

Aboriginal Legal Aid Funding: Discriminatory Policy or a Failure of Federalism?

By Jane Robbins.

The ALRM Complaint to the UN

In September 2008, the Aboriginal Legal Rights Movement ('ALRM'), the contracted Aboriginal Legal Aid service provider in South Australia ('SA'), submitted a complaint to both the UN Committee on the Elimination of Racial Discrimination and to the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, James Anaya. The substance of ALRM's submission is that inadequate funding of Aboriginal legal aid services by State Government and Commonwealth Government is discriminatory in effect, and constitutes a breach of Article 2 of the *International Convention on the Elimination of All Forms of Racial Discrimination* ('CERD').

The complaint makes a case that Government funding for ALRM's Aboriginal legal aid services is inadequate. It also emphasises the differential treatment by State and Federal Government of Aboriginal and Torres Strait Islander Legal Services ('ATSILS'), such as ALRM, compared to Legal Aid Commissions ('LACs'), which provide mainstream legal aid services. Some of the main points made in the complaint are:

- Commonwealth Government funding for Aboriginal legal aid has been static since 1996. This amounts to a 40% loss of income to ALRM 40% in real terms;
- Over this period, the level of demand for ALRM services has increased by 100%;
- In the same period, funding for mainstream LACs has increased by 120%;
- The rate of imprisonment of Aboriginal people has continued to rise during this period;
- The SA Government does not contribute to ALRM funding; in contrast, it contributes funding to LAC services on a dollar for dollar basis;
- The inadequate funding provided to ALRM prevents it from fulfilling its mandate. Because ALRM cannot provide effective support to many clients, many Aboriginal people are denied equitable access to justice; and
- Unlike LAC services, ATSILS contracts have been tendered out.¹

ALRM is not alone in facing a funding crisis; this is a problem reported by ATSILS nation-wide. But neither State nor Federal Government can claim to be unaware of this situation. In recent years, several inquiries have examined these issues and concluded that the funding of ATSILS is a serious problem that must be addressed by Government.²

The Inadequacy of ATSILS Funding

The ability of ATSILS such as ALRM to provide effective legal support to Indigenous clients is a matter that is all the more urgent in the context of the disproportionate number of Indigenous people in the Australian criminal justice

system. In 2007, the Steering Committee for the Review of Government Service Provision published the following statistics:

- between 2000 and 2006 Indigenous imprisonment rates increased by 31.9%;
- between 2002 and 2006 the imprisonment rate increased by 34% for Indigenous women and by 21.6% for Indigenous men;
- in 2006, Indigenous people were 12.9 times more likely than non-Indigenous Australians to be imprisoned (age-adjusted).³

Research indicates that a higher percentage of Indigenous offenders are given custodial sentences compared with non-Indigenous offenders as a result of 'a higher rate of conviction for violent crime and higher rate of re-offending'.⁴ It has also been shown that ATSILS are 'the legal aid body of choice' for most Indigenous legal aid. In 2000-2001, 89% of Indigenous legal aid cases were taken on by ATSILS; only 11% were taken on by LACs.⁵ Under these circumstances, ATSILS face a situation where their resources are static, yet their client group is increasing in number. Further, ATSILS require support to provide services for a higher than average proportion of serious offences. Reflecting on this, Cunneen and Schwartz have commented that the 'significant lack of parity' between ATSILS and LAC funding has 'severe ramifications'.⁶

According to ALRM CEO, Neil Gillespie, insufficient resources directly impact upon ALRM operations. He refers to 'juniorisation' of staff, a practice of replacing senior staff with junior staff to cope with inadequate funding.⁷ This leads to a situation where the ALRM has few senior, experienced legal officers to deal with what are often quite serious cases. The notable disparity in employee salaries between ATSILS and LACs was reported by the Joint Committee of Public Accounts and Audit ('JCPA') in its 2005 Report *Access of Indigenous Australians to Law and Justice Services*.⁸ Similarly, the Australian National Audit Office reported in 2003 that

*there is a flow of staff from the ATSILS to the LACs because of substantial variation in pay rates.*⁹

It has been shown that, despite lower levels of pay, ATSILS lawyers have higher workloads.¹⁰ The lack of funding impacts on other areas of practice: in a 2003 submission to the Senate Legal and Constitutional References Committee, ALRM expressed concern about its capacity to 'offer adequate rates for private lawyers', revealing that it was only able to pay a fee 11% lower than paid by the Legal Services Commission.¹¹ This was seen as compromising ALRM's ability to provide a quality service to clients. The organisation is limited in its capacity to supplement its own legal expertise with that of private practitioners who are brought in for special purposes. This disparity in funding adds up to a situation where ATSILS 'provides a cheap form of legal representation for Indigenous people'.¹²

A Federal Dispute?

In the complaint to the UN, ALRM makes a strong case that the SA Government's failure to contribute funding is a major factor in its financial difficulties. According to Mr Gillespie, this is a federal dispute over funding responsibilities. The Commonwealth Government sees its role as that of a 'supplementary funder', with the main responsibility falling to state governments. This view was confirmed by the

Attorney General's submission to the JCPAA Inquiry in 2005.¹³ The SA State Government, on the other hand, provides funding for mainstream legal aid; it regards Aboriginal legal aid as a special program that rests in the Commonwealth's jurisdiction.¹⁴ Gillespie writes:

*This standoff or demarcation dispute is having a dramatic effect on Aboriginal people accessing justice in our State. I understand other State and Territory Governments are in the same position. This is effectively two Governments at loggerheads as to responsibility to Aboriginal people.*¹⁵

It is the distinction in treatment between Aboriginal and mainstream legal aid funding that forms one of the most pressing arguments in the ALRM claim of racial discrimination. The differential treatment carries over into other aspects of ALRM's relationship with the SA court system: while other legal aid providers are exempted from court filing and transcription fees, ALRM is required to pay these costs.¹⁶ This is so even though most of ALRM's work involves defending SA clients, in SA courts, regarding breaches of SA State law.¹⁷

The deleterious consequences of this federal tension for ATSILS are clear. This raises the question: what steps has the Commonwealth Government taken to negotiate a better outcome with state governments? As the Law Society of SA submitted to the JCPAA:

*It is hardly for the ATSILS or the Law Society to be doing these high-powered political manoeuvres as between the Commonwealth and states on what is essentially a federal issue.*¹⁸

According to the Attorney General's Department in 2005, the Commonwealth has not approached state governments on this matter.¹⁹

State/Commonwealth Responsibilities

How has this situation come about? Section 51(xxvi) of the Australian Constitution originally gave the Commonwealth parliament responsibility for making laws for:

[t]he people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws.

This meant that Aboriginal policy was an exclusive State power. As a consequence of the 1967 referendum, the words 'other than the aboriginal race in any State' were struck out. The success of the referendum meant that the only reference to Aboriginal people was deleted from the Australian Constitution; yet what is often referred to as the Commonwealth 'race power' was retained. Now, as a result, Indigenous affairs policy is a concurrent area of activity, requiring negotiations to take place to allocate responsibilities between State and Federal Government.

The Whitlam Labor Government of 1972-5 was the first to embark on a large-scale expansion of the Commonwealth's role in funding Aboriginal programs. The *Aboriginal Affairs (Arrangements with the States) Act 1973* authorised the Commonwealth to make an agreement on Aboriginal affairs with each State.²⁰ The agreement struck with the SA Government expressly preserved

*the existing right of the South Australian Government to implement measures to meet the special needs of the Aboriginal people in the ordinary course of the provision of services.*²¹

This provision was typical of the agreements negotiated with other states. However, in the Fraser era, an attempt was made to make the delineation of responsibilities more precise and to clarify states' financial responsibilities.²² It was agreed that state governments would provide ordinary services to Aboriginal people as they would for non-Aboriginal citizens of the state. The Commonwealth would provide for the 'special needs' of Aboriginal people in relation to 'the particular or severe disadvantage due to Aboriginality'.²³ This essentially vague allocation of responsibility that underlies the assertion that the Commonwealth is only expected to provide 'supplementary' funding for Aboriginal programs. This has always proved unsatisfactory as a working principle and the problem persists today. Despite the negotiation of many subsequent State/Commonwealth agreements, and a commitment from all levels of government to a *National Framework of Principles for Government Service Delivery to Indigenous Australians* in 2004,²⁴ tensions and ambiguities remain characteristic of the federal relationship on Aboriginal policy.

The Commonwealth Grant Commission considered the tensions inherent in areas of shared federal responsibility in its 2001 *Report on Indigenous Funding*. It argued that 'Australia's federal system of government blurs service delivery responsibility' and results in 'some responsibility and cost shifting between governments'.²⁵ A further point is directly pertinent to the case of Aboriginal legal aid funding:

*[t]he failure of mainstream programs to effectively address the needs of Indigenous people means that, in practice, Indigenous-specific programs are being expected to do more than they are designed and funded to achieve.*²⁶

Federal States and International Obligations

Australia's federal system of government poses some difficulty in relation to compliance with obligations under international instruments, notwithstanding the Commonwealth's unequivocal powers on external affairs in the Australian Constitution. It is the Commonwealth Government that is a signatory to international agreements and treaties, but this does not necessarily mean that it administers the relevant policy field domestically. In practice, the complex and multi-faceted relationships between Commonwealth, State and Territory Governments make the political dimensions of the federal relationship as important as the legal arrangements. The Commonwealth Government does not always have unambiguous control over a given policy issue.

ALRM's complaint to the UN regarding chronic under-funding is illustrative of this problem. Certainly, the Commonwealth Government's failure to index or increase ATSIL funding over the last decade is a matter that raises the question of its obligations under CERD. However, the Commonwealth has no direct control over State funding of Aboriginal legal aid services. States are not signatories to CERD in their own right – so can they be nominated in a complaint? Past decisions by the CERD Committee of the UN indicate that federal arrangements do not abrogate

responsibility for international obligations. In 2000 the Committee issued the following comment in relation to another question on Australia's obligations:

*The Committee reiterates its recommendation that the Commonwealth Government should undertake appropriate measures to ensure the consistent application of the provisions of the Convention, in accordance with article 27 of the Vienna Convention on the Law of Treaties, at all levels of government, including states and territories, and if necessary by calling on its power to override territory laws and using its external affairs power with regard to state laws.*²⁷

In other words, it is the Commonwealth Government's responsibility to ensure that states comply with the standards of non-discriminatory behaviour laid down in CERD. Ultimately, the Commonwealth has the constitutional authority to coerce states to comply with international obligations under its external affairs power, but this may be politically controversial. In 2001, the Commonwealth Grants Commission suggested that the Commonwealth should utilise its financial resources to encourage states to consider the needs of Indigenous people as a priority in service delivery. An obvious strategy would be to increase the use of tied grants or special purpose payments which place conditions on the states.

ALRM's case to the CERD Committee draws attention to a significant problem in Australia's federal arrangements. Aboriginal programs are too often subjected to cost-shifting and disputes between agencies about funding obligations as a result of concurrent responsibilities of between levels of government. The CERD Committee now has the opportunity to comment on whether these tensions have impacted upon the provision of Aboriginal legal services in a way that is racially discriminatory, and whether they constitute a breach of Australia's international obligations under CERD. As Cunneen and Schwartz comment:

*[t]he issue of the adequacy of legal representation for Indigenous people goes to the heart of questions of access, equity and the rule of law.*²⁸

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¹ Letter from Frank Lampard, Chairperson ALRM to Ms Fatimata-Binda Victoria DAH, Committee on the Elimination of Racial Discrimination and Mr James Anaya, The Special Rapporteur Office of the United Nations High Commission for Human Rights, *Communication regarding the discriminatory underfunding of the Aboriginal Legal Rights Movement in Australia – a breach of the Convention against Racial Discrimination*, September 16 2008, ALRM, Adelaide.

² Office of Evaluation and Audit (OEA), Aboriginal and Torres Strait Islander Commission, *Evaluation of the Legal and Preventative Services Program*, (2003); Australian National Audit Office, *ATSIS Law and Justice Program: Aboriginal and Torres Strait Islander Services*, The Auditor-General Audit Report No. 13 2003-4 (2003); Parliament of Australia, Senate Legal and Constitutional References Committee, *Legal Aid and Access to Justice*, June (2004); Parliament of Australia, Joint

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- Committee of Public Accounts and Audit (JCPAA), *Access of Indigenous Australians to Law and Justice Services*, Report No. 403, June (2005).
- ³ Steering Committee for the Review of Government Service Provision (SCRGSP), *Overcoming Indigenous Disadvantage: Key Indicators 2007*, Productivity Commission, Canberra (2007) 3.121.
- ⁴ *Ibid*, Snowball and Weatherburn (2006) 3.122.
- ⁵ OEA above n 2, 3.
- ⁶ Chris Cunneen and Melanie Schwartz, 'Funding Aboriginal and Torres Strait Islander Legal Services: Issues of Equity and Access', (2008) 32(38) *Criminal Law Journal* 39.
- ⁷ Neil Gillespie, 'Justice through Aboriginal and Torres Strait Islander Legal Services' in Neil Gillespie (ed.), *Reflections: 40 Years on from the 1967 Referendum* (2007) 65, 67.
- ⁸ JCPAA above n 2, 43-4.
- ⁹ ONAO above n 2, 47.
- ¹⁰ Cunneen and Schwartz above n 6, 50.
- ¹¹ ALRM, Submission to the Senate Legal and Constitutional References Committee Inquiry into Legal Aid and Access to Justice (2003) 15.
- ¹² Cunneen and Schwartz above n 6, 50.
- ¹³ JCPAA above n 2, 60.
- ¹⁴ Gillespie, above n 7, 66. The 2003 ANAO Report indicates that some limited funding made to ATSILS by the Queensland and Northern Territory governments, see above n 2, 47.
- ¹⁵ *Ibid*.
- ¹⁶ *Ibid* 67.
- ¹⁷ South Australia, *Parliamentary Debates*, House of Assembly, 5 July 2007, 563 (Isobel Redmond, Shadow Minister for Justice).
- ¹⁸ JCPAA above n 2 60.
- ¹⁹ *Ibid*.
- ²⁰ Jane Robbins and John Summers, 'Aboriginal Affairs' in Andrew Parkin (ed.) *South Australia, Federalism and Public Policy* (1996) 173, 177.
- ²¹ *Ibid* 177-8.
- ²² *Ibid* 179.
- ²³ Department of Aboriginal Affairs, *Principles for Future Provision of State Grants by the Department of Aboriginal Affairs*, 21 October 1982.
- ²⁴ Council of Australian Governments, *Communique of Meeting 24 June 2004*, (2004), available at <http://www.coag.gov.au/coag_meeting_outcomes/2004-06-25/index.cfm> at 1 November 2008,
- ²⁵ Commonwealth Grants Commission, *Report on Indigenous Funding* (2001) 57.
- ²⁶ *Ibid* 65.
- ²⁷ Committee on the Elimination of Racial Discrimination (CERD), *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination. Australia* (2000) CERD/C/304/Add.101 19 April 2000, (7) 2, available at <[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CERD.C.304.Add.101.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CERD.C.304.Add.101.En?Opendocument)>.
- ²⁸ Cunneen and Schwartz above n 6.