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Mr Bob Charles MP  
Chairman  
Joint Committee of Public Accounts and Audit  
Parliament House  
CANBERRA ACT 2600

Dear Mr Charles

Thank you for inviting a submission from the Northern Territory Government to the Indigenous Law and Justice Inquiry. The Chief Minister has referred this matter to me.

**Background**

The social and economic context for Indigenous Australians in the Northern Territory has important implications for the provision of Legal Aid Services.

The Northern Territory has a relatively high proportion of Indigenous people compared to non-Indigenous people and most Indigenous people live in small settlements outside of the main population centres.

About 28.7% of the Northern Territory's resident population is Indigenous. Most Indigenous people spend much of their time in relatively small settlements of less than 1,000 residents. According to the Community Housing and Infrastructure Needs Survey for 2001, 72% of the Indigenous estimated resident population live on Aboriginal lands including Aboriginal freehold title, special purpose lease town camp areas and Aboriginal living areas. This contrasts with the non-Indigenous population of the Northern Territory most of whom live in the major centres.<sup>1</sup> Therefore the majority of the Indigenous people of the Northern Territory do not have direct access to services in key regional centres such as Darwin, Katherine and Alice Springs and many of them rely on outreach services by Legal Aid providers.

Most Indigenous people in the Northern Territory are dependant on welfare income. In 2001, the average personal income for Indigenous people was \$12,222 compared to \$32,151 for non Indigenous people. The participation of Indigenous people in

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<sup>1</sup> John Taylor Indigenous economic futures in the Northern Territory. The demographic and socioeconomic background, Centre for Aboriginal Economic Policy Research Discussion Paper No 246.

mainstream employment in the Northern Territory actually decreased between 1996 and 2001.<sup>2</sup>

In addition to geographic isolation and poverty the interaction of Indigenous people with the legal system is significantly influenced by their cultural and linguistic practices. Significant numbers of Indigenous people live in small clan or family based groups on Aboriginal land and more than half of the Indigenous population in the Northern Territory speaks an Indigenous language at home.<sup>3</sup> This has implications for both the nature of their legal needs and the most response to meet those needs. For example, Indigenous cultural values inform the nature of legal needs of Indigenous women in the broad area of family law and violence. Interpreters are often required which has implications for the time needed to assist people.

Geographic, cultural and linguistic factors also act as barriers to service provision. Legal Aid agencies who do provide services in remote areas to Indigenous people experience high travel costs and a lack of infrastructure to support the efficient delivery of services. Lack of telephone and post facilities, transport within and between communities and appropriate spaces to consult with clients make service provision in remote communities time consuming and physically challenging. Linguistic and cultural differences also mean that Legal Aid agencies need to invest more time and energy in delivering services to gain the trust and confidence of members of a community and an understanding of the cultural context of their clients. For the same reasons Legal Aid agencies need to have the capacity to attract and retain committed, skilled and experienced staff. General socio-economic disadvantage, and accompanying issues such as lack of housing, high levels of substance abuse and violence, also pose significant challenges for service delivery.

Indigenous people in the Northern Territory are disproportionately affected by family violence and comprise a significant majority of victims and offenders of family violence.<sup>4</sup> The Northern Territory has a homicide victimisation rate of 8.7%, which is five times the national average, and in 2000-2001 almost all of the victims of homicide in the Northern Territory were Indigenous.<sup>5</sup> About a quarter of homicide incidents in the Northern Territory occurred in the context of a family or intimate relationship. Many young people are exposed to violence in their families and most of the victims of family violence are women and the violence is perpetrated by their partner or ex partner.

### **Specialist Indigenous Legal Aid Services**

Specialist Indigenous Legal Aid services play an important role in the Northern Territory particularly when they focus on service provision for remote area clients.

Indigenous legal services in the Northern Territory have traditionally focussed on providing legal assistance in criminal matters and for Indigenous people living in remote areas. While all of the Aboriginal and Torres Strait Islander Legal Services in

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<sup>2</sup> The proportion of adult Indigenous people in employment fell from 20 per cent to 16 per cent. This does not include people working in CDEP schemes. Taylor at pages 7 and 8.

<sup>3</sup> ABS Regional Statistics Northern Territory 1362.7

<sup>4</sup> For the year 1999-2000 according to data supplied by the NT Police 62% of victims were Indigenous.

<sup>5</sup> Australian Institute of Criminology, Homicide in Australia, 2000-2001 National Homicide Monitoring Project.

the Northern Territory provide some legal assistance for matters other than criminal law (civil and family law matters) they primarily provide legal assistance to Indigenous people charged with criminal offences and have developed expertise in this area.

As documented in the Audit Office report, and elsewhere, the demand for legal services for Indigenous people is increasing. In the Northern Territory the demand for legal services by Indigenous people in criminal matters, and other areas, particularly protection from violence, has increased.

Over the three year period from 2000/2001 to 2002/2003 the number of Indigenous people apprehended for criminal offences in the Northern Territory increased from 5592 to 6423. This increase in apprehensions occurred for most categories of offending, however, there were notable increases in the categories of assault, dangerous act, unlawful entry and traffic and motor vehicle offences. It is estimated that the increase in violence offences is related to an increase in reported family violence.

Given the economic disadvantage experienced by many Indigenous people in the Northern Territory it is likely that most of those Indigenous people apprehended for criminal offences require legal aid assistance. In many areas in the Northern Territory, the assistance offered by the Aboriginal and Torres Strait Islander Legal Services is the only source of assistance in this area.

Aboriginal and Torres Strait Islander Legal Services have struggled to meet this demand for legal assistance. The Northern Territory Legal Aid Commission has experienced a steady increase since 1990/1991 in the numbers of applications for legal aid by Indigenous people primarily in the areas of criminal and family law.

### **Other sources of legal aid for Indigenous people**

Legal Aid agencies, other than the Aboriginal and Torres Strait Islander Legal Services, are also involved in the provision of legal aid to Indigenous people. While these services are not formally classified as an Aboriginal and Torres Strait Islander Legal Services, they have developed considerable expertise in delivering appropriate legal services for Indigenous people particularly Indigenous women. Some of them share common features with Aboriginal and Torres Strait Islander Legal Services, such the participation of Indigenous people in service management and employment of Indigenous people.

Indigenous women in the Northern Territory have a high level of need for legal aid services to deal with violence. Indigenous women turn to specialist services for assistance with obtaining restraining orders (under the Northern Territory *Domestic Violence Act*), for support and assistance as a victim in criminal justice proceedings and for assistance with local initiatives to deal with family violence. Research and evaluation of services developed in the Northern Territory emphasises the need for flexible and holistic responses to family violence that take account of cultural issues.

Domestic and family violence services in the Northern Territory have developed over the last 10 years due to the lack of capacity of Aboriginal and Torres Strait Islander Legal Services to meet the increasing need for services in this area. Aboriginal and Torres Strait Islander Legal Services were unable to respond to this need due to conflict problems and lack of resources. Community legal centres also provide legal assistance to Indigenous people. Domestic Violence Legal Services, funded by the

Northern Territory Government, were established in Darwin and Alice Springs in 1993. Both of these services have provided significant level of assistance to Indigenous women. In the case of the Alice Springs service, the majority of their clients have been Indigenous women. The Women's Legal Services in Darwin, Katherine and Alice Springs provide a significant level of assistance to Indigenous women in the areas of family and civil law. The Darwin Community Legal Service operates Northern Territory wide specialist disability and welfare rights services.

In addition, Women's Legal Services were established in Darwin, Katherine and Alice Springs in 1996 and the Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Domestic Violence Service was established in 1994.

With the development of these services assistance for women was expanded to a number of remote communities. These services developed outside the umbrella of the Aboriginal and Torres Strait Islander Legal Services in the Northern Territory, however, Indigenous women participated in them as managers and employees and in many respects they have operated as de facto Indigenous women's legal services. The women's legal services have also provided legal aid to Indigenous women in other areas including advice on civil and family law matters and some casework particularly in civil law areas.

By 2000, Aboriginal and Torres Strait Islander Services provided funds to three family violence prevention units in the Northern Territory. The service in Darwin is operated by the Top End Women's Legal Service and the services in Katherine and Alice Springs are auspiced by the Aboriginal and Torres Strait Islander Legal Services.

These agencies provide services to women and children in a number of remote communities. There are however some significant gaps particularly at communities that have no service but where the Northern Territory Magistrates Court holds circuit Court. These include Nhulunbuy, Maningrida, Tiwi Islands, Lajamanu and Kintore.

### **Flexible service delivery**

Rather than focusing on Aboriginal and Torres Strait Islander Legal Services as the sole providers of legal aid for Indigenous people in the Northern Territory, it is more appropriate to recognise that effective legal aid provision to Indigenous people might be delivered by a range of complementary services. For example, Aboriginal and Torres Strait Islander Legal Services have developed expertise in the provision of legal aid services in remote communities particularly for criminal matters. Recently, the Northern Territory Legal Aid Commission, has provided increasing services for Indigenous people due to lack of resources within Aboriginal and Torres Strait Islander Legal Services, as a result of agreements between Northern Territory Legal Aid Commission, and some of the Aboriginal and Torres Strait Islander Legal Services regarding referral of specific matters. A number of other organisations such as domestic violence legal services and women's legal services have developed expertise in providing effective services to Indigenous women.

There is considerable potential in the Northern Territory to continue to explore collaborative arrangements between legal aid service providers to maximise the access of Indigenous people to legal aid and to minimise costs associated with remote service delivery. This should not undermine the expertise of Aboriginal and Torres Strait Islander Legal Services, and other agencies that have developed expertise in delivering legal aid services to Indigenous people. The

Northern Territory Legal Aid Commission has already entered into collaborative arrangements with two of the Aboriginal and Torres Strait Islander Legal Services and has undertaken research into more effective legal aid services in Tennant Creek.

This research highlighted gaps in the provision of legal assistance in the Tennant Creek region.<sup>6</sup> This region has a significant and growing Indigenous population. Legal aid services are provided by Central Australian Aboriginal Legal Aid Service (an ATSIL), the Family Violence Prevention Unit in Alice Springs, Northern Territory Legal Aid Commission and the Central Australian Women's Legal Service. All of these services provide a visiting service to the town. The research identifies lack of access to legal services and the need for improving access to existing services. The research also notes, the relative socio-economic disadvantage of Tennant Creek, compared to other parts of the Northern Territory. The primary recommendation of the report, is the establishment of a Legal Resource Centre, to improve access to the whole range of legal aid services, to coordinate community legal education in the region. The centre would improve access to existing legal aid services by acting as a shop front in the community for those services, facilitating initial contact with legal aid services, in Alice Springs by telephone or video and provide advice to those legal services, about the level and nature of need in the region.

In addition, the research identified a gap in service delivery in Tennant Creek for non Indigenous women who require assistance on domestic violence matters. The report recommends the extension of domestic violence services, for non Indigenous women and that this could be implemented, by providing funds to the family violence unit.<sup>7</sup> This would be preferable to funding another service to visit the community because of the cost in providing services, in remote areas such as Tennant Creek.

However, while collaborative arrangements have significant potential to improve efficiencies and access to justice they should not be used to mask cost shifting from the Commonwealth to the Territory. The steady increase in grants of legal aid to Indigenous people, for criminal matters has resulted in unacceptable cost shifting, from the Commonwealth to the Northern Territory because of the Commonwealth's policy of only providing funds to legal aid commissions, for matters arising under Commonwealth laws. The Commonwealth Government has a particular responsibility for Indigenous people, that extends to ensuring that their special legal needs are appropriately met.

### **Exposure draft for purchasing arrangements for Indigenous legal services**

This document released by Aboriginal and Torres Strait Islander Services in March, set out significant changes to the funding of specialist Indigenous legal services. The Northern Territory Government believes that if these proposals are implemented, Indigenous people will be further disadvantaged in their interaction with the legal system. The new arrangements will only perpetuate the situation where, Indigenous specific services are subject to differential requirements and forced to operate under constraints, that are more restrictive than those imposed on other legal aid providers. It has been argued in a series of reports and publications (most recently the Senate Legal and Constitutional References Committee's report

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<sup>6</sup> Gordon Renouf for NTLAC, *Justice Too Far Away* Report of the Tennant Creek Regional Legal Access Project May 2003.

<sup>7</sup> Renouf

into Legal Aid and Access to Justice) that Indigenous legal services suffer, a shortfall in funding when compared to legal aid commissions. Further, the potential to develop flexible and efficient legal aid services in the Northern Territory will be significantly affected by the proposed new arrangements.

It is submitted that both Commonwealth and State/Territory Governments should ensure that there is a consistent approach to legal aid funding and policy so that Indigenous people are not disadvantaged. Funding programs should support flexible service delivery as well as equity.

The decision to use a tender process to identify new service providers, is based on a questionable assumption, that such a process will lead to appropriate and high quality services for Indigenous people. It is difficult to understand how a tender process will result in more effective service provision, in remote communities given the high costs of service provision and special circumstances of Indigenous people, who live in remote areas. Moreover it is difficult to understand how a tender process will ensure a distribution of resources, on the basis of need when it cheaper, and easier, for a service provider to focus resources on major centres.

It is clear some of the existing, Aboriginal legal services have been struggling for some time to meet the demand for services with the funds they have available, however this is due to a range of factors including increase in demand for services, administrative inefficiencies and failure by the Aboriginal and Torres Strait Islander Commission to properly implement reform following an extensive review of the Northern Territory Aboriginal legal services in the mid to late 1990's.

The tender specifications undermine and ignore the role of specialist legal services for Indigenous people. The current proposal will permit a tender from private firms and does not contain any mechanisms for evaluating the capacity of tenderers to engage appropriately with the people to whom they are supposed to provide services. Forcing Indigenous people to use a service that does not have an understanding of the underlying cultural and social context of clients will exacerbate the lack of access of Indigenous people to the legal system.

The new arrangements, will result in major cost shifting from the Commonwealth to State and Territory legal aid commissions. The exposure draft for the new arrangements acknowledges that the demand for legal services by Indigenous people is increasing. This translates into an increased need for legal aid services, however the exposure draft contains no strategy to deal with this increasing need other than shifting it to the States and Territories.

The tender requirements are quite onerous and will require a considerable allocation of resources by Aboriginal legal services in order to put up a credible tender. The tender documents encourage existing regional organizations to enter into a consortium arrangement with other regional services in their State or Territory. The tender requirements do not exclude private legal firms from lodging a tender.

The financial requirements and arrangements under the new arrangements are likely to be a barrier to existing regional Aboriginal legal aid services being able to submit an acceptable tender. The payment arrangements will comprise of an initial establishment payment and then monthly payments in arrears. This will be a barrier for non profit organizations that do not have access to credit arrangements.

The scope of the services to be provided under the proposed arrangements are limited to the provision of information, legal advice, referral, duty lawyer assistance and case work assistance. There are significant and unjustified differences between the guidelines and priorities to be imposed on Aboriginal and Torres Strait Islander Legal Services and other legal aid providers. This will lead to differential service provision and pressures on those other legal aid providers to meet gaps. Moreover, the differences are not based on any realistic assessment of the particular needs of Indigenous people and the current availability of other services.

The restriction of legal services, to be provided under the proposed tender arrangements, excludes ancillary activities, that other legal aid providers, such as Northern Territory Legal Aid Commission and community legal centres provide. These activities include community legal education, policy development and participation, in alternative or community sentencing schemes and diversion programs. These activities are beyond the provision of individual casework services and require expertise in the provision of legal services to Indigenous people. The approach also ignores the important role of specialist legal services for Indigenous people in pursuing issues and policies, such as mandatory sentencing and the provision of interpreters, that have a broad impact on Indigenous people.

The proposed policy guidelines, will impose a number of restrictions on the provision of legal services for Indigenous people. The guidelines also set out priorities for assistance, which are, in order of priority:

- cases where the safety or welfare of a child is at risk (note this category does not specifically include family law matters, unless it involves a case where the safety of a child is at risk);
- cases where the personal safety of the applicant or the person in the applicant's care is at risk;
- cases where an applicant is at risk of being detained in custody; and
- cases where a family member of a person who dies in custody seeks representation at an inquiry into the death.

These guidelines are inconsistent with Northern Territory guidelines and requirements of community legal centres. They are highly restrictive and will result in greater pressure on those other legal aid services.

The first and second priorities are a clumsy and misinformed response to historical concerns that Aboriginal legal service did not have a focus in these areas, and primarily directed resources to providing legal services for those accused of violent crime. These priorities are misconceived and will potentially lead to duplication and fragmentation of legal aid services. Over the last six to ten years other agencies, including family violence prevention units established by Aboriginal and Torres Strait Islander Services, have established effective and appropriate services for Indigenous women in these areas. There does continue to be gaps in the delivery of these services, however, the tender documents do not address that but rather just impose a blanket requirement regardless of the existence of alternative service providers in certain regions.

The priorities also ignore the fact that there is a significant demand from Indigenous people for criminal law matters. Most of the current work of Aboriginal legal services

involves advice and representation for Indigenous people charged with criminal offences. It is unrealistic to expect that services can meet that demand, as well as those in the first two priority areas. It also overlooks some practical limitations of one service being able to provide legal services in all four priority areas. A service will often not be able to provide services to one party in a priority area because of conflict, unless they establish separate legal services for victims of violence. However, that would only duplicate the services provided by the Family Violence Prevention Units, women's legal services and domestic violence services.

Further restrictions include a 'general rule' that legal casework should not be provided in cases where the matter at issue falls primarily within the responsibility of another Government agency or service provider, and where the provider judges that the assistance sought by an applicant is more appropriately delivered by that other body and reasonably accessible to the applicant. It would therefore be open for new service providers to refuse to provide services to clients on the basis that other agencies are available to provide services. However, this restriction does not contain any proviso about the accessibility or appropriateness of those alternative services.

A significant restriction is that services will not generally be permitted, to provide legal representation for so called minor offences such as public drunkenness and minor driving offences. This overlooks the fact that Indigenous people are overrepresented in the criminal justice system for offences of this nature and that some Indigenous people, who do not speak English as a first language, or have a cognitive disability, cannot adequately represent themselves in these cases.

A further restriction applies where a provider has previously represented an applicant in relation to criminal offences of violence or breach of restraining order, it may decline to represent the client in any subsequent similar cases and refer the client to a counselling or other support service. This simply ignores the fact that while underlying issues need to be addressed in these cases the client still has a legal need that will need to be met. It is inconsistent with the presumption of innocence.

Civil law assistance is not identified as a priority area and services will not be permitted to undertake test cases. This will also put a further strain on other legal aid service providers. There is increasing recognition of the need for Indigenous people to have access to legal advice and assistance about civil law matters, particularly where they are related to human rights issues such as discrimination, provision of adequate housing, access to credit and banking services and competition issues.

The casework guidelines will not permit the provision of assistance outside of the priority categories, where a person requires legal assistance due to a particular characteristic such as linguistic or cultural difficulties or mental or physical disability. By contrast, the guidelines used by many legal aid commissions permit the provision of legal assistance in these circumstances. Many Indigenous people, particularly those in remote areas, who have contact with the legal system, are likely to experience disadvantage because of linguistic and cultural barriers. Given the disproportionate representation of Indigenous people in the criminal justice system, and the underlying social and economic disadvantage experienced by many of these people, it is vital that they have access to appropriate legal aid services. Failure to provide legal aid assistance, even where there is no risk of a term of imprisonment, can potentially lead to unfair outcomes for Indigenous people and compound their social and economic disadvantage.



The policy guidelines will require all service providers to means test all legal services to Indigenous people. This test is more restrictive than the means test applied by Northern Territory Legal Aid Commission which only applies to casework services and not to duty lawyer or advice services. The administration of the means test will also require more administrative support, which is not matched by any increase in funding.

This letter has also been submitted by email to the Committee.

Thank you for the opportunity to raise these issues.

Yours sincerely

PETER TOYNE