The case for inverting the non-profit legal service delivery model in the Northern Territory

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ANU Law Internship Paper completed 25 October 2021
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I INTRODUCTION

The current non-profit legal service delivery model in remote Northern Territory is failing. For too long, decisions about where and how non-profit legal services are provided have been made solely by resource-starved non-profit legal service including community legal centres (CLCs) and the legal aid commission (LACs). Themselves held hostage to funding agreements with commonly unresponsive federal governments, the end result has been a largely centralised service delivery model in which lawyers and administrators are almost exclusively based in major hubs (Darwin, Alice Springs, Katherine and Tennant Creek). This failure to establish a permanent and meaningful presence in community has contributed in no small part to the widespread failure to improve the stark inequalities which continue to plague so many Aboriginal and Torres Strait Islander communities across the NT. In this paper, I canvass the existing failures in the current legal service delivery model, explore its weaknesses, and ultimately propose a new inverted service delivery model. In constructing the new model, Aboriginal people must be at the helm to decide exactly what system and structure works for them. It is proposed a combination of existing and new permanent service roles based on country could also be synchronised to redefine the methods for provision of legal services. As the NT Government currently drafts its Local Decision Making Agreements, and as the Commonwealth works through its new iteration of the Remote Jobs Program (formerly the Community Development Program), I identify space for this new model to be considered, tested and funded.

Of course, any proposed model is only as effective as the clients living in community find it to be: to that end, it is crucial that Aboriginal and Torres Strait Islander people on country wield the power to determine how the new models work best for them. I do not profess to speak on their behalf, nor do I seek to advocate the imposition of a prescriptive system top-down. Instead, I only aim to identify existing failures and explain why an inverted approach, with First Nations voices and authority at its core, can travel the distance in improving social outcomes which we have so far overwhelmingly failed to do.

II The Existing Legal Service Delivery Model: Urbanised and Resource-Starved

The Northern Territory is defined by its diverse population dispersed over a large region. 77% of Aboriginal people in the Northern Territory live in remote or very remote areas.[1] With 96 remote communities, and over 600 homelands, all service delivery (including health, government, and legal) faces added logistical difficulties presented by physically getting to communities and maintaining a continuing presence there. Coupled with the fact that 75% of roads in the NT are unsealed, some of which famously close for large periods of the year due to weather constraints, the costs of delivering resources to communities are only exacerbated by the need to often use charter planes or boats.[2]

Against this background, it is not difficult to see why in 2014 the Productivity Commission found the reason Aboriginal and Torres Strait Islander people had problems accessing legal and governmental services was largely because they were either offered infrequently in community or not at all.[3]

The task of providing comprehensive legal services to regional and remote communities is only made more difficult by the limited financial resources which non-profit legal services are given to work with. Most of their funding is derived from Commonwealth and territory governments, which are famously sparing in their allocations. Insufficiency and insecurity of funding have long been identified by stakeholder organisations as a continuing impediment to achieving the improved outcomes they work towards; they are trying to do their jobs with one hand tied behind their backs. One stakeholder pointedly remarked that 'if one [legal service] is defunded and there's not some additional money—like Legal Aid not going to Alpurrurulam anymore… That's actually dropped out of that whole community.'[4] When coupled with

[1] Northern Territory Department of the Attorney-General and Justice, *Pathways to the Northern Territory Aboriginal Justice Agreement* (Report, 2019) 82.
[2] Ibid.
[3] Productivity Commission, *Access to Justice Arrangements Inquiry* (Inquiry Report No 72, 2014) 66 [22.3].
[4] Fiona Allison and Chris Cunneen, *Access to Justice in the Barkly: A Review of the Justice Too Far Away Report on Tennant Creek and Barkly Region's Access to Legal Services and Information* (Jumbunna Institute for Indigenous Education and Research, University of Technology Sydney Report, February 2020) 113.

the demanding performance reporting requirements imposed on the legal services in their funding agreements, there is a natural tendency towards competition at the expense of collaboration: 'If a service is funded to deliver something in one, in a section of communities, there can be animosity between other services who are going in to try and also deliver in the area.'[5] The same issues arise at the executive level, where CLCs and LACs are necessarily forced to compete amongst themselves in their search to secure funding from government authorities.

The limited scope of financial resources also leads to an internal prioritisation of services in one area over others, as providers scramble to make the most effective use of what they have. It often means 'resources [are] prioritised in order to assist with criminal, rather than other legal issues' (where the legal services offers criminal assistance, which some do not), and it makes 'recruitment and retention of quality legal staff … very difficult'.[6] It is thus crucial that in any new proposed model for inverted legal service delivery, the resources required to fund new positions and programs are not sought from within the existing pool of resources; the whole pie must be increased.

Given these constraints, it is not difficult to see why legal services are overwhelmingly centralised in their service delivery models. The two largest legal service providers in remote Northern Territory, the North Australian Aboriginal Justice Agency (NAAJA) and the NT Legal Aid Commission (NTLAC), only maintain permanent office presences in Darwin, Alice Springs, Katherine and Tennant Creek.[7] NAAJA has openly struggled with maintaining permanent solicitors in some of these regions, pointing to high staff turnover in the Katherine office and the regretted recall of the sole lawyer based in Tennant Creek to Alice Springs.[8]

The absence of a permanent presence across the rural and regional communities of the NT burdens the existing limited resources non-profit legal services do have with

[5] Ibid.
[6] Fiona Allison et al, *Indigenous Legal Needs Project: NT Report* (James Cook University, 6 November 2012) 20.
[7] Northern Territory Legal Aid Commission, *Annual Report 2019/2020* (Report, 2020) 21; North Australian Aboriginal Justice Agency, *NAAJA Annual Report 2016/2017* (Report, 2017) 49–52.
[8] North Australian Aboriginal Justice Agency (no 7) 37.

the even greater task of servicing a wider area. To take just one example, the Alice Springs office of NAAJA—complete with just nine solicitors—is responsible for delivering services to at least ten rural communities spread across 700,000 square kilometres.[9]

Importantly, the centralisation of legal services in major hubs restricts them to essentially only one method of engaging and servicing communities: 'outreach'. Under the outreach model, legal service deliverers semi-regularly send lawyers and legal staff from the central base to rural communities for short periods at a time. This approach, while of course preferable to the alternative of not visiting at all, is plagued with its own shortcomings.

For one thing, there is a necessary limit to the total amount of work that can be done during a visit. As one stakeholder organisation remarked:

> *The [NAAJA] lawyers will travel on a Monday and back on a Friday, which means that half of Monday the office isn't open and half of Friday the office isn't open. So, we are receiving many, many calls and enquiries from their client base because they have no way to access their service. And also from the prison. Like screening lots. When I say 'lots', at the counter it's five or six a day… and heaps of calls.*[10]

More pressingly, short-term temporary visits to community simply do not allow the development of the types of relationships which are required to overcome cultural barriers and establish a meaningful presence. As one community member put it, 'there's nobody to go to their house and say, "Look, I'm here if you need me." … if you don't have respect from a community, you're not going to be trusted. Nobody's going to walk up to you and talk to you.'[11] The NT Government recognised as much in a recent report, noting 'Aboriginal community members may not feel comfortable confiding sensitive details to a non-Aboriginal person, especially someone they don't know very well.'[12] Without that local knowledge and trust, the battle is destined to be a losing one.

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[9] Ibid 52.
[10] Allison and Cunneen (no 4) 109.
[11] Ibid 124.
[12] Northern Territory Department of the Attorney-General and Justice (no 1) 91.

Importantly, these are not shortcomings of the legal professionals themselves nor their employers, all of which work tirelessly to provide effective legal services to clients on country. It is a structural weakness inherent in the broader service delivery model as it exists today. Accordingly, the problems it faces cannot be rectified by simply expanding its scope (ie by more regular visits or with extra lawyers) alone. Instead, the model itself must fundamentally be reconceived.

III Moving Towards an Inverted, Community-driven Service Delivery Model

In reconceiving the legal service delivery model, the client must always be placed at the centre of it. That requires putting Aboriginal and Torres Strait Islander peoples who live in community first and foremost at the centre of the model. Two traps have been historically attractive for white bureaucrats and decisionmakers to fall into: embracing consultation as a cover for imposing paternalistic measures on Aboriginal and Torres Strait Islander peoples, and the retreat to deficit discourse to describe the 'issues' which plague them.

Community 'consultations' have often allowed bureaucrats and policymakers to paper over the power gap that exists between them and Aboriginal people when drafting and implementing new policies. The NT Government expressly summarised the problem in a recent report, finding 'a common frustration in Aboriginal communities working with government is being "over-consulted" on community "issues".'[13] Similarly, '[c]ommunity members expressed consultation fatigue … where much has been promised but not much has been done.'[14] Its failure lies in the power imbalance in which decisions are still being made *for* Aboriginal people, rather than *by* them.

Charles Darwin University (CDU) academic Michael Christie's research into community consultations and its ill-fated consequences remains a powerful case study for the shortcomings which plague it.[15] Christie explores the case of an NT Government proposed policy for a community garden in Galiwin'ku, a Yolŋu township

[13] Northern Territory Government, *Local Decision Making Framework Policy* (Report) 11.
[14] Northern Territory Department of the Attorney-General and Justice (no 1) 94.
[15] Michael J Christie, 'The Box of Vegies: Method and Metaphysics in Yolŋu Research' in Mark Vicars and Tarquam McKenna (eds), *Discourse Power and Resistance Down Under Vol 2* (Sense Publishers) 45.

in north-east Arnhem Land, called the 'Box of Vegies' program. Unsurprisingly, initial community investigations by Christie and his Yolŋu colleagues found 'all agreed it would be good to have another community garden … but if government is wanting to come in and get things started, it must be properly negotiated and build on what we [the community] already have.'[16]

It was openly discussed that this seemingly great idea was riddled with failed previous iterations, as '[f]requent reference was made to other similar initiatives like the Red Cross project and the Marthakal Galawarra gardens, introduced by well-meaning outsiders, but which had failed because they have not been negotiated properly.'[17] Importantly, its failure was not rooted in Yolŋu opposition to the idea of the garden, nor their contributing financially to its maintenance. Strict emphasis was simply placed on the importance of respecting community kinship structures and connections to the land on which the garden was sought to be placed. Christie notes that '[w]hile the plan was quite straightforward in the Yolŋu imagination, it must have daunted the [policymakers] because each step would require further negotiation. There was not going to be a formal plan on paper, with pre-agreed costing and firm timelines or if there were, it could change at any moment.'[18] Ultimately, the researchers 'heard nothing back from government after they received the report, the garden never happened, and Galiwin'ku residents continue to pay exorbitant amounts for poor quality food.'[19]

The Box of Vegies example speaks to a more fundamental divide between the organisational structures and processes of policymakers and First Nations peoples. The natural consequence is, as Christie identifies, not only a failure in the set goal but a recourse to a harmful stalemate and negative attitudes towards the other: 'the government is seen as inflexible and disengaged, the Yolŋu lazy and disengaged.'[20]

These attitudes are but a small piece in the larger picture of the deficit discourse surrounding Aboriginal peoples and the unique social problems they face. At its core, deficit discourse 'refers to discourse that represents people or groups in terms of

[16] Ibid 49.
[17] Ibid.
[18] Ibid 50.
[19] Ibid.
[20] Ibid 57.

deficiency—absence, lack or failure.'[21] With all the power in the hands of the bureaucrats and the policymakers, 'policy discourse on Aboriginal and Torres Strait Islander people has been defined in terms of what they "lack" in comparison to a utopian, non-Indigenous ideal'.[22] Importantly, this is not to minimise the very real disadvantages which are faced by Aboriginal peoples across the Territory and the country. However, allowing 'discussions and policy aimed at alleviating disadvantage [to] become so mired in narratives of failure and inferiority [means] that Aboriginal and Torres Strait Islander people themselves are seen as the problem, and a reductionist and essentialising vision of what is possible becomes all pervasive.'[23]

This is not just an exercise in academia—the NT Government concedes the 'tendency towards deficit labelling contributes to discrimination and racism and feeds a negative mindset in communities. It impedes the type of empowering collaboration between government agencies and Aboriginal Territorians that would achieve better outcomes. This is an issue that extends beyond the justice system.'[24]

Encouragingly, policymakers appear to be coming around to the problems inherent in deficit discourse and in existing approaches to decision-making. The NT Government's new Local Decision Making initiative, in which it is seeking to finalise 10-year agreements with Aboriginal communities and their representatives to shift decision-making authority into the hands of community control, expressly recognises that '[f]raming "issues" or "problems" in a deficit lens can be limiting'.[25] While it remains to be seen just how much these assurances will practically manifest in the LDM agreements, it is at least promising that the executive—as the current repository of power—recognises the need for change.

These examples offer important lessons for the task of reconceiving the non-profit legal service delivery model: any new model cannot sustain the existing structures of power, where decisions are made in the urban hubs by white policymakers, then

[21] William Fogarty et al, *Deficit Discourse and Indigenous Health: How narrative framings of Aboriginal and Torres Strait Islander people are reproduced in policy* (National Centre for Indigenous Studies, the Australian National University, May 2018) vii.
[22] Ibid.
[23] Ibid 5.
[24] Northern Territory Department of the Attorney-General and Justice (no 1) 96.
[25] Northern Territory Government (no 13) 11.

simply transposed to communities under the guise of consultation. Similarly, designing the new model must not simply focus on the 'issues' trying to be resolved, thereby reverting to the harms of deficit discourse. Instead, a strengths-based approach which focuses on the existing assets, resilience, and capabilities of First Nations peoples must be the starting point for the new model. Only then will the balance of power truly be shifted in favour of the communities, putting the client at the centre of the new model and meaningfully inverting legal service delivery.

IV Proposals For an Inverted Model: Holistic, Culturally Appropriate and Beyond Lawyers

Putting the client at the centre of the model requires beginning with an assessment of the resources available in community and how these can best be harnessed and integrated into a holistic legal service framework. The solution cannot simply be hiring more lawyers and trying to engage communities through existing outreach structures. While additional advocates may be a piece in the final puzzle, greater emphasis needs to be placed on the capacity within community right now: the existing relationships, community knowledge and service infrastructures.

There is substantial historical evidence to support a greater role for community-based allied legal professionals. The Top End Women's Legal Service's (TEWLS) previously employed two local women in each community it visited as Community Legal Workers. In TEWLS' own words:

> *Community Legal Workers contribute a wealth of knowledge. They know their way around the community and where different families and clients live. With no street names, house numbers or telephones, this is essential knowledge. CLW's can advise if it is not a good time to visit the community, for example there are funerals, ceremonies or riots happening. CLW's know a lot about each family; about genealogies and family history - valuable knowledge with family violence or family law work.*[26]

The Productivity Commission similarly emphasised this value, reporting that '[f]ield officers with an understanding of Aboriginal and Torres Strait Islander culture and communities — generally Aboriginal and Torres Strait Islander people or those with

[26] Camilla Hughes, 'Community Legal Workers' (2003) 5(28) *Indigenous Law Bulletin* 18, 19.

significant community connections — play an important role in delivering legal services'.[27] One stakeholder organisation, speaking of lawyers delivering legal services in community, remarked '[t]o work well in those contexts … a lawyer really needs to be working alongside somebody senior but also someone who can work in community development or understand how to listen and [has] cultural understanding of how things work'.[28]

Not only does employing experts within community provide the crucial cultural linkage between the usually urban lawyers and the clients, but it is underpinned by an appreciation and emphasis on the skills and capabilities which are *already present* in community. This begins the far more important redistribution of power in favour of the Aboriginal people to decide what works for them: a process which can only be further advanced by shifting decision-making authority more broadly into community-controlled hands.

V Opportunities to Empower Communities with Decision-making Authority

The NT Government, through its Local Decision Making Agreements (LDM), is currently seeking to transition power into the hands of Aboriginal people to decide the approaches to combatting the inequalities they face. In its own words, LDM 'is the NT Government's ten year plan that seeks to return local decision making to Aboriginal communities by empowering Aboriginal people to determine service delivery models that work best for their community and region.'[29]

Despite focussing majorly on criminal legal matters and community diversion programs, its Law and Justice sub-agreements still stand as a ripe opportunity for redesigning the broader legal service delivery model. To this end, the NT Government ought to explicitly include the goal of a more comprehensive and integrated legal service delivery model in its negotiations and in the final LDM Agreements. Doing so would provide meaningful authority for Aboriginal communities to make decisions

[27] Productivity Commission (no 3) 682.
[28] Allison and Cunneen (no 4) 110.
[29] Northern Territory Government and Anindilyakwa Land Council, *Groote Archipelago Local Decision Making Agreement* sch 3.3 2.

about how legal services can be more accessible and client-centric for them—the ultimate clients.

Still standing in the way of this shift of power is the inescapable reality that the vertical fiscal imbalance in Australia's federal structure means the Commonwealth continues to contribute the lion's share of legal assistance funding. This gives the federal government disproportionate power to determine the restrictions and requirements attached to that funding. Noting the historically poor track record of the Commonwealth in the Aboriginal affairs space—one need not look beyond the NT Emergency Response nor the cashless welfare card for relatively recent examples—and its institutional resistance to change, existing avenues must in the interim be explored to identify potential areas to effect change.

To that end, the Commonwealth's revamped Remote Jobs Program (formerly the Community Development Program) stands as a potential instrument for such reform. Including community legal assistance training as a new funded option and assisting Services Australia employees based in community to work more closely with existing legal support services for referral, could open the door to a more integrated wrap-around legal service delivery model. Ultimately, though, these are stop-gap measures which will not fix the fundamental ill—for that, only comprehensively transitioning the power to decide whether these systems are sufficiently responsive and appropriate to communities will suffice.

VI Review and Final Remarks

The NT's current non-profit legal service delivery model is failing its rural and remote residents, overwhelmingly Aboriginal and Torres Strait Islander people. It is skewed in favour of urban-based lawyers and legal services, and relies on insufficient community outreach programs to bridge the divide. Largely, this is the consequence of restrictive and inadequate government funding which forces legal service providers to cannibalise their expensive community footprint. To rectify this, consultation and band-aid solutions will not work—a ground-level, fundamental shift in decision-making power into Aboriginal hands is required. Only then can the entrenched non-profit legal service delivery model truly be inverted, and only then can progress truly be made

towards eradicating the social inequalities plaguing the Territory's remote communities.