ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA (INC.)

SUBMISSION TO THE WESTERN AUSTRALIAN PARLIAMENT

COMMENTS ON THE ABORIGINAL HOUSING LEGISLATION AMENDMENT BILL 2009 (WA)

MARCH 2010

CONTENTS

1. Introduction and scope of the submission

The Aboriginal Legal Service of Western Australia (Inc.) (ALSWA) prepared this submission to provide law reform and policy advice from an Aboriginal[1] perspective about the *Aboriginal Housing Legislation Amendment Bill* 2009 (WA) (the Bill) which is currently being debated in Parliament. This Bill proposes radical changes to the way housing in remote Aboriginal communities of Western Australia (WA) is currently managed and has far reaching consequences.

This submission provides:
- commentary on the current housing conditions in remote WA;
- historical commentary on how this has been able to occur;
- an analysis of the Bill; and
- a series of recommended amendments to the Bill.

2. About ALSWA

ALSWA is a community based organisation that was established in 1973. ALSWA provides legal advice and representation to Aboriginal peoples in a wide range of practice areas including criminal law, civil law, family law as well as human rights law and policy. Its service is available throughout WA via 17 regional and remote offices and one head office in Perth.

ALSWA is a representative body with 16 Executive Officers[2] elected by Aboriginal peoples from their local regions to speak for them on law and justice issues. ALSWA is a legal service provider solely for Aboriginal peoples living in Western Australia (WA) and makes submissions on that basis.

The Law and Advocacy Unit (LAA) of ALSWA is dedicated to law reform, policy and community legal education and is responsible for the coordination of submissions prepared by ALSWA. The LAA consults with the Chief Executive Officer, Executive Officers, Solicitors and Court Officers for their invaluable contribution to submissions. All Court Officers are Aboriginal or Torres Strait Islander and represent Aboriginal or Torres Strait Islander people in the Magistrates Courts and the Children's Court under section 48 of the *Aboriginal Affairs Planning Authority Act* 1972 (WA). Each regional office also has a Court Officer who provides an understanding of local issues. In remote areas, Court Officers are often the only local permanent legal service provider.

[1] ALSWA has not referred to Torres Strait Islander peoples in this submission because of the context being more specific to Aboriginal peoples in remote WA where ALSWA understands there are very few Torres Strait Islander peoples. ALSWA wishes to acknowledge and respect Torres Strait Islander peoples and stand in solidarity with the many similar issues faced by them.

[2] There are two Executive Officers for each of the former eight ATSIC regions (Metropolitan, Central Desert Region, Murchison / Gascoyne Region, Southern Region, Pilbara Region, Goldfields Region, West Kimberley Region and East Kimberley Region). They are elected by the Aboriginal West Australian public every three years.

3. Executive Summary

Housing and infrastructure for Aboriginal peoples in remote WA is inadequate now, has been for some time and may be in breach of Australia's international obligations.

For the last 40 years, Aboriginal housing in remote communities of WA has been primarily funded by the Commonwealth Housing and Infrastructure Program (CHIP), which provided funding for Aboriginal housing organisations to manage their own housing. Unfortunately, the Aboriginal housing organisations were never well resourced or supported and many houses were allowed to deteriorate. After a scathing report in 2007 about the program, CHIP was abolished.

The new approach to remote Aboriginal housing is being driven by the National Partnership Agreement on Remote Indigenous Housing (NPARIH). This agreement provides WA with $496 million from the Commonwealth for remote housing and infrastructure.

In return for providing the much needed funding, the WA government must become the major deliverer of housing for Aboriginal peoples in remote areas, ensure standardised tenancy management and support for such housing and develop and implement land tenure arrangements to facilitate effective asset management, essential services and economic development opportunities.

In order to facilitate the land tenure arrangements, the Commonwealth have introduced the *Native Title Amendment Bill* (No. 2) 2009 (Cth). An analysis of that Bill is outside the scope of this paper. In order to facilitate the WA Housing Authority developing such land and managing the housing, the *Aboriginal Housing Amendment Bill* 2009 (WA) has been drafted.

The Bill provides the Authority with widened powers and relaxed approval processes for the upgrade, repair and development of housing and associated infrastructure and housing management in remote WA, including the ability to enter joint ventures and agency agreements.

Under the Bill the Housing Authority must enter into 'land management agreements' with 'Aboriginal entities'. By signing, the Aboriginal entities agree to allow the Housing Authority to manage the land and enter into tenancy agreements with individual community members for nominated houses on nominated lots. By entering such agreements, for the first time the *Residential Tenancies Act* 1987 (WA) will begin to apply in remote Aboriginal communities.

ALSWA argues that the Bill is drafted so that there is no real choice for the Aboriginal entities or the eventual Aboriginal tenants in the way the housing management agreements and residential tenancy agreements are drafted and that the government has unfair bargaining power. The amendments offer little room for negotiating the terms of the agreements, little in the way of dispute resolution processes and community education and most alarmingly little processes for the effective participation and empowerment of Aboriginal peoples. This is arguably in breach the Aboriginal communities' rights to self-determination and the NPARIH.

ALSWA has provided a series of recommendations in this submission that will provide for a more balanced playing field and greater participation of Aboriginal peoples in the design, development, maintenance and management of Aboriginal housing in remote WA.

4. The current WA remote housing and infrastructure crisis

The state of housing and infrastructure for Aboriginal peoples in remote WA is in crisis now, as it has been for some time.[3] Overcrowding is rampant[4] and the houses are generally in bad condition with a backlog of repairs and maintenance required (one in four requiring urgent attention just to be habitable) and many requiring demolition.[5] In addition, the rents charged are usually so low that the community members are ineligible for Centrelink rent assistance, contributing to their disadvantage and poverty.[6]

As well as terrible housing conditions, many communities lack basic infrastructure that other Australians readily enjoy including access to water, power, sewerage, rubbish collection and bitumen roads. They also lack access to telecommunications such as mobile phones, television and the internet.

When the Special Rapporteur on adequate housing visited Australia in 2006 he was disturbed by the conditions of remote housing and said it contributed to the "serious hidden national housing crisis" Australia was experiencing.[7]

It is arguable that these conditions are in breach of international law including Article 25(1) of the *Universal Declaration of Human Rights* (UDHR) and Article 11 of the *International Covenant on Economic, Social and Cultural Rights* (ICCPR).

> *Article 25(1) UDHR: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."*
>
> *"Article 11(1) ICCPR: The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent."*

5. How the crisis was able to occur

The appalling situation of remote Aboriginal Western Australians living in third world conditions has been able to occur because it is 'out of sight and out of mind' for most and affecting Aboriginal peoples who have been disempowered and oppressed.

---

[3] Solonec, "Housing for Indigenous Western Australians: Part Two – Indigenous Community Housing" (2008) ILB V7, Issue 5, page 23.
[4] In 2006, 41% of remote Indigenous households in WA were overcrowded: Australian Institute of Health and Welfare, *Indigenous Housing Indicators 2005 – 06* (2007) 57.
[5] Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2005,* (2005) Attachment 10A, Table 10A2.2.2; and see Department of Families, Community Services and Indigenous Affairs, *Living in the Sunburnt Country: Indigenous Housing Findings of the Review of the Community Housing and Infrastructure Program* (2007).
[6] Michael Dillon, 'Remote Indigenous Housing in 2020: Visions or Oversight? (2006) *Public Administration Today*, 14.

Aboriginal Community Housing in WA has been for over 40 years, primarily funded through the Community Housing and Infrastructure Program (CHIP). This Commonwealth program was one of a raft of programs created during the 'integration' phase of government policy for Aboriginal peoples in Australia, occurring around the time of the 1967 referendum.

CHIP was designed to meet the housing needs of Aboriginal peoples unable to access mainstream housing options, the private rental market or purchase their own homes. The funds were distributed to Indigenous Community Housing Organisations (ICHOs) to manage the houses.

Whilst this idea of community controlled housing was one that was idealistically sound and with good intentions, it failed to deliver on many fronts and in many respects, set the ICHOs up to fail. They were not given the corporate and housing management governance training, funding or support they needed and had to cope with issues including nepotism, poor associated infrastructure, poverty stricken tenants who all have in some way been disempowered and oppressed and the financial and communication barriers associated with their remoteness.

It was not surprising then, when CHIP was reviewed by Price Waterhouse Coopers, that it was deemed a failure. Their final report handed down in February 2007, "Living in the Sunburnt Country" stated in its overall conclusion that:

> *"The housing needs of Indigenous Australians in remote areas have not been well served and the interests and expectations of tax payers have not been met. CHIP in its current form contributes to the policy confusion, complex administration and poor outcomes and accountability of government funded housing, infrastructure and municipal services. The Community Housing and Infrastructure Program should be abolished."*[8]

At the time of the review, WA had the largest number of remote and very remote ICHOs in Australia with 34 providers servicing 121 communities with 2,261 houses. It seems clear that few of these providers were consulted in the review.

Some of the ICHOs we have consulted with say that the report was not as black and white as it was made out and that they had been doing well, despite challenging conditions and had built strong relationships with communities in a process that was empowering. This is supported by the fact that in compiling the report, only two Aboriginal organisations from WA were consulted, both from Kununurra. This is in stark contrast to the report itself, which said:

> *"As part of the Review, significant time was spent travelling to all States and Territories speaking with Indigenous communities and service providers about the issues facing Indigenous Australians, particularly those living in the remotest parts of Australia."*[9]

Although Kununurra is in the Kimberley, as a prospering mining, agricultural and tourism town, it hardly represents remote WA. Still, the report was embraced as a justification for radical and sweeping changes to remote Indigenous community housing, as discussed in this submission.

[8] Department of Families, Community Services and Indigenous Affairs, *Living in the Sunburnt Country: Indigenous Housing Findings of the Review of the Community Housing and Infrastructure Program* (2007).
[9] Ibid.

6. Lack of Aboriginal Advocacy Housing Bodies

In researching and preparing this submission and in recently providing a submission to the Inquiry into Homelessness Legislation (attached to this submission as "**Annexure A**"), ALSWA have noted a clear absence of housing organisations in WA that are resourced to provide expert legal advice, write submissions and generally lobby and advocate for Aboriginal housing, and in particular remote housing. There is also a clear absence of umbrella organisations nationally and in WA that assist in uniting and strengthening Aboriginal housing organisations.

Whilst organisations such as Community Legal Centres, the Tenants Advice Service of WA, Shelter WA, Jacaranda house and Anglicare all provide limited assistance to Aboriginal peoples in WA regarding housing issues (mainly tenancy), they are not Aboriginal organisations and their services are not solely dedicated to the complex needs of Aboriginal peoples, especially those in remote communities.

This is very concerning because Aboriginal housing in WA is so complex and because the housing disadvantage experienced by Aboriginal peoples in WA (including overcrowding and poor quality, maintenance and management of houses) filtrates throughout all sectors of the WA housing market including public housing, community housing, private rental housing and home ownership. That's for those who have a home. Primary and tertiary homelessness for Aboriginal peoples in WA is also disproportionately high.

In remote communities, housing is even more complex and dire due many factors including a lack of basic infrastructure in the communities, land tenure and native title constraints, low literacy and numeracy rates, poverty and lack of employment.

Due to the complex and widespread disadvantage faced by Aboriginal peoples in regards to housing in WA, in order to 'bridge the gap' there is a clear need for special support, advocacy, empowerment, consultation of and participation with Aboriginal peoples in regards to housing. But, as ALSWA has found, there is a distinct lack of organisations funded to provide such services specifically for Aboriginal peoples.

This absence was also noticed by the United Nations Special Rapportuer on adequate housing, Miloon Kothari, who in his 2006 report said:

> *"Most disturbing is the absence of adequate and comprehensive participation processes for indigenous communities in decision-making forums, resulting in some cases in culturally inadequate solutions …. There is a need to establish decision-making processes and institutions, that are representative of all communities, and allow for proper self-determination of indigenous peoples."*[10]

Despite this comment, in mid 2008, the WA Aboriginal Housing and Infrastructure Council, which was supposed to advise the WA Minister of Housing on remote housing, was abolished and has not been replaced.

The WA Government's failure to provide appropriate and effective participation processes for Aboriginal peoples in regards to Aboriginal housing in WA is arguably, in breach of articles 3 and 32 of the *Declaration on the Rights of Indigenous Peoples*, which provide as follows:

[10] Supra n 6.

Article 3:

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

We recommend that allowance be made within the Bill to create and fund a peak Aboriginal housing advocacy body for Western Australia, so that the special needs of Aboriginal peoples are met and considered. This body could provide support, training and expert advice to organisations and service providers in relation to housing for Aboriginal peoples in a way that is culturally appropriate and accessible.

Recommendation 1: That an independent Western Australian Aboriginal housing advocacy body be created as part of the amendments and provided adequate funding for its operations for at least the period of agreement (10 years).

We recommend that the body referred to in Recommendation 1 be a not-for-profit non-governmental organisation with a controlling Board made up of Aboriginal peoples from all regions of WA and who are representative of those regions. We recommend the service work across all spheres of the housing market (homelessness, public housing, private rental, community housing and home ownership) to provide services and advocate for the special needs of Aboriginal peoples.

Services needed that could be provided include:
- the provision of legal advice, representation and alternative dispute resolution services for Aboriginal entities;
- training and support for Aboriginal housing organisations and businesses; and
- policy reform advice, media liaison, community consultation and community legal education about Aboriginal housing in WA.

We recommend that this organisation only service Aboriginal housing organisations and not Aboriginal tenants themselves (except in regards to the provision of community education), as servicing both the housing providers and the tenants will create a conflict of interest. The tenants will still need assistance however. In that regard, increased funding for existing services will be required.

Recommendation 2: That there be increased funding for the Tenants Advice Service of WA (or an alternative body such as the Aboriginal Legal Service of WA) and the Department of Commerce to provide tenancy advice, representation, dispute resolution (including conciliation), support and community legal education to Aboriginal and Torres Strait tenants in private, public and especially in remote housing.

7. A new approach – the National Partnership Agreement on Remote Indigenous Housing

It is not surprising, given the 2007 review of CHIP and its subsequent axing, that a new approach is being adopted for remote Indigenous housing, through the National Partnership Agreement on Remote Indigenous Housing (NPARIH), which promises a much needed $496 million for remote housing in WA, out of a larger pool of $5.5 billion for the whole of Australia, from the Commonwealth Government.

The Commonwealth has promised this money to the WA State Government over a 10 year period and agreed to have responsibility for:

(a) "funding for additional Indigenous housing and housing-related infrastructure in remote Australia, conditional on secure land tenure being settled, to significantly reduce overcrowding and homelessness with the aim that a significant level of unmet housing need is met by the end of this period;

(b) subject to paragraphs (c), funding for the provision of some municipal and essential services under existing arrangements to Indigenous communities pending the development and take up of agreed funding responsibilities with the States and the Northern Territory; and

(c) agreeing a process with each jurisdiction on the scope and timing for comprehensive audits of the state of municipal and essential services within relevant Indigenous communities to be undertaken from 2009. The audits will assess the level and need for municipal and essential services as well as an assessment of required housing related infrastructure."

As part of the agreement, the WA Government has agreed to have responsibility for:

(a) "provision of housing in Indigenous communities and through State and territory housing authorities be the major deliverer of housing for Indigenous people in remote areas of Australia;

(b) ensuring provision of standardised tenancy management and support for all Indigenous housing in remote areas consistent with public housing standards of tenancy management including through, where appropriate existing service providers; and

(c) developing and implementing land tenure arrangement to facilitate effective asset management, essential services and economic development opportunities."

The full agreement can be downloaded from:

http://www.fahcsia.gov.au/sa/indigenous/progserv/housing/Pages/RemoteIndigenousHousing.aspx

Part C concerns native title and has been partially dealt with already in the *Native Title Amendment Bill* (No. 2) 2009 (Cth). These amendments allow the creation of a new native title process for the delivery and construction of public housing and infrastructure in communities on Aboriginal held land, in a way that does not extinguish native title.

The content of these amendments, whilst important to understand so as to place the Bill in proper context, are outside the scope of this submission. However, many organisations with expert knowledge have provided submissions about the amendments to the *Native Title Act*, which the WA Parliament should be aware of and can access at the following webpage:

http://www.ag.gov.au/nativetitlesystemreform#2009Bill

8. International Concern

As already mentioned, when the Special Rapporteur on adequate housing visited Australia in August 2006, concern was raised about the state of housing for Aboriginal peoples and their lack of participation in decision making about housing. In August 2009 the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, James Anaya, also visited Australia. In his report, he mentioned Koothari's visit in 2006 quoting from Koothari's report that indigenous peoples in Australia face a "severe housing crisis, evidence by the lack of affordable and culturally appropriate housing, lack of support services, the significant levels of poverty and the underlying discrimination". Mr Anaya went on to comment that these problems still existed and were contributing "to overcrowded living conditions and homelessness in Indigenous communities at rates exceeding those of the mainstream population." Mr Anaya then went on to specifically discuss the NPARIH as follows:

> 42. Primarily through its *National Partnership on Remote Indigenous Housing*, the Closing the Gap campaign promises to address the key issues of overcrowding, homelessness, poor housing conditions, and severe housing shortages. However, the new policy envisages the indigenous communities handing over control of their community lands to the Government for housing to be provided and managed. Long-term leases, arranged with indigenous landowners or traditional owners, are becoming a precondition for delivering housing and upgrade services. These leases grant the Government access to and control over the indigenous land for a term of at least 40 years. Tenancy management is to be undertaken by state and territory housing authorities, thus removing tenancy management from indigenous control. The Government argues that this leasing arrangement ensures clear ownership of fixed assets and therefore responsibility to maintain those assets for the benefit of residents. It further asserts that lease agreements are voluntary, although it will not provide housing without an agreement.

43. Almost everywhere, the Special Rapporteur heard concerns about the Government's approach. Numerous indigenous people, especially community leaders, expressed feeling pressured or even "bribed" into handing over ownership and control of their lands to the Government in exchange for much-needed housing services. The Special Rapporteur heard these concerns even in communities that have negotiated leases with the Government, such as in the Groote Eylandt communities of Angurugu, Umbakumba, and Milyakburra. In addition, the Special Rapporteur heard concerns that housing construction and upgrade services have, by and large, been delivered in a manner that bypasses locally-run Aboriginal construction companies, missing the opportunity to provide jobs and training to indigenous peoples for the delivery of these services, although it is worth noting that under the *National Partnership Agreement on Remote Indigenous Housing*, 20 per cent of "local employment" is required for all new housing construction.

44. The Special Rapporteur is concerned that this leasing scheme, in conjunction with other initiatives such as the 2006 amendments to the Aboriginal Land Rights Act (Northern Territory) 1976, referenced in paragraph 22, *supra*, promotes individual land tenure to the detriment of traditional indigenous communal land tenure and diminishes indigenous control over lands that traditionally have been held collectively. In this regard, the individualisation of lands could implicate threats to indigenous peoples' cultural integrity and way of life, in addition to affronting their property rights.

The full reports of the Special Rapporteurs can be downloaded at the following sites:

> *Report of the Special Rapporteur on the human rights and fundamental freedoms of Indigenous peoples, James Anaya, The Situation of Indigenous Peoples in Australia (August 2009)*
> http://www2.ohchr.org/english/issues/indigenous/rapporteur/docs/ReportVisitAustralia.pdf
>
> *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari Addendum, Mission to Australia (31 July to 15 August 2006)*
> http://daccess-ods.un.org/TMP/7667441.96414948.html

ALSWA concurs with and echoes the concerns of Special Rapporteurs Anaya and Kothari.

9. The Aboriginal Housing Legislation Amendment Bill (WA)

Parts A and B above from the NPARIH are now being implemented by the WA Government through the creation of the Bill and amendments to the *Housing Act* 1980 (WA) (the Housing Act) and the *Aboriginal Affairs Planning Authority Act* 1972 (WA) (the AAPA Act). The Bill also has important consequences regarding the application for the first time, of the *Residential Tenancies Act* 1987 (WA) (the RTA) to remote Aboriginal communities in WA.

The primary purpose of the Bill, as explained in the Second Reading Speech is "to create a mechanism —the Housing Management Agreement—under which the Housing Authority [the Department of Housing] can legally control and manage the letting and leasing of housing on Aboriginal land on behalf of any Aboriginal entity that has the power to grant a lease over Aboriginal land. An Aboriginal entity includes the Aboriginal Lands Trust, the Aboriginal Affairs Planning Authority, an Aboriginal corporation or an Aboriginal incorporated association."

These Aboriginal entities will be asked to enter a Housing Management Agreement and in return the Authority will manage the houses (including rent collection and maintenance) and the RTA will then begin to apply to those houses.

The remainder of this submission will critique the Bill in detail and provide recommendations from an Aboriginal perspective.

9.1 Are the Housing Management Agreements really voluntary?

In the Second Reading Speech of the Bill, the first key feature of the housing management agreements alerted to was that "[t]he agreement is voluntary and will be entered into on a case-by-case basis only when the Housing Authority is satisfied that the Aboriginal inhabitants of the land wish to do so." This will be provided for in the new section 62B of the Housing Act.

Whilst on a literal reading of the amendments this may be true, when we start to look more closely at the situation, the element of choice is not evident. The amendments provide no consideration of the possibility of an Aboriginal entity refusing to enter a housing management agreement. There appears to be no room for negotiation, no right of appeal and no right to independent legal advice.

Because the housing and infrastructure situation for remote WA is so dire there is no element of choice in the reforms. The way the amendments are drafted indicate that Aboriginal communities who do not sign a housing management agreement on the terms set by the government will receive no funding to repair and upgrade their existing houses or build new houses and will be 'cut loose' to fend for themselves. Either they sign up on the government's terms, or their communities face further poverty and disadvantage.

The 'housing management agreements' that must be entered into by Aboriginal entities in order to facilitate the change required and have access to the Commonwealth funds, are therefore agreements where the balance of power rests solely with the Government.

For this reason, we reassert our above recommendation, that mechanisms be included in the Bill which advocate and empower Aboriginal communities and peoples. This should include the necessary provision of funded legal advice for communities considering signing the agreements, mediation services and avenues for appeal should they not agree with the terms offered.

Recommendation 3: That further consideration be given to providing Aboriginal entities with access to legal advice, alternative dispute resolution processes and rights of appeal with regards to the entering into Housing Management Agreements, to ensure procedural fairness.

9.2 Sections 4 and 5 Housing Act – Objects and Interpretation

The amendments to sections 4 and 5 of the Housing Act appear to expand the role and purpose of the Authority to manage and maintain houses it does not own and make arrangements for third parties to provide services in relation to the letting and leasing of houses. This is to complement and enable joint ventures and housing management agreements on existing houses, which are discussed below.

Whilst ALSWA can see the need to broaden the Authority's powers in order to give effect to the amendments, it is important that the Authority, as the housing provider of last resort to also take responsibility for educating and empowering Aboriginal communities and peoples. Substantial community education about the Housing Act and the RTA will be required in order for the amendments to be successful. For this reason, we recommend a further object be added as follows.

Recommendation 4: That an object be added to section 4 of the Housing Act for the "provision of community education in forms that are accessible to culturally and linguistically diverse peoples about public housing".

9.3 Section 12A Housing Act – Joint Ventures

Under the Bill, the current section 12A of the Housing Act is deleted and replaced by a new section about joint ventures. This is basically a broadening of the kinds of joint ventures the Authority is able to enter into with the private and not-for-profit sector, and a relaxing of approval process for such ventures, so long as the ventures fit in with the expanded objects of the Act.

ALSWA is concerned that the current section 12A is replaced by a section which provides far less guidance as to the types of joint ventures entered into and the approvals required. Although we have been informed that it is not the intention of the Bill that the Authority enter joint ventures with established real estate companies, there is nothing to say that this will not occur. We seek clarification on this.

Recommendation 5: That the proposed section 12A of the Housing Act provide guidelines on the types of joint ventures that the Authority is able to enter into.

Our main concerns with joint ventures are with the private sector, which is profit driven. We assume that a number of the joint ventures will be for the design, construction, repair and maintenance of housing and infrastructure, rather than the housing management itself. There are many stories about poor workmanship in remote communities in the building, design and maintenance of houses, and the charging of excessive fees for the services provided. Mechanisms need to be put in place to ensure that this does not occur.

Recommendation 6: That the proposed section 12A require that all joint ventures entered into have rigorous reporting and evaluation requirements.

We also believe, that in order to properly engage with Aboriginal peoples and promote their active participation in the reforms and to foster Aboriginal wealth and employment, that preference be given to joint ventures with Aboriginal not-

for-profit organisations and businesses in all joint ventures connected with remote housing and that business and governance support is provided to those organisations and businesses.

Recommendation 7: That a provision be made within section 12A to allow for preference to be given to joint ventures with Aboriginal organisations and businesses.

Where joint ventures are formed with private companies and not-for-profit organisations who are not Aboriginal, we recommend that it be a condition of the venture that the organisations employ a certain proportion of Aboriginal peoples and undergo cultural awareness training relevant to the community they will be working in.

Recommendation 8: That it be legislated within section 12A of the Housing Act that all organisations who enter joint ventures with the Housing Authority for the supply, maintenance or management of houses to Aboriginal communities employ and train a set proportion of local Aboriginal peoples and engage in ongoing local cultural awareness training.

The proposed section 12A(2) of the Housing Act is about the Housing Authority having the ability be maintained on boards or bodies having a controlling interest in the project. In addition to this, we recommend that scope be made for representatives of Aboriginal communities and / Aboriginal entities to also be included on such Boards or bodies.

9.4. Sections 13 and 22 Housing Act - Minister's Consent removed

The effect of the amendments to sections 13 and 22 of the Housing Act is to remove the need to gain the Minister of Housing's consent to:

- delegate powers of the Authority to its officers (s.13);
- re-plan and sub-divide land, secure the closing of any street or the extinguishment of any easement or restrictive covenant, so long as it is with the consent of the WA Planning Commission (s.22(1)(a));
- erect houses and other buildings, or lay out and construct streets (s.22(1)(b)); and
- enter into arrangements with other bodies for services associated with the houses including the making of streets and the establishment or extension of sewerage, drainage, water, gas, power, lighting and communications systems (s.22(d)).

The explanation for this relaxing of processes is justified in the Explanatory Memorandum to the Bill as to improve efficiency and practical application of the Act. It was cited as "neither practical nor efficient for the Authority to obtain the Minister's consent" for such matters; and in regard to the delegations, that was cited as an outdated 30 year old process.

Whilst ALSWA understands the need for urgent improvement of housing conditions in remote communities and the needing to cut red tape, we are concerned about the lack of high level supervision surrounding the decisions and the lack of Aboriginal involvement.

In particular, we are concerned that some of the powers that the Minister's consent has been removed for include the creation of roads and easements, which usually have the effect of extinguishing native title, and that under the proposed section 62H no compensation is payable to Aboriginal entities.

Removing such consent may also have implications in regards to administrative fairness and the right of review.

We recommend that there be further consideration of the removal of the requirement for high level consent for such decision and that structures be put in place to ensure that Aboriginal peoples are involved in such decision making.

Recommendation 9: That a legal opinion is sought from the Crown Solicitor's office as to the effect of the removal of Ministerial consent in sections 13 and 22 of the Housing Act in regards to administrative law.

9.5. Section 22 Housing Act – power to develop 'any land'

The amendments to section 22 of the Housing Act broaden the Authority's power to develop 'any land' apart from Crown Land not held by the Authority. As we understand it, this will give the Authority the power to develop Aboriginal Lands Trust land, though we understand there is still some confusion about whether or not this can be extended to national parks. We recommend this be clarified now to avoid future confusion.

Recommendation 10: That clarification is made under section 22(1)(a) of the Housing Act as to whether not the Authority is able to develop land within national parks.

9.6. Insertion of New Part VIIA – Housing on Aboriginal Land

The crux of the amendments are the insertion of a new Part to the Housing Act, Party VIIA, "Housing on Aboriginal Land", which is analysed below.

9.6.1. Section 62A – Terms Used

In order to give proper effect to consultation we recommend that the term 'Aboriginal inhabitants' as referred to in subsections 62C and 62F(B) be defined.

Recommendation 11: That "Aboriginal inhabitants" are defined in section 62A of the proposed Part VIIA of the Housing Act.

9.6.2. Section 62B – Authority may enter into housing management agreement

In regards to section 62B(1) and the inclusion of the word 'may' and the sentiments of section 62B(3), we have already commented on the practically 'involuntary' nature of the agreements and reassert our recommendations that provisions be considered in the legislation to allow for legal advice, negotiation, dispute resolution and appeal processes for the 'Aboriginal entities' to make the negotiations a more level playing field.

In regards to section 62(2), we recommend that scope be given to the Housing Authority to enter into housing management agreements which enable the Authority to control and manage "on behalf of or in partnership with the Aboriginal entity" the letting and leasing of housing on the Aboriginal land.

This extension could apply to communities where Aboriginal entities have been managing their houses successfully and wish to continue to have a major role in that management, with the support of the Authority. Not all remote Indigenous community housing has been badly managed,[11] and it is unfair to tar all Aboriginal communities with the same brush.

This is about working 'with' Aboriginal communities, rather than taking a patronising 'we know better' approach, which has never worked for Australian governments.

Recommendation 12: That section 62B(2) be amended to include the words "or in partnership with" after "on behalf of".

9.6.3. Section 62C – Wishes of Aboriginal inhabitants to be ascertained

Our main concern about the new part rests with the proposed section 62C, "Wishes of Aboriginal inhabitants to be ascertained". We believe that the section requires substantial expansion as it currently offers little protection for the wishes of the traditional owners and others who may have lived on those lands for many years.

Under the proposed section 62C, the Authority cannot enter into a housing management agreement "unless the Authority is satisfied that doing so would accord with the wishes of the Aboriginal inhabitants of the Aboriginal land to the extent that those wishes can be ascertained and are practicable".

First, as discussed above, the term "Aboriginal inhabitants" is not defined. One would consider that at the minimum, the respective Native Title Representative Bodies should be consulted. What about people who have lived on the land for a certain period but are not traditional owners? Do they need to be consulted? As noted above, we recommend this be clarified.

Second and more concerning is the exemption that the wishes of the Aboriginal inhabitants need only be considered, "to the extent that those wishes can be ascertained and are practicable".

It is highly likely in some instances, the wishes of the Aboriginal inhabitants will be difficult to ascertain because of language barriers, cultural obligations (e.g. sorry time, lore business), low literacy and numeracy or because the governance structures required are not functioning.

[11] The fact that some of the Aboriginal entities have been successfully managing their houses is referred to in the Second Reading Speech of the Bill which said that for some communities, community managed housing "has worked well where rent was collected and used to maintain the housing stock".

And what is meant by only where 'practicable'? If the wishes of the Aboriginal inhabitants do not fall in line with the reforms will that be considered impracticable?

The section said that the 'Housing Authority' must be satisfied that the agreement accords with the wishes of these people. How must they be satisfied? What are the bench marks? How is this reported?

We believe this section should clearly state a structure for consultation which is specific about who is consulted, how they are consulted and how decisions are reached. This process needs to be transparent and structured.

Recommendation 13: That the proposed section 62C of the Housing Act be rewritten with structured consultation processes including the right to appeal and transparent reporting of such consultation.

9.6.4. Section 62D – Lots and houses to which housing management agreement applies

The Explanatory Memorandum to the Bill explains that the reference to nominated lots and nominated houses on the tenancy management agreement in section 62D is necessary so that houses can be accurately identified and so that the Authority's obligations will extend to providing and maintaining things up to the boundary line, including fences and gates. By nominating houses on lots, it will also specify exactly which buildings must be maintained, in case there are outbuildings or sheds which are used as dwellings but not intended to be covered by the agreement.

It then goes on to say that "it would not be possible nor cost effective for the Authority to bring such buildings [e.g. outbuildings and sheds] up to the standards required to meet an owner's responsibility for cleanliness and repairs under s.42" of the RTA. Section 42 of the RTA provides as follows:

> ***42. Owner's responsibility for cleanliness and repairs***
>
> *(1) It is a term of every agreement that the owner —*
> *(a) shall provide the premises in a reasonable state of cleanliness;*
> *(b) shall provide and maintain the premises in a reasonable state of repair having regard to their age, character and prospective life; and*
> *(c) shall comply with all requirements in respect of buildings, health and safety under any other written law in so far as they apply to the premises.*
>
> *(2) In this section premises includes chattels provided with the premises (whether under the agreement or not) for use by the tenant.*

Whilst ALSWA can understand the desire for the Authority to not be bound by this section for outhouses and sheds, if they are within the

nominated lot, then someone will need to take responsibility for them. Due to the overcrowding in remote WA, it is highly likely that out houses or sheds on nominated lots will be used as housing and if they are not maintained they will create an unsafe hazard for the residents of the communities, particularly the children and will have insurance implications for the nominated lots. It is preferable that such hazards are removed. We recommend that this be further considered.

Recommendation 14: That further consideration be given to the removal of sheds, outhouses and other buildings on nominated lots covered by housing management agreements but which are not nominated houses.

9.6.5. Section 62E – Rent for nominated lots and nominated houses

ALSWA supports the notion of different rents, according to the types of houses, lots and according to the incomes of the tenants. However, special consideration will need to be given to remoteness and we recommend that a special calculation for rent in remote communities be calculated. This is because, in living in remote locations, everything is more expensive, especially food and petrol.

Recommendation 15: That remoteness be considered as a 'class' of rent referred to in section 62E(4)(b).

The Authority will also need to carefully consider the cultural obligation to house relations and the cultural practices of people in remote communities to frequently visit and stay with family in other communities. This results in extra wear and tear of the houses and extra people staying in the houses, sometimes for quite extended periods. At what point do these people need to be considered in the rent calculation? We recommend that research be conducted into this practice.

Recommendation 16: That research be conducted into the cultural obligations in remote communities to house visiting relations and whether that should be considered in the calculation of rent.

9.6.6. Section 62F – Other terms of housing management agreement

Section 62F sets out the things that a housing management agreement must include.

Section 62F(a) and (c)

Under parts (a) and (b) of section 62F, the Authority must determine and execute on behalf of the Aboriginal entity the terms of residential tenancies agreements that will apply to the nominated lots or houses and these details must be included in the housing management agreements. Under the tenancy agreements, by virtue of section 62G, the RTA will apply. Please see below a discussion about the application of the RTA. Like the housing management agreements, the signing of individual tenancy agreements with community members will be agreements of little

choice or ability to negotiate terms. And then, when they are signed, because it is the first time such laws will operate in these communities and because of language, cultural, literacy and numeracy barriers, many tenants will have difficulty in understanding the terms of the tenancy agreements they sign.

Section 62F(b)

In relation to deciding who the premises are rented to, it says under 62F(b) that the Authority must have regard to the "wishes of the Aboriginal inhabitants of the land to the extent those wishes can be ascertained and are practicable." This terminology is the same used in section 62C and we reassert the comments about that made at 7.6.3 above, i.e. that "Aboriginal inhabitants" should be defined and that there should be structured consultation processes including the right to appeal and transparent reporting of such consultation.

Recommendation 17: That the proposed subsection 62F(b) of the Housing Act be rewritten with structured consultation processes including the right to appeal and transparent reporting of such consultation.

Section 62F (e), (f) and (g)

Subsections (e), (f) and (g) provide for variation and early termination to the agreement. In regards to early termination, ALSWA recommends that special efforts be made to understand and cater for the cultural practice of leaving a house once a resident has passed away. In some Aboriginal cultures this may be only for a short time or until the house has been smoked and sometimes painted a different colour. In other cultures and depending on who the person is, it may be longer. For some tenants, they may never be allowed to return to the house. For example, if a husband and wife were living in the house and the husband died, then (in some remote cultures) it would not be appropriate for the wife to return to the house at any stage. Often, it will be up to the family to decide when the house can be inhabited again and by who.

Recommendation 18: That the practice of leaving a house once a resident has passed away is researched so as to gain a proper understanding of the practical application of this cultural practice.

Recommendation 19: That special consideration of the cultural practice of leaving a house after a resident dies occur in relation to subsections 62F(e), (f) and (g).

9.6.7. Section 62G – Application of the *Residential Tenancies Act* 1987 (WA)

Section 62G sets circumstances of when the RTA will apply. This is necessary because there has been some debate in the past, as to whether the RTA applies to remote community housing in WA.[12]

[12] Supra n 2.

The section puts the Housing Authority in the position of being the owner as defined in the RTA and the nominated lots and houses in the position of being residential tenancies under the RTA. The effect is that the RTA will begin to apply to all tenancy agreements which are entered into a listed on the housing management agreements.

ALSWA has serious concerns about the blanket application of the RTA, without any amendment to the RTA to consider the special needs of Aboriginal peoples. It will also mean that section 64 of the RTA (notice of termination by owner without any ground) will apply. Such forced evictions will have a devastating effect on Aboriginal peoples in remote communities, where there is a lack of alternative and crisis accommodation.

Recommendation 20: That the Bill quarantine the use of Section 64 of the RTA for any service providers providing housing to remote Aboriginal communities under the Bill, including the Department of Housing, for the length of the agreement (10 years).

There is also a serious need for culturally appropriate and accessible community education, conciliation and dispute resolution services to be provided by the Department of Commerce and Community Legal Centres to remote communities.

The RTA is an Act that has been developed for mainstream housing. There is no consideration in the Act of the special needs of remote Aboriginal peoples or of their cultures. In particular, the cultural practice of vacating houses once someone dies, and of visiting relations in other communities sometimes for extended periods needs to be considered.

Recommendation 21: That the RTA be amended to more aptly consider the needs of Aboriginal peoples in remote communities.

Recommendation 22: That the Housing Authority in partnership with the Department of Commerce and Community Legal Centres provide culturally appropriate and accessible community education, conciliation and dispute resolution services to remote Aboriginal housing tenants.

A further concern of ALSWA is that the RTA will only apply in remote communities where (a) communities enter housing management agreements and (b) the individuals enter tenancy management agreements. So unless the communities agree to all the government's terms, they will be forced to stay in unfunded housing that is not protected by the RTA.

ALSWA believes that all Aboriginal tenants of community housing should be afforded the protections of the RTA.

We recommend that the subsections 5(2)(c)(i) and (ii) of the RTA be amended as was recommended in the Stamfords Report[13] to define 'company' to mean a company established under the *Corporations Act* 2001 (Cth) and not an organisation incorporated with the Department of Commerce or the Office of the Registrar of Indigenous Corporations (ORIC).

Recommendation 23: That subsections 5(2)(c)(i) and (ii) of the RTA be amended to define 'company' to mean a company established under the *Corporations Act* 2001 (Cth) and not an organisation incorporated with the Department of Commerce or the Office of the Registrar of Indigenous Corporations (ORIC).

9.6.8. Section 62H – No interest in land and no compensation payable

This section asserts that the housing management agree does not create any interest in Aboriginal land in favour of the authority, is not an acquisition of the property and that no compensation is payable.

ALSWA is cautious about the ability of this section to do the things it says. In practical reality, the Authority will for a set period acquire and manage the land and the houses on it. In order to protect the Aboriginal inhabitants of the land, ALSWA recommend that the housing management agreements be no longer than 10 years, as the Commonwealth funding is only guaranteed for that amount of time and because there is a 10 year sunset clause in the *Native Title Act*.

Recommendation 24: That the housing management agreements not extend for terms greater than 10 years.

9.6.9. Section 62J – Authority may act through agent

Under section 62J, the Authority may enter into an agency arrangement with a person or body to exercise "all or any of the powers considered on the Authority under a housing management agreement and to request a fee for the service".

This section seems to have two practical applications. First is that it may allow the Authority to engage an Aboriginal organisation to manage the houses according to the agreement. Second it is that it may allow the Authority to engage a private real estate company to manage the houses.

Our concerns here are similar to those expressed above in relation to joint ventures. On the basis of this concern, we recommend that first preference be given to not-for-profit Aboriginal organisations in agency relationships and that special requirements about cultural awareness training and employment of Aboriginal staff in those agencies occur.

[13] Stamfords Advisors Consultants, *Statutory Review of the Residential Tenancies Act 1987 (WA): Final Report*, (2002) recommendation 10.

Recommendation 25: That the proposed section 62J of the Housing Act require that all agency arrangements entered into by the Authority have rigorous reporting and evaluation requirements.

Recommendation 26: That a provision be made within section 62J of the Housing Act to allow for preference to be given to agency agreements with Aboriginal organisations and businesses.

Recommendation 27: That it be legislated within section 62J of the Housing Act that all organisations who enter agency agreements with the Housing Authority for the supply, maintenance or management of houses to Aboriginal communities, employ a set proportion of Aboriginal peoples and engage in ongoing local cultural awareness training.

9.7. Other comments about the Bill

As mentioned, there is only 10 years of funding committed by the Commonwealth Government and a sunset clause again of 10 years for the amendments to the *Native Title Act*. We strongly recommend the WA government consider how these arrangements provided for in these amendments will be funded after that 10 year period ends.

Recommendation 28: That budget and planning considerations for how these amendments will be funded after the 10 years of Commonwealth funding runs out commence immediately.

There seems to be no allocation throughout the bill about housing design and consulting with the Aboriginal inhabitants about the style of the 200 new houses that will be built. We request and an explanation of why design is not incorporated into the amendments and recommend strongly that allocation be made for Aboriginal consultation, participation and involvement in choosing the design of the housing and infrastructure that is developed with the funds. We recommend this be incorporated in section 62C.

Recommendation 29: That it be legislated within section 62C of the Housing Act that there be thorough consultation, participation and involvement of Aboriginal peoples in regards to the design of the housing and infrastructure that is developed in remote communities of WA.

10.Conclusion

This submission has been drafted in order to give the WA Parliament a more balanced understanding of the state of housing in remote Aboriginal communities of WA, including the concerns that have been raised internationally by Special Rapporteurs of the United Nations, and a historical context to how this position was able to occur.

The submission has carefully considered the Bill and given various recommendations on how the Bill can be drafted so that it works in collaboration and partnership with Aboriginal communities and peoples.

Whilst ALSWA understands the desire of the Department of Housing and the Legislative Assembly to push through this Bill so as to gain access to the much needed $496 million dollars that has been promised by the Commonwealth Government in return for the passing of the Bill, ALSWA strongly recommends that the Bill be carefully considered in terms of the way it breaches international law and the inherent rights of Aboriginal peoples as traditional owners of the land.

ALSWA thanks the Legislative Council for the opportunity to provide this submission and looks forward to working with members to create a more balanced Bill that is of benefit to the Aboriginal community of Western Australia and the wider population.