

# CHAPTER 8

## The ability of Indigenous people to access justice

8.1 This chapter discusses evidence presented to the inquiry regarding term of reference (f), the ability of Indigenous peoples to access justice. In general, submitters and witnesses argued that Indigenous legal services do not appropriately and adequately cater to the needs of Indigenous people, particularly women. The topics covered in this chapter include:

- an appropriate legal assistance service;
- Indigenous legal services;
- the Legal Aid for Indigenous Australians program funding;
- the adequacy of funding;
- the Family Violence Prevention Legal Services program; and
- the Indigenous Law and Justice Framework.

### An appropriate legal assistance service

8.2 Indigenous peoples remain the most socially and economically disadvantaged members of the Australian community. Submissions and testimony highlighted broad and numerous legal needs which, they argued, could only be addressed by access to appropriate legal advice and representation, that is, a high quality and culturally sensitive legal assistance service.<sup>1</sup>

8.3 The National Pro Bono Resource Centre (NPBRC) told the committee:

Research indicates that Indigenous Australians rely on [Indigenous legal offices] and are relatively less likely to seek help from mainstream providers due to a distrust of the legal system, language barriers and a perceived lack of cultural awareness among mainstream legal service providers.<sup>2</sup>

8.4 In 2009, it is widely acknowledged that a specialist Indigenous legal service is the preferred and most culturally appropriate means of providing legal assistance to Indigenous people.<sup>3</sup>

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1 Aboriginal Legal Service (NSW/ACT) Limited, *Submission 21*, p. 1; National Legal Aid, *Submission 34*, p. 32; Law Institute of Victoria, *Submission 11*, p. 8; and Prof. Chris Cunneen and Melanie Schwartz, *Submission 69*

2 National Pro Bono Resource Centre, *Submission 49*, p. 15; and Women's Legal Centre (ACT and Region), *Submission 51*, p. 9.

3 Law Council of Australia, *Submission 12*, p. 24.

## Indigenous legal services

8.5 At the federal level, the Attorney-General's Department (department) is responsible for delivering the specialist Indigenous legal service. This presently comprises four Indigenous law and justice programs:

- a national program of legal assistance for Indigenous people, the Legal Aid for Indigenous Australians (LEGA) program;
- the Law and Justice Advocacy Development Program;
- the Prevention, Diversion and Rehabilitation and Restorative Justice Program; and
- the Family Violence Prevention Legal Services (FVPLS) program, the first and last of which are discussed in this report.

8.6 Since July 2005, legal assistance services under the LEGA program have been contracted via a competitive tendering process. There is a network of eight service providers throughout the states/territories, the Aboriginal Torres Strait Islanders Legal Services (ATSILS), delivering legal assistance services to over 84 permanent sites, court circuits and outreach locations in urban, and rural, regional and remote (RRR), areas of Australia.

8.7 The department has contracted until 30 June 2011 the following ATSILS to deliver legal assistance services to Indigenous people in their state/zones:

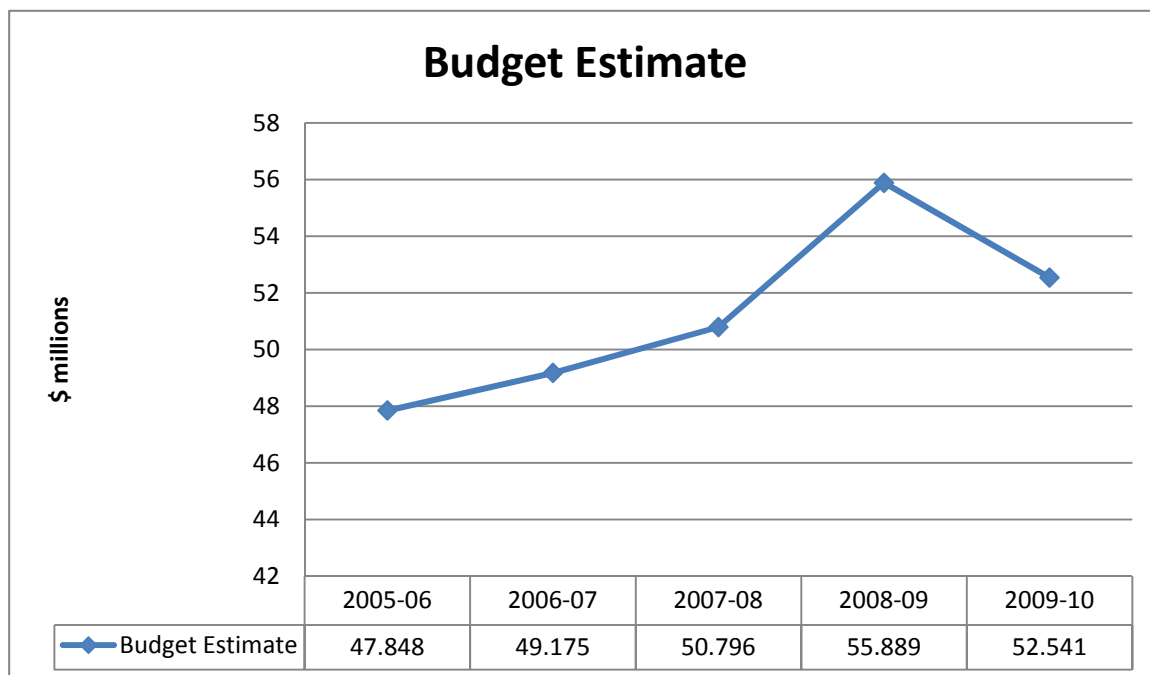
- New South Wales (including the Australian Capital Territory and Jervis Bay Territory) – Aboriginal Legal Service (NSW/ACT) Limited
- Victoria – Victorian Aboriginal Legal Service Co-operative Limited
- Queensland North and South Zone – Aboriginal and Torres Strait Islander Legal Services (Qld) Limited
- Western Australia – Aboriginal Legal Service of Western Australia Incorporated
- South Australia – Aboriginal Legal Rights Movement Incorporated
- Tasmania – Tasmanian Aboriginal Centre Incorporated
- Northern Territory North Zone – North Australian Aboriginal Justice Agency Limited
- Northern Territory South Zone – Central Australian Aboriginal Legal Aid Service Incorporated<sup>4</sup>

8.8 In 2003-04, the committee received much evidence concerning the LEGA program competitive tendering process.<sup>5</sup> Those concerns were not repeated to this inquiry. Instead, submissions and evidence focussed upon other issues, such as: funding for the LEGA program; and funding impacts on ATSILS' service levels.

### The Legal Aid for Indigenous Australians program funding

8.9 Figure 8.1 below shows Australian Government funding for the LEGA program from 2005 to 2010. In general, the funding increased over the past five years, except for an approximate 6 per cent decrease in funding for the current financial year. The Budget 2009-10 foreshadows decreased funding for the next three financial years.<sup>6</sup>

**Figure 8.1 – Legal Aid for Indigenous Australians program funding: 2005-2010**



Source: Attorney-General's Department, *Portfolio Budget Statements, 2005-10*

5 Senate Legal and Constitutional References Committee, *Legal aid and access to justice*, June 2004, p. 84.

6 Attorney-General's Department, *Portfolio Budget Statement 2009-10*, p. 30.

8.10 In addition to core funding for the LEGA program, the Australian Government made a number of one-off funding injections for Indigenous legal services in 2007-09. In 2007-08, for example, a one-off injection of \$13.215 million was made to address the increasing need of Indigenous peoples for criminal, civil and family law legal assistance services.<sup>7</sup>

### **The adequacy of funding**

8.11 As discussed in Chapters 3 and 7, the ability of legal aid commissions (LACs) and community legal centres (CLCs) to effectively provide core services is constrained by funding considerations. Indigenous legal service providers fared no better, with submissions and testimony reiterating the concerns of their mainstream counterparts.

### ***Real funding***

8.12 In essence, evidence to the inquiry stated that Australian Government funding under the LEGA program has declined since the introduction of the Commonwealth Legal Aid Priorities and Guidelines. According to submitters and witnesses, this has, in turn, adversely affected the ability of Indigenous people to access justice, with ATSILS experiencing significant funding difficulties.

8.13 According to the Public Interest Advocacy Centre (PIAC),  
ATSILS struggle to adequately meet the demands for their service as a consequence of inadequate funding arrangements.<sup>8</sup>

8.14 The Aboriginal Legal Service of Western Australia concurred, telling the committee:

ATSILS made submissions to [the 2003-04 inquiry] and the main issue being lack of funding has not changed. In our view the funding provided is now even more inadequate due to the increase in the demand for Indigenous legal services. The funding has not increased to meet ALSWA's additional operational expenses of running existing services or to meet the increase in demand for services. The need for additional funding for ATSILS is critical and should be one of the highest priorities for the Australian Government.<sup>9</sup>

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7 Attorney-General's Department, Annual Report 2007-08, p. 85; Attorney-General's Department, *Submission 54*, p. 7; The Hon. Robert McClelland MP, Attorney-General, 'Additional funding for Aboriginal legal services', Media Release, 18 April 2008; The Hon. Robert McClelland MP, Attorney-General, 'Funding for Legal Assistance Services', Media Release, 9 May 2009; and The Hon. Robert McClelland MP, Attorney-General, 'Additional \$6 million for legal assistance services', Media Release, 30 June 2009

8 PIAC, *Submission 50*, p. 13.

9 Aboriginal Legal Service of Western Australia, *Submission 62*, p. 3; and Australian Human Rights Commission, *Submission 70*, p. 7.

8.15 In South Australia, the Aboriginal Legal Rights Movement Inc. advised its frustration with the 'gross under-funding' of Indigenous legal services:

Since 1996 ALRM's legal aid funding for advice and representation has been static. Here it is in 2009 and I continue to operate on 1996 dollars. This is in excess of a 40% reduction in funding in real terms for that period, and when compared to mainstream legal aid in SA which has increased in actual dollars by over 120%.<sup>10</sup>

8.16 In the Northern Territory, the North Australian Aboriginal Justice Agency (NAAJA) receives no funding from the territory government on the basis that Indigenous people are a Commonwealth responsibility. No allowance is made for criminal law matters arising under territory law, despite such matters constituting 95 per cent of NAAJA's criminal work:

The Northern Territory government would see their providing us with any funding as the thin edge of the wedge, so to speak – that the Commonwealth would reduce their [sic] funding accordingly.<sup>11</sup>

8.17 The department acknowledged that this situation does occur, but due to inter-related responsibilities, the Australian Government is exploring a more collaborative approach to funding (and other) issues:

States and territories make very little contribution, if any, to [Indigenous legal aid]. A large proportion of the work provided by Indigenous legal aid services is in the criminal law area, particularly state and territory crime. Issues such as more court circuits or changes in criminal law policies or procedures have a direct impact on the supply and the demand for those legal services as well. That is something we are exploring with the states and territories as well, in seeking further funding for those services.<sup>12</sup>

8.18 NAAJA's submission provided a useful examination of its contractual funding arrangements with the Australian Government. The contract contains the following increases in budget allocations over and above the base 2007-08 allocation:

- 2008-09 1.08 per cent
- 2009-10 1.09 per cent
- 2010-11 3.40 per cent<sup>13</sup>

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10 Aboriginal Legal Rights Movement Inc., *Submission 61*, p. 1.

11 Mr Julian Johnson & Ms Priscilla Collins, North Australian Aboriginal Justice Agency, *Committee Hansard*, Perth, 13 July 2009, pp 29 & 32.

12 Mr Peter Arnaudo, Assistant Secretary, AGD, *Committee Hansard*, Canberra, 27 October 2009, p. 51.

13 North Australian Aboriginal Justice Agency, *Submission 6*, pp 3-4.

8.19 NAAJA told the committee that these allocations do not incorporate basic CPI increases (3 per cent), and consequently, its 2008-11 budget has the following shortfalls in real funding: \$239 517 in 2008-09; \$369 390 in 2009-10; and \$391 735 in 2010-11:

Despite some funding increases which are welcome...our core funding which gives us the basics to get out there and, certainly on the criminal side, deal with an ever increasing raft of charges against our clients, is not increasing and it is getting harder and harder to do the work.<sup>14</sup>

8.20 In Western Australia, the Australian Government exclusively funds the Aboriginal Legal Service of WA however at the Perth public hearing, the committee heard that that funding has limited capacity to provide access to justice:

We do not receive one cent from the state government. That means that our capacity to provide legal assistance to the Aboriginal community, especially in regional and remote areas, in non-criminal areas, in areas such as Centrelink, employment law, discrimination, guardianship, probate and family law, is very limited indeed simply because we are not provided with enough money to be able to provide those services.<sup>15</sup>

8.21 The Aboriginal Legal Service of WA, like most ATSILS, necessarily prioritises criminal law matters, which comprise approximately 80 to 90 per cent of its work load. It indicated that its workload is just manageable due to: informal agreements between legal assistance service providers in RRR areas regarding who will handle which circuits; and the use of Indigenous court officers.

8.22 Indigenous court officers appear in court as advocates on behalf of Indigenous clients. According to the Aboriginal Legal Service of Western Australia, this service provides accessible legal representation to Indigenous people, and is a strategy which could be more highly utilised to ensure greater access to justice:

We love our court officers; they are a tremendous addition to our service. And we are the only state or territory which has court officers who can actually do representation. But, as an Aboriginal man, I kind of feel, 'Are our people really getting a good deal here when we have got paraprofessionals doing some very serious matters?' There could be a rationalisation.<sup>16</sup>

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14 Mr Glen Dooley, North Australian Aboriginal Justice Agency, *Committee Hansard*, Perth, 13 July 2009, p. 29.

15 Mr Peter Collins, Aboriginal Legal Services of WA, *Committee Hansard*, Perth, 13 July 2009, p. 36.

16 Mr Dennis Eggington, Aboriginal Legal Services of WA, *Committee Hansard*, Perth, 13 July 2009, pp 38 & 48; and Aboriginal Legal Service of Western Australia, *Submission 62*, pp 3-4.

8.23 In its submission, the Aboriginal Legal Service (NSW/ACT) also questioned whether Indigenous people are being provided with a second-rate service due to inadequate funding of the ATSILS. In its view, the under-funding has an ulterior agenda – to force Indigenous people to use mainstream legal assistance services:

The ALS (NSW/ACT) is perplexed by repeated assurances that it is not the Attorney-General Department's intention either to impair the ALS's continuing capability to provide a high quality and culturally sensitive legal service or to force Aboriginal people into relying on mainstream-less culturally appropriate legal services.

Yet each will be the result of what has been, effectively, a reduction in funding levels, together with a consequent loss of confidence by Aboriginal people in the commitment of the Australian government to improve access to justice for Aboriginal communities.<sup>17</sup>

8.24 The preponderance of evidence to the committee indicates that, for whatever reason, ATSILS across the country are not fully funded. The committee is concerned that, as a result, Indigenous peoples' access to justice might be impaired.

8.25 The committee notes that, to date, the Australian Government solely funds ATSILS, and that funding under the LEGA program is currently declining. The committee is concerned with the decline in funding, particularly in view of the increased Indigenous population, the average age of the Indigenous population, and the increasing rates of incarceration for Indigenous people.

8.26 Furthermore, given that Indigenous peoples' legal needs arise under federal, state and territory law, the committee considers that all governments should be financially contributing to the provision of Indigenous legal services.

### **Recommendation 26**

**8.27 The committee recommends that the federal, state and territory governments inquire into and report on joint funding for the Legal Aid for Indigenous Australians program and related services with a view to more equitably apportioning financial responsibility for Indigenous legal services funding.**

### ***Comparisons with mainstream funding***

8.28 As discussed in Chapter 7, submissions and testimony argued that one-off funding injections are no substitute for the provision of adequate core funding, and evidence under term of reference (g) echoed these arguments in relation to ATSILS.<sup>18</sup>

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17 Aboriginal Legal Service (NSW/ACT) Limited, *Submission 21*, p. 2.

18 For example, Aboriginal Legal Service of Western Australia, *Submission 62*, p. 6; Aboriginal Legal Service (NSW/ACT) Limited, *Submission 21*, p. 2; North Australian Aboriginal Justice Agency, *Submission 6*, p. 4; Aboriginal Family Violence Prevention & Legal Service Victoria, *Submission 38*, p. 11; and PIAC, *Submission 50*, p. 11.

However, submitters and witnesses expressed more concern with the apparent disparity between mainstream and ATSILS funding.

8.29 Table 8.1 below compares 2006-07 Australian Government funding levels for LACs, CLCs, ATSILS and FVPLS. In general, most funding was provided under the Legal Aid Program (LAP) (60.42 per cent), followed by the LEGA program (19.66 per cent), then the Community Legal Services Program (CLSP) (9.04 per cent), and finally, the FVPLS program (4.61 per cent).

**Table 8.1 – Comparative funding levels (in '000 dollars rounded) across comparable Attorney-General's Department programs 2006-07**

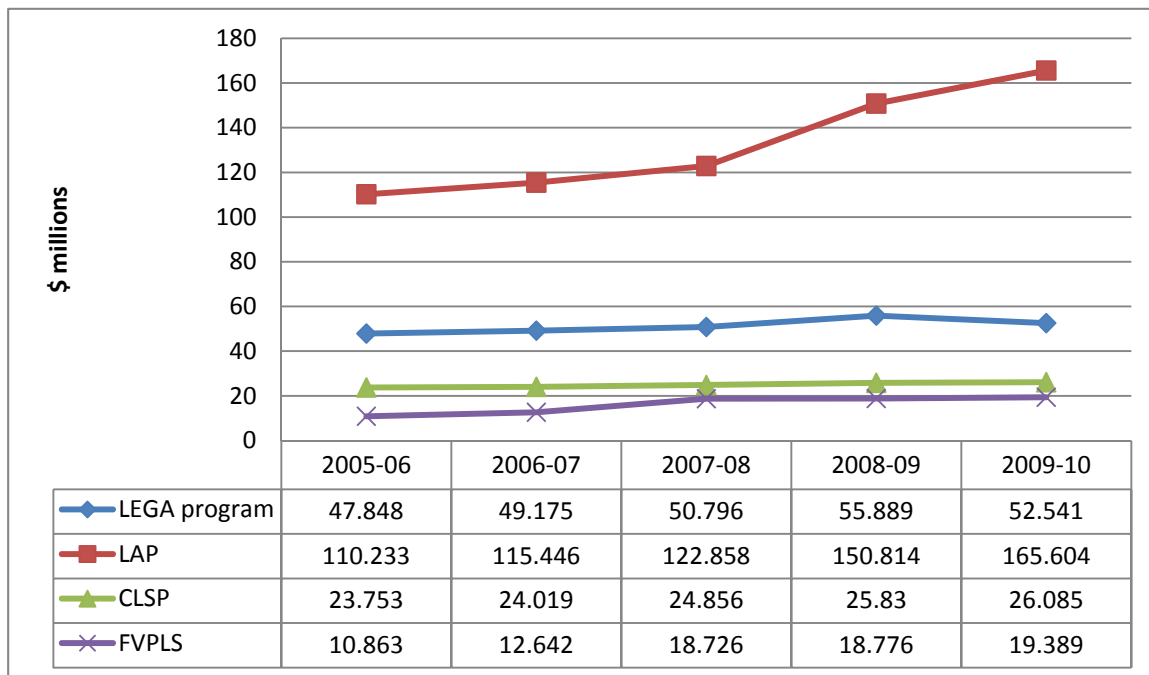
State	CLSP	% of total funding	LAP	% of total funding	LEGA	% of total funding	FVPLS	% of total funding	Total funding
NSW	5 320	7.59%	45 802	65.41%	12 664	18.08%	2 201	3.14%	70 026
VIC	4 713	10.26%	30 616	66.68%	2 809	6.12%	873	1.90%	45 916
QLD	3 362	6.40%	32 071	61.06%	12 325	23.47%	2 169	4.13%	52 522
WA	3 302	12%	13 862	46.58%	8 811	29.61%	2 755	9.26%	29 758
SA	2 910	13.43%	13 360	61.64%	3 627	16.74%	963	4.44%	21 673
TAS	1 034	13.91%	4 999	67.26%	1 399	18.82%	Nil	Nil	7 432
ACT	519	11.78%	3 887	88.24%	Nil	Nil	Nil	Nil	4 405
NT	987	7.43%	3 428	25.81%	6 536	49.22%	2 330	17.55%	13 280
Total	22 149	9.04%	148 025	60.42%	48 181	19.66%	11 291	4.61%	245 012

*Source: Attorney-General's Department, Review of the Commonwealth Community Legal Services Program, March 2008, p. 44.*

8.30 Figure 8.2 below depicts how Australian Government funding levels for LACs, CLCs, ATSILS and FVPLS have changed from 2005 to 2010.



**Figure 8.2 – Comparative funding levels for comparable Attorney-General's Department programs: 2005-2010**



Source: Attorney-General's Department, *Portfolio Budget Statements, 2005-10*

8.31 Figure 8.2 shows that: LAP funding increased by approximately 50.23 per cent over the past five years; CLSP funding increased by approximately 9.81 per cent over the past five years; and LEGA program funding for the same period also increased by approximately 9.81 per cent.

8.32 The Law Council of Australia (Law Council) told the committee that ATSILS are the most under-funded sector of all legal assistance service providers, with a 40 per cent decrease in real funding since 1997. That figure does not take into account unmet and increased need. In 2003, the Australian Human Rights Commission (AHRC) understood the shortfall in ATSILS funding to be approximately \$25.6 million per year.<sup>19</sup>

8.33 In addition, submissions highlighted additional factors which complicate the delivery of legal services to Indigenous peoples, and must be taken into consideration in funding proposals and allocations. NAAJA, for example, submitted that:

The provision of legal advice, education and advocacy “to communities organised according to traditional customs can be complex and far more time consuming than comparable work in non-Indigenous communities”. In our experience, this is eminently the case. Many NAAJA clients live in communities with strong adherence to traditional law and customs. For the majority of our clients, the operation of the mainstream legal system is

19 Law Council of Australia, *Submission 12*, pp 24-25; and Mr Darren Dick, AHRC, *Committee Hansard*, Canberra, 27 October 2009, p. 15.

totally foreign and fundamental legal concepts such as “guilty” and “not guilty” are poorly understood.<sup>20</sup>

8.34 In its submission, NAAJA provided a useful, practical comparison of a few of its budgeted expenses for 2007-08, as compared with those of the Northern Territory LAC:

- brief out budgets: \$85 000 for criminal matters and \$30 000 for civil/family matters (cf. \$1 593 043 for the Northern Territory LAC, including external disbursements); and
- client expenses: \$128 421 (cf. \$646 520 for the Northern Territory LAC, including in-house disbursements).<sup>21</sup>

8.35 Professor Chris Cunneen and Melanie Schwartz also provided detailed budget comparisons:

The authors were provided with data from the North Australian Aboriginal Justice Agency (NAAJA) comparing funding between that organisation and the Northern Territory Legal Aid Commission (NTLAC). A comparison between figures for the NTLAC 2005-6 and NAAJA 2006-7 show that the NTLAC budget is \$7,665,489 compared to the NAAJA budget of \$4,822,612. **Thus NTLAC has a 59% greater budget than NAAJA.**<sup>22</sup>

8.36 The AHRC noted that this was:

...despite NAAJA undertaking three times as many criminal matters, as well as a greater total number of criminal, civil and family law matters combined.<sup>23</sup>

8.37 Broadly speaking, the Aboriginal Legal Service of Western Australia gave evidence that the disparity between ATSIILS' and LACs' resources is an 'obvious and shameful disparity that must be urgently addressed by the Commonwealth if it is genuinely committed to ensuring access to legal services to Indigenous people.'<sup>24</sup>

8.38 The Law Council called for a funding injection to enable ATSIILS to provide a high quality and professional level of legal representation for Indigenous peoples:

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20 North Australian Aboriginal Justice Agency, *Submission 6*, pp 4 & 10; and Aboriginal Legal Service of Western Australia, *Submission 62*, p. 8.

21 North Australian Aboriginal Justice Agency, *Submission 6*, pp 6-7.

22 Prof. Chris Cunneen and Melanie Schwartz, *Submission 69*, p. 13.

23 Australian Human Rights Commission, *Submission 70*, p. 7.

24 Aboriginal Legal Service of Western Australia, *Submission 62*, p. 8; Australian Human Rights Commission, *Submission 70*, p. 3; and PIAC, *Submission 50*, p. 14.

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The justice system will continue to fail Indigenous peoples unless the most likely and effective means by which Indigenous Australians are able to receive legal services are adequately funded.<sup>25</sup>

8.39 In the 2003-04 inquiry, the committee expressed grave concern at the evidence it received regarding overwhelming deficiencies in Indigenous legal services, particularly in RRR areas. The committee made Recommendation 27, that:

The Commonwealth Government should urgently increase the level of funding to Indigenous legal services in order to promote access to justice for Indigenous people. In doing so, the Government must factor issues of language, culture, literacy, remoteness and incarceration rates into the cost of service delivery.<sup>26</sup>

8.40 In 2006, the Australian Government responded that its new funding allocation model would allocate funds on the basis of 'relative need'. The response also cited increased funding for the FVPLS program as evidence of the government's commitment to improving Indigenous peoples' access to justice.<sup>27</sup>

8.41 Evidence to the committee clearly states that Indigenous legal services remain significantly under-funded, a view which the committee accepts, and with respect, the government's 2006 response entirely overlooks the substance of the committee's earlier recommendation.

8.42 The committee continues to agree that Indigenous legal services are not adequately funded, impacting on Indigenous people's access to justice. The committee therefore reiterates *with emphasis* Recommendation 27 of its 2004 Report (now also re-labelled Recommendation 27).

### **Recommendation 27**

**8.43 The committee recommends that the Australian Government increase the level of funding for Indigenous legal services with a view to sufficiently resourcing this sector of the legal aid system to meet the needs of Indigenous peoples, including appropriate loadings for extra service delivery costs.**

### ***Family and civil law matters***

8.44 As discussed in Chapters 3 and 7, family and civil law matters are two areas of law which contributors to the inquiry argued are not sufficiently covered by the LAP or the CLSP. Submissions and testimony in relation to ATSIILS echoed these concerns.

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25 Law Council of Australia, *Submission 12*, p. 25; National Legal Aid, *Submission 34*, p. 2; and Law Institute of Victoria, *Submission 11*, p. 8.

26 Senate Legal and Constitutional References Committee, *Legal aid and access to justice*, June 2004, Recommendation 27, pp xxvi-xxvii.

27 Government Response, *Senate Hansard*, 7 February 2006, p. 73.

8.45 National Legal Aid (NLA), for example, submitted that Indigenous legal services have never been sufficiently funded to establish a family or civil law practice, meaning that these needs must either be met by mainstream legal assistance services, are otherwise neglected; or result in self-representation in the court system.

8.46 NLA told the committee that none of these options is satisfactory due to:

- inadequate funding of mainstream legal assistance providers;
- the appropriateness of the Indigenous legal services; and
- conflicts of interest, particularly in family law and family violence matters, and also due to the paucity of legal practitioners in RRR areas.<sup>28</sup>

8.47 NLA contended that:

Given the chronic disadvantage experienced by Aboriginal and Torres Strait Islander peoples, and the responsibility of the Commonwealth for Indigenous people as “Commonwealth persons”, the Commonwealth Government should provide sufficient funding to Indigenous legal services so that they can provide effective and appropriate services to Aboriginal and Torres Strait Islander peoples and their communities, not only in criminal matters, but in family and civil law matters as well.<sup>29</sup>

8.48 An additional concern, raised by the Victorian Aboriginal Legal Service Cooperative Ltd, is that the lack of civil law practices in ATSILS results in an inability to identify and refer Indigenous peoples to pro bono legal assistance service providers.<sup>30</sup>

8.49 In 2008, the NPBRC released *The Aboriginal Legal Service Pro Bono Guide*, the aim of which was to 'provide information to...the Aboriginal Legal Service...in order to facilitate the delivery of effective and sustainable pro bono assistance to the ALS'.<sup>31</sup> Two large pro bono law firms indicated to the committee however that the publication has had minimal, if any, effect.<sup>32</sup>

8.50 Elsewhere, this report refers to the difficulties experienced by ATSILS in the delivery of legal services to Indigenous peoples, particularly in RRR areas. This chapter briefly discusses language barriers, geographic considerations, and recruitment and retention issues.

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28 National Legal Aid, *Submission 34*, pp 32-33; North Australian Aboriginal Justice Agency, *Submission 6*, pp 1-2; and Employment Law Centre of WA (Inc), *Submission 26*, pp 5-6.

29 National Legal Aid, *Submission 34*, p. 33; and PIAC, *Submission 50*, p. 14.

30 Aboriginal Legal Service of Western Australia, *Submission 62*, p. 5.

31 <http://www.nationalprobono.org.au/probonomanual/> (accessed 2 November 2009)

32 DLA Phillips Fox, *Submission 32*, p. 15; and Gilbert & Tobin, *Submission 45*, p. 7.

### *Language barriers*

8.51 In 2003-04, the committee heard that a common barrier to accessing legal assistance is language as many Indigenous peoples speak English as a second, third or fourth language, if at all. Evidence to the inquiry maintained the argument, with the Australian Lawyers Alliance telling the committee:

There are over 200 Aboriginal languages still spoken in Australia; many Aboriginal people use their native language every day and may speak and understand English only at a limited level. Some attempts have been made to address these issues, including the joint Commonwealth and Northern Territory Funding of the Aboriginal Interpreters Service (AIS), which operates to assist in interpreting in up to 105 Aboriginal languages.<sup>33</sup>

8.52 The AHRC added that, in addition to English not being the first language in some Indigenous communities, the nuances of Aboriginal English can also lead to misunderstandings between clients and their lawyers (and the justice system).<sup>34</sup>

8.53 Nationwide, there is a variety of language services provided by the states/territories. For example, the Northern Territory has (limited) interpreter services, whereas Western Australia has no state-wide, publicly-funded, accredited and resourced interpreter service for Indigenous speaking people. The Aboriginal Legal Service of WA considered the lack of such a service 'a miscarriage of justice':

Our people are going to court and they should not be going to court, because they cannot understand half the things that are going on around them, let alone read back the statement that they are supposed to have made to the police. It is just unbelievable.<sup>35</sup>

8.54 The United Nations Human Rights Committee considers access to interpreter services as an effective measure to ensuring access to justice, a need recognised and endorsed by the High Court of Australia over ten years ago.<sup>36</sup>

8.55 In general, evidence argued that access to interpreters, and the right to understand both charges and proceedings, is a fundamental right, a right neither adequately recognised,<sup>37</sup> nor for which practical measures are properly resourced.

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33 Australian Lawyers Alliance, *Submission 27*, pp 22-23; Mr Dennis Eggington, Aboriginal Legal Services of WA, *Committee Hansard*, Perth, 13 July 2009, pp 45-46; and Senate Legal and Constitutional References Committee, *Legal aid and access to justice*, June 2004, p. 103.

34 Australian Human Rights Commission, *Submission 70*, p. 6.

35 Mr Dennis Eggington, Aboriginal Legal Services of WA, *Committee Hansard*, Perth, 13 July 2009, p. 44; Aboriginal Legal Service of Western Australia, *Submission 62*, p. 4; Mr Danny Barlow, President, LIV, *Committee Hansard*, Melbourne, 15 July 2009, pp 82-83; and Attorney-General's Department, Estimates Answer to Question on Notice No. 129 (27 May 2009) p. 3.

36 *Ebatarinja v Deland* [1998] 194 CLR 444 per Gaudron, McHugh, Gummow, Hayne and Callinan JJ at 26; and National Pro Bono Resource Centre, *Submission 49*, p. 12.

8.56 The NPBRC, for example, submitted that no courts have available, properly accredited interpreting services, and the Women's Legal Service (SA) Inc. told the committee that, 'more often than not matters proceed through court in the absence of interpreters contrary to all notions of justice.'<sup>38</sup>

8.57 At the Melbourne public hearing, Her Honour Chief Justice Diana Bryant told the committee that the Family Court of Australia (FCA), at least, provides free interpretation services to anyone requesting such assistance. However, Her Honour acknowledged that there are difficulties with that service:

The best interpreter services for the parties are not always available. I am hearing that sometimes the person who comes will be good and other times they will be less than optimal.<sup>39</sup>

8.58 In addition, the committee heard that the high cost of interpreters and translators prevents their engagement by some, if not all, resource poor legal assistance service providers.<sup>40</sup>

8.59 The committee accepts that language (and cultural) barriers inhibit Indigenous peoples' access to justice, and that the lack of comprehensive interpreter services causes disaffection amongst Indigenous peoples.

8.60 The committee notes that the root problem appears to go beyond a financial 'solution', and until non-financial contributory factors are identified and proposals for reform are developed, any financial solution proposed by the committee will have only limited effect. Nonetheless, the committee promotes increasing access to justice, and if this goal can be partially attained with enhanced interpreter services, then the committee recommends accordingly.

## **Recommendation 28**

**8.61 The committee recommends that:**

- **the federal, state and territory governments provide additional funding to court-based interpreter services in each state and territory with a view to expanding that service in high need areas; and**
- **the Australian Government commence a process of consultation to seek solutions to the translating difficulties associated with some Indigenous languages, with a view to reducing language barriers to access to justice.**

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37 For example, Law Institute of Victoria, *Submission 11*, p. 12.

38 Women's Legal Service (SA) Inc., *Submission 59*, pp 11 & 21; National Pro Bono Resource Centre, *Submission 49*, pp 12-13; North Australian Aboriginal Justice Agency, *Submission 6*, p. 10; and Australian Lawyers Alliance, *Submission 27*, p. 23.

39 Chief Justice Diana Bryant, Family Court of Australia, *Committee Hansard*, Melbourne, 15 July 2009, p. 6; and Chief Federal Magistrate John Pascoe, Federal Magistrates Court, *Committee Hansard*, Melbourne, 15 July 2009, p. 7.

40 National Pro Bono Resource Centre, *Submission 49*, p. 12.

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### ***Geographic considerations***

8.62 Evidence to the inquiry stated that geographic considerations affect legal practitioners' ability to provide legal services and access to justice. This was markedly so for Indigenous peoples living in RRR areas, with submitters and witnesses referring to how limited funding impacts practitioners' ability to deliver access to justice.

8.63 NAAJA, for example, told the committee:

Limited funding...means that wherever possible, NAAJA staff drive to attend bush courts while court staff and prosecution services generally fly. This requires NAAJA staff to travel long distances, generally on poor quality roads, often after court has finished for the afternoon. For some bush courts, (for example Kalkarindji and Lajamanu) where there is no accommodation available in the community, NAAJA staff travel 1.5 – 2.5 hours each way every day to attend court.<sup>41</sup>

8.64 Leaving the direct impact on legal practitioners aside, the need to travel great distances affects the amount of time practitioners are able to spend taking instructions from their clients. NAAJA described this situation as follows:

Our solicitors have only one day prior to court in the community to prepare, in turn meaning that many clients cannot be seen beforehand. With the long court lists in many communities, this leads to limited time being available for each client.

These problems extend to limited preparation time for complex hearings, as the standard practice is to collect the brief material upon the solicitor's arrival to the bush court even where the client is in custody and will only be flown to the community on the day of the hearing. This often makes it impossible to get effective instructions, in circumstances where there will be pressure on the solicitor to proceed quickly because of the expense incurred in flying the client in custody to the community and the fact that other witnesses may have been called.<sup>42</sup>

8.65 Legal assistance service providers necessarily incur additional costs in delivering services to RRR areas, and these expenses cannot always be predicted when a provider is preparing budgets and lodging funding submission.

8.66 The committee heard that if legal service providers did not bear the brunt of such expenses, then the expense would either fall to clients or discourage clients from obtaining legal assistance. Already, Indigenous peoples need to travel great distances and at great expense to interact with the justice system, including coronial inquests:

The large distances and costs also mean that many clients are reluctant to adjourn matters or set them for hearing as this means they will have to make the trip again. This results in clients pleading guilty at the first

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41 North Australian Aboriginal Justice Agency, *Submission 6*, p. 11.

42 North Australian Aboriginal Justice Agency, *Submission 6*, pp 10-11.

instance and not having the benefit of alternative resolutions being negotiated with police....The capacity for the family of a deceased person's family to be able to participate, and be represented, in the Inquest into the death is a fundamental right which goes to the very core of access to justice.<sup>43</sup>

### ***Recruitment and retention***

8.67 In general, ATSILS gave evidence that funding under the LEGA program is not sufficient to attract legal practitioners to ATSILS employment, particularly in RRR areas. Evidence acknowledged that remuneration issues are exacerbated by comparative work levels and the complex needs of Indigenous peoples.

8.68 The AHRC, for example, told the committee that:

The disparities between Legal Aid and ATSILS are exacerbated by the complex needs of Indigenous clients in accessing legal services such as relating to language, cross-cultural issues and social exclusion as well as through lower levels of educational attainment and higher levels of hearing loss, disability, mental health issues and so on. Given the sheer burden of numbers, many Aboriginal and Torres Strait Islander Legal Services are under considerable strain to meet the needs of the community.<sup>44</sup>

8.69 NAAJA provided the following comparison of its workload with that of the Northern Territory LAC:

Over the 2007/2008 period of comparison, each NAAJA solicitor attended to approximately 144 new casework matters in addition to casework matters that continued from the previous financial years. In total, in 2007/2008, NAAJA solicitors handled 3,529 criminal matters and 515 family/civil matters. This does not include the additional 1,523 duty files which were also handled by NAAJA solicitors.

By comparison, NTLAC staff only handled 1,367 criminal matters and 307 family/civil matters over the same period. This means that each NTLAC solicitor attended to approximately 76 matters per year (we presume this is, likewise, in addition to matters that continued from previous financial years).

Such disparity has "severe ramifications" for NAAJA's capacity and, therefore, the adequacy of legal services available to Indigenous clients.<sup>45</sup>

8.70 In addition to the demanding workload, submitters and witnesses referred to ATSILS solicitors' salary levels as a great disincentive for working for Indigenous legal services. Again, NAAJA told the committee:

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43 North Australian Aboriginal Justice Agency, *Submission 6*, pp 6-12; Law Society of NSW, *Submission 41*, p. 5; and Australian Lawyers for Human Rights, *Submission 43*, p. 11.

44 Mr Darren Dick, AHRC, *Committee Hansard*, Canberra, 27 October 2009, p. 9.

45 North Australian Aboriginal Justice Agency, *Submission 6*, pp 5-6.



In 2007/2008, NAAJA employed 6 additional staff than NTLAC yet NTLAC paid an additional \$897,000 on staffing salaries than NAAJA. This means that the average salary for NTLAC is \$73,489 as compared with \$52,251 for NAAJA.

As with other ATSILS, NAAJA unfortunately suffers from high staff turn over, partly as a result of lower salaries and higher workloads than other legal aid organisations (such as NTLAC). In 2006/2007, NAAJA's staff turn over was 21% and in 2007/2008, this has increased to 26%. Currently, the average length of employment for a solicitor is 12 months.

This high staff turn over affects productivity across the organisation and ultimately, the quality of outcomes for our clients.<sup>46</sup>

8.71 The NPBRC likewise submitted:

One of the biggest issues facing ILOs nationally relates to the salaries of solicitors. As result of inadequate funding, salaries offered to solicitors at ILOs are so far below those offered by legal aid and the private profession that it is very difficult for them to recruit and retain experienced staff, particularly in regional, rural and remote areas.<sup>47</sup>

8.72 The Law Council demonstrated the point by contrasting the salary of a Level 1/2 solicitor at the Aboriginal Legal Rights Movement Inc. (\$41 000-\$47 000) with the salary paid to an equivalent solicitor at a LAC (\$50 000-\$65 000).<sup>48</sup>

8.73 The Australian Legal Assistance Forum has similarly determined that, on average, ATSILS solicitors receive 20-25 per cent less than LAC solicitors for conducting the same type of work, and notes that, in some instances, the difference is as high as 48.22 per cent.<sup>49</sup>

8.74 NLA suggesting to the committee that recruitment and retention difficulties could be partially addressed with: funding increases to enable pay parity; and portability of all forms of leave entitlements across legal assistance service providers:

Pay parity and portability of leave entitlements are features of the Western Australia "Country Lawyers Program" which was established to address recruitment and retention issues in country Western Australia. It is suggested that this program demonstrates the benefits of such an approach having increased service delivery to people in regional and remote areas of Western Australia.<sup>50</sup>

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46 North Australian Aboriginal Justice Agency, *Submission 6*, p. 7.

47 National Pro Bono Resource Centre, *Submission 49*, p. 16.

48 Law Council of Australia, *Submission on Legal Aid and Access to Justice Funding for the 2009-10 Federal Budget*, 9 January 2009, p. 6.

49 Anticipated research findings quoted in National Association of Community Legal Centres, *Submission 1*, p. 7.

50 National Legal Aid, *Submission 34*, pp 4 & 33; and Law Council of Australia, *Submission 12*, p. 25.

8.75 The committee agrees that ATSILS' recruitment and retention difficulties must be addressed to provide Indigenous peoples with a consistent and high quality legal service. Portability of entitlements is a simple and effective way of immediately improving the terms and conditions under which ATSILS' solicitors are currently employed, and the committee encourages state/territory governments, in conjunction with concerned stakeholders, to explore ways of implementing such measures.

8.76 The committee also considers it odd for publicly funded legal assistance service providers to employ legal practitioners at substantially different rates, particularly when the work is in many respects similar.

### **Recommendation 29**

**8.77 The committee recommends that the federal, state and territory governments jointly, and in conjunction with affected stakeholders, review current salary levels across legal aid commissions and Aboriginal and Torres Strait Islander legal services, and propose salary level reforms for this sector of the legal aid system with a view to eliminating wage disparity.**

### **Recommendation 30**

**8.78 The committee recommends the introduction of portable leave entitlements across legal aid service providers in Australia with a view to enhancing the retention of staff in these sectors.**

### *Impact of funding on service levels*

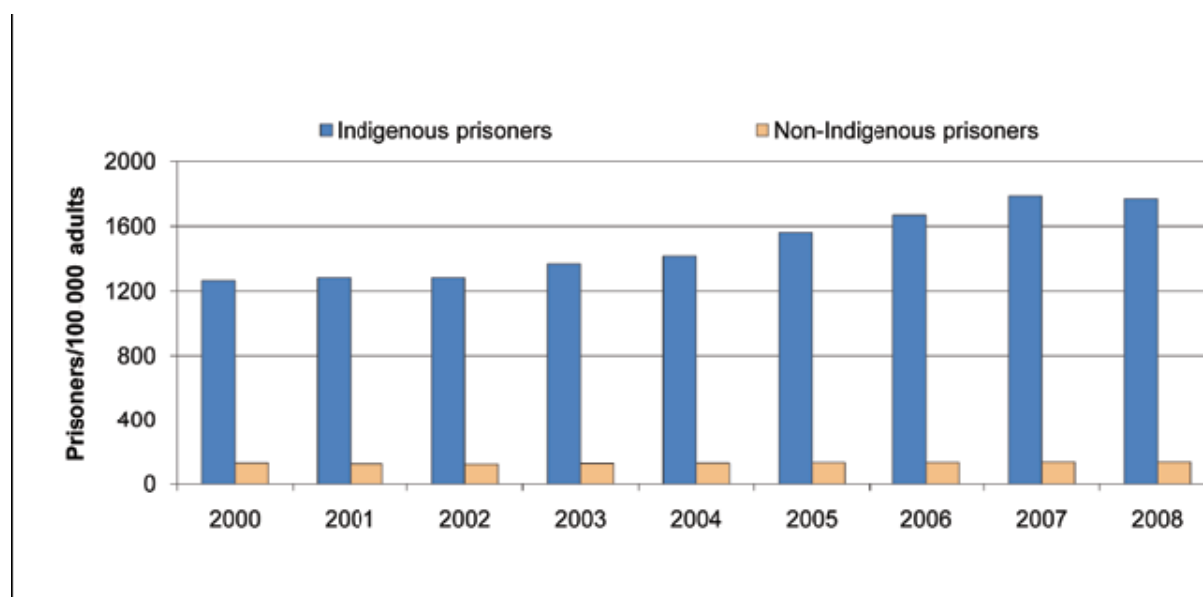
8.79 During the inquiry, the Productivity Commission released its report *Overcoming Indigenous Disadvantage: Key Indicators 2009*. This report showed that Indigenous peoples continue to be over-represented in the criminal justice system, both as young people and as adults:

- after adjusting for age difference, Indigenous people were 13 times as likely as non-Indigenous people to be imprisoned in 2008;
- the imprisonment rate increased by 46 per cent for Indigenous women and by 27 per cent for Indigenous men between 2000 and 2008; and
- Indigenous juveniles were 28 times as likely to be detained as non-Indigenous juveniles at 30 June 2007. The Indigenous juvenile detention rate increased by 27 per cent between 2001 and 2007.<sup>51</sup>

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51 Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2009*, pp 288-296.

**Table 8.2 – Indigenous and non-Indigenous prisoners (comparative): 2000-08**



Source: Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2009*, p. 289.

(Note: Further statistical breakdowns are available at pp 288-293 of the report.)

8.80 Findings similar to those of the Productivity Commission also appeared in evidence to the committee,<sup>52</sup> and measures by which the over-representation could be corrected are discussed in Chapter 6.

8.81 In general, submissions and evidence under this term of reference remarked that real funding decreases under the LEGA program have reduced both the number and range of services that ATSILS can offer Indigenous peoples, including in the priority area of criminal law.<sup>53</sup>

8.82 NAAJA, for example, attended to 7 500 matters in 2007-08, approximately 53 per cent of which involved criminal defence representation. NAAJA told the committee that the Northern Territory Emergency Intervention subsequently increased: the rate of charging; the number of matters going to court; and the number of Indigenous peoples in need of legal assistance by approximately 25 per cent:

52 For example, North Australian Aboriginal Justice Agency, *Submission 6*, pp 1-2; PIAC, *Submission 50*, pp 12-13; and Australian Human Rights Commission, *Submission 70*, pp 4-5.

53 For example, Aboriginal Legal Service (NSW/ACT) Limited, *Submission 21*, p. 2.

For example, at Galiwinku, which formerly did not have a police station and now has one, the court list is starting to grow. It is not growing with people charged with violent offending; it is growing with people charged with traffic offences, relatively minor breaches of domestic violence and offences involving police themselves. What really causes a lot of trouble for our clients is what we would term over policing. There are so many police per capita now in remote Territory areas that the charges just start to flow.<sup>54</sup>

8.83 In spite of this increase in demand, NAAJA testified that it remains inadequately funded to cope with the criminal law needs of Indigenous clients. Evidence noted that, in essence, this means Indigenous men, although the number of Indigenous women charged with criminal offences is increasing.<sup>55</sup>

### **The Family Violence Prevention Legal Services program**

8.84 In 1993, the Australian Law Reform Commission (ALRC) inquired into the discriminatory effects of Commonwealth law on women. Its findings aimed to ensure women's full equality before the law, and in relation to Indigenous women, the ALRC found that:

Aboriginal and Torres Strait Islander Legal Services do not currently benefit women and men equally. First, most services implement a policy of not acting for either party in a matter between two Indigenous clients. Second, most legal services give priority to defending criminal cases over other matters. On the face these practices appear gender neutral but their effect is to indirectly discriminate against Indigenous women. Like most groups of women, Indigenous women often need legal assistance in relation to matters of family violence and family law. For most Indigenous women such disputes are with other indigenous people. The outcome of precluding women from receiving assistance for such matters is that Indigenous women are disadvantaged compared to Indigenous men and compared to other women.<sup>56</sup>

8.85 The ALRC recommended the establishment of Indigenous women's legal services in areas where consultation with local Indigenous women indicated a demand for such a service, and taking into account:

- that the services, where possible, should be staffed and managed by Indigenous women, and the type of legal service provided should be determined by the women of the communities to be served;

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54 Mr Glen Dooley & Ms Priscilla Collins, North Australian Aboriginal Justice Agency, *Committee Hansard*, Perth, 13 July 2009, pp 29-30.

55 Mr Darren Dick, AHRC, *Committee Hansard*, Canberra, 27 October 2009, p. 14.

56 Australian Law Reform Commission, *Equality before the law: Justice for Women*, Report No. 69, 1994, para 5.31

- that the services are to be targeted toward regions of greatest need, having particular regard to remoteness and existing services in the region; and
- the existence of community networks which are demanding such a service and which will use and support the service.<sup>57</sup>

8.86 Following publication of the *Equality before the law: Justice for Women* report, the special needs of Indigenous women have been increasingly recognised, consistent with Article 22(2) of the United Nations Declaration on the Rights of Indigenous Peoples, which states:

2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.<sup>58</sup>

8.87 Despite this recognition, the committee has previously heard, and continues to hear, that Indigenous women (and children) remain chronically disadvantaged in terms of their access to justice. Evidence to the inquiry particularly focussed on situations of family/domestic violence and sexual assault.<sup>59</sup>

### ***Funding for the program***

8.88 At present, the Australian Government funds the FVPLS program, which assists Indigenous people who are either victims of family violence, including sexual abuse, or who are at immediate risk of family violence.<sup>60</sup>

8.89 Figure 8.1 above shows that, in 2008-09, the Australian Government allocated \$18.776 million in funding to the FVPLS program, with steady increases over the next four years: \$19.389 million in 2009-10; \$19.577 million in 2010-11; \$19.949 million in 2011-12; and \$20.308 million in 2012-13, a total of \$79.223 million over the next four years.<sup>61</sup>

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57 Australian Law Reform Commission, 'Equality before the law: Justice for Women', Report No. 69, 1994, Recommendation 5.2.

58 [http://www.hreoc.gov.au/social\\_justice/declaration/assembly.html](http://www.hreoc.gov.au/social_justice/declaration/assembly.html) (accessed 2 November 2009)

59 For example, Aboriginal Family Violence Prevention & Legal Service Victoria, *Submission 38*; and Women's Legal Centre (ACT and Region), *Submission 51*

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[http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle\\_Indigenouslawprograms\\_Familyviolencepreventionlegalservices](http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Indigenouslawprograms_Familyviolencepreventionlegalservices) (accessed 2 November 2009)

61 Attorney-General's Department, *Submission 54*, pp 2 & 7; and Attorney-General's Department, Portfolio Budget Statements, 2009-10, p. 30.

8.90 In addition to FVPLS program funding, the department administers Indigenous women specific funding through mainstream legal services, for example, nationwide Indigenous Women's Projects (IWP) through the CLSP. The IWPs assist Indigenous women across a wide range of legal issues, including: family law; tenancy; domestic and sexual violence; and consumer rights law.<sup>62</sup>

8.91 In spite of consistent funding, the committee heard that the FVPLS program is not adequately funded, with funding arrangements in a never-ending state of turmoil:

Funding arrangements for family violence prevention and legal services are entirely inadequate. FVPLS Victoria is still negotiating today, 15 July, its 2009-10 budget with the Commonwealth Attorney-General's Department. All family violence prevention and legal services are on a 12-month funding cycle, which does not allow organisations to engage in long term planning. It creates uncertainty for the organisation and affects stability. There is widespread acknowledgement that the complex and intractable nature of Indigenous disadvantage requires long-term funding commitments for Indigenous programs. There can be no doubt that programs dealing with family violence and disadvantage for Indigenous women require this level of commitment.<sup>63</sup>

8.92 Given the totality of evidence to the inquiry, the committee accepts that the FVPLS program experiences funding difficulties, and that as a result, Indigenous women are not necessarily being provided with legal services that meet their needs in this area. In view of Recommendation 20, the committee agrees in principle with Recommendation 31 of its 2004 Report but does not need to reiterate that recommendation.

### *Auspice arrangements*

8.93 Evidence regarding the FVPLS program tended to focus on its auspice arrangements, rather than its funding levels. Submitters and witnesses told the committee that auspice arrangements in Western Australia are seriously flawed, with the Aboriginal Legal Service of WA auspicing FVPLS units.

8.94 As previously indicated, ATSILS prioritise criminal law matters. In cases of family/domestic violence, this usually means the perpetrators of such violence, that is, Indigenous men. The Aboriginal Family Violence Prevention Legal Service Victoria submitted that:

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62 Attorney-General's Department, *Submission 54*, p. 7.

63 Ms Antoinette Braybrook, Aboriginal Family Violence Prevention & Legal Service Victoria, *Committee Hansard*, Melbourne, 15 July 2009, p. 19.

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The Aboriginal legal services are not the appropriate services to support victim survivors, due to actual and perceived conflicts of interest and their significant work with offenders.<sup>64</sup>

8.95 In its submission, the Aboriginal Family Violence Prevention Legal Service Victoria emphasised the independence of victim/survivor support services, including legal services. It argued that this independence is instrumental to Indigenous women accessing a service:

Issues of safety, confidentiality, perceived and actual conflict of interest and lack of holistic support services (as are available through the FVPLS program) mean that the ATSILS are not the most appropriate organisations to be the primary providers or auspices of services to Indigenous victims/survivors...Indigenous women experiencing family violence or sexual assault must be assured of the right to access culturally sensitive, safe and confidential legal assistance regardless of their location and independent of the service which the perpetrator, their family or friends might access.<sup>65</sup>

8.96 The Women's Legal Services Australia and Women's Law Centre WA agreed that Indigenous women hold 'very deep concerns' about the Western Australia auspice body and the consequent, broader impact on Indigenous women's ability to access legal assistance services:

If women are involved in a dispute or are the victims of an offence, it is more than likely that the offender, usually male, will have accessed [WA Legal Aid or the Aboriginal Legal Services of WA]. So, if women, say, on another matter, want to access some support, get some legal advice and so on, because of the conflict of interest issue they cannot go to Legal Aid or to the ALS.<sup>66</sup>

8.97 In response to questions from the committee, NAAJA rejected that Indigenous women would not be able to access its services. In its view, professional 'Chinese walls' appropriately insulate its family, civil and criminal law practice areas.<sup>67</sup> The Aboriginal Legal Service of WA acknowledged however a probable community perception of a conflict of interest in spite of its efforts to dispel the perception, for example: by representing female accused; and employing female legal practitioners).<sup>68</sup>

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64 Ms Antoinette Braybrook, Aboriginal Family Violence Prevention & Legal Service Victoria, *Committee Hansard*, Melbourne, 15 July 2009, p. 18; Ms Rowena Puertollano, *Submission 8*, p. 1; and Ms Megan Davis, *Submission 17*, p. 3.

65 Aboriginal Family Violence Prevention & Legal Service Victoria, *Submission 38*, p. 9.

66 Mrs Victoria Hovane, Women's Legal Services Australia and Women's Law Centre WA, *Committee Hansard*, Perth, 13 July 2009, p. 17.

67 Mr Julian Johnson, North Australian Aboriginal Justice Agency, *Committee Hansard*, Perth, 13 July 2009, p. 31.

68 Mr Peter Collins, Aboriginal Legal Service of WA, *Committee Hansard*, Perth, 13 July 2009, pp 39 & 42.

8.98 On this note, the absence of female legal practitioners in FVPLS units was highlighted as a concern. Ms Hannah McGlade submitted that this discourages Indigenous women from accessing the service:

This is highly problematic in view of the traditional Aboriginal culture and separation of genders, and particularly the notion of 'shame' that is strongly associated with sexual abuse. Overwhelmingly the victims of family violence are women and girls and a lack of women lawyers can mean that the services are inaccessible to victims. Similarly, the increasing employment of Aboriginal men in the service co-ordinator role also raises issues of gender and accessibility.<sup>69</sup>

***Rural, regional and remote coverage only***

8.99 In 2006-07, there were 31 FVPLS units in RRR identified high need areas of Australia.<sup>70</sup> Submissions and testimony argued that Indigenous victims/survivors in metropolitan areas experience the same legal need, and consequently:

It remains critical that increased funding be allocated to the [FVPLS] program to better resource existing units and to further expand geographic coverage including urban areas.<sup>71</sup>

8.100 The Aboriginal Family Violence Prevention Legal Service Victoria, for example, provided state-wide services until 2007-08 when financial considerations reduced services to the Barwon-South West and Gippsland regions only. As a result, the urban client base (approximately 48 per cent of Victoria's Indigenous community) is neither funded for nor serviced by the FVPLS program.<sup>72</sup>

8.101 Submitters acknowledged the policy reasons for restricting FVPLS units to RRR areas only, but essentially argued that there is a disconnect between policy, legal need and the appropriateness of legal services. The Aboriginal Family Violence Prevention Legal Service Victoria, for example, stated:

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69 Ms Hannah McGlade, *Submission 4*, p. 3.

70 Attorney-General's Department, *Report of the Family Violence Prevention Legal Services Conference*, 25-26 October 2007, p. 3.

71 Aboriginal Family Violence Prevention & Legal Service Victoria, *Submission 38*, pp 2 & 8-9.

72 Ms Antoinette Braybrook, Aboriginal Family Violence Prevention & Legal Service Victoria, *Committee Hansard*, Melbourne, 15 July 2009, p. 17.



We understand the policy of not funding FVPLS services in urban areas to be based upon the premise that Indigenous victims/survivors in urban areas have access to a broader range of mainstream services and that funding priorities rest with rural/remote locations. However, restricting funding to limited rural/remote geographic areas significantly weakens the FVPLS program as a whole and discriminates against Indigenous women and children in urban areas who are impacted by family violence and sexual assault...To ensure equality before the law and optimum legal services for Indigenous women in Australia, the FVPLS program must be extended.<sup>73</sup>

8.102 Similarly, Ms Megan Davis submitted that the policy rationale fails to appreciate the hidden difficulties that Indigenous women face in accessing mainstream legal assistance services or culturally appropriate services. Ms Davis intimated that the data on which the rationale is based be re-examined:

The decision to only fund rural and remote services is supposedly evidence based. However I do not know on what methodological basis this decision is formulated but I would ask the Committee to investigate this further given the majority of Aboriginal people live in urban areas and given the evidence based reality of violence against Aboriginal women in urban areas.<sup>74</sup>

8.103 Evidence to the inquiry also highlighted broader cultural and social considerations supporting the establishment of metropolitan FVPLS units. Ms Rowena Puertollano, for example, explained the importance of extended familial relationships within the Indigenous community. Ms Puertollano argued that the lack of metropolitan-based services prevents victims/survivors in RRR areas from relocating to metropolitan areas, and using extended family and support networks:

The lack of culturally appropriate Aboriginal Women's Legal services not being available in the 'city' will see, Aboriginal women, children, victims/survivors being forced to accept' the surroundings and environment they live in and the 'perpetrator's families subjecting them to more abuse because they want better for their families. This situation also denies women, families and victims and survivors, the right and opportunity to strengthen themselves and live a violence free life.<sup>75</sup>

8.104 In 2005, the Joint Committee of Public Accounts and Audit examined the placement of FVPLS units throughout Australia. Its report *Access of Indigenous Australians to Law and Justice Services* found that:

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73 Aboriginal Family Violence Prevention & Legal Service Victoria, *Submission 38*, p. 9.

74 Ms Megan Davis, *Submission 17*, p. 2; and Ms Hannah McGlade, *Submission 4*, pp 1-2.

75 Ms Rowena Puertollano, *Submission 8*, p. 2; and of Department of Families, Housing, Community Services and Indigenous Affairs, 'Time for Action to Reduce Violence Against Women', April 2009

If FVPLSs are to be considered as major Indigenous specific providers of family violence prevention, family and civil law services, these services should not be confined to regional and remote Australia but rather, like ATSILSs, be located in all areas of significant need.<sup>76</sup>

8.105 The report contained a recommendation for the department to acknowledge urban Indigenous communities' need for family/domestic violence, family and civil law services, and locate FVPLS units accordingly.<sup>77</sup>

8.106 The Australian Government responded that FVPLS units are established in high need identified areas, and with reference to a multitude of additional considerations:

The Government will continue to give priority assistance to those areas with the most acute requirements for service. The FVPLS units themselves will also make similar determinations with regards to their own allocation of resources...In determining the locations of their service outlets, units must also have regard to the locations of related services, courts and prisons within the geographic area being serviced. Indigenous communities based in major urban centres have greater access (than do those in remote or regional areas) to other legal service providers such as community legal centres, legal aid commission offices, Indigenous legal aid offices or ATSILS, other Indigenous support and referral services, solicitors undertaking pro bono work and Indigenous women's legal service units.<sup>78</sup>

### ***Review of the FVPLS program***

8.107 At the Perth and Melbourne public hearings, evidence to the committee suggested that the FVPLS program should now be reviewed.<sup>79</sup> While there are a number of options, submitters and witnesses briefly suggested extension and strengthening of the existing program,<sup>80</sup> and a new Indigenous women's legal service (see below).

8.108 The Aboriginal Legal Service of WA, for example, told the committee that the model currently operating in Western Australia was 'flawed in its genesis', with auspiced FVPLS units having next to no chance of long-term sustainability:

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76 Joint Committee of Public Accounts and Audit, *Report No. 403 Access of Indigenous Australians to Law and Justice Services*, June 2005, p. 38.

77 Joint Committee of Public Accounts and Audit, *Report No. 403 Access of Indigenous Australians to Law and Justice Services*, June 2005, Recommendation 4, p. xviii.

78 Government Response, pp 3-4.

79 For example, Mr Norman Reaburn, Chair, National Legal Aid, *Committee Hansard*, Melbourne, 15 July 2009, p. 56.

80 Ms Antoinette Braybrook, Aboriginal Family Violence Prevention & Legal Service Victoria, *Committee Hansard*, Melbourne, 15 July 2009, p. 18; and Ms Shelley Burchfield, Aboriginal Family Violence Prevention & Legal Service Victoria, *Committee Hansard*, Melbourne, 15 July 2009, p. 22.

What happened was that attempts were made to set up a standalone legal service, agencies and family violence prevention legal services in remote areas, which did not have the faintest possibility of being sustainable entities. It is impossible to set up a family violence prevention legal service in Fitzroy Crossing on its own unless it is incredibly well resourced. You cannot pay a lawyer \$60,000 to live in a place like Fitzroy Crossing as the only lawyer in town, when the nearest professional support is 600 kilometres away in Broome. It is not going to work....They needed to have appropriate infrastructure and governance, managerial and administrative supports.<sup>81</sup>

8.109 The Aboriginal Legal Service of Western Australia added:

If the FVPLS model is reviewed...consideration should be given to ensuring that principles and strategies are identified to ensure that Indigenous women are able to access justice from a range of culturally appropriate legal service providers covering a range of areas of law...Indigenous women may be reluctant to access a particular service provider because of the sensitive nature of their issues and concerns about confidentiality in their communities.<sup>82</sup>

8.110 In 2003-04, the committee expressed concern regarding Indigenous women's lack of access to justice, including in relation to family/domestic violence matters, and by evidence indicating that Indigenous women face significant impediments from within their own communities in attempting to exercise their rights and seek access to justice.<sup>83</sup>

8.111 The committee made three recommendations aimed at addressing the specific legal needs of Indigenous women. In addition to its earlier Recommendation 31, these were that:

The Commonwealth Government commission a comprehensive national study to determine accurately the legal needs of Indigenous women.

The Commonwealth Government and state/territory governments address the needs of Indigenous women as a matter of urgency by improving, developing and promoting appropriate legal and community services, community education programs, domestic violence support networks and funding models to ensure that the experience of Indigenous women within the justice system is fair and equitable. In implementing this recommendation, the Commonwealth Government, state/territory governments, legal aid commissions and other key stakeholders should

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81 Mr Peter Collins, Aboriginal Legal Service of WA, *Committee Hansard*, Perth, 13 July 2009, p. 40.

82 Aboriginal Legal Service of Western Australia, *Submission 62*, p. 9.

83 Senate Legal and Constitutional References Committee, *Legal aid and access to justice*, June 2004, pp 108-109.

consult widely with Indigenous women, so that the impetus for change comes from Indigenous women themselves.<sup>84</sup>

8.112 In 2006, these three recommendations were under consideration by the Australian Government. The government agreed that:

- information on the legal needs of Indigenous women was limited, and there was merit in examining issues surrounding perceived gender bias relating to Indigenous women's access to legal services; and
- improving legal and related services to Indigenous women was a priority area of need.<sup>85</sup>

8.113 All these issues were to be considered in the context of the (then) new Council of Australian Governments' National Framework of Principles for Government Service Delivery to Indigenous Australians. The committee is not aware whether, and if so, how, its recommendations were addressed under that framework.

8.114 In this inquiry, the committee heard that there continues to be a lack of awareness amongst all stakeholders involved in the criminal justice system regarding the needs, conditions and pressures facing Aboriginal women and children.<sup>86</sup>

8.115 In view of Recommendations 1 and 2, the committee agrees in principle with Recommendation 29 of its 2004 Report, but does not need to reiterate that recommendation.

### ***Strategic approach to women's legal services***

8.116 In 2005, the Joint Committee of Public Accounts and Audit commented on the 'myriad of programs and services that provide legal services to Indigenous women', recommending that:

The Attorney-General's Department rationalise funding of Indigenous legal services by incorporating Indigenous Women's Projects, that are currently administered through mainstream Community Legal Centres, into the Family Violence Prevention Legal Services program.<sup>87</sup>

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84 Senate Legal and Constitutional References Committee, *Legal aid and access to justice*, June 2004, Recommendations 29-30, p. xxvii.

85 Government Response, *Senate Hansard*, 7 February 2006, pp 73-73.

86 Women's Legal Service (SA) Inc., *Submission 59*, pp 23-24.

87 Joint Committee of Public Accounts and Audit, *Report No. 403 Access of Indigenous Australians to Law and Justice Services*, June 2005, Recommendation 13, p. xx.

8.117 In rejecting this recommendation, the Australian Government stated that:

The Indigenous Women's Projects were established to provide broadly based legal aid and community support to women in need. FVPLSs were established with very specific guidelines and goals. There is no obvious advantage to be had by subsuming one program within the other, apart from the administrative synergies that have already been achieved [by the creation of the department's Indigenous Justice and Legal Assistance Division].<sup>88</sup>

8.118 However, evidence to the committee stated that the non-rationalisation of Indigenous women's legal services deprives Indigenous women of access to justice, and more needs to be done to strategically address the needs of Indigenous women. The Aboriginal Family Violence Prevention and Legal Service Victoria, for example, told the committee that:

Strategic development of Indigenous women's legal services across Australia which recognizes state and territory Indigenous diversity has been lacking but is required. The role of the FVPLS program, the Aboriginal and Torres Strait Islander Legal Services (ATSILS) and the Indigenous Women's Project funding should be clarified and refined to ensure optimum outcomes for Indigenous women.<sup>89</sup>

8.119 In this regard, and with broader application, the Aboriginal Family Violence Prevention and Legal Service Victoria told the committee that a collaborative approach by governments would greatly improve Indigenous women's law and justice outcomes.<sup>90</sup>

### **The Indigenous Law and Justice Framework**

8.120 In 2007, the department released a draft National Indigenous Law and Justice Strategy. In relation to Indigenous women, the draft strategy remarked:

Over 10 years ago Indigenous women were found to be the most legally disadvantaged group in Australia...Despite many improvements, such as the introduction of specific legal services for Indigenous women, significant disadvantages still exist. The focus of recommendations of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) related to improving justice outcomes for men, who comprise the overwhelming majority of Indigenous detainees, offenders and prisoners...Services to

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88 Government Response, p. 9.

89 Aboriginal Family Violence Prevention & Legal Service Victoria, *Submission 38*, p. 7; and Mr John Burke, Aboriginal Family Violence Prevention & Legal Service Victoria, *Committee Hansard*, Melbourne, 15 July 2009, pp 25-26.

90 Aboriginal Family Violence Prevention & Legal Service Victoria, *Submission 38*, p. 11.

Indigenous women need to be targeted, culturally sensitive and more work needs to be done on assessing unmet needs.<sup>91</sup>

8.121 At its August 2009 meeting, the Standing Committee of Attorneys-General (SCAG) endorsed the principles of the draft framework as a national policy approach, and will work toward finalising the draft framework by 30 September 2009.<sup>92</sup> This includes establishment of the National Indigenous Law and Justice Advisory Body, which will provide expert high level policy advice on Indigenous law and justice issues.<sup>93</sup>

8.122 In general, submitters and witnesses supported the establishment of the National Indigenous Law and Justice Advisory Body, with evidence emphasising the importance of increased capacity for Indigenous people to engage in law and policy making processes and outcomes.<sup>94</sup>

8.123 However, concern remained for the special needs of Indigenous women, with submissions arguing that, once again, there is no strong focus on an Indigenous women's law and justice strategy. The Aboriginal Family Violence Prevention & Legal Service Victoria, for example, told the committee:

The National Indigenous Law and Justice Framework recently released by the Commonwealth AGD for comment does not include the strong focus on Indigenous women's law and justice as was contained in the 2007 draft National Law and Justice Strategy from which the framework was developed.<sup>95</sup>

8.124 At present, there is no national Indigenous women's legal service, with most, but not all, states/territories having their own Indigenous women's legal service program or an Indigenous women's program administered by a women's legal service.

8.125 As indicated earlier in this chapter, some evidence presented to the committee suggested that a better approach to Indigenous women's law and justice might be to create a national Indigenous women's legal service.

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[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(756EDFD270AD704EF00C15CF396D6111\)~Consultative+draft+National+Indigenous+Law+and+Justice+Strategy.pdf/\\$file/Consultative+draft+National+Indigenous+Law+and+Justice+Strategy.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(756EDFD270AD704EF00C15CF396D6111)~Consultative+draft+National+Indigenous+Law+and+Justice+Strategy.pdf/$file/Consultative+draft+National+Indigenous+Law+and+Justice+Strategy.pdf) (accessed 30 July 2009)

92 Standing Committee of Attorneys-General, *Communiqué*, 6-7 August 2009, p. 2.

93 Attorney-General's Department, *Submission 54*, p. 7; and Mr Kym Duggan, Acting First Assistant Secretary, AGD, *Committee Hansard*, Canberra, 27 October 2009, p. 50.

94 For example, Law Institute of Victoria, *Submission 11*

95 Aboriginal Family Violence Prevention & Legal Service Victoria, *Answers to Questions on Notice*, 22 July 2009, p. 9

8.126 The Aboriginal Family Violence Prevention & Legal Service Victoria expressed the common view that such a service must be independent, including financially independent of both ATSILS and mainstream women's legal services:

FVPLS Victoria therefore strongly supports the funding of Indigenous women's legal services across Australia...Funding for Indigenous women's legal services should not be attached to mainstream Women's Legal Services. It is critical that Aboriginal women have ownership of and drive future initiatives to advance law and justice outcomes. This is the key to successful government engagement and will lead to real on the ground change... The Indigenous Women's Legal Services would of course provide assistance in a broader range of legal matters than the areas currently stipulated within the FVPLS program. This would strengthen law and justice services to Aboriginal women significantly, would provide far greater flexibility and integration in service provision and vastly improve law and justice outcomes.<sup>96</sup>

8.127 Women's Legal Services Australia and the Women's Law Centre WA agreed, elaborating on the importance of Indigenous women in developing and providing a service effective in the provision of access to justice:

It is not that Aboriginal women are excluded from the services currently provided by Women's Legal Services; it is that the need is so great in providing direct services to Aboriginal women and also that providing services to Aboriginal women requires community connection and cultural appropriateness. All of those things are best achieved by having a service that is developed and managed by Aboriginal women...People talk about providing a culturally appropriate service and say they do this and that for Aboriginal women, but when we look at the actual practice and processes that are being engaged in we have to say as Aboriginal women that it has not been appropriate for us. The net effect has been to, if you like, silence the Aboriginal women's voice and to undermine us and undermine our position...When we talk about cultural appropriateness it is not just being appropriate for men; it is for our women and making sure that proper processes are engaged in to make sure that women are not being marginalised further.<sup>97</sup>

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96 Aboriginal Family Violence Prevention & Legal Service Victoria, Answer to Question on Notice, 22 July 2009, pp 4, 6-7; Women's Legal Service (SA) Inc., *Submission 59*, p. 20; Women's Legal Centre (ACT and Region), *Submission 51*, p. 11; Mrs Victoria Hovane, Women's Legal Services Australia and Women's Law Centre WA, *Committee Hansard*, Perth, 13 July 2009, p. 17; Ms Fabienne Balsamo, AHRC, *Committee Hansard*, Canberra, 27 October 2009, p. 15; and Ms Shelley Burchfield, Aboriginal Family Violence Prevention & Legal Service Victoria, *Committee Hansard*, Melbourne, 15 July 2009, p. 25.

97 Ms Kate Davis & Mrs Victoria Hovane, Women's Legal Services Australia and Women's Law Centre WA, *Committee Hansard*, Perth, 13 July 2009, pp 21-22; and Ms Antoinette Braybrook, Aboriginal Family Violence Prevention & Legal Service Victoria, *Committee Hansard*, Melbourne, 15 July 2009, p. 22.

8.128 The committee heard that the FVPLS program could be subsumed within a national Indigenous women's legal service program, with appropriate funding, re-badging, and referral of Indigenous male clients to alternate legal service providers.

8.129 For this inquiry, the committee received limited evidence regarding Indigenous women's legal needs. This is undoubtedly part of a larger problem, being an overall lack of empirical data on Australian legal needs. However, the wealth of material available to the committee indicates that Indigenous women are not getting adequate legal assistance to afford them access to justice.

8.130 The committee notes that a dedicated Indigenous women's legal service might better provide for that need, as well as relieve pressures on other legal assistance service providers and the Australian justice system.

8.131 The committee cannot say what effect the National Indigenous Law and Justice Strategy or National Indigenous Law and Justice Advisory Body will have on Indigenous women's access to justice. The committee hopes that Indigenous women are properly represented on the latter, and that in that capacity, Indigenous women are able to have a greater impact on Indigenous women's law and social justice policies, including the development of a strategic approach to such issues.

8.132 In the meantime, the committee notes the Australian Government for its initiatives to improve the lives of Indigenous people, including their access to justice. However, the committee observes that, on evidence to the inquiry alone, it is clear that the issue of Indigenous peoples' access to justice requires far more attention.

8.133 In an effort to address this and other issues raised throughout the inquiry, the committee makes the following final recommendation.

**Recommendation 31**

**8.134 The committee recommends that the Australian Government respond to this report no later than March 2010.**

**Senator Guy Barnett**  
**Chair**