on the Aboriginal clients view that;

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1. *The Australian,* 21 October 1986, p13
2. Office of Evaluation and Audit, Aboriginal and Torres Strait Islander Commission, *Evaluation Of The Legal Aid*

in the area of communication with indigenous clients that ATSILS have a clear advantage over LAC's[3].

PART A.: THE HISTORICAL CONTEXT OF ABORIGINAL LEGAL SERVICES

1. Introduction: A Decade of Default with Rising Imprisonment

There is an urgent need for an expansion of Aboriginal and Torres Strait Islander Legal Services in Australia. Support for this assertion is based on the fact that even though more a decade has passed since the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) delivered its *Final Report*, Indigenous imprisonment rates remains unacceptably high. As far back as in 1988, the first recommendation of the *Interim Report* of the Royal Commission into Aboriginal Deaths in Custody directly stated that:

> Governments which have not already done so should legislate to *enforce* the principle that imprisonment should be utilised only as a sanction of last resort. [4] (emphasis added)

The second recommendation of that same report called for the introduction of legislation designed to prevent imprisonment in cases of fine default, including "a statutory duty upon sentencers to consider a defendant's means to pay" prior to the imposition of any fine. [5] The *Final Report* of the RCIADIC, delivered in May 1991, restated these fundamental recommendations [6] and called for increases in the use of Community Service Orders. Significantly, it also called for a greater recognition of the broad role of Aboriginal and Torres Strait Islander Legal Services.

Although both Federal and State Governments responded positively on paper to these formulas for reducing deaths in custody, very little action has subsequently been taken. Correspondingly, the plight of Indigenous Australians with respect to their rates of arrest and imprisonment remains highly disturbing.

Although Aboriginal and Torres Strait Islander people comprise only 2.1% of the Australian population, it remains that they are significantly over-represented at all stages of the criminal justice system. In August 1995, nearly a third (31%) of all people held in police custody were Aboriginal, an

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And Preventative Services Program, January 2003, p 3

3 Office of Evaluation and Audit, Aboriginal and Torres Strait Islander Commission, *Evaluation Of The Legal Aid And Preventative Services Program*, January 2003, p 3.

4 *The Royal Commission into Aboriginal Deaths in Custody Interim Report,* December 1988, p 24

5 *Interim Report, p 24*

increase from August 1992 when the proportion was about 29%. The proportion of Aborigines amongst arrested people rose between 1992 and 1995 in all states except Western Australia, where it remained more than half. In NSW, the proportion of people in police custody in August 1995 who were Aboriginal was 21%: one out of every five people arrested is Aboriginal. Discrimination against Aboriginal people was worse in South Australia (25%), Queensland (30%), Western Australia (53%) and the Northern Territory (80%). Total arrests in Australia declined by 4382 (from 25654 to 21272) in August 1995 compared with August 1992, while arrests of Aborigines declined by only 469 (from 7058 to 6589), and arrests of Torres Strait Islanders rose from 151 to 176. [7]

Indigenous people also appear in court at a rate five times higher than that which would be expected given their population size, and their rate of incarceration is twelve times higher than that of non-Indigenous Australians. [8] On 30 June 2000, Indigenous prisoners made up 19% of the total adult prisoner population, [9] that is, almost one in five prisoners currently incarcerated in Australian correctional facilities is an Aborigine or Torres Strait Islander.

Detention rates of Indigenous juveniles are similarly disturbing. The total number of Indigenous persons in juvenile corrective institutions on 31 December 2000 was 239. This represents 41% of the total number of persons detained in juvenile corrective institutions. This rate of incarceration is almost 16 times higher than the rate for non-Indigenous juveniles. [10]

The natural projection of figures over the next few years will mean an increasing incarceration rate of Indigenous people. In real terms, this means that most Indigenous families will have at least one family member held in incarceration during their lifetime. Aboriginal deaths in custody also remain unacceptably high.

It is in this context that the role of the Aboriginal and Torres Strait Islander Legal Services must be assessed. However, in order to fully appreciate the implications of the Royal Commission and the lack of change since the delivery of its *Final Report*, it is first necessary to examine the first two decades of the operation of the Aboriginal Legal Services.

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7. C. Cunneen and D. McDonald, *Keeping Aboriginal and Torres Strait Islander People Out of Custody*, 1997, p 20; D. McDonald, *National Police Custody Survey 1992*, Australian Institute of Criminology, March 1993, p 3
8. *Prisoners in Australia*, Report prepared for the Corrective Services Minister's Council by the National Corrective Services Statistics Unit, ABS, Canberra, 2000
9. *Prisoners in Australia*, Report prepared for the Corrective Services Minister's Council by the National Corrective Services Statistics Unit, ABS, Canberra, 2000
10. Australian Institute of Criminology, *Persons in Juvenile Corrective Institutions 1981 – 2000: With a Statistical*

2. Aboriginal and Torres Strait Islander Legal Services:

The Importance of Accessibility

The first Aboriginal Legal Service (ALS) was established in Redfern in 1970 as a community response to the lack of legal representation for Aboriginal people who had been faced with institutionalised police harassment. The extent of this harassment was such that even the presence of white lawyers as witnesses did not stop routine police arrests of Aboriginal people outside several hotels in inner Sydney. The initial benefit of the ALS was dramatic in reducing routine miscarriages of justice in Sydney, and then other capital cities, but less effective in transforming numerous forms of injustice in country towns throughout Australia. [11]

In the thirty-two years since the Redfern ALS received its first Commonwealth grant to employ a solicitor, a field officer and a secretary, twenty-six similar services have been set up throughout Australia.[12] This geographic growth of the Aboriginal and Torres Strait Islander Legal Services is but one basic indication of the importance of their role, and the importance of their accessibility to Aboriginal and Torres Strait Islander people. This importance was recognised by the Australian Law Reform Commission in its first project on federal criminal investigations when, in 1975, it recommended draft legislation to ensure that:

> Where an Aboriginal or Torres Strait Islander is in custody for an offence, police should be required to notify forthwith the appropriate Aboriginal Legal Service of that fact, unless the prisoner objects to such notification. [13]

The failure of most State Governments to adopt this key recommendation was noted by the World Council of Churches team which visited Australia in June/July-1981. [14] In 1986, the Australian Law Reform Commission reported, after very extensive consultations that, as for notifying the ALS, "such a requirement is essential." [15]

Aboriginal Legal Aid Services were positively reviewed in 1979 in the findings of the *Ruddock Report* - a report commissioned by the House of Representatives Standing Committee on Aboriginal Affairs of the Commonwealth Parliament. According to this report, specialised legal services for Aborigines

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11. Yami Lester, Andrew Collett, Michael Anderson, Hal Wootten and Colin Tatz, in Garth Nettheim ed., *Aborigines, Human Rights and the Law,* 1974, pp 48-9, 52-3, 55-6, 59, 72
12. Chris Cunneen and Terry Libesman, *Indigenous People and the Law in Australia,* Butterworths, Sydney, 1995, pp 216-7
13. *The Law Reform Digest,* Canberra, 1983, p 45
14. *Justice for Aboriginal Australians,* World Council of Churches, Geneva, p 28
15. The Recognition of Aboriginal Customary Laws, Report 31, Vol 1, p 434

had become an essential element of the Australian legal system, despite a lack of support from the Commonwealth Department of Aboriginal Affairs. The *Ruddock Report* assessed all twelve Aboriginal

Legal Services then operating in Australia and concluded:

> the Committee believes that the Aboriginal legal services have had a major influence on the relationship of Aborigines with the legal system in the short time since their inception. Their effectiveness in meeting the legal needs and demands of Aboriginal people within the current limits of available funds is specifically attributable to their accessibility and acceptability to the Aboriginal people, their community-based structure, and the specialised nature of the legal service they provide.[16](emphasis added)

The benefit of these specialised services for assisting Aboriginal community empowerment was also recognised by the Ruddock Report, which stated that:

> Immeasurable benefits are being derived from the experience in administration and management which Aboriginals are gaining through their participation in the control and operation of Aboriginal legal services. [17]

The *Ruddock Report's* central recommendation was for continued government support for separate Aboriginal Legal Services "in order to promote the access of Aboriginal people to legal assistance and advice." [18] This recommendation was endorsed by the Fraser Government in 1981. However, in spite of the fact that the *Ruddock Report* had unequivocally "recommended increased levels of government financial support, and that the extra funding be directed towards meeting the legal needs of Aboriginal people in rural areas", [19] the Fraser government reduced ALS funding by approximately 15% in real terms in the period between 1975/6 to 1979/80.

The overwhelming rationale justifying government funding of specialised Aboriginal Legal Services was obvious in the 1980s *because* the contrast with the period preceding the introduction of these services was still fresh. In 1973, the basic reason for a specialised service was stressed by Hal Wootten as not just efficiency, but justice:

> The simple fact is that most Aborigines have little if any confidence in the whole legal system, including the profession as it is established. They tend ... to regard the magistrate as an arm of the police, and often defence lawyers are not very distinguishable from that, particularly if they advise them to plead guilty and get it over. But the big problem is, that if you don't have specialised services, if you don't have sympathetic people, people who develop a rapport with the Aboriginal community, you won't get the services adequately utilised, you won't get people having confidence in them, you won't get people bringing the problems to them.

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16. *Aboriginal Legal Aid,* Canberra, 1980, p 35
17. Aboriginal Legal Aid, p 150
18. Aboriginal legal Aid, p 35
19. G. Lyons, "Aboriginal Legal Services", in P. Hanks, B. Keon-Cohen eds, *Aborigines and the Law,*

> Certainly you won't get them bringing them to you in time to deal with them adequately. [20]

An assessment of Aboriginal Legal Services in *1984* noted that the development of Aboriginal Legal Services had already helped to ensure basic legal reform of police procedures for interrogating Aboriginal defendants. It also recalled that:

> The simple fact is that Aboriginal people made little use of the legal-aid schemes established for the general community. As a partial consequence, Aboriginal people tended to be simply *processed* by the legal system; they had little impact on its operations. One result has been the serious overrepresentation of Aboriginal people in prisons. [21]

Common problems with the development of Aboriginal Legal Services included:

- the difficulty of ensuring adequate representation for Aboriginal people in rural as well as urban centres;
- the lack of training for Aboriginal field officers who provide "the crucial link" in ensuring adequate communication occurs between defendants, witnesses, lawyers and judicial officers;
- poor co-ordination between different Aboriginal Legal Services throughout the country, and
- the challenge of providing essential legal advocacy in criminal cases, despite high staff turnover and community expectations of representation in other areas. [22]

The achievements of Aboriginal Legal Services in reducing the "vulnerability" of Aboriginal people were acknowledged by Commissioner J.H. Muirhead in his 1988 *Interim Report.* Pointing to the improved representation after Aboriginal Legal Services had been created, he stressed the need to strongly support them:

> Because of its diversity, because of the availability of Aboriginal field officers, Aboriginal Legal Services (ALS) have succeeded, at times under great difficulties, in providing a measure of protection and security to Aborigines. From time to time the ALS are the subject of criticism, its managers, solicitors and other staff, understandably from time to time outspoken, are positively distrusted in some circles. Suggestions are made that separately funded bodies serving the Aboriginal people are unnecessary and perhaps too expensive. I emphatically disagree. It is vital that ALS be fostered, that their capacities he widened rather than restricted. [23]

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[20] . in Nettheim ed., *1974, p 62*
[21] . Lyons, p 139
[22] . Lyons, pp 154-8
[23] .

Commissioner Muirhead observed that "the private legal profession cannot fill the role", and "the distribution of Australian Legal Aid Officers or Legal Aid Commission Officers (whose staff from time to time do provide assistance) is too confined" to ensure access to the possibility of justice for Aboriginal people. He warned that:

> until Australia accepts that Aborigines should be largely cared for, in a rehabilitative and welfare sense, by persons of their own race, current difficulties and dilemmas are likely to persist.[24]

3. The Royal Commission's Recommendations relating to Self-Determination

The *National Report* of the Royal Commission published in May 1991 based its recommendations for preventing Aboriginal deaths in custody on the principle of self-determination. Royal Commissioner Elliot Johnston QC emphasized that:

> Self-determination cannot be a reality if governments fail to recognize that Aboriginal people have clearly voiced their preference for using Aboriginal organizations; not only as their negotiators, but as the agents for delivering services. The Aboriginal organizations, when given adequate funding and when placed in a position in which they are respected negotiators and service deliverers, have performed much more effectively than the majority of mainstream agencies have performed in relation to Aboriginal people. They are trusted, they know and respect Aboriginal society and culture and they enhance self-respect within the Aboriginal community as they fulfil their roles. [25]

Recommendations 192-197 urged governments and ATSIC to give priority to developing managerial skills within Aboriginal organizations, providing convenient, reliable and simple funding processes, and establishing clear rules about the obligations and rights of managers and staff of Aboriginal organizations. Commissioner Johnston noted that mainstream organizations which experience accountability failures are rarely subjected to the constant stereotyping directed at Aboriginal organizations whose needs are often ignored. [26]

The importance of enabling autonomous Aboriginal decision-making processes, which "emphasize local loyalties" and respond to "specific, local clienteles", was also highlighted by Commissioner Johnston's discussion of self-determination. He described "the two achievements" of the Aboriginal Legal Services (and the Aboriginal Medical Services) as, firstly, demonstrating that specific Aboriginal needs ignored by mainstream services could be successfully met, and secondly, providing Aboriginal activists with the experience of administering resources and negotiating with governments

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24. *Interim Report, p 23*
25. Volume 4, pp 25-6
26. Volume 4, pp 26-8

with regard to responding to outstanding needs. He concluded that effective self-determination requires sustained funding in order to ensure that existing needs are met efficiently, and furthermore, to ensure that Aboriginal organizations develop the skills and capacity to increasingly control their lives. [27]

Commissioner Johnston assumed government funding of specialised Aboriginal Legal Services would continue. He noted that funding increased during the 1980s at half the increase in general Legal Aid funding (34.7% compared to 69.9%). No analysis of funding and caseloads for Legal Aid Commissions and Aboriginal Legal Services was made, but the greater increase in Aboriginal imprisonment during the 1980s suggests comparative under-resourcing of ALS. Commissioner Johnston also expressed concern at the lack of protection for Aboriginal women, due to the rule that Aboriginal Legal Services do not take on cases concerning a legal dispute between different Aboriginal individuals. [28] Yet he stressed that, despite complaints about Aboriginal Legal Services, there is no doubt that these services are vital and must be maintained as independent bodies. These bodies must be adequately funded to perform necessary functions of not only providing legal advice and representation, but also to provide community legal education and to argue the case for law reform on behalf of Aboriginal people. [29]

The four specific recommendations from the Royal Commission concerning the operation of Aboriginal Legal Services were endorsed by all Governments in 1992. These recommendations affirm the basic obligations of Government and of Aboriginal Legal Services in ensuring access to justice for Aboriginal people. The recommendations are as follows:

Recommendation 105

That in providing funding to Aboriginal Legal Services governments should recognize that Aboriginal Legal Services have a wider role to perform than their immediate task of ensuring the representation and provision of legal advice to Aboriginal persons. The role of the Aboriginal Legal Services includes investigation and research into areas of law reform in both criminal and civil fields which relate to the involvement of Aboriginal people in the system of justice in Australia. in fulfilling this role Aboriginal Legal Services require access to, and the opportunity to conduct, research.

Recommendation 106

That Aboriginal Legal Services recognize the need for maintaining close contact with the Aboriginal communities which they serve. It should be recognized that where charges are laid against individuals there may be a conflict of interests between the rights of the individual and the interests of the

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27. Volume 2, pp 534-7, 563
28. Volume 3, pp 85-8
29. Volume 3, p 88

Aboriginal community as perceived by that community; in such cases arrangements may need to be made to ensure that both interests are separately represented and presented to the court. Funding authorities should recognize that such conflicts of interest may require separate legal representation for the individual and the community.

Recommendation 107

That in order that Aboriginal Legal Services may maintain close contact with, and efficiently serve Aboriginal communities, weight should be attached to community wishes for autonomous regional services or for the regional location of solicitors and field officers.

Recommendation 108

That it be recognized by Aboriginal Legal Services, funding authorities and courts that lawyers cannot adequately represent clients unless they have adequate time to take instructions and prepare cases, and that this is a special problem in communities without access to lawyers other than at the time of court hearings.

These recommendations reflect the Royal Commission's definitive view in 1991 that specialised Aboriginal Legal Services are an essential part of the Australian legal system. The large rise in Aboriginal imprisonment noted above shows the need for Aboriginal Legal Services has grown. As these recommendations provide a basic framework for evaluating access to essential legal services, it is critical that present governments give urgent attention to the ways in which the implementation of these recommendations is achieved. It is subsequently submitted that the most effective way in which to manage this is through the continuation of monitoring by Indigenous organizations.

Any realistic evaluation of the implementation of these recommendations must adopt a dynamic and multi-dimensional, not a static and superficial, approach. Given the complex tasks facing Aboriginal and Torres Strait Islander Legal Services, it is not conceivable that such recommendations could be effectively realised through straightforward bureaucratic procedures. A recent review of Aboriginal Legal Services in NSW once again confirmed the need for specialised professional legal services which are responsive to the particular needs of Aborigines and Torres Strait Islanders. [30] Instead, the difficulties involved in implementing these recommendations must be carefully assessed through consideration of the basic functions which Aboriginal Legal Services must perform in order to represent their clients in the Australian legal system, and the challenges that Governments face in providing adequate legal services to a growing and internationally visible Indigenous citizenry.

The second part of this Report examines the cultural, legal and social dimensions of the contemporary role of Aboriginal Legal Services, while the third and final part assesses the obligations of Australian

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30. Review of Legal Services for Aboriginal and Torres Strait Islander People in New South Wales by The Aboriginal

Governments to maintain access to legal assistance and advice for Aboriginal people at a time when the proportion of Aboriginal people in custody is manifestly excessive.

B. CONTEMPORARY ROLE OF ABORIGINAL LEGAL SERVICES

4. Communication of Evidence: the Cultural Basis for ALS

One basic function of Aboriginal and Torres Strait Islander Legal Services is to represent in the Australian legal system Indigenous peoples who understand their world through ancient and distinct cultural traditions that historically were suppressed by the common law. As a consequence of the unique nature of this task, profound and prevalent problems, including problems of communication between non-Aboriginal lawyers and Aboriginal clients that extend far beyond difficulties of translation that usually exist with non-English speaking migrants, typically arise. Apart from the problem of continuing inadequate use of qualified translators for Aboriginal defendants who cannot understand English words, there is the much broader problem of cultural miscomprehension of the meaning of key questions.

The scope of this problem was highlighted in 1976 by Chief Justice Forster, of the Northern Territory Supreme Court. When outlining some fundamental rules that should be observed in order to ensure that Aboriginal defendants understand what they are being asked, His Honour stated:

> Another matter which needs to be understood is that most Aboriginal people are basically courteous and polite and will answer questions by white people in the way in which they think the questioner wants. Even if they are not courteous and polite there is the same reaction when they are dealing with an authority figure such as a policeman. Indeed their action is probably a combination of natural politeness and their attitude to someone in authority. [31]

Recently this phenomenon has been widely identified as a problem of "gratuitous concurrence". [32] Cultural miscomprehension occurs often when Aboriginal witnesses' silence, avoidance of eye-contact and simple answers to complex and/or negative questions are easily misinterpreted. [33]

Negative questions are a major cause of miscomprehension by many Aborigines. Detailed analysis of court transcripts has shown that Aboriginal witnesses will frequently say *yes* to affirm the veracity of a

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31. *R v Anunga* (1976) 11 ALR 412, p 414, quoted in M. Foley, "Aborigines and the police", in Hanks, *Aborigines and the Law, p 169*
32. Diana Eades, *Aboriginal English and the Law,* Brisbane, 1992, pp 54-7
33. Eades, "Cross-examination of Aboriginal Children: the Pinkeba Case", *Aboriginal Law Bulletin,* August 1995, pp

negatively framed proposition in a situation where the [standard] English speaker would say *no.*" [34] Linguistic examination of major miscarriages of justice 25 years apart in South Australia and Queensland disclosed very similar misinterpretations of Aboriginal English by experienced counsel. [35] This problem which arises with the use of negative questions was originally raised by Yami Lester in 1973.[36]

While Aboriginal defendants are most at risk of having their evidence mistaken in court, the same problem can occur with Aboriginal witnesses called by the prosecution. At a recent murder case in NSW in which an Aboriginal woman speaking non-Standard English gave identification evidence from close range, the judge observed toward the end of her evidence that she did not understand the form of many questions asked of her. She always replied "yes" in response to questions by counsel beginning "I put it to you". Judge Cooper intervened once to enable this witness to correct an answer to a mistakenly understood question, but at this stage considerable miscommunication had already Taken place. [37]

The potential for cultural miscomprehension of the evidence of Aboriginal defendants or witnesses is substantial, precisely because the cultural differences between Aboriginal and non-Aboriginal people reflect longstanding traditions in which language (even if the same words) is interpreted in very contrasting ways. One widespread difference concerns the use of direct or indirect questioning as a predominant form of disclosing information. Characteristically, the Aboriginal procedure for obtaining sensitive or hidden information is circuitous not direct.

This style of information exchange involved many silences, which non-Aborigines easily misinterpret as shyness or rudeness, hostility or lack of knowledge. The white Australian style is to use direct questions most of the time to find out any information we need. The two ways of using the same language are very different - they are cultural differences. [38]

It is vital that the Australian legal system incorporates culturally appropriate means through which Aboriginal defendants can communicate accurately with their legal representatives. Historically Aboriginal and Torres Strait Islander Legal Services have worked to achieve this through the

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34. Michael Cooke, "Aboriginal Evidence in the Cross-Cultural Courtroom", in Eades ed., *Language in Evidence,* University of NSW Press, Sydney, p 81
35. Eades, "Aboriginal English on Trial: the Case for Stuart and Condren" in *Language in Evidence, pp* 159-61, 172-3
36. in Nettheim ed. 1974, pp 47-8
37. *R v Thornton,* NSW Supreme Court, Darlinghurst, 4-14 November 1996, transcript p 69
38. Eades, "That's our way of talking - Aborigines in South-East Queensland", 1981,

employment of Aboriginal field officers, as well as appropriate training of non-aboriginal lawyers. [39] Their role provides what Lyons called "the crucial link" in the unique "ability of the ALS's to respond effectively to a wide range of situations" facing Aboriginal clients. Effective field officers are central to the community credibility of the ALS:

> Traditional' legal-aid schemes (such as State Legal Aid Commissions) employ no field officers, and there are few similar positions in community legal services. Ideally, field officers are people well known in their communities who act as a bridge between those with problems and the lawyers working in the ALS. They alert the Services to problems and they give the lawyers credibility with clients. [40]

The need for improved training for Aboriginal field officers was recognized in the early 1980s, and a pilot course was conducted at the University of New South Wales in 1982. [41] However, Royal Commissioner Johnston observed almost a decade later that, because of a lack of autonomy from ATSIC, ALSs had not adequately devised policies and set future priorities:

> Unfortunately, all too often, the pressure of work immediately at hand has meant that planning has been less a feature of ALS than should be the case. It is very regrettable, for example, that after twenty years of existence there is still no adequate training program for field officers universally applied in ALS offices, although efforts are made in some places to provide training. [42]

In response to Recommendation 212 from the Royal Commission, which related to assisting Aboriginal people to use anti-discrimination procedures more effectively, a National Indigenous Legal Curriculum Development Project was established to provide a coherent program of accessible legal training to Aboriginal field officers. Aboriginal Community Organisations are an essential element of this project, which simply could not be administered by Legal Aid Commissions. At a meeting of Aboriginal Legal Service representatives that was held in Darwin in April 1995 in order to discuss legal training for field officers, considerable concern was expressed in relating to "the mainstreaming of ALS and its implications for the work of Indigenous Field Officers". [43]

While the quality and reliability of individual Aboriginal field officers varies, their fundamental importance is in providing an institutionalised means through which lawyers representing Aboriginal people can obtain accurate evidence as a result of gaining the trust of the Aboriginal community. This process would be impossible if Aboriginal field officers were merely attached to large Legal Aid Commission offices that are far removed from most Aboriginal people, let alone from those in most

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39. John Boersig, *Effective Communication with Aboriginal Clients,* in Law Society Journal Sydney, 1996
40. Lyons, p 143
41. Lyons, pp 143-4
42. *National Report,* Volume 3, p 89
43. The Darwin Report, Concern 1, reprinted in Aboriginal and Torres Strait Islander Social Justice Commissioner,

need of legal representation. Such an arrangement would be mere tokenism, and would represent a renunciation of the obligations undertaken by all Australian Governments in response to the recommendations of the Royal Commission into Aboriginal Deaths in Custody.

The linguistic and cultural problem of the potential for misconstrued evidence in legal cases involving Aboriginal defendants or witnesses needs proper attention. One priority area in the ongoing implementation of recommendation 105, about the "wider role" of Aboriginal Legal Services, must be ensuring a much greater awareness on the part of lawyers, judicial officers and investigating police about cultural differences concerning legal questioning. In this respect the existence of Aboriginal Legal Services is vital not only for Aboriginal defendants, but also for Governments who are responsible for ensuring that prosecutions do not fail merely because of misconstrued evidence. Without Aboriginal Legal Services, the important role of Aboriginal field officers in helping to minimise the risk of miscarriages of justice due to cultural miscomprehension would be lost.

5. Trial Preparation and Sentencing: the Legal Basis for ALS

Before the establishment of Aboriginal and Torres Strait Islander Legal Services, proper representation for Aboriginal people in Australian courts was rare, and usually occurred only once a case attained considerable publicity. The Australian Law Reform Commission noted in 1986 that a common problem throughout Australia up until the 1970s was the fact that "Aborigines were invariably unrepresented by counsel. Since the establishment of the Aboriginal legal services the opposite is much more likely to be true, at least in cases involving more serious offences." The Commission found that even though a lack of adequate representation could still be a problem in some cases, "there is no doubt that the situation in the last decade has substantially improved as a result of the introduction of Aboriginal Legal Services throughout Australia". [44]

A common theme of different reviews of the operation of Aboriginal Legal Services, including both the *Ruddock Report* and the 1986 *Harkins Report*,[45] has been the need for greater responsiveness to Aboriginal clients in the local community. The *Ruddock Report* suggested that, notwithstanding accountancy models of supposed efficiencies of scale in larger organisations, the development of smaller, regionally-based Aboriginal Legal Services would provide a better, more responsive service to

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[44] . The Recognition of Aboriginal Customary Laws, Volume 1, pp 429-30

clients, to whom these services must be accountable. After noting the need for greater community representation, the Report stated:

> It is the Committee's view that the development of separate regional legal services is the most effective way to improve the access of Aboriginals to legal aid because they provide for greater community participation and control and because each legal service is directly accountable to the local community it serves. [46]

This requirement for "greater involvement of communities" in order to ensure Aboriginal Legal Services are fulfilling their clients' needs was acknowledged in recommendation 3 of the *Harkins Report*. [47] The same fundamental requirement was reiterated by the Royal Commission's *Final Report* in Recommendation 107, which stressed the importance of locating solicitors and field officers where clients can find them, and again in the 1996 University of New South Wales Review.

There are many reasons why it is crucial for Aboriginal Legal Service solicitors and field officers to be based as close as possible to the communities they serve. One which should not be underestimated is the great extent to which Aboriginal people rely on the local ALS for education about their legal rights. Although the scope for police verballing of Aboriginal suspects has been reduced as a result of widespread use of video and audio facilities, this does not alter the vital need for legal advice to be available readily to Aboriginal people, especially in country towns. Without such advice, there would be a grave risk of many Aboriginal people (especially those lacking literacy and courtroom understanding) signing false confessions because they do not know it is unlawful for police to arrest a person solely for questioning without having evidence to justify charging that person with an offence. One such case involving a young Aboriginal defendant, *Foster v R,* [48] was ultimately resolved only by the High Court.

Another reason why access to local Aboriginal Legal Service solicitors and field officers is important is to assist with the recording of statements from witnesses whilst events are still fresh in their minds. The high proportion of Aboriginal people lacking literacy in written English makes it imperative for legal assistance to be readily at hand to accurately and promptly record evidence that may be significant. Without access to a local Aboriginal Legal Service, a great many Aboriginal people would end up in court merely being processed as guilty by default of an informed defence, instead of being tried at law. This would be a denial of basic human rights, as stipulated in Articles 10 and 11 of the Universal Declaration, and would dramatically increase rates of Aboriginal imprisonment.

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46. Aboriginal Legal Aid, p 143
47. *Inquiry into Aboriginal Legal Aid,* Canberra, 1986, Volume 1, p xxiii

The conduct of a competent criminal trial is inevitably complicated whenever a defendant (or significant witnesses) are not speakers of Standard English, and/or are culturally alienated by Australian courts. Such complications can occur in various contexts (as for example in the War Crimes prosecutions where the key witnesses came from foreign countries), but the situation that confronts Indigenous defendants is significantly more troublesome. The history of animosity between police and Indigenous people throughout Australia has engendered great distrust of authority by the latter. There is a significant risk that even the lawyers representing Indigenous defendants will be perceived by their clients as part of an imposed system not deserving respect and confidence. Because Australian criminal law often seems strange to Indigenous defendants, it is vital that their legal representatives are deemed worthy of trusting with relevant information. If this were no to occur, there is very little prospect of any rehabilitation of the defendant.

The continued existence of Aboriginal and Torres Strait Islander Legal Services is essential to ensure there is regular access by Aboriginal people to competent legal assistance and advice. There is a need for careful monitoring of the quality of this legal representation. Recommendation 110 of the Harkins Report in *1986* stated in this respect that:

> While the pressures of the criminal practice remain, Aboriginal Legal Services should continue to deploy their resources and organise their operations to provide representation for Aborigines charged with criminal offences and to conduct major cases which are of ongoing importance to Aborigines. [49]

The pressures of criminal practice for Aboriginal and Torres Strait Islander Legal Services have increased significantly in the past decade and good management of adequate representation for Aboriginal clients has at times been lacking in particular Legal Services.

An instance of inadequate representation arranged by an Aboriginal Legal Service in NSW was the subject of a specific warning by Judge Madgwick of the District Court in April 1995. His Honour adjourned the sentencing of an Aboriginal defendant for a serious crime because an insufficiently experienced lawyer had been given a task of advocacy which required the professional skills of a QC supported by a very experienced solicitor. In calling for improvements to be made urgently, His Honour suggested the vital need for proper resourcing:

> Among other things, what should be done is that funds should be available for the employment of solicitors, as capable as any to be found, for the handling of the most serious cases - of which this approaches being one - and for the employment of counsel whenever judged fit in the unfettered professional discretion of such solicitors,

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[49] *Inquiry into Aboriginal Legal Aid*, p xl

> and there should be ample funds for thorough investigation of the matter by relevant social welfare professionals. [50]

While suggesting that there was an urgent problem with the management of two Aboriginal Legal Services in NSW, His Honour warned against a false response. Specifically, he argued that there should be no simple administrative change that did not acknowledge the massive need for specialised Aboriginal Legal Services:

> There are of course 'establishment' lawyers, most of them who have never set foot inside a Legal Aid office or appeared for the hard-up, let alone been hard-up themselves, who look down their noses at legal aid solicitors and in particular perhaps those who work for Aboriginal legal aid services. I do not want to be misunderstood. I am not among such people. I am proud to have assisted a long time ago in the formation of the New South Wales Aboriginal Legal Service and I support the maintenance of Aboriginal, community-controlled, legal services for Aboriginal people. Where such services work well, they work admirably. It was an Aboriginal legal aid service that brought the *Mabo* case in the High Court and things like that should never be forgotten. [51]

Judge Madgwick highlighted the problem as a result of inadequate management of legal representation by specific Aboriginal Legal Services, not as a result of such services. An appropriate response would be to monitor the provision of experienced lawyers by the services concerned in serious cases, not disrupt these services with what His Honour called "bureaucratic nit-picking", let alone make other specialised Aboriginal Legal Services suffer for performing admirably.

Current pressure upon all Aboriginal and Torres Strait Islander Legal Services throughout Australia to develop 'core services' and professional policy frameworks must be considered within the constraints of resources made available to provide the services. Specifically in NSW, and more generally in other States, Aboriginal and Torres Strait Islander Legal Services are responding effectively to the demands of 'quality assurance', but are hampered by unrealistic expectations of bureaucracy and a lack of understanding by policy makers of the realities of delivery of legal services. The current unmet legal needs of Aboriginal people can be traced back to an inadequate response by Government over the past ten years.

Inadequate representation of Aboriginal (and other) defendants at trial and upon sentencing is a fault which has also occurred at times because of mismanagement by non-Aboriginal services, whether Legal Aid offices or private solicitors. One instance in May 1994 involved an Aboriginal defendant with hearing difficulties whose private solicitor accepted on his behalf a 'sentence indication' of seven years for two serious crimes without ensuring that he understood this length of time. The President of

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50 *R v Cutmore*, NSW District Court, 21 April 1995

51 Ibid.

the NSW Court of Criminal Appeal was, like Judge Madgwick, astounded to discover that a senior barrister had not been briefed for this case, which he described as "very difficult'. [52] Rule 56 of the NSW Bar Association makes counsel responsible for ensuring that an accused is not prejudiced by difficulties in communication, but this is clearly ineffective when inexperienced solicitors take on or are made to attempt professional work.

The number of young Aboriginal people with chronic hearing loss is substantial. Research indicates that "up to fifty percent of Aboriginal children at any point in time experience conductive hearing loss". The social and psychological effects of this condition may last indefinitely, even where such loss of hearing is temporary. Aboriginal people experiencing this condition are likely to have communication difficulties which at times can become very severe. Awareness of the extent of this problem and its implications for ensuring proper trial preparation and sentencing representation of a great many Aboriginal defendants continues to grow. [53]This is certainly one area in which the wider role of Aboriginal Legal Services recommended by the Royal Commission is essential for the conducting of appropriate research.

Sentencing of Aboriginal and Torres Strait Islander defendants is often a complex matter requiring careful presentation of all relevant material to enable the judge to balance appropriately the demands for deterrence, punishment and rehabilitation. Basic principles for sentencing Aboriginal defendants outlined by Justice Wood in 1992 make it clear that while no automatic mitigation factor can be applied to such defendants, "that does not mean the sentencing court should ignore those facts which exist only by reason of the offenders' membership of such a group" as Aboriginal people who "come from a deprived background". The crucial requirement of adequate legal representation in all such cases is to establish facts which "explain or throw light on the particular offence and the circumstances of the offender." [54] Those facts in each case will have to be ascertained through careful scrutiny of the offenders' situation. Because of their connections throughout the Aboriginal community in a particular region, Aboriginal and Torres Strait Islander Legal Services will always be in a much stronger position than general Legal Aid Commissions to be able to prepare and present all the relevant subjective facts for the sentencing of Aboriginal offenders.

In undertaking trial preparation and collecting information that may be relevant to sentencing, lawyers representing Aboriginal defendants often rely on local knowledge and information from Aboriginal

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52. *R v Russell,* 15 December 1995
53. D. Howard, S. Quinn, J. Blokland and M. Flynn, "Aboriginal Hearing Loss and the Criminal Justice System", *Aboriginal Law Bulletin,* December 1993, pp 9-11
54. *R v Fernando* (13 March 1992) reported in *Aboriginal Law Bulletin,* April 1992

field officers. Their key role in the operation of Aboriginal Legal Services was recognised in the *Ruddock Report*:

> Solicitors are very dependent on field officers for advice and guidance about clients whom they are representing in court. [55]

The availability of Aboriginal field officers and their accessibility to Aboriginal communities is central to improving the implementation of Royal Commission Recommendation 108, which relates to the need for adequate time to properly prepare cases. If lawyers were required to spend time seeking information that field officers could obtain, - a situation that would inevitably occur if all Indigenous defendants had to be represented by Legal Aid Commissions - trial preparation and sentence submissions would be jeopardised.

6. Community Support or Recidivism: the Social Basis for ALS

The enormous increase in Aboriginal imprisonment in Australia since the Royal Commission reflects a terrible rate of recidivism, with a great many Aboriginal prisoners returning to gaol repeatedly as a result of the failures of rehabilitation. The intractable nature of this problem was reviewed by Commissioner Johnston:

> A person who comes before the court with a history of prior convictions reflects the past failures of the system to provide rehabilitation and deterrence and presents a particular problem to the sentencer. Where on any previous occasion a court has sentenced the offender to imprisonment, so much the less is the prospect of the offender receiving a non-custodial sentence on a later occasion. If the offender again appears charged with a similar offence to that for which he/she was previously imprisoned, so much the greater are the prospects of further imprisonment. Such an offender is caught in a vicious cycle. The more times imprisoned the less are the prospects of rehabilitation, the greater the prospects of re-offending. For a person with limited education, few employment prospects and little income, the prospects of re-offending are great. If that person is also highly visible to police so that in the event of offending the prospect of arrest is also great then the vicious circle is likely to be quickly completed. For many Aboriginal people this vicious circle is the reality of their lives. Where alcohol dependence is also a factor then so much faster is the circle completed and the process repeated. [56]

It is not only offenders who are living in this downward spiral. Their families increasingly become caught, as negative patterns pass from one generation to the next and are repeated within generations. Much more randomly, this pattern of offending affects other members of the community who become victims of the failure of previous attempts at rehabilitation. Clearly, there is an overwhelming social interest in reducing rates of Aboriginal recidivism as quickly as possible.

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[55] *Aboriginal Legal Aid*, p 154

Rates of Aboriginal recidivism are significantly higher than for other offenders. Detailed analysis of comparative rates of recidivism in Western Australia shows that:

> 43% of male non-Aborigines will return to prison for at least one further term, while 76% of male Aborigines are estimated to return at least once for any offence. For females the proportions are similar: 36% of non-Aborigines will return to prison whereas 66% of Aborigines are reimprisoned. [57]

A similar pattern is bound to exist in other states due to generally increased imprisonment. There has been a minor shift toward greater use of non-custodial orders for Aboriginal offenders in Western Australia since 1989, but a large disparity remains. For every Aboriginal offender imprisoned, another 1.8 Aboriginal offenders will receive non-custodial orders, while "non-Aborigines were 3.4 times more likely to receive a non-custodial sentence than being imprisoned". [58]

The extremely high rate of recidivism among Aboriginal youth reflects a failure of juvenile justice systems in Australia due to the deep alienation of Aboriginal communities from detention centres, which merely punish without rehabilitation. Studies in NSW and WA in the 1980s and early 1990s demonstrated clearly that even the assumed deterrent effect of detention as punishment is diminished for many Aboriginal juveniles because their peer group experience of detention is so common that "the bravado is enormous and the fear of the unknown is gone". [59] The institutionalisation of Aboriginal youth in detention centres weakens the authority over them of their community elders, which is already strained by intense social pressures. An additional cause of repeated detention of Aboriginal youth is that they are mostly detained long distances away from their families, who lack the resources to visit, so the juveniles face added difficulties re-entering their community after release.

Programmes in the United States have shown that reducing institutionalisation is the most significant factor in overcoming recidivism for the majority of juveniles. A former Commissioner of Youth Services in Massachusetts, Jerome G. Miller, highlighted the need for ways of changing not reproducing offending behaviour, by using detention for dangerous offenders and developing effective alternatives which focus on achieving the rehabilitation of offenders who are not dangerous:

> Success in lowering recidivism depended upon the quality and the diversity of the alternatives [to detention]. Where programs broke down their institutional tether, recidivism went down. Where alternatives fostered isolation or duplicated institutional regimens in the community, the youth did poorly. [60]

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56. *National Report,* Volume 3, p 68; emphasis added.
57. Richard Harding, Roderic Broadhurst, Anna Ferrante and Nini Loh, *Aboriginal Contact with the Criminal Justice System and the Impact of the Royal Commission into Aboriginal Deaths in Custody,* Hawkins Press, 1995, pp 93-4
58. Harding et al p 127
59. WA Select Committee on Youth Affairs, *Youth and the Law,* 1992 p 48, quoted in Quentin Beresford and Paul Ornaffi, *Rites of Passage: Aboriginal Youth, Crime and Justice,* Fremantle Arts Centre Press, 1996, p 117
60.

This lesson is of crucial importance for the task of reducing extreme recidivism among Aboriginal youth. Programs are urgently required which intervene early in the cycle of juvenile offending, to prevent the entrenchment of environments which foster isolation from community support and even reduce the gravity of punishment for very serious offenders by making them the 'elders' in detention.

The scale of the change required to turn around alarming increases in detention of Aboriginal juveniles since the 1991 Royal Commission is extremely large. On the basis of 1994 figures showing that nationally Aboriginal juveniles were then 21 times more likely to be detained than non-Aboriginal juveniles, Cunneen and McDonald described this as "a continuing criminal justice and social justice issue of massive proportions" which demands urgent, systematic and thorough change. [61] Figures for 1997 show further large increases in the over-detention of Aboriginal youth in all states except South Australia, with the national average having risen to nearly 25 times that for non-Aboriginals. [62]

The Royal Commission noted research in 1990 which showed, among various factors of recidivism, that "young prisoners had a very much higher probability of re-offending than older prisoners", while "for Aboriginal students, unlike the situation for non-Aboriginal students, greater exposure to schooling did not correspond to lower rates of recidivism". Commissioner Johnston commented:

> The factor of age is particularly important. The recidivism rate for Aboriginal juveniles is alarming. *These are the next generation of potential deaths in custody, and in no area is it more important to devise and implement effective* strategies to *prevent imprisonment than it is with to Aboriginal children and youth.* [63] (emphasis added)

Recommendation 94 from the Royal Commission stated that Community Service Orders should be broadened to appropriately include "Community Service work by pursuing personal development courses which might provide the offender with skills, knowledge, interests, treatment or counselling likely to reduce the risk of re-offending". [64] A recent review found such options are often still "severely limited in availability" and use, with "significant room for greater implementation of this recommendation." [65] One reason for the failure to develop such alternatives to detention on a sufficiently broad basis may well be the limited involvement from Aboriginal communities.

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61. Cunneen and McDonald, p 40
62. V. Dalton and C. Carcach, "Trends in Aboriginal and Torres Strait Islander Deaths in Custody and Incarceration", in Implementation of the Commonwealth Government Responses to the Recommendations of the Royal Commission into Aboriginal Deaths in Custody, Annual Report 1996-97, prepared for ATSIC
63. *National Report,* Volume 3, p 70,
64. *Ibid, p 71*

Positive reforms contributing to reduced recidivism among Aboriginal youth in some parts of Australia in recent years have all included strong local community involvement. A dramatic decrease since 1994 in juvenile crime at Kowanyama in Cape York has resulted from the actions of community justice groups who have used the traditional authority (based on kinship) of Aboriginal law and culture to administer justice and resurrect social control. Such a program requires a lot of community commitment and resources. Some positive changes have occurred at Palm Island, but to a lesser extent than at Kowanyama because local community involvement has been irregular due to lack of resources. In Victoria, community justice programs have likewise been most effective in rehabilitating Aboriginal youth where there is strong Aboriginal participation at the local level. [66] Significant levels of community participation are not likely to be maintained without adequate resourcing of regional Aboriginal legal services able to represent the interests of both communities and individuals, as was envisaged in recommendations 106 and 107 from the Royal Commission.

The adoption of juvenile conferencing in NSW in 1998 is a case in point. Subsequent to the introduction of this diversionary scheme, it became incumbent upon Aboriginal and Torres Strait Islander Legal Services to make staff available immediately after the apprehension of any juvenile for an offences (and prior to the conduct of conferencing sessions) whilst at the same time ensuring that all other court commitments were met. Although there have been significant increases in the amount of time ATSILS staff now spend attending police stations and conferences, there has been little in the way of Governments making available additional resources. In an environment where Aboriginal Legal Services are expected to play an ever increasing role in service provision, the adequacy of the response goes beyond a mere re-prioritisation of available resources.

Solutions to the problem of reducing recidivism among Aboriginal youth must be based on a realistic awareness of what Commissioner Johnston called "the negative perception which Aboriginal people hold about the court process." [67] Particularly in towns such as Walgett, NSW, where Aboriginal defendants routinely predominate in local court lists and recidivism is a serious concern, it may be only the presence of the ALS which prevents the court process from being regarded as totally corrupt by many Aboriginal youth. Without the existence of an Aboriginal Legal Service at the local level, there is a grave danger that spontaneous disturbances would become much more common.

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66. Cunneen and McDonald, pp 72-4, 83-4

67. *National Report*, Volume 3, p 72

C. FUTURE DEMANDS UPON ABORIGINAL LEGAL SERVICES

7. Effective Family Conferencing: Reducing Juvenile Detention

Demands upon Aboriginal Legal Services in the next decade are likely to grow as a consequence of the combination of inadequate Governmental responses to Royal Commission recommendations and the increasing birth rate of Indigenous people. At the 1991 census, 40% of Indigenous people in Australia were under 15 years old compared with a national proportion of 22%, and 15% of Indigenous people were under 5 years old relative to 7% of non-Indigenous Australians. The significance of this demographic gap was emphasised by Mick Dodson in his 1995 Aboriginal and Torres Strait Islander Social Justice Commissioner Report:

> If we combine these demographic figures with the current imprisonment rates of Indigenous youth, and project then a few years into the future, the implications for our kids become clear:
>
> * in 6 years, by 2001 there will have been a 15 percent increase in the number of Indigenous kids in detention.
>
> * in 16 years, by 2011 there will have been a 44 percent increase in the number of Indigenous kids in detention.
>
> This is the crisis. It is on us already. It will simply become more acute in the future, as our kids, who are now babies, move with the relentlessness of mathematics into what has become their birthright as the Indigenous children of this country. Just as, on average, adult Aboriginal and Torres Strait Islander peoples can expect to die 18 to 20 years earlier than other Australians, so our kids can expect more abrasive encounters with the police, more frequent arrest and more frequent detention. [68]

The urgency of this escalating social crisis was stressed again by Commissioner Dodson in his 1996 and 1997 Reports, which noted the failure of imposed forms of family group conferencing to reduce detention rates for Aboriginal juveniles.

The extreme extent of this escalating crisis can hardly be underestimated. Simply comparing projections made by the Australian Institute of Criminology in 1992 with actual increases in Indigenous imprisonment in the past five years reveals the gravity of the situation. Assuming that the age specific rates of imprisonment in 1992 remained constant, and projecting increases in imprisonment as a result of changes in the size of the different age groups in the Indigenous population, the Institute of Criminology calculated that nearly 15 years later the total number of Indigenous prisoners in Australia would have exceeded 2900. In fact this had already occurred by

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[68] ... Third Report 1995 ... 16-17

1995, after only three years. This grave trend was highlighted in 1994 by a Commonwealth Parliamentary Committee Inquiry, noting it "has been due to changes in legislation and sentencing policies which have been quite contrary to the major thrusts of the Royal Commission and to other inadequate implementations of the Royal Commission recommendations". [69]

The one Royal Commission recommendation which has been most inadequately implemented in the past seven years is arguably number 62, concerning changes to the way policies are formulated to improve the life of Aboriginal families and communities. This recommendation called for a co-operative approach to policy:

> That governments and Aboriginal organizations recognize that the problems affecting Aboriginal juveniles are so widespread and have such potentially disastrous repercussions for the future that there is an urgent need for governments and Aboriginal organisations to negotiate together to devise strategies to reduce the rate at which Aboriginal juveniles are involved in the welfare and criminal justice systems, and in particular to reduce the rate at which Aboriginal juveniles are separated from their families and communities. [70]

This warning about the need for substantial involvement of Aboriginal people and community organizations in devising new policies (not in implementing old ones) has been largely ignored. In 1996 ATSIC in its submission to the Stolen Generations Inquiry reiterated the importance of this recommendation, but the problem of inappropriate action remains because, as the Aboriginal and Torres Strait Islander Social Justice Commissioner stated in his last report, "there are no legislative obligations to negotiate with Aboriginal and Torres Strait Islander communities". [71]

The disastrous repercussions of old policies which the Royal Commission alerted to are summarised in *Bringing Them Home*. [72] Out of 1753 juveniles arrested during the month of the National Police Custody Survey in August 1995, no less than 40% were indigenous, including about 60% of the youngest juveniles (those aged 10-14). Because "most detention centres in Australia are hundreds, if not thousands, of kilometres away from many Aboriginal communities from which the detention population is drawn", there is systemic discrimination against Aboriginal juveniles. Not only is the rate of removal of Indigenous young people from their families much higher than non-Indigenous young people, they are comparatively younger and more geographically isolated from their family and kin. Furthermore, "the lack of adequate funding for Indigenous community-based alternatives to the formal

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69. *Justice Under Scrutiny,* Report of the Inquiry into the Implementation of Recommendations of RCIADIC.

70. *National Report,* Volume 2, p 252, emphasis added

71. *Bringing Them Home,* National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, Human Rights and Equal Opportunity Commission, April 1997, p 490; Commissioner Dodson, *Fifth Report 1997, p 85*

72. *Bringing Them Home,* National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from

juvenile justice system is a national problem", with family group conferencing being developed only in limited forms which "do not respect important cultural differences."

Effective diversion of Aboriginal juveniles from detention centres into real rehabilitation programs depends crucially on specific responsibility being transferred to local Aboriginal organizations. The effectiveness of this will be undermined if arrest rates are not reduced. [73]

The Royal Commission's assumption that independent Aboriginal Legal Services are without doubt "vital and must be maintained" (see section 3 above) is clearly linked with its accurate awareness of the rising rate of Aboriginal imprisonment, including the disastrous repercussions from extreme rates of juvenile detention. The failure of existing assimilatory structures of family group conferencing in all states to significantly reduce recidivism amongst Aboriginal youth was noted in the *Bringing Them Home* Report which reviewed policies of all governments:

> The available theoretical, observational and empirical evidence strongly suggests that family group conferencing as currently administered, far from being a panacea for offending by Indigenous young people, is likely to lead to harsher outcomes. It is a model that, by and large, has been imposed on Indigenous communities without consideration of Indigenous cultural values and without consideration of how communities might wish to develop their own Indigenous approaches to the issue. Even in new proposals for conferencing such as those in NSW and Tasmania where the police role in referral is somewhat circumscribed, there is no provision for Indigenous organisations and communities to make decisions about whether their children would be best served by attending a conference. The best provision among the new proposals requires only that an elder or other community representative be invited to a conference involving an Indigenous young person. [74]

This failure of governments to respond adequately to recommendation 62 from the Royal Commission into Aboriginal Deaths in Custody constitutes a warning about the grave repercussions for subsuming ALS within mainstream Legal Aid. It is precisely such an assimilationist approach that has exacerbated the crisis of recidivism amongst Indigenous youth and which now demands an effective solution.

International lessons from comparable common law jurisdictions such as Canada and New Zealand strongly suggest that negotiation with indigenous organizations is an essential part of effective family group conferencing for young offenders. Since 1989, the New Zealand *Children, Young Persons and Their Families Act* has reduced the annual number of young offenders appearing before the courts

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73. *Bringing Them Home, Bringing Them Home,* National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, Human Rights and Equal Opportunity Commission, April 1997, *pp* 498, 502, 505, 517, 521-7

74. *Bringing Them Home,* National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from

from 13,000 to 1,800, with criminal offending by young people falling by 27% in the first five years of the *Act*. This *Act* implements a process "very similar" to that used for generations by Maori communities to deter criminal conduct by their youth., [75] and the effectiveness of this process of restorative justice is, according to Judge F.W.M. MacElrea of the Auckland District Court, manifest in the fact that " young adults less likely to be prosecuted in adult courts." [76] Although successful schemes from other countries must be carefully adapted to Australian conditions, there is strong evidence for concluding that reducing recidivism among Indigenous youth will occur only if Aboriginal bodies such as Legal Services are involved in devising new policies.

8. Achieving Aboriginal Empowerment: the International Test

The continuing tragedy of Aboriginal deaths in custody in Australia has received regular international attention, including from Amnesty International and from the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Mr Bacre Waly Ndiaye. In March 1997, Australia was subjected to criticism at the UN Commission on Human Rights for the first time in 50 years. [77] Given such international attention, the shameful contrast of Indigenous imprisonment in Australia when compared with the Indigenous incarceration rates of Canada and New Zealand is likely to receive further scrutiny in coming years. The proportion of prisoners in Australia who classify as Indigenous is about 19%, 10 times the proportion of the total Australian population (1.9%); in Canada the comparable figure for over-representation is half as bad at four and a half times, while in New Zealand it is about three times. Over-representation of Maori in New Zealand prisons declined somewhat from 1991 to 1993, in contrast to Australia where over-representation of Indigenous prisoners has continued to increase. [78]

The Australian Government is a signatory to the International Convention on the Elimination of All Forms of Racial Discrimination, as a result of which it has agreed to:

Their Families, Human Rights and Equal Opportunity Commission, April 1997, pp 525-6

75. Jim Consedine, *Restorative Justice: Healing the Effects of Crime,* Ploughshares, Lyttleton, 1995, pp 82, 96, 168

76. "Restorative Justice: the New Zealand Youth Court - a Model for Development in Other Courts?", *Journal of Judicial Administration, vol 4* (1994) p 53, quoted in Rupert Ross, *Returning to the Teachings: Exploring Aboriginal Justice,* Penguin, Toronto 1996, p 23

77. Mr Bill Barker, former Director of the Human Rights Section, Department of Foreign Affairs and Trade; see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Fifth Report 1997, pp* 144-5

78.

- take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists; [79] and to

- guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of ... the right to equal treatment before the tribunals and all other organs administering justice". [80]

The Australian Government also agreed that it:

> shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms,

with the proviso that "these measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved." [81]

The significance of these international obligations was considered in 1985 by the High Court in *Gerhardy v Brown,* especially in the judgment of Brennan J, who reviewed relevant international law and assessed its implications for Australia at length. The following observations made by His Honour there are relevant:

> If it appears that a racially classified group or one of its members is unable to live in the same dignity as other people who are not members of the group, or to engage in a public activity as freely as others can engage in such an activity in similar circumstances, or to enjoy the public benefits of that society to the same extent as others there is a prima facie nullification or impairment of human rights and fundamental freedoms. ... Human rights and fundamental freedoms may be nullified or impaired by political, economic, social, cultural or religious influences in a society as well as by the formal operation of its laws. Formal equality before the law is an engine of oppression destructive of human dignity if the law entrenches inequalities 'in the political, economic, social, cultural or any other field of public life'. ... [emphasis added]
>
> A racial minority which wishes to preserve its own identity may need particular supports to preserve that identity, and it may need to preserve that identity if its members are not to be disadvantaged in the society of which it is a part. If such a racial minority is denied those supports, its members may not only lose their own sense of identity but be unable to adopt the standards and customs of the majority or to cope with the pressures which assimilation with the majority entails. In Australia, the phenomenon of landless, rootless Aboriginal peoples is sadly familiar. Many of them are incapable of enjoying and exercising on an equal footing' the human rights and fundamental freedoms that are the birthright of all Australian citizens. [82]

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79. Article 2 (1) (c)
80. Article 5 (a)
81. Article 2 (2) *Racial Discrimination Act 1975,* Schedule, pp 47-9
82. 57 ALR 472, at 514, 516, 522

Since these comments made by Justice Brennan in 1985, the over-representation of Indigenous peoples in Australian prisons has significantly worsened (as previously outlined). Obviously, the special need which led to the formation of Aboriginal Legal Services in the early 1970s remains large, and will remain at enormous levels for the foreseeable future. In this situation, any administrative move to incorporate the ALS within mainstream Legal Aid Commissions would constitute an breach of Australia's human rights obligations to eliminate racial discrimination entirely, from the letter of Australian law and from its effects.

While Aboriginal Legal Services originated in Australia as a result of demands from Aboriginal communities for equal protection from police victimization in the five years before Australia ratified the Convention on the Elimination of All Forms of Racial Discrimination in 1975, the funding of specialised Aboriginal Legal Services since then can be appropriately considered as a crucial part of the Australian Government's response to the terms of this Convention noted above. Any attempt to restrict this specialised legal service, which Aboriginal people require to achieve effective equality before the law in Australia, would be seen internationally as diminishing Australia's commitment to fundamental freedoms stipulated in Article 7 of the Universal Declaration of Human Rights and Article 26 of the International Covenant on Civil and Political Rights concerning rights of all persons to "equal and effective protection against discrimination on and ground such as race...".The grave situation facing Indigenous children outlined at the start of section 7 above hardly constitutes equal protection; instead, it is what Brennan J termed "an engine of oppression destructive of human dignity".

Considered as a 'special measure' within the meaning of section 8 (1) of the *Racial Discrimination Act,* the provision of Aboriginal Legal Services should be maintained until the special need deriving from Aboriginal over-representation in the criminal justice system has been eliminated. According to the High Court in *Gerhardy v Brown,* while it is a matter for Parliament to judge this political issue, any such judgment must be made on reasonable grounds, as elaborated by both Brennan J and Deane J in their respective judgments in that particular case. The general requirements for a 'special measure' were stated thus by Brennan J:

> The purpose of securing advancement for a racial group is not established by showing that the branch of government or the person who takes the measure does so for the purpose of conferring what it or he regards as a benefit for the group if the group does not seek or wish to have the benefit. The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them.[83] (emphasis added)

The vital matter of determining whether a 'special measure' has been taken for the sole purpose of eliminating racial discrimination was addressed by Deane J:

> Whatever may be the position before an international forum such as the Committee on the Elimination of Racial Discrimination established by Art 8 of the Convention, the question whether provisions of Commonwealth or State legislation satisfy a requirement that they be 'taken' for a designated 'sole purpose' is different from the question whether the particular provisions will in fact achieve that purpose. On the other hand, that question cannot be resolved by reference to the variety of subjective purposes which may have led individual members of the relevant Parliament to have voted in favour of the passage of the particular legislation. What is necessary for characterization of legislative provisions as having been 'taken' for a 'sole purpose' is that they can be seen, in the factual context, to be really and not colourably or fancifully referable to and explicable by the sole purpose which is said to provide their character. They will not be properly so characterized unless their provisions are capable of being reasonably considered to be appropriate and adapted to achieving that purpose. Beyond that, the court is not concerned to determine whether the provisions are *the* appropriate ones to achieve, or whether they will in fact achieve, the particular purpose.[84], with emphasis in bold added)

In view of the substantial cultural, legal and social bases for Aboriginal Legal Services outlined in Part B of this Report, and the enormous current demand for these specialised services outlined in Part A and also in Section 7, it simply is not credible to argue that Legal Aid Commissions are now or could become in the future adapted to achieving the purpose of addressing all Aboriginal needs.

9. National Responsibility: the Legacy of the Royal Commission

Aboriginal Legal Services have been in existence for over 25 years. During this time they have been analysed through various reviews, including those outlined in this report. With hindsight, it is apparent that none of these various Reports accurately appreciated the huge increase in demand from the Indigenous population people for legal services, especially in the area of criminal law during the 1980s and 1990s. That enormous demand was finally made clear by the Royal Commission into Aboriginal Deaths in Custody in its National Report in 1991, but the failure of State Governments to halt increases in the incarceration rates of Indigenous people in Australia during the 1990s has increased that demand still further. The Commonwealth Government has a national responsibility to ensure that all States respond adequately to the recommendations from the Royal Commission. Where this has demonstrably not occurred, as for example in the area of juvenile justice with its worrying implications for future incarceration rates in adult prisons, the Commonwealth will be subject to international criticism for inadequate policies.

Significantly, Aboriginal Legal Services are funded by the Commonwealth not by the States. The Commonwealth cannot absolve itself of responsibility in this area by pointing to State Government control over most issues of law and order (conversely the States make most of the laws against which Aboriginal and Torres Strait Islanders come in conflict). The Commonwealth remains committed to international conventions concerning civil and political rights and the elimination of racial discrimination which state that equality before the law will be upheld as a fundamental freedom and human right. For Aboriginal people living in a society where the criminal law derives from a common law tradition that recognises their cultural traditions in limited ways if at all, effective equality, must include the provision of legal services that are adapted to the special cultural, legal and community needs of all Aboriginal clients. Where such provision is inadequate it must be improved by appropriate reform. However, given the scale of demand from Aborigines for legal services for the foreseeable future, there is simply no credible justification for replacing specialised Aboriginal Legal Services with centralised Legal Aid Commissions.

The *Ruddock Report* was based on consultations conducted throughout Australia by the House of Representatives Committee on Aboriginal Affairs. It specifically noted that only one Government, that of Western Australia, did not support the continuation of a specialised Aboriginal legal service. This was certainly not due to any lack of need for legal services from Aborigines in Western Australia. Indeed, in the late 1970s an analysis of sentencing in Western Australia said "it is not unreasonable to expect ... an increasing number of appeals, particularly in view of the increased availability of legal aid for Aborigines."[85]. Having noted the Western Australian position, the Ruddock Report stated:

> All other governments, legal aid commissions, law societies and members of the legal profession who contributed to the inquiry applauded the existence of separate Aboriginal legal services and recognised a continuing need for separate specialised services to cater for the legal needs and demands of Aboriginals. It was suggested that the merging of legal services [with Legal Aid Commissions] could lead to a decrease in Aboriginal willingness to utilise the services, a neglect of Aboriginal interests, competition for time and resources between Aboriginals and other groups, and resentment and antagonism between Aboriginals and other sections of the community.[86] (with emphasis added)

This strong endorsement of the vital importance of specialised Aboriginal Legal Services was made after full consideration of alternative views, including what one member of the Committee referred to

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84. 57 ALR 472 at 531-2
85. M.W. DauntonFear, *Sentencing in Western Australia,* University of Queensland Press, 1977, p 193

during the course of a public hearing as pressures "'from within Government and maybe other places to say: 'What do you want an Aboriginal legal service for, why can you not do it through the Australian Legal Aid Office and save a lot of money?' " [87] The principled support for Aboriginal Legal Services from the Ruddock Report deserves reaffirmation, with due regard for changes during the past *20* years.

An extensive review of Aboriginal Legal Services in the mid *1980s* by Joseph P. Harkins, former Director of the Australian Legal Aid Office, concluded that:

> Notwithstanding the numerous criticisms of Aboriginal Legal Services by individual Aboriginals and people from Aboriginal community organisations, the overall impression of the Inquiry is one of general confidence in, and support of, the ALSs. They are visible Aboriginal organisations that Aboriginals feel comfortable in approaching. [88]

Complementing this general impression from an large-scale investigation lasting two years, there are four broad themes from the *Harkins Report* which need to be considered in the light of the Royal Commission and subsequent rise in the rate of imprisonment of Indigenous adults and juveniles throughout Australia.

First, at the time of the *Harkins Inquiry* there was an inadequate appreciation of the exact extent of the over-representation of Indigenous people in the criminal justice system. Not only did Harkins find little statistical information about the work performed by the ALSs', he felt constrained in pursuing his third term of reference dealing with the ALSs' need for resources due to the lack of objective statistics comparing the arrest and imprisonment rates of Indigenous people in all States and Territories. [89]As a result of the Royal Commission, such statistics are now generally provided on an adequate basis, and reveal a level of demand for Aboriginal Legal Services much higher than was apparent at the time of the Report, a demand which has grown substantially in gross numbers since *1985* as well as being statistically recorded. Based partly on a 6-month survey of records of courts of summary jurisdiction conducted during his Inquiry, as well as on other matters, Harkins concluded that "to seek to provide services through ALSs to satisfy all the proper demands of the many dispersed Aboriginal communities would require a massive increase in the present funding of ALSs." *(Ibid., p 128,* para. *9.32)* Even without further statistics, it was clear that ALS resources were already stretched at that time.

Second, Harkins suggested that it was unreasonable to "have expected that the work of the ALS over the years would have significantly reduced the over-representation of Aboriginals in the criminal

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86. *Aboriginal Legal Aid, p 30,*
87. (cited in Lyons, p 153*)*
88. Inquiry into Aboriginal Legal Aid, p 82, para. 7.6

justice system." He pointed out that such an "expectation is misconceived in that it does not take into account the basic causes for over-representation nor the basic reasons for providing legal assistance to persons charged with criminal offences." He observed that:

> It is reasonable to expect that the work of the ALS would have contributed to a reduction in discriminatory practices in the criminal justice system. But much of the over-representation has its roots in more basic causes such as ... cultural and economic problems [which] need to be addressed by programs other than the legal programs of the ALS. *(Ibid. p 92,* para. 8.32)

The underlying causes of the extreme over-representation of Indigenous people in the criminal justice system were analysed at length by the Royal Commission, which demonstrated that the active presence of Aboriginal Legal Services was essential to eliminating discrimination from the criminal justice system, but also that much such work remains to be completed. Because discrimination against Aborigines and Torres Strait Islanders is entrenched, a sustained reduction of it requires continued monitoring of key Royal Commission recommendations such as the use of arrest and imprisonment as a last resort. Aboriginal Legal Services are the organisations most suited to performing accurate monitoring effectively, because they obtain information directly from those who suffer discrimination.

Third, Harkins noted that criticism from Aboriginal people of the operation of ALSs was most common concerning those organisations with many branches and a large number of communities to serve, and particularly where solicitors are "usually seen only when attending court hearings of criminal cases" and have little time to give to each person coming before the court. Pressures leading to solicitor 'burn out' have characterized large Aboriginal Legal Services since their formation (eg *Lawyers in the Alice: Aboriginals and Whitefellas' Law,* Federation Press 1993) Harkins commented about high turnover of ALS staff:

> The traditional ALS office of one or more staff solicitors and field officers delivering legal services has been the strength of the ALSs in building up a relationship with Aboriginal clients and, among other things, in providing essential representation in criminal matters and taking up issues of importance to Aboriginal people. At their best, ALSs with long-serving solicitors and with support from interested barristers have provided legal services second to none but, too often, the reality is of inexperienced, sometimes unsuitable, solicitors learning the practice of law in appearing for Aboriginal clients, before escaping from the pressures of travelling court circuits to private practice. *(Inquiry into Aboriginal Legal Aid, pp* 20-21, para. 3.12)

Unfortunately, Harkins suggested "briefing out to private solicitors" as part of a solution, ignoring the problem that such some lawyers who leave may not want to do ALS work.

Fourth, Harkins posed two basic possible future directions for the operation of Aboriginal Legal Services, but without clearly comparing the realistic options. His first option involved "acceptance by

ALSs of a role of assisting Aboriginal people to make use of relevant services of staff solicitors and private solicitors available through general community legal aid agencies". An alternative "would be a move towards community self-determination" through the regionalisation of existing ALSs; he noted this would need to be accompanied by "consultation and co-ordination on matters of mutual interest and wider issues" amongst ALSs from different regions. [90]

The essential problem with the first option is that it eliminates the fundamental organisational context of field officers, whose key role in providing Aboriginal clients with "confidence" in their legal representatives was noted by Harkins.[91] In the current situation of reduced funding for Legal Aid Commissions to pay for legal representation, it is not realistic to attempt to attach Aboriginal field officers to such organisations, which are much larger and more bureaucratic than ALSs, and expect this to be effective. In relation to the second option, the ATSIC Commissioners acted in 1997 to approval regionalisation of all Aboriginal Legal Services in NSW in accord with Regional Council boundaries – in NSW this has meant a move from 4 to 6 Services – and involved considerable community consultation.

While endorsing the key role of ALSs in providing vital criminal representation, Harkins claimed that "court surveys in New South Wales show that a significant proportion of Aborigines are represented by private solicitors in courts of summary jurisdiction." [92] His general view was that access to particular legal services for Aborigines should be a matter of their choice:

> The view of this Inquiry is that obstacles to the free election by an Aboriginal to seek assistance from either the ALS or an alternative legal aid agency should be removed. Reasons why Aboriginals elect to use alternative agencies include specialist Legal Aid Commission/Australian Legal Aid Office services, factionalism and lack of privacy in some ALS offices". [93]

A particular recommendation Harkins made was for restrictions in NSW which prevented ALSs from instructing the Public Defender to be removed. [94]He said this would enable "Public Defenders to give Aboriginal clients the benefit of their specialist services with an appropriate link with the ALS." [95]The maintenance of this link was not clearly outlined. This link would have to be maintained through regional ALSs, which are essential to develop community legal education, a need that Harkins noted was not effectively met because of limited ALS resources. [96]

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90. Inquiry into Aboriginal Legal Aid, p 24, paras 3.24, 3.25, 3.26
91. *(Ibid., p 128,* para. *9.33*
92. *(Ibid., p 82,* para. 7.6)
93. *Ibid, p 122,* para *9.11,* emphasis added)
94. *(Ibid., pp 122-123,* paras *9.12, 9.17)*
95. *Ibid., p 118,* para. *8.130*

A basic problem with Harkins' first option of reducing ALSs to mere conduits for Legal Aid Commissions and private solicitors is that this eliminates choice. According to a *1995* survey, 67% of Indigenous people requiring legal services in the previous year used the ALS, while *16%* used Legal Aid and *13%* private solicitors. Given these figures and current pressures on Legal Aid Commissions, any proposal to merge ALSs with general legal services would involve a massive reduction in the legal options available to a great many Aboriginal people, who are already suffering from the failure of governments to respond adequately to recommendations of the Royal Commission into Aboriginal Deaths in Custody.

10. Strengthening Indigenous Organizations

In order to more effectively engage in debates regarding the development of legal policy and the implementation of specific pieces of legislation, strong Indigenous organizations are required. Since the first Aboriginal Legal Service was established in Redfern in 1970, the Aboriginal and Torres Strait Islander Legal Services have become a critical point of contact for Indigenous people in their involvement with the legal process. As such, these specialist Indigenous organizations play a vital role in the provision of legal services for Indigenous people.

In New South Wales, progress has been made toward strengthening ATSILS through the establishment of the NSW Coalition of Aboriginal Legal services (COALS). COALS is the peak representative body of the six regional New South Wales Aboriginal and Torres Strait Islander Legal Services. Over the past decade, there has been a significant increase in the demand for the services of NSW ATSILS, as manifest in both an increase in the number of clients seeking assistance, and a greater diversity in the type of services sought. In an attempt to assist NSW ATSILS to more effectively manage this increasing workload and address legal issues that directly affect Indigenous Australians, COALS was formed to support, advocate and conduct research on behalf of the six regional offices.

For the five years preceding the 2001 financial year, COALS operated as an informal representative body of NSW ATSILS. However, subsequent to our receipt of an ATSIC seed funding grant in 2001, COALS was formally established as an unincorporated association. Since that time, we have demonstrated an ongoing commitment to address those issues which directly affect the Indigenous population's access to justice and have remained dedicated to the continued development and provision of professional and culturally sensitive specialist legal services.

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[86] ... Ibid ... 104-7.

Since July 2001, COALS has made a total of 26 submissions to various government departments. The primary focus of the majority of these submissions is the reformation of legislative provisions that impact unjustly on Indigenous Australians. According to feedback received from submission recipients, we have become increasingly influential in shaping State policy. Our influence is further evidenced by the fact that it is now common for COALS to receive formal invitations from organizations such as the New South Wales Attorney- General's Department, the Office of the New South Wales Ombudsman and the Aboriginal Justice Advisory Council for our perspective on a wide range of proposals that have the potential to impact negatively on Indigenous people.

Since its formation, COALS has also been invited to numerous government and non-government meetings to participate and advocate for NSW ATSILS. We currently have representatives serving on the State Aboriginal Justice Advisory Committee for the purpose of the development of the Aboriginal Justice Plan, and we engage in regular discourse with Office of the New South Wales Public Defender in relation to representation for Indigenous people in the higher courts. We have developed a strong working relationship with the New South Wales Legal Aid Commission, and have successfully negotiated a Memorandum of Understanding with the latter that has lead to a number of agreements that have significantly improved the delivery of legal services to Indigenous people in this State.

In the area of research, COALS has completed the first phase of a major study into diversionary programs currently operating in New South Wales. We have also commenced work on the second phase of this project with monies received from a grant provided by the New South Wales Law and Justice Foundation. We have prepared and published a comprehensive report on the issue of wage disparity between employees of New South Wales Aboriginal Legal Services and employees of other publicly funded legal service providers - the aim of which was to ensure the maintenance of profession legal representation for Indigenous people - and we have conducted a state wide review focussing on Indigenous demand for higher court services.

Despite the ongoing efforts of both COALS and NSW ATSILS, the plight of Indigenous Australians with respect to their involvement with the legal system of this country remains highly disturbing. Although Aboriginal and Torres Strait Islander people comprise only 2.1% of the Australian population, they are significantly over-represented at all stages of the criminal justice system. They appear in court at a rate five times higher than that which would be expected given their population size, and their incarceration rate is twelve times higher than that of non-Indigenous Australians.

On 30 June 2000, Indigenous prisoners made up 19% of the total prisoner population, with one in four female prisoners and one in seven prisoners identifying as Aboriginal or Torres Strait Islander. [97] Detention rates of Indigenous juveniles are similarly disturbing. The total number of Indigenous persons in juvenile corrective institutions on 31 December 2000 was 239, which represents 41% of the total number of persons detained in juvenile corrective institutions. This incarceration rate is almost 16 times higher than the rate for non-Indigenous juveniles. [98]

The natural projection of figures over the next few years will mean an increasing incarceration rate of Indigenous people, particularly in those States - such as New South Wales - which are home to high numbers of Indigenous people. In real terms, this means that most Indigenous families will have at least one family member held in incarceration during their lifetime. Aboriginal deaths in custody also remain alarmingly high. Figures from 1996 show that 40% of the total number of Indigenous people who died in custody did so in New South Wales.

The harsh reality of these figures mean that supporting the work of NSW ATSILS and COALS should be a high priority for ATSIC. Yet ATSIC funding to COALS was not renewed during the 2002-03 financial year. We appreciate that ATSIC has limited discretionary funding to distribute to its legal and preventative services programmes, but the vital importance of the work undertaken by both COALS and NSW ATSILS should not be under-estimated.

Our efforts to address and increase the Indigenous population's access to justice has been greatly appreciated by the New South Wales Aboriginal Legal Services. Despite the fact NSW ATSILS received a mere $289,000 to be divided between the six regional offices for the 2002 – 2003 financial year (with $80,000 of that amount already allocated to higher court funding), representatives of the latter voted unanimously to make a financial contribution to COALS so as to ensure our valuable work continues. However, the allocation of funding to COALS in this manner is unacceptable. NSW ATSILS are already severely under-resourced and they do not have sufficient funds from which COALS can continue to draw in order to ensure its ongoing operation.

In its Performance Audit No.2 of 2002 – 03, the first recommendation made by the Australian National Audit Office was that "ATSIC develop a systematic method of collating information to help identify

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97 *Prisoners in Australia*, Report prepared for the Corrective Services Minister's Council by the National Corrective Services Statistics Unit, ABS, Canberra, 2000

98 Australian Institute of Criminology, *Persons in Juvenile Corrective Institutions 1981 – 2000: With a Statistical Review of the Year 2000*, unpublished report compiled by the Australian Institute of Criminology, Canberra.

the needs of Indigenous communities".[99] Needs identification is an extremely complicated and difficult task. It is submitted that the New South Wales Coalition of Aboriginal Legal Services can greatly assist ATSIC with the collection, collation and analysis of data relating to the needs of Indigenous Australians who are, or have been, involved with the criminal justice system.

COALS is dedicated to the continued development and provision of professional legal services to the Indigenous population, and to achieving legislative reform where certain provisions impact unfairly on Indigenous Australians. To assist us in this goal, however, we urgently need the Review Committee to recognize our efforts and recommend that our funding renewed, or alternatively, increased funding to be allocated to the six regional services for designated distribution to this organization.

Self-determination

In addition to the economic impoverishment characteristic of similarly socially dislocated people throughout the world, Indigenous Australians have also had to struggle with discriminatory ideologies that locate the source of their disadvantage within the people themselves. ATSILS actively advocates for the review and positive change of legislation and other practices which discriminate against Indigenous Australians.

The existence of community-based Aboriginal Legal Services provides a crucial means for controlling miscomprehension between Aboriginal clients and their legal representatives. The potential for such miscomprehension is large because of profound cultural differences which cannot be eliminated, and should not be ignored. Through the support work of field officers respected by Aboriginal communities, Aboriginal Legal Services provide the only way of moderating the extent of this miscomprehension through an institutionalised form of feedback.

Aboriginal people want to be able to control their own destiny and accept responsibility for their decision making.[100]

The Aboriginal Deaths in Custody Overview of the Response by Governments to the Royal Commission supports this view of empowerment:

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99. The Australian National Audit Office, *Audit Report No.2 2002–03 Performance Audit : ATSIC Grants Management*, Commonwealth of Australia, 2003

100 National Aboriginal Health Strategy Working Party, *National Health Strategy*, 1989, pxiii

> There is no other way. Only the Aboriginal people can, in the final analysis, assure their own future.[101]

Self-determination has as its fundamental tenet the notion that it is preferable for Indigenous communities to exercise a high degree of control over their own affairs. According to Roberts,

> While there is no commonly agreed definition in Australia of self determination, and its meaning is contested, there does appear to be a general agreement that central to self-determination is the right of Indigenous Australians to make decision on issues relating to them and to manage their own affairs.[102]

Indigenous Australians must have the right to make decisions about their own lives and future. This includes the right to develop their own institutions at the national, state/territory, regional and local levels, in accordance with their own values aspirations and priorities.

ATSIC's goal is to assist members of the Aboriginal and Torres Strait Islander population to exercise their legal, economic, social, cultural and political rights. One of the primary ways in which this is achieved is through the provision of financial assistance to individuals, communities, organizations and other levels of government. During the 2001 - 2002 financial year, ATSIC granted approximately $869 million of its $1.15 million budget to Indigenous organizations and State and Territory governments. Administered in accordance with section 18 of the *Aboriginal and Torres Strait Islander Act* 1989 (the *ATSIC Act*), approximately 78% of this grant funding was directed towards the Community Development and Employment Projects (CDEP) and the Community Housing Infrastructure Program (CHIP). The remaining 22% was categorized as discretionary funding. Included in this discretionary funding is grant money provided to legal and preventative services.

ATSICS Legal and Preventative Services programme seeks to provide access to legal representation, advice and other related services to the indigenous population. The principal recipients of this programme's average annual funding of $46 million are the 24 Aboriginal and Torres Strait Islander Legal Services that are located throughout Australia.[103] Despite a significant increase in the demand for the services, as manifest in both, an increase in the number of clients seeking assistance and a greater diversity in the type of services provided, the Aboriginal and Torres Strait Islander Legal Services of NSW received a mere $289,000 to be divided between six regional offices for the 2002 – 2003 financial year. This is not sufficient. If Indigenous people living in the most populous State in

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101. Aboriginal Deaths in Custody Overview of the Response by Governments to the Royal Commission, 1992, 19
102. Roberts D, "Self-determination and the Struggle for Aboriginal Equality", in Bourke C, Bourke E and Edwards, B (eds) , *Aboriginal Australia,* University of Queensland Press, 259
103. www.atsic.gov.au/issues/lawand justice

Australia are to have access to high quality legal representation and advice, adequate funding must be allocated to NSW ATSILS. Furthermore, funding to the New South Wales Coalition of Aboriginal Legal Services (COALS) - the peak representative body of NSW ATSILS - must be reinstated.

Conclusion

The Social Cost of Not Enhancing Aboriginal and Torres Strait Islander Legal Services.

This submission considers the ongoing need for specialised Aboriginal and Torres Strait Islander Legal Services (ATSILS). It asserts that Aboriginal and Torres Strait Islander people can be best represented in the legal systems of this country, and in the development of legal policies and programmes, by specialist Indigenous legal organizations and their peak representative bodies respectively. It is furthermore submitted that any attempt to mainstream Indigenous legal services would only serve to exacerbate the already serious problem of the vast over-representation of Aborigines and Torres Strait Islanders within police and prison populations.

Although Aboriginal and Torres Strait Islander people comprise only 2.1% of the Australian population, they are significantly over-represented at all stages of the criminal justice system. They appear in court at a rate five times higher than that which would be expected given their population size, and their incarceration rate is twelve times higher than that of non-Indigenous Australians. On 30 June 2000, Indigenous prisoners made up 19% of the total prisoner population, with one in four female prisoners and one in seven prisoners identifying as Aboriginal or Torres Strait Islander. [104] Detention rates of Indigenous juveniles are similarly disturbing. The total number of Indigenous persons in juvenile corrective institutions on 31 December 2000 was 239, which represents 41% of the total number of persons detained in juvenile corrective institutions. This incarceration rate is almost 16 times higher than the rate for non-Indigenous juveniles. [105] The natural projection of figures over the next few years will mean an increasing incarceration rate of Indigenous people and, in real terms, means that most Indigenous families will have at least one family member held in incarceration during their lifetime.

It is in this context that the need for specialist Aboriginal and Torres Strait Islander Legal Services must be considered. However, in order to fully understand the enduring nature of the over-representation of Indigenous people currently in police custody and prison populations, it is submitted

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104. *Prisoners in Australia*, Report prepared for the Corrective Services Minister's Council by the National Corrective Services Statistics Unit, ABS, Canberra, 2000

105. Australian Institute of Criminology, *Persons in Juvenile Corrective Institutions 1981 – 2000: With a Statistical Review of the Year 2000*, unpublished report compiled by the Australian Institute of Criminology, Canberra.

that the Reference Committee must also take into consideration the historical and political context in which the current situation has evolved.

The application of the criminal law to Aborigines and Torres Strait islanders has not been neutral or objective. Rather, it has followed the lines of the wider relationships of power that first shaped the nature of the colonial response to the Indigenous population. These power imbalances remain an integral part of the contemporary reality of indigenous communities, and are but one justification for the need for separate Indigenous legal representation. More tangibly, however, the need for specialist legal services for Aboriginal and Torres Strait Islander people is justified by the demonstrated failure of mainstream services to provide for the specific needs of Indigenous people.

The inability of mainstream legal aid services to adequately cater for the unique requirements of the Indigenous population in their dealings with the legal system was most recently been identified in 2001 by the Commonwealth Grants Commission in a report that examined the distribution of funding for programmes and services targeted at Indigenous people. [106] The report found:

> The failure of mainstream programmes to effectively address the needs of Indigenous people means that Indigenous specific programs are expected to do more than they were designed for...[107]

It *is* true that Aboriginal and Torres Strait Islander Legal Services are expected to do more than simply legal representation and advice. These organizations also provide community legal education, and argue the case for law reform on behalf of Aboriginal and Torres Strait Islander people. ATSILS employees exhibit a common passion for true justice, and particularly so in the context of the Aboriginal cause. They also act as facilitators in the struggle for justice for Indigenous people, and are necessarily agents of legal and social reform. Furthermore, they serve as a buffer against the fear, apprehension and alienation that invariably accompanies any involvement with the legal system.

Furthermore, dealing with Indigenous clients necessarily demands a broad understanding of the cultural and social issues confronting Indigenous people - including the consequences of colonization and dispossession - as well as an in-depth awareness of, and sensitivity to, the unique situations of individual clients. It is critical, therefore, that the Reference Committee recognize and appreciate that the true extent of the work performed by the Aboriginal and Torres Strait Islander Legal Services cannot be quantified.

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106 Commonwealth Grants Commission, *Report on Indigenous Funding*, AGPS: Canberra, 2001

107 Commonwealth Grants Commission, *Report on Indigenous Funding*, AGPS: Canberra, 2001, p. xvii

However, it should be readily apparent that considering the high proportion of Aborigines and Torres Strait Islanders currently in incarceration; their levels of contact with the police and the judicial system; the persistent problem of Indigenous deaths in custody, and the past failure of mainstream legal aid services to deal with the unique legal problems of Aborigines and Torres Strait Islanders, it is undeniably in the best interests of the Indigenous population of this country that the latter continue to have access to culturally sensitive legal representation.

Aboriginal and Torres Strait Islander people have a distinct culture. In the struggle for justice for the Indigenous population, these cultural differences must be recognized and accorded due validity. One of the primary objects of the Aboriginal and Torres Strait Islander Legal Services is to represent Indigenous people in the legal system - people who understand their world through ancient and distinct cultural traditions that have historically been suppressed by the common law. As a consequence of the unique nature of this task, profound and prevalent problems typically arise. The most fundamental of these problems relates to communication between non-Aboriginal lawyers and Aboriginal clients. In order to overcome such problems, it is vital that the Australian legal system continues to support this culturally appropriate means through which Indigenous defendants can communicate accurately with their legal representatives so the many miscarriages of justice that have occurred are not repeated.

The effectiveness of the Aboriginal and Torres Strait Islander Legal services in meeting the legal needs and demands of Aboriginal people within the current limits of available funds is primarily attributable to their accessibility and acceptability to the Indigenous population, their community-based structure, and the specialised nature of the legal service they provide. Additionally, in the provision of services to Aboriginal clients;

> ATSILS are providing legal services at a cost that is significantly lower than that paid by mainstream LAC's for legal work undertaken on a referral base by private practitioners ...[108].

These organizations have earned their place as an essential part of the legal system of this country, and they should continue to be supported in their endeavours.

Consequently, COALS strongly objects to any suggestion to merge the Aboriginal and Torres Strait Islander Legal Services with any other legal service provider. Rather, COALS urges that consideration be given to expanding these organizations and their representative bodies such that Indigenous participation within the justice process be granted.

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108. Office of Evaluation and Audit. Aboriginal and Torres Strait Islander Commission, *Evaluation Of The Legal And Preventative Services Program*, January 2003, p 1. Note; 63 % of ATSILS produce an output at a cost less than

It is submitted that any attempt to mainstream services to Aborigines and Torres Strait Islanders will inevitably lead to disempowerment of Aboriginal communities. As a consequence of many of the ideological rationales underlying arguments supporting the mainstreaming of specialist Indigenous services - especially those arguments which are founded on the view that change should be a one-way process of bringing the Indigenous population into conformity with hegemonic groups in Australian society - further advancements towards Indigenous self-determination will be impeded. This can only serve to perpetuate the many disadvantages currently endured by Indigenous people.

COALS consequently submits that in assessing the way in which Aboriginal and Torres Strait Islander people can in the future be best represented in the process of the development of Indigenous legal policies and programmes, the Reference Committee should recommend that Indigenous control of those organizations which provide services and design programmes targeted to the Indigenous population be maintained. Evidence supporting this submission is manifest in the experience of those members of the Indigenous population involved with the ongoing operation of the regional Aboriginal and Torres Strait Islander Legal Services and other Indigenous organizations. Employees of these organizations inherently know and respect Aboriginal society and culture, and their experience inevitably becomes an invaluable asset to the Indigenous communities they serve. It is in this way that Indigenous organizations such as the Aboriginal and Torres Strait Islander Legal Services can assist the indigenous population to develop the skills and capacity to take control of their own lives.

It is further is submitted that Indigenous participation and self-determination in service provision and programme design also facilitates the building of trust between organizations and Indigenous communities. This, in turn, increases the level of service acceptance by those communities and contributes to their long-term sustainability. This focus on long-term sustainability of Indigenous programmes is the most effective way in which the negative effects of dispossession and colonization, including high rates of Indigenous incarceration and high levels of Indigenous deaths in custody, can be addressed.

It is COALS view that the current situation whereby separate regional legal services are directly accountable to the local community they serve is the most effective way to improve the access of Aborigines and Torres Strait Islanders to legal aid because they provide for greater community participation and control and because each legal service. There are many reasons why it is crucial for Aboriginal Legal Service solicitors and field officers to be based as close as possible to the communities they serve. One which should not be underestimated is the great extent to which Aboriginal people rely on the local ATSILS for education about their legal rights. However, the

critical requirement of adequate legal representation in all such cases is to establish facts which "explain or throw light on the particular offence and the circumstances of the offender." [109] Those facts in each case will have to be ascertained through careful scrutiny of the offenders' situation. Because of their connections throughout the Aboriginal community in a particular region, Aboriginal and Torres Strait Islander Legal Services will always be in a much stronger position than general Legal Aid Commissions to be able to prepare and present all the relevant subjective facts for the sentencing of Aboriginal offenders.

A further reason why access to local Aboriginal and Torres Strait Islander Legal Service solicitors and field officers is important is to assist with the recording of statements from witnesses whilst events are still fresh in their minds. The high proportion of Aboriginal people lacking literacy in written English makes it imperative for legal assistance to be readily at hand to accurately and promptly record evidence that may be significant. Without access to a local Aboriginal and Torres Strait Islander Legal Service, a great many Aboriginal people would end up in court merely being processed as guilty by default of an informed defence, instead of being tried at law. This would be a denial of basic human rights, as stipulated in Articles 10 and 11 of the Universal Declaration, and would dramatically increase rates of Aboriginal imprisonment. Thus, any administrative move to incorporate the ALS within mainstream Legal Aid Commissions would constitute a breach of Australia's human rights obligations to eliminate racial discrimination entirely, from the letter of Australian law and from its effects.

It should also be observed that any attempt to merge Aboriginal and Torres Strait Islander Legal services with mainstream legal service providers would not be economically viable in the long term. COALS is acutely aware that the demand for legal aid that currently exists in this society consistently exceeds available resources.[110] COALS also acknowledges that the rationale underlying the Legal Aid Commission's imposition of restrictions on access to legal aid in the form of means tests, merits tests and limits on the types of matters eligible for assistance is to make optimum use of scarce funds and to target those in greatest need. In the context of the provision of legal assistance by the Aboriginal and Torres Strait Islander Legal Service (ATSILS), however, these restrictions are inappropriate: as a consequence of the socio-economic deprivation suffered by the Indigenous population as a whole, 99% of current clients satisfy legal aid limits.[111] It is submitted that in the dire event that ATSILS were to be

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109. *R v Fernando,* 13 March 1992, reported in *Aboriginal Law Bulletin,* April 1992

110. The unsatisfied demand has been well documented in recent years.

111. The access to legal services has diminished. This issue has been particularly acute for Indigenous Australians According to the Australian Bureau of Statistics, the average gross personal income for Indigenous Australian men and women is $15 400 and $12 700 respectively. [111] An inevitable consequence of this statistic is that the vast majority of ATSILS clients consistently fall below current LAC means test limits – limits that have long been criticised by the wider community as excessively stringent.

disbanded, the bureaucratic administration of much of this restrictive criteria would significantly reduce the amount of funds available for legal representation. The small reduction in client base that might result from the implementation of means testing would undoubtedly be insufficient to justify the corresponding increase in administrative costs. It is subsequently submitted that the application of the means test in the context of ATSILS service provision is clearly a futile expenditure of time, money and human resources, and would merely serve to divert funds that could be better used to provide quality legal representation.

The approach to legal aid assessment currently adopted by ATSILS differs in a number of respects to that of the Legal Aid Commission. In line with the object of maximising the access of *all* Indigenous Australians to appropriate legal representation, ATSILS guidelines are relatively flexible and discretionary. To a large extent, they avoid the formal and administratively intensive assessment procedures outlined in the Legal Aid Commission's guidelines in favour of more personal and culturally appropriate consultation between staff and clients. The approach adopted by ATSILS recognizes that many Indigenous people who have had dealings with the legal system have found it an alienating experience. In accordance with its objective of maximising the participation of Indigenous people in legal processes, the approach adopted by ATSILS more effectively promotes the rights of Indigenous people to empowerment, identity and culture, and in doing so, reduces the disproportionate number of the Indigenous population involved in the criminal justice system.

In summary, the unique cultural requirements of Aboriginal clients, combined with their large number as a proportion of defendants in the Australian legal system, there is no way that existing Legal Aid Commissions could provide a service that would match the Aboriginal and Torres Strait Islander Legal Services in terms of reducing the potential for miscomprehension between Aboriginal clients and their lawyers. Given the risk of serious miscarriages of justice that such miscomprehension entails, it would be a grave error of policy to disband or scale down the operation of these Indigenous organizations.