Jumbunna Indigenous House of Learning Research Unit

Briefing Paper No 4:

Tendering of Indigenous Legal Services

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for

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Introduction

Since their inception in the early 1970s Aboriginal and Torres Strait Islander Legal Services ('ATSILS') have been at the vanguard of the Indigenous struggle. Providing our communities with respite from police brutality and initiating David and Goliath battles are among the impressive accomplishments of ATSILS. As part of its ongoing assault on Indigenous self-determination, the Howard Government proposes to transform this civil rights institution into an instrument of nonpartisan service delivery.

In November 2004 the Commonwealth Government opened up Indigenous legal aid services to tender. According to the Attorney General, Phillip Ruddock, competition will

> …ensure that Indigenous Australians have access to high quality, professional and culturally appropriate legal services …The Government is committed to seeing better outcomes delivered to Indigenous Australians and ensuring value for money.[1]

In April 2005 the Attorney General announced that the Victorian Aboriginal Legal Service had been awarded the tender to provide Indigenous legal aid services in Victoria.[2] In the same month the Aboriginal Legal Service of Western Australia also secured a tender.[3]

On 10 June it was announced that two existing Aboriginal and Torres Strait Islander Legal Services were awarded contracts for Indigenous legal aid services in Queensland.[4] This process is gradually being rolled out in the remaining States and Territories.[5]

This paper will argue that far from achieving better outcomes for Indigenous people, the new arrangements may prune poverty law practices to cheap replicas of mainstream legal aid providers. While such changes will accommodate the ideology underpinning practical reconciliation, they are unlikely to address the systemic causes of Indigenous disadvantage

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[1] The Attorney General, Commonwealth of Australia, *Tendering for Indigenous Legal Services Starts*, Press Release, No 183 (12 November 2004).
[2] The Attorney General, Commonwealth of Australia, *First Indigenous Legal Service announced for Victoria*, Press Release, No 50 (1 April 2005).
[3] ABC News, *WA: the Aboriginal Legal Service of Western Australia Appointed for WA says Ruddock*, 15 April 2005 www.abc.net.au.
[4] The Attorney General, Commonwealth of Australia, *Indigenous Legal Services Announced for Queensland*, Press Release, No 108 (10 June 2005).
[5] The Request for Tender in the Northern Territory and South Australia will be released on 2 August. The Request for Tender in New South Wales and Tasmania will be released on 28 January 2006. See The Attorney General, above n 2.

within the legal system.

This paper will be divided into three parts. Part One will discuss the evolution of ATSILS as a poverty law practice and Part Two will analyse the likely impacts of privatisation. Part Three will consider the systemic causes behind Indigenous disadvantage in the criminal justice system. It will be argued that the tendering process is merely a smokescreen for the Commonwealth's failure to respond appropriately to such disadvantage.

Part One: Historical Background

Since the earliest days of the invasion, police have been the vessels of colonial violence. The native mounted police slaughtered Indigenous communities, paving the way for European expansion. Throughout the twentieth century police protectors exercised despotic control over Aboriginal wards. So it is unsurprising that the ATSILS movement was born out of a strong desire by black people to build for their communities a sanctuary from police brutality.

The first ATSILS was founded in Redfern in 1970 largely in response to a police curfew enforced against Indigenous people. Its inaugural President, Hal Wootten, described the curfew in 1974:

> The simple position was that any Aboriginal who was on the streets of Redfern at a quarter past ten was simply put into the 'Paddy wagon' and taken to the station and charged with drunkenness, and that was something that was just literally applied to every Aboriginal walking along the street, irrespective of any sign of drunkenness in his behaviour.[6]

The establishment of the New South Wales Aboriginal Legal Service fertilised the growth of a national movement. The South Australian Aboriginal Legal Rights Movement was formed in 1971, closely followed by the Aboriginal and Torres Strait Islanders Legal Service (Queensland) and the Victorian Aboriginal Legal Service in 1972.[7]

With incredible resourcefulness Indigenous communities built their organisations largely in the absence of government funding. By way of example, the New South Wales Aboriginal

[6] Garth Nettheim, *Aborigines, Human Rights and the Law* (1974) 60.
[7] Ibid 181-182.

Legal Service did not receive its first federal grant until April 1971.[8] Consequently, representation depended upon the ability of activists to forge links with the legal profession.

It is beyond the scope of this paper to provide a comprehensive history of the ATSILS movement. Rather, this paper will discuss three unique functions performed by ATSILS, namely, an inclusive socio-legal service, an agent for law reform and a shield against police violence.

An Inclusive Socio-Legal Service

The early success of ATSILS hinged on its relevance and acceptability to Indigenous people. This necessitated a holistic service, comprising not only legal representation but also community survival programs.

For example, in 1972 the Aboriginal and Torres Strait Islanders' Legal Service (Queensland) collaborated with the University of Queensland to offer the services of social work students to Indigenous clients.[9] At the same time the Victorian Aboriginal Legal Service established an adoption agency,[10] several years before the emergence of the Aboriginal Child Placement Principle.

The House of Representatives Standing Committee on Aboriginal Affairs vindicated their comprehensive approach in 1980. In its Report on Aboriginal Legal Aid (the 'Ruddock Report') the Committee observed that:

> One of the major strengths of the Aboriginal legal services has been their ability to contribute to community development … If the Aboriginal legal services were subsumed under a wider community legal service, this partisan commitment would be lost.[11]

The involvement of Indigenous people in both management and service delivery was critical to ATSILS' acceptability to black communities. In New South Wales effective control was vested in its State Council with an Aboriginal majority in 1974.[12] Among the first salaried

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[8] Charles Potter, 'Poverty Law Practice: The Aboriginal Legal Service in New South Wales' (1974) 7(2) *Sydney Law Review* 237, 238.
[9] Jill Brown, *Aboriginals and Islanders in Brisbane* (1974) 90.
[10] Phil Slade, 'The ALS – Funding and Guidelines' (1976) *Legal Service Bulletin* 144, 145.
[11] House of Representatives Standing Committee on Aboriginal Affairs, *Aboriginal Legal Aid* (1980) 32.
[12] Potter, above n 8, 245.

employees of ATSILS were Aboriginal field officers and secretaries.[13]

The significance of Indigenous agency was also acknowledged in the Ruddock Report:

> The Committee strongly believes the successful operation of Aboriginal legal services depends largely on the extent to which Aboriginal groups and individuals within each service's jurisdiction are represented in the management of the service. This principle is fundamental to the successful delivery of any service to Aboriginals and the premise upon which the Government's policy of self-determination is based.[14]

An Agent for Law Reform

Over the past thirty years ATSILS has been a fearless campaigner for law reform. An example of the bravery of those in the trenches is the resistance of the Aboriginal and Torres Strait Islanders Legal Service (Queensland) against the former Bjelke-Petersen Government.

The Bjelke-Petersen regime can be fairly characterised as the most tyrannical Australian Government in living memory.[15] It condemned Aboriginal families on reserves to abject poverty and ruled their lives with an iron fist. Whenever black communities sought a lifeline from the Fraser Government they were consistently sacrificed in the interests of maintaining harmony within the Federal Coalition.[16]

In 1977 the archaic *Aborigines Act 1971* (Qld) was subject to review, prompting the Aboriginal and Torres Strait Islanders Legal Service (Queensland) to conduct a far-reaching survey of 1800 Indigenous people.[17] Predictably, the vast majority of participants called for the relinquishment of State control over Aboriginal reserves.[18] The breadth of the survey is remarkable in light of the political environment - one fraught with unrestrained police intimidation to be exposed several years later by the Fitzgerald Inquiry.

ATSILS also laid the groundwork for Commissions of Inquiry whose impacts traveled

[13] Nettheim, above n 6, 60.
[14] House of Representatives Standing Committee on Aboriginal Affairs, above n 10, 136.
[15] For a detailed analysis of the history of Queensland Indigenous affairs policy see Ros Kidd, *The Way We Civilise* (1997).
[16] See the discussion on Aurukun and Mornington Island in Lorna Lippmann, *Generations of Resistance: The Aboriginal Struggle for Justice* (1981) 84-89.
[17] The survey was undertaken in conjunction with another Indigenous organisation, FAIRA. See Garth Nettheim, *Victims of the Law: Black Queenslanders Today* (1981) 21.
[18] Ibid 22.

beyond the legal system, to confront the national ethos. As early as 1975 the Victorian Aboriginal Legal Service drafted a petition calling for a Royal Commission of Inquiry into relationships between Aboriginal people and police.[19] It was not until a decade later that such calls were finally heeded by the Commonwealth with the Royal Commission into Aboriginal Deaths in Custody ('RCIADIC').

Likewise, the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families was preceded by the crucial work of the Aboriginal Legal Service of Western Australia. In *Telling Our Story* the Service drew from the accounts of 600 Aboriginal people, in a poignant indictment against Western Australian child removal policies.[20]

Throughout the 1990s ATSILS was at the front line of repressive sentencing regimes. In particular, the Northern Australian Aboriginal Legal Aid Service ('NAALAS') campaigned strongly against the Northern Territory's mandatory sentencing laws.

When the Northern Territory's Chief Magistrate resigned in the face of the controversy, NAALAS challenged the appointment of his successor, arguing that its fixed term duration compromised the independence of the office.[21] Although the plaintiff's arguments were ultimately unsuccessful, the case illustrates the political edge of the ATSILS movement, one that is unparalleled by its mainstream counterparts.

A Shield against Police Violence

Since its inception ATSILS has frequently played the role of watchdog over the police, often being a lone voice in attempting to hold officers accountable for racist violence. In this enterprise ATSILS has drawn on a combination of legal prowess and community ingenuity.

From an early stage ATSILS attempted to use civil litigation to counteract police abuse. The aforementioned Ruddock Report referred to cases brought by the Central Australian Aboriginal Legal Aid Service on behalf of clients who were allegedly assaulted by police officers.[22] While unsuccessful the Committee observed that, 'police procedures came in for severe criticism and the cases constituted a warning to police officers of the risk of such

[19] Lippmann, above n 16, 164.
[20] Aboriginal Legal Service of Western Australia, *Telling Our Story* (1995).
[21] *Northern Australian Aboriginal Legal Aid Service v Bradley* [2001] FCA 1728.
[22] House of Representatives Standing Committee on Aboriginal Affairs, above n 11, 79.

proceedings for improper conduct.'[23]

Due to its strong community links ATSILS has been able to respond promptly to crises rooted in police violence. Following the tragic death of eighteen-year old Daniel Yock in police custody in 1993, the Brisbane Aboriginal Legal Service provided immediate support to the young man's family and played a pivotal role in the inquiry into his death.[24]

The Service also provided support to the young complainants in what has become known as the 'Pinkenba case', a role ordinarily played by the Office of the Director of Public Prosecutions. When the Magistrate declined to commit the six police officers on charges of unlawfully depriving the children of their liberty, the Service sought judicial review of his decision.[25]

Arguably, the need for the watchdog role of ATSILS today has not diminished. This was brought into stark relief by recent events in the Northern Territory.

In February this year NAALAS lodged complaints with the Northern Territory Commissioner of Police and the Ombudsman, in response to the transportation of four youths for over 1000 kilometres in the back of a police van.[26] According to NAALAS the children were denied food, blankets and access to toilets.[27]

Part Two: The Impacts of Privatisation

Background

Just as history can elucidate the worth of grass roots initiatives, it can also explain the philosophy behind the Howard Government's approach to ATSILS. The current proposal is not a new design but one rooted in the incessant refusal of the Commonwealth to adequately resource ATSILS.

While the McMahon Government was the first to recognise the role of ATSILS, it was not until the election of Whitlam that significant monies were injected. Brimming with optimism

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[23] Ibid.
[24] Sam Watson, 'Turning Points', *The Age* (Melbourne), 19 November 1994, 3-4.
[25] *Purcell & Ors v Quinlan & Anor* [1996] QSC 10.
[26] ABC News, *Police Criticised over Caged Transportation of Youths*, 25 February 2005, <www.abc.net.au>.
[27] Ibid.

the new Government pledged to fund representation for all Aboriginal people in all courts,[28] opening Pandora's box.

From 1970 to 1973 the Commonwealth's annual expenditure on Aboriginal legal aid flourished, from a meager $44,000 to $1, 478,000.[29] Despite the generous boost however, ATSILS was insufficiently resourced to respond to the groundswell in demand. Indigenous people who had never before accessed legal representation were now availing themselves of ATSILS' services en masse, sparking panic in the Department of Aboriginal Affairs ('DAA').

In 1973 and 1975 officers from the DAA attempted to transfer responsibility for Indigenous legal aid to the Australian Legal Aid Office.[30] The Department retreated in the face of heated opposition from ATSILS. Such threats intensified after Fraser snatched power in 1975.

In May 1976 the DAA issued a directive providing that:

> The previous Government's commitment to pay the cost of representation for all Aboriginals in all Courts is no longer operative.[31]

The Department's 'New Draft Guidelines' allocated funding for a specialist service that would only fill gaps left by other legal aid providers.[32] Under the Guidelines ATSILS was to be precluded from engaging in 'ancillary activities arising out of their operations such as general welfare'.[33]

Some commentators predicted the end of ATSILS.[34] Although ATSILS endured it emerged from the Fraser era a shadow of its former self. From 1976 to 1979 funding to ATSILS shrunk by 37.4 percent.[35]

The Hawke years, albeit not as miserly, were characterised by a lack lustre commitment. While funding to ATSILS from 1981 to 1990 rose by 34.7 percent, this paled in comparison to increases to Legal Aid Commissions ('LAC') of 69.9 percent and

[28] Andrew Collett and Elliott McAdam, 'Aborigines and the law: an overview' (1976) 2(4) *Legal Service Bulletin* 99.
[29] Lippmann, above n 16, 83.
[30] Collett and McAdam, above n 27.
[31] Phil Slade, 'The ALS: funding and guidelines' (1976) *Legal Service Bulletin* 144.
[32] Ibid.
[33] Ibid 145.
[34] Ibid.
[35] Lippmann, above n 16, 157.

Community Legal Centres ('CLC') of 243.4 percent.[36]

The resource asphyxiation has continued under the Howard Government. In 2003, the Office of Evaluation and Audit calculated the shortfall in ATSILS funding by costing their outputs at the rates paid by LACs to private practitioners. The overall shortfall was $25, 605, 598.[37]

The discrepancy in Commonwealth support goes beyond relative budgets. Whereas agreements between the Commonwealth and LACs span over periods of four and a half years,[38] grants to ATSILS have always been of a far shorter duration. In 2003 annual funding was cut to six monthly cycles, in anticipation of the tendering process.

Last year the NAALAS articulated the impacts of such brief funding cycles:

> The six-monthly reporting conditions are very onerous. The fact that we only get six-monthly releases has prevented us from doing some things. For instance, our cars are over three years old. Normally we would go into another lease arrangement, but we cannot go into anything that is long term at the moment. This has been the third six-monthly release that we have had so far and, as I say, in terms of being able to operate effectively it has been very onerous. Most of our bills for insurance and things like that come in the first six months, so we are struggling at the end of the six months to make our payments. The other thing is that our funding was three weeks late this financial year, so we were not sure how we were going to pay wages. We actually stopped paying creditors' bills for a week in order to pay the wages, and then the money from ATSIC came through. We are subjected to a lot of those small things.[39]

However, when it comes to emulating Montgomery Burns, arguably the States and Territories surpass the Commonwealth. By dismissing Indigenous Affairs as a Commonwealth responsibility, they have avoided contributing funds to ATSILS.[40] Their position smacks of hypocrisy for two reasons.

Firstly, it is inconsistent with the relatively generous funding provided to LACs by both tiers of government. For example, the New South Wales Legal Aid Commission receives 70

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[36] Royal Commission into Aboriginal Deaths in Custody, *National Report*, vol 13 (1991) [22.4.54], www.austlii.edu.au.
[37] Office of Evaluation and Audit, Aboriginal and Torres Strait Islander Commission, *Evaluation of the Legal and Preventative Services Program* (2003) 45.
[38] *Legal Aid Queensland*, Annual Report 2003-2004 (2004) 3.
[39] Commonwealth, Joint Committee of Public Accounts and Audit, *Access of Indigenous Australians to Law and Justice Services*, Report No 403 (2005) [6.48].
[40] Ibid 60.

percent of its funds from the state and public purse, and only 30 percent from the Commonwealth.[41]

The huge gulf between government support for LACs and ATSILS was illustrated by NAALAS in its submission to the *Inquiry into Access of Indigenous Australians to Law and Justice Services*:

> NAALAS received $2.25m and dealt with over 3,000 matters in the 2002-2003 financial year, while the NT Legal Aid Commission received over $4m for around 1,100 matters. This did not include the funding from the Commonwealth for family law matters.[42]

The second reason is drawn from the reality that ATSILS' work largely comprises defending clients charged with criminal offences under State and Territory laws. At the very least, those governments have a moral responsibility to contribute towards the costs of administering their own legislation. This argument is brought into stark relief when one considers that the number of criminal cases dealt with by ATSILS increased by 67 percent between 1997 and 2003.[43]

Arguably, Premiers can palm off responsibility to fund the impacts of their law and order campaigns because the Commonwealth allows them to, through its failure to exercise leadership. Despite strong arguments in favour of State and Territory contributions to ATSILS funding, the Commonwealth is yet to make an approach.[44]

In June this year the Commonwealth Joint Committee of Public Accounts and Audit in its report, *Access of Indigenous Australians to Law and Justice*, made the following recommendation:

> That the Attorney-General raise the matter of Commonwealth and state/territory funding for providers of services currently delivered by Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Services with his state and territory counterparts with a view to gaining some level of state/territory contribution for these services.[45]

Only time will tell if the Commonwealth takes heed of the Committee's well-considered advice or dispenses it into the time-honored waste bin in which RCIADIC and *Bringing*

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[41] Ibid [5.7].
[42] Ibid [4.16].
[43] Ibid [2.2].
[44] Ibid [5.13].
[45] Ibid [5.93].

Them Home already languish.

The Aftermath of Long Term Neglect

After surviving a tumultuous childhood, ATSILS is now a scarred adult. The consequences for those within the Indigenous movement and their communities have been profound.

In the main ATSILS employees are underpaid, overworked and ill equipped. The disparity between the salaries paid to ATSILS staff and those employed by LACs has been estimated to be as high as 30 percent.[46] Low levels of remuneration prompted lawyers employed by the Victorian Aboriginal Legal Service to take the desperate measure of going on strike in 2001.[47]

Deflated morale has been aggravated by grueling conditions. In its 2003 report, the Office of Evaluation and Audit found that ATSILS lawyers worked longer hours than their LAC counterparts,[48] spent less time preparing their cases and more time traveling and appearing in Court.[49]

In the course of the above-mentioned inquiry, the Joint Committee of Public Accounts and Audit received evidence of ATSILS' inability to attract and retain expert staff. In the case of one organisation, nine out of thirteen solicitors were replaced in a single year.[50]

By the early 1990s some Indigenous people were voicing concerns about the quality of services delivered by particular organisations. For example, the RCIADIC received complaints about ATSILS' alleged poor communication with their constituents and neglect of community legal education.[51]

ATSILS has continued to attract criticism of poor service in recent years. Only half of the clients surveyed by the Office of Evaluation and Audit said that ATSILS' lawyers kept them

[46] Commonwealth, *Senate Legal and Constitutional References Committee Report on Legal Aid and Access to Justice* (2004) 78.
[47] John Boersig, 'Wage disparity between Indigenous and Non-Indigenous legal service providers' (2001) 5(13) *Indigenous Law Bulletin* 20.
[48] Office of Evaluation and Audit, above n 37, 71.
[49] Ibid 72.
[50] Commonwealth, Joint Committee of Public Accounts and Audit, above n 42, [4.4].
[51] Royal Commission into Aboriginal Deaths in Custody, above n 36, [22.4.58].

informed of the progress of their case.[52]

Throughout the 1990s allegations of financial impropriety were made against a number of ATSILS.[53] Some also exercised poor judgment in their litigation strategies. For example, the New South Wales ALS pursued the now notorious *Brandy* case, rendering Commonwealth anti-discrimination legislation unenforceable.[54]

ATSILS' focus on criminal representation has exacerbated the marginalisation of Indigenous women in the legal system. In 1990 a report produced for the Criminology Research Council and the Northern Territory Commissioner of Police was critical of ATSILS for protecting male perpetrators at the expense of female victims.[55]

Similar accusations were leveled at NAALAS in 2002, when it represented a man charged with having unlawful carnal knowledge of his fifteen year old 'promised' wife.[56] One of the arguments advanced by NAALAS in the appeal was for the recognition of Aboriginal customary law as a mitigating factor in sentencing.[57]

As this paper aims to critique the tendering process, it is beyond its scope to analyse the above criticisms of ATSILS. However, the writer argues strongly that Indigenous communities, as opposed to the Commonwealth, should have determined the fate of ATSILS. In the absence of consultation the Howard Government deprived us of that decision making power, by opening up Indigenous legal aid services to tender.

The Request for Tender

After navigating the storms of Whitlam's lack of foresight and Fraser's bah humbug economics ATSILS is now in the clutches of its deadliest foe yet. Its tradition as a poverty law practice is unlikely to survive.

According to the Commonwealth the quality and efficiency of Indigenous legal aid services will be enhanced through exposure to competition. In the words of the Minister for

[52] Office of Evaluation and Audit, above n 37, 63.
[53] Moira Rayner, 'Down By Law' (1996) 6(4) *Eureka* 20.
[54] *Brandy v Human Rights and Equal opportunity Commission* [1995] HCA 10.
[55] Audrey Bolger, *Aboriginal Women and Violence* (1990).
[56] See Gerard Bryant, 'Promised Marriages – The Jackie Pascoe Case' (2003) 5(23) *Indigenous Law Bulletin* 20.
[57] Ibid.

Indigenous Affairs, Senator Vanstone:

> The bottom line is when you tender, when you put people to competition you find out who can deliver the best services … That's what we want to do, not give people money because of who they are but give people money because of the services that they can deliver to Indigenous Australians on the ground.[58]

On the surface there is nothing objectionable about the Commonwealth's professed desire for legal representation that is of a high caliber. However, the potential harm to our communities springs not from the Minister's superficial press release, but rather the fine print of the Request For Tender ('RFT').

The selection criteria within the RFT are critical to any discussion about the future of Indigenous legal aid because they define the scope of the contractual obligations of the successful tenderers. The four selection criteria are:

- Demonstrated capacity to deliver high-quality and efficient legal aid services in accordance with applicable professional and ethical standards;
- Capacity to provide an accessible and culturally sensitive legal service to Indigenous Australians;
- Capacity to achieve the priorities set out in the Policy Directions; and
- Co-operation and relationships with other service providers.[59]

The 'Policy Directions' confine future services to information and referral, duty lawyer assistance and legal casework covering criminal, civil and family law.[60]

The omission of any reference in the selection criteria to ATSILS' historical role in community development means that the successful tenderers will be under no obligation to fulfill it. This is confirmed by the stipulation that 'services such as preventative, information and education services and input on law reform and law related issues are not part of the tender proposal.'[61]

The possible loss of ATSILS' participation in community development ignores the multiple dimensions of its work. In a submission to the Joint Committee of Public Accounts and Audit, the Victorian Aboriginal Legal Service listed the duties of its field officers as

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[58] ABC Online, *Boycott hits Vanstone's Aboriginal legal tender*, 1 April 2004, < www.abc.net.au>.
[59] Commonwealth, Attorney General's Department, *Purchasing Arrangements Request for Tender No 04/29 for the Provision of Legal Aid Services to Indigenous Australians in Victoria and Western Australia* (2004) 52-56.
[60] Ibid 70.
[61] Ibid 9.

including community and police liaison, drug and alcohol rehabilitation, court support, education and prevention.[62] These functions are not luxuries but crucial to the welfare of our communities.

The abandonment of ancillary services also flies in the face of the Ruddock Report that acknowledged the importance of a holistic approach:

> Because the legal services are essentially poverty law practices, they inevitably encounter welfare-related problems. It is important that when Aboriginal clients are in crisis situations, as is often the case, they have immediate access to assistance with extra-legal problems which are generally inextricable from and closely related to their needs for legal advice and assistance. The Committee believes it is a proper function of Aboriginal legal services to provide advice and assistance in welfare matters where these matters arise from related legal problems… [63]

It is arguable that concerns about the loss of participation in community development are groundless because the successful tenderers thus far are established Aboriginal Legal Services. However, it must be remembered that those community organisations are now contractually bound to operate within the four corners of the Policy Directions.

Equitable Access to Mainstream Services

Implicit in the Policy Directions is the philosophy that mainstream agencies are accessible to Indigenous people. For example, the Policy Directions proscribe assistance where:

(a) the applicant is likely to be able to resolve the matter with assistance available to the applicant from another agency (eg. Consumer Affairs; Ombudsman);

(b) a resolution is likely through a simple procedure and the applicant is reasonably able to pursue the claim or matter without legal casework assistance from the Provider (eg Small Claims Court or similar; Child Support Officer Review procedure; Social Security reviews including appeals to the Social Security Appeals Tribunal);

(c) expert assistance is available to, and readily accessible by, the applicant, so that the Provider is not the most appropriate service provider (eg Disability Discrimination Service, Welfare Rights Service; Credit Law Service; Tenancy Service etc).[64]

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[62] Victorian Aboriginal Legal Service Cooperative Ltd and National Aboriginal and Torres Strait Islanders Legal Services Secretariat, *Submission to the Joint Committee of Public Accounts and Audit Indigenous Law and Justice Inquiry* (2004).
[63] House of Representatives Standing Committee on Aboriginal Affairs, above n 14, 114.
[64] Ibid 65-66.

In reality however, most Indigenous people are not 'reasonably able' to pursue legal claims without the assistance of ATSILS. This is evidenced by our limited participation in social security review procedures.

It has been reported that Indigenous people incur Centrelink breach penalties at a rate of 1.5 times that of non-Indigenous recipients of Centrelink payments.[65] Under the *Social Security (Administration) Act 1999* (Cth) individuals subject to breach penalties are entitled to seek redress from the Social Security Appeals Tribunal. Despite high rates of breaches, only 1.058 percent of those who lodged appeals with the Tribunal last year identified as being Indigenous.[66]

This trend is mirrored by Indigenous people's limited use of mainstream legal aid services. From 2000 to 2001 LACs handled only 11 percent of all Indigenous legal aid cases.[67] While LACs have made inroads in recent years their failure to recruit Indigenous staff is likely to remain an obstacle to equitable access. Only two percent of those employed by LACs identify as being Indigenous.[68]

The Commonwealth Grants Commission in its *Report on Indigenous Funding* acknowledged that Indigenous communities did not easily access mainstream agencies.[69] The Commission concluded that:

> The Mainstream programs provided by the Commonwealth do not adequately meet the needs of Indigenous people because of barriers to access. These barriers include the way programs are designed, how they are funded, how they are presented and their cost to users. In remote areas, there are additional barriers to access arising from the lack of services and long distances necessary to access those that do exist. The inequities resulting from the low level of access to mainstream programs are compounded by the high levels of disadvantage experienced by Indigenous people.[70]

While the Commission did not study legal services,[71] it is arguable that the above

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[65] Will Sanders, *Unemployment Payments, the Activity Test and Indigenous Australians: Understanding Breach Rates*, Centre for Aboriginal Economic Policy Research Monograph No 15 (1999) ix.
[66] Communication received from Paul Corrigan of the Social Security Appeals Tribunal, email (2 May 2005) indicated that 98 applicants identified as being Indigenous, representing 1.058 percent of appeals lodged up to 30 June 2004.
[67] Office of Evaluation and Audit, above n 36, 112.
[68] Ibid 95.
[69] Commonwealth Grants Commission, *Report on Indigenous Funding* (2001).
[70] Ibid xvi.
[71] The key functional areas were housing and infrastructure, employment and training, health and education.

observations are equally applicable to mainstream legal aid providers. However, rather than taking heed of objective policy advice based on research, the Commonwealth clings to its simplistic ideology that competition is a magical panacea.

The Dilution of Indigenous Participation

Apart from stripping Indigenous legal aid services of their historical role in community development, competition has the potential to cleanse them of black agency. It is possible that in future successful tenderers could be private firms, whose management will be largely contained from Indigenous people.

The Policy Directions in the RFT prescribe Service Standards, against which each provider's performance will be assessed. Among the various attributes illustrating the Standard for Organisational Management is the promotion of Indigenous community involvement in the management of the service.[72] However, given that 'the detail is in the hands'[73] of the provider, there is no yardstick for determining what this attribute will mean in practice.

The only concrete obligation on providers to engage with Indigenous communities is in the form of annual client surveys, containing questions such as, 'How easy was it for you to get to the centre?'[74] The Attorney General's Department also plans to conduct client satisfaction surveys every two years.[75] Such piecemeal gestures are hardly an adequate replacement for Indigenous control.

It is also possible that current levels of Indigenous employment in ATSILS could shrink. Currently, 56 percent of those employed by ATSILS are Indigenous people.[76] This could change dramatically if a successful tenderer was a private firm because there is no requirement in the RFT for providers to employ Indigenous staff.

Tenderers are obliged to demonstrate how their organisations will 'deliver an accessible and culturally sensitive service'.[77] The Standard for Accessibility and Cultural Sensitivity also

[72] Commonwealth, Attorney General's Department, above n 59, 100.
[73] Ibid.
[74] Ibid 133.
[75] Ibid 90.
[76] Office of Evaluation and Audit, above n 36, 95.
[77] Commonwealth, Attorney General's Department, above n 59, 54.

anticipates cultural awareness training for staff.[78] However, both are a far cry from any obligation to recruit the black field officers who are often the crucial link between Indigenous clients and non-Indigenous lawyers.

It is doubtful that private practitioners would have any real grasp of the potential barriers to effective communication between Indigenous clients and their solicitors.
This was evidenced in the report of the Office of Evaluation and Audit, which found that 90 percent of private practitioners performing legal aid work received no training on Indigenous issues within the two-year period prior to being surveyed.[79]

Such practitioners were also far less likely to seek help when experiencing communication difficulties with Indigenous clients. Of those who did seek help, the overwhelming majority approached staff from ATSILS.[80]

The importance of Indigenous paralegal staff was recently affirmed by the Joint Committee of Public Accounts and Audit, in its recommendation that:

> … in awarding tender bids, the Attorney-General's Department ensure that the current levels of paralegal community legal workers employed by Aboriginal and Torres Strait Islander Legal Services is not diminished.[81]

The Impossibility of Improved Services

As one sifts below Senator Vanstone's rhetoric the inescapable conclusion is that the new arrangements will not result in a superior service. This inference gathers force when one considers the reality that the level of funding will remain static. In 2002 – 2003 Commonwealth funding for Indigenous Legal Aid was in the amount of $42.622 million.[82] Thus far the Minister has pledged only $120 million over three years.[83]

In states where established Aboriginal Legal Services have been the successful tenderers they will be forced to continue to spread the oil on the proverbial rag. Should other successful tenderers be private firms one can only imagine the kinds of shortcuts made in

[78] Ibid 96.
[79] Office of Evaluation and Audit, above n 36, 72.
[80] Ibid 76.
[81] Commonwealth, Joint Committee of Public Accounts and Audit, above n 42, xx.
[82] Ibid [1.13].
[83] ABC Online, *Indigenous Committee critical of Vanstone Meeting*, 27 April 2004, <www.abc.net.au>.

order to generate a profit, at the expense of Indigenous communities. Those predicting dire consequences are not confined to the ATSILS movement, but include the Law Council of Australia[84] and the New South Wales Director of Public Prosecutions, Nicholas Cowdery.[85]

Part Three: The Systemic Causes of Indigenous Disadvantage in the Criminal Justice System

While the Commonwealth stubbornly pursues competitive tendering in spite of almost universal opposition, it deflects attention from the underlying causes of high rates of imprisonment of Indigenous people. It is beyond the scope of this paper to provide a comprehensive analysis of the sources of such acute disadvantage. However, it is arguable that the Howard Government has exacerbated the discriminatory impacts of the criminal justice system through its willful neglect of the recommendations of RCIADIC.

The Royal Commission into Aboriginal Deaths in Custody

The RCIADIC was established in 1989 to investigate the deaths of 99 Indigenous people in police custody and corrective institutions. When the Inquiry delivered its final report in 1991 it did not find any grounds for criminal liability arising from the deaths. What emerged however was a watershed in exposing the intersection between Aboriginality and the criminal justice system.

A critical finding of the RCIADIC was that:

> Aboriginal people in custody do not die at a greater rate than non-Aboriginal people in custody. However, what is overwhelmingly different is the rate at which Aboriginal people come into custody, compared with the rate of the general community.[86]

Behind the chronic over-representation of Indigenous people was socio-economic deprivation:

> …the more fundamental causes for the over-representation of Aboriginal people in custody are not to be found in the criminal justice system but in those factors which bring Aboriginal people into conflict with the criminal justice system in the first place. The view propounded by this report is

[84] Law Council of Australia, *Submission to the Law and Justice Inquiry* (2004).
[85] Emma Alberic, 'Indigenous legal service tender lacks support', *The 7:30 Report*, 25 May 2004, <www.abc.net.au>.
[86] Royal Commission into Aboriginal Deaths in Custody, *National Report – Overview and Recommendations* (1991) 6.

> that the most significant contributing factor is the disadvantaged and unequal position in which Aboriginal people find themselves in the society – socially, economically and culturally.[87]

The Inquiry prescribed a three-pronged approach for the recovery of Indigenous communities: willingness on the part of Aboriginal people to take control of their lives; assistance from the State and the policy of self-determination.[88]

The centerpiece of the recommendations designed to divert Indigenous people from custody was 87(a) that obliged police to adopt the principle of arrest being the sanction of last resort, and 92 that heralded its enshrinement in legislation. The Inquiry also called for guidelines to ensure that self-determination infused the design and implementation of Indigenous programs.[89] Self-determination was to be buttressed by block grant funding to Indigenous organisations, provided on at least a triennial basis.[90]

Commonwealth Indifference to RCIADIC

Implementation of the Commission's recommendations was always going to hinge upon the Commonwealth's willingness to assert a leadership role. Just like its failure to approach the States and Territories for contributions to ATSILS funding, the Howard Government has consistently disavowed any such responsibility.

During the 1996 election the Coalition pledged to convene a summit with State and Territory Ministers for the purpose of developing a coordinated approach to implementation of the RCIADIC recommendations.[91] The pledge was eventually realised in July 1997 with the Ministerial Summit on Indigenous Deaths in Custody.

At the Summit the former Minister for Aboriginal and Torres Strait Islander Affairs, John Herron, brazenly renounced any role for the Commonwealth in reform of the criminal justice system.[92] Such reverence for State autonomy is incongruous with the Commonwealth's apparent willingness to intervene in matters such as euthanasia and abortion. Arguably, the lack of political currency in young black lives was the primary

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[87] Ibid 15.
[88] Ibid 16-19.
[89] Recommendation 188.
[90] Recommendation 190.
[91] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Fifth Report* (1997) 140.
[92] Ibid 150.

reason for its abdication of responsibility.

In the end the summit produced a brief document; the 'Outcomes Statement', containing a bare commitment to the development of strategic plans for the coordination of Commonwealth, State and Territory programs.[93] Several Indigenous representatives, including the former Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Dodson, declined to sign it.[94]

In his 1997 Report, Dodson vented his frustration with the vacuous Outcomes Statement:

> If it takes 15 months to organise a one-day national meeting of key stakeholders and sit everyone at the table to talk about the problem, how long will it take to develop comprehensive, effective strategies targeted to solid outcomes with known deadlines? In the meantime over-representation, particularly among young Indigenous people, will spiral toward the worst case scenario…[95]

Tragically, the Commissioner's prophesy finds resonance in today's grossly inflated rates of incarceration of Indigenous people. In 2003 Dodson's successor, Bill Jonas, reported that since 1997 Indigenous juveniles have consistently comprised 42 percent of all juveniles in detention.[96] Perhaps even more horrifying was the revelation that since the RCIADIC delivered its report, the Indigenous female prison population rose by 262 percent.[97]

It would be a grave injustice to Indigenous communities to explain the causes of such statistics solely in terms of simplistic rhetoric as distinct from rigorous analysis. Nonetheless, it is beyond dispute that such developments have occurred in tandem with increasingly oppressive State and Territory laws that are anathema to key RCIADIC recommendations.

It is also beyond dispute that such flouting of the RCIADIC recommendations has occurred with the tacit collusion of the Commonwealth. By way of example, the Commonwealth was conspicuously silent when the Northern Territory's notorious mandatory sentencing regime delivered terms of imprisonment for petty crimes, such as the theft of towels and cigarette

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[93] Ibid 153.
[94] Ibid 151.
[95] Ibid.
[96] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report* (2003) 221.
[97] Ibid 220.

lighters.[98] Following widespread condemnation the Prime Minister was finally moved to describe the draconian laws as 'silly'.[99]

Commonwealth apathy was manifest not only in its refusal to exercise leadership, but also in the willful dereliction of recommendations that were directly within its power to implement. Of particular relevance to this paper was recommendation 105 that obliged governments to recognise that in providing funding to ATSILS, the role of ATSILS extends beyond legal advice, to investigation and research into law reform.

Conclusion

Being born into the Brisbane Murri community at the height of Bjelke-Petersen's reign of terror, ATSILS left an indelible impression on me. Like many other young Indigenous people, my father participated in the 'pig patrols'. While my brother and I slept, Dad was helping to smash the outrageous police quota on black arrests.

The history of the ATSILS movement is filled with David and Goliath battles and precious moments of sanctuary from the blunt instruments of the law. However, despite the incredible bravery of those in the trenches, ATSILS is not infallible.

The fact that half of the clients surveyed by the Office of Evaluation and Audit complained of a failure by ATSILS to keep them informed of the progress of their cases is testament to widespread dysfunction. The reality that Indigenous women are pushed to the margins by ATSILS' focus on criminal representation is inequitable.

Such complaints were reason for community debate, not privatisation. In one foul swoop the Howard Government robbed us of the right to determine ATSILS' future, replacing it with a system that will neutralize Indigenous legal aid services of their life force – community initiative.

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[98] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report* (1999) 148.
[99] Alexandra Kirk, 'PM talks mandatory sentencing with NT Chief Minister' *ABC Online*, 10 April 2000, <www.abc.net.au>.

Through its willful neglect of RCIADIC and its failure to bat for ATSILS' right to contributions from the States and Territories, the Commonwealth has demonstrated its apathy to Indigenous disadvantage in the criminal justice system. Rhetoric unsupported by research is not only far more palatable it's achievable in one term of office.

Flimsy rhetoric is also easy to unravel. Behind the mantra that competition will enhance service delivery is an assimilation ideology that is just as brutal as Bjelke-Petersen's. The Howard Government wants to deprive us of ATSILS' greatest attribute - its black political voice. It is a voice that survived McMahon, Whitlam, Fraser, Hawke and Keating. It must endure beyond Howard.