Law Council
OF AUSTRALIA

3 February 2012

Committee Secretary
Senate Community Affairs Legislation Committee
Parliament House
CANBERRA ACT 2600

Dear Sir/Madam,

STRONGER FUTURES IN THE NORTHERN TERRITORY BILL 2011 AND RELATED LEGISLATION

Thank you for the opportunity to comment on Stronger Futures in the Northern Territory Bill 2011 ("Stronger Futures Bill"), together with the *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011* ("Consequential Provisions Bill") and the *Social Security Legislation Amendment Bill 2011* ("Social Security Bill"). These Bills are collectively referred to in this submission as the SFNT Bills.

The Law Council of Australia is the peak body for the Australian legal profession, representing around 56,000 lawyers through the Law Societies and Bar Associations of the States and Territories. The Law Council speaks for the profession on law reform initiatives and other developments at the national and international level, including in relation to Indigenous issues and the Northern Territory "national emergency response".

Due to the short time available to consider the SFNT Bills and the timing of the inquiry, which included Christmas and the holiday season, this submission provides targeted comments and does not address all aspects of the legislative package.

Background

The Stronger Futures Bill repeals the *Northern Territory National Emergency Response Act 2007* (Cth) ("NTNER Act), which was one of a package of 3 enactments that implemented the Commonwealth's "intervention", in the wake of successive reports into chronic violence, alcoholism and drug abuse in the Northern Territory. The intervention involved restrictions on alcohol, drugs and pornography in prescribed areas (mostly Aboriginal townships and communities in the NT), management of welfare payments for those in prescribed areas, compulsory acquisition of leases over Aboriginal townships and bans on judicial consideration of evidence concerning customary law or cultural background in determining appropriate sentences or bail applications. These measures were underwritten by the suspension of the *Racial Discrimination Act 1975* (Cth) ("RDA"), which was described by the Law Council in a submission to this Committee in August 2007 as "utterly unacceptable".

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There were a number of amendments to the NTNER Act and related legislation over the four and a half years since their enactment, including repeal of the provisions suspending the RDA and extension of income management to all welfare recipients in the NT and to selected "disadvantaged communities".

SFNT Bills – general comments

The Law Council makes the following general comments with respect to the SFNT Bills.

Discrimination

The Law Council notes the comments in the Explanatory Memorandum, to the effect that the measures contained in the Bills are intended to be special measures (within the meaning of the RDA) and that the Bills are to be read in a way that is consistent with the RDA.

The Law Council welcomes this commitment to ensuring any actions or measures addressed or authorised by the Bills remain subject to the RDA. However, the Law Council submits this could be made clearer by inserting a clause within the Bills, clarifying that the RDA survives in the event of inconsistency.

Alcohol management plans

The Law Council makes no comment on alcohol restrictions contained in the Bill, which do not depart significantly from the restrictions presently in place under the NTNER legislation.

The Law Council supports measures for greater involvement of Aboriginal communities in the design and implementation of alcohol restrictions, which appears to be the objective of the proposed alcohol management plans.

Land reform

The Law Council notes this continues bi-partisan policy directed at encouraging economic development and home-ownership in Aboriginal communities, by amending traditional land tenure arrangements.

The Law Council has no comments regarding the leasing provisions.

Issues of concern

1. Legal assistance for those referred for income management

The Social Security Bill will (among other things) do the following:

(a) Extend the existing referral power of Federal Government agencies to enable referrals by state and territory government agencies; and

(b) Provide that a parent's income support payment may be suspended for failing to attend a compulsory conference to discuss their child's school attendance or failing to comply with a school attendance plan for their child.

The Law Council notes that these provisions are likely to increase the number of people referred for income management and have the potential to cause hardship to disadvantaged welfare recipients, who may have their income support payments suspended or cancelled due to circumstances outside their control. This applies

particularly to those who reside in regional or remote communities, who may have to travel significant differences to apply for review of that decision.

Whilst the Social Security Bill establishes a punitive framework for welfare recipients, it does not provide any mechanism by which those affected can seek legal advice about their circumstances. Those affected by an adverse decision or referral are most likely to approach legal aid, Aboriginal legal services or community legal centres in their region for advice. There is no recognition in the Bill of the additional impost this will create for already under-funded legal assistance bodies. Nor is there recognition of the rights of those affected by such decisions to seek legal advice and representation, particularly in the event that there are good grounds to appeal the decision.

There is no regulatory impact statement accompanying the Social Security Bill, notwithstanding the significant impact it is likely to have on demand for legal assistance. Moreover, it remains unclear whether such punitive measures are indeed the most appropriate or effective means of encouraging school attendance. Whilst the impact of a decision to suspend income support payments on the basis of school non-attendance could be severe for the parent, their ability to enforce their child's school attendance may be limited.

2. Amendments to *Crimes Act 1914*

The Law Council opposes restrictions on judicial discretion to consider relevant factors in bail and sentencing proceedings, including the cultural background of the defendant.

Schedule 1 of the Consequential Amendments Bill repeals the NTNER Act, including Part 6, which extended the prohibition of judicial consideration of customary law or cultural background in bail or sentencing proceedings to the Northern Territory.

Part 6 of the NTNER Act effectively mirrored the provisions of the *Crimes Amendment (Bail and Sentencing) Act 2006* (CABS Act), which were implemented to limit judicial discretion to consider certain matters in bail or sentencing proceedings, including relevant customary laws observed by the defendant or their community, or their cultural background, in either mitigation or aggravation of any offence. The Law Council considers these laws to impose an unnecessary limitation on judicial discretion.

Justice Southwood of the Supreme Court of the Northern Territory stated in 2007, in response to the enactment of s 91 of the NTNER Act, that:

> *"…its effect will be such that sentencing courts are precluded, largely on the grounds of an offender's membership of an ethnic or other group, from considering facts that are materially relevant to making findings about the appropriate weight to be given to the purposes for which a sentence may be imposed on an offender under the sentencing act. In such circumstances and to that extent there would no longer be an even administration of criminal justice, it would mean that in yet another way Aboriginal people do not stand substantively equal before the law*."[1]

Justice Southwood's concerns were vindicated following *Aboriginal Areas Protection Authority v S & R Building & Construction Pty Ltd* [2011] NTSC 3. In that case, the defendant was prosecuted in 2007, when its employees constructed and used a pit toilet on an Aboriginal sacred site, close-by an area they had been contracted to construct a

[1] The Hon Justice Stephen Southwood, *Equality of the Law and the Sentencing of Aboriginal Offenders under the Sentencing Act (NT),* 2007

Commonwealth Government building. The defendant was initially fined $500 and compensation of $40 to the victim.

On appeal, Justice Southwood noted that:

> "*…the appellant submitted that the sentencing magistrate had failed to give sufficient weight to denunciation, to the emotional harm suffered by the victim's, to the damage, injury or loss caused by the offender and to the fact that the respondent's plea of guilty was not a plea at the earliest opportunity. As to the question of damage, counsel for the appellant initially submitted that according to traditional Aboriginal law and custom the damage to the site was permanent and irreparable. However, counsel for the appellant ultimately and properly, in my opinion, conceded that neither this Court nor the sentencing magistrate could have regard to this submission because no affidavits in support of the submission had been read in accordance with s 104A of the* Sentencing Act and under s 91 of the Northern Territory National Emergency Response Act 2007 *(Cth) a sentencing court must not take into account any form of customary law or cultural practice as a reason for aggravating the seriousness of the criminal behaviour to which the offence relates. The fact that these matters cannot be taken into account in a case such as this reemphasises the comments I made about s 91 of the* Northern Territory National Emergency Response Act in R v Wunungmurra."[2]

Schedule 4 of the Consequential Amendments Bill is designed to extend ss 15AB and 16A of the *Crimes Act 1914* (Cth) to the Northern Territory and to establish a limited exception, to allow evidence about customary laws or cultural background in proceedings concerning an offence against Commonwealth or Northern Territory heritage protection or land rights laws.

Accordingly, it will extend an unnecessary restriction on judicial discretion, introduced under the CABS Act, while creating a minor exception to address the unfortunate outcome in *Aboriginal Areas Protection Authority v S & R Building & Construction Pty Ltd*.

While the Law Council welcomes the recognition by the Government that the CABS Act and corresponding Part 6 of the NTNER Act have had unintended consequences, the Law Council considers these are poor provisions which should be repealed. Customary law and the cultural background of a party to the proceedings, or a victim, may be highly relevant in determining bail or an appropriate sentence in criminal proceedings.

When inquiring into the CABS Bill in 2006, Coalition Senators on the Senate Legal and Constitutional Affairs Legislation Committee concluded that its provisions were discriminatory and expressed concern, in particular, about:

> *"…the Bill's removal of the phrase 'cultural background' from paragraph 16A(2)(m) of the Crimes Act. The committee does not accept the Department's explanation that this will ensure the law applies equally to all persons. Evidence received in the course of the committee's inquiry strongly suggests that, in practice, this will not be the case. The proposal is at odds with well-established common law principles relating to the relevance of cultural background and customary law to sentencing decisions. The committee notes further that the Federal Parliament gave bipartisan support to the insertion into the Crimes Act of the 'cultural background' requirement in 1994. The committee is concerned about the complete absence of consultation in the present case in relation to removing the phrase, despite its specific introduction in 1994. In*

[2] *Aboriginal Areas Protection Authority v S & R Building & Construction Pty Ltd* [2011] NTSC 3, at 28.

addition, the committee notes that, while the Bill's stated aim is to address violence and child abuse in Indigenous communities, its implications are much wider.

"The committee is also mindful of evidence arguing strongly that the Bill conflicts with every major inquiry into the role of cultural background and customary law in the Australian legal system, including several ALRC reports and recommendations of the Royal Commission into Aboriginal Deaths in Custody." [3]

The Committee's concerns about the CABS Bill were sufficiently strong that the majority Senators recommended that the Coalition Government amend its Bill to "remove item 4, so as to retain the phrase 'cultural background' in the list of factors that a court must take into account in sentencing an offender, if relevant and known to the court, in paragraph 16A(2)(m) of the *Crimes Act 1914*."

Labor Senators on that inquiry produced a minority report, agreeing with the findings of the majority and further stating that:

"Labor Senators are of the view that the Bill will lead to increased racial discrimination against Indigenous Australians and those with a multicultural background. The Bill will inevitably impact most upon these persons since, clearly, its practical application will only be to offenders from certain cultural backgrounds.

"Labor Senators believe that the Bill is at odds with the overall findings and recommendations of the Royal Commission into Aboriginal Deaths in Custody. Labor Senators also consider that the Bill goes against the fundamental principles elucidated in the landmark decision of R v Fernando which provides the common law basis upon which 'Aboriginality' is, and should be, considered in the sentencing of Aboriginal defendants." [4]

The Law Council submits that these provisions should be repealed in their entirety. There is no evidence this fetter on judicial discretion serves any useful purpose. However, there is ample evidence to suggest the concerns acknowledged by all members of the Senate Legal and Constitutional Affairs Committee are well founded.

The Law Council submits that the government should take the opportunity presented by this Bill to simply repeal the CABS Act and Part 6 of the NTNER Act.

If there are any queries regarding this submission, please contact Nick Parmeter at .

Yours sincerely,

Margery Nicoll
Acting Secretary-General

[3] Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Crimes Amendment (Bail and Sentencing) Bill 2006*, Commonwealth of Australia, pp 31-32.
[4] Ibid, p 36.