

# ILAG 2001

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**International Legal Aid Group**

**Allen Hedger**

Delivery of Culturally  
Appropriate Legal Services  
for Indigenous Australians

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# **DELIVERY OF CULTURALLY APPROPRIATE LEGAL SERVICES FOR INDIGENOUS AUSTRALIANS**

**By**

**Allen Hedger  
National Manager  
Aboriginal and Torres Strait Islander Commission  
National Centre  
For Legal and Preventative Services**

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As is the custom I begin by acknowledging the Kulin Nation, traditional owners of the land that we are meeting on today. We are in their place.

Secondly, I'd like to introduce myself and my organisation and trust my presentation will inspire you to learn more about the fascinating Indigenous culture of this country and the many struggles of it's Indigenous people, particularly as it relates to the Australian criminal justice system.

I am National Manager of the National Centre for Legal and Preventative Services, which administers this element of the Aboriginal and Torres Strait Islander Commission's work (ATSIC).

ATSIC is an internationally unique policymaking and program agency for Indigenous Australians. Its establishment ten years ago by the Commonwealth government as an independent statutory authority, enabled Indigenous self-determination through elected Indigenous representatives.

Through ATSIC, Indigenous Australian's interest are brought into the processes of government through elected Regional Councils and the Board of Commissioners. ATSIC represents its people's decisions on Indigenous policy and determines the distribution of funding received from the Federal government. The Commission advises governments at all levels on Aboriginal issues, it administers a number of major economic, social and cultural programs, monitors the performance of other government agencies in providing services to Indigenous Australians and advocates for Indigenous Australians nationally and internationally.

ATSIC through the National Centre for Legal and Preventative Services supports Indigenous community controlled legal services to provide culturally appropriate, quality, and accessible legal assistance where required. Funding is provided to a national network of 25 Indigenous community legal services, 12 Family Violence Prevention Units and 2 state based advocacy and support organisations.

ATSIC also supports preventative and diversionary services which endeavour to reduce the rate at which Indigenous Australians come into adverse contact with the justice system. At the same time ATSIC supports Indigenous organisations to address other community issues which include early resolution of problems such as family violence.

Culturally appropriate legal aid - whilst addressing the critical needs of people in contact with the justice system – involves a broader approach aimed at addressing the excessively high level of contact Indigenous people have with the criminal justice system

Why is there a need for culturally appropriate legal aid for Indigenous Australians?

To answer this question you need to have some understanding of the history of this land as it relates to the Indigenous people. In particular you need to hear how since 1770 the exposure to European laws and government policies have adversely effected Indigenous Australians to this day. Hopefully I will achieve this by explaining:

- the historical time line that helps us understand how we got here
- why we must have separate services for representing Indigenous people in our justice systems
- some of the distinctive elements of culturally appropriate legal services for Indigenous Australians
- some of the broader issues which need to be considered as part of bringing forward justice for our people.

## **The tracks of time - A long time in the making**

For at least 50,000 years the Indigenous people of Australia established societies with their own laws and a land-based spirituality. Details such as kinship systems, art forms and technologies differed from place to place, as would be expected in a continent with environments ranging from dense rainforests to deserts. There was a great deal of communication between neighbouring groups and exchanges of valuable resources over long distances – you could say an effective system of governance, with rules, sanctions and forms of negotiation which ensured “law and order.”

Scholars generally accept that there were at least 750,000 Aboriginal people living on the continent at the time of the arrival of the first Europeans, representing possibly the longest surviving cultures in the world, speaking some 200-250 different languages.

Since **1770** history shows Indigenous Australians have been systematically and brutally dispossessed of their lands.

The myth of *terra nullius* in Australia sparked by Captain James Cook as a result of him not negotiating an agreement with the Indigenous people of this land has lasted over 200 years. The fact that Cook in 1768 had been instructed to make an agreement with Aborigines but failed to do so is little known, and was the first of many administrative decisions which underlie the patterns of today. He was instructed to take possession with consent of the 'Natives'. The acquisition of Australia by the British was later justified by reference to the legal doctrine of *terra nullius* – a myth was born.

By **1860** squatters had taken over 400 million hectares of land from South Australia to Queensland and Indigenous people became trespassers on their own lands. Wherever the struggle for control and use of the land was taken up a full-scale land war emerged, to which colonial authorities responded with declarations of martial law. Aboriginal people were often deliberately killed by settlers or police. Police actions were often called 'dispersals'.

Then followed 'Protectionist' policies, managing the lives of the Aboriginal population through a patchwork of laws in different States – preventing Aboriginal people from entering hotels, from marrying without permission, from living within town boundaries, excluding Aboriginal workers from industrial awards, holding wages in trust and much more. These Acts lasted a long time, and the last of these Acts was not repealed until the 1970's.

Aboriginal political counter actions for survival began in the 1920's and 1930's with strong demands for political rights, for civil rights and equality.

From the **1930s** a group of Aboriginal leaders that included Jack Patten, William Cooper, William Ferguson, and Doug Nicholls, understood that they needed to work within the system. They began to take up the leadership and to clearly articulate the plight of Indigenous people.

Aboriginal political organisations began to emerge and in 1932 the Australian Aborigines League was established and organised a petition to the King asking for better conditions and an Aboriginal representative in Parliament.

In **1937** the Aborigines Progressive Association was formed and during the 1938 Australian 150 year celebrations the Association in protest formed a "A Day of Mourning Committee". The Committee President Jack Patten said " *On this day the white people are rejoicing, but we, as Aborigines, have no reason to rejoice on Australia's 150<sup>th</sup> birthday. Our purpose in meeting today is to bring home to the white people of Australia the frightful conditions in which the native Aborigines of this continent live. This land belonged to our forefathers 150 years ago but we are pushed further and further into the background.*" "Give us a the chance!" We do not wish to be left behind in Australia's march to progress" The committee published a manifesto for Australia Day and later a delegation of the Committee presented the Prime Minister with a ten point program for Aboriginal equality. They sought the Commonwealth to take over Aboriginal affairs and to give positive help in education, housing, working conditions, social welfare and land purchases.

Aboriginal people were not recognised as citizens and had no right to vote in government elections and this was the case until 1967.

The **1967** referendum overwhelmingly carried to remove two discriminatory references to Aboriginal people in the Australian Constitution. The referendum to transfer power from the States to the Commonwealth – with reference to Aboriginal people – was passed with a 'YES' vote of 90.77%. Since Federation, 24 proposed constitutional alterations had been put to the electorate and only 4 had passed, none with such acclamation. It was only now that positive national policies for Indigenous people began to emerge.

In **1972** – 34 years after the Aborigines Progressive Association's Manifesto that called for Commonwealth responsibility for Indigenous Affairs, and 5 years after the 1967 referendum a separate Commonwealth Department of Aboriginal Affairs was established. The first Aboriginal Development Commission was then established in 1979. The Commission attempted to incorporate principles of Indigenous self-management in developing government policies and programs aimed at improving the circumstances of Indigenous people.

In **1987** the Commonwealth Government established the Royal Commission into Aboriginal Deaths in Custody which would inquire into the specific circumstances surrounding each of the 99 Aboriginal deaths in custody which occurred between 1980 and 1989. One of the critical recommendations was that imprisonment for Indigenous people should always be a last resort.

In **1990** by the Aboriginal and Torres Strait Islander Commission replaced the Department of Aboriginal Affairs and Aboriginal Development Commission. As discussed earlier ATSIC is an independent statutory authority established by the Commonwealth government under the ATSIC Act and embodies the principle of Indigenous self-determination and is the principal agency for Aboriginal and Torres Strait Islander Affairs portfolio.

In **1991**, the Commonwealth Parliament established the Council for Aboriginal Reconciliation with the aim to achieve a united Australia which respects the land, values Aboriginal and Torres Strait Islander heritage and provides justice and equity for all.

The Council was replaced in December 2000 with Reconciliation Australia. It aims to deliver real outcomes for reconciliation through strengthening the people's movement for reconciliation and forging innovative partnerships to achieve social and economic equity for Indigenous peoples.

In a landmark decision, the High Court **1992** Mabo decision finally overturned the legal fiction of *terra nullius* when it said Australia's common law recognised Indigenous peoples' property rights (native title). The 1993 *Native Title Act* followed. This case was brought by the late Eddie Mabo and four other people from Mer (Murray Island) in the Torres Strait and took ten years to go through the courts.

In **1995** a National Inquiry was established by the Federal Attorney General to trace past laws, practices and policies which resulted in the separation of Aboriginal and Torres Strait Islander children from their families. The consequent 1997 *Bringing Them Home* report concluded that from 1910 to 1970 between 10 and 30 per cent of Indigenous children were forcibly removed from their families and communities.

Indigenous people continue to feel discriminated against by the **1996** the Wik High Court Decision that confirmed native title could co-exist with pastoral leases, but only to the extent that they were consistent with prevailing leaseholder rights.

In **1996 in Western Australia**, the Western Australian *Criminal Code Amendment Act (No 2)* 1996 came into effect on 14 November 1996. Section 401 provides that offenders who have been convicted for the third or more home burglary must be sentenced to a minimum period of 12 months detention. It applies to both juvenile and adult offenders. ATSIC views mandatory sentencing regimes as unjust, discriminatory and undermine Aboriginal people's development of localised and effective community-based diversionary mechanisms.<sup>1</sup>

In **March 1997** the Northern Territory *Juvenile Justice Amendment Act (No 2)* 1996 came into effect in March 1997. Section 53AE requires a magistrate or judge to impose a period of at least 28 days detention for a juvenile (defined as a person between 15 and 17 years of age) who has been convicted of certain property offences and has at least one prior conviction for a property offence committed after 8 March 1997. At the same time amendments to the Northern Territory *Sentencing Act* (1995) introduced mandatory imprisonment for adults convicted of certain property offences. The legislation provided for 14 days imprisonment for first offenders, 90 days for second offenders and one year for third offenders. As stated in reference to the Western Australia ATSIC views mandatory sentencing regimes as unjust, discriminatory and undermine Aboriginal people's development of localised and effective community-based diversionary mechanisms.<sup>2</sup>

In March **1999** the Australian government released a draft of a proposed preamble to the Constitution, notable for 'honouring Aborigines and Torres Strait Islanders, the nation's first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country'. Whilst controversial because of the extent it recognised Indigenous peoples relationship with the land, this might have been one step towards reconciliation, ... but that's still history in the making.

These are all-important milestones that have influenced the social and economic standing of Indigenous Australians in today's society. Regrettably today's statistics do not portray an enviable standing. Australian Indigenous people have not yet recovered from the severe historical disadvantage of the past 230 years. There is much to put right.

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<sup>1</sup> ATSIC submission January 2000 to the Senate Legal and Constitutional References Committee.

<sup>2</sup> ATSIC submission January 2000 to the Senate Legal and Constitutional References Committee.

## Why Indigenous Australian's have distinct needs

I will start with some sobering facts that should help you understand that the importance of these needs can never be understated.

- Indigenous people die on average 15-20 years earlier than other Australians, and are far more likely to suffer infectious diseases or chronic diseases such as diabetes, trachoma, ear disease and renal failure.
- The unemployment rate for Indigenous people is an estimated 26 per cent, as against about 8 per cent for the general community, and incomes are approximately two thirds of the Australian average.
- Fewer than one third of Aboriginal and Torres Strait Islander students are finishing secondary school, compared with a national retention rate of around 70 per cent.
- Aboriginal people are over-represented in the criminal justice system by a factor of at least 15.
- Aboriginal people are far more likely to live in poor and overcrowded housing, without essential services.<sup>3</sup>

The Australian Bureau of Statistics profile Indigenous Australia as being the opposite of the mainstream Australian population. The Indigenous Australian population is growing rapidly, estimated to have increased by approximately 33% from 1991 to 1996 while the total Australian population grew by approximately 6% in the same period. Indigenous Australia has a younger age structure today than the total Australian population had at the beginning of the century. Forty per cent of the Indigenous population is aged under 15 years.

Indigenous Australians are much more likely to live in non-metropolitan areas than the rest of the population, although Sydney and Brisbane contain large Indigenous communities.

Consequently, Indigenous Australian's face difficulty in accessing services as more and more government resources are targeted towards an overall ageing and urban based Australian population.

**Indigenous youth** experience grossly disproportionate rates of disadvantage in the enjoyment of basic human rights (especially economic, social and cultural rights) as demonstrated by the following characteristics:

- An unemployment rate for Indigenous youth of 28.6% - more than double the corresponding rate for all youth
- 9% of Indigenous people aged between 15-29 years living in households with more than 10 residents compared to 0.4% of all young people
- 73.7% Indigenous 15 year olds in full-time education compared with 91.5% of all 15 year olds
- birth rates for Indigenous women aged between 15 and 24 two to three times higher than for the total female population
- death rates for Indigenous males and females in the 15-24 year age groups two to three times higher than for non-Indigenous people in the same age group and nearly five times higher in the 25-34 year age group<sup>4</sup>

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<sup>3</sup> Aboriginal and Torres Strait Islander Commission *AS A MATTER OF FACT*

Entrenched discrimination continues to disadvantage Indigenous peoples, exacerbating our contact with the criminal justice system. For example, zero tolerance policing, socio-economic circumstances that inhibit many Indigenous people qualifying for bail, mandatory sentencing, the high incarceration rates of Indigenous people for less serious crimes such as intoxication and enforcement of outstanding warrants are still prevalent. Sadly this last point flies directly in the face of RCIADIC recommendations of imprisonment as last resort.

Indigenous Australians of all ages continue to be over-represented in prisons and legal systems. The Australian Institute of Criminology reports an imprisonment rate for Indigenous people more than 17 times higher than the rate of non-Indigenous people. Ten years after the report of the RCIADIC Indigenous people, who make up one in fifty of the total population, are still one in five of the population in custody.

The extent of contact Indigenous people have with the criminal justice system is a manifestation of broader social problems such as systemic unemployment, poverty, poor standards of health and education and entrenched disadvantage. Additionally the growing Indigenous population, and subsequent high number of youth, reflects a future possibility of alarmingly increased adverse contact of Indigenous people with the criminal justice system.

No legal aid system can cure these circumstances. However, it is clear that in the midst of the long list of things Indigenous Australians need, they also need specialised legal assistance.

## **Distinctive elements of culturally appropriate legal services**

Aboriginal & Torres Strait Islander Legal Services (ATSILS) have been operating in an evolving operational climate since the 1970's and as a result the provision of service and performance standards during this time have varied in effectiveness. In 1996 ATSIC introduced a program of national reforms to improve the quality and effectiveness of service delivery.

These reforms include the establishment of national minimum standards, the implementation of a national ATSILS policy framework that targets how assistance is prioritised, the implementation of a quality improvement cycle that involves the development of best practice ATSILS standards on a state by state basis, the development of a nationally consistent contestability policy for the selection of ATSILS service providers, and a rolling program of effectiveness reviews and quality assurance checks.

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<sup>4</sup>Human Rights and Equal Opportunity Commission, 1999, Social Justice Report of the Aboriginal and Torres Strait Island Social Justice Commissioner, Indigenous youth characteristics in 1996



In terms of culturally appropriate delivery, Boards of Management drawn from the Indigenous community run ATSILS. They make significant use of Indigenous field officers to liaise between clients and systems. This is consistent with developing mechanisms to ensure maximum participation of Aboriginal and Torres Strait Islander people in the management of their affairs.

ATSILS are considered by Indigenous people to be the preferred source of assistance because of their better understanding of their clients' culture and circumstances. ATSILS provide a special service which is able to intervene at critical times and often in remote locations.

ATSILS clients often require further special assistance because of language difficulties. For instance many Aboriginal people in the Northern Territory have a limited understanding of English, and the ATSILS have practices in place to work with these clients through interpreter services. A significant characteristic of culturally appropriate services provided by ATSILS, distinguishing them from other forms of legal aid, is representation and explanation to clients in the face of often limited understanding by Indigenous people of the legal justice system.

ATSILS also plan to meet increased demand for services as a result of mandatory sentencing. The main Aboriginal legal service in NT has a mandatory sentencing database which indicates that a substantial level of people caught by mandatory sentencing are from remote communities.

They also undertake diversionary and preventative strategies, and advocate and negotiate with relevant government authorities about services to Indigenous people.

ATSILS primary focus and workload is on criminal matters and they do so in an environment where demand exceeds their resource capacity – approximately 85% of their time reflects the level of need for criminal assistance.

The scope of activities that ATSILS are empowered to do under their ATSIC funding policy framework include:

- preventative, information and education services,
- initial advice, minor assistance and referral,
- duty lawyer assistance,
- legal casework assistance in criminal, civil and family law matters,
- input on law reform to promote social justice, and
- outreach, support and other legal aid related services

Women's needs, and indeed their access to legal assistance remains an area of high priority for ATSIC. We continue to find ways for increased participation by women in the processes of exercising their rights through legal assistance. Female matters currently occupy one quarter of the workload.

In another targeted form of legal aid ATSIC funds Family Violence Prevention Legal Units in rural or remote areas. These are culturally appropriate and unique legal services that take a holistic approach in addressing family violence prevention.

While the primary objective is the safety of women and children, each centre recognises the complexities of family violence as a community issue. The communities themselves are forging ways to address all parts of the problem (women as victims, children, perpetrators, critical shelter and legal representation). Each unit has a multi-disciplinary team of solicitor, community educator, counsellor and outreach workers.

## **Bringing justice forward**

Continued reconciliation is a positive step in the right direction to address the underlying inequities experienced by Indigenous people – this must happen in order to have a positive effect on Indigenous peoples experience with the justice system.

It is evident to all that it will take more time for an agreement between the Indigenous people and this nation to emerge. To this end ATSIC is supporting discussion for a treaty because this may be one way to create more certainty about the relationship between us, to acknowledge Indigenous presence in a really meaningful way, to overcome and seek redress for historical grievances and to establish a framework of rights protection.

In the meantime Indigenous people continue to have appallingly high contact with the criminal justice system – accordingly the need for legal preventative and diversionary strategies is paramount.

Progressive people and thinking is required to ensure that custodial sentencing is used as a last resort for Indigenous people and likewise decisive action on everyone's part is required in order to reduce social disorder in Indigenous communities and develop and support initiatives that will break the cycle of repeat offending.

Central to any strategies is the need to address the juvenile Indigenous population. If society does nothing to restructure the use of resources to meet the needs of Indigenous youth, it will only lead to continuing excessively high rate of contact with the criminal justice system. Far greater focus is now required to enhance our concentration on preventative initiatives.

My Centre cannot possibly address this on its own. It will require a whole of Government coordinated approach. We need to foster a positive environment where Indigenous people, particularly youth, can access their own authentic culture and participate in positive employment, education, recreation and sporting opportunities.

We need to do much more to promote the Australian community's knowledge and understanding of law and justice rights and responsibilities in terms of Indigenous affairs in this country.

There needs to be an understanding of the crucial factors that lead to the over-representation of Indigenous people in the criminal justice system. Importantly community attitudes need to change and recognition given that Indigenous people have distinct special needs.

Today I have provided you with a very brief insight into one Indigenous model of how legal services can be provided through Indigenous community controlled organisations. It is a model that is working well.

To use a common Australian saying – "a fair go" is all the Indigenous people want.

Thank You.