NORTH AUSTRALIAN ABORIGINAL JUSTICE AGENCY

SUBMISSION TO THE

SENATE COMMUNITY AFFAIRS COMMITTEE INQUIRY

Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009;

Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Bill 2009;

Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Restoration of Racial Discrimination Act) Bill 2009.

FEBRUARY 2010

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Introduction

Thank you for the opportunity to make submissions to this Inquiry into the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act)Bill 2009* (the 'Welfare Reform Bill'); the *Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Bill 2009* and the *Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Restoration of Racial Discrimination Act) Bill 2009* (referred to collectively as the 'Bills').

EXECUTIVE SUMMARY

The Committee's terms of reference broadly go to an investigation into the effectiveness of the Government's proposal for the redesign of the Northern Territory Emergency Response (NTER) how it will work to overcome disadvantage in Aboriginal communities and whether the proposed measures will be cost-effective. The Committee also seeks input on alternatives to the Government's proposals.

Restoring the Racial Discrimination Act

In this submission, NAAJA expresses strong support for the full and immediate restoration of the *Racial Discrimination Act*. However, we call on the Government to work in genuine partnership with Aboriginal people to address the significant challenges that people, particularly in remote, communities face. As currently proposed, we do not believe that the NTER redesign succeeds in re-setting the relationship with Aboriginal people in the Northern Territory.

NAAJA commends to the Government a community-led approach to finding solutions to problems in communities. Adequate resourcing on the ground in the areas of health, housing, education, employment and community services are the keys to overcoming disadvantage in communities.

In relation to the Government's proposed restoration the Racial Discrimination Act, NAAJA questions the Government's contention that the NTER measures are 'special measures'. There is a distinct lack of solid and reliable evidence to support the continuation of the measures. Some only serve to label, stigmatise and further alienate Aboriginal people from a community-led approach to finding solutions.

This country has followed a consistent pattern of imposing on Aboriginal people what is thought best for them. We commend to the Government a non-discriminatory approach as the only way forward. It is only when the same rules are applied to all Territorians that Aboriginal people in the Northern Territory will feel that decisions are not simply being made for them and imposed on them and that they have a genuine role in shaping their own destiny. The *Future Directions* consultation process left many Aboriginal people feeling that the Government had made their decisions before the consultations even took place.

The NTER measures

We detail in this submission our response to those NTER measures within our area of expertise.

In relation to alcohol restrictions, NAAJA considers the redesign of the measure as improved but still discriminatory, damaging and unworkable. We call on the Government to move away from a starting point of blanket bans. There is no evidence to say that these are serving their intended purpose. We call on the Government to empower communities to drive solutions to alcohol misuse that are appropriate to the needs of individual communities. Foremost amongst these will be putting a range of culturally appropriate and accessible alcohol treatment programs on the ground, in the same way that the Government is putting police, night patrol services and increasing numbers of government workers on the ground.

NAAJA rejects the continuation of the 'prohibited materials' restrictions. It is symbolic of many of the problems with the NTER: there is simply no evidence to support it, and it has only stigmatised communities as consumers of pornography and perpetrators of violence and child abuse.

The law enforcement measure that has given extreme, coercive powers to the Australian Crime Commission should be removed. The power is clearly discriminatory in that it only applies to Aboriginal people in prescribed areas. There has been no evidence to support the stripping of fundamental civil liberties, such as the right to silence, that this measure entails.

In relation to the community stores licensing measure, NAAJA supports the inclusion of food security as an assessable matter, the strengthened governance requirements, and the option that a store not be required to obtain a licence where to so would be unduly burdensome.

The proposed changes to the Social Security Appeals Tribunal that provide for pre-hearing conferences and government agency participation are likely to further reduce access to justice by Aboriginal people. NAAJA supports the retention of the current system, whereby appellants have access to the Tribunal without undue formality or the need to engage in an adversarial contest with Centrelink.

In relation to income management (dealt with separately in Part III), we contend that the resources used to fund the proposed system of arbitrary and wide-reaching government-imposed income management would be more usefully directed to addressing the root causes of social and economic disadvantage in communities. In the alternative, a system of voluntary and case-by-case income management is to be preferred.

Customary Law

NAAJA seeks in this submission to highlight the failure by Government to even include Customary Law in the NTER redesign. NAAJA calls for the immediate repeal of provisions relating to Customary Law, and for Aboriginal people to be restored the same rights as other Territorians to put all relevant matters before a court in sentencing and bail proceedings. We also call on the Government to take steps to value and strengthen Customary Law. It is imperative to remember that these are systems of law that have successfully functioned for thousands of years and which continue to play an active and vital role in contributing to community justice outcomes alongside the conventional criminal justice system.

NAAJA

The North Australian Aboriginal Justice Agency's (NAAJA) charter is to provide high quality and culturally appropriate legal aid services for Aboriginal and Torres Strait Islander people within the North Zone of the Northern Territory. The operations of NAAJA are to:

- ensure that legal assistance is provided in the most effective, efficient and economic manner;
- provide quality, culturally appropriate and accessible legal aid related services to Aboriginal people through legal advice and representation in Criminal Law, Civil Law and Family Law;
- provide legal representation in the following courts: Supreme Court of the Northern Territory, Magistrates Court both in Darwin and Katherine and on circuit in remote communities, Family Court and Federal Magistrates Court;
- coordinate law reform and policy activities and deliver community legal education and information;
- endeavour to secure the services of language interpreters to assist Aboriginal persons with matters in respect of which they are provided with legal assistance; and
- train and employ Aboriginal people.

NAAJA legal services

NAAJA has a civil and a criminal legal section providing advice and case work, as well as a dedicated advocacy program. In addition, NAAJA employs two lawyers to run the Welfare Rights Outreach Program (WROP). The WROP is funded by the Commonwealth Government to provide casework and advice, community legal education and capacity building for government and non-government organisations in relation to Centrelink and Income Management.

Further information about NAAJA's services can be found at **Attachment A**.

NAAJA's response to the Bills

NAAJA's submission in relation to the Bills is in three Parts.

Part I concerns the Government's proposed legislation to reinstate the *Racial Discrimination Act 1975* (RDA) in a manner consistent with Australia's international commitments under the UN Convention on the Elimination of All Forms of Racial Discrimination (the Convention).

Part II addresses specific NTER measures that are within NAAJA's area of operation of experience and expertise, excluding income management.

In addition, this part covers the proposed changes to the Social Security Appeals Tribunal and, and highlights issues relating to Customary Law.

Part III focuses on income management, in recognition of the significance of the proposed changes and their impact on NAAJA's client group.

PART I - REINSTATEMENT OF THE RACIAL DISCRIMINATION ACT

As we stated in our joint submission with the Central Australian Aboriginal Legal Aid Service (CAALAS) to the Senate Select Committee on Regional and Remote Indigenous Communities, 'it is imperative the Commonwealth Government continue its commitment to the *Racial Discrimination Act* as a fundamental principle for Australia and follow through on its pre election opposition to the provisions which suspend the operation of the *Racial Discrimination Act*.'[1]

1.1. Restoring the RDA is imperative

NAAJA supports the Commonwealth Government's desire to reinstate the RDA. We share the view of the Government that a 'heightened focus on respectful engagement with Indigenous people'[2] is imperative. And we agree with the sentiment that the 'reinstatement of the RDA … will serve to restore dignity to communities and give them the backing and incentive to become involved in driving long-term solutions.'[3]

However, as the Aboriginal and Torres Strait Islander Social Justice Commissioner observed in his 2007 Social Justice Report, the NTER involved:

> 'introducing measures that undermine the rule of law and that do not guarantee Aboriginal citizens equal treatment to other Australians. If this is the case it places a fundamental contradiction at the heart of the NT intervention measures. This will inhibit the building of relationships, partnerships and trust between the Government and Indigenous communities'.[4]

Restoration of the RDA may convey the restoration of equal treatment and a sense of dignity. However, if that restoration is disingenuous and if it justifies a perpetuation of second class treatment for Aboriginal Australians, it will do nothing at all to contribute to Aboriginal people being given 'the backing and incentive to become involved in driving long-term solutions'.

Whilst we agree with restoring the operation of the RDA, NAAJA is concerned that the Government's means of restoring the RDA is not in compliance with Australia's human rights obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (the Convention), and will only further damage its relationship with Aboriginal people in the Northern Territory.

1.2. The Convention and the RDA

Australia has a proud history of being at the forefront of efforts to combat racial discrimination. The Convention enshrines the principle of non-discrimination. It was adopted by the General Assembly of the United Nations in 1965. Australia became a signatory in 1966 and became a party to the Convention in 1975. As a party, Australia is

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[1] Joint Submission by the Central Australian Aboriginal Legal Aid Service and the North Australian Aboriginal Justice Agency to the Senate Select Committee on Regional and Remote Indigenous Communities , June 2008, 3.
[2] Australian Government, 'Policy Statement Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response', 2.
[3] Ibid, 2.
[4] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007*, Australian Human Rights Commission (2007), 248.

required to submit regular reports to the Committee on the Elimination of Racial Discrimination as to the legislative, judicial, policy and other measures we have taken to give effect to the Convention.

Also in 1975, the Australian Parliament passed the RDA. The RDA makes racial discrimination unlawful throughout Australia. Importantly, it overrides State or Territory laws that are inconsistent with the RDA to the extent of their inconsistency.

1.3. The NTER redesign

The Government in its Policy Statement says that the Bills provide that 'all the laws that suspended the operation of the RDA will be repealed from 31 December 2010.'[5] In relation to income management, in proposes to do this by redesigning the measure to make it non-discriminatory. It proposes to delineate the other measures as 'special measures' for the purposes of the RDA.

1.4. Income management, indirect discrimination and the RDA

NAAJA is concerned that the redesigned income management measure will in its practical effect be indirectly discriminatory.

As discussed it its 'Draft guidelines for ensuring income management measures are compliant with the *Racial Discrimination Act*' dated 11 November 2009, the Australian Human Rights Commission (AHRC), observes that 'Indirect discrimination occurs when a term, condition or requirement is imposed *generally* that is unreasonable and has a disparate impact on people of a particular race'.

The AHRC then notes that '(i)n assessing whether actions taken in the implementation of an income management measure may indirectly discriminate against people of a particular race, it is necessary to ask:

(a) Are there any terms, conditions or requirements being imposed that are unreasonable (both in terms of what they require or how they are applied)?

(b) Are there people of a particular race who are unable to comply with the relevant term, condition or requirement?

(c) Does the requirement to comply have a negative impact upon the equal enjoyment of rights in public life by people of that race?

If the answer to all of these questions is "yes", the implementation of the income management measure is indirectly discriminatory.'[6]

[5] Australian Government, above n.2, 4.

[6] Australian Human Rights Commission, 'Draft guidelines for ensuring income management measures are compliant with the *Racial Discrimination Act*,' (2009), 7.

In NAAJA's submission, there is a serious question as to whether the Bills indirectly discriminate against Aboriginal people in the Northern Territory.

Many people in the NAAJA client group are subject to income management as a result of living in a 'prescribed area'. In effect, the new Bill will mean that most of those in prescribed areas that are currently being income managed will remain on income management, as they will fall within the new disengaged youth and long-term welfare payment recipient categories.

Of the 15,135 people subject to income management in the Northern Territory at 27 March 2009, 10,284 were in receipt of Newstart Allowance, Parenting Payment or Youth Allowance. [7] Of this group, it can be assumed that a substantial proportion will be captured by the criteria for income management under the disengaged youth and long-term welfare payment recipient categories. A further small number of people on Special Benefit will also be captured.

Based on the figure above, this leaves 4851 people, of whom 3178 are age, carer or disability support pensioners. While those in this group will not automatically be subject to income management, they may be caught by the vulnerable welfare payment recipient categories. ABstudy, Widow's Allowance and Family Tax Benefit recipients make up most of the balance and they too may find themselves deemed among the vulnerable.

These figures indicate that with the very broad reach of the new categories (and without taking into account how many people might opt for voluntary income management) it is entirely possible that some 10,000 people, or two-thirds of those currently subject to income management, will be income managed under the new system.

Extrapolating from this, we can expect that Aboriginal people in the Darwin metro area will also be affected in significant numbers given that at 1 July 2009, the number of working-age people in the Darwin metro area identifying as Indigenous was 5649, with the Indigenous employment rate of 42.6per cent.[8]

In both regional and remote centres, Aboriginal people face barriers to employment that start with a lack of employment opportunities and go through to barriers to gaining any available employment. The new system sanctions people on the basis of external structural factors, such as lack of employment and study opportunities, that are beyond their control.

The Government's new system for income management may be touted as non-discriminatory but the reality is that the initial rollout is to take place in the Northern Territory and expansion of the program will only occur if the 'evaluation' of the Northern Territory rollout shows that it worked. At this stage, this is a measure aimed at

[7] Figure extrapolated from Centrelink administrative data referred to in Australian Institute of Health and Welfare, 'Report on the Evaluation of Income Management in the Northern Territory' (2009), 19 <http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/nt_eval_rpt/NT_eval_rpt.pdf> at 5 February 2009.

[8] Australian Government Labour Market Information Portal, <http://www.workplace.gov.au/lmip/EmploymentDataNew/NorthernTerritory/Darwin/> at 5 February 2010.

the Northern Territory, being implemented in the Northern Territory, and therefore impacting in greatest numbers on Aboriginal people in the Northern Territory.

1.5. The redesigned measures, special measures and the RDA

As noted above, the Bills propose that all NTER measures other than income management are consistent with the RDA because they are 'special measures'.

In NAAJA's submission, there is a serious question as to whether the redesigned measures are special measures to assist Aboriginal people in the Northern Territory.

1.6. Special measures

The principle of non-discrimination has in-built flexibility. It allows for initiatives that actually target particular racial groups who face entrenched disadvantage. These special measures, often referred to as affirmative action or positive discrimination, are allowed because they seek to allow the targeted group to enjoy an equal exercise of their human rights and fundamental freedoms. They allow for equality of outcome rather than equality at law.

The important role of special measures which positively discriminate on the basis of race is recognised in section 8(1) of the RDA. It is here that the RDA adopts the description of special measures in Article 1(4) of the Convention:

> 'Special measures taken for the **sole purpose** of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be **necessary** in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall **not be continued** after the objectives for which they were taken have been achieved.' (emphasis added)

The High Court considered the question of what constitutes 'special measures' in *Gerhardy v Brown* (1985) 159 CLR 70. Justice Brennan held that there are four indicia for a law to be a special measure:

- the law must **confer a benefit** on some or all members of a class
- the **membership** of which is based on race, colour, descent, or national or ethnic origin
- for the **sole purpose** of securing adequate **advancement** of the beneficiaries in order that they may enjoy and exercise equally with others human rights and fundamental freedoms
- in circumstances where the protection given to the beneficiaries by the special measure is **necessary** in order that they may enjoy and exercise equally with others human rights and fundamental freedoms.[9] (emphasis added)

[9] *Gerhardy v Brown* [1985] 159 CLR 70 at 32 per Brennan J.

It is also important to consider what constitutes 'advancement' and from whose perspective — the Government's, or the purported beneficiary? Justice Brennan clarified in *Gerhardy* [10] what is meant by 'advancement':

> 'is not necessarily what the person who takes the measure regards as a benefit for the beneficiaries … (and it) is not established by showing that the branch of government or the person who takes the measure does so for the purpose of conferring what it or he regards as a benefit for the group if the group does not seek or wish to have the benefit.'; and
>
> '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.'

1.7 Special measures — Key questions

NAAJA acknowledges that issues affecting Aboriginal people in the Northern Territory, in particular those facing residents of remote communities such as entrenched poverty, systemic and less overt forms of discrimination, disadvantage of opportunity and inadequate access to housing, health, education, employment and other support services are examples of long-term disparity that could well justify the introduction of special measures.

As noted above, there are several important criteria that have been enunciated in the Convention, by the RDA and by High Court jurisprudence by which a proposed special measure is to be considered:

- are they necessary in order to ensure the group's or individual's equal enjoyment or exercise of human rights or fundamental freedoms? Could the same purpose have been achieved through other means?
- are they for the sole purpose of advancement? Has the group in question given its free and informed consent to the imposition of the special measure?
- are they only in place temporarily to prevent a situation of different rights for different racial groups? Are they subject to regular review to see whether the objectives for which they have been imposed have been achieved?

1.8 Special measures: Analysis

It is our submission that there is a serious question as to whether the redesigned NTER measures are special measures according to these three criteria. This is for the reasons that follow.

(a) Are the measures necessary?

As noted by the AHRC, 'Demonstrating necessity requires evidence – current and credible evidence which shows that the measure will be effective. The data must be

[10] Ibid. at 33.

reliable, credible and where possible, supported by both qualitative and quantitative sources.'[11]

In our view, there is a complete lack of evidence to demonstrate necessity. The Government seeks to rely on comments as extracted from its *Future Directions* consultations to support its conclusion that necessity is demonstrated. This is then considered by Government to constitute 'evidence' so as to justify special measures.

We consider below three examples[12] of the Government's conclusions and their use of evidence in relation to alcohol, pornography and law enforcement powers.

Alcohol

'The Government considers that the new alcohol restrictions, informed by the consultations, are a special measure for the purposes of the RDA. The measures will reduce the risk of alcohol-related harm involving women and children. The Government considers that the measure addresses the special needs of Indigenous communities, and will play a role in improving health outcomes of Indigenous people in the communities.

The consultations reveal that members of communities recognise these benefits and that there was a strong consensus that the alcohol restrictions should continue.'

Pornography

'The Government considers that the restrictions on sexually explicit and very violent material are a special measure for the purposes of the RDA. The measure will reduce the risk of children being exposed to pornographic material as well as the potential risk of child abuse and problem sexualised behaviour. The consultations reveal that members of communities recognise these benefits and that there is support for the continuation of the measure.'

Law enforcement powers

'The Government considers that this measure is a special measure for the purposes of the RDA. The Government believes that the measure protects the rights of Indigenous people, especially children and women, in these communities by facilitating the reporting and investigation of crimes involving serious violence and abuse, the prosecution of such offences, and therefore the prevention of further serious violence and abuse. The measure will be continued for the sole purpose of protecting Indigenous children, in particular women and children, in the communities. The Government believes that the measure is a necessary tool to assist in the protection of Indigenous people, in particular children and women, from serious violence or abuse.'

The use of evidence in the above extracts is problematic on several fronts.[13] Also, in circumstances where the Government bears the positive onus of establishing necessity as well as why the measure will be effective, the failure to make available — or even

[11] Australian Human Rights Commission, above n.4, 11.

[12] These are taken from: Australian Government, 'Policy Statement Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response'.

[13] It is also highly problematic in relation to the issue of free and informed consent, as discussed under the heading 'Sole Purpose and Advancement' below.

refer to — credible evidence surely undermines any assertion that credible evidence exists. Without the Government explicitly pointing to any actual evidence, it must be presumed that such evidence does not exist; in which case the Government cannot hope to assert that necessity has been established.

Moreover, it is unacceptable for the Government to claim to have demonstrated necessity, and yet not provided the evidence to support such claims. It could reasonably be expected that the Government would release credible and reliable data to justify their conclusions. Its failure to do so makes it impossible to assess whether the data is credible. Similarly, the failure by Government to even refer to qualitative and quantitative sources renders it simply not possible to objectively assess the reliability of the Government's assertions.

Each of these examples highlights the dearth of evidence to support conclusions that are stated as fact. In relation to alcohol, the Government does not produce any quantitative or qualitative data to substantiate its conclusion. It states that through the consultations, 'members of communities recognise these benefits [of the alcohol restrictions] and that there was a strong consensus that the alcohol restrictions should continue.'[14]

But this assertion is highly dubious. Of itself, the assertion speaks nothing on the critical issue of whether the benefits of the measure can be achieved without a racial distinction being imposed. And most concerningly, it is made by way of a sweeping statement that does not provide critical information to assess the credibility and reliability of the so-called 'evidence'. For example, there is no information as to:

- the question that was asked by which these broad-scale responses were elicited;
- whether the comments were made as a general statement that alcohol bans were 'a good thing', or
- that people acknowledged a link between alcohol and alcohol-related harm involving women and children; or
- the number of respondents as a proportion of all respondents who recognised the benefits of alcohol restrictions.

In relation to the pornography measure, the Government uses an almost identical generalised statement to conclude, 'The consultations reveal that members of communities recognise these benefits and that there is support for the continuation of the measure.' Again, the Government does not address the issue of whether the benefits of the measure could be achieved without a racial distinction being imposed. And again, it is made by way of a sweeping statement that does not allow for the credibility and reliability of the so-called 'evidence' to be considered.

We are very concerned that the Government's summary of what people said at the consultations is inaccurate. For starters, many people in communities do not know what the term 'pornography' means. It then becomes ridiculous to say that people supported the continuation of a measure when they did not even share an understanding of a term that is at the heart of the measure.

[14] Australian Government, above n. 12, 7.

Even if, as claimed, there was community support for the pornography provisions, there was no evidence provided for the Government's claim that these restrictions will reduce 'the potential risk of child abuse and problem sexualised behaviour'. Article 1(4) of the Convention defines special measures as laws necessary for 'groups or individuals' equal enjoyment or exercise of human rights and fundamental freedoms'. The Government has provided no evidence as to the link between pornography and child abuse or problem sexual behaviour. It is, therefore, difficult to believe that the Government is attempting to provide protection for human rights and fundamental freedoms through these laws.

In our experience (and from our observations of the *Future Directions* consultations), we have heard the majority of people say that they did **not** consider pornography to be widely available or widely accessed in remote communities (see discussion below). We have grave concerns that the Policy Statement misrepresents what people actually said. We are not dissuaded from this view by the striking similarity between the alcohol and pornography conclusions, which could suggest a degree of 'cutting and pasting' has taken place.

And as regards the law enforcement powers, it again must be asked where is the *credible* evidence to support the view that 'The Government believes that the measure protects the rights of Indigenous people, especially children and women, in these communities by facilitating the reporting and investigation of crimes involving serious violence and abuse, the prosecution of such offences, and therefore the prevention of further serious violence and abuse'?

It is NAAJA's direct experience as the legal aid service for Aboriginal people in the Top End that there has not been an upsurge or any increase of prosecutions of crimes involving serious violence and abuse as may have been expected if there had been any link between the measure and the intended outcome of protecting Indigenous women and children.

It is also the case that available statistics do not support the Government's justification for continuing this measure. The Long Term Recorded Crime Statistics compiled by the Northern Territory Department of Justice to September 2009 provide yearly statistics for sexual assaults and assaults.[15] In relation to sexual assaults, in the twelve months to September 2009 as compared to the twelve months to September 2008 the recorded offences reduced by 32 per cent. A similar decrease was recorded in the twelve months previous to that as well.[16]

Therefore, available evidence would appear to suggest that the increased powers and presence of the Australian Crime Commission (ACC) has not had the intended outcome of 'facilitating the reporting and investigation of crimes involving serious violence and abuse, the prosecution of such offences, and therefore the prevention of further serious violence and abuse.' For the Government to claim otherwise is duplicitous.

[15] See Northern Territory Department of Justice, Northern Territory Quarterly Crime and Justice Statistics, Issue 29: September Quarter 2009, Northern Territory Government <http://www.nt.gov.au/justice/policycoord/researchstats/index.shtml> at 5 February 2010.
[16] Ibid.

In relation to assaults generally, the statistics suggest that there were 452 more assaults in the rest of the Northern Territory (places outside Darwin, Palmerston, Alice, Katherine, Tennant and Nhulunbuy) in the twelve months to September 2009 as compared to the twelve months to September 2008. This could be considered by the Government to support a link between the presence and powers of the ACC and 'facilitating the reporting and investigation of crimes involving serious violence and abuse, the prosecution of such offences, and therefore the prevention of further serious violence and abuse.' However, it is unclear as to whether the 'assaults' recorded are examples of 'serious violence' because the definition of 'assaults' is very broad and may refer to 'non-serious violence'[17]. Nor is it whether the increase of assaults in places outside the main NT centres is because of increased police presence in NTER communities as opposed to the presence and powers of the ACC, or other reasons altogether.

And it is also important to objectively evaluate the statistics and put the statistics in context. The NT Department of Justice[18] noted in relation to the assault figures across the NT:

> 'The figure shows the underlying average level of *assault* has ranged between 406 and 539 offences per month during the past nine quarters. Its current level of 470 per month is in the middle of the range. Over the past 12 months the underlying average increased early in the period and decreased in the middle of the period. There were 1458 *assault* offences recorded in the current quarter. This represents an increase of 5per cent (64) from the previous quarter and an increase of 15per cent (191) from the same quarter the previous year.' (emphasis added)

It is therefore our view that that the actual evidence available does not support the conclusion asserted by the Government. The failure by Government to even refer to the evidence upon which they claim a link between the measure and protecting Aboriginal women and children does not assist the Government in resisting this conclusion.

(b) Sole purpose and advancement

As noted by the AHRC, three critical considerations must be borne in mind when considering whether the sole purpose of a measure is to secure advancement of the beneficiaries:

1. 'When assessing the 'adequate advancement' of a group, it is necessary to consider their views';
2. 'In dealing with Indigenous communities, the standard of free, prior and informed consent should be applied'; and
3. 'The consultation process must be a real opportunity for engagement. It should aim for full and equitable participation across and between affected communities'.[19]

NAAJA expresses grave concern as to the nature of the consultation, and that the Government was consulting about measures that it had already made up its mind to

[17] An assault can be committed even where no actual force is used.
[18] Northern Territory Department of Justice, above n. 11, 16.
[19] Ibid.

continue. We have had the opportunity to consider 'Will They be Heard? – A Response to the NTER Consultations June – August 2009' and endorse the observation that:

> 'the Government has embarked upon what it calls a process of consultation with the Aboriginal people in an attempt to gain support from the Aboriginal people for the preservation of particular features of the intervention that the Government thinks are good for them and to therefore designate them as 'special measures' that can be continued despite the reintroduction of the Act… this is not consultation at all.'[20]

NAAJA has also previously made known its serious concerns as to 19 deficiencies we observed in the consultation process. We wrote a joint letter with CAALAS, NT Legal Aid and the Darwin Community Legal Service to FAHCSIA dated 5 August 2009. The concerns we raised included:

- the limited public awareness campaign prior to the consultations;
- short notice being given to residents in communities prior to the consultations
- few people having had to read the Discussion Paper prior to the consultations, limiting their ability to think deeply about issues in the Discussion Paper prior to the consultations;
- Discussion Paper and Powerpoint presentation not being translated into relevant Aboriginal languages;
- inadequate use of interpreters during consultations, or no interpreter used at all, and inadequate definitions given of high-level of legal terms (ie. Pornography);
- lack of ability for people in communities to put forward their views other than directly to FAHCSIA or GBM when they may have bad relationship, be mistrustful or feel intimidated by these personnel;
- people not being told that consultations could be later relied upon to support Government making a case that NTER are 'special measures';
- lack of process to enable consultations in communities to be separate for men and for women; and
- discussion being steered to the options put in the Discussion Paper, and not canvassing other options (for example, income management discussion being restricted to the two options put).

[20] Alastair Nicholson, Larissa Behrendt, Alison Vivian, Nicole Watson and Michele Harris, 'Will They be Heard? – A Response to the NTER Consultations June – August 2009', Research Unit Jumbunna Indigenous House of Learning (2009), 4.

A copy of this letter is at **Attachment B.**

It is further of note that many of these issues were also independently observed by those contributing to the 'Will They be Heard? – A Response to the NTER Consultations June – August 2009' report. These include:

> 'a. Lack of independence from government on the part of the people undertaking the consultancy;
> b. Lack of Aboriginal input into design and implementation;
> c. Lack of notice;
> d. An absence of interpreters;
> e. The consultations took place on plans and decisions already made by the government;
> f. Inadequate explanations of the NTER measures;
> g. Failure to explain complex legal concepts; and
> h. Concerns about the government's motives in implementing consultation.'[21]

In relation to these deficiencies, several examples cited in the 'Will They be Heard?' report illustrate these concerns.

In relation to lack of independence from government on the part of the people undertaking the consultations, in the introductory remarks to the Utopia consultation, the convener stated the 'Government has decided to keep going in the meantime to try and make sure that the good things keep happening, at least, for another three years.'[22]

In relation to lack of Aboriginal input into design and implementation, the statement by a Government worker that, 'I hope that we can do it within an hour or so, and how you want to do the meeting is really up to yourselves'[23], displays the lack of organisation and Aboriginal input to the design of the consultations prior to meetings. This contributed to the disorganised nature of the consultations.

The absence of interpreters was a key concern. At many consultations, qualified interpreters were not present and attendees were co-opted to interpret complex legal concepts, such as those related to the reinstatement of the RDA and its definition of special measures. At the beginning of the Ampilatmatja meeting, the convener stated,

> 'the interpreter that we booked through the Aboriginal Interpreters Service wasn't able to be available. She had to go to Tennant Creek. Another interpreter isn't also here. I think Wilma has agreed to do some interpreting, when we talk to the ladies later on.'[24]

[21] Ibid, 9.
[22] Ibid, 10.
[23] Ibid, 29.
[24] Ibid, Annexure 3: Ampilatwatja - Part 1, at 00:13:14;00

Another important issue was the bona fides of the consultations, and whether future plans and decisions had already been made by the Government. The convenor at one consultation noted:

> '(There are) two options for income management … One is that they don't change it at all. And the second option is where, if people want to go off income management … they ask for what they call an exemption, so they are exempt from being on income management, and its based on an assessment of that person and their family to make sure, you know, they are not getting humbugged and all that kind of thing.'[25]

The consultations, therefore, were established with and conducted using a framework which only encouraged opinions to be expressed that were in response to the Government's provided options.

In relation to the issue of the adequacy of the explanations of the NTER measures, a community member commented at the Amplitatwatja conference that:

> 'we don't know anything about this. Ever since we come to live from another community, to …, we don't know nothing about these leases that's been put on this community and now we need to know because what you're saying is you've got the government roads already in without these people consulting us.'[26]

Similarly, there are serious concerns over how effectively complex legal concepts were explained. The 'Will They be Heard?' report commented that 'very few people knew much about this measure (five-year leases) or they weren't prepared to comment for cultural reasons.'[27] Similar comments were made about the police powers[28].

In our submission, these deep-seated deficiencies in the consultation process are particularly critical in relation to the issue of free, prior and informed consent. We would suggest that the Government has applied a level of manipulation of the process, by claiming to consult about the future of specific NTER measures, but not openly revealing the Government's true reasons for the consultations and the purpose for which responses could be used.

In these circumstances, to condone the Government's consultation process and its deliberate manipulation of the requirement for free, prior and informed consent would be to pay lip service to Australia's international and domestic human rights obligations. If the Government seeks to assert the redesigned NTER measures to be special measures for the purposes of the RDA, the Government must consult with Aboriginal people in the NT in a manner consistent with the principles of free, prior and informed consent.[29] These include that the consultation take place in good faith, prior to decisions having already been taken, where the Government openly communicates to people the

[25] Ibid, Annexure 3: Ampilatwatja – Part 2, at 00:11:01;16
[26] Ibid, Annexure 2: Bagot Community – Part 2, at 0:31:24
[27] Ibid, 9.
[28] Ibid, Annexure 2: Bagot Community – Part 2, 1:18:16.
[29] Australian Human Rights Commission, above n. 4, Appendix 1: Key elements of free, prior and informed consent.

full details of its proposals, and where it seeks a genuine dialogue to find solutions. In this regard, we agree with Vivian and Schokman[30] that:

> 'post-implementation consultation, even if adequate, cannot be used to justify measures as special measures. The requirement for consultation is in itself an integral aspect of ensuring that special measures are identified and developed to achieve legitimate ends.'

(c) Monitoring and evaluation

The AHRC points to several considerations as to thee monitoring and evaluation required to determine whether a measure has already achieved its objectives. These include 'whether the measures are appropriate and suitably adapted to their stated purpose, whether the measures are having the intended (immediate/short-term and/or long-term) effect, whether there are any emerging, unintended consequences of the measures, whether there are any negative flow on effects from the measures, and whether there is a continuing need for the measures, that is, have they already achieved their stated purpose?'

It is apparent that some of the NTER measures including community store licensing, business area management powers, five-year leases, pornography, alcohol and computers are time-limited in that they are to cease in August 2012. Notwithstanding that these measures are time-limited, NAAJA is not aware of any means by which these measures are to be monitored and evaluated. In our submission, this again suggests that the Government is not properly cognisant of its international and domestic legal obligations with respect to ensuring that special measures should only remain in place for so long as their intended purpose or objective has not been met.

We are equally concerned that the law enforcement powers, with an annual funding commitment to the Australian Crime Commission of $5.5 million, are not time limited at all. We have earlier described our concerns as to the lack of evidence to justify this measure. But even if that evidence were to exist, we can see no reason why this measure should not also be time-limited, and why the Government should not be ensuring that this special measure is only in place for so long as its intended purpose has not been achieved by having a transparent and rigorous monitoring and evaluation process.

1.9 Summary

NAAJA is dismayed at the Government's selective and manipulative use of the consultation process and its lack of credible and reliable qualitative and quantitative evidence to justify its restoration of the RDA by declaring all NTER measures other than income management to be special measures for the purposes of the RDA.

If it was not bad enough that the consultations were carried out after the Government had already declared its intention to continue the NTER measures[31], we share the view of the authors of the 'Will They be Heard? – A Response to the NTER Consultations

[30] Vivian, A and Schokman, B, 'The Northern Territory Intervention and the Fabrication of Special Measures', 13(1) *Australian Indigenous Law Review* 2009, 87.

[31] for example, in the Income Management section of the 'Future Directions for the NTER – Discussion Paper' it is clearly stated on p.11 that the 'The Government believes that income management should continue'.

June – August 2009' report that the deficiencies in the way the consultations were carried out means:

> 'that there has been a failure to consult with Indigenous people, bringing into question the credibility of alleged support and rendering invalid any potential claim that the consultations amount to genuine 'consent'.[32]

And in the context of an Intervention that has been characterised by an alienation of the very people that it is seeking to assist by its discriminatory approach, it is arguably most disappointing of all that the Government does not appear to be bringing an objective and impartial mind to the NTER measures, to assess where the very substantial resources can best be utilised. But instead, the Government appears content to produce reports that lack both evidence and intellectual rigour and that simply seek to rubber stamp pre-determined decisions to suit its political imperatives.

Finally, NAAJA considers that if the RDA is to be reinstated, and if the RDA is to be given its full effect, the Bills must include a 'notwithstanding clause', expressly providing that the provisions of the RDA prevail notwithstanding anything to the contrary in the NTER legislation.

If this clause is not included, provisions in the amended NTER legislation that are clearly inconsistent with the RDA would still override the RDA. NAAJA considers that this would substantially undermine the practical benefit of restoring the RDA. It would also preserve a situation where Aboriginal people in the NT are denied the same protections under the RDA as other Australians.

[32] Alastair Nicholson et al, above n.17, 9.

Part I Recommendations

1. NAAJA recommends that the Government immediately be required to produce credible and reliable qualitative and quantitative evidence by which it asserts the NTER measures (other than income management) are special measures for the purposes of the RDA.

2. NAAJA recommends that after having produced this evidence, that the Government embark on good faith consultations with Aboriginal people in the Northern Territory, prior to decisions having already been taken, where the Government openly communicates to people the full details of its proposals, and where it seeks a genuine dialogue to ascertain people's responses and to find meaningful and long-term solutions.

3. NAAJA recommends that to fully and effectively restore the RDA, that the Bills include a 'notwithstanding clause' and in particular contain the following clauses:

- 'that the provisions of the RDA are intended to prevail over the provisions of this Act', and

- 'that the provisions of this Act do not authorise conduct that is inconsistent with the provisions of the RDA.'

4. Finally, we also recommend that Item 4 of Schedule 1 of the Bill relating to retrospectivity and section 8 of the Acts Interpretation Act 1910 be removed.

PART II: SPECIFIC NTER MEASURES

In this part of our submission, NAAJA will seek to address specific NTER measures that are within our area of operation and expertise. These include alcohol restrictions, prohibited material restrictions, law enforcement powers and community store licensing (income management is dealt with separately in Part III). We also address the proposed changes to the Social Security Appeals Tribunal and the issue of Customary Law.

1. Alcohol restrictions

1.1 A non-discriminatory approach is needed

NAAJA considers that the redesigned Alcohol Restrictions is a step in the right direction, but that it still fails to deliver a non-discriminatory approach to alcohol restrictions. We are also concerned that the redesigned Alcohol Restrictions measure fails to appropriately prioritise the need for a multi-faceted approach to dealing with alcohol problems.

1.2 Misperceptions

Alcohol misuse has always been, and continues to be an issue in communities. That said, alcohol misuse is not a problem confined to Aboriginal communities in the Northern Territory. We are concerned that the NTER has contributed to a perception that Aboriginal people require a prohibition approach to alcohol consumption, whereas this is not required for the wider community. Research shows that Aboriginal people drink less frequently than the general population. For example, the Australian Medical Association in a 2009 Information Paper notes that 'A lower proportion overall of Indigenous people than the general population drink alcohol, and drink less frequently, but those who do drink generally drink at higher levels.'[33]

1.3 Bans alone will not work and unintended consequences of a blanket approach

The AMA Information Paper is consistent with NAAJA's submission to this Inquiry - we acknowledge that alcohol is a problem in remote communities, but we are strongly of the view than bans alone will not address these issues but that a multi-faceted non-discriminatory approach to addressing alcohol misuse is needed.

We are also concerned that the changes brought about by the NTER to ban the drinking, possession, supply or transporting of alcohol into prescribed areas, and the expansion of the definition of prescribed areas on those that were previously in place, have in some cases led to devastating and unforeseen consequences.

Example – Ngukurr

Ngukurr is an example of a community which prior to the NTER, already had community-driven bans on the consumption, possession, supply or transport of alcohol. The NTER extended the boundaries of the 'prescribed area' in which these bans were in effect. The NTER changes were imposed, without consultation with the community. The consequence is that instead of drinking by the river, as people had previously done

[33] See Australian Medical Association, 'Alcohol Use and Harms in Australia (2009) – Information Paper', <http://www.ama.com.au/node/4762> at5 February 2010.

in relative safety, those who wish to consume alcohol must now travel some 40 kilometres out of the community. This has led people to be drinking in unsafe circumstances, where there are no Night Patrol services, where there is no drinking water, no transport services and no shade. Since the NTER, there have been at least two people who have tragically passed away who were simply complying with the law and drinking outside the prescribed area.

Similarly, it is NAAJA's experience that blanket bans have caused an ever increasing number of people to gravitate towards larger towns where they can legally consume alcohol. By not having a place for people to drink safely and responsibly in communities, people become more likely to drift to towns. Because they have often travelled large distances, due to the exorbitant cost of remote travel, people often become stuck in town with no means to get home. Whilst in town, they will frequently drink as much as they can, as quick as they can and this often exposes them to situations of high risk – such as young girls who may not have money to pay their taxi fare and pay in another way, or where people become intoxicated by the side of roads and are struck by motor vehicles.

1.4 The need for an evidence-based approach

NAAJA calls for alcohol measures to be taken that are firmly rooted in credible and reliable evidence. We are concerned that the NTER Alcohol Restrictions have come about and continue to be justified in the absence of credible and reliable evidence to say that they are proving effective. In their Policy Statement, the Government puts forward a proposal that 'alcohol restrictions should continue, but that there should be a change of focus from a universally imposed measure to a measure designed to meet the individual needs of specific communities.'[34]

NAAJA entirely agrees with second part of this proposition, but we wish to restate our concern as to the tragic and horrific unforeseen consequences that can result from 'universally imposed' alcohol restrictions. We are also concerned by the following proposition in the Policy Statement:

> 'Moving to local restrictions *will be based on evidence* about matters including …' (emphasis added)

NAAJA calls for the Government to start from a position of basing decisions on evidence. It is simply unacceptable to start with a position of maintaining alcohol restrictions and declaring the same to be a special measure for the purposes of the RDA without producing credible and reliable evidence to establish the link between the alcohol restrictions and the desired outcome of addressing the 'special needs of Indigenous communities.'

1.5 Discriminatory

It is our submission that in the absence of such evidence, the redesigned NTER Alcohol Restrictions are not special measures for the purposes of the RDA and that the proposed alcohol restrictions remain discriminatory to Aboriginal people.

[34] Australian Government, above n. 12, 8.

Moreover, the current situation is both confusing and unfair. The NT and the NTER alcohol restrictions often do not sit comfortably together, with restrictions in communities being different from restrictions in towns. We are strongly of the view that there needs to be a consistent approach to alcohol, where all Territorians are subject to the same restrictions. In particular, we have grave concerns about the functioning of the permit system, where some non-Aboriginal people employed in communities are able to obtain a liquor permit which Aboriginal residents in the same communities are not able to obtain.[35] This creates a real and/or perceived double standard, and we consider that alcohol restrictions should be the same for everyone.

1.6 Clarity of approach

NAAJA is also concerned by an absence of clarity in regard to alcohol policy in the Northern Territory. We question why a policy of prohibition is the starting point for Aboriginal people in remote communities, whereas alcohol management and responsible drinking is the starting point for other Territorians. NAAJA considers that as a community, we should not be imposing policy that is out of step with prevailing community standards. In other words, it is unrealistic and simply setting people up to fail to expect Aboriginal people to comply with State-imposed prohibition when we would not expect non-Aboriginal Australians to comply a similar blanket law.

In our submission, a policy of responsible drinking needs to be urgently articulated for all Australians unless we as a community are prepared to move to a non-discriminatory policy of prohibition.

1.7 Community control

As stated above, NAAJA supports the policy direction of giving communities control over the consumption of alcohol in their community. In our experience, the best way forward is by local, culturally appropriate interventions. These have been implemented successfully in the past. For example, in 2005 and prior to the NTER, an Alcohol Management Plan was implemented on Groote Eylandt and Bickerton Island, requiring every person in the region to hold a permit to buy or consume takeaway alcohol. The Plan required extensive consultation with stakeholders and a management committee representing key stakeholders.

It is our firm view that communities must be empowered to control the manner in which alcohol is consumed in their communities, and if it is to be consumed at all. Some communities may want blanket bans, as has been the case in the past. Others may want to allow for some drinking but with restrictions. And others again may want to set up a club, a restaurant, or a pub where alcohol can be safely and responsibly consumed and in an economically viable way. We note that now that there are police stations in most remote communities, this latter option may be more viable – because there is more scope for communities to manage alcohol safely, and for people to drink moderately and responsibly.

[35] In relation to liquor permits, it is of note that prior to the NTER when many communities had alcohol restrictions in place, this same sense of grievance often arose with respect to permits, where non-Aboriginal community residents were able to obtain permits to consume alcohol against the wishes of the community.

1.8 Problems with Ministerial approval of alcohol management plan

NAAJA also has concerns not just with the discriminatory framework in which communities can ask for blanket alcohol bans to be lifted, but also in relation to the Government's proposed way in which a community can seek a declaration from the Minister that alcohol restrictions no longer apply to an area.

A community would need to satisfy the Minister that their Alcohol Management Plan has had regard to:

- the well-being of the people living in the prescribed area;
- whether there is reason to believe that the people living in the prescribed area have been victims of alcohol-related harm;
- the extent to which people living in the area have expressed their concerns about being at risk of alcohol-related harm;
- the extent to which people living within the area have expressed a view that their well-being will be improved if the declaration is made;
- whether there is an alcohol management plan in relation to a community or communities in a prescribed area;
- any discussions with people from the relevant community about with they have been subject to alcohol-related harm; and
- any other matter the Minister considers relevant.[36]

These are complex and difficult issues that need to be addressed. We are not aware of any resources, other than the goodwill of Government Business Managers (GBMs), that have been designated to assist communities make application for a declaration. Whilst we agree with the sentiment of giving communities opportunity to put forward an alcohol management plan, we are very concerned that communities will not have adequate resources at their disposal to properly put their case. Communities need independent, professional support to prepare their submission and we do not consider it appropriate that it be left to GBMs to fulfil this role.

1.9 Criminalisation

NAAJA also wishes to point to a further unintended consequence of alcohol bans in prescribed areas. It is our experience that alcohol restrictions create another level of criminalised conduct, in that it brings people into the criminal justice system for behaviour that would not be an offence in other parts of the community. In the context of the already gross over-representation of Aboriginal people in the criminal justice system, this additional level of criminalised behaviour has simply brought even more Aboriginal people before the courts. It has led to more people being introduced into the criminal justice system for conduct that would not be criminalised in non-prescribed areas, or which would not be prosecuted in other places due to lesser detection, or the exercise of police discretion to not pursue formal charges.

Statistics recently released show that charge numbers have increased monumentally from 2271 charges in 2006/07 to 3940 in 2008/09.[37] The heavy police presence across

[36] Welfare Reform Bill, Schedule 3, item 10 (section 18(3) NTNER Act).

the NT is leading to what is clearly a situation of over-policing. The NT prior to the Intervention was already the most highly policed jurisdiction in Australia. But with the additional 18 temporary new police stations and 63 new police officers, this has gone to a new level: 'the NT now has 51 police stations for a population of approximately 260,000 people. Roughly one for every 5,000 people.'[38] These increased police numbers have almost doubled the detection rate to an extraordinarily degree, seeing an unprecedented number of public place offences, such as traffic charges and possession of alcohol charges, being laid.

1.10 The lack of resources to combat alcohol misuse

NAAJA is also acutely aware of the dire lack of alcohol counselling, detoxification, support and rehabilitation services available in the NT. Whilst there are some services in the regional centres, and some excellent examples of culturally appropriate rehabilitation centres, there is nowhere near enough to meet the enormous need. Most services have significant waiting lists. Of greatest concern, people from remote communities do not have local services available to them. If people wish to undertake a rehabilitation course for example, they need to travel to a regional centre such as Darwin. They may comply with the program whilst in Darwin, but relapse as soon as they return to their usual environment where peer influences and other factors which may have lead them to drink to excess are present.

NAAJA has read the 'Closing the Gap in the Northern Territory' portion of the Government's Policy Statement. We are dismayed at the trifling allocation of $8 million over three years to 'reduce alcohol and substance abuse and its impact on families, safety and community wellbeing in remote Indigenous communities.'[39] We are dismayed to see funding prioritisation to areas such as more government staff in remote regions ($84.1 million over three years) and more Indigenous Engagement Officers ($34.6 million over three years).[40] If the Government is serious about addressing alcohol abuse and 'reducing the risk of alcohol-related harm involving women and children in communities,' [41] it needs to properly resource services to address alcohol misuse in remote communities. It is also imperative that such programs be designed to be suited to the individual community as opposed to being imposed generically. Such programs should be based on models other than the abstinence model, and that they design culturally appropriate campaigns to promote responsible drinking messages[42] and implement culturally appropriate courses to educate people about responsible drinking.

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[37] See Australian Government – Department of Families, Housing, Community Services and Indigenous Affairs, *Closing the Gap in the Northern Territory: January to June 2009 Whole of Government Monitoring Report*, available at <http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Pages/closing_the_gap_nter.aspx >. A similar trend can be seen in relation to 'substance abuse related incidents' which have gone up from 280 in 2006/07 to 481 in 2008/09. Once again, the implications of over-policing and criminalisation are clearly apparent

[38] Glen Dooley, 'The Thick Khaki Wall' (Paper presented at the Criminal Lawyers Association of the Northern Territory Conference, Bali, 30 June 2009).

[39] Australian Government, above n. 12, 21.

[40] Ibid, 15.

[41] Ibid, 8.

[42] see for example the recent Federal Government collaboration with the Australian music industry to spread responsible drinking messages: <http://www.girl.com.au/responsibledrinking.htm>.

1.11 Police powers

NAAJA wishes to state its support of the planned removal of police powers to enter private residences in prescribed areas. In our experience, this has been a source of enormous upset to Aboriginal people in prescribed areas. We have encountered many instances where police have used this power unjustifiably, without cultural sensitivity and sometimes with excessive force. It has also undermined the intended relationship of trust between police and Aboriginal people in prescribed areas.

NAAJA remains concerned, however, that there will remain the possibility for 'community residents' to seek a Ministerial Declaration to reapply this discriminatory and unwarranted power. It is unclearly how broadly 'community resident' is to be defined and whether this could include, for example, government employees on short-term postings. We have grave concerns as to the future reintroduction of this power on the application of a community resident. In our view, there is no need for police powers in prescribed areas to be any different from those in the rest of the Northern Territory.

2. Prohibited material restrictions

2.1 A Non-discriminatory approach is needed

NAAJA considers that the redesigned prohibited material restrictions fail to deliver a non-discriminatory approach to pornography. It is our view that the restrictions cannot be justified as special measures for the purposes of the RDA. We consider that in the absence of evidence to the contrary, pornography restrictions should be applied in a non-discriminatory manner throughout the entire NT.

2.2 The need for an evidence-based approach

NAAJA considers that an evidence based approach is essential in relation to pornography in prescribed areas. We are concerned that the NTER prohibited material restrictions have come about and continue to be justified in the absence of credible and reliable evidence to say that they are proving effective.

The Government's assertion that the consultations 'reveal that members of the communities recognise these benefits (of the restrictions) and that there is support for the continuation of the measure'[43] is, in our view, dubious.

From the consultations that we attended, there were serious misapprehensions as to the meaning of 'pornography'. There was also a high degree of shame associated with the subject, and a general unwillingness to discuss it openly. The consultations were not set up to take this into account.

And perhaps most importantly, the message that we heard people say was that they did not think pornography is a big problem in communities. For example, the summary of the responses provided at the Tier 4 Darwin Consultation was as follows:

> 'Participants advised there was no evidence to support this measure and saw no benefits from it continuing while ever pornography was available to communities through free to air television networks and mobile phones. It was generally agreed a national strategy was needed to deal with pornography and that the issue was not specific to Indigenous people in remote communities in the NT.'[44]

This extract indicates that many people mistakenly thought — and from our experience at this consultation, were not dissuaded from their misapprehension – that pornography as defined by the NTER was accessible on free to air television, such as SBS. It clearly demonstrates that in one consultation at least, a general view prevailed in contradiction to the Government's summary of the consultation responses.

Along these lines, NAAJA would also draw the Inquiry's attention to the practical reality of life for Aboriginal people in prescribed areas — most, if not all people do not have credit cards. Most, if not all do not have the internet available at home. The capacity of Aboriginal people to access pornography is therefore significantly more limited than the mainstream Australian community.

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[43] Australian Government, above n. 12, 9.

[44] Summary of the Tier 4 Northern Territory Emergency Response (NTER) Future Directions Organisations' consultation workshop, Darwin, 6-7 August 2009, 19

The Government has not provided evidence, other than unsubstantiated assertions of what they claim people said during the consultations. There is no publicly available qualitative or quantitative data available as to what people actually said. Nor has the Government produced any other form of evidence to establish that the NTER restrictions are necessary 'to reduce the risk of children being exposed to pornographic material as well as the potential risk of child abuse and problem sexualised behaviour.'[45]

We would also add that we have not seen any discernible increase in the number of persons charged with possession of pornography, as may have been expected particularly having regard to the increased police presence in prescribed areas. This type of offending remains extremely rare. Isolated instances that NAAJA is aware of more often than not involved non-Aboriginal visitors to Aboriginal communities.

In the absence of any such evidence to the contrary, it is our submission that the bans should be immediately lifted.

2.3 Stigma

NAAJA is also extremely concerned as to the ongoing issue of stigmatisation that has occurred since the commencement of the NTER prohibited material restrictions and the signs that were placed in prescribed areas. It is our experience that these have caused immense shame to communities and have led to people in prescribed areas feeling that outsiders view them as being consumers of pornography or perpetrators of child abuse. This stigma did not exist prior to the NTER and has particularly attached itself to Aboriginal men, in demoralising Aboriginal men and making them feel that others perceive them as consumers of pornography or perpetrators of child abuse.

2.4 Problems with Ministerial approval to have restrictions lifted

NAAJA also has concerns in relation to the Government's proposed way in which a community can seek a declaration from the Minister that pornography restrictions be removed in a particular area. We have serious reservations as to whether communities would actually bother to apply for pornography to be allowed. To do so would be considered 'a shame job' such that people would in our view be more likely to tolerate discriminatory and offensive pornography signs and restrictions rather that apply to have the ban lifted because of the principle involved.

[45] Australian Government, above n. 12, 9.

3. Law enforcement powers

3.1 A Non-discriminatory approach is needed

NAAJA considers that the redesigned law enforcement powers fail to deliver a non-discriminatory approach. We do not consider that the Powers are a special measure for the purposes of the RDA. We dispute the suggestion that the extreme and coercive powers that can be applied by the Australian Crime Commission to Aboriginal people in prescribed areas under the guise of protecting Indigenous children and women from serious violence or abuse can be justified.

In our view, there is no evidence to suggest that the ACC should have these powers in relation to Aboriginal people in prescribed areas, but not other Territorians. These coercive powers include the 'star chambers' powers, the proceedings of which can only be revealed to a lawyer. It is important to note the breadth of offences covered by the definitions of serious violence and child abuse. By way of example, the Australian Crime Commission powers are available for the offence of aggravated assault under the Northern Territory Criminal Code.[46] An assault is aggravated if the defendant is a male and the victim a female, or if 'harm' is caused which includes a bruise or a scratch, as well as much more serious consequences.

NAAJA considers it entirely inappropriate that such extreme coercive powers are only available with respect to one racial group. As we stated in our Joint Submission with CAALAS to the Senate Select Committee on Regional and Remote Indigenous Communities in June 2008, 'this is an Australia-wide issue, with one study showing that 12per cent of Australian women report being sexually abused before the age of 15[47], and another that 20per cent of women, selected randomly from the federal electoral roll, reported that they had experienced child sexual abuse.'[48]

3.2 The need for an evidence-based approach

NAAJA considers that an evidence-based approach is essential in relation to the law enforcement powers in prescribed areas. We are concerned that this measure was introduced and continues to be justified in the absence of credible and reliable evidence to say that they are proving effective. Most alarmingly, it is proposed that this measure be continued indefinitely without any monitoring or evaluation process announced.

The Government asserts in its Policy Statement that

> '(t)he measure will be continued for the sole purpose of protecting Indigenous children, in particular women and children, in the communities. The Government believes that the measure is a necessary tool to assist in the

[46] Section 188(2) carries a 5 year maximum penalty

[47] This 2005 Australian Bureau of Statistics (ABS) reported that 956,600 women (12per cent of Australian women) report being sexually abused before the age of 15: Australian Bureau of Statistics, 'Personal Safety, Australia', Publication No. 4906.0 (2005), 10.

[48] Jillian M Flemming, 'Prevalence of childhood sexual abuse in a community sample of Australian women' (1997) 166 Medical Journal of Australia, 65, 65.

> protection of Indigenous people, in particular children and women, from serious violence or abuse.'[49]

It is noteworthy that the Government has not stated words to the effect that 'members of the communities recognise these benefits (of the measure) and that there is support for the continuation of the measure,' as they have in regard to other measures.

The Government did, however, state that 'Where people commented on this measure … they considered the special powers of the ACC to obtain evidence from witnesses to be important in being able to address violence and abuse.'

3.3 What the evidence does show

From the consultations that we attended, there were serious misunderstandings of the ACC's extreme and coercive powers. The consultations did not explain what these special powers were, but simply showed a series of PowerPoint slides which spoke in generalities.

Again, the message that we heard people say was not as clear cut as the Government might suggest. For example, the summary of the responses provided at the Tier 4 Darwin Consultation was as follows:

> 'There was a mixed level of awareness of the ACC measure. Most participants did not support the government's proposal to continue funding the ACC as they considered there was insufficient evidence to support the scope and powers given to it in relation to the NTER. There was particular concern expressed about the ACC's powers to access individuals' medical records and to compel people to testify.
>
> Most participants viewed the measure as discriminatory and advised that the NT laws, prior to the NTER, were sufficient to enable the Authorities to deal with such issues as paedophilia, without the ACC being given a specific role and additional powers under the NTER.'[50]

This extract gives an indication as to the mixed level of awareness of the participants. This is of particular significance because the Tier 4 consultation in question involved predominantly key stakeholder organisations. It surely raises a serious question if amongst a relatively sophisticated and well-informed group of participants there existed a mixed level of awareness about the measure. It raises serious questions over the capacity of people from prescribed areas to comment on a measure of which they may have had little understanding of.

We are dismayed that the summary point that most participants expressed a view that existing NT laws were sufficient without the Australian Crime Commission being given extreme and coercive powers seems to have been ignored in the Government's summation of the evidence of the consultations.

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[49] Australian Government, above n 12, 13.

[50] Summary of the Tier 4 Northern Territory Emergency Response (NTER) Future Directions Organisations' consultation workshop, Darwin, 6-7 August 2009, 11-12.

In its 'Closing the Gap January – June 2009 Progress Report', the Government claims that there exists a 'crime normalisation in many remote communities'[51]. They refer to an Australian Crime Commission (ACC) Abstract from June 2008[52] to back up this claim. Yet the ACC Abstract did not even mention the term, crime normalisation. What it did make were sweeping generalisations about societal breakdown in communities, neglect of children and child sexual abuse being rife. But it not say anything about crime being normalised and the conclusion to that effect in the 'Closing the Gap in the Northern Territory January to June 2009' report is without foundation and in our submission, is solely included to conveniently allow for a pre-determined conclusion without any concrete evidence. At best it is lazy and misleading. At worst, it is plain deceitful. And it is also without any consideration of the negative impact on the morale of people living in remote communities of making such bold and unfounded assertions.

On the subject of the ACC Abstract, some of the claims therein also do not stack up to scrutiny. The ACC claimed that with more police in the communities with temporary police stations, that there would be less violence and less alcohol in communities. Interestingly, such a conclusion sits inconsistently with the idea expressed in the 'Closing the Gap' report that crime is normalised in remote communities.

Ultimately, the Government has not provided any evidence to justify the existence of the ACC's extreme and coercive powers, or for their indeterminate continuation. It is also the case that NAAJA, as the peak legal aid organisation for Aboriginal people in the Top End has not seen any increase in prosecutions for sexual offences, violence or child sexual offences as a result of the ACC's involvement. In fact, as noted above, the Long Term Recorded Crime Statistics compiled by the Northern Territory Department of Justice to September 2009[53] showed a significant decrease over the past two years in relation to sexual assaults.

Therefore, available evidence cannot on any objective basis be seen as in any way providing justification for the draconian powers of the ACC, or that their presence to date has facilitated 'the reporting and investigation of crimes involving serious violence and abuse, the prosecution of such offences, and therefore the prevention of further serious violence and abuse.' For the Government to claim this measure to be a special measure and for it to be indeterminate and not time-limited is scandalous.

[51] Australian Government, above n. 12, 32.
[52] Australian Crime Commission, Abstract: address by the CEO of the ACC, Alastair Milroy to the 2008 Bennelong Society Conference 20 June 2008 <http://www.bennelong.com.au/conferences/pdf/Milroy2008.pdf> at 5 February 2010.
[53] See above n. 11.

4. Community stores licensing

NAAJA is not in position to offer detailed commentary on this measure. The comments made here are from the perspective of comments and complaints we have received from community store customers as part of Welfare Rights Outreach Project service.

4.1 RDA and special measures

NAAJA commends the Government for reinstating the RDA in relation to this measure and notes that Government intends that measure is a 'special measure'. However, as with the other Intervention measures, we express doubt as to whether this measure qualifies as a 'special measure' given the manner of implementation, in particular the absence of free, prior and informed consent.

NAAJA commends the Government on its proposals to strengthen and amend the community stores licensing regime. The proposed changes clearly show that policy makers have listened to the concerns expressed by communities and responded by putting forward amendments that have real potential to provide solutions to problems that have been experienced under the current regime.

4.2 Previous impact of measure

It is, of course, unfortunate that the changes come three years after the Intervention. In the intervening period, some communities, stores and individuals have suffered from consumers being unable to shop locally and inexpensively. This has arisen solely as a result of the government's actions in imposing the income management scheme and the community stores licensing scheme without proper regard to whether these systems would in all cases ensure that people's priority needs would be met, and, critically, met in the most cost-effective and convenient manner for the consumer.

4.3 Extension of assessable matters for community store licences

A welcome addition to the community stores licensing scheme is proposed Item 12[54] so that food security becomes an 'assessable matter' in the grant of a community store licence. Of further benefit is that the definition of food security at Item 8 (new section 91B) as:

> 'a reasonable ongoing level of access to a range of food, drink and grocery items that is reasonably priced, safe and of sufficient quantity and quality to meet nutritional and related household needs'.

4.4 Pricing

Many communities will undoubtedly welcome the proposed oversight of pricing in local stores. Currently, many stores stock items at prices which seem insupportably high, even given the remote location of many stores. For example, in visits to three community stores across the Top End, NAAJA staff saw:

- Black and Gold brand, long-life, 1-litre milk at $3.49, while a name-brand product retailed in Darwin at $1.39;

[54] New subsection 93 (1)(h) and (i)), at Schedule 6, Welfare Reform Bill.

- a ‘soup pack’ containing one packet of soup mix (dried barley, lentils, peas etc) two six-inch lengths of celery, a turnip, carrot and onion for $12.50; and
- a shopping trolley that retails in Darwin for $14.95 or less, on sale for $45.00.

4.5 Indigenous training and employment

While welcoming the greater breadth of assessable matters in licensing of stores, we note that there is no provision for a commitment to the training and employment of local Aboriginal people as part of the assessable matters at proposed section 93(1).

We have observed that while some stores are significant employers of local staff, others employ few or no local Aboriginal staff. Given the over-arching aim of the proposed changes to the NTER legislation is to increase Aboriginal engagement and participation in the paid workforce, it seems sensible to include a local training and employment requirement in the assessable matters. Further, such reference should also include provision for local staff to be trained at managerial as well as general staff levels.

Making this change would help to fulfil the Recommendation 11 of the House of Representatives Aboriginal and Torres Strait Islander Affairs Committee *Inquiry into Remote Stores* relating to increasing the participation of local people in the staffing and management of community stores.[55]

4.6 Provision for stores to participate in income management without a licence

NAAJA supports the inclusion at Item 20 (new 95A) providing that the Secretary may decide that a community store does not require a licence. Of further benefit is new 95A(3) which provides that the Secretary must not require a licence unless to do so would be reasonably likely to promote food security in a community.

4.7 Provision for licensing of takeaways, roadhouses and fast food outlets

NAAJA supports the proposed repeal of 92(2)(a) and 92(2)(b) of the existing Act, to allow for the licensing of takeaways, roadhouses and fast food outlets. This measure will alleviate the problems currently experienced by people who are travelling in the NT, or people who live near such a store, and rely on these outlets as a source of food and other items.

4.8 Timeframe for measure

NAAJA understands that the community store licensing measure is currently subject to the sunset clause at s6(1) NTER Act, which provides that NTER measures, other than those which are excluded, will cease five years from the day after the NTER Act received Royal Assent (18 August 2007). This means the community store measures will cease on 17 August 2012.

[55] Aboriginal and Torres Strait Island Affairs Committee, House of Representatives, *Everybody’s Business: Remote Aboriginal Torres Strait Island Stores* (2009), 51. Recommendation 11: The Committee recommends the Australian Government, in collaboration with educational institutions, investigate and develop: the facilitation of training of Indigenous staff living in remote communities to store management levels, and the certification of in-store training of skills such as health promotion and food supply and storage.

While ever income management remains in place, the community stores licensing scheme is vital to ensure that stores which have a monopoly on the expenditure of income managed funds are not able to exploit that monopoly.

Moreover, there are some persuasive arguments that it is the community stores licensing scheme, and the consequent improvements in stores, which have delivered tangible benefits for consumers in remote communities and with it more purchasing of food. Indeed, there is some argument that many of the touted 'gains' attributed to income management are in fact more closely tied to improvements in stores and their range of merchandise, rather than a result of the wholesale control of people's money.

In either case, if income management is to remain indefinitely, it is of concern that the community store licensing measure will end on 17 August 2012.

4.9 Enforcement and compliance in relation to assessable matters

While commending the expansion of the assessable matters for community stores licensing, we put on record the corresponding need for strong enforcement powers.

In addition to this, the provision to the FAHCSIA stores licensing team of adequate resources and powers to monitor the performance of stores is crucial to the success of the measure.

4.10 Governance of community stores

Proposed sections 110 and 111, enabling the Secretary to require a community store owner to become registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006,* are welcomed as a further move to improve the governance in community stores.

4.11 Evaluation of community store measure

To monitor the effectiveness of the community stores licensing scheme, comprehensive evaluation of the measure should be conducted. This process should commence with the development and publication of a wide-ranging suite of benchmarks and a timetable for reporting against these benchmarks.

5. Changes to the operation of the Social Security Appeals Tribunal

The FAHCSIA Bill provides for changes to the operation of the Social Security Appeals Tribunal (SSAT) that NAAJA believes will further erode the level of access to the Tribunal by Aboriginal people in the Northern Territory.

NAAJA endorses the submission of the National Welfare Rights Network on this issue and respectfully refers the Committee to that submission in relation to the proposed changes.

5.1 Impact in the Northern Territory

In addition, we ask the Committee to take into account the following comments arising from our experience in delivering a Welfare Rights service in to Aboriginal people in the Northern Territory.

A primary consideration must be the fact that appeals by Aboriginal people in the NT to the SSAT are at shockingly low levels. Further, we are not aware of any appeals by Aboriginal appellants from remote communities in the NT to the SSAT. We understand that the low appeal rates arise for range of reasons including:

- lack of awareness of an appellable error having been made;
- lack of knowledge that matters can be appealed and that there is appeal system;
- lack of access to assistance to help navigate the appeal systems;
- scepticism as to the value of the appeal process; and
- reticence and fear of using the appeal process.

The fledging Welfare Rights Outreach Project is working to provide information in remote and urban communities about the SSAT. We can foresee that the appeal of this Tribunal as an approachable forum for Aboriginal appellants will be much reduced by the proposed changes.

In the course of our community legal education activities and in providing individual advice, we have found that people are receptive to the idea of an independent Tribunal that will hear their matter afresh, entirely independent of Centrelink.

5.2 Retain current system

We have grave concerns that to advise people that Centrelink may attend the hearing will act as a further disincentive to people to use this forum. This is particularly the case where the case at hand may relate to debt which is subject, or may be subject, to criminal proceedings. Clients who fear criminal prosecution are often particularly timorous, and often made more so if they have been through the process of a 'prosecution interview' with Centrelink.

The proposal for pre-hearing conferences to become a feature of SSAT proceedings is also one which is of grave concern. For people from remote communities, a requirement to participate in pre-hearing conference will be logistically challenging. It will also

make the idea of the SSAT process more daunting by virtue of making it more complicated.

6. Customary Law

6.1 Customary Law and the RDA

NAAJA also wishes to raise what appears a striking omission with respect to the NTER redesign. We note that the Government does not propose to restore the RDA in relation to sections 90 and 91 of the NTER Act which prohibits consideration by courts of Customary Law.

In our submission, these provisions clearly infringe the RDA. They preclude courts from taking into account all relevant matters with respect to bail and sentencing. In doing so, they discriminate against Aboriginal people in the NT.

It is important to note that it is infrequent for Customary Law matters to be raised in sentencing or bail considerations. As Chief Justice Martin stated 'only on rare occasions has Customary Law been presented as lessening the moral culpability of the Aboriginal offender. Even less frequently has the sentencing court accepted the submission as of significance.'[56]

As we pointed out in our Joint Submission with CAALAS to the Senate Select Committee on Regional and Remote Indigenous Communities in June 2008, in the Northern Territory, courts must consider 'the extent to which the offender is to blame for the offence'[57] and 'the presence of any aggravating or mitigating factor concerning the offender.'[58] Aboriginal offenders are disadvantaged because the full context of their offending cannot be considered by the court, whereas non-Indigenous offenders are given full consideration of all relevant circumstances. This position was recently confirmed in the decision of *R v Wunungmurra* [2009] NTSC 24 where Justice Southwood held that Customary Law considerations can be taken into account for limited purposes, such as establishing the defendant's character and prospects of rehabilitation, but that the NTER legislation precludes Customary Law considerations from being taken into account to assess the seriousness of the criminal behaviour in question.

The intervention legislation also precludes any form of Customary Law or customary practice from being raised to mitigate or aggravate an offence when a court is considering an application for bail. This reduces the ability of courts to take into account issues of Customary Law and cultural practice in a discriminatory way, although, it does not totally prevent Customary Law issues being considered in bail applications, as for example, a defendant's need to participate in culturally significant activities can be presented as grounds to grant bail.

It remains the case that NAAJA has not observed any increase in cases involving child abuse coming before the NT criminal courts. We have, however seen an increase in prosecutions of consensual teenage sexual relationships, where the age difference

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[56] Chief Justice Brian R Martin, 'Customary Law – Northern Territory' (Paper presented at JCA Colloquium, Sydney, 5 October 2007) <http://www.jca.asn.au/colloquium/2007.html> at 5 February 2010.

[57] *Sentencing Act* (NT), s. 5(2)(c)

[58] *Sentencing Act* (NT), s. 5(2)(f)

between the two people is not large and the younger person has consented to the relationship. This trend is not observed in relation to non-Aboriginal youths.

NAAJA is deeply concerned that Aboriginal people in the NT are treated differently, both with respect to the disturbing increase in prosecutions of Aboriginal youths for consensual teenage sexual offences, and in being prohibited from raising matters of Customary Law in mitigation of sentence or in considerations of bail.

Vivian and Schokman note that the removal of Customary Law considerations is a:

> 'departure from fundamental legal principle by excluding all relevant factors (which include cultural factors) from being considered in respect of moral culpability in sentencing. The practical effect of this exclusion is that longer and harsher sentences may be imposed on persons of the Aboriginal race in disregard of moral culpability factors that are unique to those persons. Thus, there is serious discrimination against Aboriginal persons by the exclusion of such considerations in bail and sentencing.'[59]

NAAJA respectfully agrees with this analysis and calls for the immediate repeal of sections 90 and 91 of the NTNER Act.

6.2 The important role of Customary Law

NAAJA also notes that the Australian Law Reform Commission has on several occasions recommended that Customary Law considerations should be able to be taken into account for Aboriginal defendants.[60]

Similarly, the 'Little Children Are Sacred' Report recommended that:

> 'based on the dialogue described in the recommendation above, the government gives consideration to recognising and incorporating into Northern Territory law aspects of Aboriginal law that effectively contribute to the restoration of law and order within Aboriginal communities and in particular effectively contribute to the protection of Aboriginal children from sexual abuse.'[61]

NAAJA shares this view. In our submission, it is critical that Customary Law be not only recognised, but given its rightful value and importance if we are serious about empowering people to a sense of community justice. In the NT, there are many instances where Customary Law allows for the inappropriate behaviour to be properly dealt with. For example, when considering an issue such as wrong promised wife, where elders are aware of a situation of a person doing the wrong thing, they immediately deal with it properly.

Equally, feuding between families is often the result of not letting people resolve disputes in a Customary Law appropriate way. And time-honoured discipline

[59] Vivian and Schokman, above n. 27, 96.
[60] See, for example Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006)
[61] See Recommendation 72, Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *'Little Children are Sacred'* (2007)

relationships (such as uncle-nephew) allow for inappropriate behaviour to be properly dealt with. For example, an uncle would use appropriate force to discipline their nephew. (Because of the fear that people will be charged with assault, such discipline has in many instances stopped). But it is important to note that such discipline is controlled and not personal; leaders and representatives from different clans are present and stand in a circle, with arms interlinked, recognising the authority of Customary Law and discipline according to that law.

In relation to the ongoing role of Customary Law, NAAJA strongly considers that culturally appropriate intervention comes when that intervention has the status of a law. If that status is taken away, it loses its authority.

Part II Recommendations

Alcohol restrictions

1. NAAJA recommends that the Government implement a non-discriminatory approach as opposed to seeking for this measure to be a special measure for the purposes of the RDA.

2. NAAJA recommends that for the purposes of policy clarity, that the Commonwealth and NT Governments commit to a universal policy of responsible drinking, to be applied fairly and equitably to all of the NT community.

3. NAAJA recommends that communities be empowered to develop and implement Alcohol Management Plans and that they be provided with independent, professional assistance to do so. We further recommend that the criteria set out in Schedule 3, Item 10 of the Welfare Reform Bill (section 18(3) NTNER Act) not be pursued, given that its starting point is a presumption that is discriminatory in nature.

4. NAAJA calls for the Commonwealth and NT Governments to immediately increase the provision of alcohol detoxification, counselling, support and residential rehabilitation programs in a manner that is commensurate with the increase in funding that has been directed towards police, night patrol and additional government workers.

5. NAAJA is pleased to see that the Government has aligned police powers in restricted areas with those in the rest of the NT, but recommends that the provision allowing for a Ministerial Declaration to give police powers in restricted areas as if it were a public place be removed given its discriminatory effect.

Prohibited material restrictions

6. NAAJA recommends that the Government implement a non-discriminatory approach as opposed to seeking for this measure to be a special measure for the purposes of the RDA.

7. NAAJA notes the lack of evidence to support this measure, and calls for pornography restrictions in restricted areas to be removed and for the legal situation to be aligned with all other parts of the NT. NAAJA is especially cognisant of the enormous shame these restrictions and the accompanying signs have brought to communities and notes that this shame would be highly likely to deter residents in restricted areas from bringing an application to have the bans lifted, notwithstanding the lack of justification for the ban.

Law enforcement powers

8. NAAJA recommends that the Government implement a non-discriminatory approach as opposed to seeking for this measure to be a special measure for the purposes of the RDA.

9. NAAJA notes the lack of evidence to support this measure, and calls for the extreme and coercive powers that have been given to the Australian Crime Commission in restricted areas to be immediately removed, particularly given their discriminatory application solely to Aboriginal people in restricted areas.

10. NAAJA is especially concerned that this measure is not time-limited.

Community store licensing

11. The proposed section 93(1) be amended to include reference to a commitment to training and employment of local Aboriginal people at all levels of store operation as an assessable matter.

12. While the substance of the proposed new 95A(3) is supported, NAAJA submits that for the avoidance of the doubt the clause be framed more clearly, so as to provide that the Secretary must not require a store to be licensed where to do so would not be reasonably likely to promote food security in the community which the store services.

13. Government to provide clarity on the future of the community store licensing measure and give consideration to linking the timeframe of the community stores measure to the operation of the income management scheme.

14. Government to ensure adequate communication to communities of the assessable matters for licensing and who to contact if they have a concern about pricing or other assessable matters at their local store.

15. Government to ensure that stores licensing teams are provided ample powers to allow rigorous monitoring of store standards, including the power to inspect a store without notice, and adequately resource the stores licensing teams to enable rigorous monitoring of store standards.

16. The community stores licensing measure be fully evaluated, commencing with a clear set of initial benchmarks, and with a full report due by mid 2011 to allow communities and policy makers to consider whether the measure should be extended beyond the 17 August 2012 end date.

Changes to the operation of the Social Security Appeals Tribunal

17. NAAJA recommends that the Government withdraw the proposed changes to the operation of the SSAT relating to pre-hearing conferences and agency representation at hearings, recognising the current system is already seriously underutilised by Aboriginal people in the Northern Territory and that the proposed changes are likely to exacerbate this situation.

Customary Law

18. NAAJA considers that that sections 90 and 91 of the NTNER Act precluding Customary Law considerations from being taken into account in bail and sentencing to assess the objective seriousness of the alleged or proven offending be

immediately repealed. NAAJA considers that these provisions are discriminatory and contravene the RDA.

19. NAAJA also recommends that as per recommendations by the Australian Law Reform Commission and reports such as the 'Little Children are Sacred' report, that Customary Law be afforded a level of legitimacy and respect, and recognised for its essential role in contributing to positive community justice outcomes .

PART III INCOME MANAGEMENT

1. An overview of the proposed changes

The Government's proposed changes mark a change in focus of the income management scheme from meeting the primary needs of a community 'in crisis' to a stated attempt to move social security recipients to work and study.

Government proposes that the current application of income management to all social security recipients in 'prescribed areas' in the NT will be removed. It will be replaced with a purportedly non-discriminatory program that imposes income management on social security recipients who fit in the categories set out below. Initially, it is intended that the scheme will apply across the Northern Territory, with the Australian Government to consider rolling it out nationally based on evaluation of the NT experience.[62]

1.2 Proposed income management categories

Under the Government's Bill, income management will be applied to social security recipients in the Northern Territory who fall into three new categories:

1. **Disengaged youth:** people aged 15 to 24 who have been in receipt of Youth Allowance, Newstart Allowance, Special Benefit or Parenting Payment for more than 13 weeks in the last 26 weeks.[63]

2. **Long-term welfare payment recipients:** people aged 25 but below Age Pension age who have been in receipt of Newstart Allowance, Special Benefit or Parenting Payment for more than 52 weeks in the last 104 weeks;[64] and

3. **Vulnerable welfare payment recipients:** people assessed by a Centrelink social worker as requiring income management for reasons including vulnerability to financial crisis, domestic violence or economic abuse.[65]

People who fall into these new categories will be subject to the same scheme of income management that currently applies in prescribed areas in the NT.[66] That is, 50per cent of their regular social security payments and 100per cent of any lump sum payments[67] will be quarantined into an 'income management account' which can only be used for meeting 'priority needs' as defined in the Act.[68]

In addition, the following categories will apply:

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[62] Explanatory Memorandum, Welfare Reform Bill, 13.
[63] Item 36, proposed s.123UCB, Welfare Reform Bill.
[64] Item 36, proposed s.123UCC, Welfare Reform Bill.
[65] Item 36, proposed s.123UCA, Welfare Reform Bill and Minister for Families, Housing, Community Services and Indigenous Service, Second Reading Speech, Welfare Reform Bill, 25 November 2009, 13.
[66] Section 123UB, *Social Security (Administration) Act 1999.*
[67] See Item 42, Welfare Reform Bill.
[68] Section 123TH, *Social Security (Administration) Act 1999.*

4. **Voluntary income management:** not strictly a new category but previously unavailable in the Northern Territory. People on all payment types can opt into an income management category whereby:

   - 70 per cent of income is income managed;
   - the minimum period for income management is 13 weeks; and
   - for every 26 consecutive weeks spent on the scheme, participants be eligible for a 'voluntary income management incentive payment' of $250 (which will be 100 per cent income managed).[69]

5. **Child protection category:** this is again not a new category, but Government has indicated that this will now be used in the Northern Territory.[70] Under this category, people are subject to income management at the request of child protection authorities (in the NT, this is the Northern Territory Families and Children (NTFC)). Seventy per cent of fortnightly money is income managed under this category.

6. **School Enrolment and Attendance Categories:** Under these categories, which are not currently used in the NT, income management can be imposed on parents who fail to ensure enrolment and/or satisfactory attendance at school.

1. 3 Proposed exemptions

There is provision in the bill for exemptions from the disengaged youth and long-term welfare payment recipient categories. The criteria for exemption differ significantly between those with and without dependent children.

1. 4 Hierarchy of income management categories

The Government has not fully articulated its intentions in relation to application of the existing national income management categories (relating to child protection and school enrolment and attendance)[71] in the Northern Territory.

The Welfare Reform Bill and the existing provisions in the Social Security (Administration) Act provide for a hierarchy of the categories as follows:

(1)	123UC	Child protection category
(2)	123UD & 123UE	School enrolment and attendance categories
(3)	123UCA	Vulnerable welfare payment recipient category
(4)	123UCB & 123UCC	Disengaged youth and long-term welfare payment recipient categories

[69] Item 63, proposed s. 47(1)(fa) Welfare Reform Bill.
[70] See Australian Government, 'Future directions for the Northern Territory Response: A community guide to the proposed changes', December 2009, 3.
[71] Sections 123UC, 123UD, 123UE, *Social Security (Administration) Act 1999.*

It can be seen from this hierarchy that where the existing national categories are employed, they will take precedence over the new declared income management area categories. It can also be seen that the vulnerable welfare payment recipient category will take precedence over the youth and long-term categories.

1.5 Interaction of the various school enrolment and attendance measures

It should be noted that the existing national school enrolment and attendance categories (ss. 123UD and 123UE) sit somewhat uneasily with the exemption provisions for persons with dependent children at proposed s. 123UGD.

Similarly, all the latter categories must also be read in light of the School Enrolment and Attendance Measure.[72] This is currently being trialled in six NT areas and provides for suspension and cancellation of a person's Social Security payment where they do not make reasonable efforts to ensure their child is enrolled at and satisfactorily attending school.

1.6 Need for clarity on how the various measures will work together

Making an informed assessment on the new system is difficult without knowing what the Government's intentions are in relation to whether the School Enrolment and Attendance Measure is to be rolled out across the Northern Territory and/or whether the Government intends to activate the school enrolment and attendance income management provisions.

2. NAAJA's views on the new income management system

The Committee's terms of reference may be summarised as an inquiry into whether the measures carried out under the auspices of the Northern Territory Intervention and those proposed in the Government's Bills, have and will operate to overcome Aboriginal disadvantage and improve life for Aboriginal people.

The terms of reference also go to whether current and proposed measures are the most effective and cost effective options available to Government to achieve the aforementioned aims. Finally, the Committee seeks our views on alternatives to Government's proposals.

It is NAAJA's submission that the key to improving life for Aboriginal people lies in a true engagement with Aboriginal people and an effective partnership with Aboriginal people.

In relation to the proposed system for income management, NAAJA commends to the Government a way forward built on what Aboriginal people have consistently asked of their governments — to continue to work together to create resources and infrastructure in health, education, housing and employment consistent with the expressed requirements of individual communities.

However, the Government's proposed system falls short of community expectations for a system that would be narrowly targeted and non-discriminatory. Further, it is

[72] See Part 3C, *Social Security (Administration) Act 1999.*

arbitrary, with the effect that large numbers of Aboriginal people will still be subject automatically to income management.

2.1 Impact of the new system

The Government's proposed measures do not progress us far beyond the income management status quo. The effect of the proposed measures will be to arbitrarily subject large numbers of Aboriginal people to continued income management solely by virtue of the fact that they have been in receipt of Centrelink payments for a prescribed period of time. The imposition of income management will have nothing to do with a person's ability to manage money and meet their needs without Government intervention.

Similarly, for many subject to these new categories for income management, being granted an exemption will not rest on questions of good financial management but on whether a person has 'engaged' in work or study.

2.2 Evidence and the cost of the measure

There is no clear or compelling evidence base to support the contention that this system for arbitrary and far-reaching government-imposed income management will work to overcome Aboriginal disadvantage, reduce drug and alcohol abuse, increase engagement in work and study or increase school attendance and responsible parenting.

Indeed, there are indications to the contrary. For example, after almost three years of compulsory, blanket income management, we are not aware of any appreciable increase in the employment participation rate for Aboriginal people in the Northern Territory. This points not only to the fact that income management may not be an effective way to effect participation in employment, but also suggests that the main barrier to employment is not the fact of people having access to all of their income support payments in cash.

With a price tag of over $400 million over four years, the proposed measures for income management represent an expensive and untested experiment in social engineering with Australia's most disadvantaged peoples as its subjects.

Given the absence of sound evidence to support the effectiveness of income management to achieve the above aims, the very high costs of compulsory and widespread government-imposed income management cannot be justified.

2. 3 Evaluation of the measure

The Government has stated its intention to 'carefully evaluate' the new system[73]. Presumably such an evaluation will impact on the decision as to whether to roll the system out nationally, or whether to keep it at all.

Given that the new system will disproportionately affect Aboriginal people in the NT, NAAJA is concerned to ensure that any decisions made about the future of the system are made on the basis of considered and rigorous evaluation.

[73] Explanatory Memorandum, Welfare Reform Bill, 13.

NAAJA notes the concerns raised by the NTER Review Board in 2008 about the lack of baseline date on which to evaluate the impact of the NTER[74]. NAAJA therefore urges the Government to take a rigorous approach to collecting baseline data before the new system is implemented. We further note the importance of ensuring that the baseline data will measure the stated aims of the proposed income management system.

2.4 Community expectations and the basis for the Government's measures

Given the scope and content of the *Future Direction* consultations, the Government's response must surely have taken many by surprise. As noted in the evaluation of the *Future Directions* consultation process:

> 'In a few reports, the preference for the opt out model was implied, whereas our interpretation of the feedback from the meetings on income management should be left up to individuals.'[75]

Of the Tier 3 report on the *Future Direction* consultation, the researchers found:

> 'The summary of the income management identifies the level of opposition to the two income management options included in the discussion paper. However, the summary identifies the voluntary model with triggers for those not managing their money as the preferred model. We believe this over simplifies the level of discussion and responses to some extent, as many said income management should be stopped, and the trigger model was acceptable as an alternative solution, rather than the preferred solution.'[76]

The flaws in the consultation and reporting process were also observed by NAAJA during our attendance at Tier 2, Tier 3 and Tier 4 meetings.

Of particular concern is that neither the *Future Direction* Discussion paper nor the FAHCSIA meeting facilitators ventilated the NTER Review Board's recommendation of a trigger and voluntary system of income management. Notwithstanding this oversight, this was the option that many people put forward in the consultations, often expressed in terms such as, 'it is only the ones with problems that should be managed'.

2.5 Need for genuine community engagement on welfare reform

In relation to welfare reform, to achieve meaningful progress and reform requires an engagement with Aboriginal people on how the delivery of social security payments can contribute to the wellbeing of communities and, if the system is seen to be failing communities, an engagement with communities on how and why it is failing them and an exploration of how to address the identified issues.

Such a process further requires that Government is responsive to concerns and solutions identified by individual communities. Arguably, those solutions which are identified

[74] Commonwealth of Australia (Peter Yu, Marcia Ella Duncan, Bill Grey), *Northern Territory Emergency Response – Report of the NTER Review Board*, October 2008, 20.
[75] Department of Families, Housing, Community Services and Indigenous Affairs/Cultural and Indigenous Research Centre Australia, 'Report on the NTER redesign engagement strategy and implementation: Final Report', September 2009, 21.
[76] Ibid., 22.

and implemented by individual communities will have the most lasting and effective outcomes. Thus it is of great concern is that the Government did not use the *Future Direction* consultations to ask people questions about:

- the main challenges and problems in communities;
- their views on how to address these challenges and problems;
- their ideas for solutions;
- their views the role of the current system of Social Security as contributor to problems in communities; and
- their views the role of current system of Social Security as a mechanism to solve problems in communities.

This failure to truly engage with Aboriginal people and work together on finding solutions has resulted in this raft of proposed measures that is at odds with what most people indicated as their preferred option for a continuation of income management.

More importantly, the resulting measures — inconsonant with the tenor of the consultations, with what Aboriginal people have repeatedly called for to achieve positive change in their communities and with the stated objectives of the scheme — seem unlikely to generate positive outcomes.

2.6 Community views on a system for income management

NAAJA urges the Committee to have reference to the report of the NTER Review Board released in October 2008. The Report was based on thorough and meaningful consultation with communities affected by the NTER.

The Board noted that there was general support for a scheme that allowed people to take up income management voluntarily, with limited imposition of compulsory income management where clear triggers existed: 'for those who had demonstrated in some way that they were not meeting their family or community responsibilities, especially if the wellbeing of children was at risk or if alcohol and drugs were being abused to the detriment of the community'.[77]

2.7 Rejection of arbitrary, government-imposed income management

It is NAAJA's submission that a system which provides for a trigger-based and voluntary system of income management is to be preferred, having the advantage of meeting community expectations, being narrowly targeted and involving the least amount of government intervention in the lives of individuals.

In addition, any system for income management must include mechanisms to allow individual communities to decide if and how income management can work in their community.

Beyond these broader concerns, the measure as proposed embodies significant shortcomings, inconsistencies and uncertainties, which we address in detail below.

[77] Commonwealth of Australia, above n.59, 21.

3. Detailed examination of the proposed system

This section of the submission engages with the detail of the proposed system. If the system is adopted, against the recommendations of NAAJA members, there are a number of practical issues with its proposed operation.

TRANSITION TO THE NEW SYSTEM

The Welfare Reform Bill's Explanatory Memorandum says that in the Northern Territory there will be a staged transition to the new system. Persons subject to income management under the current system 'will be able to transition to the new scheme or seek to exit from the existing scheme *once the new scheme is operational in their area*'[78] (emphasis added).

3.1 Transitional provisions don't allow people to exit the system immediately

NAAJA is concerned about the impact of this approach on social security recipients who are not required to be income managed under the new system.

The staged process will mean that depending on where they live, some people who should be entitled to full payments in cash will be kept on the existing, discriminatory income management system for a period of as long as one year from the date of commencement of the new scheme.

Given that it is very clear that recipients of payments such as the Age Pension, Disability Support Payment and Carer Payment will not be subject to the new compulsory income management system, those people should be entitled to apply immediately after the commencement of the Bill to Centrelink for a determination (under proposed item 23(5)(b)) that they should not continue to the subject to the income management regime under continuing s.123UB.

NAAJA commends the inclusion of a right of review of decisions made under proposed item 23(5)(b).

3.2 Payment of credit balances of income management accounts where a person exits the income management regime

Existing s. 123WJ of the Social Security (Administration) Act 1999 provides that where:

- a person moves off the income management regime; and
- they have a credit balance in their income management account (the 'residual amount'); and
- the Secretary is satisfied that they are not likely to become subject to IM in the next 60 days,

the Secretary may determine that the residual amount is to be paid directly to the person by instalments.

The Secretary can only pay the amount in a lump sum where:

[78] Explanatory Memorandum, Welfare Reform Bill 14.

- it is less than $200; or
- the Secretary is satisfied that there are special circumstances; or
- the person was being voluntarily income managed.

The effect of section 123WJ is that the Government retains control of any money that was in person's income management account, for up to 12 months after they have exited from income management system.

3.3 Proposed changes affecting people no longer subject to income management

Item 41 of the Welfare Reform Bill introduces amendments to s123WJ which extend its application to people subject to income management under the vulnerable welfare payment recipient, disengaged youth and long-term welfare payment recipient categories.

The FAHCSIA Bill introduces proposed section 123WJA. This provides that where a person is in receipt of instalment payments under section 123WJ, instalment payments of the credit balance will cease if the person again becomes subject to the income management regime.

These two sections affect people who had stopped being income managed and are receiving instalment payments of the credit balance of their income management account. It will mean that if such a person becomes subject to income management again, the instalment payments will cease and any remaining funds will become subject to income management. This may happen when, for example, a person is deemed a vulnerable welfare payment recipient or because 13 weeks have passed during which they have been in receipt of an activity-tested payment.

3.4 Measures are unjustifiably restrictive

There is no justification for any restricted access to the residual amount where it has been decided that a person is not required to be income managed.

Even if a person is likely to be compulsorily income managed in the future, they should be able to directly access credit balances, as, at the time that they cease to be subject to the regime, they are entitled to exercise full control over all of their income and savings.

NAAJA is particularly concerned about the effect of this provision on people who do not fall in the new compulsory income management categories and so will move off income management once the new scheme comes into operation in their area.

Of equal concern is the impact of this section on voluntary income management participants who choose to move off the scheme.

These measures extend far beyond what is reasonable, necessary or justifiable given that they apply to:

- people who are not subject to the income management regime (123WJ); AND/OR
- funds received prior to the current period for income management (123WJA).

Given, the above NAAJA believes the system should be changed so that when a person ceases to be subject to the income management regime, they immediately regain full control of their own finances.

COMPULSORY INCOME MANAGEMENT CATEGORIES

3.5 Child protection category

Noting that the Government is intending to use the national child protection measure in the Northern Territory, we raise the following concerns:

1. The use of this category is being implemented without the public having the opportunity to consider the results of the Western Australian trials;
2. The public have yet to be apprised of the content of guidelines and policy to inform the use of the category in the Northern Territory;
3. Northern Territory Families and Children (NTFC), the department which would have the power to recommend application of the category to individuals, is in crisis. Through the work of the NAAJA Civil Law Section, we know only too well of the suffering of families due to the department's abject failure to properly care for their children. We trust the Commonwealth would stringently the monitor the role of the NTFC in the implementation of this category; and
4. Because of this, and because income management imposes significant control on a person, we recommend that the legislation include a 12-month maximum time limit on the length of income management orders under this section. This will have the advantage of ensuring the affected person does have their situation reviewed at regular intervals and is particularly important given there is no real right of appeal against a decision under section 123UB.

3.6 Vulnerable welfare payment recipient category

Proposed s.123UCA provides that a 'vulnerable welfare payment recipient' will be subject to the new income management regime (provided other technical criteria apply).[79] Proposed s.123UGA provides that the Secretary is to determine that a person is a vulnerable welfare payment recipient. There is no definition of 'vulnerable welfare recipient' in the Bill. The section further provides that a determination should be made in compliance with any decision-making principals set out in a legislative instrument. At this stage, no detail on what the legislative instrument might contain has been made public.

The Second Reading Speech and Explanatory Memorandum for the Bill indicate that people will be designated vulnerable welfare payment recipients if they are assessed by Centrelink social workers as requiring income management due to vulnerability. Reasons for such an assessment are proposed to include financial crisis, domestic violence or economic abuse.[80] Presumably, any proposed legislative instrument will include these factors.

[79] Proposed ss. 123UCA and 123UGA.
[80] Explanatory Memorandum, Welfare Reform Bill, 13.

3.7 Determination of 'vulnerable welfare payment recipient'

As there is no definition of 'vulnerable' in the Bill it is not possible for us offer fully informed comment on the effect of this category on our client group. Our comments below are necessarily confined to the information that has been made available.

It is foreshadowed in the Minister's second reading speech that the question of vulnerability is to be determined by Centrelink social workers.[81]

We understand that Centrelink social workers currently perform the following functions:

- provide counselling and support to Centrelink customers with difficult personal or family issues;
- provide information about, or refer customers to, community support services; and
- help with claims for payments from Centrelink.

NAAJA is concerned that giving Centrelink social workers the additional role of determining vulnerability (with the consequence of compulsory income management) may make people less likely to seek the assistance of Centrelink social workers in relation to any changes to their personal situation, including domestic violence or other forms of abuse, for fear that it will result in the imposition of income management. The role of social workers under the new scheme is likely to undermine relationships of trust with clients and undermine the important service they currently provide.

NAAJA considers that it would be more appropriate for Centrelink social workers to raise the possibility of voluntary income management as one of a number of options for a person suffering a personal or financial crisis. Other options could include assistance with finding alternative accommodation, referral to legal services, police, counselling, domestic violence services, safe houses, and/or other community support or money management programs. A further alterative is consideration of a financial management order under the provisions of the *Adult Guardianship Act* (NT).

As indicated, we are also of the view that the definition of 'vulnerable' should be included in the legislation, not left to a legislative instrument.

3.8 Domestic violence and determination of 'vulnerable'

The inclusion of victims of domestic violence in the 'vulnerable' category is troubling. The ability to manage any income can be particularly important to victims of domestic violence who are seeking to escape violence. Any restriction on a victim's use of social security payments may limit a victim's ability to travel or find alternative accommodation. In this context, the Committee is referred to the concerns about the inflexibility of BasicsCard are outlined below at 4.1 – 4.4.

[81] Minister for Families, Housing, Community Services and Indigenous Service, Second Reading Speech, Welfare Reform Bill, 25 November 2009, 13.

Given these concerns, the fact of being a victim of domestic violence should not be a trigger for income management without evidence of economic control being exercised by a perpetrator**.**

3.9 Limitation on reconsideration of a determination re 'vulnerable'

The proposed s. 123UGA(8) enables a person subject to a vulnerable welfare payment recipient determination to seek reconsideration of their circumstances. However, a person cannot make such a request if they have already made a request during the preceding 90 days[82].

The Bill's Explanatory Memorandum says that the right to request reconsideration exists 'in addition to' review rights under Part 4 of the *Social Security (Administration) Act*[83]. NAAJA questions the value of this additional 'right' of reconsideration on top of existing appeal rights in Part 4 of the *Social Security (Administration) Act*, which enable those affected by a decision to apply for internal review of a decision at any time.

> **Case study** – Elenora is an age pensioner. On 1 September 2010 Centrelink determine she is vulnerable welfare payment recipient because her nephew has regularly been taking her key card and accessing her bank account. On 5 September 2010, Elenora disagrees with the decision, saying she is happy for her nephew to have access to her account. Centrelink makes a new determination that Elenora is a vulnerable welfare payment recipient.
>
> On 10 September 2010 Elenora's nephew moves interstate permanently. Elenora wants to stop income management as the factor which led to her being deemed vulnerable is no longer relevant. Centrelink advises that the determination that she is a vulnerable welfare payment recipient cannot be reconsidered for a further 85 days.

As illustrated in the case study, a number of concerns arise in relation the limitation on reconsideration of decision that a person is a vulnerable welfare payment recipient:

a) The reconsideration provision may operate to detract from people's awareness of their right to review under Part 4 of the Social Security (Administration) Act. Given that our client group are already largely unaware of their appeal rights, any mechanism which may serve to exacerbate this is to be avoided.

b) The reconsideration provision may operate to restrict a person's ability to move off income management, as they would be forced to wait 90 days after their last request to reconsider.

The case study illustrates that this provision will have the effect of subjecting people to the income management regime when there are no real grounds to do so. For this reason, we believe the time limit on request for reconsideration should be withdrawn.

[82] Proposed s.123UGA(9).
[83] Explanatory Memorandum, Welfare Reform Bill, 23.

Further, while the Explanatory Memorandum to the Bill states that the right to reconsideration exists in addition to rights under Part 4, this does not appear to be reflected in the Bill. There is a risk that the Bill could be read restrictively so that the specific 'reconsideration' rights apply to the exclusion of rights under Part 4. To avoid any doubt, the right to review at any time under Part 4 should be spelt out in the Bill.

3.10 Disengaged youth[84] and long-term welfare payment recipients[85]

The case studies below illustrate how the new categories for income management are a heavy-handed and inappropriate mechanism for encouraging engagement in paid work and study.

> **Case study** – Rita is 22-year-old single woman in receipt of Newstart Allowance who lives in a remote community. At 1 July 2010 she had been working for the last 16 weeks for an average of 15 hours per week as a cashier at the local community store. As she is paid at the Federal Minimum Wage[86] and earns $429.30 gross per fortnight she receives approximately $254.60 in Newstart Allowance.
>
> Because Rita has been assessed as having the capacity to work full-time, her part-time job does not satisfy the 'sufficient work test'. This means that she must also fulfil both activity test requirements and mutual obligation requirements in order to remain eligible for Newstart.[87]
>
> As part of her mutual obligation and activity requirements in respect of her Newstart Allowance, Rita must have regular appointments with her Job Services Australia provider, search for four jobs each fortnight and undertake training in retail services for 10 hours per week.
>
> Although she has been engaging in paid work immediately prior to and at the commencement of the new income management regime, studying 10 hours per week and actively searching for additional work, Rita will become subject to income management under s 123UCB. Rita will remain under the income management until she has worked for at least 26 weeks at 15 hours per week receiving at least minimum wage.
>
> The store where Rita works sometimes rosters her for 10 hours one week, and 20 hours the next week, meaning that for Rita to reach the goal 26 weeks of sufficient paid work in a 12-month period may not be achievable at all.

The simple case study above, showing how the proposed law will operate in practice, highlights the following:

a) Rita can hardly be described in ordinary terms as a 'disengaged youth'. She is engaging in paid work and in study and is actively seeking further

[84] Proposed s. 123UCB.
[85] Proposed s. 123UCC.
[86] At the 2009 Federal Minimum Wage of $14.31 per hour[86], the minimum wage for 15 hours per week for an adult would total $214.65 gross. See Fair Pay Commission, *General Wage-setting Decision 2009*, <http://www.fairpay.gov.au/fairpay/WageSettingDecisions/General/2009/>at 5 February 2010.
[87] See FAHCSIA, '3.2.2.10 Sufficient Work', *Guide to Social Security Law*.

employment. However, under the Government's proposed scheme for income management she will automatically be subject to the regime.

b) Although she will only have been out of paid work for 13 of the last 26 weeks to be captured under the new income management regime, Rita will have to work for twice as long as she was unemployed to qualify for an exemption under proposed section 123UGC.

c) The 15-hour-per-week rule to qualify for an exemption will disadvantage casual and seasonal workers whose hours of employment vary.

d) The rule will disadvantage workers who for a variety of other reasons (leave, study, training, illness, family responsibilities, cultural obligations) do not always work for at least 15 hours per week in the qualifying period.

e) As illustrated, the exemption requirements at proposed section 123UGC appear to have been developed without regard to the current compliance regime, which requires all persons in receipt of the activity-tested payments to which sections 123UCB and 123UCC apply to engage of job seeking, training and other activities to remain qualified for their payments.

3.11 Prospects of success of the new categories

The proposed scheme fails to provide incentive and reward to people who are already active in the realms of work, study, community and family.

The effect of the scheme is to place a further sanction and stigma upon a group of people already deemed to be among the most disadvantaged in all Australia, ignoring the gains and progress made in engagement in work and study and making exemption from the income management a difficult goal to achieve.

3.12 System will not assist the most marginalised

In addition, it is NAAJA's submission that the scheme may not capture those 'disengaged' people whose behaviour it seeks to change.

> **Case study:** Jack is a 17-year-old remote community resident who, like many of his peers, left school before finishing primary school. He cannot read or write beyond signing his name. He has no bank account, no personal identification papers and is unsure of his exact birth date.
>
> Because he left school before year 12, Centrelink's "Earn or Learn" scheme means that Jack has no entitlement to Youth Allowance unless he is engaged in an appropriate program of study. [88] He saw a Centrelink officer about getting on payments, but the combination of the requirement to study, and difficulty providing appropriate identification and banking details meant he didn't follow through with his claim.

[88] Ibid, '3.2.3.10 – Special Rules for early school leavers (the 'Earn or Learn' scheme).

> Neither Jack nor anyone in his family receives Centrelink payments on his behalf. As consequence, he is reliant on friends, family and other means to obtain the necessities of life.

The case study illustrates that neither the new income management categories nor Earn and Learn can have any effect on the most disengaged youth because they are not in receipt of Centrelink payments. The Government's plan for income management of large number of people will not reach those who are most disadvantaged and most at risk, yet it is the needs of this group that should be of the highest priority for Government.

To successfully address the issues confronting this group, a range of specialised assistance and resources (such as age-appropriate education programs) are required to achieve educational and social outcomes. Equally, in addressing these issues, communities and family structures must be part of the process, drawing on their Customary Law and traditional structures where appropriate. Finally, it is the development of real local employment opportunities that will serve to make education relevant to this group.

Exemptions from compulsory income management

3.13 Dependent child provision

Relevant to exemptions under the new system is proposed 123GE, which provides that a child can be a dependent child of only one person at a time. The effect of this for couples with children is to make exemption on the basis of school attendance and no indicators of financial vulnerability available to only one member of a couple. It also means that a person with dependent children who takes on full-time study, work or a New Apprenticeship will not qualify for exemption from the disengaged youth or long-term welfare recipient categories.

3.14 Exemptions based on inclusion in a specified class

We understand there has been no indication as to what characteristics will see a class of persons made the subject of an instrument[89] to exempt them from the disengaged youth and long-term welfare payment recipient categories.

NAAJA suggests that the exemption could be used to exempt people who are unable to fulfil the conditions of the exemption in s. 123UGC (work, full time study or becoming New Apprentice).

A significant group here would be people with caring responsibilities, but who are not in receipt in of Carer Payment.

Another important group who should be included in the exemption criteria are CDEP participants, people who undertake voluntary work in their communities and people working fewer than 15 hours per week. That the new scheme should not acknowledge their contribution to their community and the work they are doing is at odds with Government's aim of encouraging engagement in social and economic activities.

[89] Proposed s. 123UGB.

3.15 Exemptions for persons without dependent children: Full time student or New Apprentice at the test time[90]

A person will be considered a full time student for the purposes of the exemption if at the test time they are an eligible recipient of Youth Allowance, and they are undertaking full time study as defined in s. 541B of the *Social Security Act 1991*.

NAAJA is concerned that this exemption will be out of reach for Aboriginal people who live remotely and are therefore often unable to access educational facilities. For example, in the Katherine Region, the major adult education providers for Aboriginal people are Charles Darwin University (Katherine Campus) and the Batchelor Institute. Both of these institutions are only able to offer courses in some communities, and study will generally involve some travel (at a cost) to a regional centre such as Darwin or Katherine. Where an institution would like to offer a course in a community, they are often unable to find a location to deliver course work. Most communities lack dedicated adult education facilities and have limited alternative spaces.

Additionally, there is very limited public access to computers in most remote communities.[91] This makes it impossible for students without access to a personal computer to keep up to date with course work between on-campus sessions.

3.16 Exemptions for persons without dependent children: Work at the test time[92]

While NAAJA appreciates that the aim of this exemption is to move social security recipients into paid employment, our members consider that the legislation should take into account that there are limited employment opportunities in remote Aboriginal communities.

To ensure that Aboriginal people have an equal opportunity to qualify for an exemption under s.123UGC, NAAJA suggests that the exemption should extend to the situation where a person has been undertaking CDEP work or voluntary work. The Committee is referred to 3.10-3.12 above for relevant detail on the issues attending to this requirement.

3.17 Exemptions for persons with dependent children

NAAJA notes that proposed s. 123UGE provides that for the purpose of the exemption for persons with dependent children, a child can be the dependent child of only one person at a time, meaning that only one member of couple will have access to this exemption.

3.18 Exemptions for persons with dependent children: Financial vulnerability

Proposed s. 123UGD links exemptions from income management to school attendance or appropriate activities and absence of financial vulnerability.

[90] Proposed s. 123UGC.
[91] See, for example, the discussion of Census data about internet access in Daly, 'Bridging the Digital Divide: The Role of Community Online Access Centres in Indigenous Communities' CAEPR Discussion paper 273/2005
[92] Proposed s. 123UGC(1)(b)(ii).

Proposed s. 123UGD(1)(d) requires Centrelink to be satisfied that there have been 'no indications of financial vulnerability in relation to' an applicant for an exemption in the 12 months before an exemption is sought. There is no explanation in the Bill or extrinsic material of what will be considered an indication of financial vulnerability. Subsection (5) provides for decision making principles in relation to financial vulnerability to be set out in a legislative instrument made by the Minister. No draft legislative instrument has been made public.

NAAJA is concerned that a person will be considered ineligible for an exemption because they have found it necessary to seek an advance on their payment or loan from Centrelink in the 12 months before application. Often such action is required not because of poor financial management, but because of an unforseen event, such as an illness or accident. Given the low level of social security payments[93], it is almost impossible for social security recipients to meet unforseen expenses without assistance.

3.19 Exemptions for persons with dependent children: School attendance requirement

If proposed s. 123UGD is passed in its current form, there will be three separate measures targeting school attendance through payment quarantining or suspension and cancellation:

(1) School Attendance and Enrolment Measure (SEAM): [94] SEAM is currently being trialled in selected NT and Queensland communities. If parents fail to respond to notices requiring them to enrol their children in school or improve 'unsatisfactory' attendance records, Centrelink can suspend their payments until they comply with any notice.

(2) Income Management – School Attendance and Enrolment Categories:[95] Income management imposed on parents who, despite notice and warnings, fail to enrol their children in school or improve attendance. There is no indication in the Bills or extrinsic material as to whether these categories will be used in the NT.

(3) Proposed income management exemption:[96] people with dependent children who are subject to the new income management regime will be exempt if they demonstrate that their children have had less than five unexplained absences in the last two school terms and there are no indicators of financial vulnerability.

The existence of three measures seeking in slightly different ways to achieve the same outcome is problematic because:

- it means people in the Northern Territory are potentially subject to a bewildering array of measures and sanctions;

[93] For further information, see Australian Council of Social Service, 'Who is missing out? Hardship among low income Australians', *ACOSS Info Paper* (December 2008).
[94] Part 3C, *Social Security (Administration) Act 1999*.
[95] Ss 123UD, 123UE, *Social Security (Administration) Act 1999*.
[96] Proposed s 123UGD, Social Security and Other Legislation (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009.

- the three measures use different tests and standards to satisfy attendance and enrolment requirements; and

- robust evaluation of the effectiveness of the measures will be difficult to achieve, because it will be hard to determine which of the various concurrent measures was responsible for the improvement.

Lastly NAAJA considers that there is little evidence that the linking of social security payments to school attendance is successful. NAAJA members consider that proper funding and resourcing of schools, including home liaison officers, would go a long way to encouraging better attendance and educational outcomes. A system of incentives and rewards for good attendance should be preferred over the punitive measures and sanctions.

NAAJA is concerned that no draft policy or guideline has been released in relation to the exemption which sets out how 'unexplained absences'[97] will be interpreted and how this exemption will work in practice.

MATCHED SAVINGS SCHEME

3.20 Matched savings scheme for people on compulsory income management

Proposed Part 2.2.5E provides for a one-off 'matched savings scheme' where a person subject to compulsory income management:

(i) completes an 'approved course' (to be approved by Centrelink, on decision making principles to be set out in a legislative instrument); and

(ii) has maintained a pattern of regular savings in their personal bank account for a period of at least 13 weeks. [98]

If a person fulfils these criteria, the Government will make a one-off payment of the same amount of their savings (up to $500). This payment will be 100 per cent income managed.

3.21 Matched savings scheme: Difficulty in accessing 'approved course'

As noted above at 3.15, it is difficult for many people in remote communities to access education. NAAJA is concerned that as a result our clients will not be able to access the 'approved course' which is required to receive the benefit under the matched savings scheme.

We note with some concern that the section requires that completion of the course ***before*** the 'qualifying savings period' can commence.[99] This means the scheme is not accessible to people until an approved course becomes available in their community.

[97] Proposed s123UGD(1)(b)(i), Social Security and Other Legislation (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009.
[98] Proposed Pt 2.25E *Social Security Act 1991.*
[99] Proposed s 1061WG(1)(b)(i).

NAAJA asks the Committee to take into account that while the Government committed to the provision of money management advice and services to communities affected by the NTER, limited services are available. Many communities have only irregular outreach services and some are not serviced at all. Quality of service varies across communities.

Given that it is a stated aim of the Bill to 'ensure that recipients of certain welfare payments are given support in budgeting to meet priority needs'[100], and that completion of a course (including a money management course) is now proposed to qualify people for additional payments, it is important that the Government makes provision for expansion of the very limited money management services currently available.

Given the difficulties and delays people may experience in accessing an approved course, we suggest that where a person successfully establishes a pattern of savings while reliant on income support that should be seen as sufficient in itself to attract the payment.

3.22 Matched savings scheme: 'Pattern of regular savings' and 'qualifying savings amount'

The Bill provides that Centrelink is to determine the question of whether a person has maintained a pattern of regular savings throughout the qualifying savings period in accordance with principles set out in a legislative instrument.[101] The section further requires that qualification for the scheme rests on achieving a 'qualifying savings amount', again, accordance with principles set out in a legislative instrument.[102] No draft legislative instruments have been made public.

NAAJA repeats its view that any legislative instrument should be released for public comment and queries why this detail could not have been put into the legislation. Precedent exists in, for example, the *First Home Saver Accounts Act 2008*, which sets out the minimum amount ($1000) to be contributed to an account each financial year to qualify for a government contribution.[103]

3.23 Matched savings scheme: Income management of incentive payment

The proposal that the incentive payments will be 100 per cent income managed should be changed. Recognising that a person has demonstrated good financial management, the incentive payment should be available to the recipient as cash. To do otherwise is to further impose government control of people's finances where the aim is meant to be to encourage people to manage their own finances. Further, to do so is likely to detract from the attractiveness of the scheme.

[100] Proposed s. 123TB(b).
[101] Proposed s 1061WG(1)(b)(i).
[102] Proposed s 1061WG(1)(b)(ii).
[103] *First Home Saver Accounts Act 2008*, s. 32. It is noted, for example, that this was done in relation to First Home Saver Accounts. Relevant amounts and frequency of payment required was set out as early as February 2008 in a consultation paper released by FAHCSIA.

VOLUNTARY INCOME MANAGEMENT

3.24 Voluntary income management: Alternatives

The Bill does not disturb the option of voluntary income management for those who will not be covered by the proposed categories for compulsory income management. The Government has all indicated that voluntary income management will become available in the Northern Territory as part of the new system.[104] NAAJA prefers the option of voluntary income management to a system of income management that is applied to large groups without regard to people's individual circumstances.

There has been significant expression of support for a voluntary option.[105] We note, however, that this has come absent any invitation for affected people to explore alternatives to income management as a way of achieving improved financial management and literacy. There is a whole range of options that could achieve the goal of improved financial management and literacy without the imposition of such a significant administrative and social burden on social security recipients. These include greater use of Centrepay, periodical payments, store accounts and savings accounts, as well as access to financial counselling services, supports and education.

Similarly, the imposition of income management has removed the incentive to innovate with others ways to help vulnerable people manage their money. For example, the option of weekly, or even daily, payments has not been thoroughly explored, despite anecdotal evidence that it has proved effective where it was used.

NAAJA considers that these options in many cases offer a more sustainable pathway to financial literacy and independence. Income management, while useful in some circumstances, does not build social security recipients' capacity to manage their own money.

3.25 Deductible amount for voluntary income management

Existing s. 123XPA(3) of the *Social Security (Administration) Act 1999* provides that the deductible amount for voluntary income management is 70 per cent, and that the Minister may specify a lower percentage in an instrument. There is currently no instrument in place, and no indication in the Bill or extrinsic material that this percentage will change when voluntary income management is introduced in the Northern Territory.

As NAAJA has previously stated to the Senate on other related Bills, it is an unfortunate practice of governments in recent times to leave important elements of legislative schemes to be set out in legislative instruments and determinations, rather than provided for in legislation.

NAAJA is concerned that people who are currently compulsorily income managed and choose to be income managed voluntarily under the new system have a significantly larger proportion of their social security payments income managed.

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[104] Minister for Families, Housing, Community Services and Indigenous Service, Second Reading Speech, Welfare Reform Bill, 25 November 2009, 14.
[105] Commonwealth of Australia, above n. 66, 20-21.

There is a significant lack of understanding in communities about the operation of the income management system. For example, the NTER Review Board noted that when income management was implemented:

> 'People were required to master new, complex and often changing procedures with a minimum of information or explanation. This led to confusion and anxiety, especially because the vast majority of recipients speak English as a second language.'[106]

NAAJA is concerned that this experience will be repeated in the transition to the new system. As a result, the higher deductible amount applicable to voluntary income management may not be adequately communicated to social security recipients who are currently subject to compulsory income management.

It is also difficult to understand the rationale behind the higher percentage applicable to those who choose income management. NAAJA considers that an amount of 50per cent or less would be preferable. This would both make the system easier to understand, and ensure that social security recipients have the freedom to spend a significant proportion of their payments without Centrelink oversight.

3.26 Voluntary income management incentive payments

As with the matched savings scheme incentive payment, the proposal that the voluntary income management incentive payment will be 100 per cent income managed should be changed. Again, recognising that a person has demonstrated good financial management, the incentive payment should be available to the recipient as cash. To do otherwise is to further impose government control of people's finances where the aim is meant to be to encourage people to manage their own finances.

ALTERNATIVE MODELS OF INCOME MANAGEMENT

3.27 No option for Cape York- style income management scheme

A real and viable alternative to the untested and unproven scheme for government-imposed income management put forward in the proposed legislation should be available to any community which identifies this as an appropriate option for their community.

In the second reading speech to the Bill, Minister Macklin stated:

> 'To assist future decision making, the government will also be offering a limited number of interested Aboriginal communities in the Northern Territory the opportunity to consider the development of an additional community-based approach to re-establishing social norms, drawing on the learnings from the Cape York welfare reform trial.'[107]

[106] Ibid, 20.
[107] Minister for Families, Housing, Community Services and Indigenous Service, Second Reading Speech, Welfare Reform Bill, House of Representatives Hansard, 25 November 2009, 12787.

This statement is disingenuous indeed. The proposed legislative scheme before us provides no opportunity for a scheme similar to the Cape York trials to operate in the Northern Territory.

By way of background, the Queensland Family Responsibilities model vests in its Commission, constituted of two local community commissioners and a third non-local Commissioner, the power to require Centrelink, by way of a notice, to make a person to be subject to income management.

The scheme operates in a context where initially no-one is subject to income management and where a notice requiring that someone be made subject to income management is seen as and used as a last resort. Crucially, the scheme is predicated on the provision of resources within communities to address the root causes of dysfunction and on the provision of intensive case management where required.

The power to require Centrelink to subject a person to the income management regime is the Commission's only enforceable power. The model otherwise focuses on identifying why a person or family is experiencing problems and looking to working together with the person on solutions that go to the heart of their problems.

Moreover, the Queensland model exists at the instigation of a significant proportion of members of the participating communities.

It appears that what the Government proposes for the Northern Territory, and utterly without consultation with the people of the Northern Territory, is a model for community-controlled income management that would operate on top of the proposed categories for income management.

Given that the proposed categories for government-imposed income management in the NT will capture a very high proportion of community members, there is very little scope for communities to design a scheme which reflects what they see as the issues and solutions for their community. That is to say, a scheme which must operate on top of the current scheme, whereby virtually all but the non-vulnerable pensioners are already on income management, leaves little scope for a community-controlled model to exert any appreciable influence over the remaining cohort of un-income managed community members.

Further, there is no provision in the proposed legislation for a community to opt for a community controlled model on its own motion.

At best the proposed scheme provides at section 123UGB[108] for the Minister to determine by legislative instrument that specified class of persons are exempt for the purposes of the section. This section relates to the disengaged youth and long-term welfare recipient categories. Thus, it is conceivable that the Minister could determine that the members of a particular community are exempt so as to allow for community-controlled income management.

[108] At Item 37, Schedule 2, Welfare Reform Bill.

However, it appears that under the proposed scheme, there is no corresponding provision to allow a community-controlled body to require the Secretary to make a person subject to income management. What is required is provision in similar terms to existing 123UF (Persons subject to the income management regime – Queensland Commission).

The previous point is illustrative of the fact that significant changes to the proposed legislative framework are required to enable to community-controlled income management to occur.

INCOME MANAGEMENT ACCOUNTS OF DECEASED PERSONS

3.28 Treatment of deceased persons' income management accounts

Currently, s. 123WL prevents the release to relatives of funds where there is no legal personal representative and the residual amount in a deceased person's income management account is over $500. NAAJA supports the removal of the requirement of a legal personal representative for release residual amounts of more than $500 at proposed s. 123WL(3).[109]

This change recognises the reality that becoming a legal personal representative involves an application to a court for a grant of probate or letters of administration, which is costly and time consuming. Such applications are particularly difficult for NAAJA's client group because of a lack of services to assist people in relation to deceased estates, particularly in remote areas.

However, the change is unable to fully ameliorate the root problem which is caused by the imposition of the income management system. This has meant that money which would otherwise have gone into a person's bank account (importantly, ***at the time it was payable to the person***) being 'locked up' in an income management account.

Under the proposed changes, the $500 cap on release of funds to anyone other than the legal personal representative is removed. Instead, at proposed s. 123WL the Secretary can determine that payment of residual funds of any amount can be made to:

i) a legal personal representative; or

ii) a person/persons who the Secretary is satisfied has carried out or will carry out an 'appropriate activity' in relation to the estate or affairs of the deceased person; or

iii) the deceased's bank account.

The option of paying the money into the deceased's bank account is welcome as it creates a situation analogous to that which would exist if social security payments were made directly to a bank account.

[109] Item 6, Schedule 2, Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Bill 2009.

3.29 Treatment of deceased person's income management accounts: Appropriate activities - funeral expenses

Under the current system, Centrelink can direct any residual amount towards funeral expenses, and can reimburse or directly credit others who have incurred the expenses. Centrelink policy is, however, that funeral expenses are to be limited to:

> 'the expenses incurred directly in relation to the deceased individual (such as funeral parlour fees, the cost of a casket, and the transport costs in relation to the deceased etc), rather than to expenses incurred by people in attending the funeral, cultural activities or a wake'.

NAAJA considers that a more flexible policy should be adopted in relation to funeral expenses. While the legislation requires that funds be released to a person carrying out appropriate activities, the current Centrelink policy focuses on the funds being specifically earmarked for 'appropriate activities'. To promote better access to these funds, and to ease the burden on the bereaved, the focus should shift to allow a less restrictive approach to the release of funds, so that this can extend, for example, to include travel to funerals, ceremony expenses and the like.

4. Issues with the current system of income management

This section addresses current problems with income management that the Government's proposed changes to the system do not address. These are problems with the BasicsCard, need for protection of BasicsCard users under the EFT code, need for suspension of income management for people travelling interstate and the need for change in the percentage managed of lump sums and advances.

4.1 BasicsCard

The difficulties faced by users of the BasicsCard have been well documented.[110] They range from:

- the stigma and shame of being singled out as an income managed person in shops;
- being discriminated against by shop staff because of being BasicsCard holder;
- having to return goods at point of sale due to balance problems;
- difficulties obtaining a balance, especially where there is no access to a landline;
- difficulties in getting money moved from the income management account to the BasicsCard;
- the range of items and places people can shop is severely curtailed; and
- older people experience additional difficulty communicating with Centrelink about the BasicsCard and have to rely on others to help navigate the system.

Further, there are widespread reports of BasicsCard:

- being used by third parties, with and without the permission of the owner;

[110] See, for example, Australian Government above n.33, 57.

- being used as currency in card games;
- being sold for cash at less than the credit value on the card;
- being used to purchase items which are then on-sold for cash at less than their value;
- being used to purchase excluded goods.

It is NAAJA's position that the problems people experience with BasicsCard are symptomatic of the wider problems of income management. The weaknesses in the card system reflect the weaknesses in the income management system. For example, the problem experienced by some of having money demanded from them, has been replaced by the taking of food instead. The wide-ranging social and behavioural change sought by Government is unlikely to occur through an imposed, top-down system that does not adequately account for structural issues such as housing, health, employment and education.

4.2 Protection of BasicsCard users: The EFT Code

A further issue in relation to the BasicsCard is the protection of BasicsCard holders in the case of malfunctions or unauthorised transactions. Currently, FAHCSIA is not a signatory to the Electronic Funds Transfer Code (EFT Code). The EFT Code is a code of practice to protect consumers who use electronic funds transfer. The EFT Code offers protection and certainty to consumers by setting out rules for the providers and consumers of EFT services regarding:

- the information that a provider is required to give a consumer and how it is to be given;
- liability for unauthorised transactions;
- consumer responsibilities regarding PINs and passwords;
- complaints procedures; and
- privacy.

FAHCSIA's failure to sign up to the code puts BasicsCard users at a disadvantage compared to people who access funds through a conventional bank account. NAAJA considers that the code is a valuable protection in the case of unauthorised transactions, Centrelink errors and other complaints.

4.3 Interstate travel: Suspension of income management

While income management remains only a Northern Territory (and to a lesser extent Western Australian) system, provision must be made for suspension of income management when people travel interstate.

The inconvenience and shame which people experience travelling interstate, where even in Centrelink offices there is widespread ignorance of the ins and outs of income management and BasicsCard, must be alleviated. The continuation of income management while people travel interstate is in direct conflict with the objects of the scheme, which are to ensure people's priority needs are met.

4.4 Percentage managed of advances and lump sums

Under the current income management scheme, advances of a person's fortnightly payment are 100 per cent income managed. This is despite the fact that the advance system effectively operates as a loan, which a person repays in fortnightly instalments. Although these fortnightly instalments are 50 per cent income managed, the advance of that same payment is 100 per cent income managed.

Lump sums of Family Tax Benefit arrears and the yearly Family Tax Benefit supplements are 100 per cent income managed, as were other types of bonus payments, such as the Economic Security Strategy payments.

It is our submission that this approach is harsh and heavy handed. Many people have reported to NAAJA that this is a particularly unwelcome aspect of the income management regime and should be changed.

Part III Recommendations

Income management: Principal recommendation

1. Income management should be available to individuals on a voluntary basis.

2. Compulsory income management must be confined to clear, relevant behavioural triggers, imposed on a case-by-case basis.

3. The decision as to which triggers should activate compulsory income management should be made in consultation with communities on the basis of evidence.

4. People subject to compulsory income management should have access to culturally appropriate and accessible resources to address the root causes of the 'trigger' for income management.

Evaluation of the measure

5. Authoritative, up-to-date data that will form the basis of future evaluation should be collected and made public before the new income management scheme is implemented;

6. Evaluation of the effectiveness of the scheme should be conducted by an independently appointed review panel similar to that appointed to the NTER Review Board in 2007.

Transition to the new system

7. People who do not fall within the 'disengaged youth' and 'long term welfare payment recipient' categories in the Bill should be entitled to apply for removal from the existing income management scheme as soon as the Bill commences.

8. Centrelink should provide information to affected social security recipients so that they are aware of their entitlement to be removed from income management from the commencement date.

9. When a person ceases to be subject to the income management regime**,** Centrelink should be required to pay any residual amount as a lump sum directly to the person. There should be no requirement that the Secretary be satisfied that a person is not likely to become subject to income management in the next 60 days. As a consequence, proposed s.123WJA should be removed from the Bill.

Compulsory income management categories

Child protection category

10. The Commonwealth should exercise stringent oversight over the role Northern Territory Families and Children in the implementation of this measure.

11. Section 123UB should be amended to include flexibility on the length of orders for income management under this category and a maximum timeframe of 12 months for each period of income management. As part of this, or additionally, inclusion of provision for regular review of the situation of affected individuals.

Vulnerable welfare payment recipient

12. Proposed ss. 123UCA and 123UGA, creating a compulsory income management category for 'vulnerable welfare payment recipients' should be removed from the Bill. Instead, people offered voluntary income management and/or alternative supports and solutions.

13. If proposed ss. 123UCA and 123UGA are retained, the definition of 'vulnerable' should be set out in the legislation. Absent this, a draft legislative instrument that sets out proposed decision-making principles in relation to vulnerability should be released for public comment before it is made.

14. Domestic violence should not be an automatic indicator of vulnerability.

15. Proposed s.123UGA(9) should be removed so that a person can make a request for reconsideration of circumstances at any time.

16. If proposed s.123UGA(9) is not removed, it should be specifically stated in the Bill that a right to request reconsideration of a determination under s123UGA(9) in no way restricts rights to review at any time of a determination under Part 4 of the *Social Security (Administration) Act.*

Exemptions from income management

Specified class

17. CDEP participants, voluntary workers and those with significant caring responsibilities should be identified as classes of people to be exempted from income management under proposed s.123UGB.

18. Any proposed legislative instrument setting out a class to people to be exempted should be released for public comment before it is made.

People without dependent children

19. Adequate options for work and study should be funded in remote communities to ensure that residents have the opportunity to qualify for this exemption

20. The exemption for work at the test time in proposed s.123UGC(1)(b)(ii) should extend to social security recipients who have been undertaking CDEP work or voluntary work.

People with dependent children

21. Guidance should be provided to Centrelink as to what factors should be considered indicators of financial vulnerability. Applications for one-off advances, loans or crisis payments should not, on their own, be considered indicators of financial vulnerability. Any legislative instrument that sets out decision making principles should be made available for public comment before it is made.

22. Government should reconsider all three social security measures related to school attendance with a view to ensuring that one coherent and integrated system exists.

23. Adequate schools funding and incentives and bonuses for good attendance records should be considered in place of punitive measures and sanctions.

Matched savings scheme

24. More funding should be made available to increase the capacity of existing money management education services to ensure that social security recipients in remote areas are able to access this initiative.

25. The qualification requirements for the payment should be clearly set out in the Bill, including a definition of 'pattern of regular savings' and 'qualifying savings amount'.

26. Matched savings incentive payments should not be income managed.

Voluntary income management

27. The deductible amount for voluntary income management payments should be set at 50 per cent, with recipients able to specify a different amount if they wish.

28. Voluntary income management incentive payments should not be income managed.

Alternative models of income management

29. The existing Bill should be extensively amended to provide for community-controlled income management to take place.

30. Government should ensure adequate communication of the option for community-controlled income management is provided to communities.

Income management accounts of deceased persons

31. Where a residual amount remains in the deceased's income management account after the payment of funeral expenses, the policy should conform with the legislation and allow for less restrictive approach to the release of funds, so that this can extend, for example, to include travel to funerals, ceremony expenses.

Issues with current system of income management

BasicsCard

32. If BasicsCard is retained, it should include photo identification.

33. The card should be developed to allow balance checking at ATMs and/or by swipe facility at all BasicsCard merchants.

34. FAHCSIA should become a signatory to the EFT Code.

Interstate travel: Suspension of income management

35. Provision should be made in the legislation for suspension of income management to occur when people subject to income management travel interstate and overseas.

Percentage managed of advances and lump sums

36. Advances of fortnightly instalments should not be subject to income management. The option should be provided to a recipient to request that their advance be income managed if they wish.

37. Lump sums and bonus payments should be managed at 50 per cent, with the option for the recipient to request management at a higher percentage if they wish.

ATTACHMENT A

NAAJA – BACKGROUND

NAAJA Criminal Section

NAAJA's criminal section represents Aboriginal and Torres Strait Islander defendants in criminal prosecutions in the Magistrates and Supreme Courts. NAAJA staff attend every 'bush court' on circuit from each of our 3 offices.

- NAAJA staff based in Darwin travel to bush courts at Daly River, Jabiru, Maningrida, Milikapiti, Pirlangimpi, Oenpelli, Nguiu, Wadeye.
- NAAJA staff based in Katherine travel to bush courts at Barunga, Borroloola, Lajamanu, Ngukurr, Timber Creek.
- NAAJA staff based in Nhulunbuy travel to bush courts at Alyangula, Galiwinku, Numbulwar.

NAAJA Civil Section

NAAJA's civil section does a range of work on behalf of our Aboriginal and Torres Strait Islander clients, including:

- Complaints about government services (police, health, prison);
- Seizure or forfeiture of property because it was used to take liquor into a restricted area or was used in the commission of a crime;
- Family law matters;
- Applications that a child be declared in need of care (Family and Community Services matters);
- Assisting people to obtain compensation for injuries received in motor vehicle accidents (MACA) or as a result of an offence by some other person;
- Applications for orders in relation to adult guardianship and volatile substance abuse;
- Prison transfer requests;
- Discrimination;
- Representing people before the Mental Health Review Tribunal;
- Representing the family of people who have died in custody in a coronial inquest into the death; and
- Centrelink matters.

NAAJA civil section staff travel regularly to communities in our region to conduct civil clinics.

Advocacy

NAAJA's advocacy section prepares submissions, policy documents, advocates on particular policy issues with a range of different government and non government stakeholders and conducts community legal education. Since the 'intervention', NAAJA has been conducting particular community legal education and advocacy activities on intervention related matters, in conjunction with other legal agencies. Our experience to date has been that the changes to policing, alcohol prohibition and welfare rights (income management) have been particularly important to our client group.

5 August 2009

Mr Brian Stacey
State Manager
Northern Territory State Office
Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA)
GPO Box 9820
DARWIN NT 0801

Dear Mr Stacey

Re NTER Future Directions Consultations

As discussed with your officers in our meetings of 10 July and 17 July 2009, NAAJA, CAALAS, DCLS and NTLAC have a number of concerns in relation to the Government's current "Future Directions" consultation process.

Legal services acknowledge the difficulties involved in organising and holding consultations with diverse remote communities. However, having observed a number of community meetings and having received reports and comments from community members in relation to the consultation process, we wish to raise the following concerns:

1. To our knowledge, there has been only limited public awareness campaigning (for example, advertisements on local radio and TV) in relation to the consultations. In our view, in order to maximize meaningful participation in the process, affected people needed sufficient advance notice, both in order to raise awareness of the consultations and to enable community members to discuss and consider the issues prior to meeting with Government. We are aware that the consultations are occurring in 4 'Tiers',

however we do not consider the time periods between the tiers to be sufficient to enable community members to properly consider the issues involved;

2. Limited information was disseminated to NGOs and other organizations about the consultation process. For example, NAAJA has only learnt of the process by actively monitoring the Minister's website and the Future Directions website and by repeatedly seeking advice from FAHSCIA;

3. To our knowledge, the community meetings schedule was not disseminated to NGOs and other organisations at the start of the process;

4. Up until around 15 July 2009, the internet meeting schedule was not up to date to reflect changes in meeting dates;

5. The internet information page on the consultation process (http://www.fahcsia.gov.au/sa/indigenous/progserv/ntresponse/future_directions/Pages/default.aspx which provides information about the tiers and has the dates for the regional workshops is hard to find. One has to go through a redirect to the FAHSCIA website . We suggest it be included under the "providing feedback" link at http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/future_directions_discussion_paper/Pages/providing_feedback.aspx;

6. Reports we have had from communities indicate some residents received only very short notice (in some case less than 24 hours prior to the community meeting being held);

7. Our reports and observations indicate few people have had the opportunity to read or review the discussion paper prior the community meetings;

8. Neither the discussion paper nor the FAHSCIA summary powerpoint of the discussion paper issues have been translated into relevant community languages;

9. Little advance notice means people are unprepared for discussion, in turn, limiting the potential for discussion to canvass a range of views;

10. At Tiers 1 and 2, there is no facility for people to put their views other than in community meeting run by FAHSCIA with GBM and IEO present, or in smaller less formal meetings with the GBM and IEO. We are of the view that this is a critical flaw in the process. Legal services are strongly of the view that there needs to be a way for people to put their views which does not require direct interface with FAHSCIA, GBM or IEO. This is because in some cases people may have a bad relationship with the FAHSCIA personnel, mistrust FAHSCIA personnel, or feel intimidated by FAHSCIA personnel. People have expressed that they would like to be able to make submissions without going through the GBM or being involved in a community meeting context. Legal services suggest that people be invited to write in with their views with the relevant address – post, fax and email – to be made available immediately on the "Providing feedback" web link, at meetings, and in communications about the consultations. We also suggest that a 1800 number for voice messages be considered as a matter of urgency;

11. At meetings we have observed, people are not being advised that the consultations may be relied on to support the Government making a case that proposed or existing programs are "special measures"; in fact, in the meetings legal services have observed there is no linkage made between the meetings and whether the Government's proposed models are to be considered special measures. Both from a legal perspective and for the sake of completeness in information provision, it is crucial that this information should be provided to people attending these meetings if the special measures argument is to be relied upon when the *Racial Discrimination Act* is reinstated;

12. At community meetings, there appears to be inadequate use of interpreters, including no interpreters at a number of meetings. While we understand booked interpreters may fall through, we are not sure that interpreters are being booked for every meeting nor whether at meetings without interpreters people are being offered the opportunity to attend an alternative meeting with an interpreter present;

13. There is no formal process for separate men's and women's Tier 2 meetings to take place. We understand these would only take place at the request of community members and may only be with the GBM;

14. Your officers have said where significant numbers of people miss out meetings or miss out on appropriately convened meetings, FAHSCIA will arrange an alternative meeting. We welcome this but note that this option needs to be broadly advertised;

15. It appears (and your officers have subsequently advised us) that independent monitoring is not taking place at all meetings;

16. We have observed that on some occasions there appears to have been insufficient advice and support being provided to people at Tier 2 meetings on registration at regional workshops and on FAHSCIA's support for transport and accommodation for attendees. Further, in some cases, community meetings are being held after the closing date for registration at regional workshops, meaning some people will miss out the opportunity to attend a regional workshop;

17. Meeting discussion on income management does not canvass any options other than the limited two options proposed by government in the paper, other than asking open questions along the lines "is it good or bad". Discussion is steered to eliciting a response on the exemption proposal without, in our view, sufficient space or context being given

to alternatives, such as the NTER Review Board's recommendation for an approach based on "behavioral triggers" as well as a voluntary option;

18. At the meetings legal services have observed there has been no definition or in appropriate definitions of key terms such as "pornography"; and

19. Meetings that legal services have observed have lacked attendance by personnel with comprehensive, accurate and up to date knowledge of the legal intricacies and practical effects of income management and other measures, meaning that in some cases, there was a risk of discussion based on incorrect or partially incorrect information..

Should you wish to discuss any aspect of this letter or if you require any further information, please do not hesitate to contact the writer.

Yours faithfully,
North Australian Aboriginal Justice Agency Ltd

Priscilla Collins
Chief Executive Officer
priscilla.collins@naaja.org.au

and on behalf of:

Ms Pat Miller, CEO, Central Australian Aboriginal Legal Aid Service
Ms Caitlin Perry, Co-ordinator, Darwin Community Legal Service
Ms Suzan Cox QC, Director, Northern Territory Legal Aid Commission