



**Environmental
Defender's Office**

**REVIEW OF THE DELIVERY OF LEGAL ASSISTANCE SERVICES
TO THE NSW COMMUNITY**

31 October 2011

The EDO Mission Statement:

To empower the community to protect the environment through law, recognising:

- the importance of public participation in environmental decision making in achieving environmental protection
- the importance of fostering close links with the community
- the fundamental role of early engagement in achieving good environmental outcomes
- the importance of indigenous involvement in protection of the environment
- the importance of providing equitable access to EDO services around NSW

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Review of the Delivery of Legal Assistance Services to the NSW Community

The Environmental Defender's Office NSW (**EDO**) welcomes the opportunity to comment on the review of the delivery of legal assistance services to the NSW community. The limited time period for the provision of comments requires that this submission be brief.

We note that the review will:

1. consider whether there is evidence of unmet legal needs in the community, particularly in rural and regional areas and for vulnerable or disadvantaged groups;
2. consider whether current legal assistance services adequately meet community needs;
3. make recommendations to address any gaps identified in the delivery of legal assistance services;
4. make recommendations on any other measures aimed at improving the delivery of legal assistance services.

The EDO's activities are designed to meet a need within the community for environmental legal services. These needs are apparent within the community as a whole, but have particular prevalence in rural and regional Australia, and in Aboriginal communities. In relation to many of the matters with which it deals, the EDO is the only provider of relevant, free legal services. It provides these services in a cost-effective manner.

This submission provides detail on the ways in which the EDO has gone about meeting the needs of the community, under the following headings:

1. The EDO's services are meeting a growing need within the community;
2. The EDO has a primary focus on rural and regional NSW;
3. The EDO has a dynamic and expanding program in providing environmental legal services for Aboriginal communities;
4. The EDO provides its services in a cost-effective manner.

1. The EDO's services are meeting a growing need within the community

The EDO is a community legal centre specialising in public interest environmental law, providing advice to the public, law reform, community education work and casework. This work has played an important role in ensuring that the community is able to understand and access environmental laws across NSW. Our office in Lismore services the Northern Rivers region of NSW, while our Sydney office services the rest of the State. The EDO helps individuals, community groups and conservation groups which are working to protect the natural and built environment, as well as working with government to improve the quality of relevant environmental laws. The EDO has over 25 years' experience in public interest environmental and planning law.

The EDO seeks to provide access to justice, particularly for those in regional areas who are often affected by major environmental and pollution issues, and through working with Indigenous Australians on environmental law issues.

The EDO's operational principles are focussed on:

- Increasing access to justice by working with diverse groups within the community, and providing equitable access to services throughout New South Wales, particularly in rural and regional areas;
- Recognising the importance of Indigenous involvement in the protection of the environment;
- Engaging early in environmental decision-making processes;
- Strengthening case management with scientific expertise and focusing on the merits of cases, both through contributions prior to decisions being made and as an adjunct to judicial review.

Environmental considerations play an increasingly prominent role in public policy in NSW and Australia, with both government and the broader community now recognising the importance of such matters as proper planning, food security, water conservation and allocation, dealing with climate change, protecting biodiversity, retention of our natural and cultural heritage, and the sustainability of indigenous and rural communities.¹ The importance of environmental law was highlighted by the retiring Chief Justice of the High Court, the Honourable Murray Gleeson QC, in nominating water and climate change as matters that will dominate court disputes in the next decade.²

Set out below is some further information demonstrating the growing demand for our services within the community. This information largely draws on the EDO's activities in the last 2 years.

1.1 Telephone advice line

Both the Sydney and the Northern Rivers offices provide telephone advice services to the community. Since 1 July 2009, the EDO has provided 2200 telephone advices. Of these, 65% concerned rural and regional NSW.

1.2 Casework

Over the past two years the EDO has written around 250 detailed advices, many including assistance such as writing letters, and is currently running around 25-30 cases in various stages of development. The EDO provides representation in important matters

¹ See Australian Bureau of Statistics (2007), *Australia's Environment- Issues and Trends*, Canberra and S.Cousins (2007), "Contemporary Australia, Environmental issues", National Centre for Australian Studies, Monash University found at <http://www.radioaustralia.net.au/australia/pdf/environmental.pdf> (viewed 29/9/08).

² "If someone asked me to predict - and said it was income tax 30 years ago, and it is immigration cases now - I would say in 30 years from now it will be water ... When there is an important topic of public policy and the likelihood of government regulation, then lawyers are likely to get involved, too." Justice Gleeson said courts would have an increasing role in settling environmental issues, especially as businesses and governments dealt with concerns about climate change". See "Water the next big battleground", *Sydney Morning Herald*, 11 February 2008 found at <http://www.smh.com.au/news/environment/water-issues/water-next-big-battleground/2008/02/10/1202578600925.html> (viewed 29/9/08).

of public interest in response to community needs as well as in test cases that raise important issues of principle or possible law reform.

1.3 Legal education workshops.

Over the past two years, the EDO has held 62 free community legal education workshops in rural and regional New South Wales. Environmental law issues covered by these workshops included mining, planning, coastal law, climate change, private conservation and various aspects of natural resource management. Through these workshops, the EDO was able to provide legal education to over 2000 people.

During the same period, the EDO also provided 16 free seminars in the Sydney metropolitan area and the Northern Rivers region. Some 600 people attended these seminars.

1.4 Publications on environmental law

The EDO publishes on its website a range of fact sheets on a variety of environmental law topics. These are regularly updated. In addition, the EDO provides a free weekly e-bulletin to a subscriber list of over 2000. There were almost 5000 downloads of the bulletin in the 2010-2011 period. The EDO also published six community information guides in 2010-2011, on topics ranging from private conservation to pesticide use in the NSW Northern Rivers.

2. The EDO's primary focus is on rural and regional NSW

A large proportion of the services of the EDO are provided to residents in rural and regional NSW. Several of the EDO's education projects address a range of laws applicable to rural landholders. Topic areas include advising on the illegal taking of water, laws relating to native vegetation, bush fires, pest and weed control, agricultural chemicals and construction and development.

More detail on these services is provided below.

2.1 The majority of clients receiving legal advice from the EDO are from rural and regional NSW

As noted at 1.4 above, over the past two years 65% of the 2200 telephone legal advices provided by the EDO concerned rural and regional NSW.

2.2 The majority of clients represented by the EDO are from rural and regional NSW

The EDO's casework reflects a strong rural emphasis. For example: *Haughton* (Portland, Central West); *Barrington, Duralie* and *Newcastle Speleological Society cases* (Hunter Valley); *Hill Top* (Southern Highlands); *Ulan* (near Mudgee); *Hastings Point* and *Nambucca Valley* (on the North Coast); *Rivers SOS* and *Red Gums cases* (Riverina); *Caroona Coal* (Liverpool Plains); *Lake Cowal* (West Wyalong); *Munro* (Moree); and the *Legless Lizard* case (Yass).

In 2011, in *Sweetwater Action Group Inc v Minister for Planning* [2011] NSWLEC 106, the EDO's client, Sweetwater Action Group Inc was successful in having various decisions

of the Minister for Planning overturned, in effect halting development of the Huntlee Town Centre in the Hunter Valley.

The Northern Rivers office has had a very strong, and growing, role in meeting the demand for legal and technical services in NSW.

2.3 The majority of the EDO's community legal education workshops take place in rural and regional NSW.

As noted at 1.2 above, the 62 free community legal education workshops held by the EDO over the past two years took place in rural and regional NSW. These workshops were held in such locations as Newcastle, Gloucester, Helensburg, Wollongong, Moruya, Orange, Bulahdelah, Harden, Griffith, Majors Creek, The Entrance, Merimbula, Lismore, Bellingen, Ballina, Coffs Harbour, Byron Bay, Port Macquarie, Murwillumbah, Nambucca Heads, Adelong, Batemans Bay, Branxton, Braidwood, Mandalong, Narooma, Nowra, Springwood, Murrays Run, Corowa, Savernake, Mudgee, Goulburn, Lithgow, Dapto, Mullumbimby, Inverell, Comboyne, Evans Head and Coramba.

2.4 The majority of the EDO's guides relate to rural and regional NSW

As noted at 1.3 above, the EDO published six guides in 2010/2011. These related largely to issues of concern to rural and regional communities; and include such publications as *Rural Landholder's Guide to Environmental Law in NSW*; *Caring for the Coast: a Guide to Environmental Law for Coastal Communities in NSW*; and *Getting the Drift: A Community Guide to Pesticides Sprayed in the NSW Northern Rivers*.

3. The EDO has a dynamic and expanding Aboriginal program.

In 2006-07, the EDO commenced its Caring for Country Project through funding provided by the Law and Justice Foundation. Since this time, the project has evolved and expanded into a fully-fledged program. Initially, the focus was on establishing the infrastructure for the project – through, for example, the terms of reference of the Aboriginal Advisory Committee – and also demonstrating our bona fides. The latter was achieved, among other things, through the employment of a part-time Aboriginal Liaison Officer, producing a guide on environmental law for Aboriginal communities and running a series of community education workshops to present the material in the guide.

This initial phase served to establish the legitimacy of the project, promote goodwill and respect and build awareness of the law, policy and the services of the EDO. As a direct result of this outreach, aboriginal clients began to approach the EDO with confidence and a second phase - involving more legal advice and litigation – was embarked upon. To meet this demand and to do proper justice to the notion of indigenous engagement, the EDO responded by increasing the resources devoted to indigenous issues (with partial funding under the Aboriginal Legal Access Program).

Caring for Country is now in its third phase, with an emphasis on policy and law reform work. The program now employs a full-time Aboriginal solicitor from within existing resources. Many of the issues raised by indigenous people have no suitable legal remedy, with the destruction of their cultural heritage often sanctioned by law. To this end, the EDO has convened and funded two Roundtables on Aboriginal Cultural Heritage in May 2009 and May 2010 to draw attention to the deficiencies in the legal framework.

The current emphasis of the program on proactive law reform initiatives remains, being complemented by education workshops, legal advice and litigation. Further details on the EDO's engagement with indigenous legal issues are set out below. As Geoff Scott, CEO of New South Wales Aboriginal Land Council has stated:

The EDO is the only organisation offering free, expert legal advice to Aboriginal groups on culture and heritage issues. It is the only organisation which provides easy to understand legal information for the Aboriginal community, such as the *Caring for Country* booklet. NSWALC has disseminated the *Caring for Country* booklet widely to its members, and it has been very well received.

Specifically over the last 12 months the EDO has provided invaluable, low cost advice to NSWALC on:

- The potential impacts of legislative and policy reforms announced by the NSW Government on Aboriginal communities in NSW, and
- The preparation of a wide range of Culture and Heritage Face Sheets for the Aboriginal community.

... Culture and heritage issues are the lifeblood of Aboriginal communities and NSW cannot afford to lose the one key organisation supporting the Aboriginal community to understand and exercise its cultural rights.³ [underlined emphasis added]

3.1 *Developing "Bona Fides"*

The position of part-time Aboriginal Liaison Officer has continued through the Aboriginal Legal Access Program, with funding from the Public Purpose Fund (PPF). The position has now been converted into a full-time Aboriginal Solicitor position.

The EDO provides assistance to Aboriginal persons and organisations including Traditional Owners and Local Aboriginal Land Councils (LALCs) about a range of matters, including those concerning the management and protection of Aboriginal cultural heritage, public health, pollution and access to lands and waters.

3.2 *Community and other engagement*

The Aboriginal Solicitor has been overseeing the development of the *Indigenous Engagement Program* which comprises the production of environmental law guides and workshops on this theme.

The EDO also provides publications that are of direct relevance to Aboriginal peoples. In particular, it publishes a guide on *Caring for Country*.

3.3 *Casework*

The EDO has been involved in casework to protect Aboriginal cultural heritage. In *Munro and Nean v Minister for Lands & Ors*, the EDO acted for a representative of the Moree Murri Taskforce in a challenge to a decision of the Minister of Lands to approve

³ Letter from Geoff Scott, CEO of New South Wales Aboriginal Land Council (17 February 2010).

the sale of the culturally significant Taylor Oval in Moree. The case was settled prior to hearing.

In 2008, in *Anderson v Director General of the Department of Environment and Climate Change* [2008] NSWLEC 182, the EDO represented traditional land owners in East Ballina, unsuccessfully challenging the validity of a consent issued by the Director-General of the Department of Environment and Conservation, allowing the destruction of Aboriginal cultural heritage for a residential subdivision. The verdict was upheld on appeal: *Anderson v Director General of the Department of Environment and Climate Change* [2008] NSWCA 337. The EDO had previously acted on behalf of the Andersons in a case successfully challenging a similar consent: *Anderson v The Director-General of the Department of Environment and Conservation & Ors* [2006] NSWLEC 12.

3.4 Policy and Law Reform

Further to the activities noted at 3.2 above, the EDO has been involved in a number of policy and law reform activities, particularly in relation to the protection of Aboriginal culture and heritage. EDO has contributed to a submission to the Expert Panel on the Recognition of Aboriginal and Torres Strait Islander Peoples in the Australian Constitution in 2011; a submission on ratifying the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation* of the Convention on Biological Diversity; and, a submission on the Aboriginal and Torres Strait Islander Heritage Protection Act.

Apart from submissions, the EDO has been represented on the Office of Environment and Heritage Aboriginal Cultural Heritage Law Reform Working Party. The Indigenous Solicitor has also provided advice to the Australian Law Reform Commission in her capacity as a member of the Aboriginal Advisory Committee; provided advice to a forestry organisation on its Indigenous engagement strategy and the establishment of an Indigenous Advisory Committee; and participated in quarterly meetings as part of the Indigenous Peoples Organisations network hosted by the Australian Human Rights Commission.

4. The EDO's services are provided in a cost effective manner.

4.1 Depth of Services provided

The EDO's five core areas of operation include: legal advice and litigation; policy and law reform; scientific and technical advice; community programs; media and communications.

Many of these areas include further focus within the environmental priority areas of climate change and energy; environmental planning and development; biodiversity conservation; natural resource management; environmental justice; corporate social responsibility and governance.

4.2 Experts

The EDO employs experienced and professional staff, and receives strategic direction and governance from its Board of Management who contribute a wealth of expertise to

the organisation. Additionally, the EDO has an established Scientific Advisory Service comprised of two in-house scientists, a Technical Advisory Panel, as well as a growing Expert Register of over 130 scientific experts in a range of fields. This advice is critical in many cases to enable clients, solicitors and barristers to grapple with the scientific evidence which is often an essential consideration.

4.3 *Funding*

The EDO is overwhelmingly dependent on grants to fund its operations at their current level. The major source of funding for the organisation is the Public Purpose Fund (PPF). PPF funding provided around 68% of the EDO's income in 2010-2011. Triennial funding is also received from both the Commonwealth Attorney-General's Department and Legal Aid NSW through the Community Legal Services Program (CLSP). Other sources of funding include grants from the NSW Government and the John D. and Catherine T. MacArthur Foundation.

4.4 *Cost to the community*

The EDO continues to perform its functions at a low cost, while extracting significant value from the funding it receives. The EDO works closely with barristers and experts who often provide services to EDO clients free of charge or at reduced rates. Law firms act pro bono for the EDO's clients and provide in-kind support such as secondments, printing and venues for meetings and seminars. The EDO has also partnered with the Public Interest Law Clearing House (PILCH) to create a pro-bono referral service to provide landholders wishing to pursue private conservation with free legal advice. In addition, the EDO's volunteer program provides invaluable assistance to the office across a variety of its functions.

4.5 *Only organisation providing free legal advice on environmental law*

As noted at 1.4 above, the EDO provides free initial telephone advice and, if necessary, written advice on environmental law and policy.

The EDO is the only legal centres in NSW that provides this specialist advice about public interest environmental law matters with "little if any overlap between the functions of the EDO and the work of any other organization".⁴ As has been stated:

there is no other organisation which has the EDO's combination of environmental legal expertise, community links and depth of knowledge of environmental issues.⁵

Importantly, pro bono and legal aid services do not, and could not, provide a similar service.

⁴ The Summary to the Keys Young Report, *Review of the Environmental Defender's Office New South Wales*, 1998 noted this at p 29. See also p 20.

⁵ *Ibid* at p 20.

Conclusion

The EDO provides a wide range of high quality legal services to the NSW community within a specialist and expanding area of law. It does so using a multidisciplinary and community capacity-building approach. It has demonstrated the ability to make its services relevant and widely available to Indigenous and non-metropolitan communities who rely on the EDO to provide them with frank and independent advice on the law. This is a critical issue in terms of access to justice in relation to issues where major providers of legal services may be conflicted out or local legal services lack relevant expertise.

The model of service delivery utilised by the EDO provides an expert specialist service throughout the state. This model provides excellent value for money but the availability of economical information and communication technologies and the availability of funds to travel, especially to establish relationships initially, is critical to this strategy being effective.

Yours sincerely,

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Jeff Smith

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