

FUNDING CUTS TO ABORIGINAL AND TORRES STRAIT ISLANDER LEGAL SERVICES: WHERE IS THE JUSTICE FOR OUR NATION'S FIRST AUSTRALIANS?

by Eddie Cubillo

INTRODUCTION

The over-representation of Aboriginal and Torres Strait Islander peoples in all markers of socio-economic disadvantage, and in all stages of the criminal justice system, is one of Australia's most significant issues. It is scandalous that while Aboriginal and Torres Strait Islander people comprise three per cent of the Australian population,¹ we account for more than 25 per cent of the prison population.² We are also nearly eight times more likely to be taken into police custody than non-Indigenous people.³ Aboriginal and Torres Strait Islander offenders tend to have contact with the criminal justice system at younger ages than their non-Indigenous counterparts and in a higher proportion, with Aboriginal and Torres Strait Islander juveniles 25-28 times more likely to be detained in the juvenile justice system than other young people.⁴ Over-imprisonment also has a disproportionate impact on Aboriginal and Torres Strait Islander women. They represent the fastest growing prison population in Australia with an increase of 20 per cent in 2012,⁵ a further increase of four per cent in 2013⁶ and another increase of 18 per cent in 2014.⁷

This level of disadvantage, combined with an inevitable reduction in services due to cuts to our national budget, will place critical pressures on the Aboriginal and Torres Strait Islander Legal Services' ('ATSIIS') ability to deliver services to their clients. This paper looks at what is at risk should ATSIIS not be able to continue as they are, as well as some of the perceptions people have about our work. It also seeks to identify various indicators that point to our ongoing importance and effectiveness.

FUNDING CUTS

On the 5 September 2013, provided in the Coalition's pre-election costings, was a cut of \$42 million to the Indigenous Policy Reform Program.⁸ This program provides funding to ATSIIS across Australia and their peak body, the National Aboriginal and Torres Strait Islander Legal Services ('NATSILS'). On 17 December 2013, Federal Treasurer Joe Hockey announced, in the Mid-Year Economic and Fiscal Outlook, that \$43.1 million was to be cut across the broader legal assistance sector over the next four financial years.⁹

This change was made contrary to the many submissions and arguments made by NATSILS, individual ATSIIS and others in the legal sector, as well as other peak Indigenous and non-Indigenous organisations.

The Federal Attorney-General's Department has since confirmed that \$13.41 million will be cut from the Indigenous Legal Aid and Policy Reform Program in the 2013-14 and the 2016-17 financial years.¹⁰ The Federal Government has stated that these cuts are aimed at de-funding law reform and advocacy activities.

AN UNMET NEED: INCREASING LEGAL ASSISTANCE TO ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES

The interaction between funding for criminal law, civil and family law services is particularly complicated within the ATSIIS, as relevant funding agreements with the Commonwealth Attorney-General's Department require ATSIIS to prioritise service delivery to assist those at risk of going to jail. However, it is not the case that the fiscal resources "left over" after criminal law services are then simply allocated towards the provision of civil and family law services. If this was the case, given the level of demand for criminal law services, it could be argued that ATSIIS do not have any resources to spare for the provision of other civil and family legal services. With the high level of need for civil and family law services, and recognising how unresolved civil and family issues can escalate to criminal matters, ATSIIS directs a limited amount of resources towards these areas.

Despite ATSIIS' best efforts, there are simply insufficient resources to cover this demand. For example, until very recently our members have been largely unable to provide civil law services outside of major urban areas, but they are currently trialling civil law services in regional and remote areas due to one-off grants from the Commonwealth. Without ongoing funding it will not be possible to continue these services. ATSIIS have reported that, for the most part, Aboriginal people in regional and remote areas are almost entirely unaware of their civil law rights. Even for those people who are aware and wish to assert their rights, access to civil law services

in regional and remote areas is extremely limited. In regards to family law matters in particular, it is worth noting that our member service in the Top End, the Northern Australian Aboriginal Justice Agency ('NAAJA'), was forced to suspend its family law services in early 2012 due to a significant increase in demand for child protection matters, and an increased complexity of those matters arising from a change in court procedure. It was only with one-off funding that family lawyers could be employed. This one-off additional funding for civil and family law services expires at the end of June 2015 and without continued adequate funding, civil and family law clients may again be referred to mainstream legal aid or be forced to go unrepresented.¹¹

The convergence of chronic underfunding and a high level of unmet legal need amongst Aboriginal and Torres Strait Islander communities place ATSILS in an untenable position. This position is one where funding for services in different areas of law compete for priority, forcing ATSILS to make difficult compromises between different legal services that ultimately affect people's access to justice. A further increase in the level of ATSILS civil and family law service delivery—without additional funding—would necessarily come at the expense of criminal law service delivery. Given that the demand in this area is only growing, and the serious consequences that cut backs in this area would have, such is not an option. Additional funding must be provided in order to put a stop to this inherent competition between criminal, civil and family law services.

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Recognition of the overwhelming levels of unmet needs amongst Aboriginal and Torres Strait Islander peoples is also increasing. The Senate Legal and Constitutional Affairs References Committee has twice—in 2004 and 2009—called for the Australian Government to urgently increase the level of funding to ATSILS to overcome this significant under-funding and promote access to justice.¹² Just prior to this year's Budget announcement, the Productivity Commission released the draft report from its inquiry into *Access to Justice Arrangements*.¹³ This draft report acknowledge a number of important issues: the significant unmet legal need amongst Aboriginal and Torres Strait Islander peoples; that such a need

cannot be met by system reform, but requires the investment of additional resources; and that the need for a specialist legal assistance service for Aboriginal and Torres Strait Islander peoples (such as ATSILS) should remain. Furthermore, the Commission noted the importance of law reform and community legal education programs to ensuring an effective and efficient justice system overall. Without law reform and community legal education programs, systemic issues are not identified and addressed. People are ultimately not being encouraged or assisted to resolve legal disputes at an early stage where the costs to the system are low.

LAW REFORM AND ADVOCACY

Governments frequently reach out to NATSILS and individual ATSILS for professional and specialised advice that inform and assist in the development of laws, policies and programs. We respond to such requests with evidence based information and advice that reflects 'on-the-ground realities' within the justice sector more broadly. Law reform and advocacy therefore is an essential part of the role we play, as we identify opportunities where governments can more efficiently address systemic issues, rather than dealing with a more costly case-by-case basis.

Rather than allocating full-time staff to focus solely on law reform and advocacy, these activities are undertaken within ATSILS by a range of staff (community legal education lawyers, solicitors, managers and principal legal officers) in addition to their main roles. For this reason, implementing the announced funding cuts cannot simply be done by removing dedicated law reform and advocacy positions. Given that law reform and advocacy work is shared amongst multiple people with responsibility for areas of frontline services, the funding cuts will indeed impact upon frontline service delivery. To date, no information has been provided by the Commonwealth Attorney-General's Department as to how the announced funding cuts will be applied across different ATSILS, nor is there any evidence that the decision makers appreciate the benefits of the integrated model that we use or understand the actual impact that a funding cut of this size will have to services on the ground. This lack of information is already having an impact on ATSILS service delivery. Without information as to how the funding cuts are going to be implemented, ATSILS are unable to appropriately plan ahead and provide staff with direction and certainty. ATSILS around the country are already losing staff as a result of the uncertainty in employment security created by the announced cuts. In order to avoid last minute strategic decision-making, ATSILS are being forced to make the difficult decision of closing offices in preparation for the planned cuts that will come into effect from 1 July 2015. For example, NAAJA has made the decision to close their Nhulunbuy office¹⁴

and the ATSILS Queensland branch has closed its Warwick, Cunnamulla, Chinchilla, Dalby and Cooktown offices. We predict that many other offices across the country will close due to the cuts. Further work undertaken to predict the impact of the announced funding cuts has identified that several additional cutbacks will need to be made to a range of frontline services including the withdrawal of duty lawyer services, cessation of family and civil law services and reductions in community legal education programs.

The announced funding cuts also include the complete defunding of NATSILS, which will leave ATSILS without a mechanism to coordinate themselves and share best practice nationally. In return for a relatively small investment, NATSILS builds on the more substantial investment by the Government in ATSILS to ensure that services across the country are efficient, effective and coordinated.

CULTURAL COMPETENCY

The critical aspect of ATSILS service delivery that sets us apart from other legal assistance services is our focus on, and ability to provide, culturally competent services to Aboriginal and Torres Strait Islander clients. Cultural competency is essential for effective engagement, communication, and the attainment of successful outcomes. It is more than just cultural awareness that has, on its own, not led to changes in the behaviours and attitudes necessary for the delivery of adequate services to Aboriginal and Torres Strait Islander peoples.¹⁵ Rather, cultural competency focuses on the capacity to improve outcomes by integrating culture into the delivery of services. It requires commitment to a 'whole of organisation' approach.¹⁶ As community-controlled organisations with Aboriginal and Torres Strait Islander cultural needs at their core, ATSILS use a culturally competent service model. Mainstream organisations that have cultural liaison mechanisms built into their organisations might still not be sufficiently culturally competent, as these mechanisms exist within a wider organisational approach reflecting the needs of the mainstream population, rather than Aboriginal and Torres Strait Islander peoples specifically.

While clients may recognise that they have a problem, often they do not understand which area of law applies. When interviewing clients, it is often found that they have more than one legal problem, sometimes in numerous areas of law (civil, family and criminal). Even with limited funding, each ATSILS is able to act as a "one-stop-shop" for clients, with different solicitors responding to each problem and coordinating an approach to prioritise their legal issues. This is extremely important because Aboriginal and Torres Strait Islander peoples are less likely than mainstream clients to follow through with referrals, especially to mainstream organisations or organisations which they are unfamiliar with.

ATSILS also are flexible in terms of cultural considerations, being less rigid with clients about meeting appointment times and being aware of communication protocols.

COMMUNITY LEGAL EDUCATION

As well as the need for increased investment in civil and family law services, an increase in the ability of ATSILS to extend the reach of Community Legal Education ('CLE') programs is of particular importance. This is because there is evidence of low levels of awareness and understanding about civil and family law rights within Aboriginal and Torres Strait Islander communities. CLE therefore plays a key role in prevention and early intervention of legal problems, as it provides people with the necessary information and skills to prevent the development of civil and family law issues. It also provides advice about ways to resolve such issues to prevent them from escalating into criminal matters. Civil matters such as debt, driver's licenses and social security issues are increasing reasons for Aboriginal and Torres Strait Islander peoples' contact with law enforcement. This can lead to arrest, detention and ultimately sentencing. Early intervention can help resolve these issues before they escalate to the criminal jurisdiction.

These cuts will deny Aboriginal and Torres Strait Islander people the legal advice and representation they desperately need.

CONCLUSION

It is disappointing to witness the systemic discrimination that is rampant in the justice system. This is evident through the statistics, but also is told through the tragic individual stories of Aboriginal people who have suffered from being caught in the system. Rather than accept the tired claim that more Aboriginal people are in the criminal justice system because more of us commit crimes, there needs to be recognition that crime often is the consequence of past and present policies. We are not inherently more criminal.

The irony is that this Australian Government—which has advocated for its own version of "freedom of speech" through its attempt to amend the *Racial Discrimination Act 1975* (Cth)—at the same time is cutting funds to ATSILS and others in the legal sector with the intention of ceasing our law reform and advocacy work. But these cuts will do more, as they will affect front line services and deny Aboriginal and Torres Strait Islander people the legal advice and representation they desperately need to deal with serious criminal law, family law, discrimination and tenancy legal issues.

It has been over 20 years since the Royal Commission into Aboriginal Deaths in Custody, yet funding to ATSILS, major contributors to making changes in this area, has continually been ignored. This is despite credible reports constantly pointing out that the service offers a high value-to-cost ratio and requires further investment. ATSILS understand calls for better governance, rationalisation, economies of scale and improved service delivery, but we cannot credit them if they ignore independent research and evidence. We always come back to the question: who or what does this political rhetoric serve if it continues, and probably exacerbates, the shockingly disproportionate incarceration of Indigenous Australians?

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- 3 Select Committee on Regional and Remote Indigenous Communities, *Indigenous Australians, Incarceration and the Criminal Justice System* (2010) Aboriginal Legal Service (NSW/ACT) <<http://www.alsnswact.org.au/media/BAhbBlsH0gZmSSJhMjAxMS8wOC8xNS8yM18yNF80MI80NTRfSW5kaWdlbm91c19BdXN0cmFsaWFuc19JbmNhcmNlcmF0aW9uX2FuZF90aGVfQ0pTX09jdF8yMDEwX1NlbnF0ZS5wZGYGOgZFVA>>.
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- 8 Liberal-National Coalition, *Fiscal Budget Impact of Federal Coalition Policies* (2013) <<http://lpaweb-static.s3.amazonaws.com/2013%2009%2005%20TABLE.pdf>>. See point 9.3 of the aforementioned costings outline, under the heading 'Reprioritise Indigenous Policy Reform Program'.

- 9 J B Hockey and Matthias Cormann, *Mid-Year Economic and Fiscal Outlook 2013-2014* (2013) Government of Australia <http://www.budget.gov.au/2013-14/content/myefo/download/2013_14_MYEFO.pdf>.
- 10 National Aboriginal and Torres Strait Islander Indigenous Legal Service ('NATSILS'), *Factsheet: Funding Cuts to Aboriginal and Torres Strait Islander Legal Services* (2013) <<http://www.natsils.org.au/portals/natsils/submission/Funding%20Cuts%20Factsheet%2020April%202013.pdf>>.
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Sorry Moment

Life is so painful
Silas Hobson
Acrylic on linen, 900mm x 940mm

