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Northern Territory Legal Aid Commission

In your reply please quote

Our Ref:

Your Ref:

10 August 2007

Chair
Senate Legal and Constitutional Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

By email: legcon.sen@aph.gov.au

Dear Senator Barnett,

Thank you for the opportunity to provide a comment on this important issue.

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

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

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

1. Family law;
2. Domestic violence;
3. Child in need of care;
4. Criminal law; and
5. Civil law.

We welcome the opportunity to respond to this Inquiry as we believe that there are substantial improvements which can be made in these areas. In particular, the confidence of the community and related services in the criminal justice system needs to be substantially increased, as do the resources available.

Timeframe for Inquiry

The Northern Territory National Emergency Response Bill 2007 & Related Bills are over 500 pages long. The changes being proposed are large and complex. The impact which these changes will have on the Australian community is great. It is of concern that the time frame for submissions to the Inquiry is so short. Unfortunately, for this reason, we are unable to comment in detail on the content of the Bill.

More time is required to enable interested stakeholders to fully consider the changes being proposed, their actual or potential impact and develop and articulate any concerns identified.

It is suggested that any detriment which would be suffered by delaying the passage of the Bill would be outweighed by the benefit of allowing detailed public comment to be taken into account in the development of any legislation.

The Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse

While we welcomed the Inquiry into the Sexual Abuse of Aboriginal Children in the NT, we are also aware of numerous Reports and Inquiries in recent times which touch on the issues addressed by this Inquiry and would provide a context to this Inquiry, specifically, these are:

1. The SNAIC *State of Denial* Report into the neglect and abuse of Indigenous Children in the NT.¹
2. The HREOC Report Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Communities.²
3. The NT Youth at Risk Task Force.
4. The Review of the *Community Welfare Act*.
5. The NT Sexual Assault Taskforce.

These reports are largely based on extensive consultations and representations made by key stakeholders and it is important that this prior work is acknowledged and the recommendations are carefully considered.

The Commission made submissions to the Board of Inquiry and welcomes its report, which highlights that child abuse is a complex problem with many facets. That such extensive consultations were held and such a comprehensive report was delivered in the space of time available to the Board is a credit to the Board members and those supporting them.

The *Little Children Are Sacred Report*³ published in June 2007 has highlighted challenges which Indigenous families in remote communities face

¹ <http://www.snaicc.asn.au/publications/documents/stateofdenial.pdf>

² http://www.hreoc.gov.au/social_justice/familyviolence/family_violence2006.html

³ Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse http://www.nt.gov.au/dcm/inquiry/saac/pdf/bipacsa_final_report.pdf

in addressing a range of family related issues, including 'child maltreatment and family violence and the general dysfunction of Aboriginal communities'⁴.

The media release declaring a national emergency response to protect Aboriginal children by the Australian Government on 21 June 2007 included a list of action required by the Australian and Northern Territory governments. Of those matters listed, a significant impact on legal services may result from:

- child health checks (if they produce evidence of a crime),
- increased police (leading to increased need to represent defendants)
- liquor reform (which may lead to prosecutions for breaches)

The NT response to this Report will be released in August and the expected response by the NT which will impact on our service will be:

- increased interventions by Family and Children's services, leading to an increase in Child in Need of Care Matters where clients require advice and representation;
- Changes to the *Bail Act* resulting in more complex bail applications.

While the events unfolding from the *Little Children are Sacred* Report were unanticipated, the need identified in the Report was not. The Report found:

It was a common theme in consultations that many Aboriginal people did not understand the mainstream law and many mainstream concepts. It appeared to the Inquiry in its consultations that some Aboriginal communities were unclear on what child sexual abuse was.⁵

The NT Legal Aid Commission has been aware of the vacuum of understanding of the Australian Legal System in Aboriginal communities and has taken steps to produce linguistically and culturally relevant legal education materials.

The *Little Children are Sacred* Report and consequential intervention is expected to dramatically change the nature of service delivery across the NT, although at this point it is difficult to anticipate exactly what those changes will be and how specifically they might impact on the Commission.

There can be little doubt that they will lead to an increase in the demand for criminal defence legal services (including conflict referrals) and child in need of care interventions legal representation and advice in rural and remote areas by legal service providers in the Northern Territory. Many of these matters arising from social and family dysfunction will be complex and multi-faceted, including domestic violence; family law; assault; and child in need of care.

We also anticipate an increase in:

⁴ P 57

⁵ P 53

- the demand for development of information and educational resources;
- policy and law reform responses to government initiatives; and
- the need to continue to work collaboratively with other legal and related service providers.

While welcoming the focus on addressing the needs arising out of the *Little Children are Sacred* report, the Commission is concerned that the national emergency response to the report has detracted from the content of the Report and the urgent need for collaborative implementation of some of the recommendations which are vital to changing offending behaviour in the NT. In some important respects, the national emergency response diverts attention from the fundamental principle of community participation which the Report found to be so important:

It is critical that both governments commit to genuine consultation with Aboriginal people in designing initiatives for Aboriginal communities.⁶

The report contained valuable recommendations in relation to the need for proactive and long term approaches to addressing offending. There is a need to redirect some focus back to the content and recommendations of the Report. From a legal services perspective, we would welcome a renewed focus on the Report as a whole, with particular focus on the recommendations listed below:

FACS and Police

- Recommendation 16: That FACS and Police undertake greater liaison with family or clan groups when conducting investigations, including the conduct of post-case debriefings, and utilising trained community brokers where appropriate.
- Recommendation 26: That FACS and Police work to better integrate the Child Abuse Taskforce with other local joint Police/FACS responses, and further develop local coordinated, culturally appropriate multi-agency responses (such as the Peace at Home program) which can improve the statutory and therapeutic response for children, families and communities.
- Recommendation 29: That Police conduct effective, meaningful and ongoing consultations with individual Aboriginal communities with a view to developing protocols for working with the community and supporting each community's own efforts at maintaining peace, law and order.

Review of Legislation

- Recommendation 30: That the Department of Justice review all legislation relating to court procedures for vulnerable witnesses and child victims of alleged sexual abuse following the first 12 months of operation of the new legislation.

⁶ P 7

Offender Rehabilitation

- Recommendation 36: That the government provide more sex offender rehabilitation programs with adequate resourcing and in particular that:
 - a. wherever possible the court should structure sentences for sex offenders to provide the opportunity for community based rehabilitation
 - b. Correctional Services must provide ongoing sex offender rehabilitation programs in jail (irrespective of length of sentence) and for persons on remand, including culturally appropriate programs
 - c. supervision of parolees must be meaningful, and include:
 - i. attendance at an offender rehabilitation program
 - ii. time back in their community
 - iii. written reports from the parole officer to the sentencing Judge.

- Recommendation 38: That the government to provide youth specific, culturally appropriate rehabilitation programs for juvenile sex offenders in detention, and for those on parole or subject to community-based orders.

- Recommendation 39: That the government to commence meaningful dialogue as soon as possible with Aboriginal communities aimed at developing alternative models of sentencing that incorporate Aboriginal notions of justice and rely less on custodial sentences and more on restoring the wellbeing of victims, offenders, families and communities.

Alcohol

- The 'rivers of grog' were identified as a core issue in relation to Aboriginal child sexual abuse. As we are too well aware, alcohol and substance addiction, often at extreme levels, is linked to offending behaviour in the NT. Nine recommendations were made in relation to addressing alcohol abuse, including Recommendation 61: That the government continue to implement the Alcohol Framework as a matter of urgency and focus on reducing overall alcohol consumption and intoxication...

Community Justice

- The Report made important findings about the impact of local Community Justice Initiatives. Recommendations 71 – 73 support government facilitated dialogue between community members and the legal profession and the subsequent establishment of Community Justice Groups in Aboriginal communities who desire them.

The Northern Territory National Emergency Response Bill 2007 & Related Bills

While we have not had the opportunity to consider the Bills in detail, we make the following general comments.

Liquor Restrictions

We have serious concerns about the level of alcohol related violence in the Northern Territory, and consider that restrictions on supply and availability of alcohol are one effective way to address this. However we also submit that it is vital to consider: the need to fully educate the community about such restrictions; the rehabilitative resources required; and the consequences of criminalisation of substance abusers. Some concerns are listed below:

- Extensive education and support programs which are culturally appropriate and delivered in the first language of the audience need to accompany any restrictions.
- A fine is not likely to have a deterrent effect on anyone already affected by alcohol or with an addiction to alcohol. Will persons fined be able to access funds to pay the fines if they are Centrelink recipients? These do not appear to fall into the category of 'priority needs' as defined by section 123TH of the Welfare Payment Reform Bill.
- Criminalisation of drinking and drunkenness has proven ineffective in areas where there are alternative means to access to liquor, such as some Town Camps.
- Legal and related services, such as police and court, are already stretched and can not afford to be clogged up with repeat grog offenders.
- There is a need for more regionally based and locally managed rehabilitation facilities. – current services cannot keep up with the huge demand for services.
- The national move to decriminalise drunkenness (as set out in the RCIADIC report and recommendations) remains relevant and cogent.

Removal of cultural considerations in Bail and Sentencing

The proposed amendments will take away the ability of the court to consider all the factors of an Aboriginal offender's background and circumstances when considering bail and or sentencing. This may also impact on other groups. We believe this reveals a misunderstanding of the manner in which the Courts take into account these issues.

There have been numerous court decisions which outline the approach which the Courts have to violence against Indigenous women and children. In summary, this approach is that 'Aboriginal women, children and the weak will be protected against personal violence insofar as it is within the power of the court to do so'⁷ Coates has paraphrased this approach as meaning 'that just because you are from a deprived community does not mean that you will be deprived of the laws of protection'⁸

The above approach, however, is not inconsistent with the sentencing principles which enable Courts to take into account factors which exist because of the offenders ethnic or cultural background. Courts throughout Australia apply the principles identified in *Neal v The Queen* (1982) 149 CLR 305 when sentencing Aboriginal offenders:

⁷ *Queen v Inness Wurrumara* [1999] 105 A Crim R 512 @ 520

⁸ Richard Coates, DPP, *Indigenous Sentencing: A Northern Territory Perspective* Balance, 4/2006, 24 @29.

The same sentencing principles are to be applied, of course in every case irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of justice.⁹

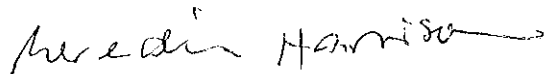
Numerous commentators have pointed out clearly and loudly that there is no 'customary law defence'. Unfortunately, there is a belief within the community that there is such a defence and the reality that the sentencing principles outlined above apply to all Australians has been ignored.

Conclusion

The Commission is concerned that the important recommendations of the *Little Children are Sacred Report* may be lost in resultant litigation arising from inevitable challenges to the Federal legislation.

We share the concerns raised by others, such as the Law Society of the NT and the Law Council of Australia that the package is lengthy and covers diverse issues and that such significant matters deserve much greater consideration through consultation with stakeholders.

Yours sincerely



 Suzan Cox QC
Director

⁹ @ 326