Legal Aid
NEW SOUTH WALES

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Indigenous Law and Justice Inquiry

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Indigenous Law and Justice Inquiry

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Executive Summary

The Legal Aid Commission of NSW thanks the Joint Committee of Public Accounts and Audit for the opportunity to make the following submission to the Indigenous Law and Justice Inquiry.

The Legal Aid Commission of NSW (LACNSW) is the largest provider of legal aid services in NSW. It was established in 1979 under the *Legal Aid Commission Act* as an independent authority to provide legal aid to disadvantaged persons throughout NSW. Its Corporate Vision is *'To ensure that the socially and economically disadvantaged can understand, protect and enforce their legal rights and interests.'*

LACNSW is keen to contribute its ideas on how legal aid services for Indigenous Australians can be improved. However, this submission does not pretend to be exhaustive of all the issues raised by the Inquiry. It focuses only on those areas which are relevant to our expertise and areas of operation, that is, Term of Reference (a) The distribution of Aboriginal and Torres Strait Islander Legal Service (ATSILS) resources among criminal, family and civil cases, and (b) The coordination of ATSILS' and LACNSW resources and the tendering of Indigenous legal services. Comments have also been made in relation to Term of Reference (c), Indigenous women's issues. LACNSW's comments are supplementary and complementary to the National Legal Aid submission, which is adopted as part of this submission.

The key issues identified by LACNSW that it would like to bring to the attention of this Inquiry are the need:

1. For the Commonwealth to fully acknowledge that it bears primary responsibility for the provision of legal aid services to Indigenous Australians.
2. For the Commonwealth to adopt a more strategic, cooperative, consistent and sustainable approach to the planning and delivery of legal aid services for Indigenous Australians, as between the States and Territories and with other legal aid service providers, including legal aid commissions, community legal centres and pro bono providers.
3. For the Commonwealth to continue to support specialised Aboriginal community controlled legal aid services as the most appropriate and effective model for delivering culturally appropriate, equitable and accessible legal aid to Indigenous Australians.
4. For the Commonwealth to abandon, or at the very least, revise its current proposal to tender out the provision of legal aid services to Indigenous Australians for the following reasons:
    - A privatised ATSILS provision will make the services less accessible to the majority of the Indigenous community who have demonstrated a preference for services managed by Aboriginal people.
    - Tendering is not the only nor the best way to achieve increased accountability and increased effectiveness.
    - Privatisation will reduce the present and future capacity of ATSILS to attract additional funds and resources from State governments and pro bono providers.
    - The type of service to be provided and the casework priority policies should not be more restrictive than those applying to mainstream legal aid providers.

5. For policy guidelines for ATSILS to be more flexible than mainstream legal aid provides given the effectiveness of holistic service provision and the need for flexibility in the context of the high levels of disadvantage experienced by Indigenous communities and the different jurisdictions involved.
6. For the Commonwealth to continue to fund ATSILS to allow them to continue as the main provider of legal services to Aboriginal people. The current strengths of ATSILS should be preserved by any new arrangements. These strengths include:

    - They are effective
    - Flexible service delivery
    - The trust of clients in Indigenous run services as indicated by their preference to use Indigenous run services
    - The cooperative arrangements already in place with Public Defenders, legal aid commissions, pro bono legal services and other mainstream legal service providers
    - The existing infrastructure

7. For the Commonwealth to substantially increase the level of funding to ATSILS to allow ATSILS to provide adequate services to Indigenous people that will address their criminal, family and civil legal needs.
8. For the Commonwealth to provide sufficient funding to mainstream legal aid providers, such as legal aid commissions, to allow them to expand their services to Indigenous communities.
9. For the Commonwealth to re-examine the basis of "the Commonwealth/State funding divide" for legal aid commissions with particular emphasis on whether it creates barriers to innovative, flexible service delivery.
10. For the Commonwealth to incorporate greater flexibility into the Commonwealth Priorities and Guidelines imposed on legal aid commissions to allow them to deliver more holistic, responsive, and flexible services to Indigenous communities.

LACNSW support for Aboriginal Legal Services

The Legal Aid Commission of NSW supports the continued existence of specialist, Aboriginal community controlled legal aid services for Aboriginal people for two main reasons.

1. They are necessary; and
2. They work.

In the 34 years since they were first established, the need for specialist Aboriginal legal services and their effectiveness has been demonstrated in numerous inquiries and through the preference Aboriginal people have shown for using legal aid services managed by Aboriginal people.

The Federal Government's proposal to put the provision of legal aid services for Aboriginal people out to tender, ignores decades of Aboriginal Legal Service expertise, a plethora of recommendations from previous inquiries and the wishes of Aboriginal people.

a. The distribution of Aboriginal and Torres Strait Islander Legal Services resources among criminal, family and civil cases

Introduction

In order to fully understand the current distribution of ATSILS' resources between the criminal, family and civil law areas, it is necessary first, to understand the historical and political context in which this situation has evolved.

Since 1970, when the first Aboriginal Legal Service was established, the ability of Aboriginal Legal Services to provide a comprehensive range of legal services to Aboriginal people has been plagued by inadequate and fluctuating policy approaches and chronic under funding.

Despite the demonstrated effectiveness of Aboriginal Legal Services in meeting the legal needs and demands of Aboriginal people within the current limits of their funding agreements, Commonwealth arrangements for the delivery of legal aid services to Aboriginal people remain fragmented and inadequate, and in many ways, perpetuate and mask Aboriginal disadvantage in the justice system.

The Commonwealth's failure to address these issues has had an impact, not only upon Aboriginal Legal Services but also on mainstream legal aid providers such as legal aid commissions, particularly in terms of their ability to play an appropriate role in providing legal aid services to Aboriginal people.

More recently, the Federal Government's commitment to providing specialised, Aboriginal community controlled legal aid services for Aboriginal people has, despite some advances, slowly dissipated. Its current proposal to tender out the provision of legal aid services for Indigenous Australians is a major policy regression.

Rather than improve services to Aboriginal people in this State, the proposed new arrangements have the real potential to destroy an effective infrastructure, leave even greater numbers of Aboriginal people without effective criminal law

representation and result in even higher levels of unmet legal need in the family and civil law areas.

The following provides a brief outline of the policy and funding issues confronting ALSs since their establishment, and how this has contributed to the current situation.

1967 and the beginning of Commonwealth constitutional responsibility for Indigenous people

Prior to 1967, Aboriginal and Torres Strait Islander welfare was exclusively the responsibility of individual State governments. The Commonwealth was excluded from legislating for Aboriginal people except in the Territories.

In 1967 the *Commonwealth of Australia Constitution Act 1900* was altered by the *Constitution Alteration (Aboriginals) Act 1967*. The amendment empowered the Federal Parliament to make laws for the benefit of Aborigines and Torres Strait Islanders.

Since then, the Commonwealth has acknowledged its special responsibility with respect to Indigenous Australians (s.51(xxvi)).

The amendment did not remove all responsibility from the States, who would still be required to provide for the maintenance of general services to Aboriginal people at the same level as their other citizens, including particular measures for disadvantaged groups.[1]

However, despite numerous attempts since then to articulate what this means in practice, and define the respective roles and responsibilities of the Commonwealth and State/Territory Governments with respect to the delivery of services to Aboriginal people, this issue is yet to be properly resolved.

The first 10 years of Aboriginal Legal Services

Since 1970, when the first Aboriginal Legal Service (ALS) was established in Redfern, the Federal Government has assumed exclusive responsibility for the funding of Aboriginal Legal Services.

The Redfern Aboriginal Legal Service was established as a community response to the lack of legal representation for Aboriginal people who were being faced with institutionalised police harassment. It came out of the Aboriginal civil rights movement, when civil rights activists looked primarily to litigation to correct the effects of generations of discriminatory practices towards Aboriginal people.

The ALS's initial and main focus was to address discriminatory practices in the criminal justice system. However, it always maintained a broader advocacy role: to argue for, implement and enforce basic civil rights for Aboriginal people; to maintain the gains that had been made and to be vigilant against the unequal administration of justice.

The establishment of the first Aboriginal Legal Service was symbolic of the Aboriginal people's struggle for self-determination, that is, the right to make decisions on issues

[1] Minister for Aboriginal Affairs, (Federal), Submission to the NSW Select Committee of the Legislative Assembly upon Aborigines, quoted in second report (1981) para 39,44.

affecting them and to manage their own affairs[2]. The Federal Government did not formally adopt this policy until 1972[3].

In 1971, the Commonwealth exercised its newly attained constitutional power by, among other things, establishing the Department of Aboriginal Affairs (DAA). Funding for Aboriginal legal services was provided solely by the Department's grants-in-aid program until the early 90's, when it was transferred to a new agency: the Aboriginal and Torres Strait Islander Commission (ATSIC).

In 1975, the Federal Government retreated from self-determination and from 1975-83, effectively pursued a policy of self-management.[4] Commitment to the adequate funding of the network of Aboriginal legal services which now existed across Australia began to diminish, with the Federal Government reducing Aboriginal Legal Service funding by approximately 15% in real terms from 1975 to 1980[5].

The Ruddock Report

In 1980, Aboriginal Legal Services existed in each State and Territory across Australia, each with a head office in the city or nearest major town and branch offices in more remote locations.

At the same time, the Commonwealth House of Representatives Standing Committee on Aboriginal Affairs undertook a detailed review of Aboriginal legal services in its report *Aboriginal Legal Aid*. The Committee, which was chaired by Philip Ruddock, MP, acknowledged the continuing need for separate Aboriginal legal services. The "special need" it said, was founded on *"social and economic disadvantages [which] have helped create tensions and conflicts between Aboriginals and the law and have placed major obstacles in the way of their understanding the law and acting to defend and enforce their legal rights".*[6] As a result, Aboriginal people were being consistently placed at a serious and systematic disadvantage in their contact with the criminal justice system.

Moreover, the Committee found that:

> *"The injustices suffered by Aboriginals in their interaction with the law can be attributed in part to the existence of a centralist legal system which is not designed to recognise the laws and customs of different groups within a pluralist society. … The criminal law has been used as an instrument of social control of Aboriginals: it has punished them for offending against the non-Aboriginal community but has rarely protected or promoted their rights."*[7]

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[2] 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, at p.259.

[3] Self-determination was defines at that time as *" …the scope for an Aboriginal group or community to make its own decisions about the directions in which it can develop or can and does implement those decisions, not necessarily implement them only with its own hands but employ the means necessary to implement the decisions which it comes to itself".*

[4] *"The Government's policy of self-management has as its objective that Aboriginals should be in the same position as any other Australian to take decisions about their future and accept responsibility for those decisions …"*

[5] Coalition of Aboriginal Legal Services of NSW, Submission to the Senate Inquiry into Current Legal Aid and Justice Arrangements, 12 August 2003, at p.8.

[6] Report of the House of Representatives Standing Committee on Aboriginal Affairs, *Aboriginal Legal Aid* (July 1980) (Cth), at p.35 ("the Ruddock Report") at p.7.

[7] Ruddock Report, ibid, at p.9.

The Ruddock Report examined in some detail the needs of Aboriginal people in the civil jurisdiction. Whilst not able to quantify this need, it nevertheless found that this was an area of law to which *"Aboriginal people rarely have access and in which they are severely disadvantaged".*[8]

It found that the problems commonly faced by Aboriginal people in this area relate to tenancy matters, social security entitlements, consumer protection claims, hire purchase agreements, appeals against administrative actions or decisions, and family law matters. Other matters included claims for wages, workers compensation claims, personal injury common law claims and fatal injury claims. It found that the majority of civil law work conducted by Aboriginal legal services was in the field of "poverty law", and that *"it is likely that this will be the case for some time to come"*.[9]

Despite an increasing awareness of, and demand by Aboriginal people for civil law services, the Committee found that Aboriginal legal services' capacity to meet this need was limited, because their solicitors did not have the time or expertise to devote to civil law work. *"Because most of the services' time and resources are taken up providing assistance in the criminal jurisdiction, Aboriginal legal service solicitors invariably become experts in the criminal field"*.[10]

The Report identified inadequate funding for Aboriginal legal services as a problem impacting upon their ability to provide a comprehensive range of legal services to Aboriginal people across all geographical areas and in all areas of law. It found that, whilst there had been a steady increase in legal aid funds to Aboriginal legal services from 1971 to 1980, funding for Aboriginal legal services *"in fact has not kept pace with inflation since 1975-76 so that in real terms the legal services' allocation of funds from the Commonwealth has decreased"*.[11] It also identified problems with the administration of the DAA, including its interpretation and application of the Government's policy on "self-determination".

The Committee concluded that:

> *" … the legal services simply do not have the necessary staffing capacity or the resources to meet the needs of the client population in the area of civil law".*[12]

Nevertheless the Committee found that, despite this lack of support from the Commonwealth Department of Aboriginal Affairs:

> *" … 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, 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".*[13]

[8] Ruddock Report, ibid, at p.85.
[9] Ruddock Report, ibid, at p.85.
[10] Ruddock Report, ibid, at p.91.
[11] Ruddock Report, ibid, at p.163.
[12] Ruddock Report, ibid, at p.91.
[13] Ruddock Report, ibid.

It also recognised the benefits of specialised Aboriginal community controlled services for assisting Aboriginal community empowerment.

> *"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".*[14]

Whilst acknowledging the benefits of having a diversity of legal services, both specialised and mainstream, to assist Aboriginal people, the Committee nevertheless recommended that:

> *"The Government continue to support separate Aboriginal legal services through the provision of financial assistance in order to promote the access of Aboriginal people to legal aid"*.[Recommendation 6]

The Committee also recommended increased levels of government financial support, and that the extra funding be directed towards meeting the needs of Aboriginal people in rural areas [Recommendations 35 and 36]. At that time, the estimated Aboriginal population in NSW was 44,100: 14,200 people in Sydney and 29,900 in regional NSW.

The Committee made 42 other recommendations aimed at improving Aboriginal people's access to Aboriginal legal services. Many of these are still relevant. They dealt with issues such as statistics, Aboriginal children and the law, Aboriginal-Police relations, Aboriginals and the civil law, Aboriginals and welfare, community legal education, alternative legal services, community participation in the delivery of Aboriginal Legal Aid, Aboriginal Legal Service staff and training, funding, national co-ordination and government policy on Aboriginal Legal Aid.

The 80's and the Harkins Report

During the 80's the Federal Government continued to assume sole responsibility for the funding of Aboriginal legal services. However, its commitment to their existence as specialised, Aboriginal community controlled legal aid services began to fluctuate, and ALSs were subjected to further reviews. Each review carried with it the threat that Aboriginal legal services would be merged with generalist legal services, such as legal aid commissions, and each review proceeded to examine this issue.

At the same time, Aboriginal Legal Services such as the Redfern Aboriginal Legal Service, established discrete family and civil law practices within their offices. Their aim in doing so was to address the full range of Aboriginal people's legal need, in particular, "poverty law" issues, and systemic legal issues contributing to their socio-economic disadvantage, such as through land rights claims, claims arising from the removal of children and non-payment of wages by the Aborigines Protection Board and the Aborigines Welfare Board, and asbestosis claims on behalf of the Baryulgil Aboriginal community.

However, inadequate funding severely limited their capacity to meet growing client demand and placed their continuation under constant threat.

In the mid 80's Joseph Harkins, a former Director of the Australian Legal Aid Office was commissioned by the Federal Government to undertake a further, extensive review of Aboriginal Legal Services.

[14] Ruddock Report, ibid, at p.150.

The review looked at the over-representation of Indigenous people in the criminal justice system, the role of Aboriginal legal services in eliminating discrimination from the criminal justice system, criticisms of ALSs and future directions for the operation of Aboriginal Legal Services, including the greater use of generalist legal aid providers, private solicitors and the regionalisation of existing ALSs.

In his report, he concluded, on the basis of available, though limited, statistical information on Aboriginal representation in the criminal justice system, that ALS resources were stretched. He therefore recommended that ALSs focus their efforts on criminal law assistance:

> *"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"*.[15][Recommendation 10]

He also commented that, *"to seek to provide services through ALSs to satisfy all proper demands of the many dispersed Aboriginal communities would require a massive increase in the present funding of ALSs".*[16]

Despite the pressures being placed on Aboriginal legal services, he concluded:

> *"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"*[17]

Harkin's recommendations for the future operations of Aboriginal legal services were problematic. A detailed analysis of the viability of these recommendations can be found in the submission made on behalf of the Coalition of Aboriginal Legal Services of NSW to the Senate Inquiry into Current Legal Aid and Justice Arrangements (12 August 2003).

The Royal Commission into Aboriginal Deaths in Custody

Five years after the Harkins Report, the Royal Commission into Aboriginal Deaths in Custody reconfirmed the need for Aboriginal specific legal services. Recommendation 107 for example, provides 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*".

The focus this time, was the need to address the vast over-representation of Indigenous people in the criminal justice system.

[15] Joseph P Harkins, *Inquiry into Aboriginal Legal Aid*, Canberra, 1986.
[16] Harkins Report, ibid, at p.128.
[17] Harkins Report, ibid, at p.82.

The Royal Commission documented in great detail the complex origins and current manifestations of the over-representation of Aboriginal people in the criminal justice system.

In doing so, it acknowledged the limitations of relying on litigation as the principal means of remedying this problem. Nevertheless it saw Aboriginal Legal Services as playing a crucial law role, not only in attending to the day-to-day legal needs of Aboriginal people, but in addressing Aboriginal disadvantage at a broader level.

> *"That in providing funding to Aboriginal Legal Services governments should recognise 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 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 5]

The tragedy of Aboriginal deaths in custody and Aboriginal incarceration rates began to receive international attention, and raised the significance of Australia's international obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination*, under which Australia agreed to:

- Take effective measures to review governmental, national and local policies, and to amend rescind or nullify any laws or regulations which have the effect of creating or perpetuating racial discrimination wherever it exists; [Article 2(1)(c)] and to
- Guarantee the right of everyone, without distinctions 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 other organs administering justice [Article 5(a)]; and
- 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.

Many have since argued that the funding of specialised Aboriginal legal services is an essential part of the Australian Government's responsibility to meeting its obligations under this Convention, and should be considered a "special measure" until the discrimination resulting in the over-representation of Aboriginal people in the criminal justice system no longer exists.

The 1990s

In 1991-92, as a direct response to the Report of the Royal Commission, funding to ATSIC's Law and Justice Program, which was then responsible for administering the funding for Aboriginal legal services, was increased from $18 million to $36 million.

During the early and mid 90's, Aboriginal legal services with family and civil law units attempted to maintain them as best they could. However, huge increases in demand for criminal law services, the urgency of these needs as highlighted by the Royal

Commission, and the failure of available resources to keep pace with demand meant that Aboriginal legal services had to give increasing priority to their "core services".[18]

The uncertainty continued, when, in 1996, ATSIC undertook a wide and profound range of Indigenous legal aid reforms. Their aim was to improve the service delivery and performance effectiveness of Aboriginal and Torres Strait Islander Legal Services (ATSILS).

The reforms to ATSILS included a major restructure of ATSILS' offices, the establishment of minimum service standards, the establishment of guidelines for targeting and prioritising clients for assistance, the establishment of improved client/performance data management systems, and a trial of an open tendering process for ATSILS in NSW. ATSIC called for tenders in six ATSIC regions of NSW in 1997. A review of this process was carried out which reported that, whilst these reforms resulted in a number of significant general benefits, these benefits might be reduced "because of the cultural specific requirements contained in the tendering process".[19] The tendering proposal was later superceded by an ATSILS contestability policy.

Under their new agreements, ATSILS were required to provide a range of core services, including preventative, information and education services; legal advice, minor assistance and referral; duty lawyer assistance, casework assistance in criminal, family and civil law matters; input on law reform and law related issues and outreach, support and other legal aid related services.

This, however, was made subject to priority categories for assistance, which included:

a. Where the person may be detained in custody;
b. Where there is a real risk to the person's safety;
c. Where cultural or personal well being is at risk;
d. Representation in deaths in custody matters;
e. Where the client would be significantly disadvantaged if assistance were not given; and
f. In public interest matters.

In order to address increasing concern about the legal needs of Indigenous women particularly in relation to family violence issues, ATSIC established a number of Family Violence Prevention Units. The Units were to complement ATSILS that are unable to provide many family legal services because of conflicting interests in representing the victim and defendant in family violence cases.

The setting of these priority areas, coupled with limited resources, severely restricted the ability of ATSILS to provide general family law services and effectively put an end to their civil law practices.

The current situation

[18] *R v Cutmore*, NSW District Court, 21 April 1995.
[19] Office of Evaluation and Audit, *Tendering of Aboriginal and Torres Strait Islander Legal Services in New South Wales*, by the Allen Consulting Group (1999).

The current aims of the Aboriginal and Torres Strait Islander Commission's Law and Justice Program, which provides the funding for Indigenous legal services, seeks to address wide ranging concerns about Aboriginal disadvantage and access to the justice system.

ATSILS *"play a leading role in promoting and protecting the rights and interests of Indigenous Australians, in promoting access to justice, and in resolving many disputes. ATSILS deliver extensive legal assistance to Indigenous Australians and undertake important welfare roles related to these legal activities."*[20]

However, since the 70's, the situation that gave rise to the establishment of specialised Indigenous legal services has worsened, not improved. Indigenous people continue to be grossly over-represented in all criminal justice processes while the level of their incarceration has increased relentlessly.[21]

In NSW, the numbers of adult Aboriginal people in prison has more than doubled since the Report of the Royal Commission (from 662 in 1991 to 1586 in 2004). In 2002, over 11,700 adult Aboriginal people appeared in NSW Local Courts on criminal matters, constituting 8% of NSW Aboriginal population. In 2001 alone, nearly one in five Indigenous males in NSW appeared in Court charged with a criminal offence.

NSW also has the highest rate of Indigenous female imprisonment (430 per 100,000 adult Indigenous population), whilst Indigenous juveniles are still 15 times more likely to be detained than non-Indigenous juveniles.

The potential client base of ALSs has also increased dramatically. In NSW, for example, the official Aboriginal population increased from 75,000 in 1991 to 135,000 in 2000/2001. 40% of these people are under 15 years of age.

Added to this are concerns about the need to address the *"escalating and unacceptable"* levels of family violence in Indigenous communities. NSW has the second highest rate of Indigenous deaths from homicide following the Northern Territory. Aboriginal people in this State are also nearly six times more likely to be a victim of domestic violence related assault, and three times more likely to be a victim of assault than non-Indigenous persons. Indigenous females are five times more likely to be victims of assault and three times more likely to be a victim of sexual assault than all persons.

Very little is known, however, about Indigenous people's non-criminal law needs. This poses a problem for service delivery planning. In NSW, some understanding is being gained through the Law and Justice Foundation's *Access to Justice and Legal Needs* project. So far, the project has found:

- The most common areas of inquiry for Indigenous persons were family law (37%), general crime (12%), domestic violence (11%), government/legal system (10%) and credit/debt (6%);
- Indigenous people are far more likely than non-Indigenous people to not seek legal help and to deal with a legal problem themselves.

[20] ATSIC, National Law and Justice Branch, *Policy Framework for Targeting Assistance Provided by Aboriginal and Torres Strait Islander Legal Services*, July 2003

[21] Australian National Audit Office, ATSIS Law and Justice Program, Aboriginal and Torres Strait Islander Services, Audit Report No.13 2003-2004 Performance Audit, (2203) Canberra, analysis of ABS data, 1992-2003.

Other studies have identified that one of the greatest areas of legal need for Aboriginal people is their need for general legal advice. Whilst most Indigenous people are aware of the services that are available for criminal matters, few are aware of the scope of the law and the range of services available for other problems, particularly in the consumer, housing and family law areas.[22] Access to this sort of advice is essential in helping Aboriginal people identify whether they have a legal problem and what legal solutions are available to address them.

A recent comprehensive review of LACNSW's civil law program has identified a range of civil law issues for which Aboriginal people require assistance, including:

- Debt and consumer protection issues.
- Resolution of inter community/organisation disputes. These can often lead to AVOs and criminal charges if not resolved.
- Housing disputes involving Aboriginal Land Councils. For conflict reasons, ATSILS would not be able to assist with these.
- Social security issues.
- Employment issues especially employment issues arising from employment with Community Development Employment Program (CDEP) schemes.
- Intellectual property (art, culture, bush medicine).
- Huge unmet need with respect to "front end" services, such as the preparation of complaints e.g. discrimination complaints.
- Corporations' law. There are 650 Aboriginal corporations in NSW. Aboriginal people need assistance with dispute resolution, corporate governance, and management issues.
- Native Title claims.
- Community development. Direct community legal education is of limited benefit on its own as a preventative measure or as a means of improving access to LACNSW's services. The training of community workers and the building of networks and relationships are likely to be more effective.
- School issues, including the suspension and expulsion of Aboriginal children.[23]

Despite the substantial increase in demand for criminal law services, as well as demands for new services, ATSILS funding allows them to do little more than provide essential legal advocacy in criminal cases. According to figures for NSW ATSILS, during 2002/2003, 94% of the case and duty lawyer services they provided were for criminal law assistance (22,674 out of a total of 24,158 case and duty lawyer services).

In the 2002/2003 financial year, the 24 ATSILS across Australia received a total of $43 million to provide legal aid services. Inadequate funding for ATSILS has been acknowledged as a problem by ATSIC, which, in an internal paper, dated 21 January

[22] Legal Aid Queensland, *Northern Outreach – A client needs survey of Aboriginal and Torres Strait Islander Communities in Cape York Peninsula and the Gulf of Carpentaria*, (2001).
[23] Legal Aid Commission of NSW, *Report of the Civil Law Review*, November 2003 (Dora Dimos).

2003, stated that: *"There has been no substantial injection of new money into the ATSILS program since 1992".*[24]

Summary

Essentially, the services provided by ATSILS have developed according to historical events, funding and other influences, rather than in accordance with a planned approach on the part of its funders and identified Aboriginal legal need. As a result, ATSILS' resources continue to be driven by the demands of the criminal courts and unless the situation changes, will continue to be consumed by them.

[24] ANAO report, op cit, at p.40

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

Since 1973, when the first comprehensive Commonwealth funded legal aid scheme was established through the Australian Legal Aid Office, the Commonwealth Government has acknowledged the need for specialist legal aid services for Aboriginal people. Until recently, it was envisaged that these would operate separately outside the framework of State and Territory legal aid commissions.[25]

Since the establishment of the State and Territory legal aid commissions in the late 1970s, Government and legal aid service providers have acknowledged the benefits of having a diversity of legal aid services available to Aboriginal people as well as the need for mainstream legal aid providers to work cooperatively with Aboriginal legal services to enhance the services they are able to provide.

In working out how they can best assist Aboriginal people, legal aid commissions and ATSILS have relied on the assumption that the Commonwealth has primary responsibility for the funding of ATSILS. This assumption is based on the following:

1. The Commonwealth's constitutional responsibilities under s.51(xxvi).
2. The 1976 Commonwealth-State Arrangement on Aboriginal Affairs, which states that:

   " … the Australian Government shall assume responsibility for, and for the administration of the planning, co-ordination and financing of, such activities as are designed to promote the economic, social and cultural advancement of the Aboriginal people in the State".
3. The fact that the Commonwealth has continued to fund ATSILS exclusively since their establishment in 1970.
4. The Commonwealth's international obligations under the *International* Convention *on the Elimination of All Forms of Racial Discrimination*.

How far the Commonwealth's responsibility extends in relation to Indigenous legal aid service provision, has, like other Indigenous service areas, never been formally articulated by the Commonwealth. Attempts during the 90's to more clearly articulate Commonwealth/State responsibilities for Indigenous service provision, such as in the 1992 *National Commitment to Improved Outcome in the delivery of Programs and Services to Aboriginal peoples and Torres Strait Islanders* (COAG), and later, the *National Ministerial Summit on Aboriginal Deaths in Custody* (1997) have failed to move onto the detail and "continued to replicate the vague, generalized approaches of the past".[26]

The impact of this continuous lack of clarity as to where Commonwealth responsibility ends and States/Territories responsibilities begin has been documented in a number of inquiries over the years, in particular, the Human Rights and Equal Opportunity Commission's *Toomelah Report: Report on the Problems and Needs of Aborigines Living on the NSW – Queensland Border (June 1988)*. In that case, it was considered a major factor in the failure of basic services to the Toomelah community. Likewise, the Commonwealth's increasing reliance on State/Territory

[25] Ruddock Report, op cit, at p.35.
[26] Aboriginal and Torres Strait Islander Social justice Commissioner, *Social Justice Report 1996-97 – Fifth report*, HREOC Sydney 1997, p.137.

Governments to pick up the tab in the legal service area, as demonstrated in the Exposure Draft Purchasing Arrangements Legal Services Contract 2005-2007 for Legal Aid Services for Indigenous Australians, risks a repeat of the same.

In the meantime, LACNSW has relied upon the Commonwealth's historical assumption of its responsibility for funding Indigenous legal services in order to work out its role in providing legal aid services to Indigenous people.

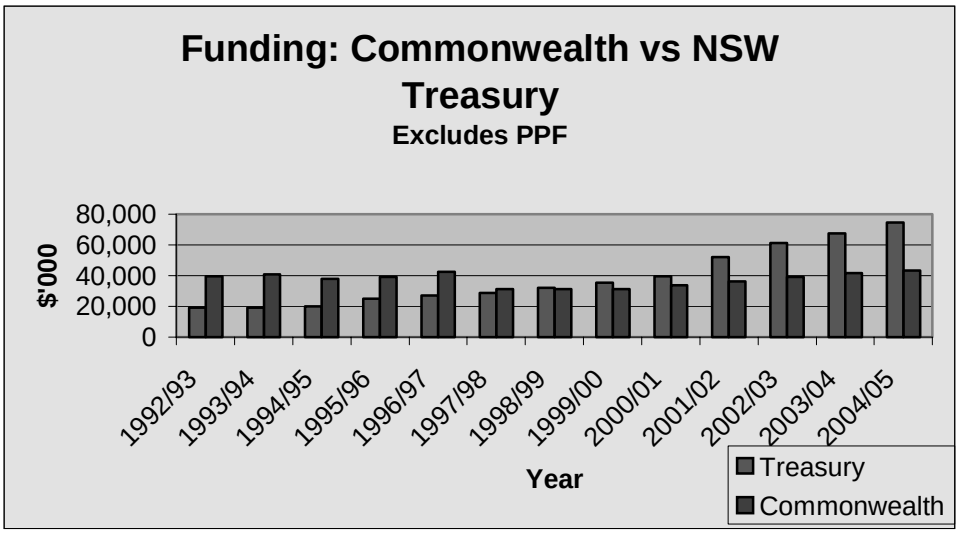
LACNSW sees its role as comprising three elements:

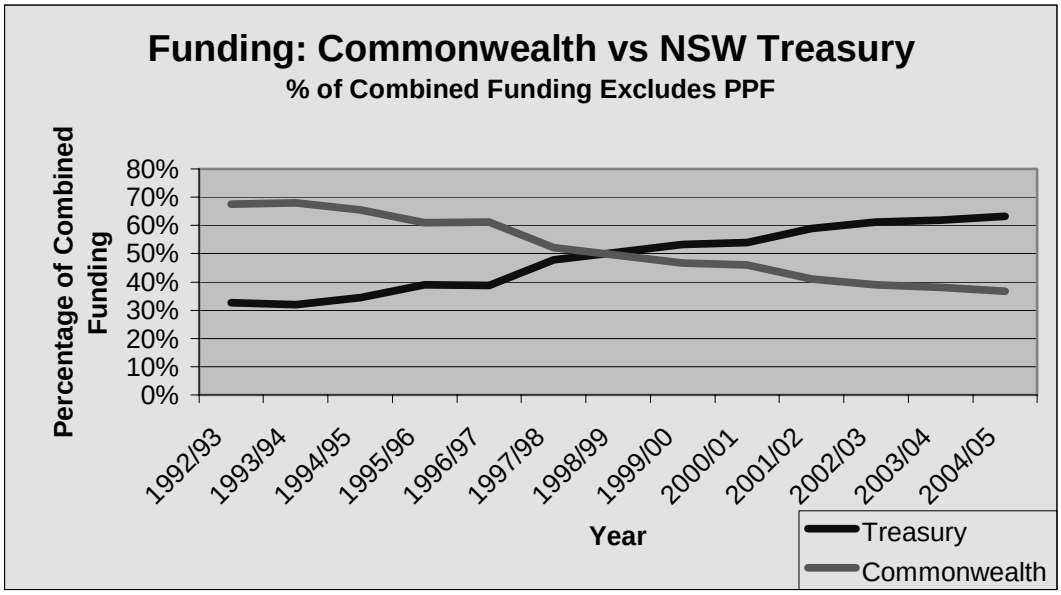
1. Providing an alternative legal aid service for Aboriginal people who do not wish, for whatever reason, to use Aboriginal legal services
2. Providing a complementary legal aid service for Aboriginal people, who, for reasons of conflict, are unable to access the services of an Aboriginal legal service
3. Providing assistance to Aboriginal legal services to enable them to increase the level and range of services which they are able to provide

In doing so, LACNSW recognises the need for specialised Aboriginal community controlled legal aid services. It also acknowledges that as a mainstream legal aid provider, which is not Aboriginal community controlled and which has a limited number of Aboriginal staff (2%), that the majority of Aboriginal people will continue to use ATSILS as their preferred legal aid service provider.

It should also be acknowledged that, without additional resources, LACNSW, which is required both through its governing legislation and funding agreements to provide services to the community as a whole, and which is already under extreme funding pressure to maintain its current services, would not be able to provide additional services to Aboriginal people. Instead, it would have to cut its services to other disadvantaged groups, such as people in remote, rural and regional NSW and children.

In recent years, funding provided by the NSW Government to LACNSW has increased substantially, both in real terms and as a proportion of the total funding received by LACNSW from the Commonwealth, the NSW Government and the Public Purpose Fund (PPF). The following graphs highlight this, as well as the decreasing level of funding provided by the Commonwealth.





It would be reasonable to expect that, given the Commonwealth's obligations in this regard, that the Commonwealth Government should fund any expectations that might be placed on LACNSW to provide Aboriginal specific services.

LACNSW as an alternative legal aid provider

Met legal needs

LACNSW statistics, which only reflect *met* legal needs, reveal that since 1991, the proportion of Aboriginal and Torres Strait Islander people accessing LACNSW's services has been steadily increasing. In 1996/97, the number of Aboriginal and Torres Strait Islander clients receiving case and duty services was 3144 (or 3.9% of the total number of grants made by LACNSW). From 1 July 2003 to 6 April 2004, the number of duty and case grants made to Indigenous people across all law types (criminal, family and civil) was 3715 or 4.4% of the total number of grants of aid for duty and case matters made during this period.

A more detailed breakdown of these figures for the same period (1 July 2003 to 6 April 2004) is given below.

Case

- 1,400 of the 31,013 Criminal Law case grants made were to Indigenous people (4.5%). 5.5% of family law grants were made to Indigenous people.
- 1,903 of the 40,690 case grants made for all law types combined were to Indigenous people (4.7%)

In-house Duty

- 1,602 of the 33,118 Criminal Law in-house duty services provided were to Indigenous people (4.8%)

- 1,812 of the 43,026 duty services provided across all law types combined were to Indigenous people (4.2%)

Advice

- 287 of the 12,416 Criminal Law advice service provided were to Indigenous people (2.3%)
- 853 of the 38,677 advice services provided across all law types combined were to Indigenous people (2.2%). 2.8% of family law advice was given to Indigenous people.

As the figures above show, the majority of services provided to Aboriginal people by LACNSW are criminal law services. When compared to the number of criminal law services provided by NSW ATSILS, this figure is not insubstantial (about one fifth of the criminal law services provided by NSW ATSILS).

By comparison, the number of clients receiving family and civil law services from LACNSW is relatively small. Given the significant levels of socio-economic disadvantage experienced by Aboriginal people in NSW, one would expect the utilisation of LACNSW's civil and family law services to be far greater.

The level of services provided by Community Legal Centres, which provide mainly civil and family law assistance, are similar. Whilst the figures for some individual community legal centres are higher (for example, Wirringa Baiya Aboriginal Women's Legal Centre which is funded solely to assist Aboriginal women (100%), Women's Legal Resources (9%), North & North West (7%), Shoalcoast (6%), Western NSW (8%)), overall, the percentages of clients assisted by CLCs from 2002/2003 who are Indigenous averages at around 2.3%.

Unmet legal needs

The need for LACNSW to provide appropriate and effective legal services to Aboriginal people in New South Wales is considered a major service priority.

Since the mid 1990's, LAC has undertaken a range of initiatives aimed at improving and expanding the provision of legal services to Aboriginal people in NSW. These include the provision of additional resources to Aboriginal Legal Services in criminal matters, the establishment of outreach civil law advice services in Sydney, Wollongong, the Central and Far North Coast, a family law funding pilot, which allows three (3) Aboriginal Legal Services in NSW to provide family law services and an Aboriginal specific family mediation program (ATSIFAM). The impetus for these initiatives has come from a range of sources, from local community consultations to executive level discussions.

More recently, LACNSW has become concerned about the need to address the overwhelming levels of *unmet* legal need in Aboriginal communities, particularly in the family and civil law area. Over the last year, LACNSW has been working closely with the NSW Aboriginal Justice Advisory Council to finalise an Aboriginal Justice Plan for LACNSW which is consistent with and which seeks to address various legal needs identified in the (draft) NSW Aboriginal Justice Plan 2003-2012.

LACNSW has worked on a range of proposals to improve access to justice for Indigenous Australians, including the establishment of Aboriginal and Torres Strait Islander Family/Civil Law Outreach Teams; the expansion of LACNSW's Aboriginal

and Torres Strait Islander family Mediation Program (ATSIFAM); the provision of financial assistance to Aboriginal Legal Services for the payment of criminal court disbursements; the expansion of the Wirringa Baiya Aboriginal Women's Legal Service and the establishment of a legal service for Aboriginal women in custody. So far, LACNSW has been unable to attract funding.

LACNSW has also done a substantial amount of work to improve its strategic planning and evaluation processes so that they more properly take into account Aboriginal legal and cultural needs.

For example, as a result of the civil law needs identified in its 2003, *Report of the Civil Law Review*, LACNSW's Board has given the Civil Law Program approval to develop a funding proposal for a client specific civil law service for Aboriginal communities. This is currently under development.

Representatives from the Coalition of Aboriginal Legal Services are invited to LACNSW's strategic planning days which are being conducted for each of its legal program areas.

LACNSW's efforts to increase access to its legal services in regional and remote areas, has also resulted in some significant increases in the use of these services by Aboriginal people including:

- Veterans' advocates conducted 25 regional advice clinics across the State. Veterans from Bateman's Bay to Lismore and inland from Armidale to Wagga Wagga were targeted during the year. As a result, it doubled the number of Aboriginal clients assisted.

- By locating family lawyers in Dubbo, Nowra and Tamworth and by locating extra family lawyers at Gosford, Lismore and Wagga Wagga, the number of Indigenous people using our family law services has increased.

Cooperative Legal Service Delivery Model (CLSD)

In June 2004, LACNSW launched a 12-month pilot of the Cooperative Legal Service Delivery Model (CLSD) in the Central Far West and Far North Coast regions of NSW.

CLSD applies a coordinated, regional planning approach to the provision of legal services. By facilitating collaboration and cooperation between legal service providers on a regional basis, and providing tools to identify and address issues specific to the communities they serve, ultimately, this should result in improved access to justice for disadvantaged communities, including Aboriginal communities. The model has been developed in collaboration with COALS, community legal centres, LawAccess, the Law Society of NSW, Local Courts, the NSW Law and Justice Foundation, the National Pro Bono Resource Centre, Community Justice Centres, Legal Information Access Centres, the NSW Attorney General's Department, Public Interest Law Clearing House, Blake Dawson Waldron, Tenants Advice and Advocacy Services and others.

CLSD builds on the current structure of the legal services sector, while introducing new concepts such as cooperative regional service delivery planning and a partnership approach to client needs, which includes the involvement of pro bono services.

Several mechanisms will be employed by CLSD to achieve its aims. These are:

- The establishment of regional coalitions of key legal service providers;
- The development of mechanisms to improve referrals for legal assistance to these key legal service providers;
- The use of evidence based planning of legal services;
- Improved access to pro bono legal services;
- Central coordination through LACNSW.

CLSD is being piloted in the Central Far West and Northern Rivers regions of NSW. A copy of the CLSD manual, which provides greater detail on how the model operates, is attached (separately), for the Committee's information.

Indigenous specific services - ATSIFAM

In 2001, the Commonwealth Attorney General's Department agreed to allow the LACNSW to use its (then) surplus Commonwealth legal aid funds to establish a pilot family law primary dispute resolution program for indigenous clients in the Dubbo and South Sydney areas (the ATSIFAM program). The pilot commenced in Dubbo and Campbelltown in April 2002 and continued by agreement with the Commonwealth, until March 2004. LACNSW decided to continue the pilot until 30 June 2004 in order to obtain a thorough evaluation of the program which has been funded out of LACNSW's other funds. Twenty-three mediations have been held since the pilot commenced.

Since its establishment there have been two reviews of the program. The first review looked at the effectiveness of ATSIFAM's intake and referral processes. The second review, conducted by Professor Cunneen, focuses on the effectiveness of the pre-mediation and mediation stages.

In his report of 31 May 2004, Professor Cunneen concludes that, overall, the ATSIFAM pilot has been successful in terms of the outcomes it has achieved, client satisfaction with the process and its effectiveness as an indigenous program – many interviewed would not have used a non-indigenous process.

The evaluation made a number of other findings, including that the cost of conducting an ATSIFAM mediation is 16 times higher than the average Legal Aid Commission mediation. LACNSW believes this to be an underestimate. The report makes a number of significant recommendations for improving the future form and organisation of ATSIFAM.

LACNSW is keen to retain an Indigenous specific family mediation program component within its general mediation program. However, there is no longer any easily identifiable source of funding to continue the current ATSIFAM pilot. In view of the current financial situation and the issues raised in Professor Cunneen's Report, LACNSW has decided to not continue the pilot beyond 30 June 2004.

A small task force is currently being established to analyse Professor Cunneen's Report and examine possible options for the future of the program.

Conflict

In NSW, LACNSW regularly assists in those matters where, for reasons of conflict, ATSILS are unable to provide representation to Indigenous clients, particularly, in criminal law matters involving a number of co-accused.

The current ATSILS' guidelines provide that where a Provider is faced with a conflict involving the different interests of clients, Providers may, in order to manage such cases, brief either one or all parties to the matter to an external legal service provider, using their briefing out funds. These funds can only be used to brief external private lawyers. In NSW, there have been several criminal cases where lack of sufficient briefing out funds has resulted in LACNSW picking up the costs. Whilst LACNSW and individual ATSILS have done their best to resolve such matters on a case-by-case basis, these arrangements, and their impact on legal aid commissions, has never been discussed by ATSIC with legal aid commissions or their funding bodies.

Co-operative arrangements between LACNSW and NSW ATSILS

The Legal Aid Commission of NSW and the Coalition of Aboriginal Legal Services of NSW (COALS) have made concerted efforts in recent years to develop cooperative strategies aimed at providing Aboriginal people with improved access to effective legal services.

On 5 April 2001, LACNSW and COALS signed a formal Statement of Cooperation. All the CEOs of ATSILS across the State and the then CEO of LACNSW signed the agreement, witnessed by the NSW Attorney General and the then Chairperson of the COALS.

Intended outcomes include improving Aboriginal access to mainstream legal aid support such as better access to the services of Public Defenders and access to other legal aid resources. A particular focus has been on developing strategies to increase access to family and civil law services, as these are generally unable to be provided by ATSILS. Other objectives include joint training initiatives, the sharing of information and research, and improved referral mechanisms.

Crime

In relation to crime, current initiatives under the Statement include:

- Provision at no cost of the services of a Commission solicitor advocate at sittings of the Griffith District Court;
- Arrangements of a fee for service basis for the briefing of a Many Rivers ALS advocate at selected North Coast District Court sittings;
- Allowing ALS staff to have access to LACNSW's video conferencing facilities on a no cost basis.

LACNSW is also aware that shortages of funding are having a serious impact on the ability of ATSILS to pay for criminal court disbursements, particularly in superior court criminal matters which might include counsel's fees, expert medical or other reports and other disbursements.

In its report, *'The Scope for Reducing Aboriginal Imprisonment Rates'* (March 2001), the NSW Bureau of Crime Statistics and Research found that while the problem of over-representation of Aboriginal persons stems initially from their higher rate of appearance at court, this is amplified at the point of sentencing, with Aboriginal

offenders sentenced to imprisonment at almost twice the rate of non-Aboriginal persons. The difference in the likelihood of a prison sentence is thought to be because Aboriginal offenders are more frequently convicted of violent offences and more frequently have a prior record.

The NSW Law Reform Commission has also found, in its report *'Sentencing Aboriginal Offenders'* (2000) that a major problem in the treatment of Aboriginal people by NSW courts is their failure to consider cultural factors which may seem irrelevant to the non-Aboriginal community, but which may be crucial to explaining the demeanour of an Aboriginal person in court or the context in which the offence was committed. Ensuring adequate legal representation is provided to Aboriginal clients could only assist in such matters.

In relation to serious offences, it goes without saying that the legal representation provided to Aboriginal clients may have a significant impact on the court's ultimate decision as to whether to imprison or not. Strategies aimed at providing increased access to legal resources, including increased access to experienced Counsel, or which allow greater use of expert evidence during trial or at sentencing, have the potential to achieve significant reductions in the imprisonment rate of Aboriginal people in NSW.

ATSILS need additional resources to allow the legal representatives of Aboriginal offenders to provide expert evidence of the relevance of such factors, as well as those factors referred to in the sentencing principles enunciated by Mr Justice Wood in *R v Fernando (1992) 76 Australian Criminal Reports 58*, at pages 62-63.

However, ATSILS, remain cash strapped and unable to meet demand. Frequently solicitors, some relatively inexperienced, represent clients in serious criminal trials when it would be prudent to have experienced Counsel briefed. This has been partly addressed by the use of Public Defenders, briefed by some ATSILS but this does not provide Statewide coverage.

To address this problem, LACNSW estimates that considerable additional funds are needed by ATSILS to enable them to cover the cost of criminal court disbursements including:

- Counsel's fees; and
- Professional reports, including medical and psychological reports.

In the following areas:

- Court of Criminal Appeal and High Court matters,
- Supreme Court trials and sentences,
- District Court trials and sentences,
- District Court appeals where a term of imprisonment has been imposed.

Family Law

In October 2002, LACNSW signed a Memorandum of Understanding ("MOU") with the Coalition of Aboriginal Legal Services of NSW ("COALS") on behalf of the Sydney Regional Aboriginal Corporation Legal Service, the Western Aboriginal Legal Service

and the Kamilaroi Legal Service (known as the "LACNSW/Aboriginal Legal Service Family Law Memorandum of Understanding").

The objective of the MOU is to provide assistance over a twelve-month pilot period to three participating ALSs in order to allow them to provide family law advice, and where appropriate, representation, in those matters that are within the Commonwealth agreement and are consistent with the Commonwealth guidelines for family law matters and ATSIC guidelines.

The pilot commenced in late October 2002. The three main aspects of the MOU are:

1. Payment by LACNSW for the provision of family law advice by participating ALSs - $40 for each advice (this is not available to private practitioners);
2. Payment by LACNSW of a Family Law e-lodgment fee for successful applications for legal aid lodged with the Grants Division. A payment of $80.00 to be made;
3. Participating ALSs being entitled to submit applications for legal aid in family law matters and having the application lodged, assessed and paid like any other private practitioner.

Other initiatives under the MOU include:

- Training of participating ALS staff by LACNSW in the Commonwealth Agreement, Commonwealth guidelines and recording requirements in family law matters.
- Training of participating ALS staff by LACNSW in the use of e-lodgement.
- Reciprocal participation in "in-house" training programs and cultural awareness.

Uptake of the initiatives under the Family Law MOU was initially slow, as ATSILS adjusted their service delivery priorities in order to provide increased family law services. However, over the last 6 months, the uptake of initiatives under the MOU has increased dramatically, resulting in the employment of a part-time family lawyer at the Blacktown office of Sydney Regional Aboriginal Corporation Legal Service (SRACLS). Problems, which have hindered Kamilaroi and Western ALSs participation, have now been resolved and they are keen to take part.

Civil Law

LACNSW now provides civil/family law outreach advice services at:

- Blacktown ALS (Head Office, Fairfield and Parramatta)
- Wollongong ALS (Wollongong Office)
- Purfleet (Aboriginal and Torres Strait Islander Medical Service), Many Rivers ALS offices at Taree, Kempsey and Singleton (Newcastle Office)
- Many Rivers ALS at Lismore, communities at Cabbage Tree Island, Box Ridge, Mulli Mulli, Tabulum (Lismore Office in conjunction with ALS field officer and ALS criminal solicitor)

LACNSW is currently reviewing the effectiveness of its outreach services and whether and how, they can be improved.

Research, training and education

Research, training and educational initiatives include:

- Agreement for ALS staff to have access to LACNSW's library resources at no cost;
- Attendance by ALS staff at LACNSW CLE activities at no cost;
- Facilitation of flexible leave without pay arrangements for LACNSW staff members to work with ALSs on 'secondment';
- ALS solicitors attending at no cost Specialist Accreditation Tutorials run by LACNSW ;
- Frequent provision, at no cost, of LACNSW staff to act in Local Court matters in remote locations where the ALS cannot act for their clients due to a conflict of interest.

In the last 6 months LACNSW has also initiated regular meetings with the Coalition of Aboriginal Legal Services (COALS), SRACLS and Community Legal Centres to discuss further possibilities for resource and information sharing and partnership strategies to improve services to Aboriginal people. The meetings with SRACLS are extremely productive on both sides. Currently, efforts are being focused on ensuring that ATSILS remain a viable and independent part of the legal service delivery environment.

c. The access for Indigenous women to Indigenous specific legal services

The difficulties experienced by Aboriginal women in having their legal needs understood and acknowledged, let alone met, was recognised as a problem back in 1979 by the Standing Committee on Aboriginal Affairs.[27]

In 1994, the Australian Law Reform Commission's *Equality Before the Law: Justice for Women* Report No: 69 (1994), examined this issue in more detail and found that:

> *"Of all the identifiable groups of women whose concerns have been presented to the Commission, Aboriginal and Torres Strait Islander women are least well served by the legal system … [and] suffer particular disadvantages both within the mainstream legal system and in the administration of Aboriginal and Torres Strait Islander legal services. Some of the discrimination they suffer, as women, is analogous to the discrimination suffered by non-Indigenous women. Some of the discrimination suffered by Aboriginal women is particular to them as indigenous Australian women".*

A number of reports and Inquiries have, since then, also examined this issue and made a range of recommendations aimed at addressing Indigenous women's' needs. This submission does not propose to go over their findings, but to make a few observations about what has happened since. A detailed summary of recommendations relating to Aboriginal women and the legal system (up to 1997) can be found on the NSW Aboriginal Justice Advisory Council's website on: http://www.lawlink.nsw.gov.au/ajac.nsf/pages/womenrecs.

The establishment of specific legal services for Aboriginal women

High rates of family violence, child sexual assault and adult sexual assault are a major issue of concern to Aboriginal communities in NSW. In NSW, Aboriginal women and children are 2.5 times more likely than non-Aboriginal women and children to experience sexual assault.

In 1997, the Wirringa Baiya Aboriginal Women's Legal Centre was established to provide specialised services to Aboriginal women and young people in the areas of sexual assault, domestic violence and child sexual assault and to address the lack of access to justice Aboriginal women were be being subjected to.

The Centre, which is entirely State funded and provides a service for the whole of NSW, has one office in Greater Sydney, which is staffed by one and a half solicitors, a coordinator and a trainee. The Legal Aid Commission of NSW through its Community Funding Program administers the service.

The Centre also has a 1800 number in NSW making it accessible to all who need to use the service. The service has a potential client base of over 70,000, this being the number of Aboriginal females living in NSW (and does not include Aboriginal children as a whole).

The intention at the time it was established was that it would be expanded with field and caseworkers to satellite centres throughout NSW. This expansion has not occurred, despite the clear need for a broader service. Despite its limitations, the

[27] Ruddock Report, op cit, at pp. 14-16.

Centre has provided since 1997 advice to nearly 4,000 women, case management to 270 women and has visited over 30 Aboriginal communities.

Aboriginal women in custody

In recent years, other needs have been emerging.

Since the 1989 *The National Report into Aboriginal Deaths in Custody*, the numbers of Aboriginal women in custody and their percentage as a proportion of the total female gaol population have risen dramatically. At the time of the Report, the total number of Aboriginal women in prison in NSW was 33 or 12%[28]. In December 2003, the figure was 30% (157 prisoners). In November 2003, the Commonwealth Productivity Commission reported that NSW has the highest rate of indigenous female incarceration in the country, at 430 per 100,000 adult indigenous population[29].

Recently, the NSW Aboriginal Advisory Council's *Speak Out Speak Strong Report* highlighted the acute levels of unmet legal need experienced by Aboriginal women in custody. It found, among other things that Aboriginal women in prison are:

- Predominantly young, with an average age of 25;
- Have low levels of educational attainment and high levels of unemployment (92%). Despite this only 52% were in receipt of Centrelink benefits;
- 54% are single mothers;
- 86% have children, with one third having between 2 and 4 children in their care. A third also cared for children other than their biological children. A third are normally responsible for the care of other family members, such as their mothers, fathers and other family members;
- 43% of those women who had dependant children did not receive and income from either paid employment or Centrelink and were using crime to support themselves and their families;
- Had long histories of involvement with the criminal justice system with a third receiving their first conviction between 11 and 12 years of age;
- 68% were on drugs at the time of their last offence;
- 78% had been victims of violence as adults.

The study also found that 70% of adult women in custody had been victims of child sexual assault, and that almost half (44%) had been sexually assaulted as adults.[30] Many of these women used drugs to self-medicate against the abuse, which then led to their incarceration. These findings are consistent with NSW Corrections Health research that 60% of women and 37% of men had been sexually abused before the age of sixteen, with approximately 70% of prisoners using drugs in the 12 months before their arrest.[31]

The report also highlights the acute levels of unmet legal need experienced by the children, families and communities of Aboriginal women in custody. Some of the

[28] *Royal Commission into Aboriginal Deaths in Custody, National* Report, Volume 1.
[29] Steering Committee for the Review of Government Service Provision*, Overcoming Indigenous Disadvantage: Key Indicators 2003 Report*, November 2003 at 3.61
[30] NSW Aboriginal Justice Advisory Council *Speak Out Speak Strong,* 2003
[31] NSW Corrections Health Service, *The 2001 Inmate Health Survey*, 2003

legal needs identified by the report include the need for greater access to legal representation and advice in relation to their criminal matters, greater access to meaningful criminal justice outcomes; the need for advice and assistance about placement options for their children (both informally and in relation to formal care and protection and family law proceedings); and the need for advice on other matters such as housing, social security, victims compensation and domestic violence.

Many indigenous women in custody are not eligible for criminal law Aboriginal Legal Services due to conflicts of interest, which arise when a male co-accused, or perpetrator is currently or has previously been represented by a legal service. Family law and civil law services provided by NSW ATSILS are almost non-existent. As a result, Aboriginal female offenders are often left with no legal assistance whatsoever.

Whilst the Wirringa Baiya Aboriginal Women's Legal Resource Centre operates a phone advice line that is also accessible to women in prison, budget and resource restrictions and unanticipated demand has led to the Service focusing more on women in the outside community.

In 1997 the Sydney Regional Aboriginal Corporation Legal Service provided a female solicitor who attended Mulawa Women's Correctional Centre half a day a fortnight. This Service complemented a pro bono legal service which attended the Centre to provide casework and legal assistance fortnightly basis. That service continued for approximately 3 years.[32]

The provision of basic legal services to Indigenous women in custody would have tremendous social benefits for Aboriginal communities, and would go some way towards avoiding the otherwise almost inevitable exodus from care, to juvenile detention and adult gaols. It would enable Aboriginal women on remand to have greater and speedier access to bail and greater access to the appeal process.

Cost is also an issue. It currently costs $66,000 to keep an adult in prison for twelve months.[33] The costs jump exponentially when costs for their children are factored in. Children whose parents are in prison run a high risk of being taken into State care[34] or juvenile detention centres.[35] Out of home care can cost as much as $260,000 a year,[36] while it costs $216 499 to keep a child in juvenile detention for 12 months[37].

[32] McFarlane, K. & Murray J. *Addressing Offending Behaviour Positive* Justice Centre / NSW Department of Women, Sydney NSW (1998)

[33] Figures supplied by the NSW Department of Corrective Services, Jan 2004.

[34] 28% of juvenile detainees have been in care – NSW Department of Juvenile Justice / Corrections Health Service*, 2003 Young People in Custody Health Survey*, *Key Findings Report* p.13. Over 20% of adult non-indigenous prisoners were in care as children and approximately one third of indigenous prisoners had been removed from their family as children - SW Corrections Health Service, *The 2001 NSW Inmate Health Survey,* 2003 p.2.

[35] 43% of juvenile detainees have a history of parental imprisonment - NSW Department of Juvenile Justice/Corrections Health Service*, 2003 Young People in Custody Health Survey*, *Key Findings Report* p.13. 16% of adult prisoners (both indigenous and non-indigenous) had had at least one parent incarcerated during their childhood and 26% of female and 41% of male adult prisoners had been in juvenile detention – NSW Corrections Health Service, *The 2001 NSW Inmate Health Survey,* 2003 pp.25-29.

[36] NSW Minister for Community Services, the Hon Carmel Tebbutt MLC, Response to a Question without Notice, Legislative Council 18.09.02 *Hansard*

[37] NSW Department of Juvenile Justice, *Budget Estimate Hearings*, 2003

LACNSW is ready to work with ATSILS to establish and provide a specific legal service for Aboriginal women in custody. However, sufficient funding would be needed in order to do so.

e. Tendering of Indigenous Legal Services

On 5 March 2004, the Commonwealth, acting through ATSIS, released an Exposure Draft of a request for tender for the provision of legal aid services to Indigenous Australians for the period 1 January 2005 to 31 December 2007.

The development of the Exposure Draft has taken place outside of the broader national context, and in contradiction to the outcomes from the July 1997 *Ministerial Summit on Aboriginal and Torres Strait Islander Affairs* (MCATSIA) and COAG.

At the Summit it was agreed that States and Territories would develop strategic plans for the coordination, funding and delivery of Indigenous programs and services, and that these plans would include "working towards the development of multi-lateral agreements between Commonwealth, State and Territory Governments and Indigenous peoples and organisations to further develop and deliver programs".[38] The Federal Government has not consulted with either the NSW Government, or mainstream legal aid providers on this process.

LACNSW has grave concerns about the direction that the Commonwealth is taking in relation to the provision of legal aid services for Indigenous Australians. It is opposed to the proposed tender arrangements going ahead on the basis that they are fundamentally flawed.

The proposed new tender arrangements will have a grievous impact upon Aboriginal people in NSW. They will also have an adverse impact upon mainstream legal aid service providers and consequently, upon the general community.

LACNSW's comments on the proposed tender arrangements are set out below.

Undermining of Aboriginal control of Indigenous legal aid services

Self-determination is the indispensable cornerstone of Indigenous identity, the basis for all other legal rights".[39]

In the thirty four years since they were established, the need for specialist legal aid services for Indigenous people and their effectiveness has rarely been questioned, even though, at times, there have been concerns about their governance.

In NSW legal aid services for Aboriginal people are almost exclusively provided by six independent ATSILS who are funded by ATSIS and controlled by the communities they service.

When the first Aboriginal Legal Service was established in Sydney in 1970 it provided a single service for the state of NSW. Subsequently, Aboriginal communities lobbied for and established their own regionally based services as it became clear that one centrally provided service did not meet their needs.

The present arrangements with ATSILS have developed around concepts of empowerment, community based services, flexibility in service delivery, strategies aimed at addressing systemic legal issues, and the provision of preventative legal assistance, such as information, education and research. All of these are absent from the new arrangements for service providers.

[38] COAG, November 2001.

[39] Quote from a speech by the Hon Bob Debus, MP, NSW Attorney General, to the Conference on Indigenous Legal services, 16 June 2004.

The proposed tendering process will also destroy one of the most fundamental principles and greatest strengths of ATSILS, local Aboriginal community control. Under the proposed tendering process anyone from a private law firm to a Legal Aid Commission could win the tender so long as they satisfy the selection criteria. There are no requirements for Indigenous governance, Indigenous lawyers or Indigenous staff. Nor is any provision made for the significant administrative costs associated with providing such services.

There is also no guarantee that organisations that successfully tender will have any experience dealing with Aboriginal people let alone be controlled by Aboriginal people. Currently, 89% of legal services provided to Indigenous people are provided by ATSILS.[40] Replacing Aboriginal Legal Services with non-Aboriginal organisations, or sending them to mainstream legal aid organisations will only exacerbate Indigenous people's lack of access to legal assistance and their ability to obtain justice through the legal system.

As the Committee would be aware, Aboriginal people are the most disadvantaged group in our community and are vastly over represented in the criminal justice system. Indeed since the 1992 *Royal Commission into Aboriginal Deaths in Custody* the number of Aboriginal people in NSW gaols has increased dramatically with the proportion of Aboriginal women in prison reaching an all time high of 31.5%.

It has been acknowledged by the NSW Government through the signing of the *Aboriginal Justice Agreement* and nationally by the Council Of Australian Governments that Aboriginal people have profound and urgent legal needs which are best resolved by Aboriginal people themselves developing, owning and implementing solutions to their own problems, which adopts a holistic approach to service provision and which demonstrates a real commitment to achieving long term sustainable change for Aboriginal people.

The Commonwealth's tender proposal flies in the face of these commitments and established wisdom in this area. As a conceptual framework it is piecemeal, retrograde and disempowering of Aboriginal people. As a practical proposal it is shortsighted, commercially unrealistic and potentially disastrous. It would appear to be designed, not to improve legal outcomes for Aboriginal people but to implement the Federal Government's broader agenda of centralising and mainstreaming specialist Aboriginal legal aid services through the disbanding of locally controlled specialist indigenous legal aid providers and to shift the costs of this service to the States.

If the proposal goes ahead it will result in the dismantling of the Aboriginal Legal Service infrastructure and the squandering of their expertise in delivering legal aid services to Aboriginal clients.

Cost shifting to the States and Territories

Since 1967, the Commonwealth has acknowledged its special responsibility with respect to Indigenous Australians.

The proposed arrangements, however, signal an abrogation of this responsibility together with an assumption that this will be picked up by the States/Territories.

[40] ANAO Report, op cit, at p.46.

It assumes throughout that mainstream legal aid services will be able to share the service provision load with Indigenous legal service providers on a geographic basis, as well as absorb an expected overflow of Indigenous clients resulting from the restrictions on priority category areas for legal assistance. It also assumes that the assistance which mainstream legal aid providers are able to provide will be equally effective.

The location requirements, for example, rely upon Indigenous and mainstream legal aid service providers sharing responsibility for service provision to Indigenous clients across the State. A map, showing the current locations of LACNSW offices and ATSILS is attached, for the Committee's information (Attachment "A").

Under these arrangements, LACNSW could be involved in taking up a major proportion of the 24,000 case and duty services currently provided by NSW ATSILS. In Dubbo, it is estimated that if the office of the Western Aboriginal Legal Service were to be eliminated, the Dubbo Office of the Legal Aid Commission would require an additional 6 legal officers to cover the expected increase in workload.

Without additional resources, LACNSW, which is required both through its governing legislation and funding agreements to provide services to the community as a whole, and which is already under extreme funding pressure to maintain its current services, would have to cut its services at the expense of services to other disadvantaged groups, such as people in remote, rural and regional NSW and children.

In the absence of additional funding for Indigenous service providers, the restrictions imposed on the priority areas for assistance, will also result in more Aboriginal people, whose needs are unable to be met, being referred to state based legal aid services such as legal aid commissions and/or community legal centres. This again, will result in a shifting of responsibility for legal service provision from the Commonwealth to State and Territory governments.

Despite this, there has been no consultation with mainstream legal aid providers or the NSW Government on this issue.

It also raises serious doubts about the Commonwealth's commitment to its leadership role in the strategic planning and delivery of legal aid services, and contradicts prior Commonwealth commitments to the development of multi-lateral agreements between Commonwealth, State and Territory Governments and Indigenous peoples and organisations with respect to Indigenous programs and services.

Reduced effectiveness

Successful tenderers must deliver services that comply with priority categories outlined in the draft exposure. They are:

- Where the safety or welfare of child at risk
- Where the personal safety of application or person in applicants care is at risk
- In a case where the applicant is at risk of being detained
- Representation of family member re death in custody

The Commonwealth's recognition of the legal needs of Indigenous women and children through the establishment of the first two priority areas is long overdue.

They are essential areas of service provision. However, it ignores the reality that 94% of matters currently undertaken by Aboriginal Legal Services in NSW are criminal law matters. Under the proposal, service providers will be expected to meet these additional needs as well as the needs of men and women facing criminal charges without any increase in funding. This shift in service delivery will leave huge service gaps to be filled by other legal aid providers in crime, family law and almost the entire civil law area.

Furthermore, the arrangements propose that assistance in minor offences "should be an exception rather than the rule". This could leave Indigenous defendants without legal representation, as legal aid would not always be able to fill the gap.

Research by the NSW Aboriginal Justice Advisory Council shows that the top three offence categories for which Aboriginal people are convicted in NSW local courts are: assault, disorderly conduct and driving licence offences. If the proposed tender arrangement proceeds, Aboriginal people who are prosecuted for these offences will not be able to obtain legal representation.

Perhaps the most disturbing of all the proposals contained in the new arrangements is the proposition that service providers be allowed to refuse assistance to second time offenders charged with violence matters.

Research from the NSW Bureau of Crime Statistics and Research shows that among Aboriginal people who appeared in court, only a small minority (17% of Aboriginal male defendants and 27% of Aboriginal female defendants) had *no* previous court appearances. If applied, this proposal would allow service providers to deny a significant proportion of Indigenous criminal defendants access to essential legal services.

The only possible rationale for this is to provide under funded services with a management tool. As a means of addressing the systemic causes of criminal behaviour, such as poverty and unemployment, it is completely without foundation and would be completely unacceptable if applied to non-Indigenous persons.

The arrangements also prevent service providers from using their funds to undertake "test cases" and most civil law matters. This new role is narrower than the already restrictive role imposed by the Commonwealth on mainstream legal aid providers and will prevent Indigenous people from obtaining assistance to seek redress from discrimination, and from pursuing their social and cultural rights. It would appear to be designed to prevent Indigenous persons from challenging Commonwealth Government authorities.

The imposition of priority categories for assistance diminishes the capacity of service providers to respond in integrated, flexible and innovative ways to individual and community need for assistance in legal matters.

Indigenous clients often present with a range of problems, which may often cross-jurisdictional boundaries. Having to confine a matter to a particular priority category area for funding purposes only is artificial and adds unnecessary complexity to the process of applying for legal assistance and reporting to funders, is confusing for both applicants and service providers, and prevents assistance from being provided in a holistic way.

As a result, there is a real danger of Indigenous legal aid providers turning into little more than legal advice bureaus, doing limited casework under grants of legal aid

and/or referring matters off to Legal Aid for further assistance and leaving large numbers of Aboriginal clients to fall into a service delivery void.

Means testing will increase costs

The proposal also requires means testing of applicants, client contributions and costs recovery. Whilst the eligibility requirements appear to enable the vast majority of Indigenous clients to receive a service, no provision is made for the additional resources necessary to administer these requirements. For the very few that would not qualify for assistance, the introduction of these requirements is an unnecessary expense.

Lack of meaningful Selection Criteria

Section 4.6 of the Exposure Draft establishes a set of Selection Criteria which tenderers are required to respond to as part of the tendering process. The Selection Criteria are almost identical to the requirements contained in the Commonwealth Agreement with the Legal Aid Commission of NSW.

As the NSW experience has shown, requirements such as these are arbitrary, empty and irrelevant to the issue of improved client outcomes. More importantly, they do not allow for flexible service delivery.

Conflicts involving client-provider relationships

The arrangements also provide that where a Provider is faced with a conflict involving the different interests of clients, Providers may, in order to manage such cases, brief either one or all parties to the matter to an external legal service provider, using their briefing out funds. These funds can only be used to brief external private lawyers. In NSW, there have been several cases where lack of sufficient briefing out funds has resulted in the Legal Aid Commission of NSW picking up the costs. The proposed arrangements assumes this situation will continue, despite never having been discussed either with legal aid commissions or State/Territory Governments which provide significant funding.

Reduced funding

Every ATSILS review has shown that their capacity to deliver services has been hampered by a chronic lack of funding. Under the arrangements, funding will be cut by an estimated $2.4 million per year nationally. As a result, service providers will have no option but to reduce the services they provide. Quality of service will also be put at risk.

The arrangements also provide that funding be provided to service providers on a monthly basis in arrears. This proposal will cause serious financial and planning difficulties for service providers whose sole funding comes from ATSIS. This is setting providers up to fail.

Currently, ATSILS also have the capacity to attract assistance that helps spread the Government dollar further: obtaining premises or meeting spaces at a reduced rate, volunteer assistance, receiving pro bono assistance and entering into cooperative arrangements with mainstream legal aid providers such as legal aid commissions and the Public Defenders. Most, if not all of these benefits will be lost if the proposed arrangements go ahead.

Rather than improve services to Aboriginal people in this State, the proposed arrangements have the real potential to destroy the valuable and hard won legal services Aboriginal people currently have access to, and to leave significant numbers of Aboriginal people without effective legal representation in NSW. In fact it has the potential to recreate the situation that led to the creation of Aboriginal Legal Services in the first place.

Furthermore, the reduction in funding, the restrictions on criminal law assistance, the resulting higher levels of unmet legal need and the reduction in access will lead to even greater numbers of Indigenous people being incarcerated.

MAP SHOWING THE LOCATION OF LACNSW

AND ATSILS OFFICES IN NSW