

AUSTRALIAN LEGAL ASSISTANCE FORUM

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The Secretariat
Senate Legal and Constitutional Committee
Room S1.61
Parliament House
Canberra
ACT, 2600



28th April 2004

Re: The Senate Inquiry into Legal Aid and Access to Justice & the proposed tender of Indigenous Legal Services.

The Australian Legal Assistance Forum (ALAF) represents the Law Council of Australia, the Community Legal Centres, National Legal Aid and the Aboriginal and Torres Strait Islander Legal Services. Constituents of ALAF made individual submissions to the Senate Inquiry into Legal Aid and Access to Justice. These addressed the issue of inadequate funding to the Aboriginal and Torres Strait Islander Legal Services.

ALAF appreciates that the Committee of the Inquiry into Legal Aid and Access to Justice is due to report on the 11th of May '04. ALAF is however concerned that the proposed Tender of Legal Services to Indigenous People by ATSIIS announced in March '04 has raised further issues that fall within the terms of reference of the Inquiry.

ALAF asks that you accept this letter and the attached copy of our submission to ATSIIS about the Exposure Draft of the Tender as a late submission from us to the Inquiry into Legal Aid and Access to Justice. Given that the proposed tender raises many important issues in connection with legal aid and access to justice to indigenous people we hope that you are able to take our concerns into account when making your findings.

Yours sincerely,

A handwritten signature in black ink, appearing to be "L. O'Brien", followed by a horizontal line.

Ms. L. O'Brien
Chairperson
ALAF

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Mr John Boersig
Manager, Law and Justice Branch
Aboriginal and Torres Strait Islander Services
PO Box 17
Woden, ACT
2606

DRAFT ONLY

Dear Sir,

**Re: Exposure Draft Purchasing Arrangements
Legal Services Contract 2004-2007 for Legal aid services for Indigenous Australians**

The Australian Legal Assistance Forum (ALAF) is responding to the invitation by ATISIS to comment on the above-mentioned Exposure Draft.

ALAF is constituted by the Law Council of Australia, the National Association of Community Legal Centres, National Legal Aid and the National Aboriginal and Islander Legal Services Secretariat. The Forum was established to enable its member organisations to consider and address Australian legal assistance issues in a co-operative way and to make recommendations on those issues in a co-ordinated fashion.

Each constituent organisation of ALAF provides legal aid services to those members of the Australian community most in need. All ALAF constituents believe that the tender as proposed is not in the best interests of the indigenous or wider communities. We also believe that it will not meet the stated primary objective of ATISIS' Legal Aid Services Program because it is culturally insensitive and commercially unrealistic. Our reasons for these views are as follows:

1. Cultural issues

There is no requirement in the Exposure Draft that the provider organisation be indigenous community controlled. Indigenous organisations are able to provide culturally appropriate services. This quality of service cannot be provided to the same extent or at all by a non-indigenous organisation. Of the utmost concern is the likelihood

that some indigenous people will not seek assistance from a non-indigenous organisation, such as a Legal Aid Commission (LAC) or a Community Legal Centre (CLC), for cultural reasons. The tender as proposed will therefore eliminate or severely reduce access to justice for these people.

2. Inadequate funding

It is widely recognised that current funding for indigenous legal services is inadequate to meet known need. It is also widely recognised that the nature and extent of existing need has not been properly ascertained. Numerous submissions to the current Senate Inquiry into Access to Justice made these points and called for increased funding to the ATSILS and for a comprehensive legal needs study to be undertaken. Funding for the tender is also reduced from existing levels notwithstanding that the Exposure Draft states that "Demand for indigenous services has grown rapidly over recent years and that the demographic structure of the indigenous population suggests that demand will continue to grow over the contract period and beyond". The proposed funding is thoroughly inadequate to purchase the level and quality of services required by the primary objective of the Legal Aid Services Program. We refer you to the report "The Erosion of Legal Representation in the Australian Justice System"¹ which sets out the real cost of providing legal representation.

3. Priorities will not achieve objectives of ATSI's Legal Aid Services Program

Whilst the prioritising of family violence is important and a positive move, ALAF is concerned that the application of the rigid priorities contemplated by the Exposure Draft without adequate funding is likely to reduce the ability of many indigenous people to access justice. We note the following:

- 1) The priority by location (paragraph 3.6) clearly intends that some indigenous people, should be forced to use LACs or other non-indigenous providers. This is regardless of the preference that that indigenous person might have for an indigenous provider. If these people are inhibited from approaching a non-indigenous provider because of cultural sensitivities they will not get any legal service.
- 2) Aboriginal and Torres Strait Islander Legal Services (ATSILS) currently prioritise criminal law. As a result and to the extent that criminal law cases are cheaper than the new priority cases involving risk to personal safety or to the welfare of a child, the new provider of services will be able to undertake less cases than the ATSILS have, ie current service levels will fall.
- 3) The Exposure Draft records that Aboriginal and Torres Strait Islander people experience far higher rates of adverse contact with the justice system than do other Australians, and are incarcerated at significantly higher rates than are non-indigenous people. Notwithstanding this fact and the growing indigenous population, no more money is to be made available for representing indigenous people charged with breaking

¹ Law Council of Australia, February 2004.

the law. ALAF notes the rise in the rate of incarceration of indigenous women. ALAF also refers to the findings of the Royal Commission into Aboriginal Deaths in Custody. Inadequate funding and the rigid application of the priorities is likely to lead to a lack of representation such that rates of incarceration will increase.

4) A "Provider" may refuse to represent the applicant where a Provider has previously represented an applicant charged with a criminal offence involving violence or the breach of a restraining order, and the circumstances of the two cases are similar. ALAF is concerned to note that cases where the applicant is charged with a criminal offence involving violence or breach of a restraint order are cases which would otherwise be likely to fall within priority 3, ie the applicant is at risk of being detained in custody. ALAF suggests that the "Providers" right to refuse in these circumstances is abhorrent. Lack of representation is likely to lead to increased rates of incarceration. The priority goes against the findings of the Royal Commission into Aboriginal Deaths in Custody.

5) The current wording of the priorities is such that cases which are interpreted as not involving risk to the personal safety of an applicant or someone in the applicants care or the safety and welfare of a child are very unlikely to receive assistance from the new "Provider". On a strict interpretation of this priority this could be the majority of family law matters.

6) ATSILS are currently able to provide some services in some locations at Magistrates Court level. The intersection of indigenous people with the law is often at this level and reflects underlying systemic disadvantage. ATSILS are currently able to represent indigenous people on such charges as appropriate. ALAF is concerned that refusals by a "provider" which are the result of inadequate funding and the new priorities will mean that people charged with repeat offences are not represented and that ultimately the chance that they will be incarcerated is increased.

7) The tender as proposed will obviously result in a major shift of work from the ATSILS to the LACs. This is because many Indigenous people who have been refused assistance by the new "Provider" will be likely to present at an LAC. LACs do not have the capacity to handle any more work than at present. If this tender is to proceed LACs will need to be properly funded to enable them to respond to increased demand for representation. LACs and CLCs will also need increased funding to enable them to provide information and advice services.

4. Justice delayed is justice denied and increased strain on the Courts

If increased funding is not forthcoming for the provision of legal services to indigenous people then there is likely to be an increase in the number of self-represented people. This will in turn place increased pressure on the Courts and cause delays and an escalation in the costs associated with Court proceedings. It is also well recognised that justice delayed is justice denied.

5. Cost Shifting to the States and Territories

This tender proposal is clearly a further exercise by the Commonwealth to shift the cost of providing legal aid to the States and Territories. There is no doubt that the new arrangements will place greater service demand on legal aid commissions, especially in the criminal law jurisdiction. Commissions, of course, cannot spend Commonwealth revenue on most criminal law services. So the States and Territories have to pick up the tab for the additional criminal law services that previously the Commonwealth funded through ATSILS. In this way the Commonwealth continues to pay lip service to their obligation to indigenous Australians while shifting the burden of actually meeting those responsibilities to others.

6. The preference for a single service Provider increases risk of conflict

The current state of the law in Australia is that it is not possible for two parties to a dispute to be represented by the one law firm as envisaged by the draft tender. Actual conflicts of interest cannot be overcome by "chinese walls". Litigants can and will, with the assistance of "no win – no fee" law firms, successfully sue on the basis of such conflict. It is money for jam. Further, the provider lawyers will quite rightly be subject to disciplinary proceedings and the cancellation of their practising certificates if they act in the face of such conflict. The Commonwealth will have to provide the Provider with legislative protection if it seriously intends to act for all parties to a dispute.

ALAF also suggests that asking a victim of domestic violence whether s/he consents to her/his abuser being represented is likely to be viewed as offensive and could constitute further abuse of the victim. Multiple service providers help avoid conflict.

5. Important functions currently provided by the ATSILS have been separated from the balance of matters which are to be tendered.

Services such as legal information, legal education, law reform and input on law related issues are not part of the tender. Whilst the Exposure Draft states that "preventative, information and education services and input on law reform and law related issues" "will continue to be funded through other channels" it is not clear what is contemplated. To the extent that the Exposure Draft implies that these services are already being funded through other channels, please can you advise us what those other channels are and the details about the source and amount of the funding provided? The new priorities also mean that much of the legal case work involving systemic issues eg charges involving the abuse of alcohol and police issues, will no longer be funded.

Whilst ALAF notes that the Exposure Draft states that it is the role of other programs and policy strategies variously administered to deal with the underlying sources of indigenous disadvantage and thereby to reduce the incidence of adverse contact with the criminal justice system, reduced legal case work, the potential for it to be handled by an organisation which is not community controlled, and which cannot conduct legal education, law reform and input on law related issues will mean that systemic issues are less likely to be identified, addressed and rectified. This has adverse long term

implications for indigenous people. It appears to be directly contrary to the stated "Objective of the Services" at paragraph 2.2 of the Exposure Draft.

6. Co-operation amongst legal service providers is not ensured by the Exposure Draft.

Selection Criterion 4 requires tenderers to demonstrate that their organisation will ensure effective cooperation between its own services and those of other relevant service delivery agencies.

The priorities in the Exposure Draft do not, however, take account of existing services, eg existing domestic violence services and family violence prevention centres, and whether those priorities are already being met. If a "Provider" applies the priorities literally without taking account of existing services there could be duplication of services which would be a poor use of insufficient funds.

The Exposure Draft does not require ATSSIS to be satisfied that in any proposed co-operative arrangements with existing service providers, that the existing service providers have the capacity, ability and preparedness to enter into those arrangements. It should be a requirement that ATSSIS consult with the existing provider about any proposed co-operative arrangements and before ATSSIS reaches any decision about whether it is so satisfied.

7. Lack of consultation about this proposed tender.

Notwithstanding that LACs, CLCs and ATSILS are referred to in the Exposure Draft as "service providers that may be used by the "Providers" and that the proposed tender would obviously have an impact on existing service providers, there had been no consultation about the proposed tender with us prior to the release of the Exposure Draft. It is relevant that existing legal service providers made submissions to the Senate Inquiry into Legal Aid and Access to Justice that access to justice to all Australians could be assisted if funders would work with principal service providers in a more co-operative and coordinated manner.

8. Waste of resources

In one or two States aboriginal legal services might not be functioning as well as one might wish. However, the vast majority of ATSILS provide an economic, efficient and effective service. Where they don't, these services can and should be reviewed and redeveloped. ALAF acknowledges that there have been governance issues in connection with some ATSILS in the past, however, most of the problems identified in service delivery issues have been found by numerous reviews to relate to inadequate funding and under resourcing. The tender proposal, however, threatens to deliver one of history's worst examples of "throwing the baby out with the bath water" without addressing the continuing underlying problem of inadequate funding being provided to meet the huge unmet legal needs of indigenous people.

ALAF is concerned that the many reviews and audits of indigenous legal organisations, over recent years have been expensive and consumed resources that could have been better applied to the provision of services. We are now concerned that this tender as currently proposed will result in an unnecessary waste of resources such as the loss of existing infrastructure and positive and co-operative relationships amongst existing service providers.

Recommendations:

1. That the proposed tender process be abandoned as misconceived.
2. That funders work with all service providers to adopt a more co-operative and strategic approach to service provision with a view to identifying need and meeting it in the most culturally appropriate, effective and economical manner.
3. That if the tender is to proceed that the Exposure Draft be amended to include a requirement of indigenous community control for potential tenderers.
3. That if the tender is to proceed that the Exposure Draft be amended to include a requirement that "Providers" take account of the services provided by existing organisations when applying the priorities for legal assistance.
4. That if the tender is to proceed that the Exposure Draft be amended to include a requirement that ATISIS be satisfied that existing service providers have the capacity, ability and preparedness to enter in any proposed co-operative arrangements with the tenderer and that ATISIS must consult with the existing provider about any proposed co-operative arrangements before reaching a decision about whether it is so satisfied.

Conclusion:

The tender as proposed in the Exposure Draft would have a significant impact on our business and the people we help. We therefore request that in any furtherance of the tender, that you continue to consult with us giving us adequate time to respond.

ALAF thanks you for the opportunity to comment on this Exposure Draft.

Yours faithfully



Ms Liz O'Brien,
Chairperson,
Australian Legal Assistance Forum