



Australian Government

Attorney-General's Department

INDIGENOUS TEST CASE GUIDELINES

December 2007

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1. INTRODUCTION

Indigenous test case funding is administered by the Indigenous Law and Justice Branch (the Branch) of the Commonwealth Attorney-General's Department. Indigenous test case funding is a sub-program of the Branch's *Legal Aid for Indigenous Australians Program*.

Applications for test case funding are considered having regard to the objectives of the Branch, the policy priorities of the Australian Government and the Branch's *Legal Aid for Indigenous Australians Program Guidelines*.

These Indigenous Test Case Guidelines set out the criteria for obtaining funding, the procedure for applying for funding and the conditions upon which funding is granted.

These guidelines come into effect on 1 December 2007 and replace all previous guidelines.

2. INTERPRETATION

(a) In these guidelines, unless the context indicates otherwise:

applicant means the legal service provider who has requested a grant of funds under the Sub-program to fund an Indigenous test case on behalf of its client

case means any type of legal proceeding

client means the person on whose behalf funding has been sought

guidelines means the Indigenous Test Case Guidelines

the Branch means the Indigenous Law and Justice Branch

the Department means the Commonwealth Attorney-General's Department

the Sub-program means the Indigenous Test Case Funding Sub-program

(b) In these guidelines, unless the context indicates otherwise:

(i) words in the singular include words in the plural and words in the plural include the singular

(ii) words importing a gender include any other gender

(iii) words importing a person include an organisation incorporated or otherwise.

3. OBJECTIVES

The objectives of the Sub-program are to:

- (a) promote the review of laws and administrative practices that have the effect of discriminating against Indigenous Australians
- (b) promote the recognition of Indigenous Australians' social, cultural, economic, legal and political rights through the conduct of litigation, and
- (c) promote the resolution of inconsistencies and ambiguities in the application of existing laws to Indigenous Australians, or to an identifiable group of Indigenous Australians, through the conduct of litigation.

4. ELIGIBILITY

Eligibility Criteria

To be eligible for funding a case must satisfy all of the following three criteria:

- (a) a successful outcome in the case would directly benefit an identifiable sector of Indigenous Australians, rather than a single individual or small subsection or interest group
- (b) the case has reasonable prospects of success, and
- (c) the dominant purpose of the case is to test a point of law to resolve an important question affecting the rights of Indigenous Australians. The law in question may be a law of the Commonwealth or of a State or Territory.

Satisfying all of the eligibility criteria above does not automatically mean that a case will be funded.

Types of matters for which assistance is not available

Cases with any one of the following characteristics will not be funded:

- (a) Those that are considered to be vexatious.
- (b) The legal questions in issue have been determined previously and the law is settled.
- (c) Where the relevant law could be more efficiently and successfully reviewed through negotiation with Government, dispute resolution, mediation, conferencing, or arbitration. If the applicant satisfies the Department that these options have already been undertaken and were unsuccessful, the Department may consider approving funding.
- (d) It raises a question already under public discussion by Commonwealth or State or Territory Governments with a view to policy reform.
- (e) The case is likely to be of benefit to one person only and no legal questions are likely to be resolved.

- (f) The law has already been amended so that the precedent or provisions being tested are no longer current—and few people are affected by the previous law.
- (g) If the issue is currently under review in another case and it is likely that the decision in that other case will answer the questions raised by the case for which funding is sought.

5. ADMINISTRATION OF SUB-PROGRAM

The decision maker

Delegates have been appointed within the Department to determine funding under the Sub-program.

6. HOW TO APPLY

Applications must be submitted in writing by a legal practitioner acting on behalf of an Indigenous Australian or group of Indigenous Australians.

Information required

Submissions for funding must contain sufficient information to enable the delegate to make an appropriate decision. This includes the following information:

- (a) the amount requested and a detailed budget setting out how the funds are to be used and justification for each item of expenditure
- (b) a statement outlining:
 - the legal issues to be tested
 - the merits and prospects for success of the case, and
 - a statement addressing the direct benefit a successful outcome would have for an identifiable sector of Indigenous Australians
- (c) copies of relevant legal opinions
- (d) an outline of evidence available to support the claim
- (e) copies of any documents already filed with the court or judgments or orders (including interlocutory orders) already obtained in the case
- (f) advice on whether a costs indemnity is likely to be required for the proposed case
- (g) details and evidence of the support for the application from appropriate Indigenous Australian communities
- (h) where the application relates to an appeal, or proceeding in the nature of an appeal, the following must also be provided

- (i) a copy of the decision appealed against, and
- (ii) a copy of counsel's advice on the prospects of success of an appeal, and
- (iii) where legal aid has been refused, the certificate of legal aid refusal.

The Department may invite submissions

The Department may—where appropriate—actively seek or invite submissions for Indigenous test case funding in order to advance particular policy goals.

Authority to seek information

Applicants and their clients must give permission to the Department to obtain information regarding their application from other Commonwealth, State and Territory government departments or agencies, including State and Territory Legal Aid Commissions.

Confidentiality of information provided

All information provided by an applicant for assistance, or on behalf of an applicant, will be treated in confidence and will not be disclosed to any other person or agency other than in accordance with the express authority of the applicant or, where required, by law.

Lodgement of submissions

Written submissions for test case funding addressing the *Indigenous Test Case Guidelines* should be directed to:

Assistant Secretary
Indigenous Law and Justice Branch
Attorney-General's Department
Robert Garran Offices
National Circuit
BARTON ACT 2600.

Telephone inquiries

Telephone inquiries should be directed to the Indigenous Law and Justice Branch of the Department in Canberra on (02) 6250 6330.

7. SCOPE OF SUB-PROGRAM

Assistance provided

Where the Department approves funding it will be for a specified amount to cover reasonable costs and may specify items for which funding is approved and the amount of funding for each item.

Any expected disbursements should be set out in the submission. Any variation in the costs of disbursements should be approved by the Department prior to being incurred. The Department will not be bound to fund any disbursement not agreed in advance.

If assistance is granted the following principles in relation to legal costs will be applied:

- (a) solicitors' professional costs, other than for solicitors employed by an Indigenous Legal service, Community Legal Services, Family Violence Prevention Legal Service or Legal Aid Commission funded by the Commonwealth or a State or Territory, should be estimated at the rate of 80% of the relevant scale, as published by the Law Society or equivalent in the jurisdiction where the proceedings are instituted. Where there is no applicable scale, costs will be based on the scale applied by the local Legal Aid Commission in the relevant jurisdiction.
- (b) fees for counsel are subject to a maximum of \$2,800 per day for senior counsel and a maximum of \$1,600 per day for junior counsel (GST inclusive) dependant on the complexity of the matter and the court in which the matter is to be heard.

Note financial assistance for counsel will only be provided where it is shown that engaging senior or junior counsel is justified having regard to the complexity of the case. Before approving funding for senior counsel to be briefed the Department may require advice by independent counsel as to whether this is necessary or justified, and whether the other party is, or is likely to be, represented by senior counsel.

If an applicant is required to engage counsel or an outside legal practitioner the Department must be consulted before any fee is agreed. Some private legal practitioners are prepared to act without charge (pro bono), or to charge only in the event that courts award costs in favour of the party they represent (on spec) in relation to Indigenous test cases. Where possible, applicants should seek out such arrangements.

- (c) travel expenses by lawyers and any witnesses are payable at economy class rates
- (d) accommodation, meals and other travelling expenses for witnesses are payable at cost up to an amount equivalent to travel allowance for non-senior executive service officers of the Department
- (e) transcript is payable at cost, and
- (f) subject to the prior approval of the Department other properly incurred disbursement are payable at cost on production of an invoice or receipt.

Additional payments to lawyers prohibited

A person to whom assistance is granted is not permitted to pay, or agree to pay, a lawyer any amount in addition to the payment received under the grant of

assistance in respect of work covered by the grant, except with the approval of the Department. A breach of this condition entitles the Department to terminate the grant of funding and recover from the applicant any amount previously paid.

Applicant ceasing to act

If an applicant ceases to act for the client they must notify the Department immediately. The application will be treated as withdrawn.

If an applicant ceases to act for the client after funding has been granted, the funding agreement will be terminated. (See Attachment A 'Program Specific Conditions for Indigenous Test Case Funding'.)

Release of funds

Funding may be approved in stages. Additional funding may need to be requested for each new stage of the proceeding. For example funding may be provided to obtain counsel's opinion on the prospects of success of the matter or seeking an extension of time.

Funds may be released as a lump sum or by instalments at the discretion of Department.

Applicants may be required to provide copies of relevant invoices before funds are released.

Unused funds

Any used funds must be returned to the Department within 14 days of the completion of the case.

Types of proceedings included

Proceedings in any Australian court or tribunal are covered provided they concern matters of importance to Indigenous Australians as outlined in these guidelines. Assistance may also be provided for the purpose of obtaining legal advice or pursuing mediation in relation to issues which are of importance to Indigenous Australians.

Appeals

An agreement by the Department to provide funding for an Indigenous test case does not mean that the cost of any appeal from the original decision, or preparations for such an appeal, will automatically be funded.

An applicant who wishes to pursue or contest an appeal must submit a request for additional funding if the need arises. Such requests will be processed in the same way as the original submission. It should not be assumed that financial assistance will continue beyond the stage for which approval has been given.

Costs order against funded party

An agreement by the Department to provide Indigenous test case funding does not mean that the Department will indemnify the applicant's client for the legal costs of the other party, should the case be unsuccessful and costs are awarded against the applicant's client.

An applicant may apply for their client to be indemnified for any cost order made against them.

8. RELEVANT CONSIDERATIONS

General Considerations

In determining whether an application for Indigenous test case funding will be approved the Department will consider all the circumstances of the litigation including:

- (a) any advice provided by counsel, both as to the law and to prospects of success
- (b) the likelihood of the case changing the interpretation or application of the relevant law, including whether the desired change would be more efficiently or successfully achieved by negotiation with government or mediation (or any other form of alternative dispute resolution) between the parties
- (c) whether the applicant proposes to use the most appropriate tribunal or court to conduct the proceedings
- (d) the likelihood and potential cost of any appeals by either party
- (e) the potential adverse consequences for future litigants in the relevant field if the action is unsuccessful
- (f) whether junior or senior counsel will be required; and an estimate of the costs involved in the proceedings, including solicitor's costs
- (g) court costs and filing fees (where no exemption can be obtained) and the costs of expert witnesses' and other opinions, preparation and discovery, interlocutory steps, transcripts, reports, and relevant disbursements, and
- (h) the financial resources available to the applicant.

Prospects of success

The weight to be given to the prospects of success in determining whether funding is granted will depend on the importance of the case and the questions of law that will be resolved.

Where it is difficult to determine what the prospects are likely to be, it is necessary that there be a reasonable case to argue; the case cannot be fanciful or raise only speculative arguments.

Benefit/detriment to the applicant

In assessing a submission for assistance regard is had to the nature and extent of any benefit that may accrue to the applicant by providing assistance or of any detriment that the applicant may suffer if assistance is refused.

Benefit to Indigenous Australians

An important consideration in deciding whether to fund a case is its potential benefit to the Indigenous Australian community. This will include consideration of whether the proceedings will resolve an important question of law that has been an area of uncertainty affecting a large number of Indigenous Australians.

In deciding whether a particular case raises important issues an opinion from counsel may be sought. The views of relevant government organisations with responsibility for administering the relevant legislation or program may also be taken into account. There may also be occasions where the Department will seek specialist, non-legal advice (from other peak Indigenous bodies and government agencies) in order to consider the merit and benefits to Indigenous Australians of potential test cases.

Availability of funds

Limited funds are available for funding Indigenous test cases. Accordingly the availability of funds may be a determinative consideration.

Consideration will be given to the number and relative merits of other applications for funding (including applications reasonably expected to be made) when considering a request for funding.

Availability of legal aid from Legal Aid Commissions

Funding may not be available to applicants who have access to other funds or legal aid from State or Territory Legal Aid Commissions in order to pursue their claim.

If an applicant may be eligible for legal aid from a State or Territory Legal Aid Commission, an application should be made to that commission before applying for funding under these Guidelines.

9. CONDITIONS OF GRANTS OF ASSISTANCE

If funding is granted to an applicant under the Sub-program, the applicant will be required to sign a funding agreement with the Department before receiving the funding. All agreements will include the Program Specific Conditions set out in **Attachment A** to these guidelines.

The funding agreement may be subject to any other conditions the Department requires and will contain terms and conditions consistent with Departmental requirements on grant administration.

A successful applicant will need to enter into an agreement with his or her client to ensure that the applicant can fulfil his or her obligations under the funding agreement.

10. WAIVER OF LEGAL PROFESSIONAL PRIVILEGE

To enable applicants for funding to meet their obligations under these guidelines and the funding agreement, it will be necessary for applicants to obtain a waiver of legal professional privilege from their clients to allow them to provide privileged information to the Department.

Attachment A

PROGRAM SPECIFIC CONDITIONS FOR INDIGENOUS TEST CASE FUNDING

1) Repayment of Grant if case successful

- (a) Where your ¹ client receives judgment in his or her favour, subject to paragraph (b) you must repay all funds advanced by the Department under this agreement.
- (b) Where the amount of costs awarded by the court is insufficient to repay the Department in full the Department may agree to accept a lesser amount in full satisfaction. In considering an application to accept a lower amount the Department will take account of any other funds received as a result of the judgment, such as general damages or other compensation that will be paid to your client, any decision by the court to reduce the amount of costs recoverable and any other matter that has affected the amount of costs recovered.
- (c) Where a matter is settled in favour of your client, subject to paragraph (d), you must repay all funds advanced by the Department under this agreement.
- (d) Where the settlement is insufficient to allow you to fully reimburse the Department or payment of the full amount would in all the circumstances be unfair to you or your client the Department may agree to accept a lower amount. In considering an application to accept a lower amount the Department may take account of all the circumstances of case including counsel's advice on the settlement, the reason the case was commenced, the nature of the action and the pecuniary circumstances of you and your client.

2) 14 Days to reimburse Funds

- (a) Where any funds are required to be reimbursed to the Department under this agreement they must be reimbursed within 14 days of the date of receipt of the costs.
- (b) Failure to reimburse any funds required to be reimbursed under the agreement may result in legal action against you.
- (c) Non-disclosure clauses in a settlement or consent orders do not relieve you from your obligation to reimburse the Department for funds advanced under an Indigenous test case grant.

3) Indemnity for Costs

- a) The granting of Indigenous test case funding does not imply that the Department will indemnify you or your client for any costs orders made against you or your client. You, your client or anybody else on their behalf must not do anything that would lead any other party, or a court or tribunal, to believe that the Department has any legal, equitable or moral responsibility for any

¹ 'Your' or 'you' refer to the applicant as defined in the guidelines as the applicant will be required to sign the funding agreement with the Department if funding is approved.

debts relating to any costs orders or potential costs orders made against you or your client.

- b) You must expressly seek the approval of the Department before offering any property, in which the Department or the Commonwealth of Australia may have a financial interest, as security for costs.

4) Confidentiality

Where a matter is settled on the basis of undertakings as to confidentiality, such terms of settlement must include an exception to enable reporting to the Department on the terms of the settlement and the acquittal of funds provided.

5) Withdrawal or Discontinuance of Proceedings

- a) The Department must be notified, in writing of the withdrawal or discontinuance of the funded proceedings within seven (7) days of the appropriate notice being filed. The notice must contain the reasons for withdrawing or discontinuing the matter.
- b) Where proceedings are withdrawn or discontinued without good reason the Department may terminate the grant of assistance and require reimbursement of all funds advanced under the agreement.

6) Proceeding struck out or dismissed

Where the proceedings are struck out due to you or your client's:

- i) failure to comply with court rules or with a court order or direction
- ii) negligence, or
- iii) failure to pursue the claim,

the Department may terminate the grant of assistance without notice and require reimbursement of all funds advanced under the agreement.

7) Reasonable Advice

You must notify the Department if your client refuses to accept the reasonable advice from you or any legal practitioner engaged by you in relation to the case.

Where your client refuses to accept the reasonable advice as to the conduct of the case, the Department may at its discretion terminate the grant of assistance by giving written notice. If the Department terminates the grant of assistance it may require your client to repay all the funds advanced under this agreement.

8) Applicant-Party Relationship

You must enter into an agreement with your client to ensure that you can fulfil the terms of the agreement.

The failure of your client to provide you with any necessary authority or to do any necessary act to allow you to fulfil your obligations under the agreement will not relieve you of any liability under the agreement.

9) Reporting requirements

You must provide reports to the Department after each significant step in the litigation, including no later than 7 days after any hearing.

You must provide a copy of any advice received from counsel relating to the evidence in the matter, the prospects of success or proposed settlement of the case within 7 days of receipt.

You must provide the Department with a full audited acquittal of all funding provided by the Department for every year funding was granted. This will include, but not be limited to, the provision of all relevant bank statements and income and expenditure statements. This is to be provided within 30 days of the completion of the case, cessation of the case (for whatever reason) and withdrawal of instructions or at any time requested by the Department. This will be in addition to the provision of annual acquittal documentation required under the General Terms and Conditions for Funding Agreements Relating to Indigenous Programs.