Central Land Council (Northern Territory Australia) | Our Land is Our Future

SUBMISSION TO SENATE COMMUNITY AFFAIRS COMMITTEE

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

14 April 2008

Introduction

The previous Australian government announced its emergency response to the "Children are Sacred" report on 21 June 2007. The emergency measures were wide ranging and severe.

The new laws gave the Commonwealth Minister an unprecedented level of discretion in the affairs of the Northern Territory. The Commonwealth Minister can now unilaterally alter funding agreements, direct how services are to be provided, seize community assets (including community stores), sack community councils, amend NT legislation through regulation and potentially evict Aboriginal landowners from their own communities.

In addition, blanket quarantining means Centrelink is now administering the spending of money by nearly all Aboriginal people in affected communities, and the compulsory acquisition of 'leases' over Aboriginal communities means that all community land is currently held by the Commonwealth.

Taken together, the effect of these emergency measures is that almost every aspect of Aboriginal life is able to be controlled by the Commonwealth. Arbitrary and sweeping interventions in community life are now possible. Such broad powers might be appropriate in a genuine emergency context but the risk here is that, in time, they may be used capriciously in ways unrelated to the emergency response supporting children's welfare. They are simply not attended by appropriate checks and balances which would prevent their misuse and avoid unintended consequences. They are also discriminatory. It is not credible to argue that the emergency legislation, taken in its entirety, could be considered to be a 'special measure' for Aboriginal people under the *Racial Discrimination Act 1975*.

The CLC agrees that the current level of child abuse and other forms of violence in indigenous communities is unacceptable. That is why the CLC welcomed the initial announcement of the Australian government emergency response and broadly supported the measures to curb alcohol and pornography, increase services through health checks and

policing, linking education and child neglect to welfare, and measures to improve community stores.

However, the CLC did not support the business management powers in communities, blanket quarantining of welfare and scrapping CDEP, and the CLC did not support the land measures relating to leases and permits. Both through the permit review process and in the response to the "Children are Sacred" report, the previous government sought to link land measures with child abuse. No evidence was provided to support that assertion. The NT Police Association rejected the link: "The Federal Government has failed to make a case in my view, about the connection between sexual assault in Indigenous communities and the permit system". The CLC rejects the link.

The "Children are Sacred" report made 97 recommendations but none related to land issues. The report focuses on long term measures to improve education outcomes and reduce alcohol harm. The CLC believes that is where the focus must be: long term vision, long term commitment and long term plan.

So while the CLC is pleased that the Australian government has at last taken issues of disadvantage and abuse in Aboriginal communities seriously, 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.

The comments in this submission on the *Families, Housing, Community Services And Indigenous Affairs And Other Legislation Amendment (Emergency Response Consolidation) Bill 2008* (**FaHCSIA Bill 2008**) are made against this background.

Schedule 1 – R 18+ programs

The CLC supports the change in this Bill for this measure not to be excluded from the operation of Part II of the *Racial Discrimination Act 1975* (Cth). In particular the CLC supports only imposing restrictions on R 18+ programming following community consultation and consent. Characterised in this way, the measure can properly be a 'special measure' and accord with and Australia's obligations under the Convention on the Elimination of All Forms of Racial Discrimination.

Schedule 3 – Permit System

As part of the emergency response the *Families, Community Services And Indigenous Affairs And Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (**FaCSIA Act 2007**) introduced a number of changes to the permit system:

- a new defence of permission of occupier (s 70(2C))
- a range of public rights of access to communities (ss 70B-70H), and

- revocation of permits only by issuer (s 74AA)

The FaHSCIA Bill 2008 would repeal those changes but leave in place an additional power of the Minister to authorise a person or class of persons to enter Aboriginal land (s 70(2BB)).

As part of the permit review in late 2006, the CLC comprehensively consulted Aboriginal communities and made a substantial submission in March 2007. Aboriginal people voiced a strong opposition to forced changes to a permit system which complements their responsibility for country under Aboriginal law and custom, and is consistent with the land title they hold under Australian law.

Specifically, the CLC remains concerned with a number of practical matters. First, our overall view is that the permit system is an effective and appropriate tool under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (**Land Rights Act**) for negotiating third party access to Aboriginal land for miners, pastoralists, developers and visitors. Where Aboriginal landowners have identified a need for more open access for visitors – for example at the heritage precinct in Hermannsburg and the tourist facilities at Wallace Rockhole – permits have been relaxed.

Second, the permit system has not impeded the provision of services. This was summed up in the NT government's submission to the permit review:

> *No Northern Territory Government agency could identify an instance where the permit system impedes program and service delivery.*

Third, the permit system is an important policing tool in remote communities. Police routinely ask unwanted visitors to leave communities because they do not have a permit. If more unwelcome visitors turn up in communities, such as grog runners and unscrupulous art dealers, there will be greater demand for policing with fewer powers of enforcement. Police resources are already overstretched and the permit system has been supported by the NT Police Association. Therefore, from a practical point of view, the CLC is of the view that the permit system offers a measure of protection for children, rather than putting them further at risk.

Accordingly, and as no evidence has been provided that the permit system is detrimental to children, or to communities generally, the CLC supports the repeal of a range of permit changes made in the FaCSIA Act 2007 by the FaHCSIA Bill 2008.

Authorisations

On the issue of the Minister's power to authorise a person or class of persons to enter Aboriginal land, the CLC does not agree with the Minister having an unfettered power to issue permits or 'authorisations' to access Aboriginal land (a power which may be delegated to an officer within FaHCSIA under s 76 of the Land Rights Act). Under the *Aboriginal Land Act 1978* (NT) land councils and traditional owners have the power to issue permits. The NT

Minister has a power to issue permits to public servants. 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.

It may also subject the Minister to administrative litigation from traditional owners, or from permit applicants who have been denied a permit. The CLC does not support the Minister's authorisation power.

Journalist access

The CLC wholeheartedly supports external scrutiny of community affairs. To this end, CLC has implemented a system which allows journalists to cover 'news of the day' stories, including any court hearings, in Aboriginal communities.

However, if the government wishes to provide for permit free journalist access, other tools are available without resort to an unfettered authorisation power. For example, government workers are afforded a defence to permit offences under section 70(2A) of the Land Rights Act, without the need for an authorisation power.

If journalists are to be afforded access, one way or another, and because the land will still be private Aboriginal land, there are a few key issues to consider:

- There needs to be an appropriate system whereby bona fide journalists can identify themselves on demand. This will avoid any person, including a grog runner or a blogger, entering communities and claiming to be a journalist.
- Reporting must be the primary purpose of the visit, not, for example, a grand 4WD adventure over Aboriginal land.
- Reporting needs to be restricted to news and current affairs, and not include documentaries and large projects which will entail staying on Aboriginal land for extended periods.
- Journalists need to be prevented from recording, without permission, cultural events such as sorry business and ceremonial business. Filming, for example, say a ceremony, may have indigenous intellectual property implications, apart from any cultural offence.
- Access needs to be by main roads, most of which are already public, and not through the myriad of back roads and outstation tracks which criss-cross Aboriginal land.

While such restrictions may seem onerous, they are sensible and necessary given community land will continue to be Aboriginal land and access to broader Aboriginal land will still be restricted.

Additionally, the boundaries of 'community land' in the schedule of the Land Rights Act may usefully delimit areas of permit free access for journalists. However, in many cases the boundaries are quite broad and include areas well beyond the reasonable footprint of communities. We are therefore concerned to ensure that any access for journalists is not unnecessarily broad to include areas close to communities which are often used for cultural purposes.

We note there is currently a process to refine the areas of the 5 year leases taken under section 31 of the *Northern Territory National Emergency Response Act 2007* (**NTNER Act**) to more closely reflect the reasonable footprint of communities. These areas mirror the 'community land' definitions in the schedule to the Land Rights Act. Therefore, we would strongly advocate that any process to refine the 5 year lease areas in the NTNER Act also apply to 'community land' areas contained in the schedule to the Land Rights Act. In making this request, we note that the 5 year lease areas may be reduced by the Commonwealth under section 35(6) of the NTNER Act, but that 'community land' areas may only be reduced by regulation under section 70A(3) of the Land Rights Act, or otherwise by legislation.

In relation to this issue, we believe that Mutitjulu community is a special case which needs to be removed from the definition of 'community land'. There are a number of reasons for this. First, the national park in which the community is located receives close to 500,000 visitors a year, including hundreds of persons who could make a claim to be a journalist. Second, as Mutitjulu sits inside the park boundaries visitor access and the capture of images and sound recordings are able to be appropriately managed by the Director of National Parks under the *Environmental Protection and Biodiversity Conservation Act 1999* (**EPBC Act**). This is a more appropriate mechanism for managing the conduct of journalists in a declared World Heritage Area. Any journalist authorisation under the Land Rights Act may have the effect of overriding the powers of the Director under the EPBC Act, impeding the park's ability to appropriately manage journalists.

We also believe that the current application of 'community land' provisions to Mutitjulu is discriminatory. Our concern is highlighted by the disparity in the treatment of the Mutitjulu community and the adjacent community known as Rangerville. The Director of National Parks has previously taken measures to protect the privacy of residents of both Mutitjulu and Rangerville in light of their proximity to Uluru. The 'community land' measures seek to override these privacy protections in relation to Mutitjulu only.

Schedule 4 – Community stores

The CLC supports the amendment in the Bill to allow roadhouses, upon which communities are substantially dependent, to be subject to the community store licensing regime.

However, this minor amendment does not address broader issues with implementation of the community store licensing system. Now the system has been in place for over 6 months, 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.

Second Reading Speech – Compensation

In the second reading speech, the Minister notes that the expression 'reasonable amount of compensation' satisfies the requirements of "just terms" compensation under the Constitution. However, this is a separate issue to whether the "just terms" requirements in the Constitution apply to acquisitions of property in the Northern Territory. Historical case law is divided and the point is arguable. In this respect the NTNER Act specifically excludes operation of s 50(2) of the *Self Government (Northern Territory) Act 1978*, which would have ensured "just terms" compensation applied to any acquisitions for emergency response measures. Therefore, rather than providing certainty, the NTNER Act *removes* the guarantee of compensation and creates uncertainty. The new Bill does not ameliorate that uncertainty. This issue is also set out in the Native Title Report 2007 by the Aboriginal and Torres Strait Islander Social Justice Commissioner.