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Working Cheaper, Working Harder: Inequity in Funding for Aboriginal and Torres Strait Islander Legal Services

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Abstract

Good legal representation for Indigenous people goes to the heart of questions of access to justice, equity and the rule of law; proper representation represents the ability of Indigenous people to use the legal system to a level enjoyed by other Australians. Aboriginal and Torres Strait Islander Legal Services ('ATSILS') are the preferred provider of legal services for Indigenous people, with nine ATSILS servicing 96 sites nationally. Funding for these services should be sufficient to provide assistance across all legal arenas, from civil law matters, to advice for victims of crime, to representation for those charged with criminal offences. This paper examines the adequacy of funding available to ATSILS, and the impact of funding constraints on ATSILS' ability to deliver effective, quality legal services. In order to make this assessment, the authors first examine some special issues in servicing Indigenous clients.

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Good legal representation for Indigenous people goes to the heart of questions of access to justice, equity and the rule of law; proper representation represents the ability of Indigenous people to use the legal system to a level enjoyed by other Australians. Aboriginal and Torres Strait Islander Legal Services ('ATSILS') are the preferred provider of legal services for Indigenous people, with nine ATSILS servicing 96 sites nationally. Funding for these services should be sufficient to provide assistance across all legal arenas, from civil law matters, to advice for victims of crime, to representation for those charged with criminal offences.

This paper examines the adequacy of funding available to ATSILS, and the impact of funding constraints on ATSILS' ability to deliver effective, quality legal services. In order to make this assessment, the authors first examine some special issues in servicing Indigenous clients.

Legal Needs Specific to Indigenous Clients

Over-representation

Between 1996 and 2006, the potential client base of Indigenous prisoners requiring legal assistance rose from 3275 to over 6000.^[1] Given the over-representation of Indigenous people in the criminal justice system, one might expect a level of funding to ATSILS to reflect a serious commitment to remedying this problem. These figures reflect an acute need for proficient, accessible, Indigenous-specific legal representation for all prison-related issues, from the time of arrest and bail, through to preparation for parole hearings.

Language

In some Indigenous communities, English is a second, third or fourth language and is not spoken at home.^[2] In metropolitan communities, Aboriginal English may be spoken; a lack of training in the nuances of this language may impair effective communication between client and lawyer.^[3] The failure to understand language and cultural differences can lead directly to miscarriages of justice.^[4]

A 2002 survey conducted by the Office of Evaluation and Audit reported that 13% of ATSILS practitioners experience difficulty in understanding what their clients are saying 'very often/often'; a further 50% 'sometimes' experience such difficulties. Practitioners also reported that their clients often struggle to understand what they are trying to convey,^[5] either because of the client's shyness or discomfort (65%), a disability that hinders communication (51%), an inability to communicate adequately in English (40%), or because clients do not

understand the legal process (77%).^[6] Legal Aid Commission ('LAC') practitioners, on the other hand, report lower levels of communication difficulty, highlighting that:

ATSILS clients are likely to be socially and economically more disadvantaged, and more alienated from mainstream Australia than their LAC counterparts. In many ways therefore, ATSILS practitioners are dealing with more 'difficult' clients than LAC practitioners.^[7]

Cross-Cultural Issues

Cultural awareness is crucial to the provision of effective legal representation to any Indigenous client. Cross-cultural issues cover a broad range of matters, many of which are taken for granted in the ordinary course of providing legal services. This includes confusion about who has the right to speak; Indigenous kinship relations; gratuitous concurrence (where clients indicate agreement in situations where they feel uncomfortable, or because of the perceived authority of the solicitor); what is appropriate eye contact, and temporal and spatial definitions. As magistrates servicing remote communities in Queensland have noted,

The complexities of cross-cultural communication impact not just upon exchanges between a non-Indigenous bench and Indigenous people, but permeate throughout the whole criminal justice process; from the first questioning by police, to the ability to properly instruct lawyers, to well known difficulties of the lack of understanding of the court process and the subtle nuances of giving evidence.^[8]

The legal needs of Indigenous clients are complex: not only do they often involve a number of discrete areas of law; they also require lawyers with cross-cultural sensitivity. The ability to attract, train and retain high quality legal advocates with these particular skills is essential if requirements of fairness and equality before the law are to be met.

Issues of Disadvantage

Indigenous people in Australia face well documented disadvantage in education, housing, employment, income and health. These difficulties can give rise to specialised needs and place more onerous requirements on legal practitioners in the exercise of their duties. For example:

- Indigenous people are less likely to share the literacy and numeracy skills of the non-Indigenous population;
- Loss of hearing due to ear disease is much higher for Indigenous people of all ages up to 55 years;
- Indigenous people have disability rates 1.4 times greater than non-Indigenous people;
- Indigenous people are twice as likely to experience high levels of psychological distress than non-Indigenous people.^[9]

These factors – combined with higher rates of self harm, childhood removal and drug and alcohol dependencies – mean that Indigenous clients are a particularly disadvantaged group with specific needs. For example, poor literacy hampers communication by mail; hearing impairment requires legal practitioners to adapt particular skills in interviewing. These issues pose extra challenges for lawyers in delivering effective legal representation.

Field Officers

As noted above, the particular needs and circumstances of ATSILS clients can create a range of cultural, communication and other difficulties in the lawyer-client relationship. For this

reason, field officers are intrinsic to the efficacy of ATSILS service. These officers, who have a particular understanding of community, culture and politics, act as a bridge between legal practitioners and clients. The importance of this role cannot be overstated; as the Victorian Aboriginal Legal Service reported to a Federal Parliamentary Joint Committee,

Solicitors would be lost without Field Officers. Field Officers are the most important link in the chain for legal service delivery.^[10]

Indeed, client satisfaction with field officers is consistently higher than that reported for ATSILS lawyers.^[11] Where these officers are not present, there is a marked difference in the client experience of the legal system. For instance, the Office of Evaluation and Audit reports that 88% of ATSILS practitioners rely on ‘ATSILS staff’ when cultural or communication issues arise. Yet 65% of ATSILS clients surveyed reported that they had not had any contact at all with a field officer during their case.^[12] Despite a demonstrated need, the majority of Indigenous clients are unable to access the services provided by ATSILS field staff.

Interestingly, 46% of LAC lawyers also nominated ‘ATSILS staff’ as an important resource in addressing communication difficulties.^[13] This represents a significant drain on essential ATSILS capacities; the consequence of this additional burden is all the greater in conditions where the majority of ATSILS clients are, in a practical sense, already denied access to important services. This highlights not only the importance of field officers, but also that this role is currently inadequately resourced to cater to existing needs.

Challenges to Effective Service Delivery

There are a number of further restraints preventing ATSILS from providing a full range of effective legal services, namely client remoteness, difficulties in recruiting and retaining staff, and funding constraints.

Remoteness

Geographical isolation is a major obstacle in Indigenous access to justice; the Women’s Legal Service in the Top End argues that, in remote communities, access is ‘so inadequate that remote Indigenous people cannot be said to have full civil rights’.^[14] This is a pressing concern given that 27% of Indigenous people in Australia live in remote or very remote communities, compared to just 2% of the non-Indigenous population.^[15]

The average costs of servicing a case in some parts of the Northern Territory and Western Australia can be double that in other states.^[16] ATSILS managers report that contacting clients and obtaining adequate instructions can be very difficult where those clients are members of highly mobile and traditionally-oriented communities. Managers describe this as one of the greatest difficulties in servicing their client base.^[17] The cost of travel to these communities is prohibitive, and face-to-face meetings are often impossible.^[18] Where practitioners can attend such meetings, there is often little or no time to obtain a brief, or to advise clients of their legal options. This lack of contact time can cause some practitioners to advise clients to plead guilty to criminal charges, irrespective of the merits of the case.^[19] Indeed, ATSILS clients, on the whole, are more likely to enter guilty pleas than their mainstream counterparts.^[20]

Recruitment and Retention of Staff

In addition to Indigenous disadvantage, and the systemic failure of ATSILS to deliver effective legal services to remote communities, managers report a ‘chronic and increasingly acute inability to maintain expert legal staff’.^[221] Between 2000 and 2005, solicitors at the Western Australian Aboriginal Legal Service reported the average period of employment to be 17 months. This is largely attributable to heavy workloads, difficulties in retaining staff in regional and remote areas, and uncompetitive salaries compared to those paid by LACs.

These difficulties further compromise the quality of service that ATSILS are able to offer Indigenous clients; clients report frustration that their matters are not managed continuously by one legal practitioner, and that time is inefficiently used due to duplication and re-briefing.^[221] High workloads mean that practitioners often have insufficient time to prepare cases adequately.^[231] Further, low salaries mean that ATSILS practitioners are likely to be nearer the beginning of their careers; practitioner inexperience is a key concern for clients and magistrates alike.^[241] Taken together, these factors lead to a situation where ATSILS have effectively become ‘a training ground for either the Legal Aid Commission or private firms’.^[251]

Paucity of Resources

Given the extent of Indigenous overrepresentation in prison, the primary focus of ATSILS is to represent those clients facing potential incarceration. The number of criminal cases dealt with by ATSILS increased by 67% between 1998 and 2003; yet despite this massive increase, funding for these services did not substantially increase during that period.^[261] The Office of Evaluation and Audit reports that some 97% of ATSILS lawyers consider ‘lack of funding, lack of resources, staff shortages, and work overload’ as the main impediments to providing quality legal service in criminal matters.^[271] In contrast, only 5% of LAC practitioners nominated funding as a difficulty; no LAC practitioners regarded staff shortage or work overload as an issue hampering effective legal representation.^[281]

Further, there is evidence of growing demand for practitioners to provide legal advice in respect of child protection, civil matters and family law. Yet ATSILS report being unable to service these clients due to insufficient funding for significant extension of services beyond criminal matters.^[291] Inaccessibility to family and civil law services compromises the ability of Indigenous people to realise their full legal entitlements. It also increases the risk that civil or family law issues will escalate to criminal acts, resulting in charges and a perpetuation of the cycle of Indigenous overrepresentation.^[301]

Funding Comparison with Legal Aid Commissions

A comparison with the resources allocated to LACs provides the most striking evidence of under-funding for ATSILS. ATSILS provide legal services at a significantly lower cost than LACs^[311] while maintaining comparable levels of client satisfaction. Yet the workload of ATSILS lawyers is significantly higher at 52 hours per week, compared with 42 hours per week for LAC practitioners. In 2003, ATSIC reported low staff morale as well as high staff turnovers.^[321]

Current funding levels mean that ATSILS provide a cheap form of legal representation for Indigenous people. An ATSIC 2001 review reported annual ATSILS funding at \$12 million less than LAC benchmarks. In 2003, ATSIC estimated the shortfall to have increased to \$25.6 million.^[331] There are very important questions about equity arising from the apparent ‘cost effectiveness’ of ATSILS. It is unsurprising that the 2003 *Evaluation of the Legal and*

Preventative Services Program found that ‘ATSILS practitioners work in a more stress filled, demanding environment than their LAC counterparts, and are very dissatisfied with their comparatively lower remuneration’.^[34] Indeed, given the

myriad studies and research that undeniably demonstrate the abysmal levels of disadvantage suffered by Indigenous people in Australia, it is incredible that Indigenous organisations continue to be funded well below the levels of mainstream services.^[35]

Potential Benefits to be Achieved through Additional Funding

ATSILS funding does generally increase from year to year, however in real terms – taking into account inflation, rising Indigenous population and increasing Indigenous criminalisation – they function in an environment where funding is effectively static, but demand is on the rise. This compromises their ability to provide adequate legal services, both in quality and quantity. The *Legal Aid and Access to Justice Report* recommended that funding to ATSILS be increased as a matter of urgency; the Report stressed that issues of language, culture, literacy, remoteness and incarceration rates – and the impact of these on the costs of service delivery – should be factored into the degree of increase.^[36]

Increased funding to ATSILS would enable individual offices to employ more legal practitioners, which would help to reduce the extremely heavy ATSILS lawyer workloads. Further, it could be used to increase salaries paid to ATSILS solicitors, so that remuneration would be at least commensurate with that paid to LAC solicitors. This would help to reduce staff turnover and to make possible the employment of experienced practitioners. Moreover, extra funding would enable ATSILS to increase services in civil and family law cases, to provide opportunities for professional development for Field Officers, and to run more community awareness programs to promote available legal services.^[37] More generally, increased funding to ATSILS, and improved legal representation, would assist in the reduction of Indigenous people in the criminal justice system. It would allow for better services for Indigenous people under arrest, in custody, or being sentenced. ATSILS would have greater capacity to work with other Indigenous justice initiatives including Murri, Koori and Nunga courts, with circle sentencing courts and with community justice groups in general.

An increase in legal services, particularly for non-criminal matters, has the potential to assist with economic development in remote Indigenous communities. At present, Indigenous people in remote communities do not have access to adequate information about the criminal justice system; they have even less access to legal advice or representation about a range of civil law matters, such as housing, consumer rights, credit and debt, employment law, negligence and corporations law. With more funding, ATSILS would be able to do more than simply try to keep up with their overwhelming workload; they would be better able to ‘empower Aboriginal and Torres Strait Islander peoples and advance their interests and aspirations.’^[38] Moreover, they would be able to pursue ‘change where needed, to improve social justice and further the fight for equal rights’.^[39]

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- ^[1] See Australian Bureau of Statistics ('ABS'), *Prisoners in Australia* (2006), 38-53.
- ^[2] Submission of Top End Women's Legal Service to Senate Legal and Constitutional References Committee, *Legal Aid and Access to Justice* (2004), 5.101; Submission of Yilli Reung Regional Council, 5.103.
- ^[3] Submission of Wirringa Baiya Aboriginal Women's Legal Service, *ibid*, 5.102.
- ^[4] See for example, the Criminal Justice Commission, *Aboriginal Witnesses in Queensland Criminal Courts* (1996).
- ^[5] Office of Evaluation and Audit, *Evaluation of the Legal and Preventative Services Program*, (2003), 3.6.4.1.
- ^[6] *Ibid*.
- ^[7] *Ibid*.
- ^[8] Tina Previterra and John Lock, 'Fly in/Fly out Justice – An Imperfect Journey' (2007) 1 *The Verdict* (Queensland Law Society) 28, 34.
- ^[9] See ABS, *National Aboriginal and Torres Strait Islander Social Survey* (2002), 28; Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators* (2007), 5.25, 8, 9.41.
- ^[10] Joint Committee of Public Accounts and Audit, *Access of Indigenous Australians to Law and Justice Services (Report 403)* (2005), 4.41.
- ^[11] Office of Evaluation and Audit, *ibid* n 5, 3.5.11.
- ^[12] *Ibid*, 3.5.10.
- ^[13] *Ibid*, 3.6.4.2.
- ^[14] Top End Women's Legal Service, *ibid* n 2, 5.120.
- ^[15] Steering Committee for the Review of Government Service Provision, *ibid* n 9, 2.
- ^[16] Office of Evaluation and Audit, *ibid* n 5, 3.3.
- ^[17] *Ibid*, 3.7.4.
- ^[18] Senate Legal and Constitutional References Committee, *ibid* n 3, 5.115.
- ^[19] National Network of Indigenous Women's Legal Services, submission to Senate Legal and Constitutional References Committee, *ibid* n 2, 5.116.
- ^[20] Office of Evaluation and Audit, *ibid* n 5, 3.
- ^[21] Joint Committee of Public Accounts and Audit, *ibid* n 10, 4.2.
- ^[22] *Ibid*, 4.2-4.8.
- ^[23] Office of Evaluation and Audit, *ibid* n 6, 3.6.2.
- ^[24] Previterra and Lock, *ibid* n 8, 31.
- ^[25] Quoted in Joint Committee of Public Accounts and Audit, *ibid* n 10, 4.27.
- ^[26] Australian National Audit Office *Report no 13*, *ibid*, 2.2.
- ^[27] Office of Evaluation and Audit, *ibid* n 5, 3.6.6.1.
- ^[28] *Ibid*.
- ^[29] Senate Legal and Constitutional References Committee, *ibid* n 3, 5.6, 5.7, 5.14.
- ^[30] Joint Committee of Public Accounts and Audit, *ibid* n 10, 2.41, 2.23.
- ^[31] Office of Evaluation and Audit, *ibid* n 5, 3.3.
- ^[32] Senate Legal and Constitutional References Committee, *ibid* n 2, 5.13.
- ^[33] Office of Evaluation and Audit, *ibid* n 5, 1-2. For a comparison of the budget of the North Australian Aboriginal Justice Agency in 2006-7 and that of the Northern Territory Legal Aid Commission in 2005-6 see Chris Cunneen and Melanie Schwartz 'Funding Aboriginal and Torres Strait Islander Legal Services: Issues of Equity and Access' (2008) 32(5) *Criminal Law Journal*, 51.
- ^[34] *Ibid*, 4.6.3.
- ^[35] Submission of the Victorian Aboriginal Legal Service to Senate Legal and Constitutional References Committee, *ibid* n 3, 5.17.
- ^[36] *Ibid*, Recommendation 27.

^[37] See Office of Evaluation and Audit, above n 5, 3.7.3-4.

^[38] Aboriginal Legal Service of Western Australia Inc, *Goals and Philosophy*, available at <<http://www.als.org.au/Philosophy.html>> viewed at 16 February 2009.

^[39] Aboriginal Legal Rights Movement Inc (South Australia), *The Role of the Aboriginal Legal Rights Movement*, available at <<http://www.geocities.com/Athens/Acropolis/7001/almr.htm>>, viewed at 16 February 2009.

