The Senate

Standing Committee on Community Affairs

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

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TABLE OF CONTENTS

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.
>
> 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

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]

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:

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.
>
> 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

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).

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]

2 *Committee Hansard* 29.4.08, p.24.

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]

3 *Committee Hansard* 29.4.08, p.25

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.

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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.

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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-slather 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.

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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

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.

APPENDIX 1

Submissions and Additional Information received by the Committee

1 Police Federation of Australia (ACT)

Supplementary information

- Supplementary submission received 8.5.08

2 Festival of Light Australia (SA)

3 Northern Territory Legal Aid Commission (NT)

4 Law Council of Australia (ACT)

5 Human Rights Law Resource Centre Ltd (VIC)

6 Central Land Council (NT)

7 AUSTAR United Communications Limited (NSW)

Supplementary information

- Summary of ASTRA & AUSTAR position and information on removing references to Adult Only on menu and Box Office ordering process, provided at hearing 29.4.08
- Response to questions from hearing, dated 1.5.08 and 6.5.08

8 Australian Subscription Television & Radio Association (ASTRA) (NSW)

9 Altman, Professor Jon (ACT)

Supplementary information

- Additional information following hearing, received 29.4.08

10 Northern Territory Government (NT)

11 Sydney Centre for International Law (NSW)

12 Northern Land Council (NT)

13 North Australian Aboriginal Justice Agency (NAAJA) (NT)

14 Tangentyere Council Inc (NT)

15 Laynhapuy Homelands Association Incorporated (NT)

16 Cox, Mr Kevin (ACT)

17 Shepherd, Ms Marilyn (SA)

18 Duell, Mr Hal (NT)

Additional information

Alice Springs Town Council

Photographs of town camps in Alice Springs, provided at hearing 29.4.08

Department of Families, Housing, Community Services and Indigenous Affairs and

Provided at hearing 30.4.08

- Letter from Lynne Curran, OIPC, to MEAA, 22.2.08 re proposed ministerial authorisation;
- Copy of Instrument of Authorisation – Specified classes of persons to enter or remain on Aboriginal land, 10.10.07

Received following hearing, dated 6.5.08

- Community stores licensing
- Community Clean Ups program

Department of Broadband, Communications and the Digital Economy

Received following hearing, dated 6.5.08

- Clarification concerning why s.49 of the Northern Territory (Self-Government) Act is to be excluded
- Clarification of the distinction between 'channel' and 'service' with regard to the 35% provision and with reference to p.3 of the Explanatory Memorandum
- Information on the cost of implementing the R18+ measure

Centrelink

Information folder on doing business with Centrelink Deduction and Confirmation Services, provided at hearing 30.4.08

APPENDIX 2

Public Hearings

Tuesday, 29 April 2008
Crowne Plaza, Alice Springs

Committee Members in attendance

Senator Claire Moore (Chair)
Senator Gary Humphries (Deputy Chair)
Senator Judith Adams
Senator Andrew Bartlett
Senator Sue Boyce
Senator Trish Crossin
Senator Rachel Siewert

Witnesses

Tangentyere Council
Mr William Tilmouth, Chief Executive Officer

Alice Springs Town Council
Mayor Damien Ryan
Mr Rex Mooney, Chief Executive Officer

AUSTAR United Communications Ltd
Ms Tracey O'Hanlon, General Manager, Northern Territory
Ms Page Henty, Corporate Counsel
Mr Elliott Ragg, Technical Operations Manager

Australian Subscription Television and Radio Association (ASTRA)
Ms Debra Richards, Chief Executive Officer

Professor Jon Altman (personal capacity) *(via teleconference)*

Central Australia Aboriginal Legal Aid Service
Dr Patricia Miller, Chief Executive Officer
Mr Mark O'Reilly, Principal Legal Officer

Law Council of Australia
Mr Nick Parmeter, Policy Lawyer *(via teleconference)*
Ms Raelene Webb, QC, Member, Advisory Committee on Indigenous Legal Issues

Wednesday, 30 April 2008
Crowne Plaza, Darwin

Committee Members in attendance

Senator Claire Moore (Chair)
Senator Gary Humphries (Deputy Chair)
Senator Judith Adams
Senator Andrew Bartlett
Senator Sue Boyce
Senator Trish Crossin
Senator Rachel Siewert

Witnesses

Northern Land Council
Mr Ron Levy, Principal Legal Adviser

Ms Olga Havnen (personal capacity)

Mr Paul Toohey, Senior Journalist, News Ltd

Police Federation of Australia
Northern Territory Police Association
Mr Vince Kelly, President

Northern Territory Legal Aid Commission
Ms Fiona Hussin, Policy and Community Legal Education Officer
Mr Michael Petterson, Indigenous Community Liaison Officer

Northern Australian Aboriginal Justice Agency
Mr Julian Johnson, Managing Solicitor, Civil Law Section
Mr Glen Dooley, Principal Legal Officer
Ms Helen Wodak, Advocacy Manager

Laynhapuy Homelands Association
Ms Yananymul Mununggurr, Chief Executive Officer
Mr Ric Norton

Northern Territory Emergency Response Taskforce
Dr Sue Gordon, Chair
Major General Dave Chalmers, Operational Commander
Mr Mark Wellington, National Manager, Northern Territory Emergency Response Operations, Centrelink

Northern Territory Government

Ms Elizabeth Morris, Deputy Chief Executive Officer, Department of Justice

Mr Robert Bradshaw, Director, Legal Policy, Department of Justice

Commonwealth Departments

Attorney General's Department

Ms Amanda Davies, Assistant Secretary, Classification Policy Branch *(via teleconference)*

Department of Broadband, Communications and the Digital Economy

Dr Simon Pelling, First Assistant Secretary, Broadcasting and Content Division *(via teleconference)*

Department of Families, Housing, Community Services and Indigenous Affairs

Ms Lynne Curran, Group Manager, Office of Indigenous Policy Coordination *(via teleconference)*

Ms Caroline Edwards, Branch Manager, Land Policy and Development *(via teleconference)*

Centrelink

Mr Mark Wellington, National Manager, Northern Territory Emergency Response Operations

Mr Robin Salvage, National Manager, Income Management Branch *(via teleconference)*