

LEGAL SERVICES CORPORATION

45 CFR Part 1614

Restrictions on legal assistance with respect to criminal proceedings in tribal courts.

AGENCY: Legal Services Corporation

ACTION: Request for Information.

SUMMARY: The Legal Services Corporation (LSC) is requesting public comments on issues associated with amending 45 C.F.R. part 1613 to align with the statutory authority granted to LSC under the Indian Arts and Crafts Amendment Act of 2010, Pub. L. 111-211, 124 Stat. 2258, 2282 (the IACAA). The IACAA amended the LSC Act, 42 U.S.C. 2996f(b) (the LSC Act), to provide authority for LSC funds to be used by grantees to represent eligible persons in any and all criminal proceedings in tribal courts. Previously, the LSC Act and related regulations in 45 CFR part 1613 permitted representation only in criminal matters involving misdemeanors or lesser offenses in tribal courts. The information received as a result of this request will be considered in rulemaking undertaken by LSC.

DATES: Written comments must be received by August 23, 2013.

ADDRESS: Written comments must be submitted by mail, fax, or e-mail to Atitaya Rok at the addresses listed below.

FOR FURTHER INFORMATION CONTACT: Atitaya Rok, Staff Attorney, Legal Services Corporation, 3333 K St., NW., Washington, DC 20007; (202) 295-1500 (phone); 202-337-6831 (fax); or lscrulemaking@lsc.gov.

SUPPLEMENTARY INFORMATION:

I) Background Information.

A. New Statutory Authorities.

The IACAA amended the LSC Act to provide authority for LSC funds to be used by grantees to represent eligible persons in any and all criminal proceedings in tribal courts. Previously, the LSC Act and related regulations in 45 C.F.R. part 1613 permitted representation only in criminal matters involving misdemeanors or lesser offenses in tribal courts.

A subsection of the IACAA, known as the Tribal Law and Order Act of 2010, Pub. L. 111–211, tit. II, 124 Stat. 2261 (the TLOA), includes new authorizations related to tribal court criminal proceedings. The TLOA increases the maximum jail sentence that any tribal court may impose from one to three years for any single offense. Prior to the TLOA, crimes (felonies, misdemeanors, or less serious offenses) within tribal jurisdiction (those not reserved to federal or state jurisdiction) that could result in jail sentences of more than one year upon successful prosecution were often referred by tribes to federal or state courts because of the tribal courts’ inability to impose lengthier sentences.

In order to use this new sentencing authority, tribes must “opt in” and implement affirmative preconditions detailed in the TLOA, including, but not limited to, ensuring that judges in tribal courts have sufficient legal training to preside over criminal proceedings; affording the defendant the right to effective assistance of counsel and, if a defendant is indigent, providing the defendant with a licensed defense attorney at the tribe’s expense; publishing the tribal government’s criminal laws and rules of evidence and criminal procedure; and creating a system that maintains records of criminal proceedings. Pub. L. No. 111-211, tit. II, 124 Stat. at 2280.

In addition to the IACAA and TLOA, the Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4, 127 Stat. 54 (the 2013 VAWA expands tribal courts' criminal jurisdiction to include crimes of domestic violence and dating violence committed by non-Indians within a tribal court's jurisdiction.

B. Current LSC Requirements.

LSC regulations currently reference the original language of the LSC Act, which explicitly carved out an exception to the general prohibition on the use of LSC funds in criminal proceedings for misdemeanors and lesser offenses in tribal courts: “[a] misdemeanor or lesser offense tried in an Indian tribal court is not a ‘criminal proceeding.’” 45 C.F.R. part 1613.2.

On November 12, 2012, LSC Management informed grantees via Program Letter 12-3 that all grantees may use LSC funds to assist any eligible person charged with any offense in a criminal proceeding in a tribal court until such time the LSC Board of Directors (LSC Board) made an affirmative decision on the issue.

On January 26, 2013, the LSC Board authorized rulemaking to consider aligning the LSC regulations and the LSC Act. Pursuant to LSC's Rulemaking Protocol, 67 Fed. Reg. 69763 (Nov. 19, 2002), a Rulemaking Options Paper (ROP) is under development. This Request for Information (RFI) is issued to better understand the impact of the IACAA, TLOA, and the 2013 VAWA on grantees that are active in tribal courts.

II) Request for Information.

LSC requests information from members of the public with any expertise or experience relating to criminal proceedings in tribal courts, the impact of TLOA or the 2013 VAWA

on criminal laws of tribal government, or tribal court appointments of lawyers.

Commenters are asked to respond to these general topics of discussion:

1. Do you or your organization currently undertake representations of criminal defendants in tribal courts?
 - a. If yes, please identify which tribal courts.
 - b. If no, do you or your organization have a formal or informal policy in place to provide or decline such representations?
 - c. Are you or your organization aware of any changes in the criminal laws of the tribal government and/or sentencing authority of the tribal courts that have been implemented in accordance with TLOA or the 2013 VAWA?
2. Do you or your organization anticipate undertaking representations of criminal defendants in tribal courts in the future?
 - a. If yes, please identify which tribal courts.
 - b. If no, will you or your organization create a formal or informal policy to provide or decline such representations?
3. As a result of the IACAA, TLOA, and the 2013 VAWA, have you or your organization seen an increase in the number of requests for assistance in criminal matters before tribal courts by eligible clients?
 - a. If yes, please estimate the number of cases and the approximate percentage these cases constitute as a proportion of all requests. Please distinguish, if possible, requests for representation in misdemeanor cases from those for more serious crimes.
 - b. Please indicate (by percentage estimation, if possible) what the increase is over years prior to 2010, if any.

- c. If no, please indicate whether you or your organization anticipate requests for representation in the future.
4. As a result of the IACAA, TLOA, and the 2013 VAWA, have you or your organization increased the number of representations in criminal cases in tribal courts?
- a. If yes, please estimate the increase, if any, in the number of representations you or your organization have undertaken in criminal cases in tribal courts since 2010. Please distinguish, if possible, between representations in misdemeanor cases and those for more serious crimes. How does the number of criminal matters in tribal courts compare to the overall number of matters you or your organization has accepted since 2010?
- b. If no, please indicate the number of matters you or your organization have undertaken in tribal courts since 2010.
5. As a result of the IACAA, TLOA, and the 2013 VAWA, have you or any staff attorney at your organization been appointed to represent a criminal defendant in tribal court proceedings?
- a. If yes, please explain the court appointment process in the tribal court(s) in which the court appointment(s) took place.
- b. Are you or your organization concerned about future court appointments in tribal courts? If yes, please indicate why.
6. Is there any additional information you would like to provide to LSC at this time about changes in tribal courts as a result of the TLOA and the 2013 VAWA that may have an impact upon you or your organization and its use of LSC funds?

III) Important Notes

Information received in response to this RFI may be published or summarized by LSC without acknowledgement of or permission by your organization. Furthermore, your responses may be releasable to the public under the LSC's adoption of the Freedom of Information Act, 42 U.S.C. 2996d(g), and the LSC regulation, 45 CFR part 1619.

LSC, in its discretion, may request individual commenters to meet with LSC to elaborate on information in their written comments.

Comments sent by any method other than email to lscrulemaking@lsc.gov, or hard copy to Atitaya Rok, Staff Attorney, Legal Services Corporation, 3333 K St., NW., Washington, DC 20007; to any other address or individual, or received after the end of the comment period, may not be considered by LSC.

Atitaya C. Rok
Staff Attorney

Dated: May 6, 2013

A handwritten signature in black ink that reads "Atitaya C. Rok". The signature is written in a cursive, flowing style.

Atitaya C. Rok
Staff Attorney

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