



## THE FUTURE OF THE NORTHERN TERRITORY 'INTERVENTION'

### -ISSUES PAPER-

### ABORIGINAL AND TORRES STRAIT ISLANDER LEGAL SERVICES AND ABORIGINAL PEAK ORGANISATIONS NT

**NOVEMBER 2010**

#### **1. Introduction**

This issues paper outlines the joint position of the Aboriginal and Torres Strait Islander Legal Services (ATSILS) and the Aboriginal Peak Organisations NT (APO(NT))<sup>1</sup> on the ongoing law and justice aspects of the Northern Territory National Emergency Response (NTNER), also known as the NT 'Intervention'.

The ATSILS and APO(NT) strongly support measures that will reduce disadvantage in Aboriginal communities and, in particular, protect and support the welfare of children. However, the ATSILS and APO(NT) are deeply concerned that without urgent changes, the NT Intervention will fail to achieve its objectives and will represent both a lost opportunity and a significant policy failure.

The recommendations set out below identify some of the changes required to ensure that the NT Intervention measures are effective, appropriately targeted and are non-discriminatory.

The ATSILS and APO(NT) call on the Federal Government, the Opposition, independents and the Australian Greens to work together to immediately implement these recommendations.

#### **2. Summary of recommendations**

##### Recommendation 1:

The redesigned income management system should be replaced with a voluntary system of trigger-based and case-by-case income management.

##### Recommendation 2:

Centrelink must move quickly to provide accurate information to Aboriginal people about the new income management system. When conducting the "change over" interview with existing

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<sup>1</sup> APO(NT) is a representative alliance of the Aboriginal Medical Services Alliance of the Northern Territory (AMSANT), the Central Australian Aboriginal Legal Aid Service, the Central Land Council, the North Australian Aboriginal Justice Agency and the Northern Land Council.

income management customers, Centrelink staff should work with customers who do not wish to volunteer for income management to set up the use of Centrepay and other mechanisms to pay their rent and other regular expenses.

Recommendation 3:

The Commonwealth Government must immediately ensure that all agencies with a potential role in achieving the objects and aims of the new income management system work together and are adequately informed and equipped to get the best possible outcomes from the scheme.

Recommendation 4:

The Commonwealth Government should work with and properly resource prescribed communities to find solutions to alcohol misuse that are appropriate to the needs of individual communities.

Recommendation 5:

The Commonwealth Government should develop and deliver a non-discriminatory approach to pornography. In the absence of clear evidence to support the specific application of NTNER prohibited material restrictions to Aboriginal people in prescribed areas, those restrictions should be withdrawn.

Recommendation 6:

The Commonwealth Government should develop and deliver a non-discriminatory approach to law enforcement. In the absence of clear evidence to support the specific application of NTNER law enforcement powers to Aboriginal people in prescribed areas, those powers should be withdrawn.

Recommendation 7

The Commonwealth Government should immediately cancel the five-year leases. If the government is not willing to cancel the five-year leases, it should amend the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* to make it explicit that the provisions of the RDA prevail over section 31 of the NTNER Act and to include an explicit undertaking that the Government will not extend the term of the leases beyond August 2012.

Recommendation 8:

The Commonwealth Parliament should immediately repeal sections 90 and 91 of the NTNER Act.

Recommendation 9:

The Commonwealth Government should recognise customary law as a vehicle to empower elders in Aboriginal communities to take responsibility for offending that occurs in their communities. The Government should work with and support communities to develop ways to use customary law to improve community safety.

Recommendation 10

The Commonwealth Government should withdraw the Business Area Management powers.

Recommendation 11

The Commonwealth Government should immediately engage with Aboriginal community organisations and APO(NT) to examine the role of Government Business Managers and consider how a community development approach can be implemented.

Recommendation 12:

The Commonwealth Government should immediately commission independent research to consider qualitative and quantitative data in relation to each of the NTNER measures. This research should be freely available to the public.

### 3. Ending Racial Discrimination

The ATSILS and APO(NT) remain very concerned that the Intervention, which started as an explicitly racially discriminatory policy, continues to discriminate against Aboriginal people.

The issue of discrimination is not a matter of ideology, legal technicality, or academic concern. It goes to the heart of why much of the Intervention is bound to fail unless it is significantly recast. Top-down policies that single out particular groups without working with them to find solutions remove both the opportunities and incentives for people in those groups to take responsibility for themselves and their communities.

It is difficult to quantify the harm done to Aboriginal people in the Northern Territory in again being singled out for second-class, discriminatory treatment. Many Aboriginal people feel disenfranchised and disempowered by the Intervention. Many consider that it has been a return to days of arbitrary and capricious decisions being imposed on Aboriginal people.

The purported consultation during the *Future Directions* consultation process has not improved this situation. The consultation process asked a series of generic questions to elicit responses as to the benefits and weaknesses of the NTNER measures. The consultation was not designed to give people a genuine say and has been criticised as 'going through the motions in order to achieve a pre-determined end.'<sup>2</sup>

It must be emphasised that the ATSILS and APO(NT) do not seek to argue against policies that will work to better protect children and improve their life chances. Our abiding concern is that policies that discriminate on the basis of race will continue to fail to do that.

While the ATSILS welcomed the partial reinstatement the *Racial Discrimination Act 1975* (RDA) in early 2010, significant aspects of the Intervention remain discriminatory and fail to respect the human rights of those subject to it. Those aspects include the income management measures which impact disproportionately and unreasonably on Aboriginal people, alcohol restrictions, prohibited materials provisions, law enforcement powers and compulsory five-year leases acquired under the NTNER legislation.<sup>3</sup>

The ATILS urge that further work be done by government and the parliament to ensure the Intervention is consistent with the human rights of Aboriginal people.

The failure to ensure that the NT intervention does not have a racially discriminatory impact places Australia in breach of its international legal obligations under the UN Convention on the Elimination of All Forms of Racial Discrimination (CERD). This was confirmed on 27 August 2010 by the Committee on the Elimination of Racial Discrimination.<sup>4</sup>

The proposition that the Intervention is generally a 'special measure' simply lacks credibility, having been rejected by the Special Rapporteur on the situation of human rights and

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<sup>2</sup> Research Unit, Jumbunna Indigenous House of Learning, *Will they be heard? A Response to the NTNER Consultations June to August 2009*, November 2009, 4. The Law Council of Australia has noted that 'genuine consultation requires substantially more than meeting with affected communities and providing information about the Government's proposed changes': see the submission to the March 2010 Inquiry by the Senate Community Affairs Committee into the changes to the NTNER, available at [http://www.aph.gov.au/senate/committee/clac\\_ctte/soc\\_sec\\_welfare\\_reform\\_racial\\_discrim\\_09/submissions/sub83.pdf](http://www.aph.gov.au/senate/committee/clac_ctte/soc_sec_welfare_reform_racial_discrim_09/submissions/sub83.pdf).

<sup>3</sup> See submissions to the March 2010 Inquiry by the Senate Community Affairs Committee into the changes to the NTNER legislation by the Australian Human Right Commission (available at [http://www.aph.gov.au/senate/committee/clac\\_ctte/soc\\_sec\\_welfare\\_reform\\_racial\\_discrim\\_09/submissions/sub76.pdf](http://www.aph.gov.au/senate/committee/clac_ctte/soc_sec_welfare_reform_racial_discrim_09/submissions/sub76.pdf)), the Central Land Council (available at [http://www.aph.gov.au/senate/committee/clac\\_ctte/soc\\_sec\\_welfare\\_reform\\_racial\\_discrim\\_09/submissions/sub61.pdf](http://www.aph.gov.au/senate/committee/clac_ctte/soc_sec_welfare_reform_racial_discrim_09/submissions/sub61.pdf)) and the Law Council of Australia (available at [http://www.aph.gov.au/senate/committee/clac\\_ctte/soc\\_sec\\_welfare\\_reform\\_racial\\_discrim\\_09/submissions/sub83.pdf](http://www.aph.gov.au/senate/committee/clac_ctte/soc_sec_welfare_reform_racial_discrim_09/submissions/sub83.pdf)).

<sup>4</sup> Available at: [http://www2.ohchr.org/english/bodies/cerd/docs/co/CERD-C-AUS-CO-15\\_17.doc](http://www2.ohchr.org/english/bodies/cerd/docs/co/CERD-C-AUS-CO-15_17.doc).

fundamental freedoms of Indigenous people, James Anaya,<sup>5</sup> the Aboriginal and Torres Strait Islander Social Justice Commissioner,<sup>6</sup> the Australian Human Rights Commission<sup>7</sup> and the Law Council of Australia.<sup>8</sup>

#### **4. Income Management**

The new Income Management regime applies across the whole of the Northern Territory from August 2010. The new model replaces the previous scheme that only applied in prescribed areas of the Northern Territory. Initially, the Government's new system for income management will operate only in the Northern Territory, which has Australia's highest per capita level of Aboriginal residents.<sup>9</sup> National expansion of the program is to occur only if an evaluation of the Northern Territory rollout shows that it is effective.

The ATSILS and APO(NT) are concerned that the Income Management regime will continue to have a disproportionate impact upon Aboriginal people, interfering with their right to social security and their ability to manage their financial affairs.

Where a measure has a disproportionate impact upon people of a particular race, it will be indirectly discriminatory unless it can be shown to be reasonable. The ATSILS and APO(NT) are concerned that the income management system is not reasonable because it lacks an evidence base, does not address the causes of welfare dependency and is not sufficiently targeted to minimise its disproportionate impact upon Aboriginal people.

##### a) Disproportionate impact

The figures in relation to the distribution of the Aboriginal population in the NT and the employment participation rate of Aboriginal Territorians indicate that it will be Aboriginal people in the NT who are affected by the new system in by far greater numbers than non-Aboriginal people.

The Government has estimated that it expects some 20,000 Territorians are to remain on, or become subject to, income management under the new system. Almost all the 16,000 people subject to income management in prescribed areas were Aboriginal. It is inevitable that the additional 4,000 people expected to come under the income management regime will be predominantly Aboriginal, given the significantly lower employment participation rates amongst Aboriginal people.<sup>10</sup>

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<sup>5</sup> See the Special Rapporteur's report of 4 March 2010 into the Situation of Indigenous Peoples in Australia, available at: <http://www.hrlrc.org.au/files/Final-Report-Special-Rapporteur-Indigenous-Rights-Australia.pdf>.

<sup>6</sup> See the Commissioner's 2007 Social Justice Report, available at: [http://www.hreoc.gov.au/social\\_justice/sj\\_report/sjreport07/chap3.html](http://www.hreoc.gov.au/social_justice/sj_report/sjreport07/chap3.html)

<sup>7</sup> See footnote 1.

<sup>8</sup> See footnote 1.

<sup>9</sup> 31.6 per cent, the state with next highest percentage is WA with 3.8 per cent. Source: Human Rights Commission, A statistical overview of Aboriginal and Torres Strait Islander peoples in Australia, 2008, accessed at [http://www.hreoc.gov.au/social\\_justice/statistics/index.html#Heading34](http://www.hreoc.gov.au/social_justice/statistics/index.html#Heading34).

<sup>10</sup> See Australian Government Labour Market Information Portal, <<http://www.workplace.gov.au/lmip/EmploymentDataNew/NorthernTerritory/Darwin/>> at 5 February 2010. For a comparison of people living remotely, see Australian Bureau of Statistics, Table 6. - Comparison of Indigenous and Non-indigenous estimates, Labour force status by Sex and Remoteness - 2009, accessed at [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/6F69831288C1C20ACA2577360017B45F/\\$File/62870do006\\_2009.xls](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/6F69831288C1C20ACA2577360017B45F/$File/62870do006_2009.xls)

Subjecting people to income management by virtue of the fact that they have been in receipt of Centrelink payments for a prescribed period of time does not speak to their ability to manage money and meet their needs without Government intervention.

Aboriginal people in regional and remote areas 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 beyond their control such as lack of employment and study opportunities.

Remote residents also face structural barriers to seeking exemptions from income management. Participation in full-time study, obtaining a place as a New Apprentice or six months' part-time employment at minimum wages is a mandatory requirement for an exemption for those without dependent children. Access to these opportunities in remote communities is limited. The jobs, training courses and programs that are available to residents in major centres such as Darwin and Alice Springs will not be available in prescribed communities.

b) Why the income management measures are unreasonable

The imposition of the new legislative scheme has occurred without:

- the release of any data to support whether it will be effective in achieving its aims or cost-effective;
- publication of clearly articulated targets, goals and benchmarking to underpin the evaluation;
- a coordinated cross-departmental and cross-government campaign to assist in realizing the stated objectives of the scheme;
- adequate information and education to affected persons and organizations who provide services and supports to affected persons; and;
- adequate resourcing for related programs and infrastructure to facilitate and underpin achievement of the program objects.

The objects of the new system are set out in section 123B of the *Social Security (Administration) Act 1999*. They include reducing hardship and deprivation, ensuring social security recipients are supported in budgeting to meet priority needs, reducing the amount of social security payments spent on alcohol, gambling, tobacco and pornography and encouraging socially responsible behaviour.

There is no available evidence that the resources used to fund income management will provide value for money, whether against economic or social measures.

Government estimates are that income management will cost approximately \$350 million to administer over the next four years.<sup>11</sup> Notwithstanding the high cost of the measure, it has been implemented without a clear articulation of its aims. The Government has not published any targets or goals in terms of expected increases in participation in adult full time study, in employment, children's school attendance or take up of immunization, pre-school, childcare or crèche, or the numbers of adults and others expected to no longer drink, gamble, use tobacco products, or access pornography.

As well as the absence of targets, there is also a dearth of publicly available benchmarks or baseline data. The available plans for evaluation of the measure indicate that evaluation will be far from comprehensive. For example, it should be noted that at September 2010, with rollout of the new system already underway, the process of tendering for evaluation services was still in train.

The absence of robust and comprehensive data and research, means there is no credible evidence for the contention that income management can achieve any of its stated objects or

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<sup>11</sup> Federal Budget 2009-2010

that the measure provides value for money. The expenditure would be more usefully directed to addressing the root causes of social and economic disadvantage in communities.

The problem with the rollout of the new income management system is that its focus has been entirely on the mechanics of switching people onto the new system. Government has missed the opportunity to conduct a coordinated, comprehensive cross-departmental rollout that could have seen all agencies working to communicate and achieve the highest possible participation in work and study, and in improving children's school attendance.

ATSILS have observed that many service providers in remote communities are unaware of the detail of the new income management system and how it may affect their client groups. For example, it does not appear that the rollout of the new system has been accompanied by a coordinated information campaign to schools, Job Services Providers, childcare service providers, clinics or other similar providers. Such a campaign could have armed providers and services to capitalize on the system's incentives to work, study, attend school and engage in responsible parenting and money management.

In relation to affected individuals, information sessions about the new system observed by ATSILS staff have been brief and lacking in detail. The sessions were delivered by FAHCSIA staff who did not understand the technicalities of the new system. This meant that most people have not been able to get information about the system until Centrelink staff come to their community to roll the system out. There have been reports of Centrelink staff pressuring those people who are not compulsorily income managed under the new system (including aged pensioners, disability pensioners) to take up the Voluntary Income Management measure at this stage.

There have also been reports that remote housing tenants are being told by Centrelink staff that they cannot use Centrepay to pay their rent. This may be one of the reasons that Voluntary Income Management is being taken up at a high rate. In fact, there is a mechanism for Centrelink customers to pay their rent out of their Centrelink payments but low awareness and promotion of this scheme by Centrelink staff has meant this is not being explained to Centrelink customers.

The lack of effective and sufficient Money Management and financial counselling services, and the failure of Centrelink to partner with these organizations during the rollout has been a lost opportunity to promote Aboriginal engagement with these services.

In relation to the resources and infrastructure required to allow for the success of the measure in increasing employment, school attendance and the other objects of the scheme, there are clear deficits. For example, the formal course required for participation in the matched savings scheme is still in its infancy. Moreover, many communities are not serviced by a course provider.

More importantly, vital fulltime study options that are appropriate to people in remote communities are not widely available. In some communities, even basic literacy and numeracy programs are not available.

Recommendation 1:

The redesigned income management system should be replaced with a voluntary system of trigger-based and case-by-case income management.

Recommendation 2:

Centrelink must move quickly to provide accurate information to Aboriginal people about the new income management system. When conducting the "change over" interview with existing income management customers, Centrelink staff should work with customers who do not wish to volunteer for income management to set up the use of Centrepay and other mechanisms to pay their rent and other regular expenses.

Recommendation 3:

The Commonwealth Government must immediately ensure that all agencies with a potential role in achieving the objects and aims of the new income management system work together and are adequately informed and equipped to get the best possible outcomes from the scheme.

## 5. Re-designed Alcohol Restrictions

The ATSILS and APO(NT) consider the redesign of the alcohol measure as improved but still discriminatory. We call on the Government to move away from a starting point of blanket bans. We note the Northern Territory Government's recently released, 'Enough is Enough' alcohol initiative:

The proposed 5-Point Plan provides a consistent response across the Territory to target problem drinkers who cause alcohol-related crime and anti-social behaviour in our community.<sup>12</sup>

In our experience, blanket alcohol bans in prescribed communities are not effective in tackling alcohol problems, except where communities have chosen to implement these restrictions themselves. Unintended consequences of blanket alcohol bans can include:

- people leaving communities to drink in towns where alcohol is available;
- people drinking in unsafe environments that puts them at greater risk of harm; and
- criminalising behaviour that is not subject to prosecution in non-prescribed communities.

The ATSILS and APO(NT) call on the Government to empower prescribed communities to find solutions to alcohol misuse that are appropriate to the needs of individual communities. 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 a club, restaurant, or pub operating in their community where alcohol can be safely and responsibly consumed. With police stations in most remote communities, there is increased scope for communities to manage alcohol safely, and for people to drink moderately and responsibly.

We also express concern 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 whether they have been subject to alcohol-related harm; and
- any other matter the Minister considers relevant.

We are not aware of any resources that have been designated to assist communities make application for a declaration. 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.

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<sup>12</sup> See [http://www.alcoholplannt.com.au/media/pdf/FactSheet\\_5\\_point\\_plan.pdf](http://www.alcoholplannt.com.au/media/pdf/FactSheet_5_point_plan.pdf)

Most significantly, the ATSILS and APO(NT) remain concerned at the lack of focus on putting a range of culturally appropriate and accessible alcohol treatment programs on the ground in remote communities. In our experience, it is only with recourse to counselling and treatment that individuals will be in a position to make the life changes to drink in a responsible way.

Finally, while we welcome the decision to remove police powers to enter private homes in prescribed areas, the potential for these powers to be reinstated upon the application of any 'community resident' (ie. a government worker living in a community) raises concerns about the seeming ease at which the power can be reintroduced.

Recommendation 4:

The Commonwealth Government should work with and properly resource prescribed communities to find solutions to alcohol misuse that are appropriate to the needs of individual communities.

## **6. Prohibited Material Restrictions**

The ATSILS and APO(NT) consider 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.

The ATSILS have not observed any discernible increase in the number of persons charged with possessing pornography, despite the increased police presence in prescribed communities. We have also not seen demonstrable evidence that prohibited material restrictions are necessary 'to reduce the risk of children being exposed to pornographic material,' 'child abuse' and 'problem sexualised behaviour.'

In the absence of evidence to the contrary, pornography restrictions should be applied in a non-discriminatory manner throughout the entire NT.

We also remain concerned about stigmatisation. It is our experience that the signs placed at the entrance to prescribed communities and across Aboriginal land 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.

The ATSILS and APO(NT) consider that pornography should be tackled through a national approach, and not simply the targeting of one part of the Australian population who have not been shown to require special treatment.

Recommendation 5:

The Commonwealth Government should develop and deliver a non-discriminatory approach to pornography. In the absence of clear evidence to support the specific application of NTNER prohibited material restrictions to Aboriginal people in prescribed areas, those restrictions should be withdrawn.

## **7. Law Enforcement Powers**

The ATSILS and APO(NT) consider 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.

It is worth recalling that the increased Australian Crime Commission (ACC) powers include the infamous 'star chambers' powers, which removes a respondent's right to silence and makes unlawful any disclosure of proceedings other than to a lawyer.

We dispute the suggestion that the extreme and coercive powers of the ACC can be justified in relation to Aboriginal people in prescribed areas. There is no evidence that the increased powers have led to an increase in sexual offence reporting or prosecutions for serious violence or child abuse in prescribed areas. To the contrary, available evidence suggests very



little change in sexual assault recorded offences over the past six years. For example, the Long Term Recorded Crime Statistics compiled by the Northern Territory Department of Justice to March 2010<sup>13</sup> showed a significant decrease over the past two years in relation to sexual assault recorded offences.

In the absence of clear evidence, we suggest that the ACC should not have specific law enforcement powers in relation to Aboriginal people in prescribed areas that it does not have in relation to other Territorians.

Recommendation 6:

The Commonwealth Government should develop and deliver a non-discriminatory approach to law enforcement. In the absence of clear evidence to support the specific application of NTNER law enforcement powers to Aboriginal people in prescribed areas, those powers should be withdrawn.

## **8. Five year leases**

The five-year leases compulsorily acquired under the NTNER are discriminatory.<sup>14</sup> The government must seek the consent of Traditional Aboriginal owners for any lease arrangement. As the Native Title Report 2009 states:

The five-year leases represent a low point in the Government's treatment of Aboriginal land.<sup>15</sup>

The ATSILS and APO(NT) share this view, and believe that the five-year leases must not be continued.

The arguments put forward by the Government for the continuation of the five-year leases have never been well substantiated and have shifted over time, reflecting an attempt to justify a measure that operates for the convenience of the Government rather than the benefit of communities.

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

It is deeply disappointing that the Government has retained the five-year leases. It is reprehensible that it has done so in a manner which puts the continuation of the leases out of the reach of a challenge under Part II of the RDA. The ATSILS and the APO(NT) believe that the five-year leases are discriminatory and are not a special measure, and the Government is denying Aboriginal land owners the opportunity to have a court determine the issue.

Recommendation 7

The Commonwealth Government should immediately cancel the five-year leases. If the government is not willing to cancel the five-year leases, it should amend the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* to make it explicit that the provisions of the RDA prevail over

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<sup>13</sup> See Northern Territory Department of Justice, Northern Territory Quarterly Crime and Justice Statistics, Issue 31:

March Quarter 2010, Northern Territory Government

[http://www.nt.gov.au/justice/policycoord/documents/statistics/31/Long\\_Term\\_Stats\\_Web\\_Six\\_Issue\\_31\\_Table.pdf](http://www.nt.gov.au/justice/policycoord/documents/statistics/31/Long_Term_Stats_Web_Six_Issue_31_Table.pdf) at 24 September 2010

<sup>14</sup> See the submissions referred to in footnote 3 for a discussion of the discriminatory nature of those leases.

<sup>15</sup> Australian Human Rights Commission *Native Title Report* (2009), 155.

section 31 of the NTNER Act and to include an explicit undertaking that the Government will not extend the term of the leases beyond August 2012.

## 9. Customary Law

The ATSILS and APO(NT) urge the Commonwealth Government to immediately repeal sections 90 and 91 of the NTNER Act. These sections seek to restrict the extent to which a court can consider customary law issues in bail and sentencing proceedings.

There is no justifiable basis upon which the discretion of courts is limited in this discriminatory way. The full context of offending should, in all case, be considered by the court. In *R v Wunungmurra*,<sup>16</sup> Southwood J recognised the many bases upon which the provisions in the NTNER legislation are objectionable:

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 not interpreting s 91 of the *Emergency Response Act* in accordance with its clear and express terms.<sup>17</sup>

Sections 90 and 91 of the NTNER Act not only contravene long-standing legal principle but also ignore key recommendations from the 'Little Children Are Sacred' Report. It was there 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.<sup>18</sup>

The ATSILS and APO(NT) share this view. In our submission, it is critical that Customary Law be not only recognised, but appropriately utilised as a valuable means of empowering Aboriginal people in remote communities to take responsibility for offending that occurs in their communities, and to work side by side with the mainstream criminal justice system.

### Recommendation 8:

The Commonwealth Parliament should immediately repeal sections 90 and 91 of the NTNER Act.

### Recommendation 9:

The Commonwealth Government is urged to recognise customary law as a vehicle to empower elders in Aboriginal communities to take responsibility for offending that occurs in their communities. The Government should work with and support communities to develop ways to use the strengths of customary law to improve community safety.

## 10. Business Management Area powers

The NTNER Act gave the Commonwealth Minister broad and unprecedented powers with respect to organisations providing services in prescribed communities to:

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<sup>16</sup> [2009] NTSC 24.

<sup>17</sup> [2009] NTSC 24, [25].

<sup>18</sup> See Recommendation 72, Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, '*Little Children are Sacred*' (2007)

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

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

The government's *Future Directions* consultation paper stated 'this power has not been used, and is not needed because the Government has other ways to ensure its funds are managed properly. The Government proposes to remove this power from the legislation'. However, the subsequent amendments to the NTNER did not include removal of these powers.

The ATSILS and APO(NT) believe these coercive and unnecessary powers should be withdrawn.

#### Recommendation 10

The Commonwealth Government should withdraw the Business Area Management powers.

### **11. Government Business Managers**

While this issues paper has focused on the law and justice aspects of the NTNER, the ATSILS and APO(NT) note that the role of Government Business Managers (GBMs) remains an issue of significant concern.

GBMs have proven to be a controversial, largely ineffectual and overly costly element of the NTNER, prompting widespread comments from residents of prescribed communities that it was like a return to the old Mission Manager days. Criticisms of the role of GBMs have included a lack of effective engagement with communities, and failure to improve the coordination of government services.

The NTNER Review Board final report recommended that the role of GBMs be realigned to a community development role and that their titles be changed to Community Development Manager.

The ATSILS and APO(NT) strongly believe that a community development approach is required to address the needs of communities and that GBMs are inappropriate to this task. Aboriginal community organisations working in the NT are well-placed to work with government to re-focus its efforts on a community development approach and should be consulted as a matter of priority.

#### Recommendation 11

The Commonwealth Government should immediately engage with Aboriginal community organisations and APO(NT) to examine the role of Government Business Managers and consider how to implement a community development approach.

### **12. Need for Further Research**

The ATSILS and APO(NT) are extremely concerned at the lack of qualitative and quantitative data in relation to the impact and effectiveness of the NTNER measures. Without this data, the need for the restrictive measures that have been considered above cannot be justified.

A significant barrier to obtaining strong evidence on impacts is the lack of an initial NTNER's policy framework, including the lack of clear objectives and measurable outcomes, and the

lack of baseline data to draw comparisons. The Government should act to improve the overall framework for the NTNER and unfortunately the Closing the Gap framework does not provide sufficient detail. To date reporting has focussed on outputs (e.g. number of teacher houses built) rather than outcomes (e.g. number of children attending school and their literacy and numeracy results).

The ATSILS and APO(NT) call on the Commonwealth Government to undertake a cost benefit analysis associated with the NTNER measures, but particularly income management.

In addition to a broad evaluation of the NTNER measures, we consider it essential that the Commonwealth Government commission independent research relating to the main NTNER measures, particularly:

- policing and crime;
- the effectiveness of alcohol prohibitions;
- the performance of GBMs; and
- the effectiveness of using the income management regime to change social behaviours.

Recommendation 12:

The Commonwealth Government should immediately commission independent research to consider qualitative and quantitative data in relation to each of the NTNER measures. This research should be freely available to the public.

**Australian Aboriginal and Torres Strait Islander Legal Service providers include:**

Aboriginal Legal Service (NSW/ACT). Aboriginal and Torres Strait Islander Legal Service (Qld).  
North Australian Aboriginal Justice Agency (NT). Central Australian Aboriginal Legal Aid Service (NT).  
Victorian Aboriginal Legal Service Cooperative. Aboriginal Legal Services (WA)  
Aboriginal Legal Rights Movement (SA). Tasmanian Aboriginal Centre.

Aboriginal Peak Organisations NT include;

AMSANT, Northern Land Council, Central Land Council, Central Australian Aboriginal Legal Aid Service, North  
Australian Aboriginal Justice Agency