FAMILIES, HOUSING, COMMUNITY SERVICES AND INDIGENOUS AFFAIRS AND OTHER LEGISLATION AMENDMENT (EMERGENCY RESPONSE CONSOLIDATION) BILL 2008

THE INQUIRY

1.1 The Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Response Consolidation) Bill 2008 (the Bill) was introduced into the House of Representatives on 21 February 2008. On 19 March 2008 the Senate, on the recommendation of the Selection of Bills Committee, referred the provisions of the Bill to the Community Affairs Committee (the Committee) for inquiry and report by 7 May 2008.

1.2 The Committee received 18 submissions relating to the Bill and these are listed at Appendix 1. The Committee considered the Bill at public hearings in Alice Springs on 29 April 2008 and Darwin on 30 April 2008. Details of the public hearings are referred to in Appendix 2. The submissions and Hansard transcript of evidence may be accessed through the Committee's website at http://www.aph.gov.au/senate_ca.

THE BILL

1.3 The Bill introduces amendments to the special measures protecting Aboriginal children in the Northern Territory, which were enacted in the *Northern Territory National Emergency Response Act 2007* and the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007*. The amendments are contained in four Schedules.[1]

Schedule 1 – R 18+ programs

1.4 The Bill amends the Broadcasting Services Act 1992 and the Northern Territory National Emergency Response Act 2007 to establish a new class licence condition that prevents subscription television narrowcasting service licensees from providing subscribers in a community declared by the Indigenous affairs minister with access to a subscription television narrowcasting service declared by the communications minister. Services cannot be declared unless they transmit more than 35 per cent of R18+ program hours over a seven-day period.

1.5 Communities cannot have their access to the television service restricted unless they are in prescribed areas. The cessation of the television service would occur

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1 The following description of each schedule is summarised from the Explanatory Memorandum and Minister's second reading speech.

only on the request of the community and after consultation with the community to the satisfaction of the Indigenous affairs minister, and an assessment that there would be benefit in such action to Indigenous women and children in particular. The arrangement will include a sunset provision.

Schedule 2 – Transport of prohibited material

1.6 The Bill will amend the *Classification (Publications, Films and Computer Games) Act 1995* to permit the transportation of prohibited material through a prescribed area to a destination outside the prescribed area. The amendments are intended to allow industry members to transport goods lawfully, in the conduct of their business, to areas that are not prescribed. Under the amendments, an offence for possession or supply would not apply if the person proves that the material was brought into the prescribed area for the sole purpose of transporting it to a place outside the prescribed area.

1.7 Amendments are also made to the seizure provisions so that prohibited material will not be seized if the material is only being transported through a prescribed area, and, if seized, will be able to be returned to the owner.

1.8 As background to this provision the Explanatory Memorandum notes that Industry has expressed concerns about their inability to transport lawfully goods via road to and from areas that are not prescribed.

> For example, a distributor delivering prohibited material from Darwin to Alice Springs could be charged with possession and/or supply offences as the Stuart Highway passes through prescribed areas. The amendments would enable Industry to carry on their business legally in areas of the Northern Territory that are not prescribed.[2]

Schedule 3 – Access to Aboriginal land

1.9 The 2007 legislation abolished the requirement for people to obtain permits prior to visiting Aboriginal communities. The Bill repeals the permit system amendments that gave public access to certain Aboriginal land and which came into force on 17 February 2008. The Explanatory memorandum noted that:

> Aboriginal people and the Land Councils which represent them have voiced overwhelming opposition to the opening up of communities to public access. The power to determine who can enter their land is viewed by Aboriginal people as an important part of their rights to land. It is not clear how the removal of the requirement for the public to obtain permits contributes to the success of the emergency response in the Northern Territory, and it may make it easier for drugs, alcohol and people with criminal intent to enter communities.[3]

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2 Explanatory Memorandum, p.10.

3 Explanatory memorandum, p.12.

1.10 The Bill will also clarify the power of the minister to authorise people to enter communities covered by the emergency response. Separately, by means of a ministerial determination, the government will ensure that journalists can access communities for the purpose of reporting on events in communities.

Schedule 4 – Community stores

1.11 The bill will provide that, if a roadhouse effectively takes the place of a community store in a remote area, it can be properly treated as a community store in having to meet the new licensing standards. Assuming the community is substantially dependent on the roadhouse for grocery items and drinks, the roadhouse should be able to be part of the scheme applying to community stores. Otherwise, roadhouses will continue not to be regarded as community stores.

Compliance with the Racial Discrimination Act

1.12 The package of legislation for the Northern Territory emergency response contained provisions for welfare reform, changes to land and housing arrangements, improving law and order and improving the safety and wellbeing of children and their families. The legislation also contained provisions which deem the measures to be special measures and exclude them from the operation of part II of the *Racial Discrimination Act 1975*.

1.13 The minister noted in the second reading speech that the Bill contains some amendments to existing measures which continue to be covered by the operation of the racial discrimination provisions in the legislation for the Northern Territory emergency response. Importantly, the Bill contains no new provisions which exclude the operation of the Racial Discrimination Act. The new R18+ measures have been designed as special measures, through the clear consultation with the community requirements. There is no provision deeming them to be a special measure, nor excluding them from the operation of part II of the Racial Discrimination Act.

Review of Northern Territory Emergency Response legislation

1.14 The Committee is examining during this inquiry only those provisions that are contained in the Bill. However, many issues relating more generally to the emergency response and its implementation were raised in evidence. The major issues included governance of prescribed areas resulting from the introduction of government business managers, income quarantining and income management; the operation of stored value cards; the delivery of health, housing and education services; employment arrangements; and urban drift, especially the growth in town camps at Alice Springs.

1.15 The Government has announced its intention to commission an independent review of the Northern Territory emergency response for completion in the latter part of 2008 to determine whether the response is improving education, health and employment outcomes. The minister indicated that further consideration will be given to the racial discrimination provisions in the 2007 legislation following the proposed review later this year.

BACKGROUND

1.16 In April 2007 the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, co-chaired by Pat Anderson and Rex Wild, presented their report 'Little Children are Sacred' to the Northern Territory Government.[4] The report outlined that child sexual abuse among Aboriginal children in the Northern territory was serious, widespread and often unreported, and that there was a strong association between alcohol abuse and sexual abuse of children.

1.17 In response to this report, the then Prime Minister, Mr Howard, and Minister for Families, Community Services and Indigenous Affairs, Mr Brough, announced a series of initiatives in June 2007. These initiatives were enacted in August 2007 through a package of legislation that formed the emergency response. While in the Parliament the five bills in the package were subject to a four day inquiry by the Senate Legal and Constitutional Affairs Committee that reported on 13 August 2007.[5]

1.18 Generally, the fact that government was acting on the issues of disadvantage and abuse in Indigenous communities was widely supported, though there remained underlying concerns. As the Central Land Council wrote:

> We are deeply concerned that the emergency response lacks a long term investment plan, a community development approach or any benchmarks or critical evaluation process.[6]

1.19 The Senate inquiry in 2007 attracted over 150 submissions. Many of these had been previously made in response to a discussion paper published by the Minister in October 2006. Many of the arguments from these submissions remain current and were repeated in evidence to the Committee's inquiry into this Bill.

ISSUES

1.20 The provisions of the Bill were supported by most submitters, though some expressed reservations, while others opposed the provisions or proposed broader bans.

Permits - Access to Aboriginal Land

Land tenure and the permit system

1.21 The issue of land tenure and the permit system was the major focus of nearly all submissions. Professor Jon Altman described the land ownership system:

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4 The report, Ampe Akelyernemane Meke Mekarle "Little Children are Sacred", may be viewed at http://www.nt.gov.au/dcm/inquirysaac/pdf/bipacsa_final_report.pdf .

5 Senate Legal and Constitutional Affairs Committee, Report on the Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 and four related bills concerning the Northern Territory National Emergency Response, August 2007.

6 *Submission* 6, p.2 (CLC).

> Prescribed areas are held under inalienable freehold title by Aboriginal Land Trusts for Aboriginal traditional owners. This is an unusual form of land ownership because it is vested in groups rather than individuals. It is also unusual because Aboriginal prescribed townships have been built on land where the underlying title is communal inalienable freehold. …[T]he permit system allows the owners of that land to exercise their rights to exclude non-Aboriginal people from the land that they own under Australian law. Because this is an unusual form of land tenure is explained in part why an unusual form of entry requirement, the permit system, is required. This system is administered by Aboriginal land councils or delegated authorities and gives substance to the property rights of traditional owners.[7]

1.22 The Northern Land Council described the aims of the permit system:

> From a policy perspective the scheme is intended to ensure that Aboriginal communities and people are not subject to breaches of privacy, or inappropriate or culturally insensitive actions by unauthorised persons on Aboriginal land, as well as ensuring that persons with a legitimate or justifiable interest may enter Aboriginal land.
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> Such inappropriate actions are not uncommon, and (in a non-court context) have included inappropriate presence or reporting regarding culturally sensitive matters such as funerals or ceremonies, unauthorised photography, and indefensible misrepresentation regarding important issues.[8]

1.23 The Laynhapuy Homelands Association emphasised that the permit system 'was and remains an important expression of our right to control access to our land and resources. It serves a useful purpose in assisting us to manage our own affairs and maintain our culture.'[9]

1.24 In 2007 the former government had sought to link land measures with child abuse. Many submitters argued that during the 2007 debate no case had been substantiated that provided any correlation or relationship linking the permit system to child sexual abuse in Aboriginal communities and therefore changes to the permit system were unwarranted.[10] It was noted that significant child abuse has been reported in communities outside of the Northern Territory, including Queensland and Western Australia where there is no permit system.

1.25 The Central Land Council addressed the positives of the permit system, indicating that 'our overall view is that the permit system is an effective and

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7 *Submission* 9, p.i (Prof Altman).

8 *Submission* 12, p.4 Attachment (NLC).

9 *Submission* 15, p.9 (Laynhapuy Homelands Association) and *Committee Hansard* 30.4.08, p.71 (Ms Mununggurr, Laynhapuy).

10 *Committee Hansard* 30.4.08, p.38 and *Submission* 1, p.6 (Police Federation of Australia); *Submission* 4, p.7 (Law Council of Australia); *Submission* 5, p.3 (HRLRC); *Submission* 6, p.2 (CLC); *Committee Hansard* 29.4.08, p.2 (Tangentyere Council) and pp.35, 39 (Prof Altman).

appropriate tool under the [Land Rights Act] for negotiating third party access to Aboriginal land for miners, pastoralists, developers and visitors'. The CLC added that the permit system has not impeded the provision of services and is an important policing tool in remote communities.[11]

1.26 On the policing issue, the Police Federation of Australia which supported the Bill as 'sensible measures taken as interim steps pending the independent review that the government has foreshadowed', reiterated comments made in their 2007 submission:

> … we have consistently said is that in some instances the permit system as such can be a useful tool for police officers in remote communities in controlling, or assisting the local community in controlling, who comes and goes from those communities—not in terms of journalists or government employees or indeed business people wanting to assist those communities but in terms of other people.[12]

Earlier reports and reviews

1.27 A number of submissions referred to earlier reports and reviews that had referred to the permit system including the 1974 Royal Commission into Aboriginal land rights chaired by Justice Woodward, the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs 1999 Report *Unlocking the Future* into the Aboriginal Land Rights Act and FaCSIA's 2006 Review of the permit system.[13] They all supported the retention of the permit system.

1.28 The Law Council advised that because no report of the 2006 Review had been published it had sought through FOI relevant reports, submissions and documents received by the Review. The consultations and submissions to the Review overwhelmingly supported no change to the permit system. The LCA concluded:

> It is apparent that a majority of Aboriginal people in the Northern Territory supported maintaining the permit system under the ALRA. Accordingly, repeal of the changes introduced under the NER legislation should be supported.[14]

1.29 The NLC and CLC indicated that they had comprehensively consulted with their communities as part of the Review. The NLC stated that 'Traditional owners, and Aboriginal people in communities, universally opposed removal of the permit system, as does the NLC' and the CLC commented that 'Aboriginal people voiced a strong opposition to forced changes to a permit system which complements their

11 *Submission* 6, p.3 (CLC).

12 *Committee Hansard* 30.4.08, p.38 (Mr Kelly, PFA) and *Submission* 1, p.6 (PFA).

13 *Submission* 9, pp.i, 2-3 Attachment (Prof Altman).

14 *Submission* 4, pp.7-8 (LCA).

responsibility for country under Aboriginal law and custom, and is consistent with the land title they hold under Australian law'.[15]

Open or closed communities

1.30 It had been argued as part of the 2007 legislation and again by some in relation to this Bill that the permit system had resulted in closed communities where issues of abuse and community dysfunction could occur without adequate external scrutiny being possible. However others argued that the permit system had allowed visitors to the communities thereby enabling external scrutiny to occur. Indeed, the permit system provided a level of control that enabled communities to exclude undesirable people from entering their community.

1.31 The NLC provided the figure of 32 010 as the number of permits granted by the Land Councils and the Northern Territory Government during 2005-06. In addition, although figures were not available, it is known that traditional owners with the assistance of community councils also issue a large number of permits. Representatives of Land Councils and Homelands advised that it is very, very rare for permits not to be granted if they are applied for and they argued, along with others, that this great flow in and out of communities by people who are not from the community provided plenty of opportunity for scrutiny. As Mr William Tilmouth from Tangentyere Council explained:

> Aboriginal people's lives are not as private as yours or mine. We are open to scrutiny every day of the week. When anyone wants to orchestrate media against us, that will happen. We are under surveillance in every walk of life.[16]

1.32 With such levels of scrutiny possible it was argued that these were not 'closed' communities. However, degrees of relativity remain. As Mr Levy from the NLC concluded:

> These communities have, in the last few years, been portrayed in the media as closed communities. I do not think they are closed communities. I do not think they are open communities either; I think they are somewhere in the middle.[17]

Ministerial authorisations

1.33 Reservations were expressed over the Minister's power under subsection 70(2BB) to authorise a person or class of persons to enter or remain on Aboriginal land. Some groups did not agree with or cautioned against the adoption of an unfettered Ministerial power to issue permits or 'authorisations' to access Aboriginal

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15 *Submission* 12, p.1 (NLC) and *Submission* 6, p.3 (CLC).

16 *Committee Hansard* 29.4.08, p.9 (Mr Tilmouth). Also *Submission* 12, p.5 (NLC) and *Committee Hansard* 30.4.08, p.9 (Mr Levy), p.23 (Ms Havnen), p.71 (Mr Norton).

17 *Committee Hansard* 30.4.08, p.10 (Mr Levy).

land (a power which may be delegated to an officer within FaHCSIA). The CLC considered that continuing to allow the Commonwealth Minister or delegate to have a power to issue permits or 'authorisations' has the potential to create a parallel permit system which will bypass the normal consultative process undertaken by land councils, allow applicants to 'forum shop' for their permit, and increase administration and confusion.[18]

1.34 The Law Council was concerned that the Minister could authorise access to sacred sites and argued that the legislation should clarify that a Ministerial authorisation under section 70(2BB) to enter Aboriginal land does not authorise entry upon a sacred site contrary to the procedures of the Northern Territory Sacred Sites Act.[19]

1.35 The Northern Territory Government expressed concern that the powers contained in subsection 70(2BB) 'leave open the possibility that a Commonwealth Minister could, in a distant time, in effect, remove the permit system for community land (as well as other aboriginal land) by a series of administrative decisions'.[20]

1.36 FaHCSIA noted that a ministerial authorisation power is currently provided in the existing section 70(2BB) of the 2007 Act which provides that the minister may give authorisation to a person or class of persons. The Department advised that:

> The amendment that is proposed in the current bill is to refine that power to do two things: to make it clear that an authorisation given by the minister under that power can be limited to a geographical area and that it can be subject to conditions. We just want to make it clear that it is an existing power, and indeed it is a power which has already been called upon... That is an authorisation which ensures that personnel engaged in delivering the measures that are part of the NT emergency response have the requisite authority to enter Aboriginal land to deliver all those measures.[21]

1.37 FaHCSIA also indicated that the existing ministerial power and the proposed power are subject to the sunset provisions and will endure only for the duration of the intervention.

Access for journalists

1.38 There was differing information provided to the Committee on the extent that journalists had been denied permits under the system that operated prior to the 2007

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18 *Submission* 6, pp.3-4 (CLC). Also *Submission* 11, p.5 (SCIL); *Submission* 12, p.1 (NLC); *Committee Hansard* 29.4.08, p.8 (Mr Tilmouth) and pp.35, 36 (Prof Altman).

19 *Submission* 4, p.9 (LCA)

20 *Submission* 10, p.1 (NT Government). Also *Submission* 12, p.3 (NLC).

21 *Committee Hansard* 30.4.08, p.94 (Ms Edwards, FaHCSIA). A copy of this authorisation was provided to the Committee, see FaHCSIA Additional information 30.4.08, Instrument of Authorisation – Specified classes of persons to enter or remain on Aboriginal land, 10.10.2007.

legislation. The NLC figures provided for the issue of permits by the Land Councils in 2005-2006 indicated that of a total of 56 permit applications received from the media, only two were refused.[22] However Mr Paul Toohey, a journalist with News Limited, advised that he had been 'refused permits on many occasions' and was aware of other journalists being refused permits.[23] An explanation was offered that given the various land tenures that operate under different laws from freehold to leasehold, rather than a permit refusal some situations were a denial of access to land not covered by the permit system and which more likely relied upon the NT Trespass Act.[24]

1.39 FaHCSIA advised that the proposed authorisation which the Minister has indicated would be made after the passage of the Bill permitting access to Aboriginal land by journalists for the purpose of reporting on events in communities, has not been finalised. The Department wrote on 22 February 2008 to the Land Councils and the MEAA setting out the broad parameters for the sort of authorisation which might be considered and inviting their comments. A copy this correspondence was provided to the Committee.[25]

Pornography - Regulating Pay-TV services for R 18+ programs

Defining pornography

1.40 The term 'pornography' is used generically in Australia and there are widely differing interpretations of what qualifies as pornography. Films, computer games and other material are strongly regulated in Australia through a national classification scheme. Classification Guidelines explain different classification categories (G, PG, M, MA15+, R18+, X18+, RC) and the scope and limits of material suitable for each category. There are six classifiable elements – themes, violence, sex, language, drug use, nudity – and the classification takes account of the context and impact of each element including their frequency and intensity, and their cumulative effect.[26]

1.41 Under the *Broadcasting Services Act 1992*, R18+ rated programs can only be shown on television as part of a subscription television narrowcasting service. Subscription broadcast channels, like all free-to-air channels including the ABC and SBS can only broadcast MA classified material or below. In order to qualify as a subscription television narrowcasting service, the audience for the service is necessarily limited. In addition to the Classification system broadcasters are also constrained by their own industry codes of practice.

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22 *Submission* 12, Attachment, p.5 (NLC). Also *Committee Hansard* 29.4.08, p.38 (Prof Altman).

23 *Committee Hansard* 30.4.08, pp.25, 30 (Mr Toohey).

24 *Committee Hansard* 30.4.08, pp.6, 8 (Mr Levy, NLC).

25 FaHCSIA Additional information 30.4.08, proposed ministerial authorisation.

26 See Guidelines for the Classification of Films and Computer Games made under the *Classification (Publications, Films and Computer Games) Act 1995*. The category X18+ is a special and legally restricted category which contains only sexually explicit material and RC is refused classification. X18+ is only legally available in the NT and ACT.

1.42 While the term pornography is used generically in the Little Children are Sacred report, Austar understands that their programming of concern to these communities is sexually explicit television content generally, and 'Adults Only' programming in particular. Austar considers that it is likely that the sexually explicit television content referred to in the report was R18+ classified (though not all R18+ programs are so rated because of sexual content) and therefore the Bill is based on restricting the supply of R18+ rated subscription television into prescribed communities.[27]

R18+ programs on Austar Pay-TV services and lockout protections

1.43 Austar advised that of the many different television services they offered only three include R18+ rated content. These are:

- The World Movies channel, a foreign language channel which occasionally shows movies that are rated R18+. In 2007 3% of all movies broadcast on the World Movies channel were R18+ rated and they are scheduled after 9.30pm;
- The BOX OFFICE Movies service, a pay per view movie service that allows customers to book and view movies in return for an additional payment. Only ten R18+ movies have been or are scheduled on this service between July 2007 and December 2008 and only one was so rated for sexual content;
- The BOX OFFICE 'Adults Only' service, which offers Adults Only movies to subscribers on a per session or monthly subscription basis, in return for an additional payment over the customer's base subscription fee. This is the service that would likely be affected by the provisions in the Bill.[28]

1.44 Austar outlined in their submission and in a presentation to the Committee the operation of their parental lockout system and PIN protection that enables parents to restrict their children's access to unsuitable programs or those that they believe should not be accessed due to the ratings classification of those programs.

1.45 There was some debate over the use of parental lock-out systems and the capacity of adolescent children to 'break the codes'. The related issue of parental supervision was also raised. Mr Kelly of the PFA commented:

> There is a lack of parental supervision across the board of what people watch on the television…The reality is, unless there is parental supervision, it does not matter what you ban. If there is no buy-in from the elders and the people in that community to supervise and self-regulate what kids are accessing then it really does not matter what you ban for the rest of us.[29]

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27 *Submission* 7, p.4 (Austar).

28 *Submission* 7, pp.5-6 and Additional information, 1.5.08, pp.3-4 (Austar).

29 *Committee Hansard* 30.4.08, p.46 (Mr Kelly, PFA).

Number of subscribers in prescribed areas and implementation costs

1.46 With only three services offered by Austar carrying R18+ material, Austar was questioned as to the number of subscribers that they may have in the prescribed areas and the number of these who would be Adult Only channel subscribers. Austar has been in discussion with FaHCSIA to determine the prescribed areas for comparison with Austar's subscription information. Currently 517 active subscribers have been identified in the prescribed areas. Given that there is a total figure of 21 000 subscribers across the whole Northern Territory of which about 3.6% are Adult Only single session or monthly subscribers, if a similar 3.6% rate is applied to the 517 who are in the prescribed areas, the number that the provisions of the Bill would cover appear to be very small.[30]

1.47 Given the limited number of subscribers likely to be affected by the Bill, the Committee sought information about the cost to Austar and ACMA of implementing this measure. Austar outlined a number of technological and administrative changes that it would need to make to comply with the legislation. Costs were likely to be significant and would be directly influenced by the scope of the ban. Any increased cost burden would likely be passed onto subscribers. The Department of Broadband, Communications and the Digital Economy (DBCDE) in its response indicated that it was not possible to provide information on the likely cost of the measure and noted the issues raised by Austar.[31]

Issues raised by Austar

1.48 Austar advised that since the release of The Little Children are Sacred report they have worked with governments to assist legislators in understanding the technical and regulatory environment in which Austar provides its services. Austar strongly disagreed with any call to implement a blanket ban as lacking an understanding about the technology on which subscription television is based and would not reflect the extensive work that FaHCSIA and DBCDE have done to ensure that the Bill is capable of achieving maximum benefit. Austar stated that:

> If, however, the Government considers it necessary to bring in legislation on this subject, we believe that the Bill currently before Parliament, with some minor amendments on technical issues such as recordkeeping, will achieve the stated policy objectives of the Government.[32]

1.49 The technical and other issues referred to by Austar, particularly relating to a blanket prohibition on R18+ content, included:

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30 *Committee Hansard* 29.4.08, pp.32-3 and *Submission* 7, Additional information 1.5.08 and 6.5.08 (Austar).

31 DBCDE Additional information, 6.5.08.

32 *Submission* 7, p.3 (Austar).

- Austar is not technologically able to block the supply of R18+ rated programs to prescribed areas in Australia on a program-by-program basis…We have consciously designed program-by-program access restrictions in a way that gives that control to parents, in the home. In addition, Austar imposes PIN protection centrally on all 'Adults Only' programming. We cannot, technically, do more than that;
- A blanket prohibition on Austar's supply of all R18+ rated programs carried on its platform into prescribed areas would therefore require Austar to suspend all Austar services that ever include R18+ rated programs, including the World Movies channel and BOX OFFICE movies in their current program configuration, into those areas;
- The difference between how AUSTAR locates its customers and how the Emergency Response Act defines 'prescribed areas' means that it is not possible for Austar to know with certainty whether one or more of its customers is located within a 'prescribed area';
- Austar also proposed amendments to refine the operation of the Bill, that related to the ability to self-declare an R18+classified service, record keeping, service provider participation in community consultation process, inadvertent breaches and exemption from the Racial discrimination Act.[33]

The technical amendments may be considered in the debate on the legislation.

1.50 DBCDE commented on the difficulties Austar had in matching their data with prescribed areas which has an impact on any possible ban into these areas.

> My understanding is that Austar has already been working with FaHCSIA people in relation to the maps. Matching the maps is obviously where they would have to start. I would imagine that a substantial proportion of the subscriptions—and there are only a relatively small number of people with subscriptions to the adults-only channel—would probably be relatively easy to identify. But there are, no doubt, going to be some areas on the margins where there will be some issues.[34]

1.51 The issue of limiting any prohibition to the prescribed areas that raised the technological issues for Austar, raised broader issues for others. The North Australian Aboriginal Justice Agency (NAAJA) commented that such arbitrariness would have no impact in encouraging behavioural change and argued:

> Let's not focus on this arbitrary distinction between where you can and cannot access pornography; let's look at providing significant services that are culturally appropriate to people in communities about what has been happening to them and some of the sexual behaviour that happens in communities. If we address that sexual behaviour, then pornography will fit into that in terms of appropriate ways in which pornography should and

33 *Submission* 7, pp.7-9, Attachment 2 and *Committee Hansard* 29.4.08, pp.24-5, 27, 30 (Austar).

34 *Committee Hansard* 30.4.08, p.101 (Dr Pelling, DBCDE).

> should not be viewed. One of the concerns with pornography is its link in grooming children for child sex offences. If we do not provide services to deal with child sex offending in a holistic way, then the pornography is going to remain an issue, whatever tough prohibitions government installs.[35]

Little Children are Sacred and recommended education campaign

1.52 The Little Children are Sacred report spoke of the impact that pornography had of inexorably leading to family and other violence and on to the sexual abuse of children.

> It is apparent that children in Aboriginal communities are widely exposed to inappropriate sexual activity such as pornography, adult films and adults having sex within the child's view. This exposure can produce a number of effects, particularly resulting in the "sexualisation" of childhood and the creation of normalcy around sexual activity that may be used to engage children in sexual activity.[36]

1.53 The report stated that the availability of pornography in communities and children's exposure to pornographic material 'was as a result of poor supervision, overcrowding in houses and acceptance or normalisation of this material'.[37] However, the report's recommendation 87 in relation to pornography was to conduct an education campaign to inform communities about film and television classifications, the illegality of intentionally exposing children to indecent material, and the harm to a child's well-being that is produced by exposure to sexually explicit material.

1.54 A number of submissions referred to this recommendation noting that the emphasis was on education as the key to providing a longer term solution which enlivens adults in affected communities to the dangers of pornographic and violent material to young and immature viewers.[38]

1.55 While the Bill does not provide for the education campaigns needed to address the issues of sexual abuse and the impact of pornography, the Committee did hear that education campaigns are commencing. Ms Morris from the NT Department of Justice advised that the NT government is working in partnership with NAPCAN (National Association for Prevention of Child Abuse and Neglect) in relation to a pornography education program:

> We have a program which is being rolled out into communities at the moment to educate people about classifications—all classification, including film and video and other forms of entertainment—and what the classifications mean and therefore what is appropriate for what level.

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35 *Committee Hansard* 30.4.08, p.55 (Mr Wodak, NAAJA).

36 Little Children are Sacred, p.65.

37 ibid, p.199.

38 *Submission* 4, pp.4-5 (LCA); *Submission* 5, p.17 (HRLRC).

> Previous education campaigns on that have not targeted Indigenous people as the audience or have not delivered those education campaigns in ways that they would understand the message.
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> We are working with a group of senior men in order to train them as to what the classifications mean and what the pornography restrictions mean. They are taking that message as leaders back to the communities. [The first phase of this program involves 27 different communities]. Various materials have been developed, and NAPCAN was on the steering committee and is assisting with the development of those materials which will provide information about that message.[39]

1.56 The Attorney-General's Department indicated that the classification area had given some assistance to the NT officers working on developing educational campaigns by providing information and participating in seminars. However, no funding has been provided by AGs nor by other Commonwealth departments.[40]

1.57 Austar also advised that they had begun work with FaHCSIA on an education program for Indigenous communities in line with the recommendation in the Little Children are Sacred report to better inform adults in the community about Austar's services and the parental control technology they can use to restrict their children's access to programming that is unsuitable for them to watch.[41]

1.58 FaHCSIA indicated that some discussions had been held with Austar in the context of the community consultations that would be required and about the benefits of educating and working with communities on what was pornography. However, the discussions were about Austar working through their service providers to get some things on the ground, rather than government actually rolling out a program around education.[42]

The 35% Rule

1.59 Some argued that the Bill proposes a limited and complex regime for restricting the broadcast of R18+ television into certain prescribed areas of the Northern Territory. The broadcasting restrictions in the Bill apply to a subscription television narrowcasting service in which the total number of hours of R18+ programs broadcast during a seven day period exceeds 35% of the total number of hours of all programs broadcast during that period.

1.60 Some uncertainty was expressed about this wording as to whether the 35% rule would apply to a specific channel or to the entire broadcast hours of a particular

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39 *Committee Hansard* 30.4.08, pp.87-8 (Ms Morris, NT Department of Justice).

40 *Committee Hansard* 30.4.08, p.106 (Ms Davies, Attorney-General's Department).

41 *Submission* 7, pp.2-3, 9 and *Committee Hansard* 29.4.08, p.23 (Austar).

42 *Committee Hansard* 30.4.08, p.103 (Ms Curran, FaHCSIA).

subscription television narrowcasting service. DBCDE and Austar[43] advised that the 35% definitely applied on a service by service or channel by channel basis. While this advice clarified the situation, there was debate during the hearing that the wording of the Explanatory Memorandum created uncertainty as it appeared inconsistent with the wording of the Bill.[44]

1.61 The Festival of Light Australia considered that 'even if the Bill were amended to ensure that the 35% rule would apply to a particular channel rather than to a particular subscription television narrowcasting service as a whole, the provision would still be difficult to apply'. FoLA recommended that the Bill be amended with these provisions being replaced 'with a blanket prohibition on any broadcast of R18+ programs into prescribed areas'.[45]

Community consultation and request

1.62 Some concerns were expressed that community members may be reticent about expressing a view on this issue or that the expressing of contrary views may not be taken into account in reaching a community decision. FaHCSIA responded that they understood that some people might be reluctant to come forward or express concerns about material. It is proposed to have guidelines to assist in the consultation process which include enabling a person to submit their views in writing to the minister:

> The idea is that the person making the complaint in writing need not be the complainant. It could be somebody in a community writing on behalf of, say, a particular Aboriginal woman or even children. We understand that it can be done on behalf of a child who might make a complaint. So the written complaint might come from somebody who is working in the community or a friend of the person in the community—but it needs to be a single person in the community, a child or a woman—and they would be able to make it with someone else's assistance.[46]

1.63 The HRLRC raised a related issue noting that while the Bill provides that the Minister must ensure that there has been adequate community consultation before declaring a prescribed area for the purposes of prohibiting the broadcast of R18+ programs, 'a failure of the Minister to consult adequately with the community does not affect the validity of a determination. This raises concerns in relation to the right to an effective remedy.'[47]

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43 *Committee Hansard* 29.4.08, p. (Austar) and 30.4.08, p.108 (DBCDE). Also DBCDE Additional information, 6.5.08, Distinction between 'channel' and 'service' with regard to the 35% provision.

44 *Committee Hansard* 29.4.08, pp.25-6 (Senator Humphries).

45 *Submission* 2, pp.1-2 (Festival of Light Australia).

46 *Committee Hansard* 30.4.08, p.105 (Ms Edwards, FaHCSIA).

47 *Submission* 5, p.22 (HRLRC).

Overlapping legislation and policing

1.64 The Police Federation of Australia reiterated its concerns in relation to policing in remote Indigenous communities and remain convinced that effective policing in these communities can only be carried out by experienced Northern Territory police permanently stationed and living in the communities. The Federation was concerned at the complexities and difficulties that arise from overlapping laws and argued:

> That the Commonwealth and Territory governments should move quickly to ensure that NT statutes, in liquor and pornography control, meet the requirements of the Federal emergency response to ensure that the arrest and prosecution process are not hampered by administrative and bureaucratic inefficiency.[48]

1.65 The NT government noted that there are 'practical problems' with some of the legislation, including in relation to compliance and policing activities. The NT government is currently assessing this issue, partly as the Territory liquor act is being reviewed, and they will work with the Commonwealth to ensure that the issue is addressed as part of the emergency response review due later in the year.[49]

Transport of prohibited material

1.66 The Festival of Light noted that the Bill provides that a police officer would only be entitled to seize prohibited material if the officer 'suspects on reasonable grounds' that the prohibited material 'was not brought into the prescribed area for the sole purpose of transporting it to a place outside the prescribed area' and argued:

> So, although in a prosecution for an offence the legal burden would be on the accused to prove that the material was brought into the prescribed area for the sole purpose of transporting it to a place outside the prescribed area, it is less likely that prosecutions would be brought because police would have difficulty in finding 'reasonable grounds' for disbelieving any claim by a person caught with prohibited material in a vehicle that it was intended for transport outside the prescribed area.
>
> This provision is likely to have a significant dampening effect on any serious effort by police to enforce the prohibition on possession of prohibited material in prescribed areas.[50]

1.67 Mr Kelly, representing the Police Federation, noted that police had experience with the NT liquor legislation which permits transport through liquor-restricted areas and commented:

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48 *Submission* 1, p.3 (Police Federation of Australia) and *Committee Hansard* 30.4.08, p.41.

49 *Committee Hansard* 30.4.08, pp.88-9 (Ms Morris, NT Department of Justice).

50 *Submission* 2, p.4 (Festival of Light Australia).

> It can become a bit of a cat-and-mouse game when you have people from the community saying, 'We're just driving across to X, Y, Z,' which are not restricted areas. So it does present challenges. But, again, if people are legitimately moving through a community and are not going to stop and distribute what they have got then I suppose that is part of life. I think the answer to your question is that it would be something that police on the ground would have to deal with. If someone stopped, they would have to enforce the law as effectively as they could.[51]

Community Stores

1.68 The amendment to allow roadhouses, upon which communities are substantially dependent, to be licensed as a community store was generally supported, though exactly how substantial dependence would be assessed was questioned.[52]

1.69 However, some broader issues relating to the community store licensing system were raised, especially that the cost of attaining licensing accreditation was being passed onto welfare dependent consumers and at the availability of healthy, nutritious food. The CLC summed up these views:

> It is apparent that the store licensing is focussing on income management and administrative arrangements, rather than nutrition and pricing. So while, as a consequence of having to implement income management, store governance arrangements are improving, deeper social and health issues are not being addressed. Anecdotally, store prices have universally increased since the advent of income management in a community. There may be some increased costs associated with administration of this system, but it appears the guarantee of quarantined money is fuelling high inflation at community stores.
>
> The CLC would support higher benchmarks for stocking nutritional food, stricter controls on pricing, and, as stated in our previous submission, a requirement that stores have the capacity to train and employ local community members.[53]

1.70 The Northern Territory Government raised an additional issue for the roadhouses that could be subjected to the licensing regime and who may pass on the cost of any regulation to customers:

> There may also be 'competition impact' issues arising from the fact that some roadhouses will be adversely affected when compared to other roadhouses or stores in towns. Compared to other roadhouses they will be

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51 *Committee Hansard* 30.4.08, p.47 (Mr Kelly, PFA).

52 *Committee Hansard* 29.4.08, p.36 (Prof Altman).

53 *Submission* 6, p.6 (CLC). Also *Submission* 9, p.ii (Prof Altman); *Submission* 15, pp.10-11 (Laynhapuy Homelands Association); *Committee Hansard* 29.4.08, p.2 (Tangentyere Council).

> subjected to higher compliance costs and thus, in dealing with tourists and other travellers, could be at a serious competitive disadvantage.[54]

1.71 FaHCSIA provided a detailed outline of the procedures that are followed for the Community Store Assessment and Licensing Process.[55] Major General Chalmers commented that many stores are operating successfully under the system:

> My contention would be that there are many stores operating under income management which are doing so successfully and, as I have said before, experiencing increasing turnover. I do not think the picture is quite as dark as it may have been painted to you.[56]

Compliance with Racial Discrimination Act and International obligations

1.72 The package of legislation that formed the NT Emergency response contain provisions that deem the measures in the legislation to be special measures and excludes them from the operation of the Racial Discrimination Act (RDA). This element of the emergency response has been heavily criticised with groups calling for the repeal of the provisions suspending the operation of the RDA.

1.73 As noted earlier, the Bill contains no new provisions which exclude the operation of the RDA. However, the new R18+ measures have been designed as special measures and do not have a provision excluding the operation of part II of the RDA. The Law Council particularly noted that the RDA will not be suspended in relation to any new measures under the Bill, commenting that 'this aspect of the Bill is supported by the Law Council and invites the further comment that suspension of the RDA in any context is inappropriate, contrary to Australia's international obligations, and sets a dangerous precedent for future Parliaments'.[57]

1.74 A number of submissions debated at length whether the provisions in the Bill are compatible with Australia's international law obligations[58], in particular the duties to protect freedom of expression, freedom of movement, freedom from racial discrimination, and the rights of Indigenous people. The Human Rights Law Resource Centre (HRLRC) was particularly concerned about a number of human rights issues in respect of the Bill, namely the right to non-discrimination and equality before the law; the right of self-determination and to participate meaningfully in policy formulation

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54 *Submission* 10, p.2 (NT Government). Also *Committee Hansard* 29.4.08, p.37 (Prof Altman).

55 FaHCSIA Additional information, 6.5.08, Community Stores Licensing.

56 *Committee Hansard* 30.4.08, p.83 (Major Gen. Chalmers).

57 *Submission* 4, p.9 (LCA) and *Committee Hansard* 29.4.08, pp.49-50 (Ms Webb and Mr Parmeter, LCA).

58 These obligations are found in a number of the major international human rights treaties to which Australia is a party, including the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); and the Convention on the Rights of the Child (CRC)

and public debate; the rights of the child and the importance of using a children's rights framework; and the right to an effective remedy.[59]

1.75 The Sydney Centre for International Law discussed whether Schedule 1 (broadcasting R18+) is compatible with freedom of expression and is not racially discriminatory with its special measures and that Schedule 3 (reintroduction of permits) is a justifiable restriction on freedom of movement. The Centre concluded that:

> In our view, the bill largely complies with Australia's human rights law obligations, although at present the bill goes too far in interfering in protected freedom of expression and we recommend that only pornographic (not all R18+) material should be restricted.[60]

Recommendation

1.76 The Committee reports to the Senate that it has considered the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Response Consolidation) Bill 2008 and recommends that the Bill be passed

Senator Claire Moore
Chair

May 2008

59 *Submission* 5 (HRLRC).

60 *Submission* 11, p.5 (SCIL). Also *Submission* 13, p.4-5 (NAAJA).