SUPPLEMENTARY Submission to

The Senate Legal and Constitutional Committee Inquiry into Legal Aid and Access to Justice

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Introduction
The National Association of Community Legal Centres (NACLC) is the peak body for Community Legal Centres (CLCs) in Australia. The Victorian Aboriginal Legal Service and the National Network of Indigenous Women's Legal Services Inc. are included in our membership. Community Legal Centres also work closely with the Indigenous Family Violence Prevention Units and the 'Our Strong Women' project.

NACLC requested permission to make this supplementary submission to the Inquiry because of the direct impact on a number of our members, the potential impact on all CLCs, and importantly, the possible further restriction of the delivery of legal services to the Australian community posed by proposals in the Exposure Draft of a request for tender for the provision of legal services to Indigenous Australians for the period 1 January 2005 to 31 December 2007. We thank you for this opportunity.

There has been continuing uncertainty about the funding of Aboriginal and Torres Strait Islander Legal Services (ATSILS). Many submissions to the Inquiry have discussed these issues. Late in February 2004, ATSILS were advised that although they needed to submit a funding submission for 2004-2005, they would only be guaranteed funding until the end of December 2004.

On March 4th 2004, an Exposure Draft of a request for tender for the provision of legal services to Indigenous Australians for the period 1 January 2005 to 31 December 2007 was released and ATSIS advertised the draft in National and State newspapers. Comments in relation to the Draft have to be submitted by April 16th. ATSIS plans to release a final draft in late May, select providers by August and have the successful providers operating by January 1st 2005.

The issues raised in the Exposure Draft and their potential impact on the provision of legal aid and access to justice by the Australian community in general, and Aboriginal Australians, in particular, are detailed below.

Ideologically Driven
The proposals in the Exposure draft, if implemented, will not provide improved access to justice arrangements nor will they provide effective and efficient legal services to Indigenous Australians. It is not a commercially realistic document. Instead, the proposals contained in it are designed to implement the agenda to mainstream aboriginal services. They are also directed at shifting costs from the Commonwealth to the states.

The need for targeted legal services for Indigenous people and the effectiveness of the service delivered have rarely been questioned, even though, at times, there have been concerns about the governance of ATSILS. All the reviews of ATSILS have concluded among other conclusions, that the fundamental issue affecting ATSILS has been the lack of funds. The level of service delivery, given this under-resourcing, the climate of instability created by the many reviews of ATSILs and the overwhelming need, is outstanding.

The Exposure Draft assumes throughout the document that legal aid services would be able to absorb the overflow of clients from ATSILS. For example, "a Provider is required to give priority to an applicant resident in an area not serviced by a legal aid commission" – the applicant residing in an area where there is a legal aid commission is clearly expected to go there. It thus assumes that mainstream legal aid services would be able to provide effective assistance to Indigenous clients. It also assumes that community legal centres would be able to provide services to those clients that would be turned away by both legal aid and the new service providers if the proposals were implemented. And yet, there has been no consultation with either organisation about the significant resource implications of this policy.

The present arrangements with ATSILS have been developed around concepts of empowerment, community-based services, flexibility in service delivery, the preventative strategies of running test cases and law reform activities, and the need for broad based assistance such as information, education and research. All these are absent in the Exposure Draft.

The Exposure Draft in its present form will make it difficult for ATSILS to win tenders and appears to have been designed to maximise the opportunities for private law firms to do so. As such, the continued existence of ATSILS as specialist community based Indigenous organizations seems unlikely. Consequently, it appears to undermine the right of Indigenous Australians to self-determination.

The arrangements for the provision of services to Indigenous clients go against recommendations 84, 105, 106 and 107 of the Royal Commission into Aboriginal Deaths in Custody. The risks created by this, together with the likely increase in the rate of imprisonment for both men and women if the plan is implemented, make the model as presented dangerous for Indigenous Australians.

The Exposure Draft will not result in the delivery of quality legal services to Indigenous people nor will it improve access to justice for these the most disadvantaged people in our community. The ideological agenda driving this proposal is likely to have a number of expensive and damaging consequences.

Services will be less accessible.
In its present form the Exposure Draft may result in some or all the present Indigenous providers being replaced by non-Indigenous providers. There is no requirement that the tenderers be an Indigenous organization nor that they employ Indigenous staff.

One of the features of Indigenous peoples use of legal services has been the very high proportion of people using the Indigenous run services rather than non-indigenous run services. The Tendering of Aboriginal and Torres Strait Islander Legal Services in New South Wales: Initial Assessment and Future Options(1999) report states:

> *From the Group's consultations it appears that the central issue is that the ATSILS are considered by Indigenous peoples to be Indigenous. It does not*

> *matter that the lawyers are not Indigenous, just that 'that is the place that Kooris go'.*

The Australian National Audit Office report (2003) quotes a figure of 89% of legal matters for Indigenous people are provided by ATSILS.

Replacing Aboriginal legal services with white organizations, possibly private practices of lawyers, make it less likely that Aboriginal people will seek assistance. It is widely known and recognised that in the vast majority of cases Aboriginal people prefer to use Aboriginal managed legal services. Access to justice will thus be further restricted for Aboriginal people.

Services will be less effective

Under the proposal, assistance must be provided in the following priority categories:

- Where the safety or welfare of child at risk
- Where the personal safety of application or person in applicants care is at risk
- In a case where the applicant is at risk of being detained
- Representation of family member re death in custody

The first two priorities are the long overdue recognition of an identified need. They are important areas of service provision and areas that are more likely to be demanded by women. Nevertheless, there is and will continue to be a high need to provide assistance to men and women who face criminal charges. Yet all priority areas must be met without any increase in funding. In fact, there appears to be a reduction of $2.4 million per year.

Up to 94% of matters currently undertaken by some ATSILS are in the area of criminal law. Where criminal law assistance is allowed in the proposed tender, it is aimed at the more serious end. The shift in service delivery would leave even larger service gaps to be filled by other legal aid providers in crime ("minor" matters), family law and almost the entire civil law area. Again, it fails to question whether other legal providers would be able to offer culturally appropriate services or whether Indigenous clients would access them.

Furthermore, the Exposure Draft states that assistance in minor traffic offences or public drunkenness, "should be an exception rather than the rule". This could leave Indigenous defendants without legal representation because Legal Aid would not be able to fill the gap.

Under the arrangements, service providers will be able to refuse assistance to second time offenders charged with violence matters. It fails to acknowledge or deal with the systemic causes of criminal behaviour such as poverty, unemployment and racism. These restrictions would be completely unacceptable if applied to non-Indigenous persons.

The Exposure Draft also proposes a much narrower role for ATSILS than they presently have. Providers would be prohibited from using contract funds to undertake "test cases". This includes possible discrimination matters which would prevent Indigenous people from obtaining ATSILS' assistance to seek redress from discrimination, and for pursuing their social and cultural rights

This new role is narrower than community legal centres and narrower than the role of Legal Aid offices. The new role excludes preventative education programs and policy

and law reform. One of the factors that adds value to community legal centres is that the services provide a range of services not just case work and duty work. This means that potential clients are informed about how the law works, how to prevent problems and how to use the law to deal with problems. It also means that a range of referral options are considered and utilised. The capacity to do policy and law reform also means that the experience of clients can be utilised in developing more effective policies and laws. Governments and Indigenous people benefit from the special needs of Indigenous people being articulated and included in new policies.

The imposition of very narrow service provision appears to be counter productive to achieving effectiveness improvements and is discriminatory. One might expect some greater flexibility of policy would be appropriate to help respond to the diverse needs and high levels of disadvantage rather than applying more restrictive policies.

Higher rates of incarceration

The 2002 Social Justice Report produced by the Social Justice Commissioner states that over the decade 1991 – 2001 there was an increase of 255.8% in the number of indigenous women incarcerated. While there was an increase in rate of incarceration generally in this period, the rate of increase for the Indigenous community was greater and for Indigenous women it increased at almost twice the rate. The $2.4m per year reduction in funding, the restrictions on criminal law assistance, the resulting higher levels of unmet need and the increase in self-represented litigants - all together will result in even greater numbers of Indigenous people being incarcerated.

Services will be less cost effective

Critically, community legal centres and ATSILS currently have the capacity to attract additional funds or in kind assistance that helps spread the Government dollar further. This includes obtaining funds from State Government or trusts, obtaining premises or meeting spaces at a reduced rate, receiving pro bono assistance from lawyers and other professionals, using volunteers and in some states receiving some additional assistance from Legal Aid Commissions. (Financial analysis undertaken by NACLC in 2003 indicated that volunteers contributed the equivalent of $21.5 million to community legal centres.) In addition to this is the social capital of existing management committee and staff and cooperative arrangements with other service providers. Most, if not all, of these benefits will be lost if the proposed Exposure Draft approach goes ahead.

Tendering can be more expensive

The benefits of tendering are often exaggerated and the costs and other unintended consequences are often underestimated. The usual purpose of tendering is to drive down costs. The Tendering of Aboriginal and Torres Strait Islander Legal Services in New South Wales: Initial Assessment and Future Options (1999) report quotes estimated savings of 9.6% or12.8 % if mainstream legal services were tendered out. Studies such as the Office of Evaluation and Audit (ATSIC 2003) indicated that ATSILS are already under funded and cheaper than Legal Aid. It is difficult to believe that the savings estimates above would be achieved. Loss of supplementary funding, pro bono support

and in kind assistance associated with moving services to private practitioners would be likely to cancel any supposed cost savings.

The tender as proposed does not offer any transparent value-free method of comparing the quality of the service being offered. Often the end result of a tender process for human services is poor quality, less appropriate services.

Means testing will increase costs
The proposal contains means testing of applicants. Client contributions and costs recovery would also be introduced. The eligibility requirements appear to enable the vast majority of Indigenous clients to receive a service. However the means test outlined is broader than that used by legal aid commissions and ATSILS will be required to administer it before advice or duty lawyer services are provided. The administration of the means test will add new costs to ATSILS. It appears that for the very few who will not qualify, the introduction of this requirement is an unnecessary expense. There has been no provision made for the additional resources required to manage these requirements.

Cost Shifting
Under these arrangements, Aboriginal people, will become less likely to receive help and less likely to seek legal help. As discussed previously, this will eventually result in longer sentences and higher conviction rates. More people will be referred to State Government services and community legal centres. This will shift the responsibility for legal service provision to the State Governments.

NACLC believes that the Commonwealth has a responsibility to provide adequate funds for Legal Aid purposes. We have previously criticised the 1996/97 Commonwealth Government funding cuts to Legal Aid. Similarly we criticised the eligibility change from Commonwealth persons to Commonwealth matters that has a range of negative flow on effects to the community and to providers. The Exposure Draft appears designed to have a similar damaging effect. Under the cloak of contestability policy dramatic new policies are being proposed that will reduce the effectiveness of Legal Aid provision to one of the most disadvantaged groups in Australia and attempts to shift funding responsibility to the States.

High Risk of Failure
NACLC is concerned that there is a high risk of failure if the proposals as outlined in the Exposure Draft are implemented. The ATSILS infrastructure built up over many years will be dismantled. Much of the good will built in the community will be squandered. Indigenous people will be distrustful and will not use the new services.

The funding to ATSILS will continue to be provided on a monthly basis in arrears. This does not enable the provider to collect any interest from the funds or to establish any reserves for contingency purposes. This payment method will be setting providers up to fail.

The tender opens the door to a private legal firm winning the tender. It is unlikely that many private firms will have the immediate ability or experience to understand the greatest areas of legal need for Indigenous people. How can an effective service be provided?

The Commonwealth must take a leadership role in the strategic planning and delivery of legal aid services, across all service sectors and across jurisdictional boundaries. Instead, there is a real danger that this process, which is more about cost shifting than cooperation, will pit legal aid providers against each other.

The ACT currently provides services according to the priority list in the Exposure Draft. They conclude that it will require at least double the funding to effectively provide the services being tendered. If the tender was to be performed on a commercial basis, a provider would have no alternative but to reduce the services provided. There are major concerns about the quality of the service that would result.

It was not possible to meet the extent of need of Indigenous people for legal services with the current mix of services and the current funding allocation. How will it be possible to do so with the provisions outlined in the Exposure Draft? How will it be possible to do more with less? If the proposals outlined in the Exposure Draft are implemented, a system of service delivery will be established with a high risk of failure.

RECOMMENDATIONS

NACLC requests that the Senate Inquiry consider recommending that the Exposure Draft be withdrawn and that a more culturally appropriate approach to improving ATSILS capacity and effectiveness is embraced. A significant step in this regard would be a substantial increase in the funding available.

Future arrangements for the provision of legal services to Indigenous Australians should include the following considerations:

1. Aboriginal organisations are usually more appropriate providers of Indigenous Legal Services and law related services than non Aboriginal providers.
2. A privatised ATSILS provision will make the services less accessible to the majority of the Indigenous Community who have demonstrated a preference for services managed by Aboriginal people.
3. Tendering is not the only nor the best way to achieve increased accountability and increased effectiveness.
4. Privatisation will reduce the present and future capacity of ATSILS to attract additional funds and resources from State governments and pro bono providers.
5. The type of service to be provided and the casework priority policies should not be more restrictive than those applying to mainstream legal aid providers.
6. Policy Guidelines for ATSILS should be more flexible than mainstream legal aid provides given the effectiveness of holistic service provision and the need for flexibility in the context of the high levels of disadvantage experienced by the Communities and the different jurisdictions involved.
7. Aboriginal Legal Services have been the main provider of legal services to Aboriginal people and they should continue to be funded by the Commonwealth to perform this role.
8. The current strengths of ATSILS should be preserved by any new arrangements. These strengths include:
    - Flexible service delivery mode;
    - The trust of clients in Indigenous run services as indicated by their preference to use Indigenous run services;
    - The cooperative arrangements already in place like Memorandums of understanding with Public Defenders, collaborative arrangements with legal aid commissions, etc;
    - The existing infrastructure

9. The Commonwealth should increase the level of funding to ATSILS.