

BRIEFING PAPER

**ACCESS TO JUSTICE
ISSUES FACED BY
ABORIGINAL AND
TORRES STRAIT
ISLANDER PEOPLES IN
WESTERN AUSTRALIA**

**THE ESSENTIAL MEMBERSHIP FOR
THE LEGAL PROFESSION**

Prepared by the Law Society of Western Australia

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Introduction

In Western Australia, there is no automatic right to free legal representation or assistance when accused of a crime. Instead, to obtain free assistance an individual must prove that they qualify for the services provided by Legal Aid, the Aboriginal Legal Service (ALS) or a CLC that is funded to advise on criminal law issues. However, due to a lack of funding to these services, the ambit of those able to obtain assistance is ever decreasing.

With the complexity of our legal system, it is highly likely that a self-represented accused may find themselves pleading guilty to an offence where they have a legal defence, pleading not guilty when a finding of guilt is unavoidable or receiving a particularly stern sentence where there are strong mitigating factors suggesting that alternative sentencing would be more appropriate in the circumstances.

Amongst other issues faced by the Indigenous community, the lack of assistance to provide an understanding of the system, lack of interpretive services and lack of support throughout court proceedings are often cited as part of the reason why this community accounts for such a large proportion of our prison population.

Unnecessary or prolonged court proceedings and unnecessary incarceration causes a drain on the justice system and corrective services. These issues at the end of the judicial process could easily be addressed by the provision of assistance to accused people, and in particular Indigenous people, at the front end of criminal proceedings.

In this paper we look at the history within Western Australia of providing government assisted legal representation to the Indigenous community, what services are currently provided within the justice

system and what other countries have done to address the overrepresentation of Indigenous people within the justice system.

Past Position

Indigenous peoples' historical lack of access to justice has contributed greatly to their incarceration rates. The government has set up many regimes in attempts to address the offending rates of Indigenous people. However, those regimes were greatly flawed because they aimed to treat Indigenous people as less human than their Caucasian counterparts.

Towards the end of the nineteenth century and the beginning of the twentieth century, the government thought Indigenous people to be one step behind on the road to evolution and that they would naturally be eradicated. The government considered its role in this natural progress was to assist by 'smoothing the dying pillow' and provided no support to the Indigenous population.²

In the early 1900s the government realised the Indigenous people were not dying out and they developed the 'protectionist legislation'.³ This legislation gave the Chief Protector the power to control the lives of Indigenous people and appointed him as the legal guardian of all Indigenous children.

The government eventually relaxed this legislation in the mid-1900s,⁴ allowing some Indigenous people to apply for 'citizenship status'. However, to achieve this, individuals would have to cut 'tribal associations', 'adopt the manner and habits of a civilised life' and satisfy certain health criteria. And regardless of whether this criteria was met or not, the legislation gave discretion to the government authority to revoke citizenship without requiring a reason.⁵ It was also around this time that Australia implemented measures that resulted in what is

now referred to as the ‘Stolen Generation’. This created great resentment amongst the Indigenous people for both the Caucasian population and their systems.

It is widely acknowledged that the systemic removal of Indigenous children from their families and consequential institutionalisation of Indigenous people has contributed to the over-representation of Indigenous children and young people in the justice system.⁶ Since the 1970s there have been numerous reports and studies indicating that there is an overrepresentation of Indigenous people in police interventions, court appearances and juvenile detention centres.⁷ In a context where Indigenous people were not permitted to make decisions about their own lives or bring up their own children, it is not difficult to imagine that any access to justice for Indigenous people was minimal.

In Western Australia in 1965, Indigenous people were charged with 7,491 offences. 7,357 of those charges resulted in convictions, being a 98% conviction rate. Only thirteen of these Indigenous people were referred to the Law Society for legal representation and just three had private legal representation. In the same year eight Indigenous defendants went before the Supreme Court without representation.⁸ It is hard to believe that in civilised times, a government would allow so many people to go before Courts without the representation and legal advice that they sorely needed. And the results of this failure to provide legal aid is borne in the States conviction rate for Indigenous people.

Around this time unpaid and untrained Justices of the Peace would stand in as Magistrates in rural areas due to limited funding in these areas. This resulted in many receiving particularly heavy sentences when perhaps they shouldn’t have even been convicted.⁹ Whilst both Indigenous and Caucasian people appeared before Justices of the Peace at this time, in 1965 56% of Indigenous

accused had cases heard before one or two Justices of the Peace, compared to just 21% of white accused.¹⁰

In 1969, Indigenous people made up about 2.5% of the total population of Western Australia but 41.3% of admissions to prison. 64% of the female prison population was Indigenous women. Imprisonment rates for Indigenous people for minor offences were over 60%, in stark comparison to a 12% rate of incarceration for non-Indigenous people who committed the same offences.¹¹ These statistics go some way towards demonstrating the lack of access to legal representation and advice that were available to Indigenous people.

The civil rights movement in the early 1970s saw some acknowledgement of the extremely high rate of incarceration of Indigenous people, with ALS opening its doors to provide legal services and assistance to the Indigenous population.¹² The aim of the ALS was to reduce incarceration and police harassment of Indigenous people, as well as to provide legal representation. The first ALS office opened in Redfern, New South Wales and handled over 550 cases in its first year. Western Australia then opened its own ALS in early 1972 under the initiative of the Honourable Chief Justice Robert French (an articled clerk at the time) and George Winterton. This centre ran on the pro bono services of the legal community.

In 1972 the Commonwealth Government began a move towards funding Aboriginal services with the Prime Minister promising to pay ‘all legal costs for Aborigines in all proceedings in all courts’.¹³ And in April 1973, the Commonwealth Government provided \$2m to the States to support their existing legal aid schemes, so there could be an immediate increase in the availability of Legal Aid.¹⁴ These steps taken by the Commonwealth Government had a drastic impact on the development of Indigenous legal services throughout the country.

However, there remains severe gaps in the current provision of aid to Indigenous people. With numerous different Indigenous languages in Western Australia it is surprising that the National Translating and Interpreting Service does not provide translation or interpreting services for any of these Indigenous languages. Instead the Kimberley Interpreting Service, a not for profit organisation, is relied upon to provide this service across the state.¹⁵ In Fiona Skyrig's *Justice: A History of the Aboriginal Legal Service of Western Australia*, Maureen Kelly, one of the first Indigenous people in the Pilbara region to be made a Justice of the Peace, remembers sitting on the bench and realising that prosecutors were mistaking 'you-ou' (meaning 'yes, I hear you') for 'yes, I'm guilty'.¹⁶ Communication and lack of interpreting services remains one of the major issues in the operation of the criminal justice system in rural Australia today.

Furthermore, the high rate of Indigenous deaths in custody has marred the interface of Indigenous legal relations. Western Australia had the highest ratio of Indigenous deaths in custody, with a rate of 87 deaths per 100,000 people in the 1980s.¹⁷ The Royal Commission into Aboriginal Deaths in Custody released its report in 1991. Recommendations included that police services should adopt arrest as being a sanction of last resort, that governments should legislate to enforce the principle that imprisonment should only be used as a last resort, that the use of Justices of the Peace for the determination of charges or imposition of penalties be phased out and that where there is doubt as to whether a person has the ability to fully understand court proceedings in English or express themselves in English, the court be obliged to satisfy itself that the person has that ability.¹⁸

As Paul Keating noted in his iconic 1993 Redfern Address, 'we simply cannot sweep injustice aside. Even if our own conscience allowed us to, I am sure, that in due course, the world and the people of our region would not'.

Present Position in Australia

There is currently a disproportionate number of Indigenous people in West Australian prisons. Nationally, the Indigenous community accounts for approximately 3% of the Australian population, however in 2015 they accounted for 27% of Australia's prison population.¹⁹ Currently, Western Australia's statistics are worse than the national average with 38% of those serving prison sentences in Western Australia indentifying as Indigenous, with the number of Indigenous people sentenced with terms of imprisonment increasing in 2015 by 4.3% on the previous year.²⁰

With these statistics continuing to increase, it is of concern that the Department of Corrective Service elected in June 2014 to discontinue the monthly graphical reports and weekly offender reports showing the current rates of imprisonment in Western Australia.²¹

Steps must be taken to address the disproportionate number of Indigenous people currently serving terms of imprisonment in Western Australia. The Law Society of Western Australia recommends that one such step would be to invest in schemes to address the reasons behind the offending behaviour. By investing money in the prevention of future crimes the Western Australian Government will reduce the rates of imprisonment in Western Australia and in turn reduce the amount of money spent on custodial services.

Aboriginal Legal Services and Community Legal Centres

Why fund ALS and CLCs

James Cook University's Indigenous Legal Needs Project found that unmet Indigenous civil and family law needs are directly linked with the continuing marginalisation of Indigenous people.²² Whilst this project did not address criminal law needs, it is fair to assume that there is a clear nexus between each of the legal jurisdictions. ALS and other Indigenous CLCs are just one way that these sensitivities could

be addressed. These services provide culturally sensitive assistance and are therefore more likely to be approached by Indigenous people requiring legal assistance, than a non-specific legal service provider. In support of this notion, former Acting Chief Executive Officer of the Victorian Aboriginal Legal Service, Meena Singh, commented to *The Age* newspaper in March 2015, “many Aboriginal people were distrustful of mainstream services because of racism and historical experience, and the 30 year old Victorian Aboriginal Legal Service offered a “safe space” to seek culturally sensitive help”.²³

The defunding of ALS and CLCs

In 2014, approximately \$40 million was cut from Legal Aid Services, with \$13.3 million of that from Indigenous services.²⁴ Whilst just over half of this funding has now been restored, the cut continues to deliver a serious blow to the already underfunded community legal sector. The impact of these cuts is vast. These services are well known to provide free access to legal services to those that need it and are known to save money in terms of downstream costs to the justice system.²⁵

The Law Society is concerned about the effect that this defunding will have on the ability for Western Australians to access justice, and in particular the effect it will have on Indigenous peoples.

Are ALS and CLCs underfunded?

In 2014 the Law Council of Australia warned “both ATSILS and FVPLS are already critically underfunded”²⁶ despite the fact that “specialised legal assistance services for Aboriginal and Torres Strait Islander people remain justified”.²⁷ Furthermore, the Law Council notes “that ATSILS, as frontline providers of legal services to Indigenous people, are the most likely means through which Aboriginal and Torres Strait Islander people receive legal assistance”.²⁸

Across Australia, commentators state that defunding of community legal centres will adversely impact the Indigenous population. Michael Smith,

Chair of the National Association of Community Legal Centres commented that the “funding cuts and uncertainty for CLC’s, ATSILS and FVPLS have, and will continue to have, a significant effect on Aboriginal and Torres Strait Islander clients”.²⁹

Access to interpreter services in court

The Hon Wayne Martin AC, Chief Justice of Western Australia, has argued that there is a need for better funded interpreting service in Western Australia. In 2014 His Honour stated that there is a need for interpretive service in Western Australia and any decision that prevents these services from happening is a backwards step.³⁰

The House of Representatives Standing Committee on Aboriginal and Torres Strait Islander affairs enquired into language learning in Indigenous communities and obtained a number of submissions from CLCs, amongst other organisations. In response to the question “what interpreting and translating services are available in your local languages? How useful and effective are they?” the Wangka Maya Pilbara Aboriginal Language Centre replied that no services were available due to lack of funding.³¹

A House of Representatives committee languages report states that the Commonwealth Government’s focus and funding have been towards Indigenous interpreter training in the Northern Territory and that there is significant demand for qualified interpreters in the States.³² The Hon Wayne Martin AC, Chief Justice of Western Australia, confirmed this in his Inaugural Lecture at Notre Dame University.³³

The effects of lack of funding are exemplified by the Kimberley Interpreting Service (KIS). KIS is a community-controlled Indigenous Australian organisation that provides interpretative services in 26 different Indigenous languages.³⁴ KIS has greatly improved Indigenous interpreting services in the Kimberley region, however there still remains a gap between the need for interpreting services and the accessibility of these services to the wider community across the state.

The Western Australian Government initially provided funding to KIS under an agreement entered into in 2006. However, that agreement came to an end in mid-2015 and the government has refused to renew its funding. KIS now depends on extremely limited funding from the Federal Government. The effects of this defunding is likely to be widespread as other interpretive services, such as the National Translating and Interpreting Services (TIS) which is funded by the Federal Government, does not provide translating or interpreting services in Indigenous languages. It is feared that a lack of interpreters will prejudice Indigenous peoples' access to justice, which will compromise the justice system and lead to an increase in incarcerations as well as delays in the criminal justice system and an increase in appeals.³⁵

Access in remote areas

As a result of funding cuts, legal services to a number of Indigenous communities are expected to cease. One example is the Anangu Pitjantjatjara Yankunytjatjara (APY) lands in South Australia. The Law Society of South Australia President, Rocco Perrotta, believes that if funding is cut, legal services are more than likely to be delivered via video link, which may not be as effective and may not result in the same level of understanding from Indigenous peoples. Mr Perrotta stated, "due to cultural sensitivities Indigenous clients benefited from face to face interactions, and remote communication would not be as effective."³⁶ Whilst this is one example from South Australia, the effect is likely to be the same in Western Australia.

In August 2015, ALS decided that it would stop operating in the Western Australian towns of Karratha and Roebourne. This decision was made due to funding cuts. However shortly afterwards, the decision by the ALS to withdraw its services was reversed, following talks with its sole funder.³⁷

The initial decision by the ALS to cease providing legal services in areas of Western Australia,

followed by the rapid reversal of this decision, highlights the precarious state of access to legal services in remote areas. Further funding cuts are likely to result in a withdrawal of legal services in remote areas. This will compound the lack of much needed legal representation in remote areas. The Hon Wayne Martin AC, Chief Justice of Western Australia stated, "Aboriginal people are also overrepresented in those who are disabled by geography from accessing legal services."³⁸

Access to community correction officers

Access to community correction officers who are able to provide culturally sensitive assistance is also a factor that leads to increasing incarceration rates among Indigenous peoples. This issue was addressed by the Law Council of Australia in its Productivity Commission Draft Report into Access to Justice Arrangements, where it stated that "It will also be necessary to train police officers, legal practitioners, judicial officers and social workers in use of Indigenous language interpreters."³⁹

Position in Overseas Jurisdictions

This section provides an overview of the legal position in relation to access to justice for Indigenous people in other countries, and focuses on three jurisdictions similar to Australia with significant Indigenous populations: Canada, Norway and New Zealand.

Canada

Access to community legal services

Like Australia, Canada has recognised an unjustified overrepresentation of Indigenous people within its criminal justice system and prison population.⁴⁰ To tackle this issue Canada provides free Legal Aid assistance to its Indigenous population. There are a number of Legal Aid Offices spread across each of the 13 provinces and territories to address issues of remoteness. Canada's Legal Aid also works on

a 'judicare' model, where private solicitors are paid to represent individuals rather than having the Legal Aid office itself represent the clients.

Access to interpreting services

A unique initiative of the Saskatchewan Provincial Court is the Cree Court, a circuit court that conducts hearings entirely or predominantly in Cree – the native language of the largest group within the First Nations. The Court handles criminal matters and child protection hearings. The Judge, clerks and court workers all speak Cree and the accused person has access to Cree-speaking Legal Aid lawyers. Whenever possible, the Crown Prosecutor also speaks Cree.⁴¹

Access to court support services

In *R v Gladue* [1999] 1 SCR 688, the Supreme Court of Canada set out general principles that apply when sentencing Aboriginal offenders, including that judges must consider the unique systemic or background factors which may have played a part in bringing the offender before all Canadian Courts. Following on from this ruling Canada has implemented training in approximately half of its jurisdictions, providing cultural awareness to the Judges, probation officers, court workers and legal counsel. The Courts now also prepare independent sentencing and pre-sentence reports involving Aboriginal offenders.⁴²

In addition to this, the Cree Courts also incorporate traditional Cree values into the proceedings wherever possible and encourage the participation of community leaders in the proceedings. The Judge will usually refer back to traditional values during sentencing to make the individual more responsive to the needs of their community and society as a whole.⁴³

Norway

Access to interpreting services

Under the *Sámi Act* (1987:56) every court within the administrative district of the Norwegian Sámi Parliament must accept correspondence in any of the recognized Sámi languages, which encompasses 10 different languages. This requirement applies to all communications, including written submissions, oral contact and oral submissions made during hearings.

To ensure that the appropriate facilities are available for each matter, in the early stages of any proceedings the court will send out forms to each of the parties asking them to register their preferred language. The Court will then facilitate practical aspects of the implementation of the hearing including the use of interpreters. Several of the employees, including Magistrates, are also able to speak Sámi, though this is not required under the *Sámi Act*.

New Zealand

Access to community legal services

Similar to Canada, New Zealand also has a number of Legal Aid offices spread across its two islands.⁴⁴ These offices also run on the 'judicare' model.

New Zealand's Government also funds 27 individual CLCs to provide free legal advice and representation to the public.⁴⁵ These services include the Ngai Tahu Māori Law Centre, which provides legal assistance to the Māori population.⁴⁶

Access to legal support

New Zealand does not have any Māori-focused court practices, however there are 13 Rangatahi Youth Courts in operation. The Youth Courts attempt to reconnect young Māori offenders with their culture to address their offending behaviour at a young age.⁴⁷ The Rangatahi Courts do this by

incorporating elements of the offender's culture and beliefs into the proceedings, using an Elder to commence the proceedings, which forces the accused to respect the procedure.⁴⁸

The Court also encourages the offender's extended family to take an active part in the proceedings. This is done in a number of ways, including participating in a family group conference and being able to address the Court in relation to the offending behaviour. The participation of the offender's extended family, and particularly their Elders, places that individual under the gaze and judgment of the people that they respect. Further, it is thought that the Māori community's participation in the proceedings provides positive guidance for the young person.⁴⁹

Conclusion

It is accepted that poor access to justice has a large impact on the incarceration rates of Indigenous people. The sense of injustice that is inevitable from a lack of understanding of the court proceedings is also likely to engender distrust for the legal system, rather than provide a space for rehabilitation, thus eradicating the prime purpose behind imprisonment.

As shown, the services available to Indigenous people have improved over the years. However, currently the services are not adequate in providing full access to justice.

Whilst we are on par with other countries in some areas of providing access to justice, there are a number of other areas in which we can improve the services available, such as expanding on the community legal services already available, providing more legal services in remote areas, providing interpreter services in every court, allowing Indigenous people to lodge court documents and correspond with the court in their language and providing more Indigenous community correction officers.

Naturally, the implementation of additional services is dependent on funding, however research has shown that funding justice will have a positive effect on the cost and long-term outcomes of corrective services.

NOTES

1. This paper was written by Jennifer Solliss, Sophie Manera, Curtis Ward and Anna Celliers of the YLC.
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3. *Aborigines Act 1905* (WA)
4. *Natives (Citizenship Rights) Act 1944* (WA).
5. *Ibid* p 8.
6. *Ibid* Ch. 24.
7. *Ibid* Ch. 24.
8. *Justice: A history of the Aboriginal Legal Service of Western Australia* – Fiona Skyrig p 52
9. *Ibid* p 53
10. *Ibid* p 53
11. *Justice: A history of the Aboriginal Legal Service of Western Australia* – Fiona Skyrig p 20
12. <http://alsnswact.org.au/pages/history#A> short history of the ALS
13. *Justice: A history of the Aboriginal Legal Service of Western Australia* – Fiona Skyrig p 68
14. *Ibid* p 71
15. *Ibid* p 154
16. *Ibid* p 155
17. *Ibid* p 271
18. <http://www.alrm.org.au/information/General%20Information/Royal%20Commission%20into%20Aboriginal%20Deaths%20in%20Custody.pdf>
19. Australian Bureau of Statistics, Aboriginal And Torres Strait Islander Prisoner Characteristics, 30 June 2015.
20. Government of Western Australia, Department of Corrective Services, 'Adult Prisoners in Custody Quarterly Statistics', December Quarter 2015.
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Recommendation

The Law Society of Western Australia makes the following recommendations on access to justice to address the overrepresentation of Indigenous people⁵⁰ within Western Australia's judicial system:

1. Improve funding to Community Legal Centres (CLCs), in particular to the Aboriginal Legal Service of Western Australia (ALS) and the Family Violence Prevention Legal Service (FVPLS)

The overrepresentation of Indigenous people within our judicial system is largely due to limited access to justice. The funding of CLCs has been proven to greatly reduce incarceration rates. In relation to Indigenous people, dedicated legal services are the preferred and most culturally appropriate provision of community legal services. Research shows that Indigenous people, and in particular women, are dissuaded from approaching mainstream legal services, with language barriers and cultural sensitivity being the main reasons for this. Greater funding to Indigenous legal services, such as ALS and FVPLS would provide greater access to justice for Indigenous people and would greatly decrease their incarceration rate.

2. Improve funding for interpretation and translation services within the Courts, allowing Indigenous people to communicate with the Court in their native Australian language.

For some Indigenous people, English is a second language. This creates confusion and misunderstandings in the legal system and procedures. Justice would be improved if Indigenous people were given better access to interpretative and translation services in relation to judicial proceedings. Indigenous people could be granted a statutory right to have interpreting services available at all stages of the judicial proceedings, as is the case in certain areas of Canada. They could also have the statutory right to lodge documents and correspond with the court in their native languages, as is the case in certain areas of Norway. In order to do this, funding for interpretation and translation services within the court must be improved.

3. Improve funding for Indigenous judicial and corrective service staff.

It has been proven in the Rangatahi Youth Courts of New Zealand that the incorporation of cultural beliefs and practices into court procedure places greater expectations on Indigenous offenders and causes greater remorse. The effect that these practices have had on court proceedings can also be applied to other areas of the judicial system. By using Indigenous judicial and corrective service staff, an element of cultural expectation can be applied to the offender and used to encourage better social behaviour in the future. It also improves communication between accused persons and the corrections system, allowing the accused to better understand the reasoning behind what is happening, and for the judicial and corrective service staff to better understand the offending behaviour.

25. Ibid
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40. see *R v Gladue* [1999] 1 S.C.R. 688 at 64.
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