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VALS supplementary submission in response to the 'Living in the Sunburnt Country: Indigenous Housing – Findings of the Review of the Community Housing and Infrastructure Programme Final Report' – sent 3 July 2007.

Just as houses need effective architecture and design, so too do Indigenous housing policies. And as with houses, architectural and design failures at the policy level are costly, have huge social implications and are extremely difficult to rectify.¹

Background

This document is the supplementary submission of the Victorian Aboriginal Legal Service Co-operative Limited in response to the 'Living in the Sunburnt Country: Indigenous Housing – Findings of the Review of the Community Housing and Infrastructure Programme Final Report' (Report). Subsequent to VALS submitting an original response to the Report on 27 April 2007 VALS received advice from a law firm providing pro bono assistance. This supplementary submission is based on such advice.

Core and Non Core Indigenous Australians: The Commonwealth Government's shrinking commitment to housing accessibility

Summary

The adequacy of Australia's housing policies in general, and for Indigenous Australian people in particular, has been the subject of criticism by United Nations bodies such as the Committee for Economic, Social and Cultural rights. Most recently the August 2006 report from the United Nations Rapporteur on Housing highlighted a range of deficiencies in relation to providing housing and paid particular attention to Indigenous Australians.

VALS argues that the further watering down of existing programs by excluding regional and metropolitan Indigenous Australians (70% of the Indigenous Australian population) from Australia Remote Indigenous Accommodation Program (ARIA), the replacement of the Community Housing and Infrastructure Programme (CHIP), is a further breach of Australia's human rights obligations.

Introduction

This is a supplementary submission of the Victorian Aboriginal Legal Service Co-operative Limited (VALS), in response to the 'Living in the Sunburnt Country: Indigenous Housing – Findings of the Review of the Community Housing and Infrastructure Programme Final Report' (CHIP review). The submission utilises pro bono advice from a law firm as to the current status of Human Rights Covenants, Instruments and Reports in relation to peoples' housing rights.

In our original submission we supported the objective of improving housing provision in remote areas but disagreed with the proposition that Indigenous Australian people in regional and metropolitan areas should have money taken away from them to fund this problem. Our

¹ Dillon, Michael, 'A New Policy Framework for Indigenous Housing' (Centre for Policy Development) as at, <http://cpd.org.au/node/4343>

submission drew attention to the Australia-wide housing crisis and referred to the UN Special Rapporteur Report of 2006. Recent census data highlights the growing number of Australians experiencing housing stress.

Our submission criticised the CHIP review for only considering overcrowding as an indicator of housing need and ignoring other indicators of need, such as affordability, evictions and stability. Our submission argued that Indigenous Australian housing provision in metropolitan and regional areas should be provided by Indigenous Australian and mainstream providers, not limited to mainstream providers. It is a fiction to pretend that only Indigenous Australian in remote areas have unmet housing need. Similarly it is not credible given the scale of the housing crisis, and the track record of mainstream providers in servicing Indigenous Australians, that mainstream provision is going to adequately respond to Indigenous Australian housing need.

Indigenous Australians access to appropriate housing is restricted by lower average incomes, larger families, racism by rental property owners and real estate agents. Also, Indigenous Australian's access to housing is restricted due to Government policies which privilege home ownership over renting. Such privileging of the former over the latter has helped create huge increases in the cost of housing and a housing affordability crisis. Against this unhappy collection of factors the CHIP review and the Minister's response represents a further retreat from housing accessibility for Indigenous Australians.

VALS argues that there are human rights implications for regional and metropolitan Indigenous Australians to the Commonwealth Government's decision to replace the Community Housing and Infrastructure Program with the Australia Remote Indigenous Accommodation Program (ARIA). The human rights implications arise from the fact that from 1 July 2008 Commonwealth funded Indigenous Australian specific housing will be provided only in some remote areas to the exclusion of regional and metropolitan Indigenous Australians.

The United Nations Covenants, Conventions and Committees relevant to considering Government obligations and responsibilities in relation to housing include:

- International Convention on the Elimination of All Forms of Racial Discrimination (CERD)
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- Committee on Economic, Social and Cultural Rights (CESCR).
- General Comment 4 of the Committee on Economic, Social and Cultural Rights
- The Convention on the Elimination of Discrimination against Women (CEDAW)
- The Convention on the Rights of the Child (CROC)
- United Nations Declaration on the Rights of Indigenous Peoples (Not ratified by UN General Assembly).

Apart from the Declaration on the Rights of Indigenous Peoples all the other instruments have been ratified and Government legislation and policy should conform with these instruments.

Only the International Convention on the Elimination of All Forms of Racial Discrimination has been recognised in Commonwealth legislation. It is a sad indicator of timidity and neglect by present and past Australian Governments that these other Human Rights Instruments have no domestic legislation to ensure they are acted on.

There have been UN human rights concerns about the adequacy of Australian Government policy to protect the right to housing. The recent changes to the CHIP program represent a further retreat by the Commonwealth Government from recognising its obligations to ensure accessible housing.

The human rights implications can in the first instance be drawn from an International Covenant that the Australian Government has both ratified and enacted into domestic legislation. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) was ratified 30 September 1975 and enacted in the *Racial Discrimination Act 1975* (Cth).

Also, human rights implications can be drawn from International Covenants that have been ratified only: International Covenant on Economic, Social and Cultural Rights (ICESCR) ratified 1 December 1975 International Covenant on Civil and Political Rights ratified on 13 August 1980 and Convention on the Rights of the Child and Convention on the Elimination of Discrimination against Women. The human rights implications can also be drawn from an international instrument that Australia should ratify, that is the Declaration on the Rights of Indigenous Peoples.

It is well established in UN human rights instruments and policy that specialist programs may be necessary to help overcome entrenched disadvantage. Abolishing or slashing access to a specialist program, such as CHIP, when there is an existing and worsening housing affordability blow out and widespread discrimination in place is equivalent to accepting reduced housing accessibility.

VALS argues that a mainstreaming policy results in a structure of service provision that is assumed to apply to all equally, but it in practice does not apply equally to all. Disadvantaged people, such as Indigenous Australians cannot access mainstream services to the same extent as other people due to reasons of culture, history and low socio economic status.

Non-Indigenous Australian culture generally fails to be self reflexive and recognise that the values it holds, some of which are racist and culturally insensitive, prevent Indigenous Australians using a service in the first place or returning to it in the second place.

VALS argues that excluding regional and metropolitan Indigenous Australians from targeted services arguably contravenes the following international law principles as mainstreaming housing in urban areas means Indigenous Australians will face difficulty in accessing housing.

- freedom from direct and indirect discrimination;
- the right to adequate housing;
- the need for special measures for disadvantaged people;
- the right to self-determination.

VALS argues that there is a place for both mainstream service provision and Indigenous Australian specific service provision. VALS takes a 'both/and' approach rather than an either/or approach (ie: you either have mainstream services or Indigenous Australian specific services). VALS argues there is need for both mainstream and Indigenous Australian services. Although

approximately 80% of Indigenous Australians prefer to use an Indigenous Australian service some Indigenous Australians choose mainstream services. Indigenous Australian services are not funded well enough to deal with all the demand for service that exists. Mainstream services are often relatively inaccessible due to indirect discrimination, limited funds and a lack of culturally inclusive policy and practice.

The recently released report by the Combined Aboriginal Organisations in the Northern Territory, in response to John Howard's proposal to deal with sexual abuse, draws attention to one of the common either/or policy cycles: the cycling between Government in control and community in control cycle. The paper highlights that community managed housing bodies are quite successful whilst some are not (pg 25). The report also highlights that the Northern Territory managed housing projects had some deficiencies. This again highlights that exclusive reliance on either mainstream or Indigenous providers is unhelpful.

FREEDOM FROM DISCRIMINATION

VALS argues that the reforms to housing contravene the international law principle of freedom from discrimination. Mainstreaming policy both directly and indirectly discriminates against disadvantaged people. VALS argues that excluding regional and metropolitan Indigenous Australians from Commonwealth Indigenous specific housing programs is discriminatory.

The following legislation and International Covenants can be used to support the above argument:

Racial Discrimination Act 1975 (Cth)

According to the pro bono law firm "The effect of section 9(1A) of the RDA is that circumstances in which Indigenous people are mainstreamed into general community services there is potential for that legislative move to constitute racial discrimination, depending upon the nature of the "term[s], condition[s] or requirement[s]" imposed upon the Indigenous group as part of their inclusion in mainstream programmes".

Sections 9(1) to (2) of the RDA outlined below contain a general prohibition of racial discrimination and define certain circumstances that will constitute racial discrimination:

Section 9(1): It is **unlawful** for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the **purpose or effect** of nullifying or **impairing** the recognition, **enjoyment or exercise, on an equal footing, of any human right** or fundamental freedom in the political, economic, social, cultural or any other field of public life.

Section 9(1c) Where the requirement to comply has the **purpose or effect of nullifying or impairing the recognition**, enjoyment or exercise, on an **equal footing**, by persons of the same race, colour, descent or national or ethnic origin as the other person, of any **human right or fundamental freedom** in the political, economic, social, cultural or any other field of public life;

Section 12 deals with racial discrimination in relation to land and housing:

- (1) It is **unlawful** for a person, whether as a principal or agent:
 - (a) to refuse or fail to dispose of any estate or interest in land, or any residential or business accommodation, to a second person;

- (b) to dispose of such an estate or interest or such accommodation to a second person on less favourable terms and conditions than those which are or would otherwise be offered;
 - (c) to treat a second person who is seeking to acquire or has acquired such an estate or interest or such accommodation less favourably than other persons in the same circumstances;
 - (d) to refuse to permit a second person to occupy any land or any residential or business accommodation; or
 - (e) to **terminate** any estate or **interest in land** of a second person or the right of a second person **to occupy any land or any residential** or business accommodation;
- by **reason of the race**, colour or national or ethnic origin of that second person or of any relative or associate of that second person.

VALS argues that the withdrawal of Indigenous Australian specific housing services from regional and metropolitan people is discriminatory.

International Convention on the Elimination of All Forms of Racial Discrimination

Article 5 of the CERD which contains a prohibition and elimination of racial discrimination in the area of housing.

Article 2(1)(a) of the CERD which states: each State Party undertakes to **engage in no act or practice of racial discrimination** against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

Article 2(1)(c) of the CERD which states: each State Party shall take **effective measures** to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of **creating or perpetuating** racial discrimination wherever it exists; ...”

Clause 5(e)(iii) of the ... which states: “In compliance with the fundamental obligations laid down in article 2 of this Convention, State Parties undertake to **prohibit and to eliminate racial discrimination** in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to **equality before the law**, notably in the enjoyment” of economic, social and cultural rights, in particular the **right to housing**.

General Recommendation 23 which calls upon States Parties to fulfil their CERD obligations and to:

- “(b) ensure that members of indigenous peoples are **free and equal in dignity and rights** and free from any discrimination, in particular that based on indigenous origin or identity;
- (c) provide indigenous peoples with **conditions allowing for a sustainable economic and social development** compatible with their cultural characteristics;

(d) Ensure that members of indigenous peoples have equal rights in respect of **effective participation in public life** and that **no decisions directly relating to their rights and interests are taken without their informed consent; ...**²

“In compliance with the fundamental obligations laid down in article 2 of this Convention, State Parties undertake to **prohibit and to eliminate racial discrimination** in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to **equality before the law**, notably in the enjoyment of the following rights:

(e) economic, social and cultural rights, in particular:

(iii) the right to housing ...”

The International Covenant on Economic, Social and Cultural Rights

Article 2(2): States Parties “undertake to guarantee that the[se] rights ... will be exercised without discrimination of any kind as to race, colour sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

The International Covenant on Civil and Political Rights

Urban Indigenous Australians are discriminated against on the basis of their location. This arguably contravenes the following:

- Article 2(1), which requires that each State Party “**respect and ... ensure** to all individuals within its territory and subject to its jurisdiction the[se] rights ... **without distinction of any kind, such as race, colour ...** or social origin, property, birth or other status.”

RIGHT TO ADEQUATE HOUSING

The Government’s policy of mainstreaming housing services for Indigenous Australians arguably breaches the international law principle of the right to adequate housing as the consequence of mainstreaming is that Indigenous Australians cannot access adequate housing. The majority of Indigenous Australians do not access mainstream services and prefer Indigenous Australian specific services. The following covenant outlines the right to housing that the Government is arguably breaching.

International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR) contains the right to housing in Article 11(1): “The States Parties to the present Covenant recognise 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 most authoritative legal interpretation of this is in General Comment 4 of the Committee on Economic, Social and Cultural Rights (ICESCR). General Comment 4 includes accessibility in the definition of adequate housing.

General Comment 4 states that...the right is not merely a right to housing, but a right to **adequate housing**, with “adequate privacy, adequate space, adequate security, adequate lighting

² Rights of indigenous peoples — General Recommendation 23, UN Doc A/52/18, annex V (1997).

and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities ... at a **reasonable cost**".³

Removing access to Indigenous specific services compromises the accessibility of housing.

SPECIAL MEASURES

VALS argues that given the distinct position of disadvantage of Indigenous Australians in the context of housing, and the recognition at International law of the need for special measures for disadvantaged groups the exclusion of regional and metropolitan Indigenous Australians from the CHIP program without a sound basis breaches international law. The distinct position of disadvantage of Indigenous Australians in the context of housing was acknowledged recently by the Special Rapporteur on Adequate Housing who identified indigenous people as a vulnerable and marginalised group in respect of the enjoyment of housing rights during a visit to Australia in 2006.⁴

VALS' interpretation of the international law below is that the Australian Government should implement special measures for Indigenous Australians. Another way of saying this is that the Government should give priority consideration (see discussion of International Covenant on Economic, Social and Cultural Rights below).

An alternative argument is that there should be Indigenous Australian specific services as an exercise of the right to self determination (see United Nations Declaration on the Rights of Indigenous Peoples).

In practice the above means delivering substantive equality and this is not something that mainstreaming can do very well if at all. The Australian Government should recognise difference, that a level playing field does not exist and that there is a need for affirmative action in the form of specific Indigenous Australian housing services. Increased funds for housing should be given not just to remote Indigenous Australians but urban and regional as well.

The following instruments contain notions of affirmative action:

Convention on the Elimination of All Forms of Racial Discrimination : special and concrete measures

The Convention on the Elimination of All Forms of Racial Discrimination (CERD) contains Article 2(2) which imposes positive obligations on States Parties in situations where particular racial groups require special protection of their rights: "State Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, **special and concrete measures to ensure the adequate development and protection of certain racial groups** or individuals belonging to them, for the purposes of guaranteeing them the **full and equal enjoyment** of human rights and fundamental freedoms."

Article 1(4): 4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human

³ Ibid, citing Commission on Human Settlements and the Global Strategy for Shelter.

⁴ Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, UN Doc E/CN.4/2006/41 (2006), available at: <<http://daccessdds.un.org/doc/UNDOC/GEN/G06/118/59/PDF/G0611859.pdf?OpenElement>>.

rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Racial Discrimination Act 1975

The RDA desires to implement the principles embodied in the United Nations Declaration on the Elimination of All Forms of Racial Discrimination and to secure the earliest adoption of practical measures to that end. Article 2(2) is quoted in the RDA.

International Covenant on Economic, Social and Cultural Rights: priority consideration

The International Covenant on Economic, Social and Cultural Rights (ICESCR) contains the right to housing in Article 11(1) (see above). The most authoritative legal interpretation of this is in General Comment 4 of the Committee on Economic, Social and Cultural Rights (ICESCR). General Comment 4 states that disadvantaged groups should be “accorded full and sustainable access to adequate housing resources”, including “some degree of priority consideration in the housing sphere”. (section 8e). The failure of the Australian Government to give priority consideration to Indigenous Australians is apparent in the criticism of the Australian Government by the ICESCR: “despite the efforts of the State Party, the indigenous populations of Australia continue to be at a **comparative disadvantage** in the enjoyment of economic, social and cultural rights, particularly in the field of employment, **housing**, health and education.”⁵

United Nations Declaration on the Rights of Indigenous Peoples

Article 22 of the United Nations Declaration on the Rights of Indigenous Peoples states: “Indigenous peoples have the right to special measures for the immediate, effective and continuing improvement of their economic and social conditions, including in the areas of employment, vocational training and retraining, housing, sanitation, health and social security. Also Article 33 states: “Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to determine and develop all health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.”

Article 31:

“Indigenous peoples, as a specific form of exercising their right to self-determination, have the **right to autonomy or self-government in matters relating to their internal and local affairs**, including culture, religion, education, information, media, health, **housing**, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as **ways and means for financing these autonomous functions**.”

CONCLUSION

The adequacy of Australia’s housing policies in general and for Indigenous Australian people in particular have been the subject of criticism by United Nations bodies such as the Committee for Economic, Social and Cultural rights. Most recently the August 2006 report from the UN Rapporteur on Housing highlighted a range of deficiencies in relation to providing housing.

⁵ Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia, UN Doc E/C.12/1/Add.50 (2000) [15].

VALS argues that the further watering down of existing programs by excluding regional and metropolitan Indigenous Australians (70% of the Indigenous population) from the CHIP program is a further breach of Australia's human rights obligations. The change not only redirects funds within a relatively small pool it effectively tries to redefine Commonwealth responsibility for addressing housing need. The change excludes 70% of Indigenous Australians from eligibility for Indigenous Australian specific housing services. It creates core and non core Indigenous Australians. The non-remote people have become non-core Indigenous Australians and the Commonwealth have downsized their responsibility to fund programs for these people.

VALS supports both mainstream service provision and Indigenous Australian specific service provision. Indigenous Australian services can not meet all the need which exists and some Indigenous Australians will prefer a non Indigenous Australian service. A recent state government study found that approximately 80% of Indigenous Australians people prefer to use an Indigenous Australian service.

VALS argues that excluding regional and metropolitan Indigenous Australians (70% of the Indigenous population) from the CHIP program contravenes the following international law principles:

- freedom from direct and indirect discrimination;
- the need for special measures for disadvantaged people;
- the right to adequate housing;
- the right to self-determination.

The first two of these principles should be protected under the *Racial Discrimination Act 1975* (Cth) which is domestic legislation of the ratified International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (ratified 30 September 1975).

VALS argues that:

- VALS argues that excluding regional and metropolitan Indigenous Australians (70% of the Indigenous population) from the CHIP program exposes this population to increased indirect discrimination from mainstream services and removes access to an important special measure.
- Given the distinct position of disadvantage of Indigenous Australians in the context of housing, and the recognition at International law of the need for affirmative action, excluding 70 percent of Indigenous Australians from Indigenous specific housing services breaches international law. This recognition is expressed as special measures or priority consideration in instruments such as Convention on the Elimination of All Forms of Racial Discrimination, RDA, United Nations Declaration on the Rights of Indigenous Peoples below and International Covenant on Economic, Social and Cultural Rights below.
- As the majority of Indigenous Australians do not access mainstream services and prefer Indigenous Australian specific services the International Covenant on Economic, Social and Cultural Rights (ICESCR) which contain the right to housing is breached).

- There should be Indigenous Australian specific services as an exercise of the right to self determination as recognised in the United Nations Declaration on the Rights of Indigenous Peoples that Australian should ratify.