



Public Health Association
AUSTRALIA

**Submission from the Public Health Association of Australia
(PHAA) to the Senate Legal and Constitutional Affairs
Committee**

**Inquiry into the National Radioactive Waste Management Bill
2010**

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The Inquiry

On 25 February 2010 the Senate referred the National Radioactive Waste Management Bill 2010 for inquiry and report.

The purpose of the Bill is to repeal the Commonwealth Radioactive Waste Management Act 2005 and to substitute a new process to select and establish a facility for managing, at a single site, radioactive waste arising from medical, industrial and research uses of radioactive material in Australia.

The committee notes that other Senate committees have previously conducted inquiries into radioactive waste management legislation (most recently in 2008). In light of the previous opportunities for consideration of environmental and other issues relating to radioactive waste management in Australia, the focus of the current inquiry will be on legal and constitutional matters, including issues relating to procedural fairness and the Bill's impacts on, and interaction with, state and territory legislation.

The PHAA's interest in the National Radioactive Waste Management Bill 2010

Cognisant of the Committee's current focus on legal and constitutional matters, including issues relating to procedural fairness and the Bill's impacts on, and interaction with, state and territory legislation the PHAA will frame its submission around these matters.

We would ask the Committee to note the Public Health Association of Australia's (PHAA) ongoing involvement in the broader debate on the proposed siting of nuclear waste facilities in the N.T. This has included written submissions to two Senate inquiries and personal appearances at the Senate Standing Committee on Environment, Communications and the Arts' hearing of the Inquiry into the Commonwealth Radioactive Waste Management (Repeal and Consequential Amendment) Bill 2008 in Alice Springs as well as directly to the Prime Minister and other government ministers¹.

In these references the Committee will find the detail of our health and related social policy reasons for opposing the proposal to site the facility in the N.T., including the currently discussed site of Muckaty Station.

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- ¹ PHAA Submission to NUCLEAR MEDICINE AND RADIOACTIVE WASTE Public Health Association of Australia NT Branch submission to Senate Inquiry into Commonwealth Radioactive Waste Management Bill 2005 http://www.phaa.net.au/documents/nt_branch_advocacy_nuclear.pdf>
 - PHAA Submission to the Inquiry into the Commonwealth Radioactive Waste Management (Repeal and Consequential Amendment) Bill 2008. < <http://www.phaa.net.au/documents/InquiryintoCommonwealthRadioactiveWasteManagement.pdf>>
 - PHAA evidence to the Inquiry into the Commonwealth Radioactive Waste Management (Repeal and consequential Amendment) Bill 2008, public hearings Alice Springs N.T. letter signed by PHAA "Stop the NT Dump - Joint NGO Statement" 1-6-08 < <http://www.phaa.net.au/documents/NGOstatement.doc>>

Submission on matters related to procedural fairness

The concept of “procedural fairness” provides an important legal and administrative framework that should provide confidence in decision making for affected individuals. This submission accepts a definition of procedural fairness as outlined by the Australian Administrative Appeals Tribunal that is based upon:

“The two principal rules of procedural fairness are:

1. a person or body having power to decide a matter must give the affected persons an opportunity to state their case, and to know the case they are to meet; and
2. the decision-maker must be impartial and have no personal stake or interest in the matter to be decided.”²

For the PHAA our concerns regarding procedural fairness go beyond the legal or administrative framework to consider the social and emotional (and related physical) impacts of how procedural fairness is applied, or how the real or perceived breach of its principles, may affect the health of the individuals affected.

The PHAA has a number of concerns regarding the *National Radioactive Waste Management (NRWM) Bill 2010* relating to the legal/administrative concept of procedural fairness which include:

- the coercive powers given to the Minister;
- the maintenance of sections of the *CRWM Act* that relate to the commercial in-confidence agreement entered into between the previous Howard government, the NLC and some land owners that seems to be driving this Bill
- the Bill does not incorporate the international recognised best practise in radioactive waste management provisions that have been central to the public discussions around siting of this facility
 - in particular we emphasise those related to community involvement in decision making
- how its provisions would override other Commonwealth legislation that affected community members who would otherwise expect such legislation would outline and protect their rights
- statements by members of the government that have created uncertainty in the community, or indicate a strong potential bias in decision making.

In addition the PHAA has a number of concerns regarding the potential health impacts upon affected community members that follow from these issues and breaches of procedural fairness.

This submission will deal with these concerns in two parts firstly focussing on the legal/administrative aspects and then on what we see as the potential community health impacts.

Legal/administrative aspects of the NRWM Bill

The manner in which this Bill has been introduced has undermined the perception that those persons immediately affected by this Bill will receive procedural fairness under its provisions.

The opportunity to state their case

In his 2nd reading statement for the Bill, the Minister for Resources and Energy, Martin Ferguson, stated that the government would be utilising the provisions of the Bill if passed into an Act, in order to pursue the siting

² <http://www.aat.gov.au/SpeechesPapersAndResearch/speeches/AATMembers/docs/JarvisProceduralFairnessApril2007.rtf>
Jarvis, D G (Deputy President) [Procedural fairness as it applies in the Administrative Appeals Tribunal](#) (RTF version, 141KB) Paper presented to the Law Society of South Australia CPD session, "Administrative Law: Natural Justice - the Golden Thread", Adelaide 16 March 2007 Also published in (2007) 81 Australian Law Review 465.

of the Commonwealth's radioactive waste dump on Muckaty station. He also stated that this was honouring an agreement with its traditional owners the Ngapa clan³, he has made similar claims outside parliament. This is at best half of the truth. The Minister is aware that not all Ngapa clan members support the nomination of their traditional country for the proposed nuclear waste dump. In May 2009 a letter was sent to Ferguson (and cc'd to Prime Minister Rudd, Environment Minister Garret, MHR Warren Snowdon , NT Senator Trish Crossin the NLC CEO and Chairman and WA Senator Scott Ludlam) clearly outlining the opposition of 25 Ngapa clan members and 32 other traditional owners of Muckaty Station to the siting of this waste dump⁴.

In addition these people have also made submissions to the Senate Inquiries and representations to federal politicians in each case clearly stating their opposition to the proposal. The manner in which the Minister has attempted to marginalise or disregard their traditional rights to speak about their country is a clear example of a breach in a key principle of procedural fairness – i.e. the opportunity to state their case, in its application to these people.

The PHAA strongly recommends

- the Senate Committee holds a public hearing in Tennant Creek to physically allow this principle of procedural fairness be applied, but also
- the Committee notes the standing of these members of the Ngapa Clan to speak and make decisions on and about this proposed site, and
- the Committee notes the rights of other Muckaty Station traditional owners to have their case heard as this proposal will affect their rights and enjoyment of the adjacent parts of that station.

To know what the case is

Prior to the introduction in 2005 of the Commonwealth Radioactive Waste Management (CRWM) Act, people affected by any proposal to site a radioactive waste dump had a degree of surety regarding the parameters of the case that they would be contesting. Because prior to the introduction of the CRWM, siting proposals were being made consistent with the principles employed by the Bureau of Resource Sciences' National Repository Project 1994, which in turn had been framed by best practice as identified by the NHMRC, the IAEC and others. This process used scientific criteria that were clear and transparent, in addition siting discussions within Australia had also mainly recognised the IAEC principles regarding the need for community involvement, cooperation and general consent in the proposal to site a facility of this nature⁵. This was evident in the both the short listing process of sites by the Bureau and the Commonwealth governments seeming acceptance of subsequent rejection of those sites by various local groups and State governments. The CRWM Act overturned all of these protocols, favouring political pragmatism rather scientific findings or community acceptance. The current Bill continues this scenario of decision making bereft of scientific evidence or effective community support. It also seems driven by political issues just in not such a transparent manner.

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- ³ Minister's 2nd reading speech 24 February 2010 < [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=;db=;group=;holdingType=;id=;orderBy=;page=;query=BillId_Phrase%3Ar4310%20Title%3A%22second%20reading%22%20Content%3A%22I%20move%22%7C%22and%20move%22%20Content%3A%22be%20now%20read%20a%20second%20time%22%20\(Database%3Ahansard%20%7C%20Dataset%3Ahansards\);querytype=;rec=0;resCount=>](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=;db=;group=;holdingType=;id=;orderBy=;page=;query=BillId_Phrase%3Ar4310%20Title%3A%22second%20reading%22%20Content%3A%22I%20move%22%7C%22and%20move%22%20Content%3A%22be%20now%20read%20a%20second%20time%22%20(Database%3Ahansard%20%7C%20Dataset%3Ahansards);querytype=;rec=0;resCount=>)
 - ⁴ Muckaty Traditional owners letter to Minister Martin Ferguson May 8 2009 < <http://www.foe.org.au/anti-nuclear/issues/oz/nontdump/Muckaty-to-ferguson-May09.pdf>> .
 - ⁵ IAEA-TECDOC-1553 Low and Intermediate Level Waste Repositories: Socioeconomic Aspects and Public Involvement Proceedings of a workshop held in Vienna, 9–11 November 2005 June 2007

This proposed legislation explicitly privileges the Site Nomination Deed entered into by the Northern Land Council on behalf of some Muckaty traditional owners with the Commonwealth under the CRWM Act. The details of this Deed have not been made accessible, but rather have been nominated by the NLC as being commercial in confidence. Requests by NGO's on behalf of Muckaty traditional owners to test the commercial in confidence status of the Deed have been referred to the Department of Resources and our understanding is that to date no response has been received. Therefore no one outside the agreement knows the details of the Deed and therefore those affected by this Deed do not know the case that confronts them. This clearly breaches the principle of procedural fairness.

In this scenario it difficult to apply the principle of "knowing what the case is" that is confronting the community. How do people at Muckaty Station or in the N.T. for that matter, successfully confront a case that is built on political pragmatism rather than science or community consent when clearly in the political process their power is so minor, having little electoral impact on a federal election and limited financial resources with which to challenge these decisions.

The PHAA recommends that this Senate Inquiry makes public the Site Nomination Deed covering the site proposal at Muckaty Station entered into between the Northern Land Council and the Commonwealth Government as part of its inquiry activity to allow the principles of procedural fairness to apply to this Bill.

Decision maker impartiality

The Minister has consistently derided those Muckaty Station traditional owners who oppose this nomination. These actions provide a clear demonstration of his lack of impartiality on this matter. As a member of parliament this may be deemed acceptable by parliamentary standards or by his colleagues, but as a Minister of the Commonwealth this is surely unacceptable and brings into question his impartiality on this matter. This perception of partiality becomes a question of procedural fairness in this Bill, which vests so much decision making power (Part 4 Division 1) in the Minister.

Submission on matters related to constitutional matters

This section deals with the impacts on, and interaction with, state and territory legislation

The PHAA considers that a number of Sections within the proposed Bill have deleterious effects upon other legislation designed to give security of tenure for land holders and that would otherwise provide legislative protection of interested parties concerns. These include the overriding of the *Commonwealth Native Title Act 1993* and the *Lands Acquisition Act 1989 (Section 19)* and the invalidation of virtually all State and Territory laws relating to any activity related to the process of site evaluation (Section 23). In addition Section 23.3 in the case of State or Territory Law and Section 24.1, in the case of Commonwealth Law, allows for regulations made under this legislation to have the power to prescribe other legislation without recourse to further Commonwealth legislation. In other words *the Minister would be vested with the power to override laws without having to seek further parliamentary powers*. This goes against both the wording and the spirit of the findings of the Senate Standing Committee on Environment, Communications and the Arts Inquiry into the Commonwealth Radioactive Waste Management (Repeal and Consequential Amendment) Bill 2008 which stated, "Not proceed any further until those pieces of Commonwealth legislation suspended from operation by the Commonwealth Radioactive Waste Management Act again apply". See full set of major recommendations at Appendix A.

Submission on matters related to health impacts of this Bill

The PHAA has raised our concern over the health impacts of this continued distress on these communities' health to previous Senate Inquiries⁶. The World Health Organisation has identified that peoples' health status are influenced by the interaction of a range of factors, behavioural, structural and environmental interplay with individual genetic inheritance. Current research into what are collectively called the social determinants of health has clearly identified an association between health status and socio-economic status, and in so doing has also identified the psychosocial pathway to poor health that social inequality creates.

Richard Wilkinson (1999), notes that for people who find themselves, "...in situations that deny them a sense of dignity, situations that increase the insecurity that they feel about their personal worth and competence and that carry connotations of inferiority", that such situations lead to chronic stress, increased vulnerability to infection and cardiovascular disease⁷. This pathway to health outcomes is described as 'the control factor', in determining people's health. Bluntly it means that the level of control that people feel over their lives has an influence on their health status.

The coercive nature of the CRWM Act 2005, that this Bill aims to replace have been well documented. The current Committee Chair herself stated in Parliament (5/12/2006),

"This is also about the five families who belong to Muckaty Station, three of whom live on adjoining land. Senator Scullion himself said—and I will be interested to see the Hansard at some stage—that this was about ensuring that anyone who was on land adjacent to the Northern Land Council boundaries could provide no objections".

"That is exactly the political reality of this bill. This bill is about cutting out all the people affected by Muckaty Station, not just some of the traditional owners but a majority of them—not the ones who live within the Northern Land Council boundary but the ones who live within the Central Land Council boundary. I have a copy of a letter that was written by those people to the chairperson of the Northern Land Council, Mr John Daly, back in July. It states:

'Dear Mr Daly,

We write to you with deep concern.

In the past, we have trusted the Northern Land Council (NLC) to protect our Homelands ...Mr Daly, why are you talking to David Tollner and Nigel Scullion for us about our country? Why are you helping the Commonwealth Government to take control of our land to build a nuclear waste facility? ...Mr Daly, we ask you to stop talking for us. We do not want a nuclear waste facility built on our land.'

This bill is exactly about silencing these traditional owners."

- ⁶ PHAA Submission to NUCLEAR MEDICINE AND RADIOACTIVE WASTE Public Health Association of Australia NT Branch submission to Senate Inquiry into Commonwealth Radioactive Waste Management Bill 2005 < http://www.phaa.net.au/documents/nt_branch_advocacy_nuclear.pdf>
PHAA Submission to the Inquiry into the Commonwealth Radioactive Waste Management (Repeal and Consequential Amendment) Bill 2008. < <http://www.phaa.net.au/documents/InquiryintoCommonwealthRadioactiveWasteManagement.pdf>>
PHAA evidence to the Inquiry into the Commonwealth Radioactive Waste Management (Repeal and consequential Amendment) Bill 2008, public hearings Alice Springs N.T.
- ⁷ Wilkinson, R. 1999 Putting the picture together: Prosperity, redistribution, health and welfare, in Social Determinants of Health, Eds M Marmot & R.G. Wilkinson Oxford University press New York p27.

She also stated that the Act, “compromises the rights of Indigenous people living in the Territory to make decisions based on free, prior and informed consent”⁸.

Unfortunately exactly the same charges seem relevant against the current Bill under inquiry.

That the essence of this Bill mirrors much of the content and method of the previous Act is a cause of great concern. This was not what was promised by the Labor when in opposition. The then opposition in both its National Conference resolutions and in statements by sitting Members and Senators (including those from the N.T.) promised amongst other matters that:

- the CRWM Act would be repealed,
- the new process would “restore transparency, accountability and procedural fairness including the right of access to appeal mechanism,
- the provisions of the Aboriginal Land Rights, (Northern Territory) Act would apply, and
- scientific process and proper agreed site selections would occur⁹

In addition the majority report of the *Senate Standing Committee on Environment, Communications and the Arts’ Inquiry into the Commonwealth Radioactive Waste Management (Repeal and Consequential Amendment) Bill 2008* - a Committee that was chaired by a member of the Labor Party - recommended that: “... radioactive waste policy be placed on a new footing, relying on five key founding principles:

- It should be built on a foundation of trust through engagement with governments, stakeholders and communities;
- It should place an emphasis on voluntary engagement rather than coercion;
- It should be grounded in sound science and best technological and engineering practice;
- It should look to national solutions for national waste management challenges; and
- It should have a fair, equitable and transparent Commonwealth legislative foundation.¹⁰”

From all of these utterances any reasonable person affected by this process would conclude that the current Governments propose legislation would indeed recognise and protect their rights and obligations to protect their traditional country.

That the current Bill under inquiry fails to deliver upon these basic promises - many of which relate to procedural fairness and legal protections - is causing considerable stress to many affected Aboriginal people around Muckaty and sends extremely negative policy messages to the broader Aboriginal community regarding their supposed rights and roles.

The PHAA believes that the processes that have been involved in determining the development of the current Bill, and its inherent provisions that undermine procedural fairness, claimants ‘dignity’ and their ‘competence’ will lead to elevated levels of stress for Aboriginal people in the affected communities and may in turn cause or contribute to stress related poorer health outcomes for these people.

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- ⁸ Hansard: COMMONWEALTH RADIOACTIVE WASTE MANAGEMENT LEGISLATION AMENDMENTBILL 2006 Second Reading 5 December 2006 p78
 - ⁹ Media Release 06-03-07 & www.alp.org.au/platform/chapter_05.php
 - ¹⁰ < http://www.aph.gov.au/Senate/committee/eca_ctte/radioactive_waste/report/c03.htm>

Conclusion and recommendation

General

To ameliorate the effects of the stress caused to affected Aboriginal people in the area of Muckaty Station, the PHAA asks that this Inquiry recommends amendments to the proposed Bill to reinstated full transparency, procedural fairness, legal protections of existing Commonwealth and Territory Legislation and standing of all Muckaty Station owners in decisions related to that property.

Specific

Additionally, the PHAA strongly recommends

- the Senate Committee holds a public hearing in Tennant Creek to physically allow this principle of procedural fairness be applied, but also
- the Committee notes the standing of these members of the Ngapa Clan to speak and make decisions on and about this proposed site, and
- the Committee notes the rights of other Muckaty Station traditional owners to have their case heard as this proposal will affect their rights and enjoyment of the adjacent parts of that station.
- the Senate Inquiry makes public the Site Nomination Deed covering the site proposal at Muckaty Station entered into between the Northern Land Council and the Commonwealth Government as part of its inquiry activity to allow the principles of procedural fairness to apply to this Bill.

The PHAA would like to thank the Committee for the opportunity to make this submission and would be pleased to further assist the Committee should it be appropriate.

15 March 2010
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Appendix A

< http://www.aph.gov.au/Senate/committee/eca_ctte/radioactive_waste/report/c03.htm>

CRAWM Bill Inquiry recommendations**Majority report Senator Anne McEwen Chair**Recommendation 1

2.65 Noting there is a current nomination put forward by some Ngapa traditional owners seeking to have a facility sited on their country, the committee recommends that with regard to this nomination the process from this point forward should comply with the *Code of Practice for the Near-Surface Disposal of Radioactive Waste in Australia*. The process should:

- Not rely on the suspension by the current Act of any of the procedural rights of other interested parties; and
- Not proceed any further until those pieces of Commonwealth legislation suspended from operation by the Commonwealth Radioactive Waste Management Act again apply.

Recommendation 2

3.23 The committee recommends that the Act be repealed and replaced with legislation founded on the principles outlined in Recommendation 3. The committee recommends that this legislation should be introduced into the Parliament in the Autumn 2009 sittings.

Recommendation 3

3.25 The committee recommends that radioactive waste policy be placed on a new footing, relying on five key founding principles:

It should be built on a foundation of trust through engagement with **governments**, stakeholders and communities;

- It should place an emphasis on voluntary engagement rather than coercion;
- It should be grounded in sound science and best technological and engineering practice;
- It should look to national solutions for national waste management challenges; and
- It should have a fair, equitable and transparent Commonwealth
- Legislative foundation.

Recommendation 4

3.26 The committee recommends that legislation to replace the existing Act should have at least the following three key differences from the existing Act:

- It should not remove procedural rights and opportunities afforded to affected parties;
- It should not suspend the operation of relevant Commonwealth laws; and
- It should not discriminate against or target one jurisdiction over others.