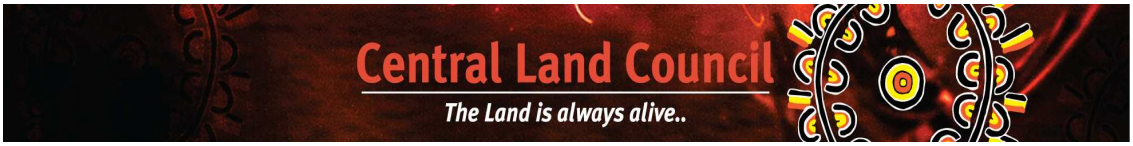


CLC Submission to the Senate Community Affairs Committee Inquiry into *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009* and related bills

February 2010

The Bills before the Committee

There are three Bills before the Committee for consideration. In this submission, the CLC use the following shorthand to refer to those Bills:

- the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009* – the Government Bill;
- Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Bill 2009 – the 2009 Measures Bill; and
- the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Restoration of Racial Discrimination Act) Bill 2009 – the Greens Bill.

Contents

Summary

Overall, the CLC is deeply disappointed that the Australian Government has squandered a valuable opportunity to reform the Northern Territory Emergency Response (NTER) in a way that would ensure positive outcomes on the ground, respond to community concerns, heal the hurt caused by the NTER processes, and lay the foundations for a respectful and equal relationship with Aboriginal people in the NT.

The Government's approach to redesigning the NTER and reinstating the RDA raises six serious concerns:

1. Many of the critical recommendations of the NTER Review Board (Yu et al. 2008) remain unaddressed, particularly those relating to resetting the relationship with Aboriginal people (see Attachment A for the CLC's advice on resetting the relationship), and supporting legitimate Aboriginal governance arrangements. This includes the recommendation that both levels of government support programs and structures 'enhance Aboriginal governance bodies at local and regional levels that will enable communities to achieve their cultural, political, economic and social goals'.

2. Partial reintroduction of the RDA: Despite the rhetoric of the Government in relation to its commitment to the RDA, the Bills presented by the Government achieve only partial reinstatement of the RDA. While the CLC welcomes the removal of clauses which exclude the operation of the RDA, for the NTER to be genuinely non-discriminatory the Government must ensure that the RDA prevails over the legislation which implements the NTER. This can be achieved through the insertion of a simple clause in the Government Bill (see below page 5). It may, however, require the Government to take further steps to ensure that all measures are non-discriminatory or can appropriately be described as a special measure.

3. Five year leases: The case for the retention of the five year leases has not been made. Despite this, the Australian Government intends not only to continue the five year leases but to put their continuation beyond the reach of a challenge under the RDA.

4. That the community consultation process undertaken by FaHCSIA was flawed and deficient, and statements connecting the consultation process with the assertion that the measures are 'special measures' is disingenuous and misleading. See below (page 7).

5. That the retention, and in some cases minor adjustment of measures, is generally not based on a rigorous and independent evaluation of the effectiveness of the measure, nor an evaluation of the cost effectiveness or opportunity cost of pursuing those initiatives rather than alternatives. See below (page 9).

6. While the proposed new income management regime is less blatantly discriminatory, it is still highly punitive and based on the assumption that welfare recipients are unable to care for their children. Providing for a national income management scheme within legislation primarily aimed at redesigning the NTER does not allow for adequate transparency or broader public debate about such a significant welfare reform proposal.

The CLC contends that the passage of the Australian Government's Bills in their current form will not achieve a 'redesign' of the NTER but simply a continuation of the NTER. Nor will the passage of the Bills unamended achieve a full reinstatement of the RDA. A crucial opportunity to turn the NTER into something that has meaning and support from communities will be lost. In summary, the CLC makes the following recommendations:

- that proposed amendments to the income management be removed from the current Bills and be enacted separately for consideration at a national level;
- that the Government Bill be amended to include a clause which makes it clear that the RDA prevails over legislation implementing the NTER; and
- the Government Bill be amended to incorporate the specific recommendations set out below with respect to each measure.

Feedback from the Aboriginal people in central Australia, including through CLC Council meetings and the CLC community survey (2008) has repeatedly shown that not only the process of the NTER but also certain specific aspects of the NTER have caused great offence to Aboriginal people in central Australia. Particularly the taking of the five year leases without consent, the changes to the permits system, the lack of consultation about the placement and role of the GBMs, and the strong public inference that Aboriginal people neglect or abuse their children and use pornography as signified by the gratuitously large blue signs setting out alcohol and pornography restrictions. The Australian Government's redesign of the NTER, as set out in the Government Bill and the 2009 Measures Bill leaves these measures virtually unchanged. The NTER redesign does not respond to the significant issues raised in the NTER review (Yu et al. 2008) or to the issues raised by the people most affected by legislation.

With respect of the reinstatement of the *Racial Discrimination Act* 1975 (the RDA), the CLC is astounded that the Australian Government proposes merely to remove the clauses which exclude the operation of the RDA without making it explicit that the RDA prevails over the legislation which implements the NTER. This means that the Australian Government will continue to implement legislation that it knows is discriminatory. As the Minister (Macklin 2009) has stated:

> [T]he NTER will never achieve robust long term outcomes if measures rely on the suspension of the Racial Discrimination Act.

Having recognised this, it is incumbent on the Australian Government to ensure that the provisions of the RDA prevail.

Of particular importance to the CLC is the apparent intention of the Government to deny Aboriginal land owners the opportunity to challenge the five-year leases under the RDA. The Australian Government has stated that it considers that the amended five-year leases will be a special measure and not discriminatory. Significant doubt is cast over the genuineness of this statement, and the reputation of the Government, when its legislation prevents this issue being considered independently by the courts.

Further, the continuation of the vast majority of NTER measures by calling them special measures is not justified by the government. The consent of people affected by the measures is required. The

consultation process undertaken under Future Directions discussion paper (FaHSCIA 2009) was not sufficient to justify special measures, if that was in fact the intended purpose of the consultations. The CLC has significant concerns over the consultations processes used by FaHSCIA in redesigning the NTER. The consultations were poorly designed and not well implemented across our communities. Nor at any stage were communities asked to give consent to the measures. The CLC believes that this omission is significant and has meant that no measures can be called special measures to reinstate the RDA.

This leads directly to the issues of evidence base in determining the redesign of NTER. There are significant limitations to reports used to present arguments of positive impact of the NTER. Further, it is disingenuous of the government to argue for the continuation of various measures by presenting positive impacts without considering the negative impacts and consequences.

In regards to income management, the CLC is not generally opposed to welfare reform or to all forms of income management. It is, however, a complex issue, and the proposed extension of an income management scheme across Australia raises issues beyond redesigning the NTER. When the NTER was introduced, the income management provisions were contained in discrete legislation and there is nothing to prevent the proposed reforms to income management being put into a separate bill. This would allow what has become a national issue to be considered separately from other measures which are aimed only at redesigning the NTER.

The CLC's comments on redesigning the NTER, as provided in our submission to the NTER Future Directions (2009), are provided at Attachment A.

Introduction

The Central Land Council (CLC) welcomes this opportunity to provide a submission to the senate inquiry into the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009* and related bills. As a Commonwealth statutory body under the *Aboriginal Land Rights (NT) Act* and a representative body under the *Native Title Act*, the CLC has made numerous submissions (CLC 2009, CLC 2008b, CLC 2008c, CLC 2008d, CLC 2007a, CLC 2007b), and undertaken detailed community consultations (CLC 2008a, CLC 2007) , regarding the impact and effectiveness of the NTER. This submission should be read in the context of this previous work.

Before responding to the individual measures in the legislation, the CLC's submission makes some opening remarks on the following issues:

- Timing of the inquiry
- NTER consultation process
- Evaluating the impact of the NTER
- Partial reinstatement of the Racial Discrimination Act

The submission then considers the non-income management provisions, including alcohol restrictions, pornography restrictions, five year leases, community store licensing, business management area powers, law enforcement powers and controls on the use of publicly funded computers. Finally, the submission makes some brief remarks on the income management provision.

Timing of the inquiry

The CLC is concerned about the timing of this inquiry. The introduction of the Bills in late November 2009, and subsequent reference to the Committee for inquiry and report by March 2010, has meant that most organisations, including the CLC, are struggling to give these matters the consideration they deserve. It is well known that both in central Australia and in the Top End climatic conditions, and cultural business, severely limit the capacity to undertake field work in the summer months. As a result most of the staff of the Land Council take leave over this time, and there is no Executive meeting until late February. A request to the Community Affairs Committee seeking an extended timeframe for this inquiry was refused, although the CLC was allowed a short extension on our submission. There is no doubt that there would be a far greater number of submissions from central Australia if the inquiry was not taking place over the summer period.

The question of timing is even more critical given the Government Bills seek to create a scheme for the national roll-out of income management, a policy issue which should be addressed distinct from the NTER and the context of the NT. Attempting to address both the NTER issues and the proposed national welfare reform agenda makes it even more difficult for organisations and individuals to adequately consider and address all of the issues and implications.

The proposed national income management regime should not have been introduced in the context of a redesign of the NTER, and certainly more time and more honest public debate about welfare reform is required.

NTER redesign consultation process

The CLC has a number of serious concerns about the NTER redesign consultation process. Those concerns fall into two categories: concerns about the connection being drawn between the consultation process and the concept of special measures, and general concerns about flaws in the consultation process itself.

The redesign consultation process and special measures

In the Future Directions Discussion Paper, the Government set out the following list of the key features of special measures under the RDA:

- the measure must result in a benefit to some or all members of a class of people
- membership of this class must be based on race, colour, descent or national or ethnic origin
- the measure must be for the sole purpose of improving the situation of the beneficiaries so they can enjoy and exercise their human rights and fundamental freedoms equally with others
- the protection given to the beneficiaries by the measure are necessary in order to achieve this equal enjoyment of human rights and freedoms; and
- the measure must end as soon as it has achieved its aims.

Importantly, what is missing from this list is any reference to obtaining the consent of the group who are affected by the special measure. The relevance of this omission was highlighted when information published in the media suggested that the Government was intending to rely on the consultations to argue that the redesigned NTER was a special measure. This led to considerable concern about the ramifications of involvement in the redesign consultation process. As such, the CLC wrote to the secretary of FaHSCIA that our input was not to be construed as consent to special measures (see Attachment B).

In November 2009, the Australian Human Rights Commission (AHRC) released Daft Guidelines for Ensuring Income Management Measures are Compliant with the Racial Discrimination Act. The AHRC reviews current law in relation to special measures and concludes that:

- for measures which benefit a particular racial group without restricting the rights of members of that group (which the AHRC terms 'affirmative action measures'), the wishes of the target community are 'of great importance (perhaps essential)' in establishing whether a measure meets the legal definition of special measure; and
- for measures which are designed to benefit a particular racial group but restrict the rights of some or all members of that group, such a measure cannot meet the legal definition of special measure unless the consent of the target community has been obtained.

It is very clear that the consultation redesign did not provide an opportunity for affected communities to provide, or withhold, their consent for the proposed measures. In addition, the flaws in the consultation process (see page 8-9) and questions set out in the Future Directions

Discussion Paper (FaHSCIA 2009a) and in the government's report on the consultation (FaHSCIA 2009b) specifically avoid giving community members the opportunity to comment on whether or not they agree with proposed measures. For example, the questions asked in relation to alcohol restrictions were:

> What are the main benefits of alcohol restrictions for individuals and communities? What are the main problems with alcohol restrictions for individuals and communities? If restrictions continue, how could they be improved? etc. (Australian Government 2009)

The analysis of answers to these questions does not allow a determination of consent by the consulted group or community. Aboriginal people in the affected NT communities have not consented to special measures.

General concerns about flaws in the consultation process

Putting aside the relationship between the redesign consultation and the legal concept of special measures, the CLC has a number of concerns about the way the redesign consultation was implemented. As has been stated, this was one of the largest consultation processes ever conducted by the Australian Government with Aboriginal people in the Northern Territory, however the CLC believes that it should not be regarded as a precedent for future consultation processes.

One of the major problems with the redesign consultation was confusion about its purpose. This was not made clear in the Future Directions Discussion Paper or through the process itself. Was it intended to provide an opportunity for people to provide feedback on the NTER? If so, it was too overtly geared towards obtaining support for the measures. Further, substantial feedback on the perspectives of the NTER measures is already available following more independent processes (CLC 2008, Yu et al. 2008). Was it intended to gather information about the effectiveness of the NTER? If so, it relied on very poor research methodology. Was it intended to consult in relation to, or obtain consent for, proposed new measures? If so, as described above, the process simply did not provide respondents with an opportunity to agree or disagree with specific proposals.

Without clear and appropriate goals and an effective design, a consultation process may be not only ineffective but also counter-productive. Any consultation process in relation to the NTER must have regard to the second major recommendation of the NTER Review Board: that in addressing the needs of remote communities the NT and Australian Governments must 'reset their relationship with Aboriginal people based on genuine consultation, engagement and partnership' (2008: 12). This is required both to repair damage caused by certain earlier NTER processes and to ensure that new measures are effective in the long term.

This resetting of the relationship cannot simply be achieved by any consultation process. Nor is it sufficient to implement a process whose overarching objectives are to present the Government's own views on the NTER and collect 'feedback from stakeholders on the benefits of the various NTER measures, and how they could be made to work better' (CIRCA 2009: 7). Where a consultation process does not provide Aboriginal people with improved control over their own circumstances and an opportunity to participate in solutions then it instead further marginalises people, perpetuating the situation where Aboriginal people in the Northern Territory are at times both over-consulted and systemically ignored.

Against this general concern, the CLC notes the following flaws in the consultation process and the documents on which the process relied:

- lack of independence: the government who undertook all of the consultations, was both arguing that all NTER measures had been effective and purporting to obtain feedback on those measures;

- misleading / one-sided presentations: for example, in relation to the five-year leases the Future Direction Discussion Paper and PowerPoint presentation used in the consultation carefully avoid any reference to the compulsorily acquisition of leases against the wishes of landowners, and instead rely on the misleading assertion that the leases were required for the delivery of services, repair of buildings and upgrade of infrastructure.

- lack of information: in the CLC's experience, there is still a significant level of confusion about the NTER measures. The material used in the consultation process is more concerned with promoting the NTER than explaining exactly how the measures work and how they relate to other possible options, and did not address the need of communities for improved information.

- lack of notice: community members have reported being unaware of the timing of consultation meetings.

- lack of interpreters: both the CIRCA Report (CIRCA 2009) and the *Will They Be Heard* (Nicholson et al. 2009) report refer to a lack of interpreters during the consultation process.

- lack of transparency: the information was collected, collated, interpreted and disseminated by the Government without any opportunity for its conclusions to be reviewed.

  (see also the comments of Nicholson et al. 2009, *Will they be heard?*)

In light of these significant deficiencies, the CLC argues that the process was flawed. The CLC also finds it difficult to see what the consultation process has achieved, and urges that it not be considered a model for future consultation.

Evaluating the impact of the NTER

The Australian Government justifications for maintaining the majority of the NTER legislation and extending the jurisdictional area of income management has been to argue the positive contribution that the NTER measures are making towards the well-being of Aboriginal people in NT, particularly Aboriginal women and children. It needs to be noted, that a significant barrier to obtaining strong evidence on impacts is the lack of an initial NTER's policy framework, including the lack of clear objectives and measurable outcomes, and the lack of baseline data to draw comparisons. While some of the NTER measures may have had some benefit for some people, this evidence should not be given more weight than evidence highlighting the negative impacts and unintended consequences of the measures. Using baseline data is essential to drawing out the actual impact of a measure overtime.

Each report (Australian Government 2009; AIHW 2009; Yu et al. 2008; CLC 2008a; Australian Government 2008) used by the Government to justified positive impact, has also drawn out several negative impacts and consequences of the NTER measures. The Government has on the whole chosen to ignore these impacts and consequences in its development of the latest NTER legislation.

There are also a number of limitations with the reports used by the government:

AIHW's Evaluation of Income management in NT (AIHW 2009)

The AIHW's report on income management analysed data compiled by FaHSCIA from a survey of 76 income managed clients and focus groups involving 167 stakeholders in 4 locations. AIHW clearly highlights the limitations of the report, stating that the "research methods would all sit towards the bottom of the evidence hierarchy" and "that a major problem for the evaluation was a lack of a comparison group, or baseline data…." (2009: 3). The AIHW goes on to suggest other limitations including small sample size, non-randomised sampling method and recall bias.

2008 Independent review of the NTER (Yu et al. 2008)

The NTER review team was asked to undertake an independent and transparent review of the first 12 months of the NTER. The review team found the lack of empirical data a major problem to their reporting and analysis on NTER impacts. In addition, the CLC found that the review report lacked a robust cost benefit analysis of the measures and the co-ordination of the NTER. Further, the Australian newspaper published articles questioning the independence of the NTER review report and arguing that the delay in its publication was because the report was extensively rewritten for the public (The Australian, 2008).

Government Business Managers Survey (TNS Consultants 2008)

The Government Business Managers Survey conducted by TNS Consultants surveyed 49 Government Business Managers working in 71 communities. The analysis and conclusion reached are limited for the following reasons. The research was point in time and despite asking a series of questions on change and impact of measures in the community the majority of GBMs had no prior knowledge or experience in the communities before the NTER and a large proportion (41% surveyed) had lived in the community less than 6 months. The results were heavily subjected to participant bias, particularly because of the role and position of GBM within government and the community. The authors did not conduct surveys on other groups for comparison or as baseline. Finally, despite the author's arguments that the survey was quantitative, the survey was entirely qualitative (with some quantitative analysis) and based on perceptions, not facts. The survey could report on a GBM's perception of impact of NTER measure, but the aim of the report to 'collect benchmark data to assess whether conditions within communities are improving as a result of the NTER measures' (TNS Consultants 2008: 1) was not achieved with the methods used and the data collected.

CLC survey 2008 (CLC 2008a)

The Central Land Council surveyed 141 Aboriginal people in six of our communities. The CLC is very aware and concerned that the Government has used only parts of the results to convey 'positive impact' of NTER, whilst ignoring the majority of the research findings. The CLC survey was intended to better inform the CLC and others working in the field on Aboriginal people's perspective on the review. It was therefore based on perceptions and experiences of Aboriginal people affected by the

measures. The limitations of the survey are small sample size relative to the CLC communities, the lack of baseline data and longitundal analysis, and the short fieldwork timeframe.

Whilst, the government has used sections of each of these reports to argue the positive contribution of the NTER, the CLC argues that the opposite could also be undertaken. That is, sections of all the reports could be used to argue the negative impacts of the NTER. Both views are unhelpful without the other view at hand, what is needed is quantitative data that measures impact, a cost benefit analysis and finally a robust analysis and consultation that considers all of the arguments and draws out consent on future action.

Partial Reinstatement of the *Racial Discrimination Act*

One of the three key recommendations of the NTER Review Board was that (Yu et al. 12):

> Government actions affecting Aboriginal communities respect Australia's human rights obligations and conform with the Racial Discrimination Act 1975 (RDA).

In its response the Australian Government said that it accepts this recommendation. Since that time, on a number of occasions the Australian Government has stated that robust long term outcomes will not be achieved while the NTER contravenes the RDA.

Despite these statements, the Government Bill will not ensure that all NTER measures conform to the RDA and are not consistent with Australia's human rights obligations. While the Government Bill will repeal the clauses which exclude the operation of the RDA (and Northern Territory anti-discrimination legislation), it fails to ensure that the RDA prevails over legislation which implements the NTER. This means that those measures which are contained in the NTER legislation will be retained regardless of whether they conform with the RDA, as legislation which is enacted later in time prevails over earlier legislation.

CLC recognises that the Government Bill will allow decisions made and actions taken under NTER legislation to be subject to the operation of the RDA, however those measures which are contained in the NTER legislation itself will prevail over the RDA. The CLC believes that a number of measures which are discriminatory (and are not a special measure) will survive the enactment of the Government Bill. The most important of these is the five-year leases, which are discussed further below (see page 15). Other discriminatory measures which will survive the Government Bill, and will not be open to challenge under the RDA, include the retention of the business management area powers, controls on government funded computers on Aboriginal land, the retention of the ACC's additional powers and the removal of the permit system / creation of a public right of access to Aboriginal land.

By comparison, the CLC notes that the Greens Bill would insert new clauses into the NTER legislation which state that the provisions of the RDA prevail over the later legislation. This would ensure that the NTER was genuinely non-discriminatory.

In her second reading speech, the Minister for Indigenous Affairs said the following:

> The government believes that all NTER measures are either special measures under the Racial Discrimination Act or non-discriminatory and therefore consistent with the Racial Discrimination Act.

If the Government genuinely believed this statement, it would allow all of the NTER measures to be subject to the RDA by including a clause to the effect that the provisions of the RDA prevail over the legislation which implements the NTER. It is disingenuous, if not misleading, for the Government to describe all of the NTER measures as non-discriminatory / special measures when the Government Bill does not allow for all such measures to be challenged under the RDA.

The legislation which implements the NTER was enacted (with the support of the current Government) within weeks of its introduction to Parliament. The CLC can see no justification for the continued delay in the (partial) reinstatement of the RDA to that legislation, as the Government has already had more than two years to work on non-discriminatory alternatives. The reinstatement of the RDA should occur as soon as possible, at the latest on 1 July 2010 (and not 31 December 2010).

The CLC:

1. supports the repeal of clauses which exclude the operation of the RDA;
2. supports the removal of clauses which deem all actions taken pursuant to the NTER to be a special measure, and their replacement with clauses which set out the objects of the Government;
3. recommends that the Government makes the NTER conform with the RDA by enacting clauses to clarify that the provisions of the RDA are intended to prevail over the legislation which implements the NTER (such as provided in Items 1, 3 and 5 of Schedule 1 of the Greens Bill); and
4. recommends that the reinstatement of the RDA take effect as soon as possible, and at the latest by 1 July 2010.

Non-income management provisions

Alcohol restrictions

Government proposal: Existing alcohol restrictions retained, although allow for the development of local alcohol management plans which could amend the restrictions. The Minister will retain the right to re-impose alcohol restrictions. Amend the existing power which allows police to enter a private residence in a prescribed area as if it were a public place so they can only be put in place through a Ministerial declaration. Remove the requirement for a licensee to record the sale of take-away liquor. Continue exemption for recreational and tourism activities.

CLC response:

The area of alcohol regulation is one area where a significant body of research is available in relation to how governments can intervene effectively (Doran et al. 2008, d'Abbs 2001). While the CLC has

not opposed the blanket alcohol restrictions imposed by the NTER, this does not mean that the current restrictions should be regarded as the most effective way of tackling the serious problems arising from high levels of alcohol consumption. Further, the proposed amendments remain discriminatory and the CLC believes they are not adequate for addressing alcohol related issues in central Australia.

Most of the communities in the CLC region had already been declared 'dry' communities prior to the NTER restrictions, based on community consent. Research conducted in this area demonstrates the importance of local community support for the effectiveness of alcohol restrictions (Gray 2000, Senior et al. 2009). Further, such initiatives demonstrate the preparedness of communities to take leadership on this issue and to support alcohol restrictions.

The move towards local alcohol management plans is welcome provided that plans are implemented following a genuinely consultative and educational process with communities. It should be remembered that many communities had already made decisions about local alcohol restrictions prior to the NTER, and communicated those restrictions to the public through signs of their own design prior to the imposition of the large blue signs. In the past, the CLC is aware that Aboriginal people who have wanted to take action in relation to alcohol management in their area have been restricted by a lack of access to resources or support from government agencies (including the police). Resources must be provided to allow communities to engage in their local plan properly and effort is required to ensure relevant agencies and departments are signatories to the plan. The CLC strongly recommends that these local plans be expanded to include other drugs. Further investment in treatment, support and education campaigns on alcohol and other drugs remains critical.

Research also demonstrates that reducing the availability of alcohol supply and implementing appropriate alcohol pricing are crucial to reduce alcohol consumption and alcohol related harm (Collins and Lapsley 2008), and that such measures are cost effective. Many Aboriginal people from remote communities and in town have supported campaigns to reduce alcohol availability in Alice Springs and Tenant Creek, and on the whole these campaigns are met with fierce opposition form licensees and members of the general public. The Alice Springs Alcohol Management Plan is perhaps the most comprehensive approach to alcohol taken in the NT. The results of this show a 18% decrease in pure alcohol sales in Alice Springs (Senior et al. 2009). However, more needs to be done in Alice Springs and other major towns in NT. Any serious attempt to address alcohol issues has to address the availability and pricing of alcohol in Alice Springs and Tennant Creek. There must be a reduction in alcohol outlets in Alice Springs and Tennant Creek, a continued reduction in take-away hours, and the introduction of a volumetric tax.

In summary, creating legislative restrictions in relation to Aboriginal land is easy and restrictions were already in place across most communities in the Central Land Council region, but implementing alcohol reduction strategies in Alice Springs and Tennant Creek continues to be politically unpalatable (particularly volumetric taxes and buy back of licences). Neither level of government seems prepared to make tough decisions, despite the support of research and repeated campaigns from Aboriginal people and organisations.

The CLC:

1. supports communities being provided with the opportunity to develop their own alcohol management plans, provided resources are allocated to allow this to occur properly (see note re other drugs above), in preference to blanket restrictions.
2. supports the removal of the power for police to enter a private residence as if it were a public place;
3. supports the removal of the requirement to record the sale of take-away over $100;
4. recommends the immediate allocation of substantial additional funds to support and increase alcohol and other drug treatment and rehabilitation programs in all regional towns and larger communities;
5. recommends that the NTER alcohol measure be broadened to include other drugs allowing a more comprehensive approach to substance misuse to be adopted;
6. recommends the immediate adoption of comprehensive measures aimed at reducing alcohol supply, including the buy-back of liquor licences and a volumetric tax; and
7. recommends that communities be asked to design or paint their owns signs setting out their identified alcohol restrictions.

Pornography restrictions

Government proposal: The current restrictions will remain in place, however communities will be able to ask to have the restrictions lifted in their community. Decisions on such a request would take into account the prevalence of very violent and sexually explicit material in the community, the well-being of the people in the community, and the views of those in the community, and the views of the relevant law enforcement agency.

CLC response:

The CLC supports measures aimed at ensuring that young people are not exposed to prohibited material, but remains seriously concerned that the Australian Government has failed to provide any evidence to suggest that the current blanket restrictions on pornography have actually worked, or that it was an issue that warranted such a universal shaming of Aboriginal people. The CLC recommends an approach that would allow communities to discuss the issue of prohibited material, including through appropriate community education initiatives, and allow communities to decide whether to impose restrictions beyond that which already applies to the broader public.

It is essential that the gratuitously large signs setting out alcohol and pornography restrictions, which are deeply offensive and insulting to Aboriginal people, be removed. This would signal some good faith in redesigning the NTER and 'resetting the relationship' between the Australian Government and Aboriginal people in the NT. It is the reference to pornography on these signs which is particularly offensive and shameful.

A community decision about the application of further restrictions would also include a discussion about signage and warnings about prohibited material. An 'opt-in' scheme rather than the blanket restriction approach would empower rather than stigmatise a community.

The CLC:

1. recommends that the Australian Government proposal to retain the blanket pornography restrictions not be supported;
2. recommends that the Bill be amended to provide for an 'opt-in' approach, allowing local communities to seek restrictions over and above those that apply to the general public;
3. recommends that communities be supported to ensure that these sensitive issues can be discussed appropriately before consent is given for local restrictions;
4. recommends that the Australian Government invest in alternative initiatives to ensure that children are not exposed to inappropriate material, including community education programs about pornographic material and the film classification system;
5. advises the consultation process that was undertaken did not meet the requirements for a Special Measure under the RDA; and
6. recommends that the gratuitously large signs setting out alcohol and pornography restrictions, which are deeply offensive and insulting to Aboriginal people, be removed, and local signage is developed by a community seeking restrictions if required.

Five-year leases

Government proposal: The five-year leases will continue until August 2012 and the provisions of the NTNER Act in relation to the five-year leases will be modified slightly. The changes to the NTNER Act include a new objects clause for the Part under which the leases are granted, a requirement that the Minister make guidelines for the administration of five-year leases and further provision for the Commonwealth to enter into negotiations with the land owner in relation to a longer term lease.

CLC response:

The five-year leases are discriminatory. The government must seek the consent of Traditional Aboriginal owners for any lease arrangement. As the Native Title Report 2009 states (Australian Human Rights Commission 2009: 155):

> The five-year leases represent a low point in the Government's treatment of Aboriginal land.

The CLC shares this view, and believes that the five-year leases must not be continued.

The arguments put forward by the Government for the continuation of the five-year leases have never been well substantiated and have shifted over time, reflecting an attempt to justify a measure that operates for the convenience of the Government rather than the benefit of communities. The information set out in the Government's 'Policy Statement' (FaHSCIA 2009c), and the proposed

'objects' clause in the Government Bill, represent yet further poorly considered attempts to justify why the five-year leases are required.

It is difficult to avoid the conclusion that because five-year leases cannot be justified, the government will ensure that their continuation cannot be challenged under the RDA. The Government Bill imposes two barriers to such a challenge. Firstly, the express invocation of section 8 of the *Acts Interpretation Act* appears to be an attempt to protect the interests acquired by the Government under the five-year leases. Secondly, the failure to include a clause stating that the RDA prevails over the NTNER Act is likely to protect the five-year leases from challenge as they are created by operation of section 31(1) of the NTNER Act itself.

It is disappointing that the Government intends to retain the five-year leases. It is reprehensible that it proposes to do so in a way that puts the continuation of the leases out of the reach of a challenge under Part II of the RDA. The CLC believes that the five-year leases are discriminatory and are not a special measure, and the Government is denying Aboriginal land owners the opportunity to have a court determine the issue.

As the Government (FaHSCIA 2009a) has stated:

> The NTER will not achieve robust long-term outcomes if it continues to rely on the suspension of the Racial Discrimination Act. The reinstatement of the RDA – coupled with effective partnership arrangements with communities – will serve to restore dignity to communities and give them the backing and incentive to become involved in driving long-term solutions.

Conversely, the decision of the Government not to allow the five-year leases to be subject to challenge under the RDA serves to further undermine the dignity of communities and reduce their ability to become involved in determining their own long-term solutions.

The CLC also notes that the Government has not been honest about its intention to protect the five-year leases from challenge. For example, the Government in the policy statement has argued (FaHSCIA 2009c: 10):

> In [their modified] form, the Government considers that the leases are a special measure for the purposes of the RDA.

This appears to be a deliberate attempt to mislead the public in relation to the Government's intentions.

The CLC:

1. Recommends that the government immediately cancel the five-year leases;
2. Advises If the government is not willing to cancel the five-year leases, it should amend the Bill to:
    a. make it explicit that the provisions of the RDA prevail over section 31 of the NTNER Act; and

b. include an explicit undertaking that the Government will not extend the term of the leases beyond August 2012.

3. Advises the government to immediately commence bona fide discussions with Aboriginal land owners and Land Councils in relation to voluntary leasing arrangements, in a manner that is free from coercion or duress, that respects the property rights of Aboriginal land owners and the legitimate aspirations of Aboriginal community members to have ownership over the development of their own future.

Community store licensing

Government proposal:

The Government proposes to continue the store licensing scheme, subject to certain modifications including: a slightly broader definition of community store, removal of the power to compulsorily acquire stores, more explicit description of the connection between licensing and income management and making certain decisions subject to review by the Administrative Appeals Tribunal (AAT).

CLC response:

The CLC supports the continuation of store licensing subject to the comments below, although the CLC does remained concerned that:

1. many community stores still fail to provide adequate fresh food at a reasonable cost;
2. the move to Outback Stores in some communities has resulted in higher prices;
3. the licensing scheme must not be used as a mechanism for installing Outback Stores against the will of a community;

The proposal to remove the licensing of store managers and only licence store owners was not foreshadowed in the Discussion Paper (FaHSCIA 2009a) and is not well explained in the Policy Statement (FaHSCIA 2009c) or other documents. The Policy Statement states that this reform 'reduces the administrative burden when a store changes manager' (2009c: 12). It is not clear that this will be the case where there are conditions on the store licence in relation to the store manager.

The Policy Statement (FaHSCIA 2009c) further states that these new arrangements 'recognise the specific responsibilities and risks borne by store owners and store managers in the operation of a community store'. The CLC believes that more can be done to support store owning corporations in meeting their responsibilities and dealing with the risks of owning a community store. This requires the provision of appropriately tailored support services. The CLC does not accept the poorly developed argument that stores will somehow be better supported in this role through the introduction of a coercive power requiring NT associations to register under the CATSI Act.

The Government has simply stated that this new power will 'ensure that stores are managed in accordance with the most appropriate standards of corporate governance'. It is not sufficient for a

government to introduce a coercive power that restricts choice and dictates the form of incorporation on the basis of such general and unsubstantiated statements. If the standards of corporate governance which apply under the *Associations Act* are insufficient then they should by altered for the benefit of all incorporated associations. In the experience of the CLC, there are both benefits and drawbacks to registration under the CATSI Act and there is value for organisations in having a choice. If there are benefits in seeking registration under the CATSI Act then these should be presented to associations. The CLC is concerned that the imposition of this new coercive rule can only result in suspicion and resentment as well as resistance and potentially litigation.

The CLC also notes that there are issues facing remote community stores that are not dealt with by the licensing scheme. One of the major issues is the capacity of store corporations to be effective in their role. This is not merely an issue with respect to corporate structures or governance. Store corporations require ongoing assistance to develop the capacity to understand reports in relation to store performance, to plan for a store's future and to effectively oversee the activities of store managers.

While the CLC has supported the store licensing scheme, it also believes that the costs (in terms of time as well as money) of compliance with the scheme needs to be monitored, particularly for small remote stores which are not well resourced.

The CLC welcomes the introduction of a means for store owners to seek administrative review of certain key decisions. Where a licence is granted subject to conditions, the terms of those conditions can have a significant impact on the ability of the store to operate and the CLC believes that administrative review should also be available in relation to the imposition of those conditions.

The CLC:

1. supports the repeal of the compulsory acquisition powers in relation to community stores;
2. supports the introduction of administrative review of decisions in relation to community store licensing, and recommends that review also be available for a decision by the Secretary to impose conditions on the grant of a licence;
3. recommends that the Australian Government provide a full explanation for the proposed move to license a store owner rather than a store manager, outlining the need, rationale and consequences of such a move;
4. opposes the introduction of a coercive power that can require a store incorporated under the NT Association Act to reincorporate under the CATSI Act;
5. recommends that store owners are provided with independent support for their role of overseeing the activities of store managers;
6. recommends that the impact on community stores of compliance with the licensing scheme be monitored; and
7. advises that the consultation process that was undertaken did not meet the requirements for a Special Measure under the RDA.

Controls on use of publicly-funded computers

Government proposal: To continue this measure unchanged.

CLC response:

The CLC has never opposed this measure but remains unconvinced and sceptical that the measure has been worthwhile, particularly the costs of administering the system are taken into account. Further, the CLC is aware that all internet filters prescribed by the legislation are 'user defined' software, so unless users define certain keywords, URLs and other program applications, then the filtering remains ineffective. Since, 31 December 2008, the Government has also cut funding for providing free internet filters.

The CLC:

1. recommends that the results of computer checking be assessed against the cost of administering this system;
2. recommends that, provided there is sufficient evidence to suggest that the control of publicly funded computers is worthwhile, that it be applied to all publicly-funded computers in the NT, thereby making the measure non-discriminatory;
3. recommends that if the scheme is continued then filters be provided free of charge; and
4. advises that the consultation process that was undertaken did not meet the requirements for a Special Measure under the RDA.

Law enforcement powers

Government proposal: Retain the Australian Crime Commission's (the ACC's) special law enforcement powers but narrow the definition of 'Indigenous violence or child abuse' so that the ACC's special powers relate only to crimes where an Indigenous person is the victim.

CLC response:

The CLC supports the ACC being provided with appropriate powers of investigation in relation to all allegations of serious violence or child abuse, wherever they occur. The CLC does not support the continuation of an investigative power that operates with respect to a person's race.

Previously the special investigative powers available to the ACC under the *Australian Crime Commission Act* were only available in relation to in relation to 'serious and organised crime'. This reflects Parliament's intention to limit the availability of the intrusive and coercive powers to extraordinary circumstances. The NTER legislation amended the Act to provide that those powers are also available in relation to 'Indigenous violence or child abuse'. The Government Bill proposes to retain this amendment but to narrow the definition of 'Indigenous violence or child abuse'.

For a crime to meet the definition of 'serious and organised crime', a number of factors must be present including multiple offenders and a substantial element of planning or organisation. These

additional factors are not required for the definition of 'Indigenous violence or child abuse'. This means that the ACC's additional powers are available for a far broader category of crimes where the victim is 'Indigenous'.

The CLC can see no justification for extending the ACC's powers on the basis of the victim's race. If Parliament believes that the ACC's additional powers should be available in relation to serious violence or child abuse, or to communities experiencing widespread and systemic violence and abuse, then the definition of 'serious and organised crime' should be amended to reflect this. This would allow the ACC to utilise its additional powers in relation to any sector of the Australian community that was experiencing crimes of the type and level, regardless of the race of the persons involved.

Maintaining an additional investigative power in relation to Indigenous people is discriminatory and unnecessary. As well as perpetuating the stigma associated with the NTER, this means that those additional powers might be exercised in relation to Indigenous people in a way that the general public would not tolerate. For example, during the redesign consultation process concerns were expressed about the Taskforce's access to medical files and the use of the ACC's coercive powers. These concerns are not trivial, as they go to the question of whether a health service is compromised in its ability to treat patients, however they appear to have been ignored. In the absence of hard evidence that these powers are necessary, are working and are doing more good than harm, their additional application to Indigenous people can only be regarded as discriminatory.

The CLC:

1. recommends that the Bill be amended to provide for the removal of the definition of 'Indigenous violence of child abuse' from the ACC Act, and for the amendment of 'serious and organised crime' so that the ACC's special law enforcement powers apply in relation to all serious violence and child abuse in Australia (including Indigenous communities where appropriate) without regard to race; and

2. advises that the consultation process that was undertaken did not meets the requirements for a Special Measure under the RDA.

Business management areas powers

Government proposal: Retain the business management powers

CLC response:

The NTNER Act gave the Commonwealth Minister broad powers with respect to remote communities to:

- unilaterally alter funding agreements
- direct how services are to be provided where the Minister is not satisfied with the current service

- direct how assets are used by or acquire assets from community organisations
- appoint observers to attend meetings of community organisations including committee meetings
- suspend community government councils or appoint managers for associations on service related grounds.

The Act also created civil penalties where entities fail to comply with a direction or to inform an observer of meetings where one has been appointed.

The CLC is not aware of any instance of the business management powers being utilised or delegated by the Minister.

The CLC considers these powers are harsh and inappropriate, give the Commonwealth Minister an unprecedented level of discretion in the affairs of remote communities and do not contribute to stable, sustainable outcomes. The Policy Statement (FaHSCIA 2009c) does not provide a convincing argument for the retention of these powers particularly given they have not yet been used, most communities are unaware of the powers and that the Commonwealth is already able to place conditions on any funding it provides towards the provision of basic services.

The CLC:

1. recommends that the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of the Racial Discrimination Act) Bill 2009* be amended to provide for the removal all of the above business management powers from the *NTNER Act 2007(Cth)*; and
2. advises that the consultation process that was undertaken did not meet the requirements for a Special Measure under the RDA.

Income management provisions

Government proposal: Existing income management measures that apply in prescribed areas will be repealed. Three new income management measures will be introduced to apply to disengaged youth, long-term welfare recipients, and people assessed as vulnerable by Centrelink staff. There are circumstances in which a person may be exempted based on a demonstration of socially responsible behaviour (studying, stable pattern of employment, responsible parenting). These new measures will apply in areas to be 'declared income management areas' which may include urban areas. Current income management triggers (child protection, school enrolment and attendance) are retained, as are the provisions relating to the Qld Family Responsibilities Commission. There will be a capacity for voluntary opt-in to income management, and some financial incentives to encourage voluntary opt-in and the uptake of financial literacy programs.

CLC response:

The CLC is encouraged by a move which would apply income management to all welfare recipients in a 'declared' area, rather than the system which is limited to prescribed areas in which almost all of the population is Aboriginal. This appears to make the scheme less blatantly discriminatory, although

the CLC does note concerns expressed by the Human Rights Commission and others, that the overall effect of the proposed scheme may still be indirectly discriminatory, and of course the application of the scheme to non-indigenous welfare recipients is dependent on the Minister declaring the area in which the scheme will apply. The CLC understands that the Minister intends to declare all of the Northern Territory.

The CLC contends that income management must:

- not be discriminatory;
- not be premised on the assumption that all welfare recipients participate in anti-social behaviour and are unable to care for their children;
- be voluntary, or be limited to certain triggers aiming to address particular behaviours (i.e. child protection , school enrolment and attendance);
- provide support and clear pathways encouraging a person who is income managed to exit income management;
- be subject to administrative review;
- be accompanied by intensive family case management and financial literacy support programs; and
- be subject to rigorous independent evaluation to determine whether objectives are being met.

The proposed new scheme does not meet the CLC's criteria above, and most particularly maintains a punitive approach that assumes welfare recipients are doing the wrong thing unless they can prove otherwise.

The CLC was encouraged by remarks in the government's policy statement (FaHSCIA 2009c) to provide opportunities for communities to develop community controlled welfare reform arrangements (such as the Family Responsibilities Commission model). Quite separately, the CLC has been investigating the FRC model as it is applied in Cape York, including commissioning a paper on the comparison of the models (Altman and Johns 2008) and holding a forum jointly with Central Australian Aboriginal Congress (CAAC) at the end of 2009 in Alice Springs. However, despite some well meaning intentions in the policy statement (FaHSIA 2009c), the CLC is concerned that there is no support in the Government Bill that would allow the community or government to impose other income management models that would supersede existing arrangements.

The CLC:

1. does not support the provisions in the *Social Security and other Legislation Amendment (Welfare Reform and Reinstatement of the Racial Discrimination Act) Bill 2009*, providing for a new income management regime;
2. recommends that the Minister exercise her discretion to make no further 'declarations' under the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007.* This would allow the current blanket income management arrangements to lapse at

the end of this 12 month period, and maintain and evaluate the child protection, school enrolment and attendance triggers;

3. recommends that the provisions providing for a roll-out of income management nationally be tabled and debated separately from the context of the redesign of the NTER;

4. recommends that any future income management regime explicitly provides for community-controlled welfare schemes.

References

Altman, J.C. and Johns, M. 2008. Indigenous welfare reform in the Northern Territory and Cape York: A comparative analysis, Working Paper No 44/2008, Centre for Aboriginal Economic Policy Research, ANU, Canberra.

Australian Human Rights Commission (2009) The Native Title Report 2009, http://www.hreoc.gov.au/social_justice/nt_report/ntreport09/pdf/ntr2009.pdf

Australian Human Rights Commission (2009) Draft guidelines for ensuring income management measures are compliant with the *Racial Discrimination Act.* http://www.humanrights.gov.au/racial_discrimination/publications/RDA_income_management2009_draft.html

Australian Institute of Health and Welfare (2009) Report on the evaluation of income management in the Northern Territory, 20 August 2009, http://www.fahcsia.gov.au/sa/indigenous/news/Pages/nter_eval.aspx

Collins D and Lapsley H. 2008. The avoidable costs of alcohol abuse in Australia and the potential benefits of effective policies to reduce the social costs of alcohol. National Drug Strategy Monograph Series no 70. Commonwealth of Australia, Canberra.

Central Land Council. 2009. Submission to the Future Directions Discussion Paper, Central Land Council, July 2009.

Central Land Council. 2008a. Northern Territory Emergency Response: Perspectives from six communities, Central Land Council, July 2008.

Central Land Council. 2008b. Submission to the Northern Territory Emergency Response Review, Central Land Council, August 2008.

Central Land Council. 2008c. Letter to Senate select committee on remote communities, Central Land Council, May 2008.

Central Land Council. 2008d. Sumission to Senate Inquiry on emergency response consolidation Bill, Central Land Council, April 2008.

Central Land Council. 2007. From the grassroots, Central Land Council, December 2007.

Central Land Council. 2007a. Australian Government NTER briefing, Central Land Council, December 2007.

Central Land Council. 2007b. Submission to senate inquiry into the NTER legislation, Central Land Council, August 2007.

CIRCA (2009) Report On the NTER Redesign Engagement Strategy and Implementation, http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Pages/report_nter_redesign_strat_implement.aspx

d'Abbs, P (2001), Living with alcohol: learning from the Northern Territory experience, Drug and Alcohol Review, vol. 20, pp. 253-255.

Doran C, Vos T, Cobiac L, Hall W, Asamoah I, Wallace A, Naidoo S, Byrnes J, Fowler G, Arnett K. 2008. Identifying cost effective interventions to reduce the burden of harm associated with alcohol misuse in Australia. Alcohol Education Rehabilitation Foundation

FaHSCIA (2009a) Future Directions Discussion Paper, June 2009

FaHSCIA (2009b) Report on the NTER redesing consultations, http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Pages/report_nter_redesign_consultations.aspx, October 2009.

FaHSCIA (2009c) Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act, and Strengthening of the Northern Territory Emergency Response , http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/policy_statement_nter/Pages/default.aspx, November 2009

Gray, D. 2000. Indigenous Australians and liquor licensing restrictions. Addiction 95 (10): 1469-1472.

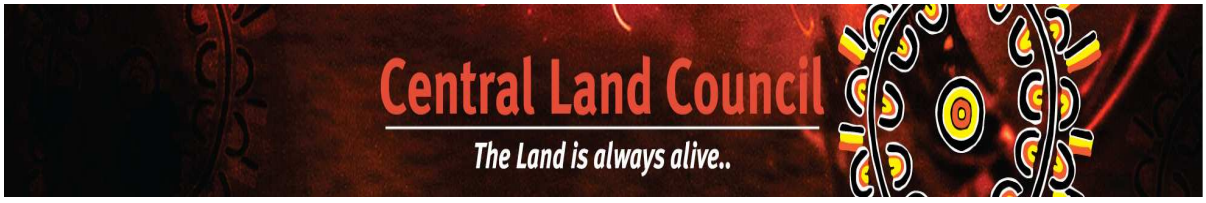
Macklin, J. 2009. Social Security and other legislation amendment (welfare reform and reinstatement of Racial Discrimination Act) Bill 2009 - Second Reading Speech - Parliament House, Canberra, Parliament House , 25/11/2009 http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/ss_legislation_amend_25nov2009.htm

Nicholosn, A., Behrendt, L., Vivian, A., Watson, N., Harris, M. 2009. Will they be heard? A response to the NTER consultations June to August 2009, Jumbunna Indigenous House of Learning: Research Unit, November 2009.

Senior, K., Chenall, R., Ivory, B., Stevenso, C. 2009 Moving Beyond alcohol restrictions: The evaluation of Alice Springs Alcohol Management Plan, Menzies School of Health Research.

TNS Consultants (2008) Survey of Government Business Managers relating to the impact of the Northern Territory Emergency Response: report findings, prepared for the department of Families, Housing, Community Services and Indigenous Affairs, July 2008.

Yu, P., Duncan, M.E., Gray, B. (2008) Northern Territory Emergency Response: Report from the NTER Review Board 2008, Australian Government, October 2008.



CLC Response

Future Directions for the NTER Discussion Paper 2009

August 2009

Introduction

The Central Land Council (CLC) welcomes this opportunity to again provide input to Australian Government processes seeking to reorient the Northern Territory Emergency Response (NTER), and is particularly pleased that the Australian Government has committed to reinstating the *Racial Discrimination Act 1975* (RDA) later in 2009. This submission builds on the CLCs August 2008 submission to the NTER Review Board and provides specific comment on the issues raised in the *Future Directions for the NTER* Discussion paper 2009 *(the Discussion paper).*

The CLC, in response to the initial package of NTER legislation, subsequent senate inquiries and in its submission to the NTER Review Board, has consistently maintained that:

- The NTER measures overall are discriminatory and that the emergency legislation, taken in its entirety, can not be considered to be a 'special measure' for Aboriginal people under the *Racial Discrimination Act 1975* (Cth);
- There is no link between the NTER land measures (for example the taking of the 5 year leases) and child abuse;
- A far greater proportion of NTER program funds should be devoted to programs that actually support women, children and families, including through the employment of a greater number of Child Protection Workers based in remote communities, and providing intensive case management support for families that are struggling to care for their children;
- The NTER was declared in haste, and lacks a policy framework outlining the overall aim, objectives and targets for the measures, making it impossible to evaluate its effectiveness;
- That lack of engagement with Aboriginal people and their organisations over the announcement and implementation of the NTER has resulted in deep disappointment, disillusionment and anger for Aboriginal people in central Australia;
- The lack of recognition for Aboriginal people – their culture, their communities, their expertise, their organisations and their property rights – and their exclusion from the policy

formulation and implementation process is completely contrary to best practice community development approaches and threatens the success of all of the NTER measures, despite record levels of government investment; and

- The Australian and NT Governments should work with Aboriginal people and their organisations towards a long term, evidence-based development plan for Aboriginal people in the NT utilising a community development approach, drawing on available evidence and rigorous program evaluation, and specifying the level of government investment required.

The CLC agrees that levels of family violence, substance misuse and child neglect are tragically high and that the living conditions for many residents in remote communities are appalling. It is relatively easy to identify the problems; it is not easy, however, to build lasting solutions. The CLC contends that any process which continues to systematically marginalise Aboriginal people from creating and driving solutions to these complex issues is ultimately doomed to fail.

Resetting the Relationship

The CLC submission to the NTER Review Board (2008) clearly highlighted the fact that NTER processes had undermined community governance structures, not been effective in reducing tensions caused by marginalisation and uneven economic development and had left Aboriginal leaders feeling completely marginalised. The CLC recommended four key principles for action (accountability, engagement, stability and fairness) and set out a suggested process for undertaking community planning and building or rebuilding structures and processes to ensure an appropriate level of community decision making. These recommendations have not yet been acted on. The need to rebuild legitimate community governance structures is now even more urgent. The last two years has been a period of profound and rapid change for remote Aboriginal communities in the NT, including:

- the NTER measures – most significantly income management, five year leases, changes to the permits system and store licensing;

- Changes to CDEP;

- Abolition of the ICHOs and transfer of housing management to Territory Housing ;

- Application of the NT Planning Act across Aboriginal land, combined with the five year leases, resulting in significant changes in the planning and planning consent processes for remote communities; and

- Abolition of the community councils (and the old 'association' councils) in favour of the Shires under the new Local Government Act (NT).

The CLC is extremely concerned about the cumulative impact of these changes on Aboriginal communities, families and individuals. While constituents of the CLC may be equally divided about the benefit of a specific NTER measure such as income management, there is much greater agreement that the NTER process, in conjunction with the radical overhaul in community

governance arrangements has left many people feeling sick, sad, powerless and hopeless. There has been a drastic reduction in opportunities for community leaders, both men and women, to play a role in governing their communities. Many smaller communities have no representation on the Shire Council, and local boards are strictly advisory and operate at the whim of the Shire. This vacuum in legitimate Aboriginal governance simply does not seem to be consistent with the obvious need to engage and support local Aboriginal leaders in building a future for their communities.

The CLC wholeheartedly agrees with the NTER Review board recommendation that the Australian and NT Governments must 'reset their relationship with Aboriginal people based on genuine consultation, engagement and partnership'. The Discussion Paper does not pay sufficient attention to this critical issue, instead it lists initiatives which are significant on the national agenda such as the Apology, the process towards forming the national indigenous representative body and support for the United Nations Declaration on the Rights of Indigenous Peoples. These initiatives are important and most welcome; however, the crucial link to the local and/or regional level is not yet developed.

Resetting the relationship in the NT requires more than a commitment to consultation. Resetting the relationship requires the Australian Government to commit to:

- Recognising and respecting Aboriginal law, culture and rights, including property rights;
- Good faith negotiation processes that do not seek to coerce traditional owners or remote community residents;
- Supporting remote communities to develop their own priorities and plans, and demonstrating that governments will support those plans;
- Supporting the development of legitimate Aboriginal governance structures and processes, and taking the advice of those structures or processes;
- Adopting an evidenced-based approach based on rigorous evaluation processes;
- Being transparent and inclusive in policy and program development and budget allocations by working with Aboriginal people and their organisations on a long-term Development plan; and
- Listening to the views of Aboriginal people and organisations in this NTER consultation process and acting on those views.

Making the NTER Sustainable

Moving beyond the 'emergency response' to the sustainable-development phase is critical, and it is vital that Governments and communities work together to develop the medium and long term strategies that will constitute a Development plan. Budget announcements will not make the NTER sustainable. The adoption of rigorous, transparent and inclusive processes to drive the budget allocations will make the NTER sustainable. We must avoid the 'stop-start' policy making and frequent changes in directions that have, for too long, characterised Aboriginal Affairs. The CLC

recommends that the following three step process be undertaken with all remote communities in our region:

STEP ONE: Undertake community planning: Revisit existing community plans (where they exist) and undertake a community planning exercise to identify current and future priorities and objectives. After appropriate community consultation processes (for example in families, kin groups, agency groups or gender aligned groups) a finalised plan should be adopted and used to guide future program and infrastructure decisions for the community. All levels of government should respect and support the community plans.

STEP TWO: Provide avenues for sharing information in the community: Hold regular community meetings for general discussion, information and review of the progress against the community plan. GBMs should be required to hold public forums, information sessions and meetings.

STEP THREE: Community representation in decision making processes: Negotiate an appropriate community governance structure or processes for decision making on implementation of the community plan and any other government initiatives and programs.

While these steps may seem simple they are not occurring in remote communities in central Australia at present.

Providing the framework for the community plans would be the long term Development plan, developed by Aboriginal people and their organisations and both levels of government. This Development plan would set the policy parameters and priorities for future initiatives and programs, indicate investment required and drive budget allocations, set out monitoring and evaluation processes, and be regularly reviewed.

Racial Discrimination Act

FaHCSIA Proposal

The government will introduce legislation into the Parliament in October 2009 to remove the provisions in the three pieces of NTER legislation that exclude the operation of the RDA and the NT anti-discrimination laws.

Some of the NTER measures will be redesigned.

CLC Response

The NTER legislation contains exclusions to the RDA to the effect that NTER measures are deemed to be 'special measures' according to the RDA, but that the discrimination provisions of the RDA do not in any event apply to NTER measures. The labelling of NTER measures as 'special measures' does not have community and legal support and the CLC welcomes the commitment of the Australian Government to reinstating the RDA in October 2009.

The principle of 'special measures' is embedded in the Convention on the Elimination of all forms of Racial Discrimination (CERD). Under article 1 of CERD, any "special measures", which may otherwise

be discriminatory, taken for the "sole purpose of securing adequate advancement" of a particular group, *are not* discriminatory.

In interpreting article 1, the leading High Court discrimination case of *Gerhardy v Brown* notes that:

> the wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement

In the past in the Northern Territory 'special measures' have been agreed in relation to alcohol on the basis that the communities themselves have agreed. In its 1995 Alcohol Report, the Human Rights and Equal Opportunity Commission concluded that alcohol restrictions which are incompatible with the policies of the community concerned will not be "special measures".

The recent adoption by the United Nations of the Declaration on the Rights of Indigenous Peoples supports the primacy of informed consent:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

The CLC supports removal of the RDA exclusions from the NTER legislation and the negotiation of 'special measures' with communities where appropriate.

Individual NTER Measures

A. Income Management

FaHCSIA Proposed model

Option 1. Income management would continue as compulsory for all welfare recipients in prescribed communities, outstations and town camps but individuals could apply for an exemption based on individual assessment.

Option 2. No change to current arrangements.

CLC Response

Consistent with our 2008 submission, the CLC considers that blanket income management is discriminatory and does not promote responsible behaviour. The CLC supports a change in the current arrangements from a blanket approach to an approach which targets individual behaviours. Income management is one of the most significant of the NTER measures and it is vital that a comprehensive and evidence-based approach is adopted for welfare reform. The CLC community survey (July 2008) found that around half of those surveyed in the CLC region were in favour of income management. The move to a voluntary income management model must ensure that

individuals would still be supported to manage their income. All remote community residents should have access to financial literacy programs and family budgeting support.

With respect of welfare reform the CLC recommends that:

1. On-going monitoring and evaluation of any welfare reform measures should be a priority and should be made publicly accessible;
2. Monitoring and evaluation should include an assessment of costs of implementation against the benefits associated with the changes;
3. A specialist taskforce be created, including local Aboriginal representation and specialist expertise, to oversee the evaluation of any welfare reform programs and develop a comprehensive welfare reform policy framework;
4. Individuals should have the option to voluntarily opt for their income to be managed, whether they live in a prescribed area or not;
5. Financial literacy support programs and access to banking services be expanded.

The CLC does not support either Option 1 or Option 2. The CLC supports the recommendation of the NTER Review board that income management that be voluntary, or should only apply on the basis of child protection, school enrolment or school attendance triggers.

B. Alcohol restrictions

FaHCSIA Proposal

- Level of alcohol restrictions could be set by taking into account:
  - community views;
  - evidence on the level of alcohol-related harm in individual communities or regions; and
  - the presence of community-developed alcohol restrictions including AMPs;
- Remove the requirement for licensees to record sales of take away liquor; and
- Maintain current exemptions for tourism, recreational boating and commercial fishing.

CLC Response

The FaHCSIA proposed model is largely consistent with the CLCs position on alcohol restrictions and is broadly supported. There must, however, be increased support and treatment services for people to deal with alcohol related problems and awareness campaigns on responsible alcohol consumption. The CLC supports a move towards community driven alcohol management plans, provided there are adequate resources available for consultation and subsequent enforcement. Complimentary alcohol measures should be assessed and adopted including a volumetric tax and minimum price benchmarks for alcoholic products. There must be a buy-back of some licences in Alice Springs. The CLC agrees that the requirement for a licensee to record sales of take-away liquor

has not been effective and should be removed. The CLC is not aware of any specific problems associated with the current exemptions.

The CLC recommends

1. the immediate allocation of substantial additional funds to support and increase alcohol and other drug treatment and rehabilitation programs in all regional towns and larger communities;
2. that the NTER alcohol measure be broadened to include other drugs allowing a more comprehensive approach to substance misuse to be adopted;
3. a community approach to the development of alcohol management plans;
4. the adoption of comprehensive measures aimed at reducing alcohol supply, including the buy-back of liquor licences and a volumetric tax; and
5. that the gratuitously large signs setting out alcohol and pornography restrictions, which are deeply offensive and insulting to Aboriginal people, are removed.

C. Pornography

FaHCSIA Proposal

Current restrictions would continue on the basis of a request from a person resident in a prescribed area, or a person acting on a resident's behalf. Before making a decision the Minister will take certain matters into account.

CLC Response

The Discussion paper does not provide any evidence to suggest that the current restrictions on pornography have had any beneficial effect beyond community education.

The CLC:

1. supports initiatives to ensure that children are not exposed to inappropriate material, including community education programs about pornographic material and the film classification system;
2. recommends that the gratuitously large signs setting out alcohol and pornography restrictions, which are deeply offensive and insulting to Aboriginal people, are removed;
3. does not support the continued application of the blanket restrictions unless compelling evidence can be provided to demonstrate the effectiveness of the restrictions; and
4. supports a community-based approach to pornography restrictions based on genuine community consent, rather than the proposed model where restrictions can be continued at

the request of an individual and the Minister need only consider the 'views of other residents of the particular area.' .

D. 5 Year Leases

FaHCSIA Proposal

- five year leases will expire in August 2012;
- when approving land use the Government encourages individuals and organisations to approach the relevant land Council or incorporated association to secure a long-term lease;
- reasonable rent to be paid to traditional owners;
- amend the legislation to clarify the purpose and operation of the leases including:
    - making the objectives of the five year lease clearer;
    - defining the permitted use of the leases as improving the wellbeing of communities;
    - excluding mining or other developments inconsistent with the continuing use of the areas as towns;
    - requiring the leases to be administered in a way that respects Aboriginal culture; and
    - outlining the Australian Government's commitment to move to voluntary leases; and
- The Government also proposes to develop clear guidelines to govern the land use approval process to ensure the transparent allocation of lots.

CLC Response

The CLC continues to oppose the 5 Year Leases. Our opposition stems from the fact that the compulsory acquisition of the 5 Year Leases does not respect Aboriginal land ownership rights. Through the 5 Year Leases the Commonwealth now exercises complete control over 31 communities in the CLC region but it has not used this control to deliver demonstrable benefits for Aboriginal people living in communities. In particular, while staff housing and governmental office accommodation has proliferated with the approval of the Commonwealth, not a single new community house has been built on Aboriginal land since the 5 Year Leases commenced.

Any discriminatory land based measure cannot reasonably be held to be a 'special measure' for the benefit of communities under the RDA.

The CLC recommends that:

1. the Commonwealth should immediately forfeit its 5 Year Leases thereby returning control of communities to the Aboriginal land owners;

2. any lease or tenure arrangement must recognise the property rights of Aboriginal people in their communities and be properly negotiated without coercion or duress;
3. fair rent and compensation be paid to traditional owners for the five year leases;
4. if the Commonwealth is not willing to forfeit its 5 Year Leases, it should:
    a. stop delaying the construction of much needed housing and infrastructure on communities (we note the double standard that allows housing for staff and governmental office accommodation can be built without a lease being in place); and
    b. immediately commit to not compulsorily acquiring an extension of the 5 Year Leases;
5. with a view to achieving a smooth transition from the 5 Year Leases back to the Aboriginal land owners, discussions between the Commonwealth and the CLC should commence immediately; and
6. the Commonwealth should immediately release details regarding:
    a. all interests in land or fixed assets that it has recognised or granted since it took control of the communities through the compulsory acquisition of the 5 Year Leases;
    b. the consultation process it follows prior to granting an interest in land within the community;
    c. the process it undertakes to identify and recognise of pre-existing interests, prior to its granting of interests in land within the community;
    d. the number of interests in land that it has granted that are currently being contested by third parties claiming to have a pre-existing interest; and
    e. the complaints process and dispute resolution process it is following to expeditiously resolve disputes.

E. Community Stores

FaHCSIA Proposal

Continue and strengthen stores licensing scheme by assessing stores in relation to:

- quality, quantity an range of groceries and consumer items for sale
- the nutritional focus of the store operation
- the retail and financial management practices of the store operators; and
- the character of the operator.

Penalties could apply where a licence is breached or where a store is operating without a licence.

The Government would have the power to require the store owner to appoint a new store operator where the store is not being operated in a satisfactory manner, or is operating without a licensed operator.

Power to compulsorily acquire stores will be removed.

Indigenous owned and controlled stores that are incorporated under the Associations Act 2003 (NT) would be required to transfer registration under the Corporations (Aboriginal and TSI) Act 2006.

Decisions taken by the Government to refuse, revoke or vary a licence or to refuse to approve a nominated manager would be reviewable by the AAT.

CLC Response

The CLC:

1. supports store licensing including the ongoing monitoring of licensing;
2. supports the application of appropriate penalties where a licence is breached, but requires further clarification about the application of penalties to a store that has not sought to become licensed;
3. notes that the FaHCSIA proposal appears to move beyond store licensing to operator licensing. It is not clear how the 'character of the operator' will be assessed, or how operators will seek to become licensed;
4. does not support the proposal to give the Government the power to require the store owner to appoint a new store operator without further discussion of appropriate checks and balances;
5. supports the proposal to remove the power to compulsorily acquire a community store in a prescribed community;
6. supports the intention to make decisions relating to licensing reviewable by the AAT;
7. is strongly opposed to the proposal to require stores currently incorporated under the Associations Act 2003 (NT) to transfer to registration under the Corporations (Aboriginal and TSI) Act 2006. The CLC supports the need for minimum reporting requirements to improve governance of community stores, but does not support the proposal to dictate legal form. The proposal to require this transfer will cause severe, unnecessary legal uncertainty and cost for community stores for the following reasons:
    a. the Association will have to obtain the consent of the Commissioner of Consumer Affairs before it can apply to transfer registration;
    b. some store associations also own the freehold title to the land (eg Aputula Social Club), or a lease over the land (the Yuendumu Social Club) and under the Associations Act must not 'dispose of, charge or otherwise deal with prescribed property' without the prior consent of the minister responsible for administering the Act;
    c. some Associations have constitutions that prohibit transfer of an Association's assets;
    d. an Aboriginal corporation that is transferred title to freehold land, a lease under the Special Purposes Leases Act or a lease on Aboriginal land from an association will be required to pay stamp duty under the Stamp Duty Act (NT);

8. supports the provision of governance training and ongoing support for the governing committees of community stores, including the provision of appropriate information about licensing arrangements, assessments and progress.

F. Pornography – Computer Checking

Future Directions Proposed model

Retain the current controls.

CLC Response

The CLC:

1. does not oppose this measure but would like to see the results of computer checking compared to the cost of administering this system;

G. Law enforcement measures

FaHCSIA Proposal

Continue the use of the ACC's special powers as approved for use by the National Indigenous Violence and Child Abuse Intelligence Taskforce.

CLC Response

The CLC :

1. has some concerns about the continued use of the ACC's special powers, particularly the power of the Taskforce to access confidential medical files and the application of the ACCs special coercive powers. The proposal to continue the use of these powers must be matched by hard evidence that the powers are working and remain necessary. Any extension of the powers must be subject to rigorous and regular evaluation and a designated sunset clause.
2. supports the increased roll out of police and policing facilities across the NT to improve community harmony and safety;
3. recommends that policing services be provided to all medium – large remote communities;
4. welcomes the continued support for community Night Patrol programs; and
5. recommends that police and justice agencies now work with communities to develop community-based policing strategies, ensure there is quality cultural awareness training for police officers, and promote more innovative community justice arrangements such as the Law and Justice Committees.

H. Business Management Powers

FaHCSIA Proposal

Proposed to remove the power to stop funding an organisation in a community if it is not doing its job properly

CLC Response

The NTNER Act gave the Commonwealth Minister broad powers with respect to remote communities to:

- unilaterally alter funding agreements
- direct how services are to be provided where the Minister is not satisfied with the current service
- direct how assets are used by or acquire assets from community organisations
- appoint observers to attend meetings of community organisations including committee meetings
- suspend community government councils or appoint managers for associations on service related grounds.

The Act also created civil penalties where Entities fail to comply with a direction or to inform an observer of meetings where one has been appointed.

The CLC is not aware of any instance of the business management powers being utilised or delegated by the Minister.

The CLC considers these powers are harsh and inappropriate, give the Commonwealth Minister an unprecedented level of discretion in the affairs of remote communities and do not contribute to stable, sustainable outcomes.

The CLC recommends that all of the above listed business management powers be removed from the *NTNER Act 2007(Cth)*, not just the power relating to organisational funding.

CLC Proposed NTER Legislative Amendments

The following matters were not canvassed in the Discussion paper, nevertheless the CLC recommends that they be resolved through amendment to the relevant NTER legislation.

Statutory rights in buildings

As far the CLC is aware, this measure has not been utilised and it does have a number of potential problems:

- For significant upgrades ownership of the existing building can pass from the land trust to the government funding the upgrade, irrespective of who may have originally constructed the building.
- Rather than streamlining an existing system, statutory rights is a new system which will require another level of consultation with traditional owners.
- Governments may choose to refuse to construct new housing on the basis that the land trust will not agree to statutory rights (but may well agree to a lease under s 19 of the Land Rights Act which would also provide security of investment with a standard transferable property title).
- Statutory rights are not transferable, except between the Commonwealth and the Northern Territory, further restricting dealings on Aboriginal land.

Once in place, statutory rights can go on forever, until the government decides it no longer wants them. Even if the government and land trust negotiate a s 19 lease, the statutory rights will survive the lease.

The CLC recommends amendment to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) to abolish the statutory rights as it creates a new species of property right to deal with an objective that can already be met by existing s 19 leasing arrangements.

Native Title

Under the NTNER Act, the "future act regime" of the *Native Title Act 1993* (Cth) is suspended in relation to anything which might happen under that Act. If any action under the Act affects or extinguishes native title rights, native title holders will have no right to negotiate over that action. The "non-extinguishment principle" will apply and any native title in conflict with the action will be of no effect for the duration of the action.

The CLC recommends that the suspension of the 'future act regime' be removed. It is unfair for the NTNER Act to override the Native Title Act and for native title to be suppressed indefinitely without any negotiation or agreement.

Permits

The previous Australian Government introduced a number of changes to the permit system under the Land Rights Act:

- a new defence of permission of occupier (s 70(2C))
- a range of public rights of access to communities, notably to 'public areas' within communities (ss 70B-70H), and
- revocation of permits only by issuer (s 74AA)

The CLC :

1. supports the Australian Government's legislation seeking to reinstate the permits system;
2. recommends that s.74AA be repealed as a matter of urgency. The CLC has very serious concerns about the s 74AA provision which only allows revocation of the permit by the issuer. In a letter recently sent to the Minister for Indigenous Affairs, the CLC outlined the problems with this provision, namely the capacity for a dishonest person to obtain a couple of signatures on a scrap of paper on which a rudimentary permission is endorsed. If the signatures are not those of traditional landowners for the area, or if they were obtained by fraud, duress, corruption or deception, in the absence of a formal revocation by the signatories, the only remedy available is the uncertainty of seeking an appropriate declaration from the Supreme Court of the Northern Territory. In the past when pretty much identical circumstances arose on Aboriginal land, the CLC co-operated with the NT Police to revoke permits and enable the Police to remove offending individuals from communities without delay. That appears no longer to be possible.

Central Land Council

33 Stuart Highway
Alice Springs
Northern Territory

P.O. Box 3321
Alice Springs
N.T. 0871

28 July 2009

Dr Jeff Harmer
PO Box 7576
Canberra Business Centre ACT 2610

Dear Dr Harmer

CLC ATTENDANCE AT NTNER ACT REVIEW CONSULTATIONS

The CLC has indicated that it will attend the *Future Directions for the Northern Territory Emergency Response Consultations: Major Stakeholder 4th Tier* (the consultations) being conducted by the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) in Darwin on 6-7 August 2009 (the Darwin consultation).

Recent media reports regarding the FaHCSIA minute, detailing legal advice it had received from AGS, suggests that the Commonwealth may not be conducting the consultations in good faith but rather as a risk management strategy. The minute suggests that through the consultations, the Commonwealth is hoping to gain a legal advantage should the constitutionality of the compulsory acquisition of the 5 Year Leases make it to the courts. The issue of course is whether, once the *Racial Discrimination Act 1975* is reinstated in relation to the *Northern Territory National Emergency Response Act 2007* (NTNER Act), the compulsory acquisition of 5 Year Leases is more likely to be characterised by the High Court as a special measure if there has been extensive consultation with Aboriginal people living in the Northern Territory.

Presuming that the FaHCSIA minute is authentic (and one must presume that it is, given that the Department has not stated otherwise), the Commonwealth's sincerity in relation to the consultations is questionable. We are writing to ensure that our appearance at the Darwin consultation is not misconstrued or improperly relied on by the Commonwealth.

The CLC will participate in the Darwin consultation subject to the following disclaimers and conditions.

1. The CLC is participating in the Darwin consultation in good faith for the sole purpose of providing the Commonwealth with:

   (a) *information* regarding its view, and its constituents view on the *Future Directions for the Northern Territory Emergency Response: Discussion Paper*; and

   (b) *advice* on to how the Commonwealth could make more effective and principled amendments to the NTNER Act,

2. The CLC's attendance at the Darwin consultation is not to be construed as approval or consent to any proposed action by the Commonwealth.

3. Unless the CLC expressly states that it 'approves' a proposed Commonwealth action, none of the information and/or advice provided by the CLC at the Darwin consultation is to be construed as approval or consent to any proposed action by the Commonwealth.

4. Any Commonwealth transcription, summary or notes relating to CLC's appearance at the Darwin consultation must be provided to the CLC within 14 days. If this information is not provided to the CLC, the Commonwealth is not authorised to make reference to, or in any way rely on, the information and advice provided by the CLC at the Darwin consultation.

5. The CLC will tape its appearance at the Darwin consultation.

Given that the Commonwealth's motives for conducting the consultations are now highly questionable, the CLC would like to request that the Commonwealth mitigate these concerns by making publicly available, via the internet, the following documents and details.

1. Full transcripts or summaries (depending on the mode of information collection being utilised by the Commonwealth) of all consultations conducted – 1st – 4th tier.

2. Copies of the questionnaires, briefing notes or other documentation provided to Government Business Managers and other Commonwealth employees in preparation for the consultations. As the Commonwealth is aware, the format of questions can be determinative of the response that is received. The concern is that the questions asked at the community consultations were not open or neutral.

3. Details of who conducted the consultations, when and where. This is especially necessary in relation to the consultations that were carried out in communities with varying degrees of professionalism, diligence and success. It would be inappropriate if the Commonwealth placed great weight on the results of community consultations which were, in fact, nothing more than personal reports from Government Business Managers or other Commonwealth employees or which represented the views of select interest groups.

Yours sincerely

David Ross
Director