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'INDIGENOUS LAW AND JUSTICE: NEW CHALLENGES'

Presented by Frank E Guivarra (CEO) at the Law Institute of Victoria Biennial Criminal Law Conference 2004 (10-12 September 2004) on 12 September 2004

I want to briefly talk about the current State and Commonwealth Government policy that is directly impacting on the Victorian Aboriginal Legal Service's capacity to assist the Indigenous community. But first I would like to reflect on a quote by Larissa Behrendt, Associate Professor of Law at the University of NSW from her book "Achieving Social Justice".

"How societies deal with 'otherness' and 'sameness' will impact on their ability to allow individuals freedom from oppression and enough scope for the exercise of liberty…The experience of Indigenous people, their tenacity in the face of racist and assimilationist policies, is testament to the fundamental and central role identity plays in our lives."

In recent times there have been new reminders that some Governments and some sections of the community are threatened by the idea of difference or otherness. This is particularly the case if the difference is connected to Indigenous Australian self-determination, Indigenous Australian management, Indigenous Australian Courts, multi-culturalism and racial vilification laws to name but a few issues. This disquiet about otherness has led to words like 'separatism' and 'apartheid' being used by Federal Government Ministers to describe Indigenous specific programs. Programs and services which once provided for recognition of difference and the need for appropriate programs are now being relabelled as a symbol of dysfunction.

On 13th July 2004, Mr Bob Charles, Chairman of the Joint Parliamentary Committee on Public Accounts and Audit, inquiring into the Indigenous Law and Justice Program, asked the following question to an Indigenous Australian woman who worked at an Indigenous Women's Legal Service - *"Let me ask you this and I am not being rude in any sense of the word. Would we need a similar service for Greeks, Yugoslavs, Romanians, Russians and Ukrainians?"* This attitude of scepticism to the need to recognise difference is not localised in Canberra. More generally the question is along the lines of "Why do they get their own services?"

When the establishment of the first Koori Court was announced a lawyer described it as it creating two different justice systems. Now apart from the question of how different the Koori Court is, there is the implication that difference equals privilege or advantage.

What happened to the idea of horses for courses, of specialisation or of appropriateness? All these words indicate difference but without the suggestion that some sort of privilege or unfair advantage is occurring. Difference was once ok, even celebrated in some contexts, now it's often a threat, a handicap and even un-Australian.

There are a range of theories about why a Hansonite influenced policy stream has emerged and whether there are signs of it waning. From the perspective of an Indigenous Australian person managing an

Indigenous organisation such a policy has to be acknowledged, has to be questioned and it adds an additional degree of difficulty to what was already a challenging environment.

The Commonwealth and State Government Record on Implementing the Royal Commission into Aboriginal Deaths in Custody - An Instructive Case Study

Before looking at the Commonwealth and State policies, today let us consider what has happened in relation to something that was clearly a State and Commonwealth responsibility, the Royal Commission into Aboriginal Deaths in Custody Report (RCIADIC, 1991).

There was no effective State-Commonwealth commitment to the implementation of the RCIADIC Recommendations until 1997. The pace of reform in various States is different. In Victoria, the Aboriginal Justice Agreement was released in 2000. There are some useful reforms occurring as a result of State Governments working with Indigenous Australian communities to implement RCIADIC Recommendations. However, there have been other trends at a State and Commonwealth level which in many cases have undermined the progress made.

Since the release of the RCIADIC Recommendations there has been a vast national increase in the number of prisoners. The rate at which people are dieing in custody has dropped, but the numbers in prison have not and the over-representation rate of Indigenous Australians in prison has hardly changed. There has been a national enthusiasm to revisit and reinvigorate Australia's convict past.

Professor Arie Freiberg in his review of Victorian sentencing highlights that sentencing rates are increasing ahead of crime rates: "*In Australia, as possibly elsewhere, there is little evidence that increasing imprisonment rates have significantly affected crime rates. Victoria's crime rate over the last decade, which has shown small annual increases for the most part, appears to be unrelated to the numbers in prisons.*

Victoria's prison population has grown from 2,250 in 1992 to 3,464 in November 2001, of which 2,890 were sentenced prisoners" (p. 41, Freiberg 2002).

Nationally, in 1991 Indigenous Australians constituted 13% of the prison population. Since 1999 the proportion has been approximately 20% (Human Rights and Equal Opportunity Commission 2004).

Freiberg attributes the increase in prison numbers across Australia largely to a shift to more punitive attitudes to prisoners and a reduction in rehabilitative programs and policies: *"As society turns from rehabilitative and deterrent notions to punitive and preventive ones, prison sentences may become fewer, but considerably longer"* (p. 14, Freiberg, 1999).

Over the last decade there has been significant media and State Government attention on being "tough" on crime. This has often meant higher minimum sentences, new laws, limits on judicial discretion and the building of more prisons. Victoria has not gone as far down this path of being "tough" on crime as other States, but it has nevertheless gone a long way. Dramatic increases to the number of people in prison are an expensive way to mislead the public into thinking something constructive is being done about "the problem".

The dominance of tougher sentencing policies has meant that the over-representation rate of Indigenous Australians has continued to be unacceptably high. Nationally the over-representation rate of Indigenous Australians is around 14 times the non- Indigenous Australian rate and the total number of

Indigenous Australian prisoners has skyrocketed. Tough sentencing policies have largely been pursued at the expense of smart sentencing.

The public and in many cases the Government have not been made aware of the costs and ineffectiveness of increasingly punitive sentencing policies. There is a pressing need to put evidence before the public to dissuade people from pursuing more punitive sentencing in the mistaken belief that it is a solution. It is in fact part of the problem. While some politicians have made political capital out of this ignorance there is a need to contest and inform the community about the real causes of crime and an appropriate mix of responses. Public opinion which in many cases is not well informed on this issue needs to be better informed. It is unacceptable to walk away from the issue and say, "Oh well, the public wants us to be tough on crime."

According to Freiberg, *"Research into public opinion and sentencing consistently finds that the more information that is provided to respondents the less punitive are their responses, especially when the polling takes the form of sentencing vignettes or simulated sentencing exercises"* (p. 42, Freiberg 2002).

In the past societies believed that the earth was flat, that women should not vote and that witches should be burnt at the stake, but we have moved beyond these understandings and that needs to be the objective in relation to sentencing policies. This will be difficult given the success that victims groups appear to have in obtaining Government support. We have seen the Victims of Crime lobby and within a matter of weeks force a change to the composition of the Sentencing Council. On 25th August 2004 the State Attorney-General announced possible changes to the Sentencing Act to reflect the impact of a crime on the individual victim.

Commonwealth Policies

The 2002 Aboriginal and Torres Strait Islander Social Justice Commissioner's Report stated that the Government's approach to Aboriginal self-determination (e.g. preferring the term self-management to self-determination) raises the question – "Is the Government's approach a stylistic or language change or something more substantive?" The Commissioner concludes that the Government's approach is far more substantive than semantics and goes on to list five main concerns:

- The Government's reliance upon inflammatory, provocative untruths to reject Indigenous Australian's right to self-determination.
- The failure or perhaps refusal of the Government to accept that any consequences flow from recognising the unique, distinct status of Indigenous peoples in this country.
- No underlying basis, no guiding principles, for relations between Governments and Indigenous Australians.
- The Government's current framework is oppositional in its approach and sets up Indigenous Australians as competitors of Government. It is a strange almost paranoiac view of partnership.
- No general acceptance by the Government of the legitimacy of Indigenous peoples being the primary decision makers on matters that effect their daily lives….(pp. 47-52 HREOC Aboriginal and Torres Strait Islander Social Justice Commissioner, 2002).

Since that Report the Social Justice Commissioner's assessment has been confirmed.

- In spite of spending $1.5million on a Review of ATSIC the Commonwealth Government appear to have completely ignored the Review and decided to establish an

Advisory Group and mainstream all Aboriginal and Torres Strait Islander Services (ATSIS) program funds.

There is now another Parliamentary Committee trying to ascertain what this will mean in practice.

- The Office of Evaluation and Audit Review of the Legal and Preventative Services Program (2003) recommended against tendering of legal services to 'for profit' legal providers. However, ATSIS have ignored this in their Exposure Draft of a Request for Tender for the Purchase of Legal Services for Indigenous Australians (Exposure Draft).

The closing down of ATSIS, the organisation responsible for a number of Indigenous programs and the proposal to tender Indigenous legal services indicates a lack of support for Indigenous Australian controlled organisations and a lack of recognition for what they can do. Rather than see Indigenous organisations and peoples as having relevant expertise which could contribute to better policy, programs and services for Indigenous Australians, the Government direction has been to mainstream services.

Practical Reconciliation

The Government emphasis on 'practical reconciliation' has been portrayed by the Government as a success contrasted with the 'failure of symbolic reconciliation'.

Altman and Hunter(2003) monitored the impact of "practical" reconciliation by reviewing changes in the socioeconomic status of Indigenous Australians during the decade 1991-2001, a period that closely matches the 'reconciliation decade'. The authors state: *"It is of particular concern that some of the relative gains made between 1991 and 1996 appear to have been offset by the relatively poor performance of Indigenous outcomes between 1996 and 2001"* (p. v 2003).

Larissa Behrendt argues that a reliance on practical reconciliation without recognising the importance of 'symbolic' issues, such as Indigenous Australian management and the need to tackle institutional bias, will fail. Behrendt's comments indicate that behind the "either/or" thinking that often passes for policy there is considerable room for "both/and" thinking. Unfortunately, I fear we have some way to go before this insight is widely shared.

Legal Aid Policy

As you are aware the Commonwealth Government removed one hundred million dollars plus from the Legal Aid System in 1996 and stated Commonwealth dollars could only be spent on Commonwealth laws. That had a dramatic impact across the country and a flow on effect to Aboriginal and Torres Strait Islander Legal Services (ATSILS).

More recently, the Law Council of Australia has documented some of the consequences of this backflip in its Report "The Erosion of Legal Representation in the Australian Justice System" (2004).

The plan to tender out and mainstream Aboriginal Legal Services is another example of the Commonwealth Government retreating from and undermining the strength of the existing system.

The Victorian Aboriginal Legal Service (VALS) has had twelve years of effective funding cuts, seven years of uncertainty about whether ATSILS would be mainstreamed and two years of six monthly

funding announcements as a curtain raiser to the tendering out of the service. VALS has a track record of surviving in difficult circumstances and we plan to continue that record by winning the tender sometime between now and the 30th of June 2005.

Reports provided by Government agencies, such as the Australian National Audit Office, Review of Law and Justice Program provide clear evidence that ATSILS are delivering valuable services on a shoe string.

The Review of the Law and Justice Program provides the following overview of ATSILS:

- Services provided have increased dramatically;
- Funding has been static since 1991;
- Demand has and is likely to increase;
- Services require between $12.5 and $25 million extra;
- ATSILS are the primary provider of legal services providing approximately 89% of all services (pp. 25-6, 46 Australian National Audit Office, 2003).

On top of this, there is the continuing challenge of services to an increasing Indigenous Australian population. The Indigenous Australian population has increased from approximately 260,000 to 410,000 in the ten years since 1991. Before providing details about the tender proposals we need to look briefly at State Government policy.

State Government Policy

The State Government has a more strategic and Indigenous friendly approach to Indigenous justice than the Commonwealth Government. However, as should be clear from the previous comments we regard the development of the Aboriginal Justice Agreement as valuable, but being overshadowed by broader mainstream policy settings. These include budgetary policy and priorities, lack of effective consultation models and timelines, ineffective crime prevention and sentencing policies and too narrow a focus on criminal justice to the exclusion of economic and social justice issues.

In relation to the proposed amendment to the Constitution to recognise that Indigenous people were the first owners of Australia, VALS has urged the State Government to go a step further. We want a Government commitment to consider the impact of Governmental decisions upon Indigenous Australians prior to deciding to change legislation. We want the impact of legislation on Indigenous people to be wired in to Government processes, not grafted on at the end.

The Role of Aboriginal Legal Services in Australia's Legal Aid System

Established in 1971 the Redfern Aboriginal Legal Service was the first Community Legal Centre in Australia. VALS was established in 1972 and employed its first staff member in January 1973. Victoria, Tasmania South Australia and Western Australia have one service per State, often with Regional Offices. NT has four services, NSW has six and Qld has eleven.

ATSILS provide approximately 89% of all legal aid services to Indigenous Australians and about 90% of their work is criminal law work. ATSILS are not a supplementary service, they are the primary

service for Indigenous Australians. Legal Aid Commissions recognise that they have a supplementary role to ATSILS in legal service provision to Indigenous Australians. ATSILS are different to most other areas of service provision where Indigenous organisations play a secondary or niche role in the provision of services.

In the context of other providers of legal aid, ATSILS receive all or almost all their funding from the Commonwealth Government via the Department of Immigration, Multicultural Affairs and Indigenous Affairs. The role of ATSILS is part Legal Aid Commission (in terms of providing the bulk of all casework), part Community Legal Centre (in terms of providing a range of legal aid related services such as education, community development, policy and law reform and having a community based management committee). On top of this ATSILS via their use of Indigenous staff provide a valuable culturally appropriate bridge between Indigenous Australians and non-Indigenous peoples both inside and outside of the organisation.

A quick snapshot of the Victorian Aboriginal Legal Service

- Almost 90% of legal aid services to Indigenous Australians in Victoria are provided by VALS.
- We have 35 staff who operate from 7 locations in Victoria.
- We provide assistance at over 70 Courts across Victoria.

Metropolitan/Regional work

- 55% of Indigenous Australians in Victoria are outside the metropolitan region.
- 70% of our Client Service Officer resources are devoted to the non metro area.
- Over 60% of our criminal law work is for clients outside the metro area.
- Over 45% of our family law and civil law work is for clients outside the metro area.

Female/Male Clients

- 26% of our criminal law clients are female.
- Over 50% of our civil and family law clients are female.
- Family law includes Child Protection matters.
- Over 37% of solicitor hours are directed to matters for female clients.

<u>The Tender</u>

The Exposure Draft announced in March 2004 revealed that the default policy setting was to mainstream ATSILS. The tender proposal was an opportunity to introduce a range of new program guidelines for ATSILS without consultation.

Initial opposition to the proposed tender has come from the Australian Legal Assistance Forum. There has also been opposition from State Attorneys-General, Directors of Public Prosecutions, Community Legal Centres, Politicians and Indigenous organisations. VALS appreciated the assistance of Arnold Bloch Leibler in preparing our response to the Exposure Draft.

On 28th July 2004 in a media release of the Attorney-General, Phillip Ruddock indicated that there has been some movement back to the status quo on the policy front. However, the tender is going to proceed with the first request for tender being released in Victoria, then Western Australia and followed by Queensland. For probity reasons, the exact policy framework contained in the tender will not be released until the Request for Tender, so VALS only has the Minister's media release to go on and that leaves a number of big questions.

Indigenous Access to Legal Services

Even for non-Indigenous people knowledge about what the law says and how it might help is not distributed evenly. There is unequal access to the law. For Indigenous Australians there is the additional problem that the law has been used systematically to legitimise removal of access to land, removal of children, removal of families and moving on from public spaces, such as shopping centres and parks. The over-representation of Indigenous Australians in prison and in child protection cases and in early school leaving highlights that the so called equality of Indigenous Australians does not translate to equal outcomes. Indigenous Australians haven't seen a lot of good outcomes from their experience of the law.

Indigenous Australians are more often processed by the law rather than have an opportunity to use the legal process to defend their rights or protect themselves using the law. That's one of the reasons that most Indigenous Australians will use an Indigenous Legal Service as the least unpalatable option. Some will choose not to use an Indigenous Australian service or for conflict of interest reasons will use another service, but generally Indigenous Australians prefer to use their own service providers.

If the Government announced that it was going to move ATSILS offices to areas where there was no public transport or start to charge for services, most people would appreciate that this would reduce access to services. This would be a tangible and physical obstacle. The move to have Legal Services provided by non-Indigenous providers is in some respects an even bigger blow to accessibility.

Tendering out of services which was seen as something of a panacea in the nineties has come to be regarded with slightly more scepticism in many quarters. I won't go into the critiques of tendering but given the complexity of this issue it would seem reasonable to expect, at the very least that ATSIS perform a cost benefit analysis prior to embracing tendering.

Wayne Gibbons, the then Chief Executive Officer of ATSIS appeared before the Senate Estimates Committee and in response to questions from Senator O'Brien, admitted that there had been no cost benefit analysis with respect to the proposed tendering of legal services for Indigenous Australians.

The only benefit that Gibbons could point to was the supposed savings from amalgamations of services in States with more than one service. Ironically, neither Victoria, Western Australia nor South Australia has multiple services though they each have Regional Offices. How did ATSILS qualify for this 'special treatment' (eg: discrimination compared to other legal aid providers)?

The tender will also introduce means testing which the Government has already piloted and found to be a waste of resources. Keys Young, who did an evaluation, recommended instead only means testing expensive cases. At least this way services would be wasting less resources.

The Vital Role of Prevention and Proactive System Improvement which are Dismissed in the Proposed tender

The proposed tender no longer includes prevention, education, diversion, policy analysis, law reform or test case work as core services. This work is a function of Legal Aid Commissions and Community Legal Centres and it is not clear why ATSILS should have this function taken away.

Victorian Aboriginal Legal Service – Policy and Law Reform

VALS has and continues to be active in the following areas: law reform, policy formulation, research and Community Legal Education. In 2004 VALS has been involved in the following initiatives relevant to criminal law:

- Research about improving diversion for young people which has resulted in approval for pilot projects in two locations
- Drafting of a submission to the Victorian Law Reform Commission about changes to the Bail Act which will enable circumstances of Indigenous people to considered more fully
- Drafting of a submission to the Law Reform Commission on Defences to Homicide

These activities help improve the law, the legal system and the policy making and implementation process. If the proposed new ATSIS tendering policies go ahead **none** of these sorts of initiatives will be done by ATSILS in the future.

On top of the tender, there is also the promise of a yet to be released new Funding Allocation Method which will rearrange the State by State funding allocations. This has the potential to undermine the capacity of ATSILS to maintain existing services.

ATSILS have been operating in a climate of uncertainty for the eight years following the 1996 Productivity Commission Recommendation that ATSILS be mainstreamed. This uncertainty has become more debilitating since June 2003 when ATSIS was created. Since that date ATSILS have been on six monthly or less funding periods. To ATSILS, which are acknowledged to be under funded and have difficulty recruiting and retaining suitably experienced staff, the move to shorten funding periods is at best an example of carelessness and at worst part of an agenda to destroy Indigenous Australian organisations.

The RCIADIC recommended simplification of funding accountability requirements and three year funding and this did not occur. Instead Indigenous organisations have been subject to:

- Continual uncertainty about funding;

- Ongoing evaluations and reviews;
- Erratic policy changes;
- A decline in funding levels;
- Increased demand;
- Expanding population numbers;
    - Continued expansion of the prison population and high over-representation rates of Indigenous Australians within the prison population;
- Poor or non existent support from ATSIS and;
    - A increasingly hostile policy environment for Indigenous organisations.

The Future of Aboriginal Legal Services

VALS will keep trying to work with other organisations and pursue improvements to our service. The support we receive from mainstream services is critical to helping us achieve this. Below are a few issues which we intend to keep putting before the Government.

Recommendation 1:

In recognition of the high needs of Indigenous Australian communities and the important role of Indigenous organisations and staff in providing appropriate services and better linking Government Departments to communities that: a collaborative and consultative approach be adopted by Government as a first principle. The views of Indigenous Australians must be sought and as far as possible acted on. Approaches such as tendering, privatising and mainstreaming should only be considered if collaborative approaches to service improvement fail.

Recommendation 2

That there be a three year program of funding increases which: reduces the current salary gap between Indigenous legal service funding and Legal Aid Commission funding, replaces the Fringe Benefits Supplementation funding which is about to cease, reduces state inequities and increases the funds available to remote areas, civil law assistance, family law assistance, women's access to services, community education and prevention strategies.

Recommendation 3

It is vital that funded services are able to provide a range of types of services (eg: individual prevention and policy). The power to decide the mix and changes to that mix needs to be delegated to and addressed by Indigenous Australian communities in the particular State and organisation.

Recommendation 4

If it is determined that tendering is to go ahead this should only occur after three issues are investigated:

(a) Policy changes to ATSILS are discussed, analysed, and finalised (the tender proposal contains a number of new policies some of which have been rejected already and some of which have not been previously discussed). The discussion of these new proposals should include some modelling of their impact and input from Indigenous Australian community organisations.

(b) A cost effectiveness analysis should be done on whether building on the existing service structure or abolishing it and starting again is preferable.

(c) There should be a cost benefit analysis of using a tender versus a benchmarking process.