Productivity Commission: Inquiry into Access to Justice Arrangements

Draft Report

May, 2014

NATSILS

NATIONAL ABORIGINAL & TORRES STRAIT ISLANDER LEGAL SERVICES

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1. About NATSILS

The National Aboriginal and Torres Strait Islander Legal Services (NATSILS) is the peak national body for Aboriginal and Torres Strait Islander Legal Services (ATSILS) in Australia. NATSILS brings together over 40 years' experience in the provision of legal advice, assistance, representation, community legal education, advocacy, law reform activities and prisoner through-care to Aboriginal and Torres Strait Islander peoples in contact with the justice system. NATSILS are the experts on the delivery of effective and culturally competent legal assistance services to Aboriginal and Torres Strait Islander peoples. This role also gives us a unique insight into access to justice issues affecting Aboriginal and Torres Strait Islander peoples. The NATSILS represent the following ATSILS:

- Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd (ATSILS Qld);
- Aboriginal Legal Rights Movement Inc. (ALRM);
- Aboriginal Legal Service (NSW/ACT) (ALS NSW/ACT);
- Aboriginal Legal Service of Western Australia (Inc.) (ALSWA);
- Central Australian Aboriginal Legal Aid Service (CAALAS);
- North Australian Aboriginal Justice Agency (NAAJA); and
- Victorian Aboriginal Legal Service Co-operative Limited (VALS).

2. Introduction

NATSILS make this submission to the Productivity Commission in response to its Draft Report from the Inquiry into Access to Justice Arrangements. We thank the Commission for the opportunity to provide feedback on the contents of the Draft Report and its many Draft Recommendations. While the Commission is to be commended for the breadth of its analysis, we have focused our feedback on those issues most relevant to ATSILS and service provision to Aboriginal and Torres Strait Islander peoples.

3. Centralised information and contact systems

Draft Recommendation 5.1

All states and territories should rationalise existing services to establish a widely recognised single contact point for legal assistance referral. The service should be responsible for providing telephone and web-based legal information, and should have the capacity to provide basic advice for more straightforward matters and to refer clients to other appropriate legal services.

The Draft Report identifies a significant lack of consumer knowledge about whether and what action to take in relation to legal issues, particularly amongst disadvantaged groups including Aboriginal and Torres Strait Islander peoples. In response, Recommendation 5.1 suggests a central service to improve consumer knowledge of legal services and access to legal services.

Language barriers, communication issues and lack of access to telephones and technology mean that a state-wide or centralised source of legal information, advice and referral will not be suitable across all geographic regions of Australia, particularly in relation to Aboriginal and Torres Strait Islander peoples. While New South Wales currently has a centralised service that works well, such would not be effective in other jurisdictions. The generalisation that there is often duplication in these types of services is not accurate in regards to all jurisdictions. For example, in several States and Territories there is a paucity of services which means that not only is there no overlap, but there is in fact, significant gaps.

The Aboriginal Legal Services in the Northern Territory for example, are the largest legal service providers, provide a comprehensive service and with very few exceptions are the first port of call for Aboriginal and Torres Strait Islander peoples. It would be inefficient for Aboriginal and Torres Strait Islander peoples to first call another service for 'assistance and referral', particularly where other services have significant gaps in what they can actually do. The significant limitation of telephone and web-based information in meeting the legal needs of Aboriginal and Torres Strait Islander peoples in remote communities also needs to be recognised as the lack of access to reliable telephone and online services is a significant issue.

In many areas across Australia, a state-wide approach would simply further complicate the situation for ATSILS clients. By adding in an extra step before they can reach a culturally competent service such as ATSILS, it just creates a further hurdle and a potential deterrent for them in regards to accessing legal services.

While the significant lack of knowledge around legal issues and remedies highlights the critical need for clear contact points where people can obtain advice and assistance, Aboriginal and Torres Strait Islander communities already have longstanding (over 40 years) relationships with their local ATSILS and rather than outsourcing these services to a centralised service, these relationships should be utilised. It would be rare to find an Aboriginal or Torres Strait Islander person who is unaware of the existence of ASTILS. Having a centralised call centre would thus not assist in this regard.

Generalist resourced will not be appropriate for many Aboriginal and Torres Strait Islander communities. ATSILS are best placed to deliver culturally competent and locally tailored community legal education resources to assist people in identifying legal issues and ways to address these. ATSILS have traditionally been under-resourced in the area of community legal education, and could extend their reach to meet the identified need, as well as increase community awareness of the non-criminal services offered by ATSILS, if they were appropriately resourced to do so.

Outsourcing advice would also mean increased costs to the sector, as in most locations, advice is provided by the lawyers who also provide the casework and duty lawyer services in the courts. Hence, relieving legal assistance services of "advice" duties would not mean any cost savings to ATSILS, or other legal assistance services, as the same number of staff would still be required for court. The New South Wales after-hours call centre is a possible exception to this however.

4. Professional Indemnity Insurance

Draft Recommendation 7.3

State and territory governments should remove the sector-specific requirement for approval of individual professional indemnity insurance products for lawyers. All insurers wishing to offer professional indemnity insurance products should instead be approved by the Australian Prudential Regulation Authority.

NATSILS support Draft Recommendation 7.3 as such would encourage market competitiveness, remove regional monopolies that exist in some states and territories, and foster greater tailoring of products to the individual needs of practices. However, it should be noted that South Australia already currently has an effective system in place that encourages relatively low costs for legal services.

5. Alternative Dispute Resolution

Draft Recommendation 8.1

Court and tribunal processes should continue to be reformed to facilitate the use of alternative dispute resolution in all appropriate cases in a way that seeks to encourage a match between the dispute and the form of alternative dispute resolution best suited to the needs of that dispute. These reforms should draw from evidence-based evaluations, where possible.

As a general principle, NATSILS supports the greater use of alternative dispute resolution to resolve appropriate disputes but notes that particular care must be taken to match disputes with the appropriate type of alternative dispute resolution. The greater use of alternative dispute resolution must be accompanied by the increased provision of culturally competent services to enable Aboriginal and Torres Strait Islander peoples to reap the benefits of such. There is also critical need for a greater level of service provision in remote communities around Australia. Furthermore, greater engagement with alternative dispute mechanisms for legal disputes will also necessarily increase the level of demand for legal advice and representation, and as a result, such must be accompanied by increased investment in legal assistance services, including ATSILS. For further detail as to culturally competent alternative dispute resolution services, see NATSILS submission entitled *Joint ATSILS Proposal to the Commonwealth Attorney - General for the Establishment of a National Aboriginal and Torres Strait Islander Dispute Management Service which* is available at http://www.natsils.org.au/PolicyAdvocacy.aspx .

Draft recommendation 8.2

All government agencies (including local governments) that do not have a dispute resolution management plan should accelerate their development and release them publicly to promote certainty and consistency. Progress should be publicly reported in each jurisdiction on an annual basis commencing no late than 30 June 2015.

In general NATSILS agree with Draft Recommendation 8.2. However, we note that given the power differential between government agencies and Aboriginal and Torres Strait Islander peoples, legal representation will often still be required to support Aboriginal and Torres

Strait Islander peoples to engage with such processes. For example, ATSILS often play a critical role on behalf of clients in negotiating major tenancy disputes with government housing agencies and pursuing internal review options. In addition, we also note that the independence of the alternative dispute resolution practitioner in disputes with government agencies is critical to their effectiveness and the willingness of individuals to engage with the process.

6. Ombudsmen

Draft Recommendation 9.1

Governments and industry should raise the profile of ombudsmen services in Australia.

The Draft Report states that ombudsmen offer a cheap and effective dispute resolution mechanism, and can assist in addressing unmet legal need. NATSILS agree that Ombudsmen provide a useful dispute resolution tool and can result in matters being finalised more efficiently. They can also advocate for systemic changes in industry and government which can result in the prevention of future legal issues. However, they are not able to significantly reduce the demand for legal assistance services provided by ATSILS.

Most industry ombudsmen deliver a telephone and web-based service. This would be a significant barrier to access for most of ATSILS' clients. Many, particularly those from remote communities, have limited English, low or no literacy and have unreliable or no access to phones and computers. Many Aboriginal and Torres Strait Islander peoples need face to face assistance from culturally appropriate services, such as ATSILS. It is ATSILS experience that while ombudsmen provide a useful dispute resolution service, they usually need to support their clients through the ombudsmen process.

Draft Recommendation 9.3

In order to promote the effectiveness of government ombudsmen:

- *Government agencies should be required to contribute to the cost of complaints lodged against them;*
- *ombudsmen should report annually on systemic issues they have identified that lead to unnecessary disputes with government agencies, and how these agencies have responded; and*
- *Government ombudsmen should be subject to performance benchmarking.*

NATSILS supports measures designed to improve the effectiveness of government ombudsmen. We agree with the idea that a levy based on systemic failures and a lack of response to those failures may be effective.

There is a clear role for government Ombudsmen, however many lack adequate powers and resources to make them an effective remedy. In addition to annual reporting of systemic issues, they need 'teeth', including investigative powers and enforcement powers and adequate resources. Where there are no enforcement powers government agencies should be held to account if they do not implement recommendations.

Draft Recommendation 9.4

Governments should review funding for ombudsmen and complaints bodies to ensure that, where government funding is provided, it is appropriate.

In light of the comments above we support this recommendation.

7. Tribunals

Draft Recommendation 10.1

Restrictions on the use of legal representation in tribunals should be more rigorously applied. Guidelines should be developed to ensure that their application is consistent. Tribunals should be required to report on the frequency with which parties are granted leave to have legal representation.

In general we agree with the underlying reasons for this recommendation provided within the body of the Draft Report. However the recommendation should explicitly state that this should not be to the detriment of those parties, who because of their disadvantage require independent assistance in understanding the proceedings and presenting their case.

Tribunals have long been established for the purpose of providing a fast resolution to legal disputes that is driven by individual people rather than legal practitioners. However, in trying to achieve fast resolution, the rights and needs of individual parties can be overlooked. No matter how informal a tribunal is, there will always be specific people who are vulnerable, particularly Aboriginal and Torres Strait Islander peoples, and who will require the need for legal representation. Further, there are necessarily unequal relationships that are often being adjudicated by tribunals (consider relationships between landlords and tenants, particularly where the landlord is a government agency providing accommodation for people who are, by necessity, our most disadvantaged). An essential feature of tribunals is the ability to allow people to be heard and feel engaged in the decision making process.

It is ATSILS' experience that without legal representation (at least initially), clients are less inclined to utilise relatively inexpensive mechanisms such as tribunals and commissions for resolving disputes. For example, ATSILS' clients generally would not be able to resolve a tenancy dispute before a tribunal or commission without legal representation due to the difficulties posed by language and cultural differences, low or no literacy, and very low understanding of the civil legal system. It is essential that the tribunal system retains access to legal representation for disadvantaged litigants.

Hence, while we agree with the premise of Draft Recommendation 10.1 it is imperative that it includes an exception for those not able to fully participate if self-represented.

8. Court fees

Draft Recommendation 16.1

The Commonwealth and state and territory governments should increase cost recovery in civil courts by charging court fees that reflect the cost of providing the service for which the fee is charged, except:

- *In cases concerning personal safety or the protection of children;*
- *For matters that seek to clarify an untested or uncertain area of law – or are otherwise of significant public benefit – where the court considers that charging court fees would unduly suppress the litigation.*

Fee waivers and reductions should be used to address accessibility issues for financially disadvantaged litigants.

Draft Recommendation 16.4

The Commonwealth and state and territory governments should establish and publish formal criteria to determine eligibility for a waiver, reduction or postponement of fees in courts and tribunals on the basis of financial hardship. Such criteria should not preclude courts and tribunals granting fee relief on a discretionary basis in exceptional circumstances.

Fee guidelines should ensure that courts and tribunals use fee postponements — rather than waivers — as a means of fee relief if an eligible party is successful in recovering costs or damages in a case.

Fee guidelines in courts and tribunals should also grant automatic fee relief to:

- *parties represented by a state or territory legal aid commission*
- *clients of approved community legal centres and pro bono schemes that adopt financial hardship criteria commensurate with those used to grant fee relief.*

Governments should ensure that courts which adopt fully cost-reflective fees should provide partial fee waivers for parties with lower incomes who are not eligible for a full waiver. Maximum fee contributions should be set for litigants based on their income and assets, similar to arrangements in England and Wales.

The issues raised in Draft Recommendation 16.1 are complex. On the one hand, it is appropriate that court fees reflect the costs of providing services however, prohibitively high fees could also have the negative effect of suppressing meritorious public interest litigation. NATSILS recommends that a broad interpretation of public interest litigation should be applied to decisions as to fee waivers and reductions.

NATSILS support the continuation of fee waivers for financially disadvantaged litigants, including in regards to transcript and filing fees. Across Australia there are differing practices in regards to eligibility for fee waivers. For example the Federal Courts allow for fee waivers for those who are being represented under a grant of aid from a legal aid body (the rationale being that in order to receive a grant a means test has already been applied). However, this does not apply to the Supreme Court or consistently in the civil jurisdiction of local Courts. Requiring Aboriginal and Torres Strait Islander clients, especially those living in remote areas, to provide documentation of income at the time of filing proceedings is often overly burdensome and negatively impacts upon access to the courts.

As such, we support Draft Recommendation 16.4 in recommending that courts and tribunals in all jurisdictions allow fee waivers for those who are being represented under a grant of aid from a legal aid body and that the formal criteria to determine eligibility for waivers,

reductions or postponement of fees in courts and tribunals on the basis of financial hardship should be made as generous as possible.

9. Civil vs criminal funding

Draft Recommendation 21.1

Commonwealth and state and territory government legal assistance funding for civil law matters should be determined and managed separately from the funding for criminal law matters to ensure that demand for criminal assistance does not affect the availability of funding for civil matters.

NATSILS would support this approach on the condition that additional funding specifically for civil law matters is provided so that increased provision of civil law assistance does not come at the expense of ATSILS' ability to provide assistance in criminal law matters. Due to the high demand for assistance in criminal matters, there is no capacity in ATSILS' current operation budgets to allow for increased provision of assistance in civil matters without negatively impacting upon our ability to provide crucial assistance in criminal matters.

10. Extent of unmet need

Draft Recommendation 21.2

The Commonwealth and state and territory governments should ensure that the eligibility test for legal assistance services reflects priority groups as set out in the National Partnership Agreement on Legal Assistance Services and takes into account: the circumstances of the applicant; the impact of the legal problem on the applicants life (including their liberty, personal safety, health and ability to meet the basic needs of life); the prospect of success and the appropriateness of spending limited public aid funds.

While NATSILS supports the broad thrust of Draft Recommendation 21.2, there may need to be some variation in the way in which eligibility tests for legal assistance services are applied in order to appropriately recognise the uniquely disadvantaged status of many Aboriginal and Torres Strait Islander peoples. For example, there is a great need for Aboriginal and Torres Strait Islander peoples to be eligible for legal assistance in relation to comparatively minor street offences, even though these matters would not satisfy eligibility criteria under other legal aid systems. Broadened criteria are necessary for Aboriginal and Torres Strait Islander peoples as relatively minor matters account in some way for the over representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system. Vigilance by ATSILS is needed to ensure that the rights of Aboriginal and Torres Strait Islander peoples are protected in this area.

Information Request 21.4

The Commission seeks feedback on the extent of, and the costs associated with meeting the civil legal needs of disadvantaged Australians, and the benefits that would result.

It is NATSILS' view that the research referred to in Information Request 21.4 is critical to ongoing planning and decision-making about the delivery of legal assistance in the civil law system. Our experience suggest that the extent of unmet civil legal need is significant and in regards to Aboriginal and Torres Strait Islander peoples in particular, we are clearly only

scratching the surface. However, it would be very difficult for us to accurately quantify the significant level of need, not least of all because we lack the resources to collate and evaluate such.

There is a level of reliance upon the Legal Australia-Wide (LAW) Survey conducted by the Law Foundation of NSW in determining the level of unmet need. Given that this survey largely involves interviews conducted via the telephone, we are concerned that it does not adequately capture the level of unmet need amongst Aboriginal and Torres Strait Islander peoples. In fact, the authors themselves accept that it does not adequately depict the situation in regional and remote Aboriginal and Torres Strait Islander communities. Furthermore, the questioning methodology of the survey itself would increase the risks of gratuitous concurrence amongst Aboriginal and Torres Strait Islander respondents.

The cost of meeting legal need in civil law matters is exacerbated by existing gaps in social services and inadequate service provision by government agencies. Lawyers are spending significant time doing non legal work – for example in facilitating access to social services and holding government agencies to account.

Our experience shows that the results of meeting people's civil law needs can be significant and far reaching. For example, assisting an individual to keep their public housing tenancy can mean that they avoid homelessness and related potential consequences such as poverty-related engagement with the criminal justice system or adverse contact with child protection agencies. Reunifying families, keeping people in their jobs, helping people negotiate a debt or renegotiate an unfair contract gives us a sense of the significant benefits that would result from more people having access to justice.

Despite gaps in data as to the exact level of unmet need, it is our view that there is sufficient available evidence to enable the Commission to reach a clear finding on the inadequate quantum of funding for legal assistance services, particularly the disparity in the funding of ATSILS, and encourage the Commission to make such the subject of a clear and unambiguous recommendation.

11. A new National Partnership Agreement

Draft Recommendation 21.5

The Commonwealth and the state and territory governments should renegotiate the National Partnership Agreement on Legal Assistance Services (following the current one expiring) and seek agreement on national core priorities, priority clients, and aligned eligibility tests across legal assistance providers.

NATSILS support Draft Recommendation 21.5 on the condition that if such is going to involve the ATSILS' program, or ATSILS are going to be reviewed against it, that ATSILS are incorporated as a party to the actual Agreement and are involved in its negotiation. This would avoid the current situation whereby despite not being a party to the Agreement nor receiving any funding under it, ATSILS are currently being reviewed as to their performance in relation to it.

The renegotiation of the Agreement must be adequately informed in order to be able to produce an effective national plan for the delivery of legal assistance services across each stream. As such, the development and negotiation phase must include representatives from each legal assistance service stream who can contribute their on-the-ground knowledge to ensure that a new Agreement is practical, efficient, effective and achievable.

12. Advocacy and law reform

The Productivity Commission rightly identifies the importance and cost-effectiveness of advocacy and community legal education in providing access to justice. This important finding should be reflected in a specific recommendation that government should continue to invest in these activities. Furthermore, we encourage the Commission to directly examine the implications of the proposed $43 million funding cut to the entire legal assistance sector that will prevent ATSILS and others from engaging in 'advocacy' work and (given that such work invariably involves the same staff), community legal education also.

Funding uncertainty in this area has already resulted in some ATSILS losing staff. It is our experience that Aboriginal and Torres Strait Islander communities value community legal education programs. It takes a significant amount of time to build up relationships with communities and key organisations which is pivotal to delivering such services. This work will be lost if the issue of funding uncertainty is not resolved soon. Once gone, it will be very difficult to rebuild such programs and relationships.

13. Assistance for Aboriginal and Torres Strait Islander peoples

DRAFT FINDING 22.1

Specialised legal assistance services for Aboriginal and Torres Strait Islander people remain justified.

NATSILS welcome the Commission's finding that there is ongoing need for specialised legal assistance services for Aboriginal and Torres Strait Islander communities. Specifically we ask that this finding be highlighted to governments, especially in light of recent funding cuts announced to ATSILS.

INFORMATION REQUEST 22.1

The Commission seeks views on the most appropriate model for engagement between governments and Indigenous-specific legal assistance services. Practical examples of successful models and the lessons from implementation are also sought.

In our view, Information Request 22.1 raises issues for discussion that would be best had within the context of a future renegotiated National Partnership Agreement. Elsewhere in the Draft Report the Commission states it support for a renegotiated National Partnership Agreement with the possibility of state and territory government funding of ATSILS. a renegotiated National Partnership Agreement, incorporating ATSILS as a party to the agreement, would provide a clear platform for formal engagement. If such was to materialise, it would be our strong recommendation that discussions as to the most effective model of engagement must occur with all relevant parties having a seat at the table, including ATSILS. Having ATSILS, the Commonwealth Government as well as state and territory governments working together on an equal basis to determine the most effective engagement model for inclusion in such a renegotiated NPA would, in our view, be vital to its overall success.

Currently, across all jurisdictions there are a variety of engagement models between ATSILS and various levels of government. Engagement between ATSILS and the Commonwealth

Government, namely the Attorney-General's Department, is generally positive and effective. However, there is always room for improvement, especially in regards to data collection and reporting mechanisms. The relationship between ATSILS and their respective state or territory government varies greatly across Australia. Some ATSILS have very open and consultative engagement with their respective state or territory governments while others have essentially no relationship at all. A lack of engagement on behalf of state and territory governments with ATSILS in their jurisdiction has proven to have significant consequences for both ATSILS and Aboriginal and Torres Strait Islander communities. Where there is a lack of engagement, governments tend to implement legislation and policies in relation to the justice system which negatively impact upon Aboriginal and Torres Strait Islander peoples and disproportionately bring them into contact with the justice system. In turn, this drives up demand for the services provided by ATSILS. If a National Partnership Agreement is to be renegotiated, with the inclusion of ATSILS as a party to the agreement, and is to provide an effective platform for formal engagement, there will need to be significant change in the apparent attitudes of some state and territory governments.

Some lessons could be learned from further analysis of the effectiveness of Legal Assistance Forums across Australia. It is apparent to ATSILS that there is a great degree of variation in regards to the success of different Legal Assistance Forums. There would be benefit in identifying what factors contribute to Legal Assistance Forums working well and what factors impede successful engagement, and then applying this consistently. The Northern Territory Legal Assistance Forum appears to be the best working example at the moment, with all services showing consistent commitment to participation, coordination in service planning and respect of each member's expertise.

DRAFT RECOMMENDATION 22.1

The Commonwealth Government should:

- *establish service delivery targets (as currently apply to Aboriginal and Torres Strait Islander legal services (ATSILS)) within service plans for family violence prevention legal services (FVPLS)*

- *develop and implement robust benchmarks with ATSILS and FVPLS to better measure performance. These agreed benchmarks should be a consideration in framing the administrative data collection for ATSILS and FVPLS.*

NATSILS has long supported robust reporting requirements for ATSILS (and indeed, the entire legal sector), but note that additional resources will be required to implement any significant change to data collection and reporting systems, both in terms of start-up costs and the ongoing collection/reporting requirements. These resources cannot be found in existing operational budgets.

Whilst there need to be robust benchmarks, the differences between jurisdictions need to be recognised. The current funding agreement model does not sufficiently take into consideration the different ways in which each ATSILS operates, nor does it adequately measure the amount of service that is provided to each client. In particular, the work of client service officers and field officers is not properly recognised, despite the fact that such is regularly referred to as a beneficial and important feature of ATSILS' services. Targets and benchmarks should not merely be quantitative, but reflect the quality of service being

provided. Further, an integral element of the utility of the data collation process should be a high degree of uniformity across the entire sector.

Performance reporting needs to provide sufficient scope to allow ATSILS to report on the different initiatives and measures which they are undertaking in their jurisdictions which promote access to justice of Aboriginal and Torres Strait Islander people.

For example, how do we capture data and report on:

- response times to notifications of arrest of Aboriginal and Torres Strait Islander peoples (e.g. the ATSILS provide a 24-hour service);
- reduction in offending rates as a result of specific measures;
- number of community legal education sessions delivered or the range of topics covered;
- staff training in cultural awareness;
- turnaround times for recruitment;
- number of warm referrals provided;
- increased awareness of, and engagement with, complaints mechanisms;
- increased exercise of civil rights in bringing complaints for civil matters; and
- decreases in breach of intervention or apprehended violence orders because of greater education about their effect.

DRAFT RECOMMENDATION 22.2

The Commonwealth Government should allocate funding for both Aboriginal and Torres Strait Islander legal services and family violence prevention legal services in accordance with differences in need and service costs across geographic areas.

NATSILS support the allocation of funding in accordance with need and service costs. ATSILS are significantly underfunded in comparison to other legal assistance streams. Indeed, the Commission does make a finding despite growth in funding for other legal assistance streams, real funding per person for ATSILS has declined by about 20 percent between 2000-01 and 2010-11. While we welcome this finding, such should be highlighted more clearly in the Draft Report and should be the subject of a specific recommendation.

INFORMATION REQUEST 22.2

The Commission seeks feedback on how the funds determined in draft recommendation 22.2 should be distributed across providers and how the relatively small scale of some providers affects the efficiency and effectiveness of services. Would there be benefits from further amalgamation of services and if so, how might this process be brought about?

ATSILS are already highly streamlined services with the majority of services being governed at the state level to avoid duplication and encourage efficiency. Furthermore, ATSILS are

very lean in regards to administration costs and 'backroom' services in order to prioritise funding on frontline services.

From an ATSILS-specific perspective, any further amalgamation of services would need to be very carefully considered. Such would pose significant challenges as a result of the differences between state and territory jurisdictions in addition to the need to safeguard community approaches which have been developed to meet specific localised and geographical needs.

DRAFT FINDING 22.2

The policies of state and territory governments can impact significantly on demand for services provided by Aboriginal and Torres Strait Islander legal services and family violence prevention legal services. Given these services are funded by the Commonwealth Government, there are poor incentives for state and territory governments to consider the ramifications of their policy changes on demand for these Commonwealth funded services.

NATSILS welcome this finding, which we consider to be long overdue. State and territory policy and legislation has perhaps the single biggest impact upon ATSILS service delivery environment and the level of pressure placed on services. This combined with the fact that ATSILS are solely funded by the Commonwealth Attorney-General's Department places ATSILS in a very difficult position.

INFORMATION REQUEST 22.3

The Commission seeks feedback on whether the National Partnership Agreement on Legal Assistance Services should include state and territory government funding for Aboriginal and Torres Strait Islander legal services and family violence prevention legal services to provide a greater incentive for state and territory governments to consider the impact of changes in state or territory based policies on the demand for these services. Are there other ways this could be achieved? Where state and territory governments do not provide funding, or only provide limited funding, what role should they play in influencing service delivery and reporting requirements?

NATSILS support state and territory governments being required under the National Partnership Agreement to provide funding to ATSILS in response to the reality that their policies and laws impact upon the level of demand for legal assistance services amongst Aboriginal and Torres Strait Islander peoples. In regards to a role for state and territory governments in influencing service delivery and reporting requirements, it is our view that given the historical relationship and knowledge and experience gained over time, the Commonwealth Attorney-General's Department remain the key agency with whom decisions regarding service delivery should rest. Further, it is crucial that the Commonwealth not abrogate its responsibilities to Aboriginal and Torres Strait Islander peoples under the Australian Constitution. We would not however, support any duplication of reporting requirements. Furthermore, unlike the current National Partnership Agreement from which ATSILS were excluded, ATSILS must be included in the renegotiating a National Partnership Agreement which includes state and territory funding of ATSILS, to ensure that such will result in service delivery and reporting arrangements that will be practical and effective.

DRAFT RECOMMENDATION 22.3

While recognising there are significant challenges to addressing unmet need for Indigenous language interpreters, the Commonwealth and state and territory governments should agree

and implement the proposed national framework for the provision of Aboriginal and Torres Strait Islander interpreters as part of the National Partnership Agreement on Remote Service Delivery.

Access to Aboriginal and Torres Strait Islander interpreter services is critical for many ATSILS clients, particularly in remote areas. Furthermore, case law such as *Frank v Police* [2007] SASC 288 enshrines it as a legal right. We welcome the Commission's recognition of such.

INFORMATION REQUEST 22.4

The Commission seeks information on the level of funding required to expand interpreter services to meet some or all of the gap in Indigenous interpreter services.

While NATSILS do not have the ability to calculate the level of funding required to expand Aboriginal and Torres Strait Islander interpreter services, it is our view that such would best be investigated through further consultations with the Stakeholder Reference Group associated with the development of the National Framework for Aboriginal and Torres Strait Islander Interpreters, which includes existing Aboriginal and Torres Strait Islander interpreter services, as well as NATSILS.

DRAFT RECOMMENDATION 22.4

The Commonwealth Government should:

- *undertake a cost-benefit analysis to inform the development of culturally tailored alternative dispute resolution (including family dispute resolution) services for Aboriginal and Torres Strait Islander people, particularly in high need areas*
- *subject to the relative size of the net benefit of such a service, fully fund these services*
- *encourage government and non-government providers of mainstream alternative dispute resolution services to adapt their services so that they are culturally appropriate for Aboriginal and Torres Strait Islander people (where cost-effective to do so).*

NATSILS welcome Draft Recommendation 22.4 and the Commission's recognition of the critical need for culturally competent alternative dispute resolution services. NATSILS would be interested in assisting the Commonwealth Government with its analysis.

INFORMATION REQUEST 22.5

The Commission seeks information on the cost of a culturally appropriate Indigenous-specific alternative dispute resolution (including family dispute resolution) service(s), particularly in 'high need' areas. Views on the appropriate engagement model and governance arrangements are also sought.

NATSILS would refer the Commission back to our original submission for further information as to appropriate engagement models and governance arrangements. However, we would like to take the opportunity to reiterate the point that there will not be one single model that will work Australia wide, there will need to be a range of models in response to the different needs of different Aboriginal and Torres Strait Islander communities. Such is

explored in our initial submission to the Commission as well as previous submissions referred to therein, namely our submission entitled *Joint ATSILS Proposal to the Commonwealth Attorney - General for the Establishment of a National Aboriginal and Torres Strait Islander Dispute Management Service which* is available at http://www.natsils.org.au/PolicyAdvocacy.aspx.

INFORMATION REQUEST 22.6

The Commission seeks information on the cost-effectiveness of earlier and more pro-active engagements by government agencies with Aboriginal and Torres Strait Islander clients who are at risk of disputes with government.

NATSILS agree that earlier and more pro-active engagement by government agencies might also help reduce disputes. This could be achieved in a range of areas, including:

- Child protection - There is a need for increased services aimed at supporting families to prevent crisis child protection situations requiring court intervention

- Housing - Some housing authorities have adopted quite punitive approaches to tenancy management which often proceed to eviction very quickly and sometimes on the basis of fairly minor breaches. Not only is it necessary to take a more proactive approach to inform tenants of their rights and responsibilities, there also needs to be a shift in culture around public housing management from policing housing to supporting tenants to maintain housing.

- Social security – improvements could be made by significantly increasing the use of interpreters in the delivery of social security services, auditing remote files regularly and addressing small issues quickly and in consultation with the client before they escalate into major issues, and adapting processes to reduce unnecessary complexity. Many of the issues identified in NAAJA and CAALAS' social security law practice, for example, could be avoided or mitigated if government agencies administering the social security system had proactively explained the client's obligations, engaged interpreters as required, and checked small errors and issues with Centrelink payments as they arose (rather than many years after the event).

14. Pro bono services

Draft Recommendation 23.1

Where they have not already, all jurisdictions should allow holders of all classes of practising certificate to work on a volunteer basis.

Further, those jurisdictions that have not done so already should introduce free practising certificates for retired or career break lawyers limited to the provision of pro bono services either through a Community Legal Centre or a project approved by the National Pro Bono Resource Centre. This could be modelled on the approach currently used in Queensland. 74

For those not providing court representation, persons eligible for admission as an Australian lawyer coupled with a practising certificate that has expired within the last three years

(without any disciplinary conditions) should be sufficient to provide pro bono work, particularly if the service is supervised.

NATSILS supports the introduction of "free practicing certificates" for retired or career break lawyers limited to the provision of Pro Bono services through a community legal centre or a project approved by the national Pro Bono Resource Centre.

NATSILS endorses the Commission's view that while pro bono services are valuable, there are clear limitations on the ability of pro bono services to plug holes of unmet need. The Commission goes on to suggest that most of these can be overcome. However, it is our view that many of the strategies and actions suggested to overcome barriers to expanding the use of pro bono services would not work in many regional and remote areas of Australia where large Aboriginal and Torres Strait Islander communities exist. For example, offering free practising certificates to retired and career break solicitors and conflict of interest coordinator services would not increase access in such thin markets and telephone and web-based pro bono services are of limited use to Aboriginal and Torres Strait Islander peoples.

Ultimately, it is our view that while increased participation by pro bono services should be facilitated, current focus must be placed on the greater issue of the chronic underfunding of ATSILS, and other legal assistance services. With regards to Aboriginal and Torres Strait Islander peoples in particular, while pro bono services do have a role to play, support for ATSILS as the best placed service to provide high quality culturally competent legal services to Aboriginal and Torres Strait Islander peoples should be the priority.

15. Data and evidence

Draft Recommendation 24.1

All governments should work together and with the legal services sector as a whole to develop and implement reforms to collect and report data (the detail of which is outlined in this report).

To maximise the usefulness of legal services data sets, reform in the collection and reporting of data should be implemented through:

- *adopting common definitions, measures and collection protocols*
- *linking databases and investing in de-identification of new data sets*
- *developing, where practicable, outcomes based data standards as a better measure of service effectiveness.*

Research findings on the legal services sector, including evaluations undertaken by government departments, should be made public and released in a timely manner.

NATSILS supports the better collection and reporting of data and identifies the main barriers to achieving such as being inconsistent requirements across legal assistance streams and a lack of resources to support changes to such arrangements. Indeed, NATSILS, along with other legal assistance service peak bodies, has invested a significant amount of time and effort into the Commonwealth Attorney-General's Department's Data Standardisation Project. We understand that a draft manual for the collection of consistent data across the sector has now been developed and will soon be released for consultation with the sector. Hence, while we support better and more consistent data collection in principle, it is

essential that dedicated resources are allocated to support any changes to data collection. Furthermore, in our view, any data standardisation process should aim for uniformity both within states and territories, as well as between states and territories, to the highest extent possible.