



**Australian Government**

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**Attorney-General's Department**

**INDIGENOUS TEST CASES SUB-PROGRAM GUIDELINES**

*2011*



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If you believe that you have a matter which could be eligible for Indigenous Test Cases funding, you should first seek legal advice from a legal practitioner.

To assist you, the definitions below are provided as a guide when reading the Indigenous Test Cases Sub-Program Guidelines 2011.

**Test Case:** Test cases are those brought for the purpose of resolving an important legal question arising under a law of the Commonwealth and/or a State or Territory that, in the opinion of the Attorney-General's Department, affects the social, cultural, economic, legal and political rights of one or more Indigenous Australians or Indigenous Groups.

**Applicant:** An applicant is any legal practitioner employed by a legal practice (such as a private law firm, an Aboriginal and Torres Strait Islander Legal Service or a Community Legal Centre), who applies or is intending to apply, on behalf of a client, for funding under the Indigenous Test Cases Sub-Program.

**Client:** A client is one or more persons or a group, who is being represented by a legal practitioner (the Applicant).

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The Indigenous Test Cases Sub-Program falls within the Indigenous Legal Assistance and Policy Reform Program (LAPR). These Indigenous Test Cases Guidelines set out criteria for obtaining funding, the procedure for applying for funding and the conditions upon which funding is granted that are specific to this sub-program.

## **1. Scope**

1.1 The Department may provide funding under this sub-program for case work to:

- a. promote the review of laws and administrative practices that have the effect of discriminating against Indigenous Australians, or
- b. promote the recognition of Indigenous Australians' social, cultural, economic, legal and political rights through the conduct of litigation, or
- 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.

1.2 Applications for funding under this sub-program are considered with regard to the objectives and priorities outlined in the Indigenous Legal Assistance and Policy Reform Program Guidelines.

1.3 Parties must ensure that, as far as possible, genuine steps have been taken to resolve the matter before court proceedings are instituted in accordance with the *Civil Dispute Resolution Act 2011 (Cth)* or any other relevant state or territory legislation.

## **2. Eligibility**

2.1 Funding for Indigenous Test Cases is not limited to organisations that are in receipt of funding from the Department to deliver Indigenous legal assistance services.

2.2 To be eligible for funding under the Indigenous Test Cases sub-program, a case must satisfy all of the following 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, and
- b. the case has reasonable prospects of success, and
- c. the dominant purpose of the case is to test a point of Australian law before an Australian court or tribunal to resolve an important question affecting the rights of Indigenous Australians, and
- d. the client has insufficient financial resources to finance the case.

2.3 Whether the client has insufficient financial resources will be assessed by considering the amount of assistance sought and the income and assets of the client.

2.4 If the client is not a natural person or the client is a trustee, consideration must be given to what other financial resources may be available to the client. For example, in the case of a company, consideration will be given to the financial circumstances of those owning it; in the case of an association, consideration will be given to its capacity to levy its members; and in the case of a trustee, consideration will also be given to the financial circumstances of the beneficiaries of the trust.

- 2.5 A publicly listed company is regarded as having sufficient financial resources.
- 2.6 The client may be required to pay a contribution towards the cost of assistance as a condition of the authorisation of the provision of funding. The maximum amount of the contribution that may be required will be determined by the Department.
- 2.7 Satisfying all of the eligibility criteria above does not automatically mean that a case will be funded. The Department retains ultimate discretion in determining which applications are successful.
- 2.8 Cases will be deemed ineligible if they possess any one of the following characteristics:
- a. cases that will go before or be determined by a foreign authority, body, court or tribunal,
  - b. cases that are considered to be vexatious,
  - c. the legal questions in issue have been determined previously and the law is settled,
  - d. 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,
  - e. cases that raise a question already under public discussion by Commonwealth or State or Territory Governments with a view to policy reform,
  - f. cases likely to be of benefit to one person only and no legal questions are likely to be resolved,
  - g. 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, or
  - h. 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.

### **3. Relevant Considerations**

- 3.1 In determining whether an application for Indigenous Test Cases funding will be approved the Department will consider, in addition to the eligibility criteria outlined in these Guidelines, 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 client.

#### *Prospects of success*

3.2 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 client*

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

#### *Benefit to Indigenous Australians*

3.4 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.

3.5 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*

3.6 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 assistance from Legal Aid Commissions*

3.7 Funding may not be available to applicants whose clients have access to other funds or legal assistance from State or Territory Legal Aid Commissions in order to pursue their claim. If a client may be eligible for legal assistance from a State or Territory Legal Aid Commission, an application should be made to that commission before applying for funding under these Guidelines.

## 4. Conditions of Funding

4.1 If funding is granted to an applicant under this sub-program, the applicant will be required to sign a funding agreement with the Department. 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.

4.2 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. The failure of a client to provide the applicant with any necessary authority or to do any necessary act to allow the applicant to fulfil his or her obligations under the agreement will not relieve the applicant of any liability under the agreement.

### *Assistance provided*

4.3 Applicants will seek in-principle approval of their spending proposal from the Department as part of the application process.

4.4 Where the Department approves funding it will be for a specified amount to cover reasonable costs as detailed by the applicant in their application. Funding may be provided on a reimbursement basis.

### *Release of funds*

4.5 Funding may be approved in stages. Funds may be released as a lump sum or by instalments at the discretion of the Department. Applicants are required to provide copies of relevant invoices before funds are released.

4.6 All expected disbursements should be set out in the application and approved in-principle by the Department. Any variation in the costs of disbursements must be approved in-principle by the Department. The Department will not be bound to fund any disbursement not agreed in advance.

4.7 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 Service, 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. Counsel fees will not be paid at a daily rate higher than that published in the Legal Services Directions on the Department's website unless the Applicant is able to justify in writing to the Department that exceptional circumstances apply.
  - A. **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.

- B. 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.
- f. Subject to the prior approval of the Department, other properly incurred disbursements are payable at cost on production of an invoice or receipt.

#### *Additional payments to lawyers prohibited*

4.8 An applicant or client 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 funding agreement and refuse to reimburse the cost of any additional payments.

#### *Types of proceedings included*

4.9 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 in relation to issues which are of importance to Indigenous Australians either as part of the conduct of litigation before an Australian court or tribunal, or for the purpose of determining whether litigation should be commenced before an Australian court or tribunal.

#### *Repayment of funds if case successful*

4.10 Where the client receives judgment in his or her favour, subject to the amount of costs awarded by the court being sufficient to repay the Department in full, the applicant must repay all funds advanced by the Department under the agreement.

4.11 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 the 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.

4.12 Where a matter is settled in favour of the client, subject to the settlement being sufficient to allow the applicant to fully reimburse the Department, the applicant must repay all funds advanced by the Department under the agreement.

4.13 Where the settlement is insufficient to repay the Department in full amount or would in all the circumstances be unfair, the Department may agree to accept a lower amount. In considering an application to accept a lower amount the Department may take into account all the circumstances of the case including counsel's advice on the settlement, the reason the

case was commenced, the nature of the action and the pecuniary circumstances of the applicant and/or client.

#### *Withdrawal or discontinuance of proceedings*

4.14 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.

#### *Proceedings struck out or dismissed*

4.15 An applicant must notify the Department if the proceedings are struck out due to the applicant's or the client's failure to comply with court rules or with a court order or direction, negligence, or failure to pursue the claim.

#### *Reasonable advice*

4.16 An applicant must notify the Department if their client refuses to accept reasonable advice from the applicant or any legal practitioner engaged by the applicant in relation to the case.

4.17 Where a client refuses to accept the reasonable advice as to the conduct of the case, the Department may at its discretion terminate the funding agreement by giving written notice.

#### *Applicant ceasing to act*

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

#### *Appeals*

4.19 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.

4.20 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*

4.21 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. The applicant 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 debts relating to any costs orders or potential costs orders made against the applicant and/or client.

4.22 Applicants 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.

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

## **5. Performance Measures**

5.1 Applicants must provide reports to the Department after each significant step in the litigation, including no later than thirty (30) days after any hearing; describing briefly the work undertaken, the actions taken and the outcome.

5.2 Applicants 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 thirty (30) days of receipt.

5.3 Applicants must provide relevant documentation that must:

- a. be in accordance with the funding agreement, applicable Australian Accounting Standards and based on proper accounts,
- b. report income and expenditure relating to the funding provided under the funding agreement (the report must show expenditure in accordance with the pre-approved budget),
- c. include any other matters we require to allow us to meet Commonwealth financial management and accountability legislation.

5.4 Applicants must provide a Certification signed by their CEO and Senior Partner or Board verifying that the funding was spent in accordance with the funding agreement.

## **6. Application Process**

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

6.2 The Indigenous Test Cases Online Application Form must be used to submit applications. The Online Form requires applicants to provide sufficient information to enable the Delegate, appointed within the Department, to determine funding under this sub-program, to make an appropriate decision.

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

6.4 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.

### *Privacy Notice*

6.5 Information submitted as part of an Indigenous Test Cases Application Form is collected for the purpose of determining eligibility for Test Case funding. The information will be used for that purpose and may be disclosed, where necessary, to obtain information regarding the application from government departments or agencies and legal aid commissions.

6.6 In making an application for Indigenous Test Cases funding, an applicant is taken to consent, and to confirm that their client consents to, the Department disclosing any personal information contained in the Application Form to other Commonwealth, State and Territory government departments or agencies for this purpose.

#### *Confidentiality*

6.7 Information provided by an applicant, or by another person on behalf of an applicant, in relation to the application (including whether an application has been made) will be treated in confidence and may only be disclosed if:

- a. it is necessary for purposes relevant to administering this sub-program,
- b. it is in accordance with the applicant's express authority,
- c. it is necessary to correct the public record, or
- d. it is required by law.

To enable applicants for funding to meet their obligations under these Guidelines and the funding agreement, an applicant will be required to confirm that if legal advice obtained by their client is provided in support of the application, their client permits the disclosure of the advice to the Department for the limited purpose of processing the application. Any legal advice provided would be treated in confidence by the Department in accordance with this paragraph.

## **7. Procedural Fairness**

#### *Review of decisions*

7.1 Where an application for funding is refused the reasons for refusal must be provided. The applicant will also be advised of the mechanism to seek a review of the decision and any request for review must be lodged within 28 days after reasons for refusal have been given to the applicant. The review shall be carried out by a nominated officer independent of the original decision maker.

7.2 Similarly, where an application for assistance is approved subject to conditions and the applicant is dissatisfied with any part of the decision, the applicant may seek a review of the decision by lodging a request in writing. Applications for review must be made within 28 days after reasons for imposing the conditions have been given to the applicant. The review shall be carried out by a nominated officer independent of the original decision maker.

#### *Ombudsman & complaints*

7.3 Where a person is dissatisfied with any aspect of the administration of his/her application, a complaint may be made to the Commonwealth Ombudsman. Applicants will be advised of the Ombudsman's contact details for making complaints. More information about the Ombudsman is available at [www.ombudsman.gov.au](http://www.ombudsman.gov.au).

#### *Freedom of Information Act 1982*

7.4 Any person has the right to apply for access to documents in the possession of Commonwealth agencies under the *Freedom of Information Act 1982* (FOI Act). Section 15 of the FOI Act sets out what is required for an application under the Act. The application has to:

- a. be in writing
- b. refer specifically to the FOI Act
- c. provide sufficient information to permit identification of the document, and
- d. be lodged at an office of the agency (including by email to a specified address).

7.5 More information about making requesting documents under the FOI Act from the Attorney-General's Department is available at [http://www.ag.gov.au/www/agd/agd.nsf/Page/Freedom\\_of\\_Information](http://www.ag.gov.au/www/agd/agd.nsf/Page/Freedom_of_Information).

#### *Privacy Act 1988*

7.6 The *Privacy Act 1988* requires Commonwealth Government departments and agencies to comply with certain Information Privacy Principles (IPP). Where a person believes that his/her privacy has been infringed because of a breach of an IPP, that person may complain to the Office of the Australian Information Commissioner. More information about that office and the *Privacy Act 1988* is available at [www.oaic.gov.au](http://www.oaic.gov.au).