



## Aboriginal Legal Rights Movement Inc.

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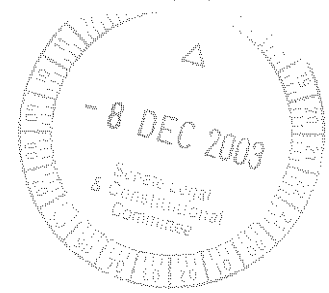
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Reply To: Adelaide

Your Reference:  
Our Reference: CJC:aj

5<sup>th</sup> December 2003



The Secretary  
Senate Legal & Constitutional References Committee  
Room S1/61  
Parliament House  
CANBERRA ACT 2600

Dear Sir/Madam

**Re: Inquiry into Legal Aid & Access to Justice**

I refer to the attendance of Mr Neil Gillespie Chief Executive Officer of the Aboriginal Legal Rights Movement Inc and Mr Chris Charles General Counsel of the Aboriginal Legal Rights Movement Inc at the Port Augusta hearings on the Committee on the 11 November 2003.

Further to that appearance, I enclose a copy of a letter sent by the Chief Executive of ALRM to the Attorney-General for South Australia on the 22 October 2003. This letter is provided to the Committee in response to a request of Senator the Hon Nick Bolkus. The matters raised in it are detailed and complex, no response has yet been received from the Hon Michael Atkinson.

That letter raises matters of fundamental importance to your enquiry, in relation to the provision of legal services to Aboriginal people in South Australia and the provision of legal aid to people in South Australia in general, through the Community Legal Centres Movement.

You will see that the letter to the Attorney-General raises questions about the suitability of associations incorporated under the Associations Incorporation Act of South Australia, to be a vehicle for the provision of legal services by legal practitioners. Problems are identified in relation to trust accounts, groups of sole practitioners acting as if they were a group legal practice, and the question of right of appearance of legal practitioners employed by a community legal centre.

Suggestions for reform are made, by means of amendment to the Legal Practitioners Act of South Australia and the suggestion is made that the SCAG process for reforming the legal profession of Australia on a national basis, be widened to include provision of legal aid services to the population by not for profit corporations.

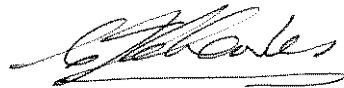
I commend the letter to the Senate, in the hope that the impulses contained within it will be the subject of recommendations by the Senate for the recognition of not for profit corporations, as including groups or subcommittees of employed legal practitioners to be recognised as a legal practitioner for the purposes of the various State Legal Practitioners Acts. The submission in the letter is necessarily limited to South Australia however.

Further to the evidence provided by Mr Gillespie and myself on the 11 November 2003, I write to advise that the solicitors in the Port Augusta office of ALRM do act for respondents to applications made in the Federal and State Magistrates courts by the Aboriginal Family Violence Legal Service. ALRM solicitors also act for some Aboriginal victims of domestic violence, regardless of who is the respondent, whether Aboriginal or not. Again this is a very restricted legal practice. And again it is consistent with the ALRM conflict policy which was set out in great detail in oral submissions. All ALRM solicitors act under proper ethical conduct rules in relation to conflict of interest, which are mandated by the Professional Conduct Rules of the Law Society of SA and by ATSIC policy guidelines.

The Aboriginal Legal Rights Movement Inc does have a family law practice in Port Augusta, but it is a very restricted practice, having regard to the under resourcing of that office and the need for more solicitors to work there to cover the workload and needs of the community. In most cases the Pt Augusta solicitors act as the agent or instructing solicitor for the Family lawyer in the Adelaide office, who is responsible for all ALRM Family Court business throughout South Australia.

In relation to the separate representation of Aboriginal children, the subject of proceedings, whether in State or Federal courts, I advise that ALRM is not resourced to provide such representation and does not provide it. ATSIC has been made aware of ALRM's views on these and related topics through it's response to a report on the provision of ATSI legal services in South Australia.

Yours faithfully



**Christopher Charles**  
General Counsel

*enclosure (1)*



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22 October 2003

The Honourable Michael Atkinson LL.B MHA  
**Attorney General**  
DX: 336  
ADELAIDE

Dear Mr Attorney

### **Re: Aboriginal Legal Rights Movement Inc & The Provision of Legal Services within a Corporate Structure**

I refer to the letter of the Hon Paul Holloway, dated 19<sup>th</sup> August 2003, directed to Mr Charles, the General Counsel of ALRM. That letter invited submissions from ALRM on the SCAG project and not for profit legal practices. In relation to the SCAG project, I understand that it includes the preparation of a model Bill for consideration of the Parliaments of the State and the Commonwealth to allow for more harmonious regulation of the legal profession between the States. Consideration has also been given to the development of multi-disciplinary practices, which include lawyers, and for the employment of lawyers within corporations. The Advertiser of 8-8-03 made mention of the proposals "Wider scope for lawyers", page 28.

I have been informed however that the model Bill does not consider the provision of legal aid services by a not for profit corporation for the benefit of the community or a section of the community and which are, for the most part government funded.

The purpose of this correspondence is therefore to raise a submission to you that the existing project ought to be expanded to consider that very matter.

I am also conscious that the SCAG process may be long and drawn out, however it may be that ALRM's problems require more immediate attention.

#### **Statement of the Issues**

The Aboriginal Legal Rights Movement has been operating as an Incorporated Association for 30 years. We have been a successful provider of legal aid services to Aboriginal people in South Australia, however we are acutely aware that there are problems inherent in the present corporate structure of ALRM in relation to the employment of legal practitioners.

Those issues can be summarised as follows:

The Aboriginal Legal Rights Movement Incorporated has its management vested in a Council of 21 Aboriginal people elected and appointed from the communities throughout the State.

ALRM presently employs 8 legal practitioners in its Criminal Section, and 6 legal practitioners in its Civil, Family and Human Rights Section and there are 5 legal

practitioners employed at the country offices of ALRM, 3 in Port Augusta, 1 in Murray Bridge and 1 in Ceduna. The Native Title Unit employs 7 legal practitioners.

It is necessary to refer to the separate sections of ALRM, because they operate as if they were separate practice sections. Each has a separate filing system, database, and separated access to the ALRM files server. To the extent necessary, "Chinese Walls" separate each section and regional office from each other. The Native Title Unit carries out the functions of a Native Title Representative Body for the purposes of the *Native Title Act 1994C/W* and for the purposes of the *Native Title (S.A), Act 1994*, ALRM also carries out the functions of a Representative Aboriginal Body. This Unit operates entirely separately from the Law & Justice sections, described above.

ALRM employs legal practitioners but cannot be a legal practitioner, the members of the Council of the Association are not legal practitioners and ALRM is not incorporated as a legal practice. (Refer to Section 16(2) *Legal Practitioners Act*.)

On the other hand, each of the individual legal practitioners employed by ALRM is entitled to seek an individual Practising Certificate pursuant to Section 16(1) of the same Act, on the basis that they are employed sole practitioners with the right of private practice. In practical terms ALRM legal practitioners work exclusively from ALRM offices as their primary place of practice.

The question of right of audience of legal practitioners employed by ALRM, as if ALRM were a Community Legal Centre, has not been tested. I refer in that regard to Section 51(1)(da) *Legal Practitioners Act*. The question whether ALRM constitutes a 'community legal centre' within the definition found in Section 5 of the *Legal Practitioners Act* has not been tested. It certainly seems arguable that ALRM constitutes "a body established on a non-profit basis to provide legal services to the community, or a section of the community" – being the Aboriginal and Torres Strait Islander community of South Australia. Having raised this question as a matter of statutory interpretation in relation to right of appearance of legal practitioners, I also point out that ALRM has a mandate for the representation of a different community than applies to a Community Legal Centre as the term is generally understood. The history and funding arrangements of ALRM are also different from those of Community Legal Centres. Nevertheless there may be common interests in the matters raised herein, and it may be that statutory amendment could be used to make it clear that a wider understanding of a 'community legal centre' includes a body with a mandate like that of ALRM.

At all events, the legal practitioners employed by ALRM practise on the basis that they consider themselves to be legal practitioners who practise the profession of law as a principal and thus also maintain their right of audience pursuant to Section 51(1)(e) of the *Legal Practitioners Act 1981*.

In practice both State and Federal Courts treat ALRM as if it were itself a provider of legal services. The courts' practice for many years has been to refer to ALRM as the solicitor when ALRM legal practitioners appear as, or instruct, counsel, notwithstanding their practice of referring to themselves as the practitioner on file. Despite concerns being expressed by individual ALRM

practitioners, the Courts Administration Authority has provided PIN numbers to ALRM Adelaide and country offices, not to the individual legal practitioners employed by ALRM.

I am not to be taken as disagreeing with these practices, which are eminently sensible, so the purpose of this submission is to seek to regularise arrangements so that this ceases to be merely a legal fiction.

There are four main issues that arise from the employment of legal practitioners by ALRM:

1. Whether each practitioner should maintain an individual Legal Practitioner's Trust Account in order to carry out Trust Account transactions if they are necessary for that solicitor's practice. The costs of auditing fees for such an arrangement are prohibitive and it would be highly inefficient to carry out. Furthermore ATSSIS does not fund ALRM to maintain a large number of individual Legal Practitioners' Trust Accounts.
2. The question of right of appearance arises, this has been addressed above.
3. A group of sole practitioners cannot operate as if they were a firm, so issues arise in relation to the transfer of files between legal practitioners within the offices of ALRM and also in relation to the work of our paralegals, Aboriginal Field Officers, who work to assist legal practitioners in dealing with Aboriginal clients.
4. Each legal practitioner has and maintains personal professional indemnity insurance, which is a condition of their receiving an annual practising certificate. Obviously it would be cheaper and more efficient for there to be practice based group professional indemnity insurance for ALRM lawyers. For some years now, ALRM has been requesting ATSSIS to arrange corporate professional indemnity insurance for all Aboriginal Legal Services in Australia. At the time of writing no such arrangements have been made. Group insurance is also contingent on the achievement of other reforms, discussed below.

The difficulties that flow from these arrangements are not insurmountable and ALRM's present advice to its legal practitioners is that:

1. All trust moneys are paid directly into one nominated Legal Practitioner's Trust Account, in accordance with the client's written instructions and thereafter disbursed, also in accordance with the client's written instructions. Trust Account records of all of these transactions and files are maintained, in accordance with the *Legal Practitioners Act 1981*. In other words the nominated legal practitioner and the other concerned legal practitioners ensure that all trust account transactions and records are kept. The nominated Legal Practitioner's Trust

Account is the subject of the usual audit, Combined Trust Account and spot check requirements of the *Legal Practitioners Act* 1981. The Law Society is well aware of the practice, which has operated for 10 years at least, and it has been the subject of direct discussions as to the preferred format for the future. ALRM understands that the Law Society would prefer it that there be a change to legislation to enable trust moneys to be handled effectively within ALRM's legal practices without undue expense. Obviously ALRM shares that wish.

2. Generalised arrangements for the grant of legal aid to ALRM's clients specify that a grant of aid creates the basis for a relationship of solicitor and client between the grantee and the solicitor acting but also, to the extent necessary in the conduct of the file, with all of the legal practitioners working in the Section with which the client has dealings. Also, to the extent necessary and subject to client confidentiality, with the Aboriginal Field Officers who also work in that section of ALRM.

The generalised engagement of a client to an ALRM legal practice section and the need to explain the basis of the provision of Legal Aid Services by ALRM legal practitioners and their clients are both required for a number of reasons:

1. *Privacy Act* considerations require that ALRM's clients be informed of the use to which their personal information may be put by ALRM in the course of gathering depersonalised statistical information.
2. The Aboriginal and Torres Strait Islander Legal Services [ATSILS] policy guidelines which apply to ALRM as a condition of its grant from Aboriginal and Torres Strait Islander Services [ATSIS] also require the provision of information to clients on a host of issues arising under the guidelines, including the nature of decisions about the provision of legal aid, conditions of the grant of legal aid and rights of appeal.
3. The client needs to understand that the basis of receiving legal aid is upon a generalised engagement to all relevant sole practitioners working within the practice sections to which the grant of aid relates. This is in each case a matter of fact and degree; in many cases the solicitor client relationship and work on a file will only involve the one practitioner engaged.

ALRM has determined that a suitable way to deal with all of these requirements is to place them in one generalised form letter, granting legal aid to new and existing clients.

Notwithstanding that ALRM legal practitioners are able to deal with the problems that arise by virtue of them being sole practitioners ALRM submits that it is high time that the corporate arrangements for the Aboriginal Legal Rights Movement were regularised and improved.

### The Importance of ALRM Being A State Body

Although ALRM is funded by a Commonwealth body, ATSIS, it is incorporated under the State *Associations Incorporation Act*. It employs legal practitioners who are admitted to practice under State legislation and who practise predominantly in State courts and tribunals. It is for these reasons that I consider that the assistance of the State Government is needed to carry out the needed reforms

Also the partnering agreement between ATSIC and the State in the areas of law and justice requires further and stronger integration of activities between the State Government, it's instrumentalities and the Aboriginal Legal Rights Movement and ATSIC and ATSIS.

This must occur in a host of areas including criminal representation of Aboriginal people in all State Courts, from the most remote sittings of the Magistrate's Court to the Court of Criminal Appeal, civil representation at all levels in Courts and Tribunals, prisons issues including prevention of deaths in custody, law reform, implementation of Deaths in Custody Coronial and Royal Commission Recommendations, and implementing the Partnering Agreement generally in improving the legal position of Aboriginal people in South Australia.

The otherwise prohibitive costs involved in service provision and the recognised importance of continuing effective and independent legal aid services to Aboriginal people in South Australia are further reasons why these questions must be addressed.

In accordance with it's "National Contestability Policy" ATSIS has determined that Aboriginal Legal Aid Services will be subjected to a tendering process rather than a continuation of grant funding. ALRM has received a number of communications from ATSIS on the time frame for the commencement of tendering. Whatever the ultimate commencement date, ALRM wants to ensure that it is in the best possible position to maintain its role in the new environment.

What ever view ALRM has of this policy shift by ATSIS we point out to you that ALRM has been the provider of legal services to Aboriginal people in South Australia for 30 years, we have a proud history in that service provision and case for case provide legal services on a much cheaper basis than the Legal Services Commission. An evaluation by the ATSIC Office of Evaluation and Audit found that ALRM service delivery output is at a cost significantly below that of the mainstream - \$3.45M funding compared to \$9.12M, estimated value of work done. ALRM has made a submission to the Senate Legal and Constitutional References Committee-current inquiry into Legal Aid and Justice Arrangements. That submission and the ATSIC evaluation report may already have been provided to you, but if you require them, I will send them to you for your consideration.

The issues raised above suggest the need for the legislation to regularise the position of ALRM as an employer of legal practitioners.

At the same time I am aware that the requirements of the *Legal Practitioners Act* that legal practices be solely governed by legal practitioners, is a pressing

and a real requirement. But I am also aware that Aboriginal Legal Services work best when there is a proper mix between legal professionals and community representatives both in the management of the Legal Aid Service and in the employment of Aboriginal people both as legal practitioners and as paralegals who are best able to communicate with Aboriginal community members and assist legal professionals in providing services. Management of the Association as a whole in terms of policy is a matter for the Aboriginal community; management of legal practice sections in accordance with the provisions of the *Legal Practitioners Act*, is a matter for legal practitioners.

I point out in that regard that ALRM is the leading employer of Aboriginal people in South Australia outside of Government and presently employs four Aboriginal legal practitioners.

### **What can usefully be done by the State?**

I do not suggest that ALRM should be set up as a Statutory Authority, but for the purposes of this submission, certain sections of the *Legal Services Commission Act* are relevant. I refer you to Section 26 of the *Legal Services Commission Act*, which confirms the ability of the Commission, a Statutory Authority under State legislation, to hold trust moneys under the *Legal Practitioners Act* as if it were a legal practitioner.

I refer also to Section 29 of the *Legal Services Commission Act*, which confirms the right of appearance of Legal Services Commission lawyers and sections 30 and 31, which confirm the ethical and disciplinary obligations of Legal Services Commission lawyers.

Similar provisions could be enacted for *not for profit legal aid services* like ALRM, conceivably by amendments to the *Legal Practitioners Act*, which amendments might also benefit Community Legal Centres.

Thus, by making this submission ALRM is not seeking special treatment by the State of South Australia to assist it in preparation for tendering.

Provided necessary arrangements were made to ensure the independence and professional standing and maintenance of ethical standards of the legal practitioners employed by the Association, it may even be possible to make the Association itself, or the legal practice section or sections of the Association, a Legal Practitioner. That is, a system of certification could be made to apply to such not for profit Associations as complied with fixed statutory conditions for their operating as legal practitioners.

A not for profit Association's constitution could be required to provide that sole responsibility for the conduct of legal aid casework, including of course, all matters related to clients' trust moneys, be vested in legal practice subcommittees, membership and active participation in the operations of which was a condition of employment and practice for the Association's legal practitioners. That process of operating legal practice subcommittees could to the extent necessary be regulated through the *Legal Practitioners Act 1981*. Other constitutional safeguards could and should also be built into a certification system.

**The *Legal Practitioners Act 1981* provides a model.**

A statutory code could be set up for *not for profit legal aid services* similar in effect to section 16(2) of *the Legal Practitioners Act 1981*. That subsection regulates the constitutional requirements for a Company, which is a legal practitioner and applies for a practising certificate. Many of the requirements in that subsection deal with shareholdings and control of such companies by Directors and are not relevant to the operation of not for profit Legal Aid Association.

Division 4 of Part 3 of the *Legal Practitioners Act 1981* provides a statutory code regulating legal practice by Companies. This includes, notice requirements for Directors and former Directors, Practice returns to be lodged in Court, provision for civil and criminal liability for Directors and section 29 which specifies that no constitutional amendment for such a company can take place unless submitted to and approved by the Supreme Court. It is submitted that *mutatis mutandis*, similar provisions could and should be made for the legal practice sections and subcommittees of a not for profit Legal Aid Association.

#### **Present Arrangements for Preserving Independence of Legal Practitioners**

Although these are desirable outcomes for the future, it should be pointed out that ALRM legal practitioners already enjoy protection of their independence. I attach for your consideration, a copy of the ATSILS Policy Guidelines, which are a condition of the grant of funding to ALRM by ATSIS. They are also likely to be applied to the successful tenderer, when the ATSIS tender process gets underway.

I ask you to note in particular chapters 5.2 and 5.3, which ensure the independence of legal practitioners from inappropriate pressure by ATSILS Board Members or indigenous ATSILS staff or from ATSIC officials or ATSIC Regional Council Members.

Legal practitioners can rely upon their obligation to act in accordance with those guidelines as a means to maintain their independence and resist inappropriate pressures. ALRM supports and applies the guidelines.

I would be happy to discuss the matters raised in this correspondence with you at your earliest convenience.

Yours faithfully

**Neil. E. Gillespie**  
Chief Executive Officer

Encl.: ATSILS Policy Guidelines for the Provision of Legal Services

Cc: Mr Andrew Goode President Law Society of South Australia  
Commissioner Mr Klynton Wanganeen ATSIC

Ms Woods Network Regional Manager ATSIIS  
Mr David Bulloch Westside Community Legal Centre