**Aboriginal and Torres Strait Islander Legal Services and Access to Justice**Jonathon Hunyor[[1]](#footnote-1)Commonwealth Regional Law Conference, Sydney, Australia  
21 April 2012

**Introduction**

Last year marked the 40th anniversary of Aboriginal Legal Services in Australia. The first service was established in Redfern NSW in 1971, with services in other states and territories starting in the following years. For the Northern Territory (NT), this year marks 40 years since the first service was established in Darwin.

The main drivers behind the establishment of Aboriginal Legal Services were a lack of legal representation for Aboriginal people in the criminal justice system and concerns about police brutality and discriminatory policing practices.[[2]](#footnote-2)

Aboriginal and Torres Strait Islander Legal Services (ATSILS) now provide legal aid in all states and territories, funded exclusively by the Commonwealth Government. While the bulk of the work of ATSILS is still in the criminal law, they play a significant role in policy and law reform advocacy and some – including NAAJA - have significant practices in civil law. The ATSILS sit alongside ‘mainstream’ legal aid providers which typically receive a mix of funding from Commonwealth and state and territory governments.

From time-to-time there is both a bureaucratic and ideological push for ‘mainstreaming’ of legal services for Aboriginal and Torres Strait Islander people. In short, the bureaucratic imperative is one of efficiency and economies of scale – why maintain multiple legal aid services, particularly in general areas of law like the criminal law? The related ideological imperative is generally couched in terms of formal equality and having one system for all.

So I will make the case today for why – 40 years on – the ATSILS are still as relevant and necessary as ever in assisting Aboriginal and Torres Strait Islander people to access justice.

I will first touch on the unique legal needs of Aboriginal and Torres Strait Islander people and argue that the ATSILS best meet those needs.

I will then look at some of the more creative work that ATSILS, such as NAAJA, are doing to promote access to justice for Aboriginal and Torres Strait Islander people, beyond providing standard legal services to individual clients.

Finally, I will discuss the importance of ATSILS in the context of the relationship between the state and Australia’s first peoples and consider the broader roles that ATSILS play as advocates for justice.

**The legal needs of Aboriginal and Torres Strait Islander People**

Chris Cunneen and Melanie Schwartz have done significant work in identifying the particular legal needs of Aboriginal people and the barriers that Aboriginal people face in accessing justice.[[3]](#footnote-3)

An important contextual factor is the gross overrepresentation of Aboriginal and Torres Strait Islander people in the criminal justice system. Nationally, Indigenous people make up about 2% of the population, but 26% of the prison population.[[4]](#footnote-4) In the NT, Aboriginal people are about 30% of the population but over 80% of the prison population and over 90% of the young people locked up in juvenile detention.[[5]](#footnote-5)

It is also important to acknowledge that Aboriginal people are overrepresented as victims of crime – this is particularly the case for Aboriginal women as victims of violent crime.

Particular legal needs and barriers to accessing justice also arise from issues such as

* Social disadvantage in the areas of education, housing, employment, income and health.
* Cross-cultural issues, including who has the rights to speak on particular topics, kinship relationships and issues such as gratuitous concurrence (the tendency to agree with the questioner). These issues particularly arise in remote communities in which Aboriginal customary law is still practiced, although they are by no means confined to those communities.
* Remoteness.
* Language issues. In many parts of the country, Aboriginal people speak Aboriginal English (a distinct dialect) as their first language. In the NT, as well as in other remote areas, notably in parts of South Australia and Western Australia, many Aboriginal people speak English only as a second or third language and require interpreters. In a number of communities that are serviced by NAAJA (including communities like Wadeye, the NT’s largest Aboriginal Community), almost all people appearing before the court require an interpreter.

**Why ATSILS are best placed to meet the needs of their clients**

In the face of the complex legal needs of Aboriginal and Torres Strait Islander people, having a specialist legal service is essential.

ATSILS lawyers, through induction and training as well as the accumulation of experience, develop both cultural competence as well as in-depth knowledge about legal issues commonly faced by our clients (such as, in the criminal law context, the admissibility of admissions and the *Anunga* rules[[6]](#footnote-6) for police questioning of Aboriginal suspects).

The ATSILS have developed a deep institutional knowledge around particular issues including, most notably, the exercise of police power (particularly in relation to summary and public order offences), the removal of Aboriginal and Torres Strait Islander children from their families and deaths in custody. This brings a depth to the work that we do as well as allowing sustained and strategic advocacy on important issues.

The ATSILS also provide their services in a unique way, through the work of field officers (at NAAJA, Client Service Officers). While precise duties differ across agencies, field officers are people with an understanding of Indigenous culture and community - generally Aboriginal and/or Torres Strait Islander themselves or with significant connections to Indigenous society. Field officers assist clients to access legal services and with issues related to their legal problems. For example, their work includes:

* Providing legal information to clients before and after court and making referrals to other agencies;
* Assisting lawyers to understand cultural and communication issues that may arise with a particular client or in a particular community;
* Assisting clients to engage with other service providers, such as rehabilitation services, crisis accommodation or government agencies that can assist with fine payment options;
* Liaising with clients families and communities; and
* Assisting lawyers to contact clients and witnesses where remoteness and/or itinerancy may make this difficult.

The qualitatively different nature of the services ATSILS provide also makes them more accessible to Aboriginal and Torres Strait Islander People. The National Pro Bono Resource Centre has argued:

Indigenous legal services play a critical role in helping indigenous people access the legal system. Research indicates that Indigenous Australians rely on [Indigenous legal services] and are relatively less likely to seek help from mainstream providers to resolve their legal issues due to a distrust of the legal system, language barriers and a perceived lack of cultural awareness among mainstream legal service providers. As a result, Indigenous Australians are less likely to obtain legal assistance in areas that are not provided by [Indigenous legal services], such as civil law, despite being particularly vulnerable to credit and debt and employment problems.[[7]](#footnote-7)

It seems that, at least for the time being, the argument around mainstreaming has been won. In 2009 the Law Council of Australia stated:

It is widely acknowledged that dedicated Aboriginal and Torres Strait Islander legal service providers (ATSILS) are the preferred and most culturally appropriate providers of legal services to Indigenous Australian peoples.[[8]](#footnote-8)

And in 2010, the *Strategic Review of Indigenous Expenditure* undertaken by the Commonwealth Department of Finance and Deregulation concluded that

it is important that a separate legal aid service for Indigenous Australians continue. Indigenous people need to have the confidence that they can access a legal aid service that understands their needs and the specific problems and challenges faced by many Indigenous families and individuals.[[9]](#footnote-9)

**‘Working cheaper, working harder’[[10]](#footnote-10)**

There is another reason why ATSILS are indispensable - government could not afford to provide the services we deliver without us. It’s a bit of a dirty secret – although it is rather more dirty than it is secret.

We work much harder for much less than our counterparts at mainstream legal aid agencies. Our caseloads are bigger, our administration leaner, our salaries smaller. The Law Council of Australia has observed that

Notwithstanding the extraordinary levels of disadvantage suffered by Indigenous Australians, the ATSILS are the most underfunded sector of all legal aid service providers for the work required of them, that is to say, they still continue to be funded well below mainstream levels.[[11]](#footnote-11)

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 our significant under-funding and promote access to justice for Indigenous people.[[12]](#footnote-12) This has not happened.

While the Australian Government has given NAAJA and our counterpart in Alice Springs (the Central Australian Aboriginal Legal Aid Service) welcome boosts in funding in recent years to meet the increase in workload that has resulted from what is popularly referred to as the Northern Territory Intervention, the core funding position of the ATSILS has not changed. In fact, the additional funding that we have received is not even enough to cover the increase in our workloads since the NT Intervention started. A fair estimate is that a funding increase of at least 50% for the ATSILS is required for there to be parity with mainstream legal aid funding.[[13]](#footnote-13)

Arguably, the ATSILS are perversely complicit in this state of affairs. There is little incentive for government to fund us adequately when we are able to provide something that looks like access to justice. We stretch and strain to protect and promote the rights of Aboriginal and Torres Strait Islander people - and we are rightly proud of what we can achieve with what we get in the face of the many obstacles in our way and in the way of our clients. But there can be no doubt that our clients will often get less than they need and less than clients of mainstream services: less access to lawyers, less time with their lawyer, less understanding of the process and ‘agency’ within it, less access to expert reports when their case might benefit from it and so on.

We are reluctant to admit this because it suggests failure; because it offends our professionalism; and because it is fundamentally unjust. But we know there is something on the sole of our shoe that smells bad.

In the end, we have too much skin in the game to walk away or withdraw services that we know people need and may not otherwise get.

There is a significant opportunity for something to be done about this gross inequity in the course of the review of Commonwealth legal assistance funding that is forming part of the current Review of the National Partnership Agreement on Legal Assistance. I don’t have time to go into that Review today, but we might be hopeful that it will provide the opportunity for governments to remedy the clear disparities in ATSILS funding. In particular, the failure/refusal of state and territory governments to provide funding to ATSILS is something that needs to be addressed.

**A ‘holistic approach’ to access to justice**

ATSILS are typically associated with representing Aboriginal men accused of crimes and related issues around ‘law and order’ and deaths in custody. This has led to a narrow view of the work we do and, I think, a misunderstanding of the broader role we can and do play in assisting Aboriginal and Torres Strait Islander people to access justice.[[14]](#footnote-14)

Let me give a few examples of some of the work that we are doing at NAAJA.

The first is in the area of welfare and housing/tenancy rights. Our Welfare Rights lawyers provide legal advice to people faced with the compulsory management of their social security benefits under the NT Intervention and in relation to housing and tenancy issues. In addition to this, an important part of their role is to provide community legal education around these issues and to work co-operatively with Centrelink (the Commonwealth social security agency) and housing agencies to deal with systemic problems faced by our clients.

The second is the work of our community legal education (CLE) team. The CLE team have taken an innovative approach to their work, using principles derived from community development, medical research and adult education. Rather than the process being a one-way communication of the information lawyers think community members need to know – for example about issues like the right to silence - our CLE team have been spending time working intensively in communities to find out (amongst other things) what the community wants and needs to know, and how best to communicate concepts from what is, for vast numbers of our clients, a foreign legal system.

The third is our work in prisoner ‘Throughcare’. Throughcare is aimed at preparing prisoners for their reintegration into the community and supporting them in their transition to the ‘outside’. The aim of the program is to reduce the NT’s high recidivism rates – in the NT, over 47% of prisoners will be back in jail within two years (compared with a national average of 39.7%).[[15]](#footnote-15)

Our four Throughcare caseworkers work with clients in the six months before and after their release from prison. The program is voluntary and with demand for the service far exceeding our capacity, we choose the clients with the highest needs – those who will struggle the most to re-integrate and who are at the highest risk of reoffending.

Client exit surveys show that Throughcare empowers clients to rehabilitate and reintegrate after release from prison. In the second half of 2011, only three Throughcare clients (out of more than 75 clients) breached court orders or reoffended. Given recidivism rates, this is a remarkable contribution to both improving community safety and reducing the over-incarceration of Aboriginal people.

**A voice for the dispossessed**

ATSILS have a significant role to play as advocates for law and policy reform. Particularly in jurisdictions like the Northern Territory, there is a shortage of groups with grass-roots experience and community membership that are able to speak out on issues such as policing, sentencing or child protection. The extent of Indigenous disadvantage, to which I have referred above, makes it all the more important that Aboriginal and Torres Strait Islander people are able to have their voices heard in the often clamorous debates about these issues.

But the role of the ATSILS is more than that of advocates for a disadvantaged minority group – as important as such a role is. ATSILS should be understood in the context of a post-colonial society which continues to grapple with the impacts of colonisation and Indigenous dispossession. The role of the ATSILS is to give voice to dispossessed first peoples in areas where the state continues to impose itself most directly, intrusively and even violently on their lives.[[16]](#footnote-16)

The work of ATSILS can also be understood in human rights terms. ATSILS assist in giving some effect to the right to self-determination and providing a way of monitoring and promoting the enjoyment of human rights by Aboriginal and Torres Strait Islander people.

It is important to recognise that ATSILS are fundamentally Aboriginal and Torres Strait Islander organisations. While they hire whitefellas like me to work for them, their boards are exclusively made up of Aboriginal and Torres Strait Islander people, their CEOs are all Aboriginal people and a significant proportion of their staff are Aboriginal and Torres Strait Islander people. At NAAJA over 40% of employees are Aboriginal, including in senior management roles. ATSILS are, therefore, more than just legal service providers. They are strong organisations that speak *from* the community as well as for it. And they are places that foster and promote Aboriginal and Torres Strait Islander talent and leadership.

40 years on, the ATSILS are also a testament to the resilience and strength of Aboriginal and Torres Strait Islander peoples and their determination to achieve justice.

1. Principal Legal Officer, North Australian Aboriginal Justice Agency (NAAJA). These are my personal views and not those of NAAJA, its staff or members. My thanks to Ruth Barson for her insightful comments. [↑](#footnote-ref-1)
2. See Charles E Potter Jr, ‘Poverty Law Practice: the Aboriginal Legal Service in New South Wales’ (1974) 7(2) *Sydney Law Review* 237; Cunneen and Schwartz, ‘Funding Aboriginal and Torres Strait Islander Legal Services: Issues of Equity and Access’ (2008) 32 *Criminal Law Journal* 38. [↑](#footnote-ref-2)
3. Cunneen and Schwartz, above n 2; *The family and civil law needs of Aboriginal people in New South Wales*,Law Faculty, University of NSW (2008). [↑](#footnote-ref-3)
4. Australian Bureau of Statistics, *4512.0 Corrective Services, Australia, December 2011*, available at: www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/4512.0Main%20Features2December%202011?opendocument&tabname=Summary&prodno=4512.0&issue=December%202011&num=&view=. [↑](#footnote-ref-4)
5. See Northern Territory Department of Justice, *Northern Territory Quarterly Crime and Justice Statistics*, Issue 35, March Quarter 2011, 94-5, available at: www.nt.gov.au/justice/policycoord/researchstats/index.shtml. [↑](#footnote-ref-5)
6. See *R v Anunga* (1976) 11 ALR 412. [↑](#footnote-ref-6)
7. National Pro Bono Resource Centre, *Submission to the Senate Legal and Constitutional Affairs Committee: Inquiry into Access to Justice* (2009), 15 available at www.nationalprobono.org.au. [↑](#footnote-ref-7)
8. Law Council of Australia, *Submission to the Senate Legal and Constitutional Affairs Committee: Inquiry into Access to Justice* (2009), 24 available at: www.aph.gov.au/Parliamentary\_Business/Committees/Senate\_

   Committees?url=legcon\_ctte/access\_to\_justice/submissions.htm. [↑](#footnote-ref-8)
9. See www.finance.gov.au/foi/disclosure-log/2011/docs/foi\_10-27\_strategic\_review\_indigenous\_

   expenditure.pdf, 240. [↑](#footnote-ref-9)
10. See Schwartz and Cunneen, ‘Working Cheaper, Working Harder: Inequity in Funding for Aboriginal and Torres Strait Islander Legal Services’ (2009) 7(1) *Indigenous Law Bulletin* 19. [↑](#footnote-ref-10)
11. Law Council of Australia, above n 8, 24. [↑](#footnote-ref-11)
12. Senate Legal and Constitutional References Committee, *Legal aid and access to justice* (June 2004); *Access to Justice* (December 2009). [↑](#footnote-ref-12)
13. See the 2009 report of the Senate Legal and Constitutional References Committee, ibid, [↑](#footnote-ref-13)
14. This is not to apologise for the fact that ATSILS provide an effective legal aid service to people accused – and convicted - of crimes. Aboriginal and Torres Strait Islander people should enjoy the same right as others to a fair trial and effective representation and having a culturally competent service is the best way to ensure that these rights are protected. The report of the Royal Commission into Aboriginal Deaths in Custody also emphasised the wider role that ATSILS have in areas such as research – and the need to ensure that ATSILS are adequately funded for this work: see recommendation 105. [↑](#footnote-ref-14)
15. Steering Committee for the Review of Government Service Provision, *Report on Government Services 2012*, (Productivity Commission, 31 January 2012) vol 1, p C.22, available at: http://www.pc.gov.au/gsp/rogs/2012. [↑](#footnote-ref-15)
16. The importance of the role of Aboriginal organisations, including legal services, in empowering Aboriginal people and society was highlighted by the report of the Royal Commission into Aboriginal Deaths in Custody: see *National Report*, Volume 1, 1.8. [↑](#footnote-ref-16)