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Reply To: Adelaide

16 January 2009

The Hon Wayne Swan MP
Treasurer
Parliament House
CANBERRA ACT 2600

Dear Treasurer

2009-10 Budget

I refer to your Media Release of 24 November 2008 calling for submissions for the upcoming Federal Budget. I now make my submission.

There is one key budget consideration that I am placing before you as Treasurer. This submission relates to Aboriginal legal aid. I am separating this submission into an introduction to the Aboriginal Legal Rights Movement (ALRM) plus the two key components for inclusion in the 2009-10 budget as each have separate issues that warrant your support:

- Legal Aid for advice and representation, and
- Legal Aid for the Stolen Generations

Introduction to ALRM

ALRM is an independent incorporated Aboriginal community organisation controlled by a Board of 10 Aboriginal Members from Aboriginal communities throughout the State of South Australia. Members represent both metropolitan and country areas. Appointments are made by the Board Appointment Committee as provided for in ALRM's Constitution.

ALRM fulfils a special social role in the delivery of legal services to the Aboriginal peoples in South Australia, and as such, is a vital part of the legal system in the State. Its major aim is to advance the legal interests of Aboriginal people in South Australia, and to ensure that those rights are protected by the law and not adversely affected by abuse or misuse of any powers under the law. There are approximately 21 major Aboriginal language groups within SA.

ALRM was incorporated on 25 January 1973 when a number of prominent members of the Aboriginal Community and supporters accessed limited funding to provide basic representation to Aboriginal people in the courts. It was set up to overcome the disadvantage suffered as a result of the racist society that existed in Australia at the time.

The impetus for starting ALRM was the 1967 Referendum when citizenship was finally bestowed on Aboriginal peoples. Unfortunately it is a sad fact that this

Constitutional amendment has not delivered improvements in the quality of life, marginalisation, institutionalised discrimination and acceptance of Aboriginal peoples as our First Nations peoples. We still have no recognition in either our Constitution, or even its preamble.

Despite overwhelming evidence of disadvantage, it is unfortunately true that the Australian and State Governments have not resolved whose responsibility it is to fund Aboriginal Legal Aid. The consequence is that whilst neither the Federal nor State polity takes full responsibility and blame each other for inadequacies, the Aboriginal population and this Aboriginal Legal Service suffers the consequences of 15 years of under resourcing and poor morale.

ALRM is a community-governed Aboriginal organisation Chaired by Mr Frank H Lampard OAM, a Ngarrindjeri Elder (local language group). ALRM provides a number of Commonwealth and State funded programs to the Aboriginal peoples of South Australia (SA) which I will detail later.

Our Missions says:

“We exist to strengthen, promote and enhance the legal, cultural, political and social rights of Aboriginal peoples of South Australia through the provision of legal services”.

Our Core business comprises the provision of the following services:

- Criminal law advice and representation
- Civil, including family law advice and representation

These services are supplemented by the following services:

- Low Income Support Programme (LISP)
- Aboriginal Visitors Scheme (AVS)
- Education and Prevention
- Child Protection
- Law Reform and Advocacy
- Early Intervention & Prevention
- Restorative Justice
- Financial Counselling

Advice & Representation

ALRM is funded for its legal aid program by the Commonwealth Government to which ALRM is certainly most grateful, and in particular the funding received for supporting programs such as Restorative Justice. The State Government on the other hand denies it has any responsibility to fund ALRM. This standoff has resulted in ALRM's funding and indeed all Aboriginal Legal Aid service providers nationally, remaining static since 1996. That is correct Treasurer, 1996, not 2006, but 1996.

The key issue of concern in this dispute is Federalism. In particular the roles each tier of Government has in Aboriginal Affairs.

The Commonwealth Government says it is supplementary to the State Government to fund Aboriginal Legal Aid – whereas the State views the responsibility to be that of the Commonwealth Government. ALRM has endeavoured to have the State contribute to our legal aid program as most of our services are governed by State law, however the State argues that responsibility for Aboriginal people rests with the Commonwealth. This argument goes round and round in circles and has done so for at least the last 12 years.

Meanwhile our service delivery continues to suffer from gross under funding, thereby denying Aboriginal people access to justice and other basic human rights services as required in Article 1 of the Universal Declaration on Human Rights to which Australia is a signatory.

The Commonwealth/State responsibility argument leaves ALRM grossly under funded across a number of its programs. ALRM is focussed on ensuring that the responsibility for funding Aboriginal services is assumed by either or both Commonwealth and State. What is intolerable is that we continue to be left with enormous responsibilities and expectations that we will be continuing to provide services to a distressed and demoralised Aboriginal community, notwithstanding that we have insufficient resources to carry out our responsibilities.

Whilst I can understand the Commonwealth's position and respect to being a supplementary funding body to the State on account of its stance that it should only fund matters relating to Commonwealth legislation, I cannot however understand why the State is deferring its responsibility insofar as funding Aboriginal Legal Services given that the majority of our legal matters relate to State legislation.

I am also further confused by the State's stance, given that the State is prepared to fund other programs for Aboriginal South Australians for example in the areas of housing, health and so forth.

To highlight the discrepancies regarding determinations made on funding at a State and Commonwealth level, I now provide you with the following examples:

- The Aboriginal Legal Aid budget is the same as it was in 1996/1997 yet neither the Commonwealth nor State will provide an increase. As a result, ALRM is disadvantaged in its funding by about 40% in real terms.
- The Attorney Generals Department funds the Family Violence Prevention Legal Services at a disproportionately higher rate per staff member than Aboriginal Legal Aid whose staff undertake the same or indeed greater responsibilities.
- The salaries of ALRM professional staff are about 65% of the salaries of equivalent government lawyers including mainstream

legal aid. This results in ALRM's inability in attracting or retaining senior lawyers.

- ALRM must pay State Court Filing & Transcript Fees whilst mainstream Legal Aid is exempt.
- ALRM is not funded for the State's Emergency Services Levy as it is a State impost and the Commonwealth says ALRM should have the State make us exempt. The State's view is the Commonwealth funds us so the Commonwealth should fund the ESL.
- ALRM has never been funded for Long Service Leave, which is a statutory obligation on the organisation. Whilst this issue has been the subject of many years of discussions about the inconsistent application of funding of some States and Territories and not others since the ATSIC days, it remains the subject of ongoing communication with the AGD – although it is acknowledged that the AGD has provided about 20% funding of our LSL liability to our staff. ALRM continues to pursue an earlier commitment by the AGD to fund our total liabilities in this area by highlighting an inconsistent funding policy since the early 1990s.
- Various government reports recommend increased funding yet the Commonwealth has not accepted these recommendations (Office of Evaluation and Audit, the Senate's Legal Aid and Access to Justice Report, the Australian National Audit Office and the Public Accounts and Audit Committee).
- With our gross under funding due to the demarcation dispute between the Commonwealth and the State, ALRM is being "juniorised". By this we mean that when senior staffs leave, replacement staff are less experienced because ALRM can't afford to offer higher salaries because we are still paying 1996 rates, which results in Aboriginal people not receiving the same level of service as other members of the community.

ALRM's performance as an efficient and effective organisation has been reviewed by the Government's own Office of Evaluation and Audit and was found to be at least two times more efficient than mainstream.

I also note that the Federal and State funding of mainstream Legal Aid for the period 1997-1998 to 2006-2007 has increased over 120% yet the State denies any responsibility for Aboriginal Legal Aid. It is extremely disturbing that the Government Agency that has increased mainstream legal aid for this period has NOT increased Aboriginal funding because of this demarcation on responsibilities with the States. This agency is surprisingly the principal law office in the nation yet denies ALRM adequate funding in a discriminatory way.

By now you as Treasurer must be as thoroughly confused as me by the policies pursued by the Commonwealth and State Governments on Aboriginal Legal Aid.

ALRM fails to comprehend the wide discrepancies in funding between Aboriginal and Mainstream Legal Aid and the denial to employees of ALRM of similar employment conditions enjoyed by mainstream. We are

then left to question whether it is a deliberate attempt to disadvantage Aboriginal South Australians of culturally appropriate legal services. It is noted that at a Commonwealth level the same Government agency funds both forms of legal aid.

The ALRM Board has determined that this discriminatory funding situation cannot continue as it places ALRM in an unsustainable position to the detriment of Aboriginal people. The Board has lodged a formal complaint to the United Nations Special Rapporteur on the Human Rights of Indigenous Peoples in Geneva.

My Board was certainly most reluctant to lodge this complaint to the UN under the Convention for the Elimination of Racial Discrimination (CERD) because of other *supporting* funding for related programs that it has received from both the Howard Government and more recently the substantial generosity from the Rudd Government. However both Governments were/are aware of our concerns, and have ignored the various Government and Parliamentary Reports that recommend an increase in our funding.

It is also disappointing to advise that the Age Newspaper reported late last year that Aboriginal Affairs is still subject to policy advisers that continue to follow the ideologies of senior bureaucrats Peter Shergold and Wayne Gibbons. This is extremely disturbing in the fact that Labor's stated policies are in conflict with those of the Howard Government and in particular Shergold and Gibbons.

To support this submission I now refer the Treasurer to an article by Professor Chris Cunneen and Melanie Schwartz from the University of New South Wales (see attached). This article more than adequately addresses the major plight of ALRM's gross underfunding due to a demarcation on funding responsibilities between the Federal and State Governments in Australia.

I also add the disturbing statistic on the gaoling of Aboriginal people. The SA male Aboriginal incarceration rate is close to 30% of the prison population whilst for women it is even higher. In the NT it is 85%. These are shocking statistics when we consider Aboriginal people make up 2% of the population of this country.

I remind the Treasurer that Labour gave a commitment to ALRM leading into the 2007 Federal Election to increase Aboriginal Legal Aid. This commitment has NOT been honoured although on Budget night in 2008 you had told all Australians that all Labor's promises have been kept. It is regrettable that you remained silent on the commitment to ALRM. It is hoped that the 2009-10 budget will address this outstanding commitment.

I now turn to the Government's response to the world financial crisis. To its credit the Rudd Government has responded appropriately and responsibly and if increased funds flow to ALRM, this will impact positively in regional centres when we increase our services in these communities.

Mr Treasurer, I am aware that your responsibilities are particularly onerous, not least in these difficult times. Although what I have said in this letter has primarily dealt with social justice and human rights issues, there is an important economic aspect as well.

ALRM is very conscious that it needs to put more resources into rural and remote parts of South Australia. We need to employ lawyers and field officers and secretaries. We need to spend money on office equipment, real estate, vehicles and accommodation. We need to spend money on salaries which will be spent in remote parts of the State. There will be multiplier effects from that spending in local economies. So apart from social justice I believe that extra Commonwealth subventions to ALRM would have the important effect of providing economic stimulus to the Australian economy, particularly in remote areas. That the Aboriginal economy is very important to the survival of rural South Australia is unquestioned and it has been subject to comment in the final report of the RCIADIC and in numerous academic studies. In that regard I refer particularly to the study by Dr Paul Chapman completed in 1990. That report was footnoted in the National Report of RCIADIC and which refers to the economic impact of CDEP and other Aboriginal organisations upon the township of Ceduna on the west coast of South Australia.

Our submission is that the 2009-10 Federal Budget provide and increase of \$1.5m to our legal aid program to enable ALRM to achieve on par funding of 1996 in 2009.

Stolen Generations

The Commonwealth Government has funded the successful Trevorrow Stolen Generations Test Case for a number of years and which certainly must be applauded. It is unfortunate though that since that case was decided that the Commonwealth has decided NOT to fund other similar claims that have resulted from the Trevorrow decision.

This is disappointing as there was a *legitimate expectation* within ALRM that further funding would be properly considered and an appropriate policy response forthcoming, in relation to the interests of other claimants.

The Attorney Generals Department officers have shown a commendable interest in the Trevorrow case and one thing is very clear from the judgement, that the case has very clear precedent value for other cases that occurred in similar circumstances and in the same time period as Mr Trevorrow's removal. Effectively the Department was and is on notice that the Trevorrow judgement might be the basis of claim for many other Aboriginal people in South Australia.

In all the circumstances proper consideration of further funding has not eventuated. ALRM is told that nothing is available and with respect, we can not conceive that that is an adequate response to the expectation of our clients. It is not an adequate response that the Commonwealth wash its hands of the plight of other Aboriginal claimants in similar circumstances to the late Mr Trevorrow.

It is also extremely disappointing in my view, for the AGD to recommend as an alternative to funding, that ALRM seek pro bono support for our claimants. The AGD is aware pro bono work is usually performed by wealthier firms who have far less experience in conducting cases on behalf of plaintiffs, and where the work is usually performed by the firm's most junior inexperienced lawyers. We do not consider that this is in the Stolen Children's best interest. Ultimately we will require the most experienced and committed specialist plaintiff lawyers, historians, psychiatrists and the like.

Since the first instance decision by Justice Gray in *Trevorrow - v - The State of South Australia*, ALRM has been inundated by Stolen Children seeking advice in respect of their rights arising out of that decision and the impending Appeal. ALRM has effectively been placed in a position where it has to either provide representation and or advice to these people, or send them away. Given the restrictions placed on this organisation, we cannot afford to do the former, and given the expectation by the South Australian Aboriginal Community that ALRM will act as their representative on such matters, you can appreciate that we cannot turn our backs on these people. We inform you that to date no formal retainers have been entered into with new clients, nor have applications for legal aid been received or considered, and you should be aware that our civil section is already committed to achieving its quota of work under the legal services contract. There is not an excess of capacity, indeed existing staff are working beyond requirements to keep the stolen generation cases going with volunteer assistance.

Furthermore, given the uncertainty of future Stolen Children's cases, with the pending State Appeal against the decision in *Trevorrow - v - The State of South Australia*, it is unlikely that there will be many private firms who will be prepared to take on potential claimants without the requirement of money being placed in trust for security for their costs. The majority of those who have approached us do not have the financial capacity to put money in trust. Again we make the point that, effective plaintiff lawyers are not from wealthy firms which can afford to carry expensive litigation pro bono, at least not in South Australia.

Moreover, the Legal Services Commission of South Australia does not conduct such civil litigation and is not prepared to represent or fund private solicitors to represent clients in such matters.

Whilst it is not clear how many potential claimants there will be for Stolen Generations compensation, we are aware of at least 40 sets of writs which may need to be issued on or before the **29th of July 2009**. hence the urgency of funding be provided to ALRM.

The Prime Minister whilst not committing to funding a compensation scheme has supported, by implication in the Apology, the ideal of addressing the wrongs of the past. May I respectfully suggest that the full text of the Apology be read prior to making a final decision on our submission for financial support.

ALRM has consistently advocated for a form of compensation scheme to be introduced by the State of South Australia. It would seem reasonable to expect

that the Commonwealth would work with ALRM to achieve such an aim through SCAG or COAG. ALRM remains ever willing to assist in that regard.

I would also remind the Minister of the Universal Declaration of Human Rights and its 60th anniversary and in particular Article 1 which reads

All human beings are born free and equal in dignity and rights.

Those Stolen Generations claimants have rights. The same rights as the rest of the Australian community.

Aboriginal people continue to be disadvantaged by these misguided Government policies. Here is an opportunity to take a small step to address a significant wrong and to take the first steps toward the achievement of an equitable and reasonable solution. A solution which would improve the dignity and well being of the Stolen Generations as well as immeasurably improving the standing of the Australian Government, both domestically and in the international arena.

What I must impress upon you however is that the die is cast and ALRM is committed to and would be very loath to walk away from worthy and deserving claimants, due to lack of funding.

ALRM is seeking a modest \$460k to further the legitimate claims of the Stolen Generations against the State of South Australia.

Conclusion

In Australia we suffer from institutionalised discrimination that continues to add to Aboriginal peoples social and economic disadvantage and marginalisation.

This is evidenced in the lack of funding for our legal services and statistics in other areas such as mortality, health, education, housing and employment.

The Commonwealth Government in Australia provides funding for the legal aid and other programs and which in the main are valuable services to the most disadvantaged within Australian society. The State Government on the other hand continues to reject its responsibility to provide funding for legal and other justice and prevention and other services as its position is that these are the responsibility of the Commonwealth Government.

The only people that are missing out as a result of this demarcation are Aboriginal people. The same is said for the Stolen Generations.

I conclude by suggesting Australia, whilst having a quality of life for most of its population well above the most of rest of the world, fails to address the fact that a small proportion of the population continues to be denied access to basic services and in particular services related to justice.

It is hoped the Rudd Government in the 2009-10 budget process does what is right and honour its 2007 pre-election commitment to ALRM and

increase our funding by a modest \$1.5m to redress the gross underfunding of the last 12 years and provide access to justice for Aboriginal people. In addition the \$460k Stolen Generations funding so urgently needed is sought to further future claims against the State of SA.

The issue of the demarcation on responsibilities raised in this submission is rightly addressed through other forums.

Thank you in anticipation of a favourable response to our modest submission.

Yours sincerely,

Neil E Gillespie

Neil E Gillespie
Chief Executive Officer