Minority Report from the Australian Greens and Australian Democrats

Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Response Consolidation) Bill 2008

A significant number of submissions presented and evidence given to the inquiry went beyond its immediate terms of reference and sought to comment on wider issues and concerns with the NT emergency response that were not being dealt with by this Bill. This reflects a high level of community concern with the on the ground impacts of the intervention.

These concerns included:

- the suspension of the Racial Discrimination Act 1975 (RDA),
- practical problems with the income quarantining regime,
- the large amount of money being spent on measures which did not address the underlying causes of Indigenous disadvantage, child abuse or neglect,
- wastage of money on income quarantining
- increasing levels of urban drift from remote communities into population centres,
- a corresponding increase in demand for emergency response support from charitable organisations (reported to be around 300%),
- the failure to build new houses or schools or to employ more teachers, health workers and child protection workers … and so on.

While the Government has continued to point out in response to these concerns that it intends to commence a review of the first twelve months of the NT intervention in July, this is not a completely satisfactory answer, and apparently failed to convince the large number of witnesses and submitters who sought to go beyond the terms of reference of the inquiry.

On issues such as the suspension of the Racial Discrimination Act 1975, the Anti- Discrimination Act (NT) 1992 and the Northern Territory (Self Government) Act 1978, which relate directly to whether the measures are right from a moral and human rights perspective and fit with our obligations under international conventions, this assessment is a logical and legal one that is independent of how they have been implemented over a twelve month period.

Similarly, where there are pressing issues with the implementation of the emergency response legislation concerning unintended consequences, or the

measures are causing undue hardship, we would argue that there is an immediate need to address these issues directly to ameliorate or moderate these impacts, rather than delaying and causing further unnecessary hardship.

The Australian Greens and Australian Democrats are disappointed that this Bill only addresses a number of predominantly minor legislative amendments when it is clear that much larger changes to the NT intervention legislation are warranted. We are disappointed that in government the ALP has failed to address the issues with the Racial Discrimination Act that it raised in opposition[1], and failed to seek to make the implementation of emergency measures in NT Aboriginal communities consistent with its commitments to social inclusion and evidence-based policy.

We are also concerned that at the same time that many critical issues are being deferred to the twelve month independent review there is no information publicly available about the terms of reference for this review or the manner in which it will be conducted. We believe that it is essential that there is an open and transparent review process that properly consults with and engages stakeholders and service providers in both identifying relevant assessment criteria and in evaluating them.

At the same time evidence provided to Senate Estimates and consultation with community organisations and service providers suggests that there is a significant lack of baseline data to assess the on-the-ground impacts of the intervention. Little appears to have been done to address this shortcoming, despite the fact that many people have been raising this issue since the intervention was first announced. There is concern that due to this difficulty in obtaining robust data, evaluation will tend to focus on those things most easily measured and be skewed towards accounting for expenditure rather than measuring changes in community well-being.

At the time the NT 'Emergency Response' measures were announced there was an expectation that during this first 'emergency stabilisation' phase a clear, costed long-term plan for the future of Aboriginal communities in the NT would be developed by the NT Emergency Response Taskforce[2]. We are concerned that there have been no announcements of the framework for this

[1] Additional comments by the Australian Labor Party, Senate Standing Committee on Legal and Constitutional Affairs report, August 2007.

[2] The initial budget appropriations for the intervention were made with an endpoint of 30 June 2008 with no provisions to roll over unallocated funds, and the Northern Territory National Emergency Response Act 2007 has a five year sunset clause.

long term strategic plan and, as far as we are aware, no consultations with stakeholders, communities and service providers to develop such a plan.

We believe that there is a need to make a smooth transition from the current top-down 'emergency response' phase (which is resource-intensive, administratively top-heavy, and reliant on bringing in outside personnel) to a consolidation and community development phase (which engages communities, builds local capacity, and makes more effective and targeted use of resources on evidence-based longer-term programs).

Reinstating the Permit System

The Australian Greens and Australian Democrats support in principle the move by the Government to repeal the amendments to the permit system (Schedule 3) that gave the public unfettered access to prescribed areas of Aboriginal land held under inalienable communal freehold title. However, we are concerned by the measures relating to Ministerial discretion to unilaterally exempt a person or class of persons (under Section 70(2BB)) from the need to obtain a permit. To this end we will be seeking further clarification of the intent of these measures from the Government and putting forward amendments to address these concerns.

The Rationale for abolishing the permit system

When the Emergency Response legislation was introduced to Parliament in 2007 the former government went to great lengths to imply a relationship between the permit system and child sexual abuse in Aboriginal communities, without presenting either any concrete evidence linking abuse of the permit system to cases of child abuse (or other aspects of Aboriginal disadvantage), or putting forward a logical argument of how the permit system might facilitate child abuse. They failed to demonstrate either correlation or causation.

In announcing the measures to abolish the permit system the former Minister for Indigenous Affairs, Mal Brough referred specifically to a review of the permit system conducted by FaCSIA between October 2006 and February 2007 as justification for the need to change the permit system. In doing so he implied that there was a high level of community dissatisfaction and concern with the permit system. In his second reading speech the former Minister stated that:

> "The government has been considering changing the system since it announced a review in September 2006 and the changes follow the release of a discussion paper in October 2006 and the receipt of almost 100 submissions…

> Over 40 communities were visited during consultations following the release of the discussion paper. It was disturbing to hear from officials conducting the consultations that numerous people came up to them after the consultations, saying that the permit system should be removed. They were afraid to say this in the public meetings." [3]

However, despite requests, the Minister refused to release this report and did not substantiate his claims of numerous calls to remove the permit system.

In evidence provided to the committee by the Law Council of Australia obtained through a request under the Freedom of Information Act, that:

> "All 80 consultations revealed unanimous support among Aboriginal communities, individuals and organisations for NO CHANGE to the permit system."[4]

The submission from the Law Council of Australia stated that it could find no record in any of the documentation provided to support the Minister's claims of individual community members making private submissions to Departmental Officers.

We are concerned that there is no evidential basis to support the abolition of the permit system and that the rationale given for its abolition seems to be at odds with the evidence provided in the official findings of the FaCSIA review[5]. We support reinstating the permit system, but have reservations about the provisions relating to Ministerial discretion.

Ministerial Discretion

While the Australian Greens and Australian Democrats support those provisions within Section 3 of the Emergency Response Consolidation Bill that revoke the changes made by the previous government which abolished the permit system for defined common areas (including townsites, road reserves and airstrips) for prescribed communities on Aboriginal land held under inalienable communal freehold title, we have strong reservations concerning those provisions empowering the Minister for Indigenous Affairs to unilaterally declare a person or class of persons exempt from the need to obtain a permit (Section 70(2BB)) or to delegate this power to an officer of FaHCSIA.

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[3] Mal Brough, Minister for Indigenous Affairs, second reader, 21 June 2007
[4] Submission 4,Law Council of Australia, page 7
[5] Departmental Minute of 13th March 2007, as presented in evidence to the committee.

We do not believe that it is either necessary or desirable for the Minister or their delegate to issue permits without consultation with the Traditional Owners of the land over which a permit may be issued.

We note that under the existing provisions of Section 70(2BB) of the *Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* that the Minister already has these powers, and that FaHCSIA provided evidence to the committee of such a ministerial authorisation. In evidence to the committee FaCHSIA stated 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..."

However, it should also be pointed out that, prior to the legislative changes introduced in 2007, Section 70 of the Aboriginal Land Rights (Northern Territory) Act 1976 (ALRA) did in fact contain provisions under NT Law that gave the NT Minister the power to issue permits to government employees to access specified areas of Aboriginal land in the performance of their duties and to specify the conditions under which that authorisation took place.

We note the concern raised by the Law Council of Australia that the proposed changes to Section 70(2BB) would potentially give the Minister the power to issue a permit which could specifically allow an applicant to visit a sacred site or sites. We also note that by failing to specify on a permit that the applicant was not permitted to visit sacred sites that a permit authorised by the Minister might constitute a legal defence for an applicant visiting a sacred site against the expressed wishes of its custodians.

To this end the Australian Greens and Australian Democrats recommend that the Government amend Section 70(2BB) to clarify that a Ministerial authorisation under that section does not authorise entry to a sacred site contrary to the Northern Territory Aboriginal Sacred Sites Act 1989 and Section 69 of ALRA.

We also note the concern expressed by the Northern Territory Government that this provision potentially opens a back-door by which a future Minister could seek to remove the permit system in effect through a series of administrative decisions. We seek an assurance from the Government that such a move would be against the intent of the legislation.

We also share the concerns of the Central Land Council that this provision has the potential to create a parallel permit system which bypasses community consultation, encourages applicants to shop around and creates confusion.

Recommendation:

- **That Section 70 (2BB) of the Bill be amended to specify that a Ministerial authorisation under this section does not authorise entry to a sacred site contrary to the Northern Territory Aboriginal Sacred Sites Act 1989 and Section 69 of ALRA**

Regulating Pay TV services for R18+ programs

The Australian Greens and Australian Democrats have some reservations about the likely impact and cost effectiveness of the proposed amendments regulating pay TV narrow casts of R18+ materials. We note on the basis of the evidence provided to the committee that this issue is not as clear cut as the banning of X rated magazines, videos and DVDs from prescribed communities. Banning of R18+ programming being narrow-cast into prescribed communities is technically difficult and expensive and likely to result in many legitimate subscribers outside prohibited areas also being denied access to this programming to exclude the estimated 50 households in prescribed communities that may be viewing R18+ programs.

Of the three different television services of concern listed in the committee report, World Movies and Box Office Movies have low levels of R18+ programming of which a subset are so rated because of sexual content, and would be unlikely to be affected by the 35% rule, meaning that some sexually explicit and violent materials inappropriate for viewing by children would still be potentially accessible. The Box Office Adults Only service would be subject to blanket prohibition.

This raises a question of whether this is the best approach when it is expensive and technically difficult, but still fails to prevent access and exposure to some unsuitable and inappropriate programming. A more effective approach may be a combination of better education about the illegality and undesirable consequences of exposing children to harmful material, together with appropriate instruction on how to use the available PIN protection and parental lockout system to restrict access to unsuitable programming.

The Little Children are Sacred report noted that it was unlikely that access to violent and sexually explicit material can be prevented and recommended the implementation of an education campaign as a result (Recommendation 67).

> It is an offence under the *Criminal Code* to intentionally expose children to indecent material. In the usual household, it might be hard to establish such an intention. However, it is suggested that bringing the existence of this legal provision to the attention of community members might focus their minds on the real problem to be resolved. Section 132 (2)(e) provides :
> Any person who without legitimate reason, intentionally exposes a child under the age of 16 years to an indecent object or indecent film, video tape, audio tape, photograph or book; is guilty of a crime and is liable to imprisonment for 10 years.
> Once again, education is required. It is unlikely that access to pornography itself or violence in movies and other material can be effectively prevented.[6]

This suggests that a more effective approach to dealing with the concern about children viewing unsuitable programming would be to implement an education campaign to inform community members of the harm done to children by viewing sexually explicit material and the illegality of intentionally exposing them to indecent material. Such an education campaign should also address the harm caused by exposing young children to violent programs as well as sexually explicit ones, and should be supported by culturally appropriate education programs for children that tackle personal safety issues and clearly define what is inappropriate sexual behaviour and how best to respond to threatening situations.

As Olga Havnen recommended, in evidence to the committee:

> I do think that the ban is a good idea in principle. As to how effective it is likely to be, I think it is highly dubious, to be honest with you. There are some practical implications with all of this that make it extremely difficult to be around there monitoring people's TVs and what they are watching and reading.
> The more important part, I think, comes back to the question you asked around education—the age-appropriate and culturally appropriate education for kids around sexual health, personal safety and personal wellbeing. It has been extremely distressing to note that, given the great haste and the great focus that was originally placed on this thing around child protection and the need to tackle child sexual abuse, so little appears to have been achieved to date by way of the employment and engagement of child protection workers. To the best of my knowledge there has been no training of people in communities such as, in particular, women who work in the schools, in the health care centres and in the women's centres, where you might actually build up the skill level of local people to be better placed to identify kids who may be at risk or

[6] Anderson, P and Wild,R. *Ampe Akelyernemane Meke Mekarle* 'Little Children are Sacred' Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, 2007, p200.

> who they believe are vulnerable to abuse of any kind. Those people would then be in a position to take some appropriate action, by referring it and reporting it to the appropriate authorities or what have you.
> The reliance on external so-called professional child protection workers and trying to have the number of people that would be needed across the Northern Territory, given the number of communities we have, again is highly problematic and unrealistic. We have really got to come back and think about some of the basics here—that is, how do you build the local capacity of local people and local families to be in a much better position to address this problem of child abuse?

We welcome the fact that the provisions relating to pornography within Schedule 1 of the bill are consistent with the RDA and designed as 'special measures'. However, we wish to emphasise that that such provisions will only qualify as special measures in practice to the extent that a majority of those in an individual affected community support those measures[7]. It is important to note that through ensuring that the new provisions are consistent with the RDA the Government has acknowledged the fact that consistency with the RDA is an important issue, which further highlights the fact that they have not attempted to deal with the other provisions that are inconsistent with the RDA (as discussed below).

Community Stores

The proposed amendment seeks to allow roadhouses upon which prescribed communities are 'substantially dependent' to be licensed as community stores and hence able to receive quarantined monies. The Australian Greens and Australian Democrats are concerned that there is not a clear definition of what counts as 'substantial dependence' and that the accreditation system fails to tackle the larger issues of the cost and nutritious value of the food provided. To this end we are seeking clarification from the Government and recommending that they define within the legislation what counts as 'substantial dependence' and/or provide a listing of roadhouses on which remote communities are substantially dependent.

We would like to see a more rigorous accreditation scheme being applied to community stores in a manner that helped and encouraged them to lift the quality of food on offer, and requiring them to offer that food at a reasonable price that makes due allowance for food transport costs but does not allow them to exploit the virtual monopoly of welfare dependent customers in remote locations. We remain concerned by anecdotal reports of significant price increases since the introduction of welfare quarantining in community

[7] As pointed out in submission 4 by the Law Council of Australia, p6… and as spelt out in more detail in Chapter 3 Section 3 of the HREOC Social Justice Report 2007.

stores, and remain disappointed that the intervention taskforce appear to have devoted more effort on administering the quarantining of welfare than they have on ensuring that good, healthy food is being made available to remote communities at a decent price. We also support the suggestion put forward by the Central Land Council[8] that stores should be encouraged and required to train and employ local community members as part of building more sustainable local economies in remote communities.

We do not in principle object to local roadhouses being licensed as community stores where there is a substantial dependence on these stores (and provisions made to ensure food quality and price) in the absence of a viable alternative, but we believe that the first priority should be to build community capacity and enterprise by establishing or supporting community stores where there are sufficient economies of scale to make them viable. Our concerns remain however about the wider issues of compulsory welfare quarantining, and continue to advocate for the provision of financial management support and education together with a transition to a voluntary quarantining and community banking scheme (based on the successful CentrePay system). This could be backed up by a community supported scheme targeting specific parents who are not properly caring for their kids.

Recommendations:

- **That the Government clearly define what they consider to be 'substantial dependence' within the legislation.**
- **That the Government should prioritise support and assistance for the development of community stores as part of its efforts to encourage community enterprises where communities stores do not exist and there are sufficient economies of scale to make them viable.**
- **That a more rigorous accreditation scheme be applied to community stores to encourage and assist them to providing nutritious food at a reasonable price and to train and employ local community members.**

Compliance with the Racial Discrimination Act & international obligations

The Australian Greens and Australian Democrats welcome the fact that the new measures introduced by the Government do not seek to exempt their provisions from the RDA, however we express our disappointment that the Government has not sought to overturn the exemptions to the RDA in the existing legislation, despite having been critical of this aspect of the

[8] Central Land Council, submission 6, p6

intervention in opposition. As observed above, we note that the Government has acknowledged the significance of compliance with the RDA in the new provisions relating to the broadcast of R18+ material.

We note that the argument that substantial changes to the Emergency Response legislation should be held off pending the twelve month review of the on-the-ground impacts of the NT intervention does not logically apply to the exemptions to the RDA or the suspension of the NT Discrimination Act. The fundamental issue of concern with these measures is not merely the extent to which they prove effective or ineffective in delivering particular policy outcomes (although there are arguments of the extent to which they are unlikely to do so) but rather the manner in which they are wrong from a moral, human rights perspective and in direct contradiction of our international human rights commitments and obligations. These issues of principle were acknowledged by the ALP at the time in their dissenting report on the legislation[9].

An excellent analysis of the manner in which the emergency intervention contradicts our international obligations, what changes need to be made to reinstate the RDA and NTDA and enact our international obligations, and what principles should be applied from a human rights perspective to ensure effective and appropriate engagement with Indigenous communities in policy and community development is contained in the Social Justice Report 2007. The Social Justice Commissioner, Tom Calma makes the fundamental point that:

> "Measures that undermine the human rights of the intended beneficiaries are more likely to work in ways that undermine the overall well-being of these communities in both the short and longer term.
> For example, the Government has clearly stated that the NT intervention seeks to address a breakdown in law and order in Aboriginal communities. And yet it potentially involves introducing measures that undermine the rule of law and that do not guarantee Aboriginal citizens equal treatment to other Australians. If this is the case it places a fundamental contradiction at the heart of the NT intervention measures. This will inhibit the building of relationships, partnerships and trust between the Government and Indigenous communities…"[10]

On this basis the Australian Greens and Australian Democrats recommend the following actions:

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[9] *Additional comments by the Australian Labor Party*, Senate Standing Committee on Legal and Constitutional Affairs, *Report of Social Security and Other Legislation Amendment (Welfare Payment Reform) and four related bills concerning the Northern Territory National Emergency Response 2007*, p37-47.

[10] Tom Calma, Social Justice Commissioner, HREOC, Social Justice Report 2007, p 248

Recommendations:

- **That the Australian Government repeal the provisions suspending the RDA and the NTDA as soon as possible (in line with Recommendation 4 & 8 of the Social Justice Report 2007) and amends those relevant acts to insert a *non obstante* clause to ensure their provisions are subject to the protections of the RDA (in line with Recommendation 5 of the Social Justice Report 2007).**
- **That the Australian Government amend those sections of the relevant legislation deeming the provisions of the NT emergency response to be 'special measures' to clarify that they are intended to be special measures and as such in the implementation of those measures they should be consistent with the RDA and their beneficial purpose for the communities concerned should be their primary consideration (in line with Recommendation 6 of the Social Justice report 2007).**

Creation of a long-term plan and community consultation in policy development

At the time the NT 'Emergency Response' measures were introduced there was an expectation that during 'emergency stabilisation' phase a long-term plan for the future of Aboriginal communities in the NT would be developed by the NT Emergency Response Taskforce, with clear targets and timelines. To date there have been no announcements by the new Government that a longer term strategic plan is under development. We have as yet had no indications of what might be the framework for how the Government intends to proceed with the intervention, the structure by which it will be developed, or the manner in which effected stakeholders, communities and service providers will be consulted.

Similarly, there has been no indication to date of the framework and terms of reference for the promised twelve month independent inquiry. We note that in a budget press release the Minister for Indigenous Affairs, Jenny Macklin stated that "$0.2 million to continue the role of the Commonwealth Ombudsman in the NT and undertake an independent review of the NTER."[11]

The Australian Greens and Australian Democrats welcome the commitments of the Rudd Labor Government to an 'evidence-based' approach to policy

[11] - Budget 2008-09 Media Release, Jenny Macklin MP Minister for Families, Housing, Community Services and Indigenous Affairs, 13 May 2008. Note that the Budget Papers carried no reference to the independent review component mentioned in the release.

development and to a 'social inclusion' approach to community services and its engagement with the community sector. We note that in its current form the NT intervention is incompatible with both of these policy positions, and encourage the government to build from its principled base – by actively engaging with communities to develop effective community based strategies and programs, and by building on what works by supporting and expanding successful community programs and putting in place measure for the transfer of this knowledge and experience.

A good place to start in developing a long-term plan is:

- The nine principles for engagement outlined in the *Little Children Are Sacred*[12] report [That is: Improve government service provision to Aboriginal people; take language and world view seriously; engage in effective and ongoing consultation and engagement with communities; maintain a local focus and recognise diversity; support community-based and community-owned initiatives; respect Aboriginal law and empower Aboriginal people; maintain balance in gender, family and representation; provide adequate ongoing support and resources; and commit to ongoing monitoring and evaluation]
- The *Values Statement for Aboriginal and Torres Strait Islander children* and the *Principles for justice in child well-being and protection* articulated by the Secretariat of National Aboriginal and Islander Child Care (SNAICC)[13]
- The framework and priorities articulated in the *Proposed Emergency Response and Development Plan to protect children in the Northern Territory* by the Combined Aboriginal Organisations[14]
- The case studies of nineteen 'promising projects' listed in the Social Justice Report 2007[15]
- Ensuring that funding for programs and initiatives that address family violence and child abuse are a first-order priority

We can see no reason why under the current legislative provisions of the NT intervention that the Minister for Indigenous Affairs does not simply direct the NT Emergency Response Taskforce, government business managers and all public servants delivering services to Indigenous Australians to consult with Indigenous communities and ensure the participation of affected

[12] Anderson, P and Wild,R. *Little Children are Sacred Report* 2007 (op cit)
[13] Secretariat of National Aboriginal and Islander Child Care, 2007. http://snaicc.asn.au
[14] Combined Aboriginal Organisations, *Proposed Emergency Response and Development Plan to protect children in the Northern Territory – A preliminary response to the Australian Government's proposals*, CAO Darwin November 2007.
[15] Tom Calma, Social Justice Report 2007 (op. cit.)

Indigenous people in all aspects of the design, delivery and assessment of the programs and services which impact upon their lives.

Government Business Managers in the Northern Territory and ICCs should be directed to develop 'Community Partnership Agreements'[16] which put into place at the local level comprehensive community development plans that are endorsed and supported by the local community.

This would be the most effective way to transition from a top-down, inefficient 'emergency response' phase to a longer-term, sustainable community development framework that engages community support to deliver cost-effective outcomes at the local level.

Recommendations:

- **The Minister for Indigenous Affairs direct the NT Emergency Response Taskforce, and all public servants to ensure the full participation of Indigenous people in design, delivery and evaluation of all relevant programs.**
- **The Minister for Indigenous Affairs direct Government Business Managers to develop Community Partnership Agreements enacting comprehensive community development plans supported by the local community.**

Senator Rachel Siewert
Australian Greens
Western Australia

Senator Andrew Bartlett
Australian Democrats
Queensland

[16] Community Partnership Agreements comprise Recommendation 13 of the Social Justice Report 2007 (op. cit.) and this concept is explored in more detail in Chapter 3 Section 4 of that report. This approach is consistent with that recommended by the Combined Aboriginal Organisations *Emergency Response and Development Plan* (op cit) and the nine principles of engagement outlined in the Little Children Are Sacred Report.