



**Victorian Aboriginal Legal Service
Co-operative Ltd.**

Head Office:
6 Alexandra Parade,
P.O. Box 218
Fitzroy, Victoria 3065
Phone: (03) 9419 3888 (24 Hrs)
Fax: (03) 9419 6024
Toll Free: 1800 064 865

Arnold Bloch Leibler

Lawyers and Advisers



Submission to ATSIIS – Response to “Exposure Draft of a Request for Tender for the purchase of Legal Services for Indigenous Australians”

TABLE OF CONTENTS

Page no.

1	General comments and overview	4
2	Policy	5
3	Type of services to be provided	5
4	Purpose and objectives of services	6
5	Priority categories	7
6	The “one strike and you’re out” policy	9
7	Interrelationships with other programs	9
8	Service providers	10
9	Strong cultural requirements versus contestability.....	11
10	Contestability policies that increase the competitiveness of private law firms	11
11	Contestability policies which make ATSILS less competitive	13
12	Discrimination against VALS	13
13	Broader policy issues	14
14	Responsibility of Commonwealth	16
15	Cost effectiveness.....	17
16	National Competition Policy (“NCP”).....	17
17	Commonwealth Procurement Guidelines.....	17
18	Conclusion	18
	SCHEDULE 1 - THE NEED FOR SEPARATE ATSILS	20
	SCHEDULE 2 - ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY SELF DETERMINATION RECOMMENDATIONS.....	21
	SCHEDULE 3 - EROSION OF LEGAL REPRESENTATION IN THE AUSTRALIAN JUSTICE SYSTEM.....	23
19	References	25

RECOMMENDATIONS

- A That the Minister acknowledge and take account of the primary role that the Victorian Aboriginal Legal Service (“**VALS**”) has in providing legal services to Indigenous people in Victoria.
- B That the Minister acknowledge the important role presently played by Aboriginal and Torres Strait Legal Services (“**ATSILS**”) such as VALS, which is recognised by other Legal Aid providers. That the Minister commit to a careful analysis before making far reaching changes to the current program of Aboriginal legal service delivery through the Aboriginal and Torres Strait Islander Services (“**ATSIS**”) Law and Justice Program.
- C That the Minister recognise the interdependence of the various legal aid providers and ensure that effective consultation occurs in the future prior to the initiation of substantial policy changes. This was a recommendation of the Australian National Audit Report Number 13.
- D That the purposes of the Aboriginal legal service program include the following:
- (a) to play a leading role in promoting and protecting the rights and interests of Indigenous Australians, including being involved in the important welfare roles related to legal activities;
 - (b) to promote legal justice and reduce the disproportionate involvement of Indigenous Australians in the criminal justice system;
 - (c) to promote the review of legislation and other practices which discriminate against Indigenous Australians.
- E That the list of core services in the Policy Framework for Targeting Assistance Provided by ATSILS (2003) be adopted by ATSIS. There is no effectiveness or efficiency or policy argument for excising any of these core services from the services provided by ATSILS. The list includes:
- (a) preventative, information and education services;
 - (b) initial legal advice, minor assistance and referral;
 - (c) duty lawyer assistance;
 - (d) legal casework assistance in criminal civil and family law matters;
 - (e) input on law reform and law related issues to promote social justice for Indigenous Australians; and
 - (f) outreach support and other legal aid related services.
- F That the tendering process cease and a cost benefit analysis be done that compares tendering with other purchaser provider options, taking into account more collaborative approaches to enhanced effectiveness and the value of existing social capital.
- G That in performing a cost benefit analysis ATSIS consider the Competition Principals Agreement (“**CPA**”). The CPA sets out a (non-exhaustive) list of 'public interest' factors that governments should consider when assessing the costs and benefits of a particular policy or course of action [Clause 1(3)]. Relatedly, ATSIS should be required to consider whether the provision of legal services to Indigenous Australians, such as those provided by VALS, falls within the public interest exception to the National Competition Policy (“**NCP**”).

- H That the tender should only be employed in circumstances where ATSILS are under-performing and it should be open to “not for profit” Indigenous organisations only.
- I That the priority categories be reassessed or re-categorised to be less rigid.
- J That plans to introduce mandatory means testing be abandoned.
- K That the “one strike and you’re out” policy be abandoned.

1 General comments and overview

- 1.1 This submission analyses key features of the “Exposure Draft of a Request for Tender for the purchase of Legal Services for Indigenous Australians” (“**EDPA document**”). The submission has been prepared by the Victorian Aboriginal Legal Service (VALS) with advice from and the support of Arnold Bloch Leibler, Lawyers and Advisers (ABL).
- 1.2 VALS strongly objects to and opposes the proposal to tender out Aboriginal legal services as presently proposed for the reasons set out in this joint submission. VALS requests urgent discussions with Aboriginal and Torres Strait Islander Services (ATSIS) on the matters set out in this submission.
- 1.3 The EDPA document fails to acknowledge or take account of the present *primary* position that ATSILS like VALS hold in the provision of legal services and legal aid related services to Indigenous communities in Australia. In this respect Aboriginal and Torres Strait Islander Legal Services (ATSILS) are unlike most other ATSIS funded services which are supplementary to main stream providers. This means that the proposed dramatic changes to ATSILS will have major impacts on Indigenous people’s access to justice, the operation of the legal aid system and the court and corrections systems.
- 1.4 Rather than recognize the vital role of ATSILS and seek to build on the considerable strength and capacity of ATSILS, the EDPA document assumes that ATSILS should be restricted to a narrow supplementary role; in doing this the EDPA document unfairly discounts the existing social capital contribution of ATSILS such as VALS.
- 1.5 The contestability policy within the EDPA document is a significant departure from previous policy positions of the Aboriginal and Torres Strait Islander Commission (ATSIC) and ATSIS, as the proposed tendering model appears designed to tender a narrower range of services than current ATSILS provide. The EDPA document does this by changing the definition of core services and the structure and content of service priorities and introducing means testing. The EDPA document is also a significant departure from ATSIC and ATSIS policy because it encourages non-Indigenous providers to take over some or all of the provision of legal services to Aboriginal people.
- 1.6 The EDPA document, as drafted, does not encourage the provision of effective, efficient and culturally sensitive legal services to Indigenous Australians. To the contrary, Indigenous Australians’ access to culturally sensitive legal advice is at risk of being considerably reduced by the EDPA document. Aboriginal people seeking access to a legal service will be disadvantaged by the EDPA document.
- 1.7 The EDPA document minimises the legal services targeted specifically to Indigenous Australians, creating an environment in which many Indigenous Australians will be forced to seek advice and help from mainstream Legal Aid Offices and other forums, with limited if any cultural sensitivity and cross-cultural expertise. It is recognised that this shift decreases the Commonwealth Government’s responsibility for providing and funding Aboriginal legal services and attempts to increase the responsibility of the States and Territories for such services.

2 Policy

The new contestability policy to narrow services provided by ATSILS

- 2.1 The ATSI 2004 contestability policy, including new policies on ATSILS, is contained in the EDPA document. The EDPA document ignores the findings quoted most recently in the 2003 Australian National Audit Office Review that “the potential for finding a market of non-Indigenous tenderers was highly restricted and in many cases non-existent”¹. It also ignores the recommendation in the Office of Evaluation and Audit review, which states, “In implementing its present contestability policy ATSIC should be cognisant of the demonstrated unwarranted costs of using the services of other than non-profit legal providers”².
- 2.2 The 2001 ATSIC contestability policy was framed to use tendering where existing providers were not performing adequately. The policy was also one of seeking tenders from Indigenous organizations only. ATSILS were aware in June 2003 that funds for service provision were going to be tendered when they were informed that they were receiving only six months funding. It was only in March 2004 that it became clear to VALS that the tenders were open to non-Indigenous and “for-profit” services. It was only in March 2004 that it became clear to VALS that there were major policy changes to the ATSILS policy guidelines. Compared with the existing ATSILS Policy Framework for Targeting Assistance Provided to Aboriginal and Torres Strait Islanders, issued in July 2003, the EDPA document proposes a substantial narrowing of the purpose of legal services. The EDPA document redefines and narrows the core services to be provided and sets out policy prescriptions which are more inflexible than those in the existing Policy Framework.

3 Type of services to be provided

- 3.1 The scope of services that ATSI wants to purchase through a tendering process is considerably narrower than the services ATSILS provide at present. The EDPA document outlines the services to be purchased as follows:
- (a) Information, initial legal advice, minor assistance and referral delivered in the most appropriate form including:
 - (i) Face to face contact on a providers premises;
 - (ii) Telephone using a 1800 reverse charge number; and/or
 - (iii) Outreach arrangements including field officers;
 - (b) Duty lawyer assistance; and
 - (c) Legal casework including representation and assistance covering criminal, civil and family law matters.
- 3.2 These services will be delivered in accordance with the requirements, priorities and procedures set out in the Policy Directions³.
- 3.3 ATSILS, including VALS, provide a broader range of core services, as is defined by the ATSILS Policy Framework (2003). They include:
- (a) preventative, information and education services;

¹ Australian National Audit Office, Report Number 13 (003), Para 212, Page 38

² Office of Evaluation and Audit OEA (ATSIC 2003), Recommendation 9, Pg109

³ ATSI EDPA document 2004, Appendix A, para 2.3 pg 17

- (b) initial legal advice, minor assistance and referral;
 - (c) duty lawyer assistance;
 - (d) legal casework assistance in criminal civil and family law matters;
 - (e) input on law reform and law related issues to promote social justice for Indigenous Australians; and
 - (f) outreach support and other legal aid related services.
- 3.4 Of great concern is the fact that the EDPA document does not include the core services referred to in paragraph 3.3 (a), (e) and (f) above. This omission implies that such services are not core services. If the omitted services are to be funded separately, the EDPA document does not explain how or why it is advantageous to excise some services from others. The omitted services are intrinsically connected to and inter-relate with the provision of legal aid and should continue to be a core service of ATSILS.
- 3.5 **It is requested that ATSIIS advise as a matter of urgency why it believes it is more effective to separate these core services.**
- 3.6 **It is requested that ATSIIS provide clarification, again as a matter of urgency, on the types of services that are required to be provided and in what priority they should be provided.**

4 Purpose and objectives of services

- 4.1 The introduction of the EDPA document makes reference to Indigenous Australian's higher incarceration rates and lower scores on measures of socio-economic status and well being. It states that the ATSIIS Law and Justice Program has a number of interrelated programs (pg 17 EDPA document). The EDPA document does not explain what the interrelationship with other Law and Justice programs will be or how tendering legal services out will advance these interrelationships.
- 4.2 The EDPA document does not mention that ATSILS are to "play a leading role in promoting and protecting the rights and interests of Indigenous Australians" or mention "important welfare roles related to these legal activities".⁴ The EDPA document also does not make any mention of ATSILS "...promoting social justice...reducing the disproportionate involvement of Indigenous Australians in the Criminal Justice system...(or) promoting the review of legislation and other practices which discriminate against Indigenous Australians".⁵
- 4.3 The EDPA document results in the narrowing of the role of ATSILS because it omits fundamental policies about legal rights and interests of Indigenous Australians and leads to the reduction of Indigenous involvement in the criminal justice system. These omissions contrast greatly with the present ATSILS arrangements. The services provided by ATSILS currently center around key concepts of empowerment, prevention (through the running of test cases and law reform activities) and involvement in community and education.
- 4.4 The EDPA document does not allow for the provision of such important projects as the provision of diversion programs for young people and the coordination of community forums and groups. The EDPA document also does not allow for the drafting of submissions on draft legislation and other community issues. The above activities are currently undertaken by VALS and many, if not all, other ATSILS. If the tender is not amended to allow for a greater breadth in the services provided by eventual contractors for the provision of legal services, then these types of initiatives will not be carried out by

⁴ Policy Framework for Targeting Assistance Provided by ATSILS (2003) Para 1.2 pg 3

⁵ Ibid Policy Framework for Targeting Assistance Provided by ATSILS (2003) Para 2.1 pg 4

the service providers of legal aid for Indigenous Australians in the future. This occurrence will be to the detriment of all Indigenous and non-Indigenous Australians.

- 4.5 The EDPA document does not contain any recognition that ATSILS occupy a different place to many other Indigenous services in that ATSILS are the *primary* provider of Indigenous services in the legal sector. The primacy of ATSILS was recognised in 2003 in the Australian National Audit Office report (“**ANAO report**”) as follows:

*“In many ATSIIS programs, the ATSIIS role is intended to be that of a supplementary funding body. In the case of legal aid to Indigenous Australians 89 per cent of legal aid cases were handled by ATSILS in 2000-2001 and 11 per cent were provided by LACs. Accordingly, ATSIIS through its Law and Justice program is effectively the primary funding body for legal aid to Indigenous Australians.”*⁶

- 4.6 The proposed ATSIIS contestability policy fails to acknowledge the *primary* role played by ATSILS in the delivery of legal services to Indigenous people. Allowing the continuation of the present range of core services, especially in the areas of education, policy and law reform, would enable the experiences of the new service providers’ clients to be developed into more effective policies and laws.
- 4.7 **It is urgently requested that ATSIIS provide reasons on how the more narrow definition of service provision in the EDPA document accords with the Commonwealth Procurement Guidelines (“CPG”) that seek efficient and effective outcomes.**

5 Priority categories

- 5.1 The new priority categories (in order of priority) are:
- (a) where the safety or welfare of the child is at risk;
 - (b) where the personal safety of the applicant, or a person in the applicant’s care, is at risk;
 - (c) where an applicant is at risk of being detained in custody; and
 - (d) where a family member of a person who dies in custody seeks representation at an inquiry into the death.⁷
- 5.2 Other categories of legal practice may be dealt with only when all demand of applicants in the priority categories has been satisfied. Priority is also to be given to people in an area not serviced by a Legal Aid Commission (LAC).
- 5.3 The EDPA document incorporates two orders of priority. Firstly, it differentiates between applicants who satisfy one of the priority categories, as opposed to an applicant within a non-priority category. Secondly, the EDPA document seeks to prioritise between the priority categories, such that top priority be given when the safety or welfare of the child is at risk, and least priority to where a family member of a person who dies in custody seeks representation at an inquiry into the death.
- 5.4 The policy priorities in order of priority have the effect of narrowing the core services that legal services providers offer. The priority categories in the EDPA document should also include the following categories:
- (a) where cultural or personal well being is at risk;
 - (b) where circumstances of public interest exist;

⁶ Australian National Audit Office Report 13 (2003) Pg. 46, 27

⁷ ATSIIS EDPA document 2004, Pg 62-63

- (c) where the provision of aid is likely to substantially benefit the Indigenous Australian community or Indigenous Australians generally; and
 - (d) where the client would be significantly disadvantaged if assistance is not provided.
- 5.5 Does ATSI expect that demand in Priority Category 1 must be exhausted before Priority Category 2 cases can be addressed? Are the priority categories to be reflected in staff levels and expertise?
- 5.6 **VALS urgently seeks further clarification from ATSI on how demand in various priority categories is to be managed.**
- 5.7 VALS acknowledges the importance of child safety and personal safety. Governments, through Child Protection and Police departments, have the primary responsibility for these matters. Legal and legal aid related remedies are sometimes appropriate to secure assistance in these matters and should be provided by ATSI.
- 5.8 For VALS and equally for its constituency, all the identified priorities are important areas of service provision, especially the newly included first priority category. These are positive developments. However, the inclusion of this new category has not been accompanied by further funding. Consequently, the ability of the new service provider to adequately provide services to those Indigenous Australians who seek it will be severely reduced.
- 5.9 The new priorities will have the effect of making it less likely that family law will be provided. Intervention orders, which are comparatively low cost cases compared with family law cases, will be likely to be prioritized by providers in order to get high case numbers. It also appears that the only way to qualify for family law assistance is by alleging violence is occurring.
- 5.10 In Victoria, VALS currently provides the majority of its assistance in the area of criminal law. The policy changes will disadvantage Aboriginal people by exposing them to unnecessary risks of imprisonment. It is foreseeable that the reduction of criminal law assistance to priority three will ultimately lead to:
- (a) An increase in unrepresented or self-represented men and women, especially those who have committed minor offences or are recidivists in violence offences. Representation in less serious matters is important for Aboriginal people.
 - (b) Increased number of defendants failing to appear at court.
 - (c) More defendants experiencing pressure to plead guilty.
 - (d) Longer sentences and a higher population of Aboriginal people within the prison system. This is especially the case for recidivists who are not represented, as leniency is not extended to repeat offenders.⁸ The further detention and increased incarceration of Aboriginal people is a major concern in light of the critical findings of the Royal Commission into Aboriginal Deaths in Custody (“**RCIADIC**”, 1991)⁹, in relation to the overrepresentation of Aboriginal people in the justice system and rate of death.
 - (e) Increased pressures on the court system, due to a combination of the above factors.
- 5.11 The policy priorities will have a significant impact on the practice of civil law. Civil law is not listed as a priority and the demand for civil law is likely only to be met once the first four priorities have been satisfied.

⁸ ‘Australian Legal Assistance Forum – Exposure Draft Purchasing Arrangements: Legal services Contact 2004-2007 for Legal aid services for Indigenous Australians’ p3

⁹ Royal Commission Into Aboriginal Deaths In Custody (1991)

- 5.12 It is a concern that the shift in the emphasis of the priorities will compound the inability of legal services to meet needs of Indigenous Australians. Many applicants seeking assistance for less-serious crimes will be ineligible for assistance from the new service provider and therefore denied culturally sensitive assistance, which VALS (like other ATSILS) is expert at providing. The EDPA document fails to examine the means by which the other legal service providers can be objectively judged as being capable of providing assistance to those who would be ineligible for assistance under the new system.

6 The “one strike and you’re out” policy

- 6.1 Apart from the four priorities mentioned above there are also additional policies which appear aimed at reducing access to criminal law services. For example, section 3.10 of the EDPA document states:

*“Where a Provider has previously represented an applicant charged with a criminal offence involving violence, assault or the breach of a restraining order and the circumstances of the two cases are the same or similar, the Provider may refuse to represent the applicant and refer the applicant instead to a service providing appropriate counselling and support (where such a service is available and reasonably accessible)”.*¹⁰

- 6.2 The “one strike and you’re out” policy would exclude a significant number of ATSILS clients. This policy encourages a provider to refuse legal services to persons who are repeat offenders in violence matters, and is much more restrictive than LAC policies. There is no rationale provided for this new policy, which is a major change from existing policy. This policy would be likely to have the effect of funnelling clients to mainstream legal aid offices and private solicitors and shift the cost of service provision from the Commonwealth Government to the State and Territory Governments. The “one strike and you’re out” policy is unacceptable because it encourages discrimination against repeat offenders.

7 Interrelationships with other programs

- 7.1 The new role of a provider will be narrower than the role of both Community Legal Centres (CLC) and mainstream legal aid offices. The EDPA document assumes that mainstream legal aid services will absorb the clients that the new service providers will not be able to service, especially in metropolitan and regional areas. Applicants residing in an area where a legal aid service exists are, according to the EDPA document, expected to go to a legal aid service rather than the new service provider. This assumption is based on a premise that legal aid services will be able to provide effective assistance to Indigenous clients. Further, for those applicants that are neither able to access the new service providers, nor legal aid services, the EDPA document assumes that CLCs are capable of helping Indigenous clients.
- 7.2 The above assumptions have been made without any consultation with and the informed consent of those experienced and expert in the unique requirements of servicing Indigenous clients (ie. ATSILS, including VALS and Indigenous community organisations). There has also been no consultation with legal aid services and CLCs as to either their capacity for additional workload or their capacity to assist Indigenous clients “in a culturally and sensitive way”.

¹⁰ ATSIIS EDPA document 2004Pg 64

- 7.3 **It is strongly recommended that AT SIS further consults with the appropriate organisations as to the division of work prior to proceeding any further on the tender. Further, it is suggested that a re-categorisation of priorities occurs so that Indigenous clients are able to access justice from the new service providers in a greater range and number of cases.**
- 7.4 The EDPA document needs to more accurately and explicitly outline what services will be preferentially provided by the chosen legal providers, and what services should (post-tender) be provided by LACS. In reaching this decision, AT SIS should have regard to the benefits associated with Indigenous-focused legal aid. AT SIS should remain the prime funding body, and the provision of legal services to Indigenous Australians should not be further supplemented by non-Indigenous-specific legal aid providers.
- 7.5 **As a matter of urgency, it is requested that AT SIS provide further clarification on what the inter-related programs are and how the legal service providers should co-ordinate with them.**

8 Service providers

8.1 Selection Criteria Service Providers Need To Meet

- (a) The AT SIS policy not only narrows the core services that Aboriginal legal services are to provide, but opens up the possibility of such restricted services no longer being supplied by Indigenous organisations with Aboriginal staff, but mainstream providers. The way in which the EDPA document is framed opens up the possibility of control over Aboriginal legal services being transferred from Indigenous organisations. For instance, arguably, the selection criteria in the EDPA document are geared towards mainstream service provision. The selection criteria are as follows:
- (i) demonstrated capacity to deliver high quality and efficient legal aid services in accordance with applicable professional and ethical standards (40%);
 - (ii) capacity to provide an accessible and culturally sensitive service to Indigenous Australians (30%);
 - (iii) capacity to achieve the priorities set out in the Policy Directions for the Delivery of Legal Aid Services for Indigenous Australians (30%); and
 - (iv) cooperation with other service providers (10%).

8.2 Cultural Specificity – Selection criteria B

- (a) The second criteria, “accessibility and cultural sensitivity” is detailed in the Service Standards section of the EDPA document.¹¹ The wording of the Service Standards makes it clear that the determination of the successful tenders will be done in a culturally insensitive way. The EDPA document contains no requirement that the legal service provider be in any way linked to an Indigenous community of peoples - whether that be through an Indigenously owned or managed entity or through an employer of Indigenous Australians. This omission ignores the recommendations of the Allens Group’s “Final Report to the Office of Evaluation and Audit, Tendering of Aboriginal and Torres Strait Islander Legal Services in New South Wales: Initial Assessment and Future Options” (“The Allens Group report”, 1999)), which stated that a provider of Indigenous legal services should be controlled by Indigenous peoples and represent Indigenous communities.

¹¹ AT SIS EDPA document 2004 Pg 87

- (b) The EDPA document does not limit the potential service providers to “not-for-profit” organisations. In this critical area, the EDPA document has not implemented the recommendations of the Office of Evaluation and Audit, that ATSIIS be “cognisant of the demonstrated unwarranted costs of using the services of other than non-profit legal providers”¹².

9 Strong cultural requirements versus contestability

- 9.1 The Allens Group Report highlights the trade off between cultural specificity in the tender document and contestability. Unlike the NSW tender specifications, the EDPA document does not include a requirement that the registrant should have, “[a]n organisational structure which maximizes Aboriginal Community control”.¹³ In its present form, the EDPA document may very well result in some ATSIIS being replaced by non-Indigenous providers. This is a concern given the present use of ATSIIS by Indigenous Australians indicates that a very high proportion of Indigenous Australians favour Indigenous service providers.
- 9.2 The Allens Group report quotes a range of arguments and reports in support of strong cultural requirements being imposed on a service provider, as opposed to weak cultural requirements that are a consequence of a trade off between cultural specificity and contestability at the expense of the former. For instance, the 1980 House of Representatives report on Aboriginal Legal Aid, which was chaired by Phillip Ruddock, supports strong cultural requirements (refer to Schedule 1).
- 9.3 Of major concern to VALS, as it is to all ATSIIS, is the very real possibility that replacing Indigenous providers with non-Indigenous providers will reduce the numbers of Indigenous Australians who seek assistance, which would be a tragic result. It is significant that selection criteria B links cultural sensitivity to accessibility. If the cultural sensitivity of a service is limited, Indigenous access to that service is also limited. Lack of access to legal services is a very real possibility because the EDPA document appears to have discounted the need for strong cultural requirements of a legal service provider by drafting the guidelines to maximise the chances that private law firms will tender for the funds in a competitive environment.

10 Contestability policies that increase the competitiveness of private law firms

- 10.1 There are several obvious measures which have been adopted by ATSIIS to encourage private law firms to tender for Aboriginal legal services. These include:
- (a) Cultural Inaccessibility**
- (i) Removal of references to Indigenous management or control.
 - (ii) Attachment of a weighting to the selection criteria for “..accessible and culturally sensitive service..” of only 30%¹⁴.
 - (iii) Writing the standard for accessible and cultural sensitivity in terms which make it clear that employing Indigenous staff is not a prerequisite¹⁵.

¹² Australian National Audit Office Report 13 (2003) Recommendation 9, pg 109

¹³ Allen Consulting “Final Report to the Office of Evaluation and Audit, Tendering of Aboriginal and Torres Strait Islander Legal Services in New South Wales: Initial Assessment and Future Options” (1999) p.40

¹⁴ ATSIIS EPDA document 200 4p 51

¹⁵ ATSIIS EPDA document 2004 p 87

(b) Abolishing holistic service provision

The abolition of holistic service provision means that the EDPA document includes only the core ATSILS services which private firms are likely to be familiar with, for example information, duty work and casework¹⁶.

(c) Absence of a Geographic Focus for the tender

ATSIS have previously made it clear that it believes there are economies of scale to be achieved by reducing the number of separate service providers and that this would be achieved by tendering for the provision of legal services of an entire State.¹⁷ At the same time, in the EDPA document, ATSIS has indicated a willingness to consider tenders for only part of a State or for more than one State. These conflicting positions provide a window of opportunity for private law firms to put in a bid that would take over two or smaller ATSILS areas, or fragment State coverage by one ATSIL.

(d) Means testing

Private practitioners are experienced in administering a means test to obtain legal aid. The proposed means test appears to be inconsistent with the research by consultants Keys Young, Improved Targeting of ATSILS 1999 ("the Keys Young report"), for the Commonwealth Government, which reviewed a three centre pilot project assessing the operation of a simple means test. The research demonstrated that means testing is not a cost effective measure. As a result, the Keys Young report proposed that a means test to apply only to expensive cases. In the late 1990s, Victoria Legal Aid introduced a requirement that a \$20 fee be paid by clients. This was eventually withdrawn in the face of evidence from the private profession that it cost considerably more to collect the fee than the amount received.

(e) Conflict of Interest

Providers are encouraged to set up "chinese walls" to overcome conflicts of interest. Again this is something that will be easier for very large legal organisations than for smaller community based ones.

(f) Consultation

- (i) ATSIS has failed to enter into consultations with Aboriginal communities, organisations and peoples. Without consultation ATSIS have assumed that the provision of Aboriginal legal services by non-Indigenous organisations is suitable.
- (ii) The lack of consultation is in breach of a number of recommendations (including the RCIADIC recommendations, the Commonwealth Grants Commission Inquiry into Indigenous Funding (CGC), 2001) and the ANAO Review (2003), which state that ATSIS should consult with the ATSIC Board, Regional Councils, ATSILS and other Indigenous organisations. The ANAO report stated that ATSIS should conduct extensive consultation with stakeholders and potential tenderers prior to proceeding with the tender.
- (iii) VALS, as with other ATSILS and Indigenous organisations, had a legitimate expectation that they would be consulted prior to the decision to competitively tender being made. The level of consultation to date on the EDPA document has fallen far short of these recommendations.

¹⁶ ATSIS EPDA document 2004 p 9

¹⁷ Australian National Audit Office Report 13 (2003) para, 2.30 Pg.23

11 Contestability policies which make ATSILS less competitive

- 11.1 There are other measures which appear designed to make ATSILS less likely to secure tenders. These include:
- (a) *The requirement to have adequate financial viability including operating funds to deliver a service.*¹⁸ As most independent community organisations will be almost totally dependent on Government funding to operate, the requirement for tenderers to have cash reserves equal to one or two months anticipated cash expenditure, to facilitate the arrears payment system, is likely to represent a significant handicap to most not-for-profit providers.¹⁹
 - (b) *The requirement to meet selection criteria C (“capacity to achieve the priorities”).* As ATSILS have traditionally focused on criminal law, ATSILS will be burdened by the need to accommodate to the new policy priorities which introduce the concept of ‘priority in order of priority’ and rank criminal law as priority three. The low rating to crime will put most existing ATSILS at a disadvantage.
 - (c) *An assumption that ATSILS are supplementary providers to legal aid providers rather than primary providers.* The report implies that Indigenous people in cities do not need Indigenous legal services and states that ATSILS should prioritise rural areas where there is no legal aid office.²⁰
 - (d) *A new policy which recommends people with a prior charge that involves violence be refused assistance and be referred to counselling.*²¹ This will lead to VALS being unable to help a significant proportion of their clients, resulting in their clients seeking help elsewhere, representing themselves or failing to appear.
 - (e) *There appears to be no recognition of the valuable organisational knowledge and skill that is likely to be lost in this process.*

12 Discrimination against VALS

- 12.1 The NSW experience in competitive tendering indicates that not-for-profit organisations are inexperienced at competitive tendering. The Allens Group report reported that four of the eight regions had no “suitable” registrant because the majority of registrants were, for the most part, non-profit organizations that appear to have been “relatively inexperienced in openly competitive tenders”.²² Whilst ATSIIS will not address the difficulties “not-for-profit” organisations will face in the interests of maintaining the probity of the tendering process, at the same time ATSIIS has not established a level playing field in the EDPA document.
- 12.2 Private law firms, with no proven links to, work experience with or support of Indigenous Australians, should be ineligible to tender. Otherwise, Indigenous Australians’ capacity for self determination is significantly reduced. The ATSIIS decision to shift from an approach of tendering as a last resort to a broad tendering approach open to mainstream organisations is likely to disadvantage ATSILS.

¹⁸ ATSIIS EPDA document 2004, section 3.2.3, pg 23

¹⁹ ATSIIS EPDA document 2004, section 3.5.4 pg 33

²⁰ ATSIIS EPDA document 2004, pg. 63

²¹ ATSIIS EPDA document 2004, pg 64

²² Allen Consulting “Final Report to the Office of Evaluation and Audit, Tendering of Aboriginal and Torres Strait Islander Legal Services in New South Wales: Initial Assessment and Future Options” (1999) Pg 25

13 Broader policy issues

13.1 Self determination, self management and effective partnerships

- (a) The EDPA document does not accord with many of the recommendations of the RCIADIC. It is specifically inconsistent with recommendations 84, 105, 106, and 107.
- (b) The implementation of the EDPA document has the potential to increase the imprisonment rates of Aboriginal people. ATSIIS notes in the EDPA document that Aboriginal and Torres Strait Islander people are incarcerated at significantly higher rates than non-Indigenous people in line with the RCIADIC, but does not increase the chances that more Aboriginal people will receive representation. This is because the definition of Aboriginal legal services has been narrowed and more money for representation is not made available.
- (c) A key theme in the RCIADIC is the importance of Aboriginal self determination. Recommendation 188 states:

“That Governments negotiate with appropriate Aboriginal organisations and communities to determine guidelines as to the procedures and processes which should be followed to ensure that the self-determination principle is applied in the design and implementation of any policy or program or the substantial modification of any policy or program which will particularly affect Aboriginal people. Refer to Appendix B for a list of the RCIADIC Recommendations relevant to the issue of self determination.”
(Refer to Schedule 2)

- (d) The Commonwealth Government prefers the term self management to self determination. Whatever term is used, the lack of consultation about significant policy changes to ATSIIS certainly ignores the letter and the spirit of the RCIADIC recommendations. The Commonwealth Grants Commission Report on Indigenous Funding (2001) (“**CGC Report**”), released eleven years after the RCIADIC, uses different language but makes some similar recommendations about how Government should deal with Indigenous organisations.
- (e) The CGC Report states that:

“There are important principles and key areas for action that should guide efforts to promote a better alignment of funding with needs. These include:

- (i) *the full and effective participation of Indigenous people in decisions affecting funding distribution and service delivery;*
- (ii) *ensuring a long term perspective to the design and implementation of programs and services, thus providing a secure context for setting goals;*
- (iii) *recognising the importance of capacity building within Indigenous communities.”*

“Effective partnerships between service funders, service providers and Indigenous people will better direct services towards Indigenous disadvantage. Some essential features of such partnerships are that there is:

- (i) *the involvement of all relevant spheres of government, with across-functional perspective;*
- (ii) *a financial stake for all parties, so that Indigenous representatives do not feel dominated by the fund-holding agencies;*

- (iii) *full and equal access to policy and service delivery information for all parties; and*
- (iv) *Indigenous control of, or strong influence over, service delivery expenditure”*

For those communities where capacity building is lacking, a higher initial investment of resources will need to be made to provide a framework for the effective delivery of services and sustainable outcomes”²³.

- (f) ATSI in designing the EDPA document appears to have not taken into account the above recommendations and focused instead only on recommendations about increased targeting of services. An audit is necessary to ascertain the consistency of the EDPA document with the RCIADIC Recommendations.

13.2 Commonwealth Grants Commission Report (2001)

- (a) The CGC Report focused on health, housing, infrastructure and education. In this context it described Indigenous specific services as being aimed at supplementing mainstream services. This is clearly not the case with ATSI, which provide 89% of legal service to Indigenous people. ATSI are different to many other Indigenous service providers as ATSI are the primary provider of services, not a secondary service or a supplementary service. This primary role of ATSI is recognised clearly in recent reports to Government.²⁴ This is also something recognised and acknowledged by LACs.
- (b) Some of the recommendations of the CGC Report about mainstream providers taking more responsibility and Indigenous services being a supplementary service which targets the most disadvantaged clearly do not fit the ATSI context. However, some of the language and ideas of the EDPA document appear to have been influenced by the CGC Report (eg. targeting and the idea of Indigenous services being supplementary). Unfortunately, the EDPA document ignores the CGC emphasis on the importance of Indigenous involvement and control and ignores the significance of ATSI being primary providers of services.

13.3 Funds Available for Purchase of Services

- (a) There has been no substantial injection of new money into the ATSI program since 1992. Under current funding levels ATSI are experiencing increasing costs and difficulty in attracting and retaining professional staff.²⁵
- (b) The present level of annual funding for ATSI is \$42.9 million. \$2.4 million of this is temporary supplementation for Fringe Benefits Tax transition arrangements which ends in June 2005. There is no indication that this will be replaced with increases to core funding. The Office of Evaluation and Audit (ATSI) report in March 2003 indicated that ATSI required an additional \$25 million to achieve funding levels similar to LACs. In 2003 the Australian National Audit Office report stated:

“other reports on the provision of legal services by ATSI have referred to ‘shortfalls’ in ATSI funding for legal aid of either \$12.4 million or \$25.6 million”²⁶.
- (c) Although ATSI suggests in the EDPA document that the funds available for legal services during 2004-2007 are indicative only, it is concerning that there is no suggestion of any increase in this document. It appears that for two and half

²³ Commonwealth Grants Commission, 2001, Inquiry into Indigenous Funding. Pg xvii-xix

²⁴ Australian National Audit Office Report 13 (2003), para 2.46 pg 27

²⁵ Australian National Audit Office Report 13 (2003) Internal ATSI paper 21st January 2003 Quoted on Pg. 40

²⁶ Australian National Audit Office Report 13 (2003) pg 23

years of the next three years the funds available will be \$40.46 million, a decline of \$2.4 million nationally²⁷.

- (d) It is clear from the ANAO report that cost shifting to the States is part of the new contestability policy. It is stated in the report that:

“[w]ith the proposal to move to tendering and contract arrangements, AT SIS will need to assure itself as to how, in the future, legal aid services that are required, but not provided by AT SILS because of constrained funding, will be provided by alternative providers such as LACs”²⁸

“..... 89% of case and duty matters in 2001-2002 were for criminal matters which if unfunded by AT SIS would place “far greater funding pressures on the LACs in particular (i.e. most criminal law matters) funded by the State”.²⁹

14 Responsibility of Commonwealth

- 14.1 Section 51(xxvi) of the Australian Constitution empowers the Commonwealth Government to make laws with respect to Indigenous Australians. By seeking to increase the number of Indigenous Australians who seek assistance from State or Territory run legal service providers, the EDPA document suggests a shifting of some of the responsibility and cost for the provision of these services to the States and Territories. If the development of policy is consequently divided between States/Territories and Commonwealth, a consistent approach to the support and empowerment of Indigenous Australians will be difficult, if not impossible.

- 14.2 The CGC Report highlighted the problem of cost shifting in the following terms:

“18. Australia’s federal system of government blurs service delivery responsibility between governments and has complex funding arrangements. It results in citizens generally having a limited understanding of the responsibilities of the different spheres of government. It also results in some responsibility and cost shifting between governments. The overall result, for Indigenous people, is that they generally distrust government agencies and do not believe all the funding reaches the intended goals.

19. Lack of clarity on the allocation of responsibility among the spheres of government in Australia can create opportunities for cost shifting between levels of governments and between agencies at the same level of government. From an Indigenous perspective, the detrimental aspects of cost shifting arise when services are not provided because one party has ‘vacated the field’.”

- 14.3 The AT SIS tendering proposal appears to be squarely aimed at cost shifting. The last major example of the Commonwealth Government cost shifting in relation to legal aid was the 1996 funding cut, which was accompanied by a new restriction that Commonwealth legal aid is provided for Commonwealth matters only. This cost cutting has had the effect of reducing the supply of funds for family law and State criminal matters. The effects of changes to legal aid have been extensive and damaging. Such changes have been characterised as a policy reversal that fragments the system and in policy terms takes Australia back to the fifties³⁰. It has also led to a range of damaging

²⁷ AT SIS EDPA document 2004 Pg 20-21

²⁸ Australian National Audit Office Report 13 (2003), Pg 49

²⁹ Australian National Audit Office Report 13 (2003), Pg 47

³⁰ Fleming, D, 2001 Australian Legal Aid Under the First Howard Government British Columbia Law Review.

flow on effects such as “juniorisation” of lawyers doing legal aid, a dramatic rise in unrepresented litigants and reducing numbers of lawyers who do legal aid work. Such erosion of legal representation is discussed in detail in a recent Law Council of Australia report titled, ‘Erosion of Legal Representation in the Australian Justice System’ (2004). Refer to Schedule 3).

15 Cost effectiveness

- 15.1 The cost effectiveness of current ATSILS, including VALS, when compared to the potential competitive tenders of “profit” organisations, is excellent as instanced by the OEA 2003 report. The report provides evidence that the private sector could not provide a more cost efficient and effective legal service than ATSILS. For instance, it is noted that ALSWA was funded for \$5.85 million with the private sector service equivalent being \$24.21 million. Cost effectiveness is a relevant consideration that must be, but to date has not been, adequately considered in the decision to tender Aboriginal legal services.
- 15.2 In some cases Aboriginal legal services might not be functioning at an optimal level. However, the vast majority of ATSILS provide economic, efficient and effective services. Most problems with ATSILS service delivery stem from inadequate funding levels³¹.
- 15.3 The introduction of a means test in the EDPA document ignores the conclusions of consultants Keys Young that a simple means test is not a cost effective measure³². It would heighten administrative costs with, in most cases, little return. In accordance with the priorities of “value for money”, any means test should only be applied to expensive cases.

16 National Competition Policy (“NCP”)

- 16.1 The provision of legal services to Indigenous Australians clearly falls within the public interest exception to the NCP. Clause 1(3) of the Competition Principals Agreement (“CPA”) sets out a (non-exhaustive) list of “public interest” factors that governments should consider when assessing the benefits and costs of a particular policy or course of action. Relevant considerations include “social welfare and equity considerations, including community service obligations,... the interests of consumers generally or a class of consumers,... (and) the efficient allocation of resources”. These are highly relevant considerations which ATSIIS, in drafting the EPDA document, should have considered, but have not.
- 16.2 If the interests of Indigenous Australians are given due and proper regard, the tender should be limited to not-for-profit organisations with the strongest available links to Indigenous communities. In any event, more weighting and more substantive criteria must be given in the selection criteria on the ability of the service provider to deliver a culturally empathetic service geared towards Indigenous communities.

17 Commonwealth Procurement Guidelines

- 17.1 ATSIIS is a “prescribed agency” under schedule 1 of the *Financial Management and Accountability Regulations 1997* (Cth) (“FMAR”). As such, Schedule 8 of the FMAR provides that an official performing duties in relation to the procurement of property or services must have regard to the Commonwealth Procurement Guidelines (“Guidelines”).

³¹ ‘Australian Legal Assistance Forum – Exposure Draft Purchasing Arrangements: Legal services Contact 2004-2007 for Legal aid services for Indigenous Australians’ , p5

³² Keys Young Consultants ‘Improved Targeting of ATSILS’ (1999)

The Guidelines state that “value for money is the core principal governing Commonwealth procurement”. This core principal is underpinned by four supporting principals:

- (a) Efficiency and Effectiveness;
- (b) Accountability and Transparency;
- (c) Ethics; and
- (d) Industry Development.

Efficiency and Effectiveness

17.2 The Guidelines recognise that no single purchasing method suits all situations, stating that “buyers must consider the requirements and existing market conditions of each procurement”. AT SIS has not properly considered the requirements and existing market conditions of the procurement of legal services for Indigenous Australians.

Accountability and Transparency

17.3 The Guidelines state that “transparency through internal and external scrutiny is an essential element of accountability and should be an inherent characteristic of all processes, procedures, plans, actions or decisions relating to procurement.” The EDPA document states that information sessions and questions will be taken during the consultative period and answers posted on the AT SIS website. The information sessions were inadequate and the delay in giving answers to questions (answers did not appear on the relevant website until 2 April 2004 has compromised VALS’ ability to effectively respond to the EDPA document. Further, answers when they appeared, were brief and non-substantive. This lack of transparency is particularly inadequate, especially given the Guidelines’ statement that “fundamental to all Commonwealth procurement is that it is sufficiently transparent to allow Government, Parliament and the public to have the utmost confidence in the procurement process...”.

17.4 Both in relation to the CPA and the CPG, VALS had a legitimate expectation that the Guidelines would be followed in the conduct of the tender for provision of legal services. This legitimate expectation has not been met by AT SIS and VALS reserves its legal rights as a consequence.

18 Conclusion

18.1 By limiting the new service provider to the provision of legal services in their narrowest form and by cutting back core services and introducing policy priorities in order of priority, the benefits currently provided by AT SILS, the primary provider of Aboriginal legal services, will not be available to Aboriginal people.

18.2 The EDPA document not only narrows legal services to be provided to Aboriginal people by reducing core services and shifting priority emphasis, but also alters who will provide the narrower version of Aboriginal legal services. The EDPA document has been drafted to maximise the chances of attracting competitors and in particular private law firms. The new narrower and less flexible AT SIS proposed policy directions mean the very idea of AT SILS has been downsized. The new post-contestability service envisaged by the EDPA document will no longer be holistic. It will no longer need Aboriginal staff or management. And it will no longer be a primary service provider but a service to supplement Legal Aid.

18.3 The EDPA document represents an attempt to reposition AT SILS as a supplement to Legal Aid. It attempts to make providers as similar in appearance to Legal Aid as possible by encouraging private lawyers to become the main providers. The EDPA document provides no clarity about how the providers will be structured geographically.

- 18.4 The EPDA document seeks to deconstruct ATSILS by removing some of their core functions. It seeks to set city people against country people. It seeks to set women and children's issues against criminal issues. And it seeks to shift responsibility for criminal law matters from the Commonwealth Government to the State government.
- 18.5 The CGC Report about other Aboriginal services highlights the deficiencies of an approach which turns its back on Aboriginal organizations and seeks to rearrange an appallingly under-funded sector using complicated redistribution formulae.
- 18.6 Indigenous people in all regions have high needs relative to the non-Indigenous population. An important question is whether new methods of distribution should be applied to existing programs and funds. Any change in methods of distributing existing resources means that some regions would lose funding and others would gain. Redistributions risk losing the benefits of investments made over long periods of time, including those in developing organisational capacity and people.³³

³³ Commonwealth Grants Commission, 2001, Inquiry into Indigenous Funding

SCHEDULE 1 - THE NEED FOR SEPARATE ATSILS

The 1980 Aboriginal Legal Aid report, chaired by the now Attorney General Phillip Ruddock, produced a comprehensive list of reasons why separate ATSILS were a useful policy initiative and program. After discussing the arguments against separate legal services (para 87-92) the report strongly recommended that ATSILS should continue to be separate from their mainstream legal aid counterparts.

The Standing Committee outlined a number of key arguments to support this recommendation:

- Lower costs (para 95) – the report found after consultation that separate Indigenous legal services are more cost effective. One argument made was that salaries paid to Aboriginal legal service staff are less than those paid to Legal Aid employees. Legal Aid employees are paid according to public service regulations.
- Accessibility (para 96-97) – ATSILS create a unique relationship of trust and cultural understanding with their clients that simply could not be emulated by a larger mainstream Legal Aid service. This relationship means that Aboriginal people are more confident with the legal system, and therefore more likely to access legal representation when they need it.
- Community based services (para 98) – because they are specific to Aboriginal communities, ATSILS form close bonds with the communities they represent and are more likely to represent the needs of these communities.
- Community development (para 99-102) – as well as the central role of legal representation for Indigenous people, ATSILS play an important part in other key related areas of community development. These areas, among other things, include housing, Aboriginal-police relations, law reform and welfare.
- Need for specialisation – separate ATSILS mean that legal practitioners are better skilled and more culturally aware in dealing with the particular legal issues that confront Aboriginal people.
- Competing interests – by retaining separate ATSILS, conflict is avoided between the competing needs of the Aboriginal community and the rest of the community. (1980, pg 29-35)

All these reasons were the justification given by the Committee to the House of Representatives Standing Committee on Aboriginal Affairs for retaining ATSILS. It is clear that these justifications still have striking resonance today.

SCHEDULE 2 - ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY SELF DETERMINATION RECOMMENDATIONS

188. That governments negotiate with appropriate Aboriginal organisations and communities to determine guidelines as to the procedures and processes which should be followed to ensure that the self-determination principle is applied in the design and implementation of any policy or program or the substantial modification of any policy or program which will particularly affect Aboriginal people. (4:7)
189. That the Commonwealth Government give consideration to constituting ATSIC as an employing authority independent of the Australian Public Service. (4:12)
190. That the Commonwealth Government, in conjunction with the State and Territory Governments, develop proposals for implementing a system of block grant funding of Aboriginal communities and organisations and also implement a system whereby Aboriginal communities and organisations are provided with a minimum level of funding on a triennial basis. (4:4.21)
191. That the Commonwealth Government, in conjunction with the State and Territory Governments, develop means by which all sources of funds provided for or identified as being available to Aboriginal communities or organisations wherever possible be allocated through a single source with one set of audit and financial requirements but with the maximum devolution of power to the communities and organisations to determine the priorities for the allocation of such funds. (4:21)
192. That in the implementation of any policy or program which will particularly affect Aboriginal people the delivery of the program should, as a matter of preference, be made by such Aboriginal organisations as are appropriate to deliver services pursuant to the policy or program on a contractual basis. Where no appropriate Aboriginal organisation is available to provide such service then any agency of government delivering the service should, in consultation with appropriate Aboriginal organisations and communities, ensure that the processes to be adopted by the agency in the delivery of services are appropriate to the needs of the Aboriginal people and communities receiving such services. Particular emphasis should be given to the employment of Aboriginal people by the agency in the delivery of such services and in the design and management of the process adopted by the agency. (4:28)
193. That the Commonwealth Government, in negotiation with appropriate Aboriginal organisations, devise a procedure which will enable Aboriginal communities and organisations to properly account to government for funding but which will be least onerous and as convenient and simple as possible for the Aboriginal organisations and communities to operate. The Commission further recommends that State and Territory Governments adopt the same procedure, once agreed, and with as few modifications as may be essential for implementation, in programs funded by those governments.
194. That Commonwealth, State and Territory Governments, in negotiation with appropriate Aboriginal communities and organisations, agree upon appropriate performance indicators for programs relevant to Aboriginal communities and organisations. The Commission further recommends that governments fund Aboriginal organisations and communities to enable the appropriate level of infrastructure and training as is required to develop, apply and monitor performance indicators. (4:29)
195. That, subject to appropriate provision to ensure accountability to government for funds received, payments by government to Aboriginal organisations and communities be made

- on the basis of triennial rather than annual or quarterly funding. (4:30)
196. That whilst governments are entitled to require a proper system for accounting of funds provided to Aboriginal organisations and communities, those organisations and communities are equally entitled to receive a full explanation of the funding processes which are adopted by governments. The Commission recommends that governments ensure that Aboriginal communities and organisations are given prompt advice, in writing and in plain English or, where appropriate, in Aboriginal languages, as to decisions concerning funding applications and as to financial and other matters relevant to the assessment of applications for funding made by those organisations and communities so as to enable those organisations and communities to make appropriate planning decisions. (4:30)
197. That ATSIC Councillors and Commissioners at an early stage be encouraged to consult with Aboriginal organisations and communities to develop a program for training staff of Aboriginal organisations and communities in appropriate management and accounting procedures to ensure the efficiency and integrity of the organisations which are culturally appropriate. In particular, there should be a commitment to devising management procedures which provide rules for the relationship, obligations and rights, both individually and as between each other, of directors, managers and staff of Aboriginal organisations. (4:30)
198. That governments commit themselves to achieving the objective that Aboriginal people are not discriminated against in the delivery of essential services and, in particular, are not disadvantaged by the fact that the low levels of income received by Aboriginal people reduce their ability to contribute to the provision of such services to the same extent as would be possible by non-Aboriginal Australians living in similar circumstances and locations. (4:38)
199. That governments recognise that a variety of organisational structures have developed or been adapted by Aboriginal people to deliver services, including local government type services to Aboriginal communities. These structures include community councils recognised as local government authorities, outstation resource centres, Aboriginal land councils and co-operatives and other bodies incorporated under Commonwealth, State and Territory legislation as councils or associations. Organisational structures which have received acceptance within an Aboriginal community are particularly important, not only because they deliver services in a manner which makes them accountable to the Aboriginal communities concerned but also because acceptance of the role of such organisations recognises the principle of Aboriginal self-determination. The Commission recommends that government should recognise such diversity in organisational structures and that funding for the delivery of services should not be dependent upon the structure of organisation which is adopted by Aboriginal communities for the delivery of such services. (4:38)

SCHEDULE 3 - EROSION OF LEGAL REPRESENTATION IN THE AUSTRALIAN JUSTICE SYSTEM

(11 February 2004)

Produced by Law Council of Australia in conjunction with Australian Institute of Judicial Administration National Legal Aid Aboriginal and Torres Strait Islander Legal Services.

*“[T]here has been an erosion in the level of legal representation and that this has had a detrimental impact on the legal system and the delivery of justice”.*³⁴

The finding of the *Erosion of Legal Representation in the Australian Justice System Report* is that the erosion of legal representation has been an issue since 1994. The cause of such erosion is the “reduced availability of legal aid funding” as a result of “cuts to funding and changes made to policy and procedural guidelines which tightened the availability of legal aid”.³⁵ The consequences of such erosion are as follows:

Rise in number of self-represented litigants

Inequity in access to legal representation has resulted in an increase in the number of self-represented litigants³⁶. It is recommended in the report that that urgent attention is given to increasing public funding to reverse the trend of self-represented litigants in court.

Costs of self-representation

The report quotes the Honourable Chief Justice Murray Gleeson: “[p]roviding legal aid is costly. So is not providing legal aid”³⁷. It is noted that cutting back on publicly funded representation could, in effect, be a false economy because it imposes extra costs on the court and other government funded bodies.³⁸ The report suggests that a greater investment in the public funding of legal representation is likely to result in cost savings to the court system and to the justice system as a whole.

The rise in self representation has the following detrimental effect on the court system:

- Rising cost, prolonged cases and delays;
- Increased demands on judicial officers as the burden of ensuring that the necessary work of the litigant in person is done falls on the court administration or the court itself³⁹; and
- The impartiality of the court is compromised which can lead to an injustice. When a party is self represented the court experiences a tension between the desire to see justice done, and the need to remain impartial in the delivery of justice.⁴⁰

34 Erosion of Legal Representation in the Australian Justice System (February 2004), para 3

35 Erosion of Legal Representation in the Australian Justice System (February 2004), para 199

36 Legal Support Fails Justice: LCA Lawyers Weekly, Issue 179, 20 February 2004, p.1

37 (Hon Chief Justice Murray Gleeson of the High Court of Australia, State of the Judicature Speech Australian

Legal Convention Canberra 10th October 1999 as cited in Erosion of Legal Representation in the Australian Justice System (February 2004), para 13

38(Law Reform Commission of Western Australia Review of the Criminal and Civil Justice System in Western Australia Project 92 LRCWA Perth September 1999 para 18.3 at ALRC:304) as cited in Erosion of Legal Representation in the Australian Justice System (February 2004), para 247

39 Erosion of Legal Representation in the Australian Justice System (February 2004), para 35

A self represented party will be disadvantaged in the following manner because of their lack of representation:

- pressure to plead guilty or abandon case;
- inability to properly put their interests to the court⁴¹; and
- less likelihood of success in comparison to represented parties.⁴²

Lack of Access

The lack of public funding and the erosion of the legal representation have resulted in inequity in access to representation.

Diminution of legal rights

The lack of public funding and the erosion of the legal representation have diminished the ability of people to enforce their legal rights.

Significant withdrawal of experienced lawyers from publicly funded legal work Leading

Cuts to legal aid funding have led to a “diminution in the numbers of skilled and specialised lawyers undertaking legal aid work.” (ALRC 2000:301)⁴³

Some diminution in the quality of publicly funded legal representation;

Cuts to legal aid funding, leading to a significant withdrawal of experienced lawyers, means that junior counsel are more likely to take on legally aided matters. This process is termed ‘juniorisation’ and leads to some diminution in the quality of legal representatives available to publicly funded parties.⁴⁴

40 Legal Support Fails Justice: LCA Lawyers Weekly, Issue 179, 20 February 2004, p.4

⁴¹ Legal Support Fails Justice: LCA Lawyers Weekly, Issue 179, 20 February 2004, p.4

42 Erosion of Legal Representation in the Australian Justice System (February 2004), para 52

43 Erosion of Legal Representation in the Australian Justice System (February 2004), para 31

44 Erosion of Legal Representation in the Australian Justice System (February 2004), para 23

19 References

- 19.1 Aboriginal and Torres Strait Islander Commissioner, 2002 *ATSIC Commissioner Report 2002* Human rights and Equal Opportunity Commission.
- 19.2 Allen Consulting, 1999, Tendering NSW Aboriginal Legal Services report (NSW report).
- 19.3 Australian National Audit Office, 2003 Report Number 13; Review of the Law and ATSI, 2003, Policy Guidelines for ATSI.
- 19.4 ATSI, 2004, EDPA document: Purchasing Arrangements for Aboriginal and Torres Strait Legal Services.
- 19.5 Commonwealth Grants Commission, 2001, Inquiry into Indigenous Funding.
- 19.6 Erosion of Legal Representation in the Australian Justice System (February 2004)
- 19.7 Fleming, D, 2001 *Australian Legal Aid Under the First Howard Government* British Columbia Law Review.
- 19.8 Justice Program.
- 19.9 Johnston, E 1991. National report 5 Vols, Royal Commission into Aboriginal Deaths in Custody, AGPS.
- 19.10 Keys Young Consultants 'Improved Targeting of ATSI' (1999)
- 19.11 Office of Evaluation and Audit OEA (ATSI), 2003, Evaluation of the Legal and Preventative Services Program.