Chapter 4

Other measures

4.1 This chapter provides a summary of the evidence presented to the committee regarding several other measures in the proposed legislation. The committee notes that it was not possible to examine or report on all measures contained in the legislation package and has here focussed on the government's proposed changes to the alcohol, restricted materials and associated measures, as well as comments regarding customary law and provisions in the *Northern Territory National Emergency Response Act 2007*.

4.2 The government's proposed legislation offers the opportunity for communities to tailor their own alcohol management plans to replace the existing blanket restrictions imposed on prescribed communities under the existing legislation. Similarly, residents of a prescribed area will be able to apply to the minister for an exemption from the prohibition of restricted material which includes pornography and violent material.

4.3 Witnesses before the committee were generally supportive of the proposed changes. Some desired more government support for new alcohol management plans, including assistance in terms of development of the consultation process and the plan itself.

4.4 The Central Land Council was supportive of the move to provide communities with the greater decision-making powers with respect to both measures:

> I guess what we are trying to say, and the same applies for our approach to the restrictions on prohibited material, is that you had a system where communities were empowered to make a decision around alcohol and they had made a decision. Now that decision may change over time, who knows, but the NTER effectively took that decision-making power away and gave it back to the government. What we are suggesting, and all the evidence shows in relation to substance issues that you need to engage the community that has the problem, is that we would welcome moves that allow that decision-making power to come back to a community level.[1]

4.5 The North Australian Aboriginal Justice Agency (NAAJA) informed the committee that while they supported the ability of communities to shape their own alcohol management plans, they would prefer the starting point to be non-discriminatory:

> What we would point out, and this came through our board consultations, is that we think the starting point should be non-discriminatory. We think the Liquor Act should be applied to all Territorians the same. That may mean

1 Ms Jayne Weepers, Central Land Council, *Committee Hansard*, 17 February 2010, p. 6.

> that some communities, as they did prior to the intervention, want to ban alcohol from their communities. That was clearly the case in a lot of communities— alcohol was banned, and that was the decision that communities took. What came through very strongly from our consultations is that the communities themselves have the solutions that they know will work in their communities.[2]

4.6 NAAJA noted that the development of alcohol management plans was resource-intensive and would require support from government:

> I guess our concern about those changes is that it is going to be quite onerous. The process that is outlined in the new proposed legislation involves writing to the minister, which is going to be quite a complex process for individuals in communities. We just have concerns about how an individual in a community that has an issue with alcohol is going to be able to put their voice and get a practical plan in place within their community.[3]

4.7 Aboriginal Medical Services Alliance Northern Territory (AMSANT) noted that the ability to tailor local solutions was important, but also highlighted the need to provide support in developing and implementing alcohol management plans:

> One of the problems that has happened under the intervention is that a lot of the dry areas have been massively expanded in geographic size such that people cannot drink outside the dry area but still close by their community so they can walk back in, and some of them are eight to 10 kilometres away which, the morning after, is a fairly decent hike. But some of them have now been moved to 20 or 30 kilometres from communities and so on which has actually got quite dangerous for people. It has always been AMSANT's principle that the only successful alcohol management plans are ones that are driven by locals, and which locals properly resourced.[4]

4.8 Changes to alcohol measures also include the repeal of a section in the Northern Territory Emergency Response (NTER) legislation that allows police to treat private areas in prescribed communities as public places with respect to the power to apprehend intoxicated individuals. In effect, the provision as it currently stands allows police the right to enter a private residence in order to apprehend an intoxicated person for a certain period. Under the proposed change, this police power would only exist if requested by a resident of the community, and agreed to by the minister or delegate after community consultation.

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2 Mr Vernon Patullo, North Australian Aboriginal Justice Agency, *Committee Hansard*, 15 February 2010, p. 33

3 Ms Hannah Roe, North Australian Aboriginal Justice Agency, *Committee Hansard*, 15 February 2010, p. 32

4 Mr Chips Mackinolty, Aboriginal Medical Services Alliance Northern Territory, *Committee Hansard*, 15 February 2010, p. 58.

4.9 The Northern Territory Police noted that they had some concerns as to how this would operate but that community consultation was a positive addition:

> Certainly I think the issue of community consultation is what is important in this. All the communities in the prescribed areas are vastly different, so I think bringing it back to the local level with community consultation is a positive.[5]

4.10 Additionally, the committee recognises that the signage erected as part of the NTER alcohol and restricted materials measures has caused considerable offence to Indigenous communities. It therefore welcomes provisions in the proposed legislation that would allow greater discretion in placing appropriate signage and publishing notices.

4.11 The committee notes that several witnesses were concerned that the redesign of the NTER did not include amending provisions in the original legislation relating to the consideration of customary law in courts in the Northern Territory. Sections 90 and 91 of the *Northern Territory National Emergency Response Act 2007* include provisions that ensure bail and sentencing decisions cannot take into consideration any form of customary law or cultural practice.[6]

4.12 NAAJA was of the opinion that customary law strengthened Indigenous communities and needed to be recognised in Northern Territory courts. Mr Vernon Patullo, NAAJA, stated:

> I will say that, with the remote parts of the Northern Territory, not so much the urbanised parts, in the Little children are sacred report they are always talking about customary law. They do not recognise it in this system, and we really need them to understand that type of customary law. If customary law was in place, many of these things would never have happened in these communities. That was customary law. That was our law. I think you really need to look at it, particularly in the Northern Territory. We could manage many of these issues that they imposed on us if our law was recognised.[7]

4.13 Mr Jared Sharp, NAAJA elaborated further, stating:

> As Mr Patullo pointed out, we are very concerned about the glaring omission of customary law in the redesigned package. In our submission the NTER measures, particularly sections 90 and 91 of the NTER act, cause discriminatory treatment to Aboriginal people in the matters that they can have raised before courts, for sentencing or for bail purposes. We are very concerned that the government has not even addressed this in its redesigned package. As Mr Patullo pointed out, our board is very strongly of the view that customary law pays a vital role in community justice. As reports such

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5 Mr Robert Kendrick, Northern Territory Police, *Committee Hansard*, 15 February 2010, p. 24.

6 *Northern Territory National Emergency Response Act 2007*, subsection 90(b) section 91.

7 Mr Vernon Patullo, North Australian Aboriginal Justice Agency, *Committee Hansard*, 15 February 2010, p. 28.

> Little Children are Sacred have pointed out, the approach we think should be taken is actually developing the utilisation of customary law—rather than condemning it, we should have it working in partnership with the Northern Territory law.[8]

4.14 Concerns over the exclusion of customary law from the redesign of the NTER were shared by the Law Council of Australia,[9] Northern Territory Legal Aid Commission[10] and the Central Australian Aboriginal Legal Aid Service (CAALAS). Ms Emily Webster, CAALAS, stated:

> …we note that the bill before you does not deal with the issue of customary law. At the time the legislation was put in place in 2007 mechanisms allowing customary law to be taken into consideration in sentencing and in bail applications were removed. We are quite concerned that this has not been addressed at this point in time in the redesign of the legislation. We believe that those provisions that take away the right of a magistrate or a judge in the Northern Territory to take into consideration those issues should be repealed, therefore allowing them to take into consideration those issues when determining sentencing and bail applications.
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> …
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> It is actually not just about NTER legislation. It is about any crime in the Northern Territory. It is not about whether you are prosecuted under the NTER legislation. It is about when you appear before a court in the Northern Territory.[11]

4.15 Mr Richard Downs, Alyawarr Engkerr-Wenh Aherrenge Cooperation informed the committee of the importance of customary law in remote communities, stating:

> We have always had controls and measures in place in remote areas and the communities, working in partnership with the Northern Territory government over the last 30 or 40 years. We utilise tribal customs and ways. Punishment has to be dealt out, but it is done in a particular way. You follow the customary family line, so the family takes responsibility. We were able to control that but, since the AFP and the police came in, those controls and measures were taken away from us. So there is nothing much we can do. People say, 'Why aren't you people taking control of your kids?' but as soon as we touch them we are portrayed as offenders. The tide has turned and there is nothing we can do. But we did have those controls

8 Mr Jared Sharp, North Australian Aboriginal Justice Agency, *Committee Hansard*, 15 February 2010, pp 28–29.

9 Dr Sarah Pritchard, Law Council of Australia, *Committee Hansard*, 25 February 2010, p. 11.

10 Ms Susan Cox QC, NT Legal Aid Commission, *Committee Hansard*, 15 February 2010, p. 30.

11 Ms Emily Webster, Central Australian Legal Aid Service, *Committee Hansard*, 17 February 2010, pp 33–34.

> and measures in the leadership group, and it was working. But we are losing it.[12]

4.16 FaHCSIA noted however, that the issue of customary law and its role in bail and sentencing decisions was under review, with a decision on whether further legislative reform was required to be made after 12 months.

> The bail and sentencing provisions in Part 6 of the Northern Territory National Emergency Response Act are not subject to the provisions that suspend the operation of the Racial Discrimination Act 1975 (RDA). Rather, they apply in relation to all bail and sentencing decisions made under Northern Territory legislation, regardless of the defendant's race.
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> The provisions have been reviewed separately by the Attorney-General's Department and a report provided to the Attorney-General and the Minister for Home Affairs on 12 November 2009. There is little evidence available at this stage about the impacts of the provisions. The Attorney-General and Minister for Home Affairs have therefore decided to monitor the provisions for a further 12 months before deciding whether legislative reform is required.[13]

4.17 The committee notes that this is an area that should be the subject of future consultation with remote communities in the Northern Territory.

4.18 The committee supports the changes outlined in the government's legislation and recommends that the Senate pass the government bills.

Recommendation 4

4.19 The committee recommends that the Senate pass the government's bills.

Senator Claire Moore

Chair

12 Mr Richard Downs, Alyawarr Engkerr-Wenh Aherrenge Cooperation, *Committee Hansard*, 17 February 2010, p. 26.

13 FaHCSIA, answer to question on notice WR33, p. 1.