The University of Sydney

Faculty of Law

SYDNEY CENTRE FOR INTERNATIONAL LAW

173–175 Phillip Street
Sydney NSW 2000
Australia

DX 983, Sydney
Tel: +61 2 9351 0354
Facsimile: + 61 2 9351 0200
Email: bsaul@usyd.edu.au

Committee Secretary
Senate Community Affairs Committee
Parliament House, Canberra ACT 2600

28 April 2008

Dear Senate Community Affairs Committee

Re: Inquiry into Provisions of the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Response Consolidation) Bill 2008

Please accept this late submission to this inquiry. The Sydney Centre for International Law is a leading research and policy centre on international law. This submission considers whether Schedules One and Three of the bill are compatible with Australia's international law obligations, in particular the duties to protect freedom of expression, freedom of movement, freedom from racial discrimination, and the rights of Indigenous people.

Schedule One is Compatible with Freedom of Expression

Schedule One amends the *Broadcasting Services Act 1992* and *Northern Territory National Emergency Response Act 2007* to allow the Minister to prohibit certain pay television licensees from providing television channels that contain a large amount of R18+ programming to certain prescribed areas.

(a) The bill restricts free expression

Article 19 of the International Covenant on Civil and Political Rights (ICCPR) requires Australia to protect the right to freedom of expression in the following terms:

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

By permitting access to R18+ programming to be restricted in prescribed areas, the bill would enable prima facie interference with freedom of expression.

(b) The restriction would be justified if it were more limited in scope

The question is whether such interference is lawfully justified by human rights law. Article 19(3) of the ICCPR provides for the restriction of freedom of expression where it is 'provided by law' and is a necessary (including not arbitrary) and proportionate measure for the protection of public order, public health or morals:

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Informed, robust democracies depend on the adequate protection of free expression. The right is broadly construed, applying regardless of the mode of expression or the contents of the message and encompassing a right of access to information.

However, the right may be limited when such limits are *necessary, proportional,* and for the purposes stated in (3)(a) or (b). The ability of States to restrict freedom of expression by reason of public morals has been interpreted quite widely by the United Nations Human Rights Committee. In *Hertzberg et al v Finland (61/79)* it was suggested that States are given a margin of discretion, or the benefit of the doubt, when legislating to control freedom of expression for legitimate and demonstrable justifiable public policy purposes.

In our view, the voluntary banning of certain broadcasts may be a *necessary* restriction on freedom of expression where it aims to protect public health, order and morality (in the narrow sense of averting sexual violence and abuse). Internationally, there are divergent research-based views about the relationship between pornography and sexual violence, and whether depictions of sexual activity (whether consensual or violent) are causally related to increases in sexual violence: see B Harris, 'Censorship: A Comparative Approach Offering a New Theoretical Basis for Classification in Australia' (2005) 8 *Canberra Law Review* 25 (reviewing the relevant research).

In the Australian indigenous context, however, numerous reports, most recently *Little Children are Sacred*, have highlighted the negative impact that access to pornography has on indigenous communities. The report found that pornography leads 'inexorably' to family and other violence and the sexual abuse of adults and children, and noted the role of pornography as a 'sex-grooming' tool and a cause of sexual offending by children.

In principle then, restrictions on pornography in indigenous communities may constitute a legitimate restriction of freedom of expression if they are designed to safeguard indigenous women and children against empirical risks of violence. The UN Human Rights Committee has even implied, in General Comment 28, an obligation on states to 'control' pornography, suggesting that pornography controls are not only a permissible limitation to freedom of expression, but may in fact be *required* under the ICCPR.

It must be noted, however, that the Report above did *not* recommend a ban on R18+ material. Under the national Classification Code, the R18+ category encompasses a range of disparate material which is 'unsuitable for a minor' to see, and which extends beyond the sub-set of pornography. The restriction of access to non-pornographic material is not a necessary or

proportionate means of responding to sexual abuse and violence in indigenous communities, and bears no real relation to that legitimate policy objective.

Accordingly, we **recommend** that the bill should only restrict the broadcast of X18+ material (that is, which depicts sexual activity) and R18+ material *which has a substantial pornographic content*.

Finally, the restrictions envisaged in the bill are otherwise likely to be *proportionate* in that a ministerial prohibition would occur only on the request of the community and after consultation with the community, and must be accompanied by an assessment of whether Indigenous women and children would benefit from a prohibition in the particular circumstances. Such safeguards are designed to avoid blanket interferences with freedom of expression which are not demonstrably justified by reference to the particular circumstances and risks faced by particular communities.

Schedule One is Not Racially Discriminatory

Article 1(4) of the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) provides:

> Special 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 such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, 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.

Article 1(4) thus permits differentiation between groups on a racial basis under strictly limited conditions. Subsection 127A of the bill states that the Schedule One amendments are to be regarded as such 'special measures'. Special measures must confer a benefit on some or all members of a class, membership of which is based on race or national origin, for the sole purpose of securing adequate advancement of the beneficiaries and the special measure is necessary to achieve this. The special measure must be discontinued as soon as its objectives have been achieved.

In our view the proposed voluntary banning of certain R18+ material meets these requirements, and thus meets Australia's obligations under the ICERD. The prohibition of pornographic material may be regarded as a sufficient material benefit, and the 'emergency' health and welfare circumstances may render the ban 'necessary' in order to secure the enjoyment of the range of human rights by indigenous people. The sunset clause in the bill ensures that the measures have a limited time frame.

Most crucially, the 'sole purpose of securing adequate advancement' test is met by the bill. The High Court decision of *Gerhardy v Brown* (1985) 159 CLR 70 established that this test required not only that the person taking the measure believes it will benefit the group, but also that the beneficiaries *wish* to receive that benefit (as indeed, this bill requires). In this regard, the non-consultative blanket ban on pay-television pornography advocated by the Opposition would not be a 'special measure' as contemplated by the ICERD and may compromise Australia's international obligations. The bill's requirement of community request and involvement in any ban means it is more likely to satisfy the requirements for a 'special measure'.

Schedule Three is a Justifiable Restriction on Freedom of Movement

Schedule Three would amend the *Aboriginal Land Rights (Northern Territory) Act 1976* and *Northern Territory National Emergency Response Act 2007 (NTERA)* to reinstate elements of the permit system in the Northern Territory, including requirements that visitors to certain aboriginal areas to first seek permission to enter the area. The bill would replace measures enacted by NTERA, which suspended the permit system and granted public access to certain aboriginal land. It would retain the list of individuals entitled to enter aboriginal land contained in NTERA, as well as the Minister's broad discretionary power to authorise specific individuals or classes of individuals to enter onto specified aboriginal land.

(a) The Bill restricts movement

Australia has an obligation under Article 12(1) of the ICCPR to protect the freedom of movement of people lawfully present in Australia:

> Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

The freedom is not contingent on the reason for a person's decision to move or reside in a particular place, and ordinarily precludes measures preventing the entry of persons into a defined part of the territory. The Human Rights Committee's indicated in General Comment 27 that the article is horizontal in effect; that is, Australia is obliged both to refrain from interfering with person's freedom of movement and to ensure that a person's freedom of movement is not unduly restricted by others.

The bill prima facie enables interference in freedom of movement into indigenous areas regulated by the revived permit system.

(b) The restriction is justified

The question is whether such interference is demonstrably justified as necessary to protect public order, health or morality or the rights and freedoms of others, as specified under Article 12(3):

> The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

In our view, Schedule Three constitutes a legitimate restriction on freedom of movement which may be necessary both to protect public order, health and morality (by restricting predatory sexual offenders accessing vulnerable indigenous children where such risks are serious and demonstrable), and to protect the 'rights and freedoms of others' (including indigenous interests or rights in land, and the rights of children under the *Convention on the Rights of the Child*).

While international law does not recognise a strict right to property as such, minority rights under article 27 of the ICCPR understood to include traditional or other indigenous rights in land: UN Human Rights Committee, General Comment 23, para 7. In the UN Human Rights Committee's General Comment 27, it was stated that 'limitations on the freedom to settle in areas inhabited by indigenous or minorities communities' would be a valid restriction under the ICCPR. In *Lovelace v Canada* (Communication No. R.6/24 (29 December 1977) the UN

Committee further found that rights of residence can be validly restricted in order to reserve land for special minority groups, which are entitled to have their cultural rights protected (including as they relate to access to and control over traditional lands).

In addition, Article 26 of the 2007 UN Declaration on the Rights of Indigenous Peoples, though non-binding, elaborates on the normative content of minority cultural rights insofar as they concern indigenous rights in land:

> 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
>
> 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
>
> 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

The power to determine who can enter land is a necessary element of any right to own or control land, and thus by giving Indigenous Australians limited autonomy over entry requirements through the permit system, Schedule Three constitutes a necessary restriction on the right of freedom of movement by protecting the rights in article 26. The restriction may also protect Indigenous rights to (internal) self-determination (article 4), protection from destruction of culture (article 8), access in privacy to religious and cultural sites (article 12) and the determination and development of priorities and strategies for the development or use of lands (article 32).

Given that indigenous rights in land are a legitimate minority cultural right that is protected by international law, it is submitted that the permit system is anecessary measure for the adequate protection of these rights. It is also consistent with article 5 of ICERD, which provides for the right to own property without discrimination and article 17. The repeal of existing permit system removed a measure designed to secure Indigenous peoples' cultural rights in land. Accordingly the reinstatement of the permit system is consistent with Australia's international law obligations.

(c) Ministerial override is questionable

The bill provides for 'ministerial authorisations' to override the permit system under the proposed s 70(2BB). We caution against the adoption of an unfettered ministerial discretion to permit entry to indigenous lands. Were there to be legitimate reasons for enabling ministerial authorisations (which we doubt), any power would need to be exercised in accordance with specific statutory criteria in order to show demonstrably justifiable grounds for interfering in indigenous rights in land. Permitting ministerial authorisations diminishes the stature of indigenous land rights as against ordinary free-hold land title-holders, who are not subject to a comparable regime of discretionary ministerial interference.

Conclusion

With the exception of s70(2BB), we welcome the bill as a considered response to concerns about the effectiveness of the NTERA package. In our view, the bill would largely complies with the 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.

Separate Quarantining Issue

We would welcome a separate opportunity to submit our concerns about whether the 'quarantining' of welfare payments in indigenous communities, as part of the broader Northern Territory Emergency Response legislation, complies with international law, since those provisions raise real suggestions of impermissible racial discrimination and the denial of the right to social security under ICERD (article 5 (e)(iv)) and the *International Covenant on Economic, Social and Cultural Rights* (article 9).

Yours sincerely

Dr Ben Saul
Director, Sydney Centre

Dr Thalia Anthony
Associate, Sydney Centre

Ms Claire McEvilly
Researcher, Sydney Centre