

DISSENTING REPORT BY LIBERAL SENATORS

on the

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

1.1 The Liberal senators who participated in this inquiry believe that many provisions of the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Response Consolidation) Bill 2008 (the Bill) represent a retreat from the principles which underpin the Northern Territory emergency response announced and commenced by the former Coalition government. That package of legislation, financial assistance, on-the-ground support and administrative changes constitutes a vital initiative responding to the extreme and urgent needs of indigenous children in the Northern Territory.

1.2 As the majority report notes, the Government has announced its intention to commission an independent review of the Northern Territory emergency response for completion later this year. As such, Liberal senators believe that the measures in this Bill pre-empt that review and undermine the basis on which so much Federal effort and money has been expended since June 2007. Such measures run the risk of confusing those benefiting from the intervention, and those working on Commonwealth programmes and initiatives constituting the intervention, as to the Federal Government's position on the fundamental objectives of this exercise. The proposed amendments also appear designed to confuse and deflect the focus of the former Government's initiative.

1.3 The *Little Children are Sacred* report of April 2007 by the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse found that 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 and, to a lesser extent, between the use of pornography and sexual abuse of children. Liberal senators heard no evidence in the course of this Inquiry to suggest that the magnitude or urgency of that problem in indigenous communities had lessened in the last year, although some witnesses suggested that evidence on the original size and scope of the problem had been inadequate. Therefore the senators believe the legal and financial framework around the Intervention should not be tampered with at this time. To do so in fact has the potential to harm those the Intervention was designed to help.

1.4 A number of specific issues arising from the Inquiry are addressed in this dissenting report.

Identifying Austar customers in prescribed areas

1.5 Liberal senators were troubled by evidence from the subscription TV industry as to the difficulty it would encounter in complying with the legislation as originally enacted.

1.6 Austar noted that the difference between how it 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’. According to Austar, this would create a number of issues should a blanket ban on R18+ rated programming across all prescribed areas be introduced, including:

- If AUSTAR thinks a customer is outside a prescribed area and does not switch the customer off, but the customer is actually inside the prescribed area, AUSTAR would be in breach of the content prohibition; and
- If AUSTAR thinks a customer is inside a prescribed area and switches the customer off, but the customer is actually outside the prescribed area, AUSTAR would be in breach of its Customer Agreement with the customer and may be in breach of the Racial Discrimination Act 1975 (Cth).¹

1.7 These views were challenged at the hearing. In respect of the first dot point the following exchange took place:

Senator HUMPHRIES—As you know, in most offences there is an intent requirement. Whereabouts in the legislation is the offence made an absolute liability provision whereby intent is not a factor?

Ms Henty—We have actually requested that there be an amendment to show that this is the case. Can I read the current language out?

Senator HUMPHRIES—Can you direct me to the section you are reading from?

Ms Henty—We are talking about schedule 1, paragraph 10. It starts at the end of part 7, schedule 2. It talks about amendments to the Broadcasting Services Act. We are talking about subclause 12 in the Broadcasting Services Act, which is titled, ‘Condition applicable to declared subscription television narrowcasting services provided in the Northern Territory under class licences’. The channels that we carry that would be subject to this are World Movies, the Adults Only service and Box Office movies. Those are the only three services that we are talking about. Subclause (1) states:

The provision by a person of a declared subscription television narrowcasting service under a class licence is subject to the condition that the licensee will not provide the service in a way that will enable a subscriber in a declared prescribed area to receive the service.

1 *Submission 7*, pp.8-9 (AUSTAR).

That in our minds, without any implied by law mens rea or more complicated legal theory, is a blanket prohibition that we are required to comply with in order to preserve the conditions under which we continue to broadcast World Movies, Box Office movies and the Adults Only service.

Senator HUMPHRIES—You would be well aware, Ms Henty, that bodies like the High Court have made it very clear that legislation intended to oust protections like the requirement for mens rea has to do so explicitly, not by implication?

Ms Henty—Absolutely. We are not seeking—

Senator HUMPHRIES—This does not do that, does it?

Ms Henty—The thing that might be useful for the committee to hear is that we do not disagree that the provision of adults-only services into these communities might be a bad thing.

Senator HUMPHRIES—With respect, I do not want to hear the principle; I want to come to the practical detail of your submission. Let us suppose that it was banned in prescribed areas. If you supply that material into an area that is outside the prescribed area, thinking that it is inside a prescribed area, you say you would commit an offence. Can you show me where in this legislation the intent provisions that are normally applicable in Australian law do not apply in this case?

Ms Henty—We would hope that the intent provisions do apply.

Senator HUMPHRIES—So, with respect, that first dot point is not accurate, is it?

Senator CROSSIN—Is it not the reversal of the onus of proof—in other words, you are guilty of that offence unless you can prove otherwise?

Senator HUMPHRIES—If it is clear that you are reversing the normal Australian legal position that you need to have a guilty mind to accompany your guilty action, if you create an absolute liability offence, you are quite right that you would be caught. But common law in Australia is quite clear that you need to expressly state that in a piece of legislation for it to occur; otherwise the assumption will be that a guilty act needs to be accompanied by a guilty mind—and that is not in this legislation, is it?

Ms Henty—With respect, I am certainly not prepared to talk about the significance of criminal intent in this legislation. We are trying to comply with it and we have raised the point just to indicate the difficulty that we have in locating individuals in these communities.

Senator HUMPHRIES—It also, with respect, sounds to me as if you are attempting to portray to the committee more problems and issues with respect to complying with the intent of the legislation than actually exist.

Ms Henty—That was not our intent.²

1.8 In relation to the second dot point, while there was agreement with the aspect of breaching the Customer Agreement, the second aspect of breaching the Racial Discrimination Act was challenged.

Ms Henty—The Racial Discrimination Act in representing the relevant international convention would at least prima facie start a differentiation in the treatment of people on the basis of their race. There is an exception to that: if it is established that it is for the good of the local community. We have said, as noted in here, that our concern about the Racial Discrimination Act is that we may be in breach of it. I think the point was raised in the submissions made by the Law Council of Australia and some others that there is an open question that the bill and certainly a blanket prohibition may offend Australia's international conventions.

Senator HUMPHRIES—Yes, but that is a different question to the one I am raising. I am raising the issue you have raised in your second dot point as to why we should not support the creation of a ban on broadcasting or narrowcasting into prescribed areas: by switching off a customer because you believe he is inside the prescribed area when he is in fact outside the prescribed area you may be in breach of the Racial Discrimination Act. As you rightly point out, making that decision on the basis of the race of the person you are dealing with may well fall within the Racial Discrimination Act's provisions. But if you are making that decision based on your attempt to comply with federal broadcasting legislation how can that possibly be construed as a decision made with the intent of advantaging or treating differently a person of one race over another?

Ms Henty—There is, as I am sure you know, a significant legal debate about whether we would be actually up for breach of the Racial Discrimination Act if a group brought us to court for switching off someone on the basis of their race. It is not something that I feel qualified to discuss here.

Senator HUMPHRIES—With respect, nobody else has raised that particular point with us. The Law Council have not raised that point in their submission. They have raised the issue about the capacity to exempt some actions from the Racial Discrimination Act but they have not made the point that you have made in your second dot point. If you are not prepared to make that point here then why is it in your submission?

Ms Henty—The point in the submission was to highlight, as the Law Council of Australia and the department have, that there are issues in a blanket prohibition without a consultative process that raise racial discrimination problems. Like the government, we are concerned about these issues and, to the extent that we are the perpetrators of the activity that the legislation is trying to put in place, we feel that we are particularly vulnerable to any claim of breach.

Senator HUMPHRIES—I do not think that is the point that is being raised by the Law Council...³

1.9 In summary, Liberal senators saw the technical “objections” raised by the industry as self-serving. They believe, for example, that there is no good reason why providers such as Austar cannot work with the Government to identify those areas into which it can and cannot narrowcast material with pornographic content, and by doing so in good faith obviate any question of their committing an offence under any law.

The *Little Children are Sacred* report and reference to pornography

1.10 The *Little Children are Sacred* Report drew attention to the exposure to pornography in communities and the abuse of children. The Report noted that the issue of children’s and the community’s exposure to pornography was raised regularly in submissions and consultations with the Inquiry. The use of pornography as a way to encourage or prepare children for sex (“grooming”) had featured heavily in recent prominent cases. The Report stated:

In written submissions to the Inquiry from community groups and individuals, concern was expressed about the availability of pornography in communities and children’s exposure to pornographic material, in particular videos and DVDs. This was as a result of poor supervision, overcrowding in houses and acceptance or normalisation of this material.

It was subsequently confirmed at the regional meetings conducted by the Inquiry in February and March 2007, that pornography was a major factor in communities and that it should be stopped. The daily diet of sexually explicit material has had a major impact, presenting young and adolescent Aboriginals with a view of mainstream sexual practice and behaviour which is jaundiced. It encourages them to act out the fantasies they see on screen or in magazines. Exposure to pornography was also blamed for the sexualised behaviour evident in quite young children⁷⁰. It was recommended that possible strategies to restrict access to this material, generally and by children in particular, be investigated.⁴

1.11 The general need to control pornography was supported. Ms Havnen said:

I think retaining some sort of control and ban on availability of pornographic material is probably highly desirable under the circumstances. I do not think anybody is really opposed to that proposition at all. Anything that we can do that might go some way to ensuring the protection and wellbeing of kids I think is a positive thing.⁵

1.12 In terms of narrowcasting into ‘prescribed areas’, some witnesses suggested it was insulting to indigenous people to provide them with less freedom than other Australians to view what they wished. Liberal senators however were conscious of the special circumstances affecting those communities which require special measures.

4 Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, Report, *Little Children are Sacred*, April 2007, p.199.

5 *Committee Hansard* 30.4.08, p.16 (Ms Havnen).

These circumstances were best summarised by the Northern Australian Aboriginal Justice Agency:

There is an expectation that traditional people living in Aboriginal communities will innately comply with standards and norms set by contemporary Western democracies. You really need to understand the different world views. I am not specifically referring to what my friend was talking about. Their view is not the same as ours. They have a different view of supervision of young children than contemporary Western democracies have. Because over the years there has been so much disempowerment of Aboriginal people, there tends to be a lot of apathy in communities about those kinds of standards—and understandably so. The intervention has only exacerbated that sort of confusion and apathy. But that difference in world view is an important conceptual idea that we need to get our heads around.⁶

Access to Aboriginal land

1.13 The use of the permit system to restrict access to aboriginal land disturbed Liberal senators.

1.14 Mr Paul Toohey, a senior journalist with News Limited, took issue with the comments by Mr Ron Levy of the Northern Land Council who did not consider that that these were closed communities, nor that they were open communities – rather they were somewhere in the middle. Mr Toohey strongly advocated the view that the permit system rendered them closed communities, stating:

I think it is a tragedy that the permit system will be reintroduced for townships... Keeping these townships closed is backwards, negative and basically a dangerous act which does not help anyone. No-one has any issue with requiring people to have a permit to access the vast holdings of Aboriginal land. The roads leading to them and the townships are a different issue altogether. If people want to practice their culture, protect their land, protect their sites, run businesses on their land and require people to have permits, so they should. It is land that has been won under the Aboriginal Land Rights Act or vested even earlier than that. I fully support Aboriginal people having total control over that, except on the roads and the towns where there are schools, clinics, police stations and shops. I fail to see why these places need to be closed.⁷

1.15 Mr Toohey confirmed that he had been refused a permit to enter indigenous land. He was asked about the frequency of journalists being refused permits prior to the 2007 amendments to the permit system. He responded:

I do not have any idea how frequently it has occurred. All I know is that it is a barrier that should not be there. This argument has gone beyond

6 *Committee Hansard* 30.4.08, p.54 (Mr Johnson, NAAJA).

7 *Committee Hansard* 30.4.08, p.25 (Mr Toohey).

journalists. This is not about journalists and access to communities; it is about communities themselves being open.⁸

1.16 Some argued that the Schedule 3 of the Bill should be deleted so that the provisions of the emergency response legislation that abolished aspects of the permit system would remain in place. The Festival of Light submitted:

The many tragic accounts of sexual abuse of Aboriginal children in the [Little Children are Sacred] report largely involve abuse by other residents of the local community. It seems reasonable to assume that allowing such “small geographically-isolated communities” with endemic problems of sexual abuse to refuse entry to people from outside the community only perpetuates the problems of isolation.

A permit system which can exclude outside visitors from a community seems to violate the fundamental principles of freedom of movement and freedom of association, as well as the notion of Australia as a single nation with a shared sense of community.⁹

1.17 Mr Hal Duell raised other concerns with a reinstated permit system:

A new system of local government is being rolled out across the NT. Shires stretching in some cases from Queensland to WA will replace a myriad of local councils, and shire meetings will be held on a rotational basis in different townships. As the third tier of government these meetings must be open to the public with the usual confidential section as prescribed by the Act. At the very least any reinstated permit system would have to be lifted on the day of the Shire Meetings to allow access to the township and to the building hosting the public meeting.

Another concern with the new shires is the shires will levy rates and use some of that money to maintain public roads. Is there a conflict when publicly funded (rates funded) roads are submitted to a private permit system?¹⁰

1.18 Liberal senators strongly believe it is too early to assess the success or failure of the previous government’s decision to remove the permit system. Although the preponderance of those stakeholders giving evidence supported the system’s scrapping, little evidence was offered as to tangible problems arising from its abolition.

1.19 The Liberal senators were concerned about some elements of paternalistic behaviour which were offered as benefits of the permit system.

1.20 Mr Tilmouth suggested that the permit system worked to protect indigenous people from outsiders.

8 *Committee Hansard* 30.4.08, p.25 (Mr Toohey).

9 *Submission 2*, p.5 (Festival of Light Australia).

10 *Submission 18*, p.1 (Mr Duell).

There has not been open-slathe movement into those town camps, but unwanted media has been going into town camps or trying to access stories from individuals within town camps. ...We did deny others who were unscrupulous dealers—people selling vacuum cleaners to people without carpets, people selling encyclopaedias to people who cannot read, people selling alcohol to grog runners and, ultimately, carpetbaggers in relation to art.¹¹

1.21 Subsequently Mr Tilmouth suggested that consumer education would assist in this area.

Mr Tilmouth—...There are a lot of people who buy things, do not know their rights, and at the end of the day their consumer rights are totally abused. You can never get that issue solved. That is the reason why we have a consumer rights person at Tangentyere. He is also a financial adviser. We are getting people stung by sharp loans, these Aussie loans sorts of things. Used-car dealers all park around Tangentyere. They are across the road. There are second-hand shops across the road. This is all because a lot of people know that Aboriginal people do not know their rights and are very prone to abuse. That has happened time and time again in the history of Aboriginal people.

Senator BOYCE—So some legislation to protect people would be—

Mr Tilmouth—There is enough legislation there. There is not enough education. There is not enough prosecution of people out there. People do it and they get away with it. It happens time and time again.¹²

1.22 Mr Tilmouth also noted the ability to stop "media manipulation" of issues arising on indigenous land as a benefit of the permit system.

Senator BOYCE—...Going on to the permit system: it is accepted—universally, I would think—that perversion and corruption flourish when there is no transparency and no oversight of what is going on. What structures do you have in place to stop the permit system being misused or abused to protect undesirables who might already be in the community?

Mr Tilmouth—I do not think there is an opportunity now. You are talking about privacy being the main ingredient for all abuse—and privacy is. 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. We are not as private as people think we are. At the end of the day, abuse does thrive in privacy—yes, I agree with that—but media can utilise our lives for their own purposes. As I said earlier, the police have complete entry, the welfare services have complete entry and the medical services have complete entry. We do not deny those people access. If somebody

11 *Committee Hansard* 29.4.08, p.3 (Mr Tilmouth).

12 *Committee Hansard* 29.4.08, p.10.

wants to call the police, if somebody wants the welfare services to go in, they have complete access.

You were talking about openness to media. You know the media—it can manipulate a story so badly.¹³

1.23 The Committee was advised that, whilst FaHCSIA has received correspondence relating to the permit system and its abolition, there has been no formal complaint received by the Department or the Minister regarding that abolition.

FaHCSIA has not received any such formal complaint and nor am I aware of any formal complaint having been referred to the minister's office...

There has been plenty of correspondence about the issue generally, but no formal complaint about any particular instance that I am aware of.¹⁴

1.24 Of further concern is evidence that permits are often provided for a charge, suggesting that profit rather than privacy may sometimes be the rationale for their use.

Conclusion

1.25 Every inquiry into various aspects of indigenous disadvantage or disempowerment of which the Liberal senators are aware has drawn attention to a wide range of seemingly-intractable problems and challenges facing indigenous Australians. Every such inquiry has further noted the 'interconnectedness' of these problems, suggesting in effect that any solution must be comprehensive, multifaceted and well-resourced.

1.26 The Northern Territory emergency response is the most comprehensive, multifaceted and well-resourced attack on indigenous disadvantage that our nation has yet seen. It is of course too early to judge whether it will succeed in substantially improving the lives and well-being of aborigines in the Northern Territory, even in respect of the sexual and physical abuse of women and children which was the trigger for this suite of measures. We believe however that it would be a tragic mistake for the Federal Government to unpick the key elements of this emergency response in this critical early phase.

1.27 We believe that passing this Bill begins the process of gutting the Northern Territory emergency response from within. We believe this Bill is not framed with the interests of indigenous people in the Northern Territory foremost, rather it demonstrates the Government's preference for superficial political symbolism.

13 *Committee Hansard* 29.4.08, p.9.

14 *Committee Hansard* 30.4.08, p.107 (Ms Edwards, FaHCSIA).

Recommendation

Liberal senators urge the Senate not to pass the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Response Consolidation) Bill 2008 at this time.

Senator Gary Humphries
Deputy Chair
LP, Australian Capital Territory

Senator Judith Adams
LP, Western Australia

Senator Sue Boyce
LP, Queensland