Northern Territory
Legal Aid Commission

Submission to the Senate Community Affairs Committee

regarding the

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

Introduction

The Northern Territory Legal Aid Commission (the Commission) aims to ensure that the protection or assertion of the legal rights and interests of people in the Northern Territory are not prejudiced by reason of their inability to:

- Obtain access to independent legal advice;
- Afford the financial cost of appropriate legal representation;
- Obtain access to the Federal or Territory legal systems; or
- Obtain adequate information about access to the law and legal system

Our service provides legal advice and assistance to persons in a range of matters, including:

- Family law;
- Domestic violence;
- Immigration Law
- Child in need of care;
- Criminal law; and
- Civil law.

We have a significant Community Legal Education function and since 2006 have been implementing the 'Indigenous Families Project' which uses a community development model to produce legal education DVDs in Indigenous languages in the NT.

Over the past two years, our service has conducted an Outreach Project from our offices in Darwin, Katherine, Tennant Creek and Alice Springs, which includes information sessions, education workshops, legal advice, minor assistance and referrals to people in prescribed communities[1].

Background to the Commission's Involvement

The Commission welcomed the focus on addressing the needs arising out of the Ampe Akelyernemane Meke Mekarle "Little Children are Sacred Report" (the AAMM report), in particular those relevant to our services. The report contained valuable recommendations in relation to the need for proactive and long term approaches to addressing offending such as:

- improved resources for child protection services and police;
- improved access to rehabilitation for offenders;
- a comprehensive alcohol supply reduction strategy; and
- strengthened community justice mechanisms which would enhance community participation in law and justice concerns.

The Commission has expressed concerns that the national emergency response to the Report has detracted from the content of the AAMM Report and there is an urgent need for collaborative implementation of some of the recommendations which are vital to changing offending behaviour in the NT. In many important respects, most notably income management, the national emergency response diverts attention from the fundamental principle of community participation which the AAMM Report found to be so important.

We have made submissions to successive Inquiries since the Intervention[2] that there is a need to refer back to the content and recommendations of the AAMM Report.

Increased Activities

The Commission received funding in late 2007 to undertake additional activities arising as a result of the Northern Territory Emergency Response (NTER). These activities have assisted us to assess the legal issues arising out of the intervention, but also to identify a range of broader and substantial unmet legal needs in remote Aboriginal communities.

In our Outreach Project over 200 visits to prescribed communities have been held to have discussions with community members on legal education needs and work with community members in deciding how best to meet those needs. Where possible these activities are planned and delivered in conjunction with other legal and related services such as the Aboriginal legal services, women's legal services, Federal and Territory Ombudsman, Anti-

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[1] Communities prescribed under the NTER legislation

[2] Submission to the Legal and Constitutional Senate Inquiry on the Intervention; Submission to the Senate Community Affairs Committee on the further laws relating to the intervention; Submission to the Senate Select Committee of Regional and Remote Indigenous Communities; and Submission to the review of the Intervention

Discrimination Commission, Consumer Affairs and the Australian Securities and Investment Commission.

Legal needs identified

The Commission has prioritised remote communities that are not on the 'bush court' circuit and, as a result, are not regularly visited by legal services. We have come across clients at these communities with many and varied unmet legal needs. These include:

1. Credit/debt issues
2. Consumer issues
3. Police complaints (including inadequate responses)
4. Warrant issues
5. Alcohol
6. Centrelink/ welfare rights
7. Housing/tenancy issues
8. Transport to court
9. Work health claims
10. Employment Law
11. Unclaimed Superannuation
12. Corporations law including commercial business advice
13. Banking issues relating to ID
14. Deceased Estates
15. Victims of Crime Compensation
16. Motor Accidents Compensation
17. Other civil law issues

Community Legal Education

There is a need for a sustained program of community legal education in many of the remote communities visited. There is a paucity of understanding of the foundational structures of laws and governance among many Aboriginal people living in prescribed communities. In the long term, education about the sources of the Australian laws would facilitate some recognition of the legitimacy of the laws under which people live. In the short term, education about the many changes that have been made to a variety of laws both at a federal and territory level in the last couple of years is urgently needed in many places.

There needs to be consideration given to the different and creative ways that education can be presented to community members. The Commission continues to work with community members and other legal services to develop CLE material. Existing resources are utilised and new resources developed in consultation with stakeholders and community members.

Advocacy

The Commission undertakes a range of advocacy activities in response to outreach visits. These activities include assisting community members to write letters to government; responding to requests for submissions on a range of law and justice topics impacting on remote communities; attending meetings with representatives of government at a territory and federal level.

This advocacy is a crucial role that, as long as it is supported by community members, should be continued. While the Commission is careful not to speak on behalf of community members, we have an important role in raising awareness of issues and persistent campaigning may, eventually, bring about change.

Comment on Intervention Laws

The following submissions have been collected during the 2 years that the Commission has been undertaking its Outreach Project as part of the NTER. They are based on the opinions and views of a variety of persons affected by the implementation of the NTER legislative measures. They include anecdotal examples of personal experiences.

We preface our submission with the following preliminary comments.

Rapid change

We record our concerns at the amount of change that community members have encountered in the past 3 years. It is our observation that widespread and rapid change has impacted negatively on the morale of many community members, leaving them feeling disempowered and disregarded.

The legislative and policy changes that have occurred since 2006 have had a substantial impact on people living in prescribed communities. This snowball of changes commenced with the abolition of the Aboriginal and Torres Strait Islander Commission and the devolution of the programs which were governed by that Commission and then by Aboriginal and Torres Strait Islander Services to 'mainstream' Australian Government agencies. In itself this was a monumental change to service delivery and under these 'new arrangements' Indigenous Coordination Centres were established with a range of functions including the negotiation of 'Shared Responsibility Agreements' between the Australian Government and community members. This raft of changes was only beginning to be absorbed by those affected the NTER commenced in 2007, bringing sudden and radical laws and policies. At the community level, this resulted in a steady stream of people appearing in communities from a variety of agencies including the military. There are many documented accounts of the confusion which this brought about.

These changes occurred in parallel to a number of other policy changes impacting on the lives and environment of people living in prescribed communities. Three examples of these changes are:

- The amalgamation of Aboriginal Community Government Councils into Shires;
- The cessation of CDEP, which was then 'reinstated' and has since been 'reformed'; and
- Housing reforms, including the 'takeover' of Aboriginal Housing by Territory Housing and the Strategic Housing Infrastructure Program.

Despite these well intentioned and well funded programs, many people in prescribed communities have and continue to express to the Commission that the programs have not impacted on their lives in a beneficial way.

Appropriateness of delivery

There has been little if any attempt by government to understand the existing community and family culture, structures and decision making processes. While these structures are the appropriate way to respectfully and meaningfully engage with community members, they have often been ignored or overlooked. We have observed that the blanket roll out and implementation of NTER and related programs has been inappropriate for communities which are already struggling to keep up with so many changes.

Unfortunately there has been a widespread confusion among service providers and community members about the role of the FaHCSIA Government Business Managers ('GBMs') in communities. It is essential that there is clear understanding of this role, as GBMs are intended to be the vital link between government agencies, service providers and community members. The Commission has regularly sought to engage the GBMs when visiting prescribed communities, however has done so with mixed success. While we welcome the establishment of Indigenous Engagement Officer positions, there is similar confusion about their role.

Time

Often unrealistic time frames have been placed on the roll out of many programs, for example income management. The impact of this is well documented, and has led to tangible detriment, such as people missing out on money and food.

In other program areas, such as the 'safe houses' the time frames led to decisions being made without adequate time to discuss and decide on the best way forward with community members. In some communities this has resulted in a wasted opportunity to create a positive and community managed space and resource.

Community engagement processes have also often been rushed. This was demonstrated in the time frames allocated to the Future Directions consultations.

Communication

Communication by government with people in remote communities has been at times haphazard and confusing and at other times denigrating and discriminatory. This was a foreseeable consequence of the unrealistic time frames referred to above.

The 'prescribed community' signs which were erected at the commencement of the NTER serve as a visual example of the communication style of government. These signs brought shame and humiliation to many people living in those areas.

The importance of interpreters was and continues to be disregarded by some government and other agencies

An early review of Centrelink's communications strategy was highly critical of their communication methods. To their credit, Centrelink significantly shifted in their approach, by providing a range of visual tools to assist them in communicating with clients.

Repeal of the laws limiting anti-discrimination laws

To many Australians the National Apology to the Stolen Generations in February 2008 provided hope that some of the previous Australian Government decisions, like suspending the *Racial Discrimination Act* 1975 ('the RDA') would be addressed to give effect to a future based on mutual respect, resolve and responsibility in the relationship between government with Aboriginal and Torres Strait Islander people.

In the areas affected by the Australian Government intervention there is widespread confusion about what the suspension of the RDA actually means. Many believe that the RDA and the Northern Territory Anti-discrimination laws are suspended in full. The effect of this being that that racial discrimination is permissible and that no legal protections from being discriminated against exist.

The belief that racial discrimination is now allowed is fueled by some of the measures that the Australian Government has taken in implementing intervention measures within prescribed areas in the Northern Territory.

Some Aboriginal people still feel that the 'prescribed community' signs encourage discrimination against Aboriginal people. Many report an adverse emotional response to the signage including a sense of shame, anxiety, degradation, lowered self-esteem and a sense of being punished for something they have not done. Common examples of comments include words to the effect that:

- all Aboriginal men are now seen as pedophiles and rapists by whitefellas;
- too much shame to come to town;
- good people are being punished for the actions of some bad people;
- we never had this kind of trouble in this community;
- little kids now ask "what is pornography?"

There is a great deal of support for "bringing back" the RDA. The Australian Government proposed bills refer to this as the restoration and/or reinstatement of the RDA.

On the reinstatement of the RDA many laws will arguably remain discriminatory. These include prohibitions on alcohol and other prohibited materials, the fettering of the courts' discretion to take into account customary law or cultural practice in relation to criminal offences in bail decisions and sentencing.

The assertion that a number of the intervention measures are 'special measures' as defined by the RDA is questionable. The law defining 'special measures' is complex. It is submitted that 'special measures' should only be temporary and should only be introduced with the consent of those affected by them.[3]

Although the Australian Government claims to have the overall consent of those who affected by the special measures, there are questions surrounding the process used to obtain this consent. In our view consent must be obtained in a context of consciousness on the part of the affected individuals. The Future Directions consultations provided no structured or in depth discussion of the concept of special measures. Nor did the consultation provide an on the spot user-friendly mechanism for community feedback on this measure.

It is difficult to see how people engaged in the consultations could make an informed decision to consent or otherwise to the formulation of the measures as special measures in these circumstances.

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[3] RDA, sections 8 and 10

Welfare Reform

Income management – the evidence

The Australian Governments' Policy Statement (Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response) cites majority support for the continuation of income management amongst consultation participants and states a belief that income management is an effective tool for supporting welfare recipients who are, "living in communities under severe social pressure"[4].

The body of evidence available about the impacts of income management is limited and presents inconsistent results. The main publicly available data sources cited in support of the proposed reform consist of impressions derived from consultations with affected Northern Territory residents between June and August 2009 (the NTER Future Directions Consultations), an evaluation study compiled by the Australian Institute of Health and Wellbeing (AIHW) released in August 2009[5], research undertaken by the Central Land Council between February to June 2008[6], and research undertaken by the Cultural & Indigenous Research Centre Australia (CIRCA) in August-September 2008 for the NTER Review Board's Review of the NTER[7]. The quantitative data in these reports is limited and the qualitative data presents widely divergent views. Most importantly, these views are not necessarily gender, age or community specific. The Australian Government's decision to retain and expand the income management scheme in this context is particularly concerning in light of the significant impact on the rights and obligations of welfare recipients and the substantial costs involved in implementation of the reform.

The consultations

The Australian Government's redesign consultations with Aboriginal people affected by the NTER followed a recommendation by the NTER Review Board that the Government urgently needed to "reset" its relationship with Aboriginal people in the Northern Territory on the basis of genuine consultation, engagement and partnership[8]. A discussion paper (*Future Directions for the Northern Territory Emergency Response*) formed the basis for the consultations.

The options contained in the discussion paper in relation to the income management measures were limited to maintaining the status quo or to having a system that allowed people to apply for an exemption based on individual assessment. The discussion paper did not refer to the fact that

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[4] At page 5

[5] AIHW, *Report on the Evaluation of Income management in the Northern Territory, August 2009*

[6] Central Land Council, *NTER: Perspectives from Six Communities (undertaken by local Aboriginal researchers)*

[7] *CIRCA – Community Feedback on the NTER Research Report, September 2008*

[8] *Report of the NTER Review Board on the Northern Territory Emergency Response, October 2008, p12*

there was already an avenue for exemption in place in the legislation[9]. Absent from the options presented in the discussion paper were both voluntary and trigger based options. Although participants were assured that the two options presented in the paper were non-prescriptive and that discussion of other alternatives was welcome, the impression that outcomes were predetermined undermined the sense of genuine participation in the decision making process.

Of further concern was the absence of Government initiated discussion as to whether the information provided by participants during the consultations would be used to support a redesign of the NTER measures as special measures. While the discussion paper sets out information about the key features of special measures generally, there was no clear indication of the Government's intention to redesign any of the measures as special measures following reinstatement of the *Racial Discrimination Act 1975.* If the Government intended to rely on the consultations to support a case that proposed or existing NTER measures were intended to be special measures then this should, in good faith, have been made clear to participants at the outset. This would have better ensured that participants had complete information prior to engaging with Government (central to the issue of informed consent) and would have maximised meaningful participation.

While the consultations were independently monitored by CIRCA, monitoring was limited to 15 Tier 2 community consultations (public meetings in prescribed areas) and attendance at one Tier 3 meeting (regional workshops targeting Indigenous leaders). Observation of Tier 1 (key interest groups, families and individuals) and Tier 4 meetings (peak Indigenous organisations) was reported to be outside the CIRCA's terms of reference. CIRCA's actual terms of reference are not included in their report.[10]

The object of the Tier 1 consultations was to allow comprehensive discussions targeted at individuals, families and clan groups, men, women and youth and community organisations *on country* in prescribed communities and living areas. They were to be conducted by Government Business Managers (GBMs) and Indigenous Engagement Officers (IEOs) employed by FaHCSIA. The Tier 1 meetings presented perhaps the most grass roots interface for many Aboriginal people to contribute their views about the NTER measures. They occurred on the ground in the communities in which the participants live. GBM/IEO engagement and communication skills and understanding of the measures themselves were crucial to obtaining high quality information as to of Tier 1 participants' views. Independent monitoring of this engagement and communication process would have lent more weight to the findings reported.

The CIRCA Report notes that at both Tier 2 and 3 meetings time constraints meant that some measures were not discussed in sufficient detail. This compromises the evidentiary value of the information recorded because it

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[9] *Social Security(Administration) Act 1999 (Cth), s.123UG*

[10] *CIRCA,,Report on the NTER Redesign Engagement Strategy and Implementation September 2009*

risks both the tendency to generalisation and the likelihood of misunderstanding. Meaningful participation was hampered in this way.

Deficiencies in reporting the content of the consultations included that there were inconsistencies with what was said by participants and what was recorded and reported by Government. For instance, it was reported that overall people preferred the voluntary model with triggers to income management operating for those not managing their money as the preferred model, whereas in fact people had in many cases said income management should be stopped though the trigger model was acceptable as an alternative solution, rather than the preferred solution[11].

In relation to the openness and accountability of the consultations, the CIRCA Report notes that in many cases interpreters were not available and that the bulk of the discussion was conducted in English. While most Aboriginal people in remote communities can speak some degree of conversational English, this does not mean that English is an appropriate medium for discussion about a wide range of complicated legislative and policy changes within an extremely limited timeframe.

Other evidence

The quantitative data compiled for the purpose of the AIHW evaluation was limited. The study interviewed 76 participants from 4 locations out of a pool of over 15,000 in 73 locations. This sample (approximately 0.5% of income managed residents in around 5% of prescribed Aboriginal communities and living areas) is sufficiently small and non-representative to raise concerns about the value of the findings obtained from the data. Aboriginal communities in the Northern Territory are essentially dissimilar in many ways and to generalise quantitative statistics gleaned from such a small number is not useful. The remainder of the study compiled qualitative data from focus groups involving 167 individuals (included community representatives from the same four locations and community and government employees from a wider range of locations), a telephone survey of 66 community store operators, a survey of 49 Government Business Managers, and an earlier qualitative report based on consultations in four communities.

There are deficiencies in the breakdown of statistical information used to support the claim that it is income management that has caused increases in healthy food purchases. While some evidence suggests that there has been an increase in the purchase of fresh fruit and vegetables (AIHW study), what is not so clear is whether this attributable to income management or to other factors such as the community stores licensing requirements to stock more fresh produce.

The survey undertaken by the Central Land Council[12] utilised local Aboriginal researchers and sought to document the experiences and opinions of

[11] Ibid
[12] NTER: Perspectives from Six Communities

Aboriginal people in Central Australia in relation to the NTER. The research was undertaken between February to June 2008. In relation to income management, views were widely divergent with close to half opposed to income management and half in support. This survey did not include people in the Top End of the Northern Territory.

Finally, The CIRCA Report, *Community Feedback on the NTER Research Report September 2008* (commissioned by the NTER Review Board) used a qualitative approach compiling opinions from affected residents in 4 prescribed communities. While this approach enabled a more in depth analyses of people's stories about the impacts of income management on their day to day lives, in the absence of quantitative data and due to the inconsistent responses obtained, it is not particularly useful as an evaluative tool.

Discrimination

The redesigned welfare measures which would apply to indigenous and non-indigenous welfare recipients alike may still remain indirectly discriminatory under anti-discrimination laws (should these be reinstated) as it is likely that a disproportionate number of Aboriginal people will be affected.

Rather than a blanket compulsory scheme, the Government's proposed welfare reforms are targeted to specific groups of welfare recipients living in disadvantaged areas. Because of their social and economic circumstances and, in many cases their geographic isolation and remoteness, there is a greater likelihood of Aboriginal people meeting the criteria of 'vulnerable', 'disengaged youth' and 'long-term welfare recipients'. It is noted that these terms are not defined in the Bill. Clear policy guidelines need to be developed for those assessing whether an individual meets one or other of these categories (which appear to overlap in some aspects). There also needs to be a well targeted community education drive in relation to reviewability of the departmental decisions.

The income management category relating to vulnerable persons allows for an assessment to be made that due to risk of either economic abuse or domestic violence, a person should be income managed. It is concerning to think that a person seeking to flee from a domestic violence situation may be hampered in that attempt by a lack of access to cash. It effectively imposes a punitive measure on a victim. This needs to be reconsidered.

Seriously concerning is the fact that the Bill allows for race-based discriminatory compulsory welfare quarantining in prescribed areas to continue until the end of 2010. After 2010, the proposal opens the *possibility* of a national roll out of income management in disadvantaged areas and the potential transition into an era of "postcode discrimination". Indirect discrimination is likely to continue due to the disproportionate number of Aboriginal people living in disadvantaged areas.

Properly targeted income management measures may arguably have some benefits for individuals and families. The voluntary for individual income

management are positive and should be supported as they provide people with alternative options to financial management. Similarly the financial incentives proposed for those who do choose to be income managed under the voluntary scheme are a positive step. The Government's rationale for a 13 week minimum requirement for voluntary agreements comes down to administrative efficiency. The fixed minimum risks deterring people from considering whether to try it out. A more flexible system allowing individual negotiations would be preferable.

While there are pathways to getting off income management (undertaking education or training or entering the workforce) it is likely that a disproportionate number of Aboriginal people falling into the new compulsory income management categories will find this barrier higher than would those living in regional or town centres, due to the lack of employment opportunities in the bush.

The $53 million investment into financial literacy is a positive.

As a matter of priority, the Australian Government also needs to commit to a substantial increase in resourcing of independent welfare rights and employment advocacy services across the Northern Territory.

Rationale & burden of proof

The proposed legislation is intended to address child neglect, encourage responsible parenting and to stimulate participation in education or training among the young and long term unemployed in disadvantaged parts of Australia. Stripping a person of their control over decision making is not likely (taken alone) to develop self-responsibility. Ideally, there needs to be more emphasis on supportive interventions to assist people *before* the imposition of income management.

Bringing about long term social change by controlling individual behaviour rather than addressing the causes for that behaviour (for instance, inter-generational trauma, poverty, limited employment opportunities and substance abuse) will be less effective and can promote false economy. The most effective change requires ownership of that change and greater focus should be given to effective rehabilitation and support options in individual cases instead of a coercive or deterrent approach.

As the burden of proving financial management competence, for exemption purposes, still lies with the affected individual (aside from those who enter into voluntary agreements) income management retains a compulsory and blanket flavour. A responsible Government should legislate on the basis of sound evidence based policies. The decision to continue with a form of compulsory and potentially discriminatory income management system without a sound evidence base risks the development of poorly considered policy and uncertain outcomes for Aboriginal people.

Barriers to access

Income management creates concerns in relation to accessing social security. The operational and administration requirements of the Basics card have, for some people, created barriers accessing welfare support. Barriers such as access to reliable communications infrastructure (for checking balance information or transferring funds), limited public transport, prohibitive costs of travel and language have in many cases made people's lives more difficult.

Stories from communities

A list of issues raised by community people affected by the intervention and collected during the Commission's Outreach work in relation to income management:

- shame of having Basics card and the stigma attached to it makes people feel that they are automatically considered to be a bad money manager, child abuser or a bad parent
- people living or shopping in the major regional centres suffering humiliation and overt racism because of the difficulties associated with acquiring and using Basics Cards
- difficulties for elderly people to use their Basics card
- limitations placed on where shopping can occur – costs of travel to stores where Basics card accepted
- issues with inability to use basics card interstate such as when travelling for medical treatment – inconvenience, shame
- administrative issues complicating access to funds
- Inability of people to access food/power cards where stores that provide these are closed
- Inability of people to access food/essentials due to technical issues with Basics card operation
- Lack of understanding about how IM works leading to incorrect assessment by residents of value of cards
- Lack of training of Basics card merchants – leading to incorrect information being given to residents about lack of sufficient funds
- Centrelink balance checks not always accurate, compounding shame where shopping transaction has to be cancelled at time of payment
- absence of clear and transparent information about income management is compounded by the fact that English is not the first language for many affected
- disempowerment – undermining local economic practices – complicating access to cash money for travel for ceremonial purposes or funerals
- Many residents of prescribed communities have expressed concern that their ability to send cash money to their children who are attending boarding schools is severely restricted – how does this further the goal of improving the lives of children?

- Humbugging for money continues – people in prescribed communities are still able to hassle family members in non-prescribed towns/suburbs for cash – encouraging an urban drift with all it's associated problems
- Basics cards may still be used as if they were "cash money" for gambling
- Basics cards may still be sold to others for less than their value in return for cash;
- The build up of IM funds means that when the Basics cards are being used for gambling, higher amounts are being played with
- Inappropriate actions by Basics card merchants - people purchasing white goods with Basics card/IM funds and then immediately selling the white goods back to the vendor at a lesser value for a cash component.
- Compulsory income management is disempowering and not conducive to capacity building and financial literacy

Alcohol

The *Emergency Response Act*, Part 2 introduced measures that modified the operation of the *Liquor Act* (NT) in order to give effect to restrictions on alcohol possession, consumption, sale and transportation in prescribed areas.

Many prescribed communities were already restricted areas for the purposes of the *Liquor Act* (NT). These prior restrictions were brought about by community leaders or communities as a whole making application to the Licensing Commission to have their communities declared restricted areas. The boundaries were well defined and signposted.

There is confusion about the expansion of the restrictions, especially as some leaders in communities had at times tried unsuccessfully to introduce alcohol restrictions to areas where it was thought they would be desirable. At least one town camp in the Alice Springs region had applied to have the camp declared a restricted area. The application was refused following opposition by Police and others.[13]

The *Northern Territory National Emergency Response Act 2007* (Cth) (the NTNER Act) imposed blanket changes on prescribed areas with little or no consultation with the residents of the areas. This total ban approach is viewed as being disempowering and discriminatory.

Information about the changes should have been made accessible to all people affected. Although there were restrictions already in place, there has been a paucity of information about the implications of the new restrictions available to residents affected. In particular information was lacking for residents wishing to obtain permits in prescribed areas that had not previously been subject to restrictions under Northern Territory law.

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[13] http://www.nt.gov.au/justice/commission/decisions/Abbotts_Camp_(Mpwetyere)_0699.pdf

Similarly, there has been a lack of transparency in the permit approval process. Initially some residents were informed there was no way to obtain a permit to possess alcohol. Over time in some communities, however some residents were able to obtain permits. Others desiring a permit were not provided with application forms and in one community residents did complete and submit application forms but the forms were never processed. One community that had no pre-existing restrictions reports being told that the new restrictions would be renegotiated after 12 months.

The proposed Bill leave the NTNER Act restrictions in place. The relevant Australian Government minister will retain power to declare areas to be restricted areas. The new Bill provides for a consultation process however any failure to consult will not affect the validity of a declaration that an area is a restricted area. This approach fetters a community's power to meaningfully take leadership in decision making about their own local affairs. The decision as to whether a community wants alcohol restrictions (that will be enforced by police) remains with the Minister.

Some residents of prescribed areas feel that they are being unfairly singled out when they know that alcohol abuse is also prevalent in the wider community.

With the NTNER Act restrictions, boundaries around existing restricted areas in prescribed communities were changed and often the boundary was moved further away from the community. With the extension of these boundaries came both positive and negative results.

Often drinking areas existed near a community but outside the pre-existing boundary. These areas were often within walking distance to a community. One of the concerns, repeatedly raised by Aboriginal people living in affected areas is that vehicles are now being used to get to drinking areas. This means an increase in risk of injury to drinkers and non-drinkers alike as vehicles are being operated by intoxicated drivers. It also increases the likelihood of drinkers facing adverse contact with the criminal justice system.

Coupled with the increase in Police numbers across the Northern Territory (brought about through the NTER) is an increase in the detection of traffic offences. In some cases it is fortunate that highly intoxicated drivers are apprehended. Unfortunately, the changed restrictions also mean that unlicensed drivers are tempted to use vehicles which are often unsafe, unregistered and uninsured.

Prohibited material

The changes proposed in the Bills allow for consultations with residents of prescribed areas regarding the prohibitions on pornography and violent material. This measure is almost impossible to enforce as the material may easily be downloaded from the internet via mobile phones and other electronic devices.

Pornography is a topic Aboriginal people feel 'shame' to discuss openly. It is highly unlikely that residents in affected prescribed communities will feel comfortable to stand up and say in a group setting that they favour pornography.

There is a sense that Aboriginal people have been unfairly singled out as similar restrictions are not imposed on the wider community.

Licensing of community stores

Some aspects of stores licensing are positive such as the increased stock of fresh fruit and vegetables. However the price disparity between products available at remote community stores and those in urban and regional centres is still marked. The costs of healthy fresh food can be prohibitive (sometimes in excess of 25-50% above urban or regional center store prices).

The Australian Government has indicated that it is concerned about food security however has indicated that pricing is not an area that is easily regulated. As there are multiple factors contributing to pricing of goods in remote stores, for instance freight, inefficiencies in store management and lack of competition, the Australian Government needs to reconsider whether there are realistic controls, such as subsidies, that may be introduced to ensure that healthy food is accessible and food security is strengthened.

Customary law (bail and sentencing)

It seriously concerning that the terms of reference of this Senate inquiry do not specifically include sections 90 and 91 of the NTNER Act which deal with bail and sentencing.

The effect of section 91 is that, for the purposes of sentencing, an Indigenous offender who may have been raised on a remote community in accordance with local cultural practices, with no formal education and little English literacy is to be treated in the same way as a person who is raised in an urban setting with a formal education and understanding of mainstream Australian law.

The Australian Law Reform Commission's 1986 report on Recognition of Aboriginal Customary Law concluded that discrimination did not extend to preclude reasonable measures distinguishing particular groups and responding in a proportionate way to their special characteristics.[14]

In the case of, *The Queen v Wunungmurra* [2009] NTSC 24, at paragraph 27, Southwood J held that:

> The effect of s 91 of the *Emergency Response Act* is that when sentencing courts are determining the objective seriousness of an offence in cases in which the section is applicable, proportionally greater weight will be given to the physical elements of the offence and the extent of the invasion of the rights of the victim of the offence. Less

[14] (Australian Law Reform Commission, Recognition of Aboriginal Customary Law Report No.31 (1986) para 150 – 158.

weight will be given to the reasons or motive for committing the offence.

At paragraph 25 Southwood J said the following:

> The fact that legislation might be considered unreasonable or undesirable because it precludes a sentencing court from taking into account information highly relevant to determining the true gravity of an offence and the moral culpability of the offender, precludes an Aboriginal offender who has acted in accordance with traditional Aboriginal law or cultural practice from having his or case considered individually on the basis of all relevant facts which may be applicable to an important aspect of the sentencing process, distorts well established sentencing principle of proportionality, and may result in the imposition of what may be considered to be disproportionate sentences provides no sufficient basis for interpreting s 91 of the In September 2006 the law Council of Australia wrote to the Senate expressing significant concerns about the *Emergency Response Act* in accordance with its clear and express terms. The Court's duty is to give effect to the provision.

Sections 90 and 91 of the NTNER Act offends the principle of equality before the law and we firmly submit that they should be repealed.

Increased policing

There is some diversity in opinions about the increase in policing. Many residents in prescribed areas support police stations being established in their communities.

Additional police stations and enhanced policing capacity naturally result in more charges being laid by police and more people being summonsed to attend Court. A parallel increase in access to independent legal advice and representation does not necessarily follow.

New police stations have not always been stationed in places where Court regularly sits, and therefore access to both legal help and to the Courts themselves is problematic. Sometimes the nearest Court is more than 600 kilometres away from the Court. Where there is no public transport and extremely limited access to private vehicles this presents significant difficulties.

The Commission provides legal help and assistance to people who have warrants issued against them due to non-appearance in court and also assists these people to surrender where appropriate. The Commission has developed a CLE resource in response to this issue which has particular prevalence in Central Australia. A copy of the Commission's 'Warrants' fact sheet is **attached**.

Complaints about police are most often linked to particular police rather than the additional police presence. Generally, community residents are happier with Northern Territory Police (rather than the Australian Federal Police) staffing community police stations because there is a view that these police have a better understanding of community life and cultural issues.

Other issues raised in relation to police include:

- Police are cycled through communities too quickly and there is not enough time to establish relationships of respect and trust with individual police members. Some ideas suggested to keep police in a community for longer periods of time include having family quarters to accommodate the police members' family.
- Both male and female police should be stationed in a community because it is often difficult for women to speak to male police officers. The police stationed in communities tend to be mostly male.
- Police can enter houses without warrants, and cause shame, humiliation and embarrassment. One example was of police entering a house in a prescribed area without warrant and opening the door to find a child sitting on a toilet. This is reported to have happened after the police had been told by a female relative that a child was in the toilet.

Fines

The offences of driving unlicensed, uninsured and unregistered are offences usually dealt with by fines. The fines for these offences are high with a first offence of driving uninsured carrying a 5 penalty unit minimum for a first offence and 10 penalty unit minimum for a second offence.

It is not uncommon to find community residents who have accumulated thousands of dollars in fines. Failure to pay fines leads to a variety of fine enforcement ramifications including escalation in the fine with enforcement penalties attached, license suspension, community work orders and at a last stage imprisonment. Most prescribed areas do not have provision for residents to undertake community work.

The Fines Recovery Unit (FRU) has been established to facilitate the process of fines repayment. Many people have fines that they would like to repay but due to language and literacy issues require assistance to establish a repayment plan. This form of assistance is not readily available in remote and rural settings. In its outreach work, the Commission has found this to be a common request for assistance. The Australian Government should consider resourcing either the FRU, the Courts or the local Shires to provide a service, such as an on-site officer who can facilitate the negotiation of repayment plans, to address this unmet need.

Australian Crimes Commission

The *Families, Community Services and Indigenous Affairs and Other Legislation Amendments (Northern Territory Emergency Response and Other*

Measures) Act 2007 gave the ACC Board power to authorise an ACC operation/investigation into Indigenous violence or child abuse (as distinct from serious and organised crime) and to determine that the ACC's coercive powers may be used for such an operation/ investigation.

Coercive powers akin to those of a Royal Commission allow the ACC to summon any witness to appear before the ACC, require that witness to give evidence of their knowledge of matters concerning the criminal activities involving themselves and others upon whom an investigation or intelligence operation is focused, and/or require the person to provide documents. It is an offence to fail to attend an ACC examination, fail to take the oath/affirmation, fail to answer questions, provide false or misleading information under examination or to disclose the fact that they have appeared before and given evidence to an ACC Examiner upon being summonsed. These offences are punishable by fines and or imprisonment.

Australian Government consultation with prescribed community residents affected by this measure was extremely poor. At the Tier 3 Regional consultation in Katherine hardly anyone at the meeting appeared to be aware of the ACC's powers under this measure. People were generally unaware of the ACC. When the powers under the measure were explained to people, the general response was that this was a good thing and that the measure should continue. Regardless of the positive response following the explanation, the lack of awareness of the measure calls into question the effectiveness of these powers if community residents are not aware that the body exists or how it can help. There needs to be education and information dissemination in communities about the ACC role.

The removal of such a fundamental civil right as the right to silence raises the risk of the arbitrary exercise of power by the ACC in the absence of any accountability mechanisms. Interrogation may be used as a fishing expedition for the production of evidence of criminal behaviour.

While protection of confidentiality in disclosure of child related abuse is a positive thing that may encourage reporting, there are already mechanisms in place for this to occur under Northern Territory law (i.e. *Care and Protection of Children Act, Domestic and family Violence Act*). It is difficult to accept that the ACC powers could be considered to be a special measure for the purposes of anti-discrimination laws.

Further consideration must be given to whether the ACC powers effectively protect people who do give evidence to in circumstances where offenders may be referred to Police and Courts for prosecution.

The amendment to the *Australian Crime Commission Act 2002* to ensure that the Australian Crime Commission's use of its special powers is in relation to violence and child abuse committed against Indigenous victims is positive.

The Northern Territory Law Society's submission to this Committee that queries the appropriateness of the ACC to undertake investigations into child

sexual abuse is supported in this submission along with the fact that a social welfare and educative approach to building safe communities is to be preferred over an increasing in policing and law enforcement.

Due to the significant civil rights implications clear guidelines need to be developed in relation to this measure, should it continue. The measure needs to be explained to affected Aboriginal people in a comprehensive and accessible way as a matter of priority.

Housing and Tenancy

All tenants in the NT, including people living in prescribed communities should be entitled to the same protections under the legislative framework, which is the *Residential Tenancies Act*. Unfortunately the condition of many houses or other shelters which tenants in prescribed communities are renting is so poor it has led housing authorities to argue that the houses are exempt from compliance with the *Residential Tenancies Act*. This leaves tenants in prescribed area vulnerable, without basic protections, such as being fit for habitation, which are available to all other Territorians.

There is a great need for basic community education in relation to tenancies including rights and responsibilities of both tenants and landlords.

Examples of community concerns include:

- It is common to hear of four generations of a family sharing a three bedroom home with anywhere between 15 and 30 people depending on the season.
- Lack of community input or control over refurbishments – one house painted on the exterior several times in a few years – not inside.
- House built from colour bond on outside was painted – not inside.
- Some people have given up reporting repairs and maintenance needs to their housing provider due to requests not being actioned
- Confusion about how rent calculations are made, who is responsible for what and clarity in tenancy rights and obligations.

Interests in land

The amendments proposed deal with the provisions governing the five-year leases that have been compulsorily acquired over prescribed communities with the intention of confirming the beneficial intent of the leases. They allow for the development of guidelines to better explain the land-use approval process and include improvements, such as defining the permitted use of the leases and stipulating the objectives of the leases. Importantly, the redesigned measures aim to facilitate Government's commitment to voluntary leases.

It is clear that many community residents in prescribed areas have been very confused about the lease measures and the intention behind the measure. Monitoring of the Government's Future Directions consultations has suggested that in relation to the 5 year lease measure, it was difficult to have open discussions about the measure as the level of understanding and

knowledge of Aboriginal people affected by the measure varied. Time constraints meant that there was not sufficient time to fully explain the measure or to discuss its implications.[15]

Some community residents feel that as a result of the Australian Government's intervention and local government reforms, they have lost control of their assets – use of what was once considered to be community property must now paid for. This has contributed to a sense of disempowerment. In one community the Commission was told that the local Shire was charging hundreds of dollars as a fee for the use of a back hoe to dig a grave for a deceased person. The compounding effect of the legislative and administrative changes in prescribed communities is a sense of confusion about who is now responsible for what.

Many people have asked questions about what will happen after the 5 year leases finish. People have asked questions about ownership of buildings and other assets on Aboriginal land in prescribed areas – who will own those assets when the 5yr leases finish and the intervention ceases? While the acquired leases will cease pursuant to the sunset clause in legislation, and in the absence of any further longer term or other leases negotiated with Government, residents are unclear about whether the traditional land owners will be able to force the removal of assets associated with the intervention from their land.

CDEP and Employment Rights

The reforms to the Community Development Employment Projects (CDEP) Program and the Indigenous Employment Program (IEP) that began on 1 July 2009 were stated to be a key to making progress on the Government's aim of halving the employment gap between Indigenous and non-Indigenous Australians within a decade. The restructuring of CDEP aimed to focus on work readiness in remote areas with emerging and limited economies. CDEP ceased in non-remote areas with established economies (Darwin town camps). From 1 July 2009, new CDEP participants were paid income support (known colloquially as 'Work for the Dole'), with existing CDEP participants continuing to access CDEP wages until 30 June 2011 to allow a transition period before CDEP workers are to be transferred to other income support categories such as Newstart allowance.

Prior to the NTER, community councils were responsible for administering CDEP programs in their communities. This meant local CDEP workers being employed in local CDEP programs. The CDEP program had widespread support in Aboriginal communities. With the introduction of Northern Territory Local Government reforms in mid-2007 along with the Australian

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[15] CIRCA *Report on the NTER Redesign Engagement Strategy and Implementation (September 2009)*; Central Land Council – *NTER: Perspectives from Six Communities*

Government's NTER measures many of these arrangements were shaken up. Funding was centralised in super-Shires or other bodies and there have been breakdowns between the new CDEP administrators and the local workforces. Many communities are commenting that there are now less of their own CDEP workers undertaking CDEP programs on their communities. Many community residents affected by the changes have commented that since the CDEP changes, that there is no work being done in their community public areas such as basic upkeep, maintenance and repairs.

The Central Land Council survey of 6 Aboriginal communities in Central Australia undertaken between February and June 2008 found very strong support for the continuation of CDEP. The survey found people reporting that in the absence of CDEP, there is less incentive to work owing to the arbitrary enforcement by Centrelink of work requirements compared to CDEP where if you don't work, you don't get paid. Other disincentives include, "the lack of pay differentiation between Work for the Dole and welfare, and inability to earn top-up wages."[16]

Transitioning of people from CDEP to work for the dole scheme has increased the need for welfare rights and employment law advice. The current capacity of legal services to provide this advice (particularly remote areas) is severely limited. The Government needs to take steps to creatively address and adequately resource this unmet demand.

Conclusion

The Ampe Akelyernemane Meke Mekarle "Little Children are Sacred" Report provided the Government with both the vision and the impetus for the dramatic range of measures introduced into Aboriginal communities in June 2007. Protecting children from harm and improving the lives and wellbeing of Aboriginal communities in the Northern Territory are worthy goals.

Without doubt, the Australian Government's Northern Territory Emergency Response intervention measures have impacted heavily on the every day lives of Aboriginal people in the Northern Territory.

The NTER Review Board's appeal to the Australian Government to recognise as a matter of urgent national significance the continuing need to address the unacceptably high levels of disadvantage and social dislocation within Aboriginal communities in the Northern Territory was acknowledged by the Australian Government. The appeal to address these needs by resetting the Government's relationship with Aboriginal people based on genuine consultation, engagement and partnership was also acknowledged.

The Commission believes that if the Government is genuinely committed to improving conditions in remote Aboriginal communities, then it needs to

[16] Central Land Council – *NTER: Perspectives from Six Communities* 2008

meaningfully engage with those communities in order to effect lasting improvements.

The Commission has commented above on the widespread confusion caused by the rapid rate of change in law and policy in Aboriginal communities affected by the intervention measures. The Commission has also commented unfavourably on the restricted time frames for engagement and consultation with Aboriginal people about their views on the impact the intervention measures have had on their lives, their health and well-being. The Commission has expressed disappointment at the suspension of anti-discrimination laws and serious concerns about the lack of a sound evidence base to sustain the proposed welfare reforms.

We reiterate the fundamental need for a collaborative approach that utilises the rich knowledge and skills base of Aboriginal people.

SUSAN COX QC
DIRECTOR

9 February 2010

Worried About Warrants?

What is a warrant?

A warrant is a court document which gives the police (or sometimes somebody else) the power to do things like:

- arrest you and take you to a court
- search you, your car, where you live
- take and keep your things found in a search
- put you in jail

A warrant from interstate can apply in the NT.

When there might be a warrant?

- Not turning up at court
- Not paying a fine

If you get an infringement notice (fine) from court or police and you don't pay it, the FRU can make an enforcement order. Enforcement orders can suspend your license or car registration or require you to do a community work order. If you keep ignoring enforcement orders to do community work, a warrant might be issued to take you to jail.

Ring up and find out

How can I find out if there is a warrant?

You will need to provide your name and date of birth to find out if there is a warrant. There are different ways that you can find out if there is a warrant.

1. Get legal advice and ask the lawyer to find out if there is a warrant
2. Go to the court or ring the court and ask if there is a warrant
3. Go to the police station or ask your local police but if there is a warrant they might arrest you straight away

If you find out there is a warrant for your arrest, you should talk to a lawyer and get legal advice as soon as possible about what to do. Your lawyer might advise you to go to court and ask the magistrate to stop the warrant and give you bail so you don't get locked up.

Search Warrants

If the police think someone is breaking the law where you live or work they may get a warrant which lets them search places. This is called a search warrant. Sometimes police can search your house or your car without a warrant.

What do I do if the police come with a warrant?

- Read the warrant or ask the police to read it to you.
- Make sure that it is your name, address and date of birth on the warrant.
- Be polite to the police.
- If police ask you, you have to give your name and address but you don't have to say anything else unless you want to.
- Call a lawyer as soon as you can for legal advice.

Get help to ring up

1800 636 079

How do I get help from a legal service?

NT Legal Aid Commission has offices in Tennant Creek and Alice Springs. Call **89515377** or **Freecall 1800 019 343**

Central Australian Aboriginal Legal Aid Service has offices in Tennant Creek **8962 1332** and Alice Springs **8950 9300**. Also **Freecall 1800 636 079** and **24 Hours 0419 849 870**

North Australian Aboriginal Justice Agency has offices in Darwin **Freecall 1800 898 251**, Katherine **Freecall 1800 897 728** and Nhulunbuy **Freecall 1800 022 823**