

Indigenous Law Bulletin

Faculty of Law, University of New South Wales, Sydney 2052 Australia

Phone 61 2 9385 2256

Fax 61 2 9385 1266

Email editors ilb@unsw.edu.au

Subscriptions ilbsubscriptions@unsw.edu.au

Website www.ilc.unsw.edu.au/publications/ilb

Editorial Board Terry Chenery, Neva Collings, Eddie Cubillo, Megan Davis, Mick Dodson, Nathan Jarro, Jacqui Katona, Garth Nettheim, Robynne Quiggin, Keryn Ruska, Louise Taylor

Editor Zrinka Lemezina

Volunteer Editorial Assistance Jeremy Smith

Subscriptions Janette Murdoch

Graphic Design / DTP John Hewitt

Published by

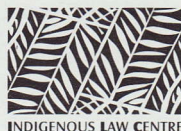
Indigenous Law Centre, Faculty of Law, University of New South Wales, Sydney 2052 Australia

Phone 61 2 9385 2252

Fax 61 2 9385 1266

Email ilc@unsw.edu.au

Website www.ilc.unsw.edu.au



Printing Print & Mail Pty Ltd

Disclaimer

No expression of opinion in this magazine may be regarded as legal advice. Readers should make and rely on their own enquiries when making decisions affecting their own interests. The views expressed in the *Indigenous Law Bulletin* are not necessarily those of the editors, the Indigenous Law Centre or the University of New South Wales.

ISSN 1328-5475

Citation (2008) 7(8) *Indigenous Law Bulletin* (or ILB)

Produced with financial assistance from the Australian Government Attorney-General's Department



Contribute

The ILB welcomes articles from all interested contributors for any section of the magazine. In particular, Indigenous lawyers, paralegals and visual artists are encouraged to contribute their work for publication. Electronic submission is preferred.

Articles

Language: To ensure accessibility to a broad readership, technical and jargonistic language must be simplified into plain English. Aboriginal English is an exception to this rule but where necessary, translations will be provided in addition to the original expression.

Style: Australian Guide to Legal Citation
<http://mulr.law.unimelb.edu.au/aglcdl.asp>

Word lengths (including footnotes): 1 page article 600; 2 page article 1200-1300; 3 page article 1800-2000; feature articles (maximum of 4 pages) 2400-2800.

Articles may be subject to anonymous peer review.

Art

Images of visual artworks in any medium that are suitable for reproduction in colour or black and white may be submitted for publication. Images may be submitted as slides, photographic prints, transparencies or 300 dpi electronic scans of the work. Graphics inserted in Word documents or obtained from the web are not suitable.

EDITORIAL

The devastating environmental and economic impacts of global warming and climate change are widely documented and now feature regularly in public discourse. Yet there has been very little discussion about the effect of such change on Indigenous Australians. In this edition, we take a closer look at this pressing theme.

Dr Donna Green and Kirsty Ruddock examine the impact of climate change in the Torres Strait, outlining some possible legal mechanisms that Torres Strait Islander people may use to pressure business and Government to take preventative action to slow the rate of environmental degradation.

Joe Ross and Emily Gerrard argue that sustainable climate change solutions require active engagement with Indigenous people, outlining potential co-operative initiatives and the benefits that can emerge from integrated adaptation measures.

Bridget Lewis rounds out our examination of climate change by highlighting the way in which global warming disproportionately impacts upon Indigenous rights. Bridget emphasises the need to recast climate change as a *rights* issue, as well as an environmental and economic issue.

In addition to climate change, we discuss the difficulties for Victorian Aboriginal people in obtaining formal identification, and the impact of these difficulties on Indigenous participation in civil life. Joel Orenstein reviews the inflexible policies of the Victorian Registry of Births, Deaths and Marriages, illustrating how rigid practices can encroach upon the right of Aboriginal people to be recognised as persons before the law.

Nicole Watson evaluates the Cape York Family Responsibilities Commission, arguing that the Commission should not be implemented in other jurisdictions as it further chips away at Indigenous rights and the *Racial Discrimination Act*.

Finally, I review the Australian Human Rights Commission's Issues Paper on the development of a National Indigenous Representative Body. The AHRC raises some outstanding issues for consideration to ensure that any future Indigenous Representative body is effective and sustainable in the long term.

Zrinka Lemezina
Editor

THE FAMILY RESPONSIBILITIES COMMISSION

ACT 2008 (QLD)

CAUSE FOR CONCERN

by Nicole Watson

INTRODUCTION

In March 2008 the Queensland Parliament passed the *Family Responsibilities Commission Act 2008* (Qld). Premier Bligh described the legislation as a 'world-first trial to link parental responsibility with Government assistance'.¹ The objects of the Act include the 'restoration of socially responsible standards of behaviour' in welfare reform community areas.² The welfare reform community areas are all located in north Queensland and have predominantly Indigenous populations.³

The achievement of the Act's objects is the concern of the recently established Family Responsibilities Commission ('FRC').⁴ The FRC is worthy of analysis, not only because it is the first of its kind, but also due to its potential influence on Indigenous policy throughout Australia. The possibility of replication in other jurisdictions arose in October, when the Northern Territory Deputy Chief Minister, Marion Scrymgeour, asked the Commonwealth to explore introducing a model based on the FRC in the Northern Territory.⁵

This article raises a number of concerns about the FRC and argues against replication in other jurisdictions. It will be divided into three parts. Part one will discuss the role and structure of the FRC; part two will examine issues that revolve around community consultation and part three will discuss rights implications for individuals who appear before the FRC.

PART I: THE ROLE AND STRUCTURE OF THE COMMISSION

The FRC comprises a commissioner, deputy commissioners and local commissioners.⁶ Its inaugural commissioner is Senior Magistrate, David Glasgow. The Commission's functions include convening conferences with 'community members', defined to encompass welfare recipients who reside in the welfare reform community areas.⁷ Conferences will result from notices triggered by events such as the recording of a criminal conviction,⁸ a child safety notification,⁹ the breach of a tenancy agreement,¹⁰ or children's unexplained absences from school.¹¹

In a conference, the FRC must deal with matters to which the notice relates in a way that facilitates early intervention, supports the restoration of socially responsible standards of behaviour and makes appropriate use of community support services.¹² The FRC may enter into family responsibilities agreements with individuals who appear before it.¹³ In a case where agreement cannot be reached, the FRC has a number of options that include reprimanding the person, directing him or her to attend a community support service, or placing him or her on income management.¹⁴

The Act also established the Family Responsibilities Commission Registry. The Registrar's tasks include the preparation and monitoring of compliance with case plans established pursuant to family responsibilities agreements and family responsibilities orders.¹⁵ Non-compliance with a case plan will result in a 'show-cause' notice, which may ultimately lead to more stringent income management.¹⁶

When the Family Responsibilities Commission Bill 2008 ('the Bill') was being debated in the Queensland Legislative Assembly, Premier Bligh described it as 'an independent, community based organisation'.¹⁷ It is correct to say that the legislation does attempt to involve Indigenous people in the operation of the FRC. For example, there is provision for consultation with community justice groups over the appointment of local commissioners,¹⁸ as well as a requirement that local commissioners be Indigenous.¹⁹ However, the design of the FRC has little regard for Indigenous methods of dispute resolution that commonly incorporate consensus.²⁰ Furthermore, characteristics such as closed hearings,²¹ documents akin to pleadings, as well as the offices of registrar and commissioner, all make the FRC very similar to other tribunals.

PART II: COMMUNITY CONSULTATION

The FRC is the brainchild of the Cape York Institute for Policy and Leadership ('CYIPL') and is taken directly from the Institute's blueprint for socio-economic reform in Cape York, *From Hand Out to Hand Up*.²² According to the CYIPL, in recent decades social norms in Cape York

have collapsed, primarily as a result of passive welfare and alcohol abuse. The CYIPL's reform agenda is aimed at effecting behavioural change by eliminating both.

The Queensland State Government has worked closely with the CYIPL to realise its vision for Cape York. The Premier revealed the Government's close ties with the CYIPL during the parliamentary debate of the Bill:

The State Government contributes half a million dollars every year to the Institute for its running costs. The institute's report [*From Hand Out to Hand Up*] ... was funded by the Commonwealth Government in cash and by the State Government in kind. The Queensland Government placed a senior officer from the Department of Premier and Cabinet and paid their salary for 12 months to coordinate input from all State Government agencies into the development of the report.²³

While it is commendable that the CYIPL was intimately involved with the development of the FRC; it is concerning that consultation with other Indigenous people was limited. This is spelled out in the Explanatory Notes, which provide that, 'there has been no public consultation on the Bill.'²⁴

Over the past decade, numerous reports have attested to the need for Indigenous communities to be consulted in relation to the design and implementation of programmes that are to be for their benefit. Most recently this need was expressed in the first recommendation of the *Little Children are Sacred* Report:

It is crucial that both Governments commit to genuine consultation with Aboriginal people in designing initiatives for Aboriginal communities.²⁵

Although the FRC has only been in operation since July 2008, it has already encountered resistance in some parts of north Queensland. For example, in August a group of Indigenous mayors signed an open letter to both Premier Bligh and Prime Minister Rudd, in which they expressed opposition to the reforms. The Director of the CYIPL, Noel Pearson, was moved to fly to Aurukun in order to address people's concerns. After five hours of negotiations, Mr Pearson told the press that:

Mostly they are worried they are going to lose their money, people will be punished, or their children taken away ... They are anxious and they are alarmed.²⁶

Genuine consultation is crucial not only to successful implementation. It also impacts on whether or not the FRC can be properly categorised as a 'special measure' and therefore permissible under the *Racial Discrimination Act 1975* (Cth) ('RDA'). In her second reading of the

Bill, the Premier envisaged inconsistency with the RDA, but adopted the Commonwealth's justification for the Northern Territory National Emergency Intervention, that is, that the legislation is a 'special measure'.²⁷ However, many of the submissions to the Senate Legal and Constitutional Affairs Committee's Inquiry into the Intervention rejected this; for example, the Human Rights and Equal Opportunity Commission argued that:

Measures that may impact negatively on rights, such as limitations upon the availability of alcohol, may be considered 'special measures' where they are done *after consultation* with, and generally the consent of, the 'subject' group...²⁸

Such arguments also apply to the FRC; consultation with the CYIPL is not the same as inclusive consultation with those within the welfare reform community areas.

PART III: RIGHTS IMPLICATIONS

The FRC is objectionable not only because it is racially discriminatory. In practice, it may also deprive individuals of their freedom of personal movement. The legislation presupposes the existence of community support services, but what happens if there are no such services in the proposed welfare reform community area? Will individuals who are subject to the FRC's orders be compelled to relocate to areas where such services exist?

The rights of individuals may also be impacted upon by excessive surveillance. The breadth of the mandatory notice provisions is so wide that increased surveillance seems inevitable. For example, if a lessor suspects that rental premises are being used for an illegal purpose, the lessor must provide a notice to the FRC,²⁹ turning social housing bodies into the eyes and ears of the FRC. Likewise, the obligation on a clerk of the Court to notify the FRC of a criminal conviction applies to all offences,³⁰ including public order offences associated with the over-policing of Indigenous people. This broad sweep may serve to alienate the very people whom the FRC is intended to help. There are also a number of provisions in the Act that evince a lack of regard for procedural fairness, as discussed next.

THE EXCHANGE OF RELEVANT INFORMATION BETWEEN THE FRC AND PRESCRIBED ENTITIES

The rights of individuals may be impacted upon by Part 8, which concerns the exchange of 'relevant information' between the FRC and prescribed entities. Prescribed entities include the chief executives of departments relating to child protection services, education and criminal justice matters.³¹ 'Relevant information' is broadly

defined to include opinion.³² Should the Commissioner request 'relevant information' from a prescribed entity, it must comply unless the disclosure would result in rare scenarios, such as the endangerment of a person's life.³³ Should an uninformed or erroneous opinion be the subject of 'relevant information', that entity may unfairly prejudice an individual who is the subject of an FRC conference.

BIAS

Although the Commission is obliged to observe natural justice,³⁴ it may be difficult for the FRC to avoid the appearance of bias. Given the very small populations of the welfare reform community areas, it is likely that local commissioners will regularly exercise decision-making power over individuals with whom they are familiar, or with whom they share a kinship relationship.

THE RIGHT TO MERITS REVIEW

The decisions of the FRC are not subject to review, with the exception of appeals on questions of law.³⁵ The rationale for the absence of merits review is provided in the Explanatory Notes:

Internal merits review is not possible as there is no higher body within the Commission than the panel which sat. Any other external appeal will necessarily involve people who are not connected with the community, which may undermine a key tenet of the trial, namely that the communities should take responsibility for their issues.³⁶

While outsiders may not be fully aware of the nuances of community life, at least they would bring the appearance of impartiality. Furthermore, citizens who are aggrieved by a Centrelink decision ordinarily have a right of appeal to the Social Security Appeals Tribunal. It is not clear why the dispensation of a right so fundamental as merits review was necessary to achieve the objects of the legislation.

In theory, it will be possible for an individual to pursue an appeal in the Magistrates Court on the basis of unreasonableness. However, individuals in the welfare reform community areas may not have access to a lawyer with expertise in administrative law. Section 112, which prevents a stay on an order of the FRC, may also act as a further impediment to appeals.

CONCLUSION

No one disputes the need for governments to respond to crises within Indigenous communities, many of which are the legacies of decades of neglect. However, in order to be effective, those solutions must be designed in partnership with Indigenous communities. They must also conform to the principles of natural justice and those embodied in

the RDA. For the reasons discussed in this paper, the FRC falls short of all three requirements and should therefore not be replicated in other jurisdictions.

Nicole Watson is an Aboriginal lawyer from Queensland. She is currently employed as a research fellow at the Jumbunna Indigenous House of Learning, University of Technology, Sydney.

- 1 The Hon Anna Bligh, 'Parliament Passes Historic Family Responsibility Commission Legislation – Welfare Reform Trial Ready to Begin' (Ministerial Media Statement, 11 March 2008).
- 2 *Family Responsibilities Commission Act 2008* (Qld) s 4(1).
- 3 *Ibid*, the Schedule defines 'welfare reform community area' as Aurukun, Coen, Hope Vale and Mossman Gorge.
- 4 *Ibid* s 4(2).
- 5 Patricia Karvelas, 'Push by NT Government for Indigenous Welfare Body', *The Australian*, 18 October 2008.
- 6 *Family Responsibilities Commission Act*, above n 2, s 12(1).
- 7 *Ibid* ss 10, 7.
- 8 *Ibid* s 43.
- 9 *Ibid* s 42.
- 10 *Ibid* s 44.
- 11 *Ibid* s 40.
- 12 *Ibid* s 5(2).
- 13 *Ibid* s 68.
- 14 *Ibid* s 69.
- 15 *Ibid* s 35(2)(e), (f).
- 16 *Ibid* Part 7 Division 2.
- 17 Queensland *Parliamentary Debates*, Legislative Assembly, 11 March 2008, 688 (The Hon Anna Bligh, Premier).
- 18 *Family Responsibilities Commission Act*, above n 2, s 14.
- 19 *Ibid* s 18.
- 20 Larissa Behrendt, *Aboriginal Dispute Resolution* (1995).
- 21 *Family Responsibilities Commission Act*, above n 2, s 60(3).
- 22 Cape York Institute for Policy and Leadership, *From Hand Out to Hand Up: Design Recommendations* (2007).
- 23 Queensland, *Parliamentary Debates*, above n 17, 689.
- 24 Explanatory Notes, *Family Responsibilities Commission Bill 2008* (Qld) 12.
- 25 Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle 'Little Children are Sacred'* (2007) 22.
- 26 Peter Michael, 'Backlash Threatens Family Responsibilities Commission', *Courier-Mail*, 15 August 2008.
- 27 Queensland, *Parliamentary Debates*, Legislative Assembly, 26 February 2008, 333 (The Honourable Anna Bligh, Premier).
- 28 Human Rights and Equal Opportunity Commission, Submission to the Senate Legal and Constitutional Committee on the Northern Territory National Emergency Response Legislation (10 August 2007) [21] emphasis added, references omitted.
- 29 *Family Responsibilities Commission Act*, above n 2, s 44.
- 30 *Ibid* s 43.
- 31 *Ibid* s 90.
- 32 *Ibid* s 91.
- 33 *Ibid* s 93.
- 34 *Ibid* s 56(1)(a).
- 35 *Ibid* s 110.
- 36 Explanatory Notes, above n 24, 10-11.