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Mr J.Boersig
Manager
Law and Justice Branch
ATSIS
PO Box 17
Woden,
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7th April 2004

Dear Sir,

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

National Legal Aid (NLA) is responding to the invitation by ATSIS to comment on the above-mentioned Exposure Draft.

NLA is concerned that the tender as proposed is not in the best interests of the indigenous or wider communities. The Exposure Draft states that the primary objective of ATSIS' Legal Aid Services Program is to improve the access of Indigenous Australians to high quality and culturally appropriate legal aid services so that they can fully exercise their legal rights as Australian citizens. A tender by ATSIS in the terms of the Exposure Draft will not achieve this objective. On the contrary, the Exposure Draft is culturally insensitive and commercially unrealistic. NLA fears that an RFT in these terms will result in a reduction of the quality and number of services currently being delivered by legal service providers to indigenous people.

Amongst the reasons for our concern that this tender will not achieve the stated objectives of the Legal Aid Services Program are the following:

1. The Exposure Draft does not require indigenous community control.

Indigenous community control is critical because indigenous organisations are alert to cultural and community sensitivities in a way that non-indigenous organisations cannot be. As a result indigenous organisations are better placed to provide a quality service to indigenous people. Indigenous people prefer to use legal aid services provided by indigenous organisations. This is clearly reflected in the statistics about comparative use of indigenous and mainstream legal services by indigenous people. The Exposure Draft fails to take account of the fact that indigenous people have made this statement about who is best equipped to meet their needs. There is a real risk that

some indigenous people with pressing legal issues, eg the right to seek a recovery order for the return of children taken against a Court Order, may be inhibited from enforcing those rights if they are required to seek legal assistance from a non-indigenous organisation.

2. Funding for the provision of indigenous legal services is inadequate to meet existing need.

The Exposure Draft states that total funding for indigenous services for the three year contract period will be \$2.39m per annum less than at present. The failure to increase funding is 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”.

It is widely recognised that current funding for indigenous legal services is inadequate to meet known need. Legal service providers submitted to the current Senate Inquiry into Legal Aid and Access to Justice that funding to the Aboriginal and Torres Strait Islander Legal Services should be increased. Legal service providers also stated that the real extent and nature of legal need in Australia, both in the indigenous and wider communities is unknown, and that a comprehensive needs study should be undertaken as the first step in addressing access to justice.

3. Priorities in the Exposure Draft belie a false assumption that LACs have the capacity to provide more legal aid services than at present.

A combination of limited funding, the high cost of legal services, and the new priorities in the Exposure Draft are likely to cause more indigenous people to approach LACs than is presently the case. NLA refers to its previous advice to ATSIIS and others that most LACs do not have the capacity to handle any more work than at present.

(1) Paragraph 3.6 of the priorities states that where the relative claims of two applicants are judged to be equal on other grounds, a Provider is required to give priority to an applicant resident in an area not serviced by an LAC in preference to an applicant who has a choice of legal service providers (whether or not the applicant opts to exercise this choice). This suggests that ATSIIS expects that the funding for this tender for the provision of indigenous legal services will be insufficient to meet need and the stated objectives of ATSIIS’ Legal Services Program.

(2) The Exposure Draft states that Providers will be expected to deliver assistance in the order of stated priorities which are; 1) where the safety or welfare of a child is at risk, 2) where the personal safety of the applicant or another person in the applicant’s care is at risk, 3) where an applicant is at risk of being detained in custody, 4) where a family member of a person who dies in custody seeks representation at an inquiry into the death.

Aboriginal and Torres Strait Islander Legal Services (ATSILS) which currently provide legal services to indigenous people prioritise criminal law. As a result and to the extent that criminal law cases are cheaper than 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. It is reasonable to expect that many people whose legal needs cannot be serviced will present at LACs.

(3) Criminal matters are no longer a first priority and the “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. NLA expects that many people charged and who the new “Provider” can’t or won’t represent will present at LACs. NLA 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. NLA suggests that the “Providers” right to refuse in these circumstances is abhorrent and goes against the findings of the Royal Commission into Aboriginal Deaths in Custody.

(4) To the extent that some ATSILS do fund family law matters LACs also expect an increase in indigenous people presenting for assistance in family law matters. The current wording of the priorities is such that there may be an overflow of those 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. On a strict interpretation of this priority this could be the majority of family law matters.

In summary, the tender as proposed contemplates a shift of work to the LACs without providing the funds necessary to do the work. If the tender proceeds as proposed LACs will need increased funds.

4. The preference for a single service Provider given the potential for conflict and the costs involved in avoiding potential conflict are prohibitive.

The Exposure Draft suggests ways in which Providers might avoid conflict. It also states ATSI’s preference for a single service provider. The smaller an organisation is, the less able it will be to avoid actual or perceived conflict.

The Exposure Draft contemplates one Provider acting for both parties on the same matter. One suggestion for managing this situation is that the “Provider could make a second solicitor available to handle a conflicting matter on a confidential basis. In these circumstances, all parties to a case must provide their written consent in advance to this means of managing the conflict”. NLA is of the view that such a measure would be inadequate to protect the lawyer involved from possible civil or disciplinary action. NLA expects that there will be many cases involving domestic violence where there could be a question about a party’s ability to give real informed consent.

The Exposure Draft makes a range of other suggestions as to how conflict might be addressed. The implementation of these suggestions and other measures to ensure sound chinese walls is likely to involve significant cost for the provider, eg staffing and IT costs. Furthermore, "Providers" will have a responsibility to ensure that their clients are not exposed to harm. Separate offices or advice locations will be needed for each side of cases involving domestic violence and/family law matters. Failure to take this precaution could facilitate the occurrence of an assault or breach of a Court Order and render the "Provider" liable to civil action.

Under the terms of the current tender any potential provider would need to be prepared to shoulder these costs.

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.

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. LACs are identified as service providers that "may be used" by Providers.

The priorities in the Exposure Draft do not, however, take account of existing services, eg existing domestic violence services and family violence prevention centers, 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 the impact on LACs there had been no consultation about the proposed tender with us prior to the release of the Exposure Draft. It is relevant that NLA and other 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.

Recommendations:

- 1. That prior to the proposed tender proceeding any further 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.**
- 2. That the Exposure Draft be amended to include a requirement of indigenous community control for potential tenderers.**
- 3. 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 the Exposure Draft be amended to include a requirement that ATSSIS 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 ATSSIS 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.

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

Yours faithfully

N. S. Reaburn
Chairperson,
National Legal Aid.