SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

AMENDMENTS TO THE SERVICE AND EXECUTION OF PROCESS ACT and THE NATIONAL CROSS BORDER JUSTICE SCHEME:

SUBMISSION OF THE ABORIGINAL LEGAL RIGHTS MOVEMENT

This submission covers Schedule 1 and 2 of the **Bill for an Act to amend various Acts relating to law and justice ,and for related purposes.**

Schedule1.

Clause 1 , subsection 3(1) defines the cross border laws by reference to the existing WA Cross Border Justice Act 2008 and allows for regulations under the SEPAct to prescribe the laws of a State or provisions of the laws of a State as being cross border laws for the purposes of the SEP Act.

The effect of clause 2 , section (3A) appears to be to confirm that the SEPAct does not affect the operation of the cross border laws and that the SEPAct does not apply in relation to a matter where the cross border laws would apply, apart from the SEP Act.

No submission is made in relation to the Schedule 1 Amendments other than that they appear to achieve what the Explanatory Memorandum specifies, namely preventing provisions of the SEPA overriding arrangements prescribed under the scheme where those arrangements would be inconsistent with the SEPAct. It is noted that Clause 1 does not specifically refer to Northern Territory laws.

Schedule 2.

ALRM notes the proposed amendments to the *Service and Execution of Process Act1992*, (SEPAct)**in Schedule 2**, which relate to taking evidence by audio or audio visual links. The Schedule 2 legislation will allow such links to be used for SEP Act court proceedings.

The effect of Schedule 1 is of course that the SEP Act does not affect the operation of the Cross Border laws, so schedule 2 will not affect the operation of the Cross Border laws by allowing, by force of Commonwealth law, for audio visual links in cross border matters. State and Territory legislation will need to be passed in order to allow for audio visual links to be used in the cross border courts.

Audio visual Links on the APYLands

It was an impulse flowing from the COAG trials that the Commonwealth should supply audio visual links to enhance communications for court purposes and for Transaction Centres on the APY Lands. ALRM has been recently advised by the APY Executive Administration, that seven PY Ku video resource centres have been set up. This is most impressive. Nevertheless they are at varying levels of workability, and ALRM is advised that lack of recurrent funding has prevented them form being used very much, or consistently. ALRM is advised that at this stage, the Indulkana PYKu centre is working and the Amata centre may be working

reasonably well. A recent press release suggests that the Commonwealth Dept of Health may take up responsibility for recurrent funding into the new financial year.

What follows in this submission is a detailed analysis of the State of SA Cross Border Justice Bill and the concerns of the ALRM as an Aboriginal Legal Service, as to the effects and the likely costs of the scheme.

Legislative Frameworkfor the Tristate Scheme

In about October of 2005 the Solicitors General of Northern Territory, Western Australia and South Australia agreed in principle that there should be Cross Border Legislation to allow for cross border jurisdictional laws between NT, SA & WA. More or less identical State laws would be enacted in SA.WA&NT and this would be authorized by amendments to the Commonwealth *Service and Execution of Process Act* .

The Cross Border region is to be defined by mutually agreed regulations under each of the three Acts, when they are all passed. Roughly it is proposed to cover all of the APY Lands , the WA Central Reserves and NT Aboriginal Land south of but not including Alice Springs .

At the time of this submission Western Australian legislation has been enacted and in the NT and South Australia Bills are before the respective Parliaments. Amendments to the *Service and Execution of Process Act1992* (SEPA) are also the subject of this submission.

In so far as the amendments to the SEP Act will enable the state and territory schemes to be operated , it is appropriate that this Senate Committee be informed of the concerns of ALRM in relation to the scheme as a whole, as it will apply in SA.

Fundamental Concept

The fundamental concept of the Scheme is a person's "connection with the Cross Border Region" This is defined by Clause 20(2)& (3) of the SA Bill to be:

a. The offence is suspected , alleged or found to have been committed in the cross border region .
b. If at the time of the person's arrest for the offence, the person was in the Cross Border Region or the person ordinarily resided in the region.
c. At the time at which the offence is suspected , alleged or found to have been committed, the person ordinarily resides in the region.

Corresponding principles apply to prescribed courts of the other participating jurisdictions in relation to other cross border proceedings .subClause (3)

Of itself Clause 20 does not extend the territorial operation of South Australian Criminal Laws. That is already defined by Section 5G of the *Criminal Law Consolidation Act.* Subject to that section, South Australian criminal laws only cover the geographical area of South Australia. The offence being committed in the SA part

of the cross border region is a sufficient but not a necessary trigger for the legislation to apply.

How the Scheme would work

An SA person, resident in Adelaide, who commits an offence at Indulkana on the eastern edge of the APY Lands , and thus part of the cross border region, has sufficient connection and the laws would apply to his offence. But also a person who resides at Indulkana who commits an offence in Adelaide also has sufficient connection for the laws to apply . In reality their offence would most likely be dealt with in Adelaide in the usual way. ALRM raises the question whether it is really necessary that the cross border scheme apply to offences committed in and likely to be dealt with, in localities well away from the cross border region.

What is the effect of the SA Cross Border Justice Bill ?

What the SA Cross Border Bill will do is to give WA&NT Police and Correctional Services powers, and Magistrates jurisdiction to deal with persons who have the relevant connection with the Cross Border Region, in any part of South Australia, and the same effect will be achieved to give SA officials similar powers in each of the other State and Territory affected by the parallel sets of legislation.

A South Australian person in WA

So if a South Australian person with connection to the region commits an offence in South Australia but flees to Western Australia, provided they have the necessary connection to the Cross Border Region, then a South Australian Police Officer can arrest and charge them under South Australian Law in Western Australia and take them before a Cross Border Magistrate to be dealt with by South Australian Law, in Western Australia. If they are sentenced to imprisonment, they are likely to be imprisoned in a Western Australian prison and Western Australian Corrections Law would apply with respect to the South Australian warrant of commitment issued by the SA court in WA . If they were to die in SA Police custody in WA , it appears to that either or both a South Australian Coroner and a Western Australian Coroner would inquest the death. The South Australian Coroner would have jurisdiction by virtue of section 3 of the *Coroner's Act 2003 and clause 139* of the SABill .

Cross border Magistrates will also be able to deal consecutively , with one offender, under three sets of laws . If a person with the necessary connection with the cross border regions has committed offences in each state, the cross border Magistrate can exercise each state and territory's jurisdiction over the person, consecutively. That is because of cross appointment of Magistrates under Part 13 of the SA Bill. The effect is likely to be net widening and cumulative sentences. It seems that there may also be a danger of forum shopping.

Powers of interstate officials in SA

Police Officers of WA&NT are given specific powers to exercise their WA & NT powers in South Australia. Specific powers are given to police in respect of arrest, drink driving laws (powers to administer alcohol tests etc) , vehicle impounding laws, restraining orders and the like and the cross border Magistrates are given parallel but quite specific summary jurisdictions. There are also corresponding police powers over youths and a corresponding youth court jurisdiction to deal with minor juvenile crime.

Major indictable offences

Major indictable offences of all kinds will be dealt within the usual way by extradition, and it seems likely that committals could be carried out under the cross border procedures. If so, a committal for a SA major indictable offence could be carried out interstate, but would commit the person for trial to a South Australian superior court.

Extraditions, authorised by the SEP Act, (and which are usually applied to major indictable offences) are not affected by the cross border justice laws. This would appear to be a corollary of, but is not made in any way explicit by clause 2 Section (3A)of Schedule 1.

The effect of section (3A) appears to be to confirm that the SEPAct does not affect the operation of the cross border laws and that the SEPAct does not apply in relation to a matter where the cross border laws would apply, apart from the SEP Act.

Cross Border Magistrates

Cross Border Magistrates from WA and the Northern Territory would be able to exercise their Jurisdiction, as well as South Australian Jurisdiction in South Australia. That would include warrants of commitment upon defendants to serve terms of imprisonment in South Australian Prisons. Courts of participating Jurisdictions would have powers to set up Registries, compel witnesses, administer oaths , punish contempt and issue warrants, summons and other process.

Judicial Officers and Legal Practitioners' would also receive the same protection and immunity as is provided by their enabling Legislation in their own States, within South Australia, although ALRM is concerned that whilst lawyers appearing before interstate cross border Magistrates would receive protection in SA , by clause 85(2), but interstate lawyers appearing before a prescribed court of the State of SA appear not to receive equal protection by Clause 73. Part 11, Division 1 specifically authorises the serving of custodial sentences in South Australia, upon orders made by Cross Order Magistrates in South Australia. There are parallel principles for the enforcement of fines, the registration of restraining orders and like matters.

ALRM concerns and comments about the South Australian Bill

The Legislation is extraordinarily complex. The SA Bill has 147 Clauses and covers some 58 pages. It might be described as a sledgehammer to crack a walnut.

The Western Australian Legislation has been enacted; the Northern Territory Legislation is before its Parliament. The South Australian Legislation is before the SA Parliament.

ALRM concerns:

1. The Bill allows for reversal of the onus of proof in relation to the facts of connection to the Cross Border Region. If there is an arrest, and the

arrestee disputes they were in the Cross Border Region at the time of the arrest , or that they ordinarily resided in the Cross Border Region at that time , the onus of proof of that matter is upon them. It is not appropriate in ALRM's submission that there should be any reversal of onus of proof in relation to matters relevant to proof of an arrest.. Clause 27

2. The laws will operate retrospectively and can be used with respect to offences committed before the commencement of the legislation. Clause 18.

3. ALRM is also concerned that the legal concept of residence is a very elastic concept, particularly when the English common law principles are to be applied to nomadic people who go to ceremonies, live , spend time with family, work, go to funerals and sorry camp and also seek entertainment both within and without the Cross Border Regions. There is the potential for real incongruity in applying English common law concepts of residence to such persons. ALRM had submitted that there ought to be a uniform definition of residence; otherwise it is likely that different common law interpretations could be applied by the Superior Courts of the States and Territory in the operation of essentially the same Legislation.

4. It is entirely conceivable that a cross border matter dealt with by a cross border Magistrate exercising SAWA&NT jurisdiction over a single defendant could give rise to three different appeals to three different Supreme Courts. This raises a further point that effectively the only Court that can exercise uniform jurisdiction over cross border appeals is the High Court of Australia , since it is the only Court of Appeal superior to each of the State and Territory Supreme Courts in the judicial hierarchy. Whether the High Court will be able to develop uniformity between the State and Territory Supreme Courts remains to be seen. There needs to be uniformity of interpretation and we argue below, a kind of cross border common law needs to be developed also. How will the High Court be able to do this , if cases do not merit Special Leave?

5. It is unclear, for example whether WA Magistrates, sitting in SA, exercising WA and SA jurisdiction consecutively over the same defendant, would be obliged to apply *Frank v Police*,[1] in determining a matter concerning a breach of WA law. That case establishes that, where a defendant's command of English is so poor that they cannot understand the criminal proceedings in which they are appearing, the Court is obliged to stay those proceedings and grant immediate bail, until such time as a competent interpreter is made available. But the South Australian case of *Frank v Police* is not binding authority on WA or NT Magistrates Courts. Would there be different results for consecutive WA and SA matters before a cross border Magistrate if no interpreter was provided? There is the potential that major Constitutional Law questions could arise, if the

[1] *[2007]SASC288, confirmed by the Full Court of the Supreme Court [2007]SASC418, appeal refused*

same human rights standards for defendants were not applied, as apply under the South Australian common law, as a result of *Frank v Police*. Clause 8(2)(d) of the SA Bill has a definition of WA law , impliedly this includes WA common law "with any appropriate modifications."

6. ALRM recommends that a Tristate Appellate Jurisdiction be set up with Supreme Court Judges from each participating State and Territory to hear cross border appeal cases and thus encourage the development of a tristate common law. Consistency is essential to the scheme if it is to succeed; all defendants are entitled to equal treatment before the law.

7. ALRM has also expressed major concerns about the resource implications of the Cross Border Legislation for its services. ALRM and the Legal Services Commission of SA provide legal services on the APY Lands. As such ALRM lawyers would potentially be appearing in Cross Border Courts sitting on the APY Lands from Western Australia and the Northern Territory. It would be necessary that the ALRM Legal Practitioners and the Field Officers concerned receive training in the relevant substantive, procedural and evidential law of Western Australia and the Northern Territory.

8. The same considerations would apply to CAALAS and ALSWA and the corresponding Legal Aid Commissions if they work in the cross border regions. The cost of providing and maintaining adequate and properly accredited training in these fields and the time and effort required for the practitioners concerned would be enormous. There are also implications in terms of Professional Indemnity insurance.

9. On going and properly accredited legal training for ATSILS lawyers and field staff, as well as Legal Aid Commission lawyers is likely to impose significant financial burdens upon the Commonwealth and is a significant matter for the consideration of this Senate Committee ,

10. ALRM is also concerned that there will be limited cross admission for its practitioners in respect of Western Australia and Northern Territory Law, which would be applied by Cross Border Magistrates, only to a limited extent. South Australian practitioners might be able to practice in Western Australia and the Northern Territory, but again it would be a limited status as Interstate Practitioners, cross admitted by the limited terms of the Legislation. They would not have the same status as fully admitted practitioners of those States and Territories.

11. ALRM also raised questions about the appropriate extension of Cross Border principles to Guardianship Boards and Mental Health Legislation. ALRM has recommended to State officials that there be consultation with Nganampa Health Council to find out from its Medical Practitioners, whether they would consider it desirable that they be given authority to

exercise detention powers that would apply in the NT and WA, should a person be detained under the South Australian *Mental Health Act*, but be required to be detained, from the APYLands cross border region to the Alice Springs Hospital rather than to Adelaide Mental Hospitals. This is not apparently, in contemplation at this time.

12. Similar considerations would apply in respect of Guardianship Orders for persons with mental handicaps from acquired brain injury being extended to the Tristate Region. This should apply in circumstances where a guardian such as the Public Advocate of SA might need to seek parallel orders in WA and NT in respect of a person under South Australian Guardianship who lives within the Cross Border Region. Logically it would be useful to allow for a cross border scheme of mutual recognition and registration of Guardianship orders. This is particularly relevant to cases of brain damaged petrol sniffers who reside in the cross border region. This is not in contemplation by governments at this time. ALRM hopes this impulse will be taken up. since it would be an appropriate response to the South Australian Coronial inquests into the deaths of petrol sniffers from 2002 and 2005.[2]

13. ALRM is concerned that this complex criminal justice legislation is being enacted to cover the Tristate Region. In SA it will have the effect of singling out the people who live on the APY Lands.. The South Australian citizens to whom the legislation would apply are predominantly the Ngaanyatjarra, Pitjantjatjara and Yankunytjatjara people and although the legislation is expressed in terms of geographical operation, its effects will be primarily be felt by them, because the Cross Border Region of SA is to be defined by regulations in terms of the lands, over which they have been granted Land Rights.[3]

14. The effect of allowing Magistrates sitting in the Tristate Regions to deal with matters from each of the three Jurisdictions(provided the person has connection with each of the three cross border regions) will be that many criminal files may be aggregated and dealt with at the same time. It will be entirely possible for a South Australian Magistrate sitting in Western Australia to deal with NT, SA & WA offences in relation to the same individual.[4] It is acknowledged that this will have the potential advantage of allowing an individual to have all of his or her outstanding criminal matters dealt with at once, but the individual can also be coerced into such aggregation of files by the strategic execution of first instance warrants.

---

[2] www.courts.sa.gov.au/coroner/findings/2002 Kunmanara Hunt , Ken and Thompson, but see also 2005 Petrol inquests , where the same recommendations were repeated word for word. www.court.sa.coroner/findings/2005 Kunmanara Cooper, Ward, Ken and Ryan.

[3] *Pitjantjatjara Yankunytjatjara Land RightsAct 1981SA* .See also *Gerhardy v Brown* (1985) 159CLR 70 , wherein the HighCourt held that the Act was a Special Measure for the purposes of the *RacialDiscriminationAct*1975

[4] Part 13 of the SA Bill

The possibility of custodial sentences being imposed is inevitably increased by aggregation of interstate matters. There is also a danger of forum shopping.

15. SA police are required to notify ALRM whenever there has been an arrest of an Aboriginal person in SA. SA Police General Order 3015 requires this in SA. Such notifications were acknowledged in SA pursuant to judicial decision [5] and are consistent with implementation, through police orders, of recommendation 224 of the 1991 *Royal Commission into Aboriginal Deaths in Custody* ('RCIADIC').[6]

16. It is unclear at this stage what effect the Cross-Border legislation will have on compulsory custody notifications, since none of the Bills comprising the scheme have yet made mention of it. Yet it is essential feature of Aboriginal legal representation.

17. Ideally, SA police would advise the ALRM of interstate arrests of Cross-Border persons who are arrested by SA Police , but without specific legislative provision, this cannot be taken for granted. Further, there is no indication as to who is responsible for notification to an interstate ATSILS when an interstate arrest occurs in SA. Clearly, it would be desirable for the legislative scheme to impose a uniform standard in that regard. Further, there will be cases where an arrest requires more than simple phone advice from the local ATSILS; some matters will require either a Field Officer or a legal practitioner to be present at the police interview. In such cases, ATSILS may need to consider inter-jurisdictional resource sharing;. These practical considerations need to be the subject of proper consultation with affected ATSILS as a group. There is a clear need for appropriate protocols to be arranged.

18. In addition protocols will need to be arranged to ensue that the appropriate ATSILS is notified of an interstate arrest by its jurisdiction's police, interstate. In the case of multiple state and territory arrests of the one person , the police and the ATSILS concerned will have to arrange between them selves questions of responsibility for persons in custody. This will apply to persons in custody in their jurisdiction on interstate charges, as well as their own jurisdiction charges and for persons in other jurisdictions, arrested on charges flowing from their jurisdictions. All of

---

[5] R v Williams [1976]14 SASR1.

[6] RCIADIC 224. That pending the negotiation of protocols referred to in Recommendation 223, in jurisdictions where legislation, standing orders or instructions do not already so provide, appropriate steps be taken to make it mandatory for Aboriginal Legal Services to be notified upon the arrest or detention of any Aboriginal person other than such arrests or detentions for which it is agreed between the Aboriginal Legal Services and the Police Services that notification is not required. (4:111)

these considerations bespeak the need for an interstate ATSILS consultation to discuss the full implications of the legislation .

19. The Commonwealth *Crimes Act 1914 section 23H and J* imposes a very detailed obligation upon Commonwealth officers investigating Commonwealth offences to notify ATSILS of the arrest of an Aboriginal or Torres Strait Islander person. It is a clear and unambiguous statutory obligation to notify. Section 23H(1) imposes on the investigating official a reasonable suspicion test in relation to the question of Aboriginal identity. This is a well known test and in order to satisfy it, the official has to advert their mind to the question of ATSI identity and make due inquiry in order to inform him or herself. The onus is on the official to do so. Upon satisfying the test, the official is under an immediate obligation to inform the person that they are notifying the nearest ATSILS of the arrest and to actually notify that ATSILS. Section 23H(1)(a)&(b).

20. The Commonwealth model should be a benchmark for the States and Territories. ALRM suggests that this Senate Committee should recommend that the states and Territories enact similar provisions in relation to custody notifications, albeit that ALRM recommends the repeal of section Section 23H subsection (8), which specifies that the investigating official is not obliged to comply to notify if the investigating official does not believe that the ATSI suspect is disadvantaged in comparison with members of the Australian community generally.[7]

21. ALRM also has concerns in relation to the operation of the Coroner's Jurisdiction under the Tristate Legislation and regarding the proposed affect of the Legislation on the Coroner's Jurisdiction on Deaths in Custody. At this stage it appears the State Coroner will have interstate jurisdiction over deaths of SA people in SA Police custody interstate, by virtue of section 3 of the *Coroner'sAct 2003* ,as well as geographical jurisdiction over all deaths in custody that occur in South Australia, regardless of whose custody the person was in.

22. A further concern is that persons remanded in custody or imprisoned as a result of the scheme could be imprisoned a long way from home. So a West Australian cross border resident could be sentenced to imprisonment under SA and WA Law in SA and prior to sentence could be held in a prison in Adelaide. Correctional authorities, not Magistrates decide where a particular prisoner will be held, during remand and after sentence . See *Sections 22and 23 Correctional Services Act SA* This tendency toward

[7] Section 23H Subsection (8) is contrary to RCIADIC 224; it should not matter whether the ATSI person is well educated, that their arrest is notified to the ATSILS. It is the fact of an ATSI person's arrest that is the gravamen of the RCIADIC recommendation, not the arrestee's education status and ability to withstand questioning. Subsection (8) should be repealed. The right to be advised by police of the availability of a prisoner's friend, or the right to have a solicitor present at interview is now regarded as a universal right for arrested or suspect persons, and it does not depend upon the relative disadvantage of the Aboriginal or Torres Strait Islander person or their level of education and understanding.

See for example section *79A Summary Offences Act* SA.

imprisonment at a place remote from the prisoner's home is contrary to RCIADIC Recommendation 168, but is an inevitable consequence of the scheme being brought into operation.[8] ALRM notes that the WA Coroner is sitting on a death in custody inquest in relation to an Aboriginal person who died in transit between a remote cross border police station and Kalgoorlie.

23. It is also a matter of concern to ALRM that the State of South Australia has not yet implemented the 2002 and 2005 recommendation of former Coroner Chivell that a small scale correctional institution be built on or near the APYLands.[9]

24. ALRM greatly fears that the legislation has the potential to increase the imprisonment rate on the APY Lands and imprisonment away from the lands causes significant social and family disruption to the members of these communities.[10]

ALRM 09 04 2009

[8].Rec 168:- That Corrective Services effect the placement and transfer of Aboriginal prisoners according to the principle that, where possible, an Aboriginal prisoner should be placed in an institution as close as possible to the place of residence of his or her family. Where an Aboriginal prisoner is subject to a transfer to an institution further away from his or her family the prisoner should be given the fight to appeal that decision. (3:310)

[9] www.courts.sa.gov.au/coroner/findings/2002 Kunmanara Hunt , Ken and Thompson, but see also 2005 Petrol inquests , where the same recommendations were repeated word for word. Recommendation 8.10, attached to the findings made by the Coroner in 2002 was that "Planning for the establishment of secure care facilities on the Anangu Pitjantjatjara Lands should commence immediately…."

[10] www.court.sa.coroner/findings/2005 Kunmanara Cooper. The findings in that inquest disclose just how complete the disruption flowing from imprisonment and detention in an alien environment can be for Anangu.