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Senate Community Affairs Legislation Committee

Parliament House

Canberra ACT 2600

by email: community.affairs.sen@aph.gov.au

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Dear Community Affairs Committee

Inquiry into the Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill and Two Other Bills

The Law Society Northern Territory welcomes the opportunity to provide comments on these Bills and we thank the Committee for granting us an extension of time in which to make this submission.

The Bills have been considered by the Society's Indigenous Issues Committee. We have also been involved in responding to the major changes to Aboriginal affairs in the Northern Territory since 2007. This has included writing submissions, having meetings with governments and stakeholders and consulting with service providers. Our work in this area has led us to have some concerns about the process taken by the current government in reshaping the Intervention.

This submission will begin by making some comments about the circumstances in which the amendments have been proposed and of this Committee inquiry, including the short time frame for submissions and the unavailability of information prior to the Bills being introduced to Parliament.

The second part of the submission will make some brief comments about some of the individual NTER measures and mechanisms in the Bills. It will deal mainly with the Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill ("Welfare Reform Bill"). This submission will not deal with five year leases or the licensing of community stores.

In addition to the comments in this submission, the Society endorses in full the submission made to the Committee by the North Australian Aboriginal Justice Agency, a copy of which is attached.

Circumstance of the introduction of the Welfare Reform Bill

The Society is pleased that the current government is taking steps to reinstate anti-discrimination legislation including the *Racial Discrimination Act 1975* with respect to the Intervention measures. This is a very important development and something that we have been calling for since 2007.

The Society also welcomes the Australian Government's commitment to resetting the relationship between Indigenous people and the government. But we are concerned that people remain unable to access sufficient information to understand enough to participate meaningfully in the debate about the future of the NTER measures. This is despite several reports and rounds of community consultations.

The Society considers that tackling Indigenous disadvantage requires an evidence based approach. We are concerned that there is a shortage of useful data about the effectiveness or otherwise of the various Intervention measures since they began in 2007. We are also concerned that much of the material available is opinion evidence from limited numbers of people and that

there is apparently conflicting, but equally reliable, data available on the efficacy of each of the Intervention measures. This makes it difficult to be confident in relying on what little data is available because the different reports and studies frequently come up with quite different results.

The volume of material means it is almost impossible for any organisation to have read every relevant report and all the documents relevant to the policy and laws of the Intervention. And for Aboriginal people in prescribed communities, this is absolutely impossible. Although the Society acknowledges the necessary complexity of making changes to things such as social security laws, we think it is a pity that what information was available was not accessible to the people who will be affected by the outcomes of this process.

The process behind this redesign of the Intervention involved consultations with affected communities and stakeholders that were known as the "Future Directions" consultations. A Future Directions Discussion Paper was published and the community consultations were loosely based around the content of the discussion paper. The discussion paper was intended to be simple and easy to understand, but this meant that it was not comprehensive. The suggested changes that could be made to the Intervention measures were limited and in many cases did not include the changes which have now been proposed in the Welfare Reform Bill.

The Society understands that it is important that affected people have an opportunity to be heard, particularly when the outcome of the process will inevitably have a significant impact on their legal rights and obligations. We agree that consultation was important, but we would be very concerned if the intention of the consultations was that they would be used to support an argument that the Intervention measures are "special measures" under the *Racial Discrimination Act*. We are concerned about this because Aboriginal people were not informed that the consultations were to be used in this way, and the people and communities did not have access to independent legal advice about the consultations. The Society raised these concerns with the Minister and FaHCSIA at the time of the consultations.

The Future Directions consultation process was apparently intended to be a step in resetting the relationship between government and Indigenous people. It is unfortunate that the Aboriginal

communities will be unable to make meaningful comments on the changes which are now actually proposed. There is no mechanism which would allow them to have meaningful input into the Committee's inquiry. The changes are in a long Bill which amends several other Acts, and amendment bills by nature are harder to read than bills for principal legislation. Combined with a short time frame for the Committee to conduct the present inquiry, this presents a significant barrier to participation for most of the affected people.

I will now turn to the changes to selected individual Intervention measures which are proposed by the Welfare Reform Bill.

Income management regime

The Society refers to the attached submission by the North Australian Aboriginal Justice Agency (NAAJA) which deals with the issue of income management in detail. We support the position of NAAJA in full, and the comments we have made below are in addition to those included in their submission.

There is a lack of evidence to show that income management is a useful tool, especially for general application. Expanding the income management regime will have a huge impact on the day to day lives of many Australians and the Society believes that the available evidence is not sufficient to justify a continuation or expansion of income management. The evidence, on balance, seems to indicate that in some cases income management may be a useful budgeting tool for a small select group of people. There is much stronger evidence to support case management approaches which involve assistance with budgeting, understanding credit, financial literacy and other life skills.

The Welfare Reform Bill proposes to overhaul the income management regime. Automatic income management for people living in Aboriginal communities will be replaced with income management categories and exemptions that are now to be determined by factors such as vulnerability, hours of employment, participation in study or children's school attendance. The groups of people to whom income management will apply under the new regime indicate that there has been a change of approach to the objectives of income management, which now aims to

move people off welfare and into work or study. The original objectives of compulsory income management in the NT were said to be making sure priority needs were met, thereby improving health and food security.

The Society understands that the government has chosen to redesign and expand income management to make it compliant with the *Racial Discrimination Act*. But these are very significant changes; they are the biggest that have been proposed to be made to the *Social Security Act* since it was introduced in 1947. It is not necessary, for the purpose of reinstating the *Racial Discrimination Act*, to introduce such complex and radical welfare reforms that aim to push people into work or study.

It is difficult to offer detailed comments on the extension of compulsory income management because important details are not in the Welfare Reform Bill and will instead be left to regulations and ministerial declarations. An example is the meanings of "vulnerable" and "financial vulnerability"; these are not defined in the Bill, although they are important tests which determine whether income management will apply to a person. As such, it is not possible to know the scope of the income management categories proposed or how many people are likely to be affected.

Similarly, the Bill gives the Minister power to declare income management areas; it does not define what areas will be affected. We understand that most or all of the Northern Territory will be included in the first declaration but we do not know this for sure and we do not know what other areas will be encompassed. Consequently, our ability to provide meaningful comments is hampered by the lack of information which would otherwise assist in our understanding of the scope of the proposed welfare reforms.

The Society is very pleased that decisions under the income management regime will be reviewable decisions. Income support is essential to life and wellbeing for many people and as such they should have full recourse to a range of appeal and review mechanisms. It is also important that decisions are reviewable and that brief reasons for decisions are recorded, because

these mechanisms are required if we are to ensure that the standard of decision making under the regime remains high.

Many lawyers have considered the regime for compulsory income management under the Welfare Reform Bill, but we are not clear exactly how rights to welfare for individuals will be affected. In addition to the amount of important detail which is to be left to legislative instruments and ministerial declarations, the complexity of the laws which are altered and their interplay with other laws means that it will take time to develop a body of caselaw to shed a clearer light on the operation of the new provisions. Until such a body of caselaw exists, many unanswerable questions will remain. It is important that any changes are monitored and assessed and that the legislation and welfare categories are reviewed.

Changes to income management will affect a potentially huge number of people. The changes will have a significant impact on their day to day lives, and the people will need to have access to independent information and advice about the welfare regime. It is essential that all affected people have access to a service which can provide independent legal advice about welfare rights in a culturally appropriate manner. There are only six welfare rights lawyers in the NT at present. The massive changes to welfare, which are already underway in the NT, require the government to fund a welfare rights legal service which is resourced well enough to provide information and education to everyone affected, and where necessary, legal advice and casework. This is particularly important given the complexity of the laws and the lack of clarity about how they will be applied by our courts.

The Society supports voluntary income management and we consider that it should be available for anyone who wants it. The proposed incentive payments for people who volunteer for income management are good because positive incentives are most effective in helping people to learn and practice new skills.

On the other hand, the plan to restrict voluntary income management to periods of 13 weeks or more does not further the positive aims of voluntary income management. It creates a barrier to participation for many people, because rather than being able to try it and see if it works for them,

people would have to commit to the restricted access to cash before they have a chance to experience whether it is effective or helpful for them. It would be far better for people to be able to try it out knowing that if they don't find it helpful they need not stick with it. This would allow many people to try it out even on the off chance that may be useful to them. The introduction of the 13 week minimum period is, according to the explanatory memorandum to the Welfare Reform Bill, to reduce the administrative expense of moving people on and off income management. The Society considers that it is unfortunate to introduce barriers to access merely to save some minor administrative workload, and we do not support the introduction of the 13 week rule.

Alcohol prohibition and restriction

The Society does not support the blanket prohibition of alcohol across large areas which was introduced in 2007. This is mainly because previously, under the Northern Territory *Liquor Act*, there was a more appropriate scheme which allowed for dry areas to be declared by the Licensing Commission, at the request of a community and after a hearing which involved the affected parties. This mechanism is preferable than a system of ministerial notices and approval. Dry areas are not new to the Territory and they have been very effective and highly supported in many cases.

We are also concerned that blanket prohibition is discriminatory and does not help tackle underlying issues of disadvantage which cause alcoholism. The prohibition has displaced many people with consistently higher numbers of people coming to big towns to drink since the Intervention started in 2007.

The criminalisation of alcohol possession, transportation, supply and usage also means that Aboriginal people are liable to be caught up in the criminal justice system for behaviour that would not be criminal in other communities. Aboriginal people are already highly overrepresented in our criminal justice system and we must work to change this trend by using evidence based health approaches, not the criminal law, to deal with alcohol consumption and reduce alcohol related harms.

The Society is pleased that the Bill foreshadows that homes within a prescribed area will no longer be automatically deemed to be a public place for the purposes of police powers to enter. However, we do not consider that this deeming is necessary at all and have some concerns at retaining the power, even though it has been improved by the addition of a requirement for a specific declaration by the minister.

Pornography

The Society does not consider that special pornography restrictions for prescribed Aboriginal communities are necessary or appropriate. Our classification rules should apply equally across Australia and it appears discriminatory to select some groups to be subject to harsher restrictions than the rest of us.

There are already offences in the general law which prevent children from being exposed to adult material that may be harmful to them. It is unfair to say these laws are not sufficient for Indigenous people if they are sufficient for all other Australians. And, as with alcohol, the extra criminal offences around pornography have the potential to lead to further problems with the criminal law and defy the aim of reducing the Indigenous incarceration rate.

It is common knowledge that many Aboriginal people in prescribed communities are very offended by the signs at the entrance to communities that refer to alcohol and pornography restrictions. In addition, many people believe that the signs have the unintended effect of suggesting to young children that pornography is normal, because they make a big issue out of something that most children were not aware of before.

The Society understands that consultation around the pornography measures was particularly ineffective because most people were not comfortable discussing it with government representatives. Also, at many consultations the issue was raised in a mixed gender group or in front of children and the communities did not feel it was appropriate to expose children to that discussion.

The Society considers that the special restrictions on pornography that apply only in prescribed communities should be repealed.

Five year leases

This submission will not deal with the question of five year leases.

Licensing of community stores

This submission will not deal with the provisions for licensing of community stores.

Australian Crime Commission powers

This document will not deal with the special law enforcement powers in detail, but we refer to and adopt the more thorough response in the attached NAAJA submission.

The Australian Crime Commission (ACC) is a high level powerful law enforcement organisation which is mainly concerned with serious organised crime. It has a wide range of strong coercive investigative powers. The Society does not consider that the ACC is an appropriate body for investigating and responding to issues of violence and child abuse in remote communities. We do not consider that is proper to count these strong investigative and coercive powers as a "special measure" under the *Racial Discrimination Act* and we do not think there is evidence that would support that. While we are pleased that these powers are proposed to be limited to violence *against* an Indigenous person, we do not think this goes far enough; we consider that the ACC is not the right body for the job. Available evidence shows that a social welfare and education approach is more effective in building strong communities than an approach based on overpolicing and harsh law and order strategies.

Customary law bail and sentencing

The Society is disappointed that no changes have been foreshadowed to the customary law amendments to bail and sentencing legislation which were part of the original Intervention package. These provisions prevented courts from taking account of customary law issues and had the effect of limiting the context of the offending that can be considered by a court during bail and sentencing applications. In practice, Aboriginal people are not able to present evidence

to explain their offending but all other people are, because non-Aboriginal people won't have customary law issues to raise.

These provisions were unnecessary because the common law of the Northern Territory already limited the use to which such evidence could be put, and it is incredibly rare that the Court has accepted submissions about customary law and taken them into account in deciding on a sentence or bail application.

Conclusion

The Society is pleased that the Welfare Reform Bill reinstates the *Racial Discrimination Act*, but we are dismayed by the continuation of various Intervention measures for which there is not good evidence of success. We are not sure that the measures will in fact comply with the *Racial Discrimination Act* if they continue, as they are likely to constitute indirect discrimination at the very least if they have a disproportionate impact on Indigenous people.

We are pleased that there is planned to be an increased opportunity for review of decisions made about the application of each of the measures by government agents.

The Society is disappointed that despite a commitment to resetting the relationship with Indigenous people and after a string of consultations, Aboriginal people in the Northern Territory are still in the dark about what is planned for the Intervention and how it will affect their lives. Aboriginal people have not had an opportunity or resources to explore alternative approaches to improving their lives. Community controlled programs and service delivery by Aboriginal organisations have been suffering from a lack of support and many positive local programs have fallen by the wayside, unsupported, since the Intervention began. On almost every level, the government's Intervention has disempowered Aboriginal people and communities and prevented them from making choices and exercising control over their lives. The government must take steps to reverse this trend and work towards empowering Aboriginal people if we are to close the gap and reduce Indigenous disadvantage. An evidence based approach is needed rather than radical reforms to welfare payments.

Finally, the Society is concerned at the disparity between what was discussed during the consultations and the content of the Bills. We are unhappy about the complex and expanded income management regime and the continuation of all of the other Intervention measures. We also call on the government to fund a welfare rights legal service which is accessible to everyone who may be affected by the changes to welfare.

We thank the Committee for considering our submission and we would be happy to provide more information at the Committee's request.

Yours sincerely

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