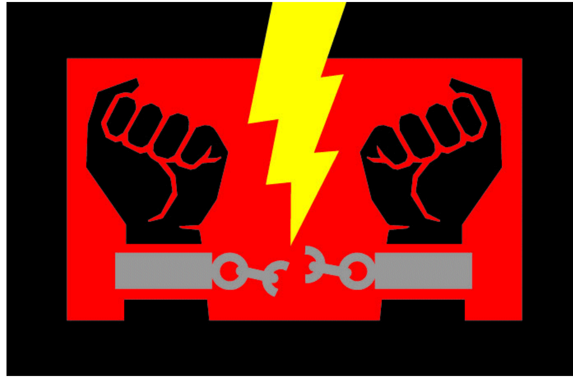
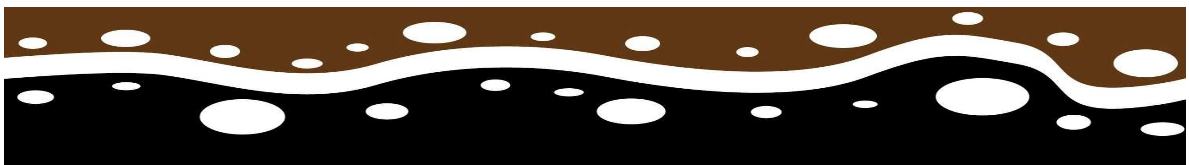


# Joint submission by the Central Australian Aboriginal Legal Aid Service and the North Australian Aboriginal Justice Agency to the Senate Select Committee on Regional and Remote Indigenous Communities

**June 2008**



# 1. Introduction

There are two Aboriginal and Torres Strait Islander Legal Services ("ATSILS") in the Northern Territory. The Central Australian Aboriginal Legal Aid Service ("CAALAS") services the Central Zone and the North Australian Aboriginal Justice Agency ("NAAJA") services the Northern Zone. This is a joint submission by both ATSILS.

We ask the Committee to note we have successfully applied for funding for a year-long research project to look into the impacts of the intervention. We hope to be able to present detailed research findings to future reviews.

We note the Inquiry is looking into:

a) the effectiveness of Australian Government policies following the Northern Territory Emergency Response, specifically on the state of health, welfare, education and law and order in regional and remote communities;

b) the impact of State and Territory Government policies on the wellbeing of regional remote Indigenous communities;

c) the health, welfare, education and security of children in regional and remote Indigenous communities; and

d) the employment and enterprise opportunities in regional and remote Indigenous communities.

We have focused our attention on the law and order and welfare implications of the intervention legislation[1] although in doing so we recognise the issues relating to health, welfare, education and law and order in regional and remote communities are all interlinked and interrelated.

In essence, our submissions are based on concerns about the mismanagement of Government policies because of:

a) the lack of consultation and long term, sustainable planning;

b) the inherent discrimination in the intervention legislation and policies; and

c) the "unforeseen consequences" of this discrimination.

## 1.1 The "Emergency" Excuse

We support the Central Land Council's view that:

[1] Throughout this submission, the term "intervention legislation" refers to the Northern Territory National Emergency Response Act 2007; Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007; and Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007.

"We are deeply concerned that the emergency response lacks a long term, investment plan, a community development approach or any benchmarks or critical evaluation process"; [2]

We also repeat our previous submission that:

"The passing of the intervention legislation was described as such an emergency that this justified both the extraordinary lack of consultation and opportunity for public comment and the removal of the ordinary checks and balances within the Westminster system. It is our experience that this has resulted in uncertainty (both for Aboriginal people and Government officials), confusion, poor policy planning and wasted public resources – the opposite of what the "emergency" was said to require."[3]

In saying this, we support the attention and focus given to Aboriginal issues in the Northern Territory. ATSILS have always been deeply concerned about the poverty and degradation experienced by Aboriginal people and the failure of all levels of Government to listen to Aboriginal people, in how these issues could start being addressed.

### 1.2 Racial Discrimination

We note that the Government intends to commission an independent review of the NTER for completion in the latter part of 2008 and that the Minister for Families, Housing, Community Services and Indigenous Affairs has indicated the Government will further consider the racial discrimination provisions following the proposed review later in this year.[4]

In our submission, it is imperative the Commonwealth Government continue its commitment to the *Racial Discrimination Act* as a fundamental principle for Australia and follow through on its pre election opposition to the provisions which suspend the operation of the *Racial Discrimination Act*.

This is an issue of profound importance. As the Law Council has stated "the suspension of the *Racial Discrimination Act* in any context is inappropriate, contrary to Australia's international obligations, and sets a dangerous precedent for future Parliaments".[5]

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[2] Central Land Council submission to Senate Standing Committee on Community Affairs, Report on Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Reponses Consolidation) Bill 2008, p 2
http://www.aph.gov.au/senate/committee/clac_ctte/NT_emerg_response_08/submissions/sub06.pdf

[3] NAAJA submission to the Senate Standing Committee on Community Affairs on the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Response Consolidation) Bill 2008
http://www.aph.gov.au/senate/committee/clac_ctte/NT_emerg_response_08/submissions/sub13.pdf

[4] Senate Standing Committee on Community Affairs, Report on Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Reponses Consolidation) Bill 2008 p 3

[5] Law Council of Australia submission to the submission to the Senate Standing Committee on Community Affairs on the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Response Consolidation) Bill 2008, p 9
http://www.aph.gov.au/senate/committee/clac_ctte/NT_emerg_response_08/submissions/sub04.pdf

This is not only an issue of principle, but has important practical implications. As the Social Justice Commissioner has noted, the suspension of the *Racial Discrimination Act* can also contribute to a breakdown in law and order:

"… the Government has clearly stated that the NT intervention seeks to address a breakdown in law and order in Aboriginal communities. And yet it potentially involves introducing measures that undermine the rule of law and that do not guarantee Aboriginal citizens equal treatment to other Australians. If this is the case it places a fundamental contradiction at the heart of the NT intervention measures. This will inhibit the building of relationships, partnerships and trust between the Government and Indigenous communities…"[6]

In our experience, this is exactly what has transpired.

The suspension of the *Racial Discrimination Act* sent a message to mainstream Australia that it was acceptable and appropriate to discriminate against Aboriginal people from the Northern Territory. In Alice Springs, Aboriginal people experienced previously subtle racism becoming overt because the intervention conveyed implicit Government sanction of discrimination against Aboriginal people.

# 2. Law and Order

## 2.1 Racial Discrimination and policing

There are also important rule of law implications for policing.

Legal services have received anecdotal reports from Aboriginal people that they have experienced an increase in discriminatory treatment from the Northern Territory Police Service.

A typical example is the comment by a particular community that the "white cops are going over board" and are treating the community members as though "we're criminals". The community members stated the problem was with the new recruits, rather than with the older police, and gave the following examples of their concerns:

- As soon as some people are seen drinking, all of the houses in the community are searched.
- Police are searching the houses without even explaining what they're doing or finding out who owns the house or who lives in the house.
- Police have been conducting searches on houses in the community when they are in the community looking for someone on a warrant or a summons.
- When conducting searches, police have been breaking sacred items that are used for ceremonies because the police view these items only as weapons.

[6] Social Justice Report 2007, Aboriginal and Torres Strait Islander Social Justice Commissioner, p 248

- Female police have been looking at sacred objects that women are not allowed to see. This is being reported back to communities, making problems for the community members in relation to witchcraft.

- Aboriginal women and their bags are being searched by male police officers.

- There have been a lot of instances in which unopened alcohol has been destroyed by the police outside the boundary of the community.

- At the local bus-stop, Aboriginal people's bags are searched purely because they're Aboriginal.

- Police know that taxis and mini buses are bringing alcohol into the community but taxi drivers and mini bus drivers are not being caught by the police nor having their vehicles confiscated.

- Intoxicated people are being taken into protective custody while sitting on the verandahs of their house.

- Police are refusing to give their rank number when they're asked.

The Northern Territory Emergency Response Act provides that "any acts done under or for the purposes of this Act" are excluded from the operation of Part II of the *Racial Discrimination Act*[7] and have effect despite any law of the Northern Territory that deals with discrimination.[8] In our view, the phrase "for the purposes of this Act" provides a wide ambit and would include police powers which were recently significantly broadened by the Northern Territory Government in its recent changes to the *Liquor Act (NT).*

Thus, we have had to advise clients that they do not have any legal remedies for discriminatory actions by the police with respect to alcohol restrictions in prescribed areas. While providing this advice and explaining its implications, we have watched the mainstream legal system being brought further into disrepute in the eyes of Aboriginal people.

This is concerning in a number of respects.

Even prior to the intervention legislation, the Northern Territory Anti-Discrimination Commissioner had been concerned at the low levels of complaints the Commission receives from Aboriginal people.

Furthermore many Aboriginal people already have concerns about the mainstream system and some doubt its very existence. As a recent report by the Aboriginal Resource and Development Services Inc stated:

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[7] S 132
[8] S 133

> "Yolŋu people constantly commented that they found the Balanda legal system meaningless or very difficult to understand. This left them feeling disempowered and confused. Most were surprised to hear that all those in the Balanda legal system were following processes of law.[9]

## 2.2 Lack of information about legislative change

In our experience, the Northern Territory and Federal Governments' failure both to consult with Aboriginal people about legislative changes, and to properly communicate and engage with them about the changes that have been made, contributes to Aboriginal people feeling disempowered by the mainstream legal system.

We acknowledge that legal agencies such as ATSILS have an important role with respect to providing community education about the law, but our contribution to this process should be to augment Government initiatives and to date we have not been funded sufficiently to do this. This is clearly a responsibility of Government, as can be seen by the Government education initiatives about other legislative changes.

By way of example, communities became prescribed on 15 September 2007, meaning that they were to be treated as general restricted areas under the Liquor Act and that it was an offence to bring, possess, consume, sell and control alcohol in these communities. In many communities these offences already applied, but in other communities this was a significant change. The only form of Government notification about this was a letter sent from Canberra on 14 September 2007. In some communities, signs were eventually erected some weeks or months later, but in many cases these signs were placed in inappropriate locations (such as at vehicle not pedestrian access to communities) and the terminology on the sign has been criticised by community members.

When complaints were made to the relevant Government agencies about these issues, we were advised that the Government was "aware that the information was very late" and it was acknowledged that this was a "fairly rushed deal". In our view, this is totally inappropriate.

In our experience, if no one explains the law and legal changes in an appropriate and understandable manner, then it is to be expected that Aboriginal people perceive the mainstream legal system as lawless.

It is a long-standing legal principle that ignorance of the law is no defence. This "fairly rushed deal" has left Aboriginal people exposed to being prosecuted for behaviour which was legal one day, illegal the next, without them being advised of this. We understand that the previous Commonwealth Government placed pressure on the Northern Territory police to start prosecuting as soon as the NTER came into effect. This was resisted by the Northern Territory police and the Northern Territory police decided initially to take on an educative role. While we commend the Northern

[9] "An Absence of Mutual Respect, Aboriginal Resource and Development Services, p 5 http://www.ards.com.au/print/LawBookletWeb.pdf

Territory police for their stance, this highlights the precariousness of the situation for Aboriginal people.

Furthermore, the Inquiry should also be aware that many Aboriginal people have wanted to comply with the law, but have not been able to because their direct questions about the law were not able to be answered by Government and the Police. ATSIL staff have watched at community meetings when people have asked the police and government representatives to show them where the boundaries to the prescribed areas are and no one has been able to do so.

### 2.3 Issues with respect to police behaviour

Many ATSILS clients complain about how they have been treated by the police. We have long standing issues with how these complaints are investigated by police and then responded to by the Northern Territory Ombudsman. Many of our clients have lost faith with this system.

This loss of faith has been exacerbated by the recent personnel changes and policing behaviour following the intervention. Many Aboriginal people have complained about the behaviour of young police and/or police from inter state who have very little knowledge or understanding of Aboriginal people in the Northern Territory. Senior police have acknowledged privately that some of the police sent to the Northern Territory were “inappropriate for remote communities” and have had to be redeployed.

ATSILS have received complaints from Aboriginal people of police taking people in restricted areas into protective custody[10] whilst they have been sitting on their verandas or even sleeping in their homes. We have queried this with the Northern Territory Police and been advised police believe they have the power in restricted areas to take people out of their houses and put them in protective custody, should they meet the statutory criteria for protective custody. In ATSILS view, police do not have this power because it violates the purpose of protective custody legislation. Furthermore, should this ever be tested by a court and the view of the police upheld, this would be yet another instance of racial discrimination given that police do not have this power outside prescribed areas.[11] It is important to note protective custodies are disturbingly common in the Northern Territory. In 2006/2007, there were 26,448 protective custody incidents, 24,807 of which were Indigenous (7,432 female, 17,375 male).[12]

### 2.4 Alcohol Regulation

There have been significant changes to the regulation of alcohol across the Northern Territory in a small space of time. As well as the changes in the intervention legislation, Alice Springs and Katherine have been declared dry, a permit system has

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[10] Pursuant to s 128 of the Police Administration Act; s18 Northern Territory National Emergency Response Act 2007

[11] Police v Craig Baker NT CSJ 2032859

[12] Northern Territory Police, Fire and Emergency Services Annual Report 2006 – 2007, http://www.nt.gov.au/pfes/index.cfm?fuseaction=page&p=132&m=60&sm=169, p 132

been introduced for Nhulunbuy, and large areas in Darwin have also been declared dry.

For Aboriginal people who previously drank alcohol in public because there was no where else to drink (for example, because they were itinerant or their home is a "restricted area" premises[13]), the option is now to drink in out of the way places or in licensed premises.

Our clients tell us that people are now forced to drink on the outskirts of town boundaries, where it is difficult for them to access police and health services because of the lack of telephones. This problem has also been reported in the media.[14] Our clients have also told us that they do not wish to drink in licensed premises because they experience racist taunts and aggressive behaviour.

In Nhulunbuy, following the introduction of a permit system on 15 March 2008, many of the Yolgnu people who used to drink in the bush have been forced to drink in the clubs, and there have been an increased number of assaults as well as people charged with accompanying offences of trespass and failure to leave premises as directed.

There has also been an increase in violent offences that ATSILS and the Northern Territory Government believe is linked to the urban drift to major centres following the intervention. In Alice Springs, the latest Government figures show there was a 17 per cent increase in assaults in Alice Springs towards the end of 2007. Darwin has recently seen a spike in the number of clients charged with homicide offences, which we believe is linked to the drift to urban centres. We note that this issue cannot be left to be dealt with by the blunt instrument of the criminal justice system, as Chief Justice Brian Martin stated "(i)ncreased penalties in the Northern Territory have had no discernable impact upon the unacceptably high rate of alcohol fuelled violence."[15]

We believe that many of these issues have been caused by the lack of services available to address complex social issues. The "rivers of grog" require a co-ordinated, whole of Government approach which works with communities and not simply legislative change which criminalises addiction. Although such sweeping legislative changes may have a visible initial effect, without the services to support people, such legislative changes can exacerbate problems. This is particularly the case where (as in the Northern Territory), the provision of such services has historically been underfunded and unable to cope with the current levels of demand. We note that after Alice Springs was declared dry, the CEO of Alice Springs Town Council noticed an "immediate improvement … with a perception of a decrease in alcohol consumption. However, I think it is fair to say that has now turned around and the issues in town might have even increased in terms of alcohol consumption."[16]

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[13] Pursuant to Part VIIIA Liquor Act
[14] http://www.abc.net.au/news/stories/2008/01/29/2148954.htm
[15] JCA Colloquium, "Customary Law – Northern Territory, Chief Justice Brian R Martin 5 October 2007
[16] Rex Mooney, Transcript of the Alice Springs hearing of the Senate Standing Committee on Community Affairs on the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Reponses Consolidation) Bill 2008 p 18 http://www.aph.gov.au/hansard/senate/commttee/S10741.pdf

There is also disturbing research showing alcohol restrictions leading to people switching to marijuana,[17] and anecdotal reports of increased consumption of alternatives to alcohol.[18]

### 2.5 Incarceration rates

We are also concerned about additional rises in the incarceration rate of Aboriginal people, which is already alarmingly high. Already 82% of the prison population in the Northern Territory is Aboriginal[19] and the rate of imprisonment rate for adults in the Northern Territory is 563 per 100,000, compared to a national average of 163 per 100,000 people. [20]

We have been advised by Northern Territory police that the new temporary police stations with interstate police do not have the training, qualifications or equipment to do testing for licenses or motor vehicle registry work. This has significant implications for the rate of Aboriginal incarceration in the Northern Territory, where in 2006–2007, 21% of Aboriginal prisoners were incarcerated for driving offences and there was a 78% increase in the number of prisoners held for "driving while disqualified".

As Dr Simon Quilty wrote: [21]:

> "It's good that there is a police station now. There is a lot to be said for the benefits of well-established road rules in preventing avoidable death, and in the rule of law in the protection of citizens. But the people of Utopia see the two immaculately uniformed officers in a different way. The police have been focusing on road rules. They have a speed camera and have been fining people who are travelling too fast. They have been booking people driving unregistered vehicles, and they have been prosecuting drivers who have too many people in the car.
>
> People are getting fines which they don't understand and can't pay. The court list has been growing since the police arrived, mainly for non-payment of fines. Immediately the police have arrived, the number of people on the wrong side of the law has grown. It's as if all of a sudden the people of Utopia have become more criminal than they were.
>
> The Sandover Highway is 50 meters wide and growing, a series of continued expansions to get around unpassable bogs. It's rough and very corrugated. Every time it rains, axle-breaking washouts appear on the road and aren't repaired until the annual passing of the grader occurs. The toll of these rough roads is high on suspension and brakes, and even the best Toyota 4WD's owned by the clinic last three or four years at most.

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[17] "Indigenous Grog bans in the Northern Territory lead to substances switch", Adam Cresswell, The Australian May 23 2008

[18] William Tilmouth, Chief Executive Officer, Tangentyere Council, Transcript of the Alice Springs hearing of the Senate Standing Committee on Community Affairs on the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Reponses Consolidation) Bill 2008, p 8

[19] NT Department of Justice, Correctional Services Annual Statistics 2006 – 2007, p 3

[20] Ibid p 2

[21] www.crikey.com.au, on 15 February 2008

For the rest of the population of Utopia, the cars they buy from extremely unscrupulous second-hand car markets in Alice Springs at exorbitant prices last a year or two before they fall apart. Once a car enters the community it rarely leaves, attested by the haunting metal graveyards littering the highway. Getting the cars registered isn't easy. An appointment has to be made with the Harts Range police officer some 150km away. Fuel costs just under $2 per litre. The new police station in Utopia doesn't/isn't permitted to issue vehicle registration certificates. And most of the cars wouldn't pass a roadworthy anyway.

It begs the question of the value people at Utopia get from paying the $600 rego fee. Try explaining the concept of registration fees to Aboriginal people who have been into Alice Springs maybe a few times in their lives, the full extent of their understanding of white culture coming from television shows like ABC news and MTV in a language they don't comprehend - "so everyone who uses the roads contributes equally to it's upkeep". What upkeep? The explanations I have attempted to Aboriginal people for these and other laws - speeding for instance - are met with puzzled expressions confirming that white people really are a strange lot."

## 2.6 Racial Discrimination and the Australian Crime Commission

In late February 2008, the Australian Crime Commission Board authorised the Australian Crime Commission ("ACC") to undertake intelligence or to investigate "Indigenous violence or child abuse", which is defined as serious violence or child abuse committed by or against, or involving, an Indigenous person, with serious violence and child abuse defined as:

- "serious violence" (an offence involving violence against a person (including a child) that is punishable by imprisonment for a period of 3 years or more)
- "child abuse" (child abuse means an offence relating to the abuse or neglect of a child (including a sexual offence) that is punishable by imprisonment for a period of 3 years or more).

Thus the "special coercive powers" of the ACC are available for an operation/investigation into indigenous violence or child abuse, as they are for the investigations into outlawed motorcycle gangs, international crime syndicates or terrorists. The ACC has stated that "the approval of coercive powers was considered essential to overcome impediments in accessing information collection relating to indigenous violence and child abuse."[22] These coercive powers include the 'star chambers' powers, the proceedings of which can only be revealed to a lawyer. The ACC has stated that "it will utilise coercive powers in a culturally sensitive manner in order to identify offenders and obtain specific intelligence relating to violence, child abuse and related offences of substances abuse and pornography".[23]

It is important to note the breadth of offences covered by the definitions of serious violence and child abuse. By way of example, the Australian Crime Commission powers are available for the offence of aggravated assault under the Northern

[22] Alistair Milroy quoted in "Outback taskforce gets star chamber", The Australian, Simon Kearney 21 February 2008

[23] Ibid

Territory Criminal Code.[24] An assault is aggravated if the defendant is a male and the victim a female, or if "harm" is caused which includes a bruise or a scratch, as well as much more serious consequences. Currently, 42% of the prison population in the Northern Territory are incarcerated for assault[25] and in 2006–2007, there were 2,744 offences against the person punishable by 3 years or more.[26]

In May 2008, it was reported that the coercive powers were used in April 2008 "for the first time to gather fresh evidence to force witnesses to give evidence"[27] and that further examinations would be held in May and June.[28] The National Indigenous Violence and Child Abuse Taskforce had "requested documents" and "spoken directly" to witnesses but would not reveal any further information, including "the communities subjected to these new powers." Therefore, the lack of specificity about service providers, and the information sought, could lead to many Aboriginal people losing confidence in the ability of service providers to maintain the confidentiality of their highly sensitive personal information. We note legal action has been taken by one organisation to prevent the Australian Crime Commission from taking certain actions.

We are extremely concerned about the existence of these powers and that these powers are being used. The ATSILS are as concerned about child abuse as all other Australians. However, we do not think that the use of these powers is an appropriate or an effective means of addressing the complex issues. Nor do we think it is appropriate that such extreme coercive powers are only available with respect to one racial group. This is an Australia-wide issue, with one study showing that 12% of Australian women report being sexually abused before the age of 15,[29] and another that 20% of women, selected randomly from the federal electoral roll, reported that they had experienced child sexual abuse.[30]

For ATSILS, these issues are highlighted by the two justifications publicly reported for these powers:

a) "High levels of underreporting of child sexual abuse by service providers" [31]. It is an offence in the Northern Territory not to report a belief on reasonable grounds that a child has suffered or is suffering mistreatment.[32] In our view, this duty extends to service providers and it is not a breach of professional duty to reveal information.[33] Thus, the issue is why the ACC were not able to

[24] 188(2) carries a 5 year maximum penalty
[25] NT Department of Justice, Correctional Services Annual Statistics 2006 – 2007, s p 15
[26] This includes everything from aggravated assault to murder
[27] "NT cops use coercive Powers", Northern Territory News, Saturday 17 May 2008 p 3
[28] "Child Abuse Taskforce Powers Working" 13 May 2008, www.abc.net.au
[29] This 2005 Australian Bureau of Statistics (ABS) reported that 956,600 women (12% of Australian women) report being sexually abused before the age of 15 ABS: 'Personal Safety, Australia': 4906.0: 2005, pg 10
[30] Jillian M Flemming, 'Prevalence of childhood sexual abuse in a community sample of Australian women' *Medical Journal of Australia* 1997; 166; 65-68, pg 65
[31] "Child Abuse Taskforce Powers Working" 13 May 2008, www.abc.net.au
[32] Community Welfare Act s 14
[33] S 14(2)

use ordinary investigatory powers of the police where they believed that the offence of failing to report may have been committed; and

b) "Hamstrung by stand over tactics and a culture of secrecy in remote Aboriginal communities." [34] We believe that any allegations of child abuse must be thoroughly and appropriately investigated. However, we question the need for additional powers to do so. In our experience, the right to silence is very poorly understood by Aboriginal people, in part because the concept is culturally foreign and also because the caution advising of the right to silence is so poorly administered. Therefore, when faced with a police officer asking questions, the vast majority of Aboriginal people will disclose highly incriminating information.

We are also concerned about the ACC's belief that it has powers with respect to "related offences" of substances abuse and pornography. Although we believe that this interpretation would not be upheld were it legally challenged, the chances of this occurring are slim, given the secretive nature of ACC operations and the general lack of awareness by Aboriginal people of their rights.

### 2.7 Child abuse

In our view, the complex issue of child abuse can only be dealt with by a holistic, culturally appropriate approach which is both well resourced and long term. Unfortunately, we have not seen any indication of such an approach in the Northern Territory. Instead, the failure of Government to install an appropriate community policing model in conjunction with other services has led to Aboriginal people being subject to extreme police powers.

We have seen this tragic lack of services highlighted in a recent high profile case.

In December 2007, his Honour Justice Riley sentenced five young people involved in the very serious sexual assault of a child, then aged 11 years. The case had been in the courts for almost 12 months and had attracted a significant amount of media attention, both in the Northern Territory and around Australia. Much of the commentary was inflammatory and some of it was ill informed. The Accused in this case were aged between 13 and 19 years. They pleaded guilty to a range of offences, from indecent dealing to sexual intercourse with a child under the age of 16 years. None of the offenders faced charges of sexual intercourse without consent (commonly referred to as rape). Three of the five offenders were children at the time they committed the crimes for which they were sentenced.

RP was aged 13 at the time he committed the two offences he pleaded guilty to - one count of indecent dealing and one of gross indecency. His acts did not involve any penetration of the victim. The Supreme Court accepted the evidence of an experienced psychologist that RP had a narrowly formed view of the world and was a product of a community characterised by chronic disadvantage, including limited access to education, overcrowded housing and disease. The psychologist further

[34] "NT cops use coercive Powers", NT News Saturday 17 May 2008 p 3

suggested that the offence could be explained in part by the child RP's access to pornographic materials. The Court received evidence that the victim had told prosecutors on more than one occasion that RP was himself a victim of sexual assault. His Honour accepted that in engaging in sexual conduct, RP was mimicking behaviour that he had seen in pornographic material and/or that he had been personally subjected to.

To date there are no programs to assist with the rehabilitation of a child who has himself been subject himself to repeated sexual abuse and had gone on to act out that behaviour on another. In fact, no perpetrator programs are available in the community in either Darwin or in Maningrida. Repeated efforts were made to contact the relevant Minister. Detailed correspondence was sent to Minister Scrymgour outlining the difficulties facing the child offenders and requesting assistance so that rehabilitation and counselling could be arranged, that would focus on healing and preventing any risk of re-offending. Defence counsel received no written response, despite repeated follow up calls. A meeting with the Minister was made, and then cancelled by the Minister's office. To date, as the Supreme Court was told, the requests for funding and program assistance have been ignored.

RP was sentenced by Justice Riley to a term of imprisonment of 8 months, suspended after 1 month imprisonment. That decision was successfully appealed to the Court of Criminal Appeal (CCA) by counsel for RP and an adjournment has been granted to enable a Juvenile Justice report to be provided, outlining the non-custodial options available for the child offender. The CCA was again interested in what programs might be available to assist in the rehabilitation of the offender. Again, the Court was told that no programs yet exist, despite repeated calls for assistance.

## 2.8 Customary law

The intervention legislation precludes any form of customary law or customary practice from being considered for sentencing decisions.

In ATSILS experience, sentences have increased in recent times, but not specifically because of the exclusion of customary law. This is partly due to customary law having only rarely been used to mitigate moral culpability, despite common perceptions frequently reported in the media to the contrary. As Chief Justice Martin stated “only on rare occasions has customary law been presented as lessening the moral culpability of the Aboriginal offender. Even less frequently has the sentencing court accepted the submission as of significance.”[35]

The exception to this is in relation to ‘child-bride’ matters. Since early 2004, customary law has no longer been a defence to consensual sex with a child under 16, and the exclusion of customary law prevents the court from considering the offence in its context.

[35] Chief Justice Brian R Martin, ‘Customary Law – Northern Territory’ JCA Colloquium 5 October 2007

This is another instance of racial discrimination. In the Northern Territory, courts must consider "the extent to which the offender is to blame for the offence"[36] and "the presence of any aggravating or mitigating factor concerning the offender."[37] As such, Aboriginal offenders are disadvantaged because the full context of their offending cannot be considered by the court, whereas non-Indigenous offenders are given full consideration of all relevant circumstances. The consequences of this discrimination can be extremely serious. In ATSILS experience, consensual sex with a child under 16 now receives higher sentences because customary law cannot be considered as a mitigating factor.[38]

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

## 2.9 Prosecutions seen by ATSILS to date

To date, since the intervention, the ATSILS have not seen an increase in cases involving child abuse, which we would describe as matters generally involving sexual abuse of pre adolescent children by adults significantly older than them. Instead, we have seen an increase in prosecutions of teenage relationships, where the age difference between the two people is not large and the younger person has consented to the relationship (leaving aside the legal issue that a person cannot consent before the age of 16).

There is ample evidence that teenage sexual activity is an issue right across Australia and certainly not just in Aboriginal communities. Australia has a "higher teenage pregnancy rate than many other developed countries, and one of the highest teenage abortion rates in the developed world."[39] However, in our experience, non Aboriginal relationships are not similarly being prosecuted.[40]

ATSILS are deeply concerned therefore that Aboriginal and non Aboriginal people in the Northern Territory are being treated so differently. This is not an example of a special measure, but rather racial discrimination.

Instead of treating under-age teenage sex as a complex social and medical issue, this issue is being treated solely as a criminal issue, and we are deeply concerned about the consequences of this for the individuals involved (who are facing longer jail

[36] Sentencing Act (NT), s 5(2)(c)
[37] Sentencing Act (NT), 5(2)(f)
[38] R v Leroy Gibson, 17 March 2008 per Martin CJ:
http://www.nt.gov.au/ntsc/doc/sentencing_remarks/2008/03/20080317gibson.html
[39] Skinner and Hickey, 'Current priorities for adolescent sexual and reproductive health in Australia' *Medical Journal of Australia* 2003; 179: 158 – 161, pg 159
[40] There are no publically available statistics on this issue but we make this comment based on what our lawyers have witnessed on court lists throughout the Northern Territory.

sentences than they did previously for this offence and are also subject to onerous reporting requirements when they are released) and for the communities.

This is an important issue given the prevalence of teenage pregnancies in the Northern Territory, particularly amongst Aboriginal people. Research shows that Indigenous women generally have larger families (more children) than non-Indigenous women,[41] and Indigenous women generally begin having children earlier than non-Indigenous women.[42] The Northern Territory teenage fertility rate in 2006 (63.6 births per 1000 teenage girls) was significantly higher than the national average of 15.4,[43] and was the highest in Australia. The Northern Territory also had the youngest median age of both mothers and fathers in all of Australia.[44] The ABS report concludes that "births to Indigenous teenage mothers represented 79% of all births to teenage mothers in the Northern Territory."[45]

These figures are not surprising given that "there are now clear trends showing that the more educated a woman is, and the higher her income, the fewer children she will have."[46] There is also research from Queensland that "teenagers living in disadvantaged areas had two to four times higher birth rates than for all women in Queensland and 10 to 20 times higher rates than those from affluent areas".[47]

Research shows there are significant health risks associated with teenage pregnancy. Teenage mothers have a higher likelihood of suffering adverse psychosocial and perinatal outcomes, such as depression, social isolation, leaving school early, and being unemployed or earning a low income,[48] and higher perinatal death rates.[49] These risks are particularly high for young Aboriginal mothers who are "more likely to have all the antenatal risk factors and to have poor birth outcomes than non-Aboriginal teenagers."[50]

We are extremely concerned that criminalising this type of behavior may discourage young women from accessing health services. We believe that this might be the case in situations where the relationship between the two people was consensual and sanctioned by both families, and furthermore where there are issues as to the "voluntariness" of the young woman's evidence to the police about the relationship

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[41] 'Births, Australia': 3301.0: 2006, Pg 27

[42] 12.2% of Indigenous women aged 19 and under in 2006 had given birth to at least 1 child. This compared with only 2% of non-Indigenous women aged 19 and under who had given birth to a child ibid, pgs 27, 29, 31

[43] ibid, pg 19

[44] ibid, pg 20

[45] ibid, pg 12

[46] Anne Summers, 'The Reproductive Years – The baby bust', Medical Journal of Australia 2003;178 (12); 612-613

[47] Family Planning Queensland, 'Teenage Pregnancy Indicators – live births and abortions' Client Information Sheet, www.fpq.com.au

[48] Australian Institute of Health and Welfare, 'Australia's young people: their health and wellbeing 2003', Canberra 2003, pgs 113 - 114

[49] ibid, pg 114

[50] Skinner and Hickey, 'Current priorities for adolescent sexual and reproductive health in Australia' *Medical Journal of Australia* 2003; 179: 158 – 161, pg 159

There is also an important issue about the reporting requirements imposed on a person convicted of a sexual offence under the Northern Territory *Child Protection (Offender Reporting and Registration) Act*. These requirements apply to defendants irrespective of the age difference of the two people, whether the relationship was consensual, whether the relationship was sanctioned by families and communities, and whether the relationship continued after both people turned 16.

Most ATSILS clients who fall under the Act have post-release reporting obligations which apply for 15 years and these obligations include:

- An annual report at a police station, giving details of any address the offender will reside at for 14 or more days, the names of other occupants of the places of residency, the names and age of any children residing at those places; whether the offender has any unsupervised contact with children and the registration of any vehicle the offender drives on 14 or more days each year. For many Aboriginal people, the movement between houses and communities of extended family groups in the Northern Territory would make this obligation particularly onerous.

- The offender must report any travel plans of 14 days or more outside the Northern Territory and provide addresses of where the offender will reside during the time of travel. This requirement is particularly onerous for people living at remote communities near Northern Territory borders who would ordinarily regularly travel outside of the Northern Territory.

Failure to comply with a reporting obligation is punishable by 2 years imprisonment.

# 3. Welfare

## 3.1 Income management

The ATSILS have recently been awarded funding by the Commonwealth Attorney General's Department to second up to two welfare rights lawyers and/or caseworkers to NAAJA and CAALAS respectively for 12 months. The focus for these positions will be casework, community legal education, and advocacy about income management issues in the Northern Territory. These upcoming positions as well as our research position will provide the ATSILS with detailed information about the impact of the income management regime on our clients. Nonetheless, we have prepared this submission based on our current concerns given the anecdotal information we have to date.

As with our concerns about law and order discussed above, we are extremely concerned about the racially discriminatory model of income management that has been rolled out in the Northern Territory, and the implementation problems that have occurred with the model, which in our experience have had significant consequences.

## 3.2 Racial Discrimination

As with many other aspects of the intervention legislation, most income management provisions and any acts done in relation to them are declared "special measures" under the *Racial Discrimination Act*. As this would be open to legal challenge, the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* goes on to specifically and unequivocally exclude these acts from the operation of the prohibition on racial discrimination in the *Racial Discrimination Act* and from the operation of any Northern Territory law on Discrimination. This does not include where a person is income managed because of a child protection notice, however this type of income management has not yet commenced. Thus so far the only income management to have commenced in the Northern Territory is solely dependent on race.[51] We are fundamentally opposed to any measure which is racially discriminatory and in breach of Australia's international obligations under the Convention on the Elimination of All Forms of Racial Discrimination.

This is an issue of fundamental principle, but it also has important practical implications. ATSILS have experienced Aboriginal people feeling that their self worth has deteriorated. Some Aboriginal people feel they have returned to a previous welfare system. Indeed, the Government has implicitly sanctioned the view that all Aboriginal people are irresponsible with their money, and unable to properly care for their family. ATSILS staff have witnessed shop assistants verbalising this assumption, after serving Aboriginal people subject to income management. This has led to many Aboriginal people finding income management to be an insulting and degrading experience.

We acknowledge there have been a variety of experiences with income management and that while some individuals and communities have had very negative experiences, others have welcomed it. We also acknowledge that there have been some positive statistics about increased purchasing of food, although we have experienced some communities having the opposite experience. Senior leaders in one community reported to us that before income management people had enough food to eat and that following income management people are going hungry and are "criss-crossing" family groups in the community, looking for food. The community reported children were crying for food, and at times being fed gruel made from powdered milk. In our experience, some people have experienced having less money because they have been unknowingly accumulating surpluses in their income managed accounts. For other people, it is because they are now forced to travel long distances, incurring additional costs, to be able to shop with income managed funds.

We believe the support for income management from some Aboriginal people is in part a symptom of the lack of financial assistance and support for Aboriginal families encountering difficulties, rather than being support for the continuation of a racially discriminatory welfare practice. We believe the cost of "employment and welfare reform" ($72.4 million to February 2008)[52] must be compared to the cost of providing

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[51] We acknowledge there are a small number of non Aboriginal people in prescribed areas who are being income managed, but the vast majority of people being income managed are Aboriginal.

[52] Income Management – Implementation, Gilbert + Tobin Centre of Public Law Website Project on Northern Territory Intervention, Last updated 11 March 2008, http://www.gtcentre.unsw.edu.au/Resources/docs/irlg/Evaluation_Sheet_Income_Management_March 08.pdf G + T, p 1

sustainable, community orientated programs and services which could start to address the underlying issues which have resulted in some people welcoming income management.

We support the increased Centrelink service delivery for Aboriginal people. We understand the Centrelink staff who have been visiting communities have discovered some people who are eligible for benefits but who have not been receiving them, and also people who have been paying debts which they do not owe. These issues highlight to us the lack of services to these clients to date. They also indicate that Government cannot rely on free call numbers to access clients, as the most disadvantaged people most requiring of assistance are not able to access an English-speaking telephone service.

We also support attention being paid to issue of the issues of price, quality and nutritional value of food available in remote communities. However, it does not appear that this attention is being directed to the fundamental issues. We note with concern the comments by the Central Land Council that

> "It is apparent that the store licensing is focussing on income management and administrative arrangements, rather than nutrition and pricing. So while, as a consequence of having to implement income management, store governance arrangements are improving, deeper social and health issues are not being addressed. Anecdotally, store prices have universally increased since the advent of income management in a community. There may be some increased costs associated with administration of this system, but it appears the guarantee of quarantined money is fuelling high inflation at community stores. The CLC would support higher benchmarks for stocking nutritional food, stricter controls on pricing, and, as stated in our previous submission, a requirement that stores have the capacity to train and employ local community members"[53]

We also note with concern the privacy implications for the information that is being collected about people being income managed. In one community that we know of, service providers not related to the store or Centrelink have had access to detailed information about the purchases made by community residents at the local store.

### 3.3 Implementation Issues

There have been significant and serious implementation problems for the income management roll out. In our experience, many of these problems are related to income management being rolled out in an "emergency" and being subject to political pressure. There are many instances of this, including:

a) the lifting of the Remote Area Exemption (RAE), originally scheduled for 4 years, being instead "fast tracked" into 6 months;

b) the political pressure to complete income management in the Katherine region, which resulted in people having insufficient store cards over Christmas; and

[53] Central Land Council submission to Senate Standing Committee on Community Affairs, Report on Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Reponses Consolidation) Bill 2008, p 6

c) the fast tracking of Outback Stores taking over community owned and operated stores, which resulted in a program of extensive community consultation being cut.

A consequence of the "emergency" roll out has been the lack of co-ordination with other services, and income management being implemented in communities where important support services are not available or easily accessible. Many Aboriginal people have had credit and debt issues arising from income management. In part this is because of long-standing credit and debt issues particularly in remote communities, such as in relation to unscrupulous car dealerships. However, income management has also been detrimental to some Aboriginal people who were managing their debts prior to income management. As an example, one ATSILS client had a payment arrangement with a bank to pay off a car loan at a rate of about $400 per month. After income management was introduced, she was unable to maintain her loan repayments because the amount of money available to her for discretionary spending was insufficient to meet the loan repayments. This resulted in her incurring additional charges on her loan and being at risk of the loan being sold to a debt collector. ATSILS have spoken with many clients whose outstanding loans or debts had not been identified or addressed in the income management interview which is described by FAHCSIA as:

> "What it does involve is Centrelink sitting down with each customer and working through with them what their expenses are, particularly those in relation to priority needs as defined in the legislation, and then setting up with the individual a range of deductions in respect of those expenses. So the person would indicate, for example, that they spend this much on rent, or this much on food, or this much on whatever and those deductions are then made to the various providers of those goods." [54]

Centrelink staff have advised us that financial management programs are being rolled out across the Northern Territory so that most clusters are getting some sort of financial counselling support. Our concern is that some of these services are located on regional centres and are not sufficiently funded to do outreach work. We are also puzzled about why Centrelink's stated intention to have community visits in conjunction with financial counsellors has not been a fundamental and integral part of the income management program.

In some cases, income management has resulted in more pressure being applied to Aboriginal families who are not being income managed, because they are being asked to support relatives who are. It is important to note that the family members who are not being income managed may live only metres from the family who are being

[54] Income Management – Implementation, Gilbert + Tobin Centre of Public Law Website Project on Northern Territory Intervention, Last updated 11 March 2008, http://www.gtcentre.unsw.edu.au/Resources/docs/irlg/Evaluation_Sheet_Income_Management_March08.pdf G + T, p 5

income managed, such is the nature of the arbitrary distinctions created by the prescribed area regime.

There has been a lot of criticism of the store card system and anecdotal reports of people disposing of cards after one use, not realising the card still has credit on it and that there is a trade in store cards. ATSILS staff members have been offered store cards for sale at a discount rate by alcohol-dependant clients for cash (such offers have of course been refused). These issues highlight the inherent problems in a scheme which works in isolation from other services and which has not been "rolled out" with the much needed increase in social services. In this regard, the resources required for the income management scheme must be subject to serious consideration by the Committee.

The income management model rolled out thus far in the Northern Territory is by its very nature a "one size fits all" model. This is one of its inherent flaws. Furthermore, the method of its implementation has been similarly rigid and inflexible. ATSILS have raised some of these issues with Centrelink, such as it being more culturally appropriate to offer income management interviews as a family group because this respects the ways in which Aboriginal people use money. Centrelink believes it cannot offer this because then they "won't get anything done". In our view, this shows a deep lack of cultural understanding and an inability to acknowledge the problems that have been created for individuals and their families by this process.

As these issues highlight, the removal of the standard appeal rights for persons subject to income management is a matter both of principle (it is inherently discriminatory on the basis of race) and also has profound practical implications. In this regard, we commend the Commonwealth Ombudsman's decision to increase its presence and outreach work in the Northern Territory and to concentrate on issues relating to income management.

We note that there are forthcoming reviews by the Commonwealth Ombudsman about the income management complaints they have received and also by independent consultants into the communication about income management by Centrelink and FACHSIA.

### 3.4 The future of income management

There have been some indications that there is a "shift in mood" and that income management will move to being a discretionary system based on individual circumstances. While we support the shift from a race-based model, we would only support a model which:

a) had clear and easily accessible appeal mechanisms built into it;

b) was open and transparent;

c) was accompanied by a dramatic increase in culturally appropriate local services to address the issues which gave rise to the person being income managed.

# 4. Conclusion - Resources for ATSILS

As this submission highlights, there are many issues associated with Australian and Northern Territory Government legislation and policy of significant concern to ATSILS. There are also important resource implications for our services.

We acknowledge the NTER funding provided to the ATSILS and the additional provision of funding for one-off 12-month projects, including the welfare rights lawyers and/or caseworkers and the research position described elsewhere in this submission. However, at this stage this funding has only been guaranteed for one more year. Furthermore, this funding has to be viewed in light of:

a) the Federal Government's refusal to increase operational funding even in line with CPI increases (over the next 3 years, NAAJA's operational funding will increase by 1% in 2008–2009, 0% in 2009–2010 and 2% in 2010–2011) and the Northern Territory Government's refusal to provide any funding to an ATSIL;

b) the historical underfunding of ATSILS across Australia such that as Professor Chris Cunneen states "the static funding that ATSILS operate in results in compromised capacity to provide adequate services to the sector of the population that arguably needs the best possible quality legal services";[55] and

c) the dramatic increase in the demand for legal services and the high levels of unmet demand.

[55] "Funding of Aboriginal and Torres Strait Islander Legal Services: Issues of Equity and Access", Professor Chris Cunneen and Melanie Schwartz (2008) 32 Crim LJ 38, p 1