

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

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Senate Standing Committee on Community Affairs

14 April 2008

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## Introduction

1. Thank you for inviting the Law Council of Australia to make submissions to this Inquiry, concerning certain amendments to the Northern Territory National Emergency Response legislation passed in September 2007 (the NER legislation).
2. The Law Council is the peak body for the Australian legal profession, representing over 50,000 lawyers through the law societies and bar associations of the Australian states and territories, and the Large Law Firm Group (the “constituent bodies” of the Law Council). A list of the Law Council’s constituent bodies is provided at Attachment A.
3. The *Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Response Consolidation) Bill 2008* (the Bill) will amend the NER legislation to:
  - restrict broadcasting of material and programming classified R18+ in designated areas;
  - permit transport of alcohol and prohibited material through designated areas (providing it is not intended for sale or distribution within designated areas); and
  - repeal certain changes to the permit system under *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (the ALRA).
4. It is further noted that proposed new measures under the Bill will be subject to the operation of the *Racial Discrimination Act 1975* (the RDA). This is an important improvement on the approach under the original NER legislation, which included specific provisions suspending the operation of the RDA.

## The NER legislation and related Senate Inquiry

5. The NER legislation refers to the following three Acts passed simultaneously by Federal Parliament on
  - Northern Territory National Emergency Response Bill 2007;
  - Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007; and
  - Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill 2007.
6. These laws were passed through the House of Representatives following an extraordinarily truncated debate. The legislation was subsequently referred by the Senate to the Senate Standing Committee on Legal and Constitutional Affairs, which was given less than a week to conduct a review of the legislation and its potential impact on Aboriginal people living in the Northern Territory.

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7. The Law Council made submissions to that Inquiry and identified several matters of serious concern, including:
    - the suspension of the RDA;
    - compulsory acquisition of Aboriginal townships;
    - provisions for “just terms” compensation in the event of compulsory acquisition;
    - changes to the permit system under the ALRA; and
    - changes to the Northern Territory criminal laws to preclude consideration of the cultural background or customary laws of an offender in bail and sentencing proceedings.
  8. These matters continue to be of concern to the Law Council and this submission is made in light of the Law Council’s earlier submissions concerning the NER legislation.

## **Prohibition of broadcasting of R18+ material**

9. Schedule 1 of the Bill will amend the *Broadcasting Act 1992* (Cth) to enable the Minister to prohibit the broadcast of subscription or other narrow-casted television services in a prescribed area under the NER legislation if the total number of hours of R18+ classified content exceeds 35 per cent of the total number of hours of programs broadcast by the service over a 7 day period.
10. The measure is directed at preventing access to pornographic content on the Austar subscription television service, which is available throughout the Northern Territory, where it is apparent that children may be exposed to the material. The Explanatory Memorandum notes that Austar maintains two channels providing exclusive R18+ adult entertainment on a single pay-per-view or monthly basis.
11. The Government has indicated<sup>1</sup> that the proposed measure is predicated on the findings of the Northern Territory Inquiry into Child Sexual Abuse in Aboriginal Communities (the NT Inquiry).<sup>2</sup> It is also noted that the Northern Territory Intervention Taskforce has confirmed the availability of such services and has advised that children may be exposed to the content, unsupervised.
12. The NT Inquiry documented disturbing details concerning the exposure of children to violent and pornographic material and made the following recommendation:

“Recommendation 87

That an education campaign be conducted to inform communities of:

  - a) the meaning of and rationale for film and television show classifications; and

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<sup>1</sup> In the Explanatory Memorandum accompanying the Bill.

<sup>2</sup> As outlined in its report, *Ampe Akelyernemane Meke Mekarle - Little Children are Sacred: Report of the Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse*, 2007, Northern Territory Government.

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- b) the prohibition contained in the *Criminal Code* making it an offence to intentionally expose a child under the age of 16 years to an indecent object or film, video or audio tape or photograph or book and the implications generally for a child's wellbeing of permitting them to watch or see such sexually explicit material."

13. In reaching this recommendation, the NT Inquiry noted its conclusion that:

"Once again, education is required. It is unlikely that access to pornography itself or violence in movies and other material can be effectively prevented."<sup>3</sup>

14. As noted, the problem identified was not simply with access to pornography, but exposure of children to violent or sexually explicit material generally. The recommendation acknowledges that a longer term solution is required, which enlivens adults in affected communities to the dangers of pornographic or violent material to young or immature viewers; and addresses current overcrowded housing, which is identified as a primary circumstantial factor behind the exposure of children to inappropriate material.<sup>4</sup>
15. The Law Council notes that the recommendation of the NT Inquiry should be followed to ensure children in affected areas are protected from exposure to inappropriate material in the long term.

## Discrimination

16. The proposal appears to be directed at restricting a service to Aboriginal people living in designated areas (although it is noted that non-Aboriginal people living in the designated area may be incidentally affected). To this extent, the restriction on broadcasting R18+ material in a 'designated area' is arguably discriminatory and could breach the RDA and Australia's corresponding obligations under international law, including the United Nations Charter, the Convention on the Elimination of all Forms of Racial Discrimination (CERD) and international customary law.
17. The specific exclusion of the operation of Northern Territory anti-discrimination laws under clause 13 of the Bill appears to be an acknowledgement to this effect and an attempt to preclude any challenges on that basis.
18. As was the case with respect to the NER legislation, the Government has sought under clause 16 of the Bill to classify these measures as "special measures" for the purposes of the RDA. Under CERD, "special measures" are:

"measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure equal enjoyment or exercise of human rights and fundamental freedom, provided that such measures do not lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved".

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<sup>3</sup> Ibid, page 200.

<sup>4</sup> Ibid

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19. The Law Council accepts that the concept of “special measures” does potentially provide an avenue to secure the validity of laws to protect women and children who are at risk. For more than a decade, the Human Rights and Equal Opportunity Commission has supported the voluntary introduction of alcohol restrictions in some indigenous communities as a ‘special measure’ on the basis that social benefits are likely to result in reduced violence and abuse and improved public safety.
  20. In this regard, however, it is the wishes of the communities concerned which are integral to the assessment of whether the measures are justified as “special measures”. The Law Council notes with approval the provisions under proposed section 127C and 127D of the *Broadcasting Act 1992*, contained in clause 16 of the Bill, require the Minister to consult affected communities before making a determination.
  21. Accordingly, the Law Council makes the following submissions in relation to Schedule 1 of the Bill:
    - in order to address the concerns identified over the long term, recommendation 87 of the “Little Children are Sacred” report should be implemented as a matter of priority;
    - Schedule 1 is supported, to the extent that it is an interim measure directed toward immediately limiting exposure of children to harmful content and is only exercised where it is demonstrated that prohibition is supported by the majority of people in an affected community.

## **Free trade and commerce**

22. The LCA notes the exclusion of section 49 of the *Northern Territory (Self-Government) Act 1978* (Cth) with respect to the new standard licence condition in clause 12 and related provisions.
23. Section 49 is a statutory guarantee of freedom of movement between the Northern Territory and a State similar to section 92 of the Constitution, which is a constitutional guarantee of absolute freedom of movement between States. However, section 49 of the *Northern Territory (Self-Government) Act* is amenable to statutory exclusion by a law of the Commonwealth and no constitutional issue arises.

## **Transport of prohibited material**

24. The Law Council has no comments in relation to Schedule 2 of the Bill.

## **Changes to the permit system**

25. Schedule 3 of the Bill repeals changes to the ALRA made under the NER legislation, which had the effect of weakening the Aboriginal lands permit system in the Northern Territory.

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26. The amendments under Schedule 3 are supported, subject to comments below concerning access to sacred sites.
27. The Law Council notes that the amendments introduced under the NER legislation effectively removed the requirement to obtain a permit before entering and remaining in 'common areas' of Aboriginal townships, using access roads on Aboriginal land and significantly broadened the class of individuals exempt from requirements to hold a permit in any event.
28. In submissions to the Senate Standing Committee on Legal and Constitutional Affairs' Inquiry into the NER legislation, the Law Council was highly critical of the measures amending the permit system. The Law Council noted that no correlation or relationship had been established by the former Government or its agencies linking the permit system to child sexual abuse in Aboriginal communities.
29. In announcing the changes, the former Minister for Indigenous Affairs referred to the findings of the review of the permit system, conducted by the Department of Families, Community Services and Indigenous Affairs (FaCSIA) from October 2006 to February 2007 ("the permit system review"). The former Minister did not, however, release any report or attempt to refer to the results of the extensive consultations carried out under the permit system review to support his statements.
30. In June 2007, the Law Council lodged a request with FaCSIA under the *Freedom of Information Act 1982* (Cth), seeking reports, submissions and documents relevant to the Minister's decision to amend the permit system. The application was finally concluded at the end of November 2007 (one week after the recent Federal election) and the information provided by FaCSIA revealed the following:
- 38 Indigenous organisations and individuals made written submissions to the review of the permit system and a further 42 field consultations were conducted by FaCSIA. **All 80 consultations revealed unanimous support among Aboriginal communities, individuals and organisations for NO CHANGE to the permit system;**
  - 10 out of 21 non-Indigenous organisations and individuals consulted supported NO CHANGE to the permit system, while of the remaining 11, 5 supported amendment and 6 supported complete repeal;
  - 8 out of 8 academics supported NO CHANGE;
  - 5 out of 7 industry groups/peak bodies supported NO CHANGE. The remaining 2 supported amendment to the permit system, but not complete repeal;
  - 2 out of 2 recreation/community groups supported NO CHANGE;
  - 4 out of 7 State/Territory Government & Agencies supported NO CHANGE. The 3 remaining supported amendment, but not repeal; and
  - 1 of 2 mining companies supported NO CHANGE. The other sought amendment, but not repeal.

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31. Accordingly, of 124 separate consultations and submissions to the Review, 107 supported NO CHANGE, 11 supported AMENDMENT and 6 supported repeal (all of whom were non-Indigenous).
  32. The Law Council would be pleased to provide to the Senate Standing Committee all source documentation received from FaCSIA, from which this information has been extracted, if the Committee so requests.
  33. It should be noted that the findings of the review of the permit system (as to the unanimous support among Indigenous Australians for a strong mechanism to control access to their land) are supported by the original findings of Commissioner Justice Woodward in the 1974 Royal Commission into Aboriginal land rights and the 1999 Report of the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs inquiry into the ALRA.
  34. In his second reading speech presenting the *Families, Community Services and Indigenous Affairs and other Legislation Amendment (Northern Territory National Emergency Response and other Measures) Bill 2007*, the former Minister for Indigenous Affairs 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.”
  35. It is concerning that there is no mention by the former Minister, in his speech before Parliament or elsewhere, of the official findings of the permit system review, which were provided to him in a Departmental Minute on 13 March 2007. In addition, the Law Council found no record in any of the documents provided by FaCSIA to support the former Minister’s statement that individual community members had made private submissions (i.e. outside formal field consultations with community members and leaders) to Departmental Officers supporting removal of the permit system.
  36. 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.

## **Sacred sites**

37. Section 70(2BBA) provides that a Ministerial authorisation under section 70(2BB) for access to Aboriginal land may be subject to conditions. The Explanatory Memorandum gives, as an example of a condition of Ministerial authorisation, that sacred sites may not be entered.
38. Section 69 of the ALRA makes it an offence for any person to enter or remain on land in the Northern Territory that is a sacred site, except in accordance with Aboriginal tradition. It is a defence if a person enters or remains on the land in accordance with the ALRA or a law of the Northern Territory (s 69(2A)).



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39. Sacred sites are protected under the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) (“the *Sacred Sites Act*”). A procedure is established which involves consultation with traditional owners in respect of sacred sites and what can be done in respect of those sites.
  40. The Law Council opposes any amendment which might purport to allow the Minister to authorise access to sacred sites and recommends that the legislation make clear 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*.

## **Racial Discrimination Act 1975**

41. It is noted that the RDA will not be suspended in relation to any new measures under the Bill, an aspect that is remarked on by the government in its Second Reading Speech. 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.
42. The Law Council reiterates its strong objection to suspension of the RDA under the NER legislation and calls for repeal of the provisions suspending the RDA as soon as possible.

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## **Attachment A**

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### Profile – Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.