Law Council
OF AUSTRALIA

Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009

Senate Community Affairs Committee

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GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

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Introduction

1. The Law Council of Australia is pleased to provide the following submission to the Senate Community Affairs Committee concerning the Review into the provisions of the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act*) Bill 2009 ("**the SS Bill**"); the *Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Bill 2009* (the 2009 Measures Bill); and the *Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Restoration of Racial Discrimination Act) Bill 2009* ("**the RRDA Bill**").

2. It is noted that both the SS Bill and 2009 Measures Bill were introduced by the Government. The RRDA Bill is a private Senator's Bill, introduced by Senator Rachel Seiwert.

3. Due to time constraints, the following submission focuses on the Government's proposed amendments set out in the SS Bill. The Law Council supports Senator Seiwert's initiative in introducing the RRDA Bill, which pre-empted the Government's promised amendments to the NT intervention to restore the application of the *Racial Discrimination Act 1975* (Cth) ("**the RDA**") under the NT National Emergency Response Act and related legislation ("**the NTNER legislation**").

4. The principal common objective of the SS and RRDA Bills is (broadly) to repeal:

   (1) Sections 4 and 5 of the *Families, Community Services and Indigenous Affairs Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007*;

   (2) Sections 132 and 133 of the *Northern Territory National Emergency Response Act 2007*; and

   (3) Sections 4, 5, 6, and 7 of the *Social Security Amendment (Welfare Reform) Act 2007*,

   each of which suspends Part II of the *Racial Discrimination Act 1975* (Cth) ("**the RDA**"), as well as NT and Queensland anti-discrimination laws.

5. The SS Bill will also amend the income management regime under the Northern Territory "emergency intervention" ("**the NT intervention**") to target particular welfare recipients and apply it to all welfare recipients living in the Northern Territory and those residing in prescribed 'disadvantaged' areas across the country. It is the apparent intention that the income management regime will no longer discriminate on the basis of race.

6. The SS Bill will also make minor amendments to other aspects of the NT intervention, which will continue to apply in a discriminatory manner against Aboriginal people in the NT. The Minister for Families, Housing, Community Services and Indigenous Affairs stated in her second reading speech to Parliament, introducing the Bill, that "the redesigned measures are special measures under the *Racial Discrimination Act 1975* (Cth)", suggesting that they are for the benefit of, and supported by, Aboriginal communities affected.

7. The Law Council strongly supports repealing laws that suspend Part II of the RDA. The Law Council rejects entirely any suggestion that the objectives of the NT intervention required repudiation of Australia's international human rights

obligations. The Law Council submits that Schedule 1 of the Bill should be enacted as soon as possible to restore rights of Indigenous Australians in the Northern Territory on an equal basis with all other Australians.

8. The Law Council considers that the question of whether the NT intervention will meet international human rights standards, following passage of these Bills, is more complex. This is because the conformity of several aspects of the NT intervention with the RDA will continue to rely on the assertion that the measures are "special measures".

9. The Law Council's key submissions are as follows:

   (1) The Law Council strongly supports reinstatement of the RDA under the NT intervention.

   (2) Application of income management across the Northern Territory may resolve concerns with respect to direct discrimination against Aboriginal communities. However, there continues to be potential for indirect discrimination against Aboriginal people in the application of the measure to highly disadvantaged groups.

   (3) Key aspects of the NT intervention, including alcohol and pornography restrictions and compulsory acquisition of 5 year leases may continue to be discriminatory following reinstatement of the RDA.

   (4) It is not clear that reinstatement of the RDA will have any impact on actions or decisions authorised by NTNER legislation.

   (5) The SS Bill should therefore be amended to state that the RDA is intended to apply to the NTNER legislation and survives to the extent of any inconsistency, perhaps along the lines of clauses 1, 3 and 5 of the RRDA Bill.

Background

10. In a submission in September 2007 to the Senate Standing Committee on Legal and Constitutional Affairs concerning the Inquiry into the NTNER legislation, the Law Council made the following statement with respect to the suspension of the RDA:

> "The Law Council considers the inclusion in legislation proposed to be enacted by the Australian Parliament in 2007 of a provision specifically excluding the operation of the RDA to be utterly unacceptable. Such an extraordinary development places Australia in direct and unashamed contravention of its obligations under relevant international instruments, most relevantly the United Nations Charter and the International Convention on the Elimination of All Forms of Racial Discrimination ("**CERD**")."

11. The Law Council is not alone in its condemnation of the suspension of the RDA under the Federal "intervention" in the Northern Territory. The suspension of the RDA has been strongly criticised, both domestically and internationally, by affected Indigenous communities and their representative organisations, the United Nations Human Rights Committee and the Committee on the Elimination of Racial Discrimination, international human rights organisations, academics, religious organisations and commercial bodies.

12. In particular, the Law Council notes the comments of the United Nations Human Rights Committee in its concluding observations with respect to Australia's fulfilment of its obligations under the International Covenant on Civil and Political Rights that:

> "The State party should redesign NTER measures in direct consultation with the indigenous peoples concerned, in order to ensure that they are consistent with the Racial Discrimination Act 1995 and the Covenant."[1]

13. The Law Council also notes the observations of the UN Special Rapportuer on the Rights of Indigenous Peoples, Dr James Anaya, who visited Australia in 2009 and commented:

> "6. ...Of particular concern is the Northern Territory Emergency Response, which by the Government's own account is an extraordinary measure, especially in its income management regime, imposition of compulsory leases, and community-wide bans on alcohol consumption and pornography. These measures overtly discriminate against aboriginal peoples, infringe their right of self-determination and stigmatize already stigmatized communities.
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> ...
>
> "8. In this connection, any special measure that infringes on the basic rights of indigenous peoples must be narrowly tailored, proportional and necessary to achieve the legitimate objectives being pursued. In the view of the Special Rapporteur, the Northern Territory Emergency Response does not meet these requirements. As currently configured and carried out, the Emergency Response is incompatible with the country's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights, treaties to which Australia is a party, as well as with the Declaration on the Rights of Indigenous Peoples, for which Australia has affirmed its support.
>
> "9. The Special Rapporteur notes with satisfaction that a process to reform the Emergency Response is currently under way and that the Government has initiated consultations with indigenous groups in the Northern Territory in this connection. He expresses the hope that amendments to the Emergency Response will diminish or remove its discriminatory aspects and adequately take into account the rights of aboriginal peoples to self-determination and culture integrity, in order to bring this Government initiative into line with the international obligations of Australia. The Special Rapporteur also urges the Government to act swiftly to reinstate the protections of the Racial Discrimination Act with regard to the indigenous peoples of the Northern Territory." [2]

14. These comments followed stark criticism of many aspects of the intervention by the Federal Government's independent review of the NT intervention, Chaired by Peter Yu, which reported in October 2008 that:

> "Support for the positive potential of the NTER measures has been dampened and delayed by the manner in which they were imposed.

[1] UN Human Rights Committee, Concluding Observations on Reports Submitted by Australia Under Article 40 of the ICCPR, Ninety-fifth session Geneva, 16 March- 3 April 2009, CCPR/C/AUS/CO/5
[2] See http://www.unhchr.ch/huricane/huricane.nsf/view01/313713727C084992C125761F00443D60?opendocument

> "The intervention diminished its own effectiveness through its failure to engage constructively with the Aboriginal people it was intended to help."[3]

15. The statements of these international bodies and the report of the NTER Review Board reflect significant concern, resentment and anger within substantial proportions of communities affected by the NT intervention.

16. In the Law Council's view, there can be no basis for arguing that the intervention should proceed in its present form.

Consultation

17. The Explanatory Memorandum notes some of the events preceding the introduction of the SS Bill, including the 2008 12-month review into the NT intervention and "extensive consultations" carried out in the NT in 2009, including with all 73 Indigenous communities directly targeted by the NT intervention.

18. In her second reading speech accompanying the SS Bill, the Minister for Indigenous Affairs, the Hon Jenny Macklin MP, described the consultations preceding the Bill as:

> "...unprecedented in scale and conducted intensively over more than three months. More than 500 meetings were held."

19. The Law Council notes the 4 tier consultation strategy outlined in the Cultural and Indigenous Research Centre Australia (CIRCA) Report on the NTER Redesign Engagement Strategy and Implementation.[4] It is clear that the Federal Government has gone to considerable effort to create a perception of engagement and consultation with Aboriginal communities in the NT.

20. The Law Council is unable to comment on the nature and extent of the consultation process. However, it is relevant to note that the Department of Families, Housing, Community Services and Indigenous Affairs' (FaHCSIA) Discussion Paper, entitled "NTER Future Directions", which was a primary mechanism used during the consultations referred to by the Minister, has been criticised by some Indigenous organisations for failing to provide a platform for genuine engagement with Indigenous communities.

21. A key aspect of this criticism was the framing of only limited options to amend income management, apparently developed without consultation. While the consultation process permitted general discussion of the positive and negative aspects of the intervention, the Discussion Paper permitted consideration of only 2 options in respect of income management: either maintaining the status quo or allowing individuals to apply for exemptions based on their individual circumstances. This approach narrowed the ambit of consultations considerably and has attracted the criticism that "...the Government is not offering any choice. It is simply telling the people what it proposes to do. The consultation is nothing more than going through the motions in order to achieve a pre-determined end."[5]

22. It is noteworthy that, prior to the commencement of FaHCSIA's consultations over the "future directions" of the NT intervention, there had already been extensive

[3] Report of the NTER Review Board, October 2008, Commonwealth of Australia, page 9-10.
[4] CIRCA, *Report on the NTER Redesign Engagement Strategy and Implementation*, September 2009.
[5] *Will they be heard? A Response to the NTER Consultations June to August 2009*, Research Unit, Jumbunna Indigenous House of Learning, November 2009, page 4.

consultation with Aboriginal communities in the Northern Territory by the NTER Review Board, which reached different conclusions as to what should be done to address the concerns of Aboriginal communities in relation to the NT intervention.[6] Its recommendations included replacing mandatory income management with voluntary income management. This recommendation was expressly rejected by the Minister.[7]

23. The Law Council considers that genuine consultation requires substantially more than meeting with affected communities and providing information about the Government's proposed changes. Consistency with Australia's international obligations requires that Indigenous communities and representative should be actively involved in the design and implementation of the proposals. These obligations include, relevantly, the right of Indigenous peoples to self-determination (Article 3 of the UN Declaration on the Rights of Indigenous Peoples), the right to participate in decisions which affect them (Article 18) and the obligation of governments to consult with Indigenous peoples in order to obtain their consent before adopting laws which may affect them (Article 19).

24. If independent criticism[8] of the consultation process is well-founded, it is unclear whether the process has succeeded in overcoming widespread condemnation of the manner in which the original NTNER legislation was imposed on Aboriginal communities in the Northern Territory.

Income management amendments

Summary of amendments

25. The proposed amendments to income management in Schedule 2, Parts 2 and 3 of the SS Bill will, if enacted, have the following key effects:

    (1) Item 12 will repeal s 123UB of the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (the 2007 Act), which applies income management compulsorily to a person who stayed overnight in a designated area. This section presently applies income management to people who reside in an Aboriginal community in the Northern Territory (which are the majority of prescribed areas under the NTNER legislation).

    (2) Those subject to compulsory income management under s 123UB immediately prior to the repeal of s 123UB will continue to be subject to compulsory income management for a period after the SS Bill is enacted. Transitional arrangements will apply to those people such that they will either continue to be income managed under the new income management provisions (if they meet the relevant criteria), or they will be moved off income management no later than 12 months from 1 July 2010.

    (3) Item 25 amends section 123TA to replace paragraphs (a) to (e) [note: the SS Bill refers to paragraphs "**(a) to (f)"**, however it is assumed that this is an error as section 123TA of the 2007 Act does not contain paragraph "(f)"] and inserts

[6] Report of the NTER Review Board, October 2008, Commonwealth of Australia
[7] This may be because of concern by the Minister that people could be coerced into opting out of income management by "humbuggers". In public statements the Minister has also referred anecdotally to discussions with isolated groups of Indigenous people who have expressed support for income management.
[8] Such as *Will they be heard?*, ibid, op cit 5.

new paragraphs (a) to (h), which set out various categories of welfare recipient to whom compulsory income management will apply.

(4) Under the new income management arrangements, compulsory income management will apply to **all** welfare recipients in the NT:

(a) under 25 years, who have been on welfare for greater than 3 months out of the previous 6 months ("disengaged youth");

(b) over 25, who have been on welfare for more than 1 year in the last 2 years;

(c) who are required by a State/Territory child protection officer to be income managed;

(d) who are determined by the Secretary to be a "vulnerable welfare recipient" (the assessment of which will generally be carried out by a Centrelink social worker involuntarily, with avenues for appeal in light of any change in circumstances);

(5) Subject to the above, the following will be excluded from income management:

(a) Pensioners;

(b) Full time students;

(c) Welfare recipients with children at home or in child care (except those notified by child welfare authorities).

Comments on amendments

26. The fundamental objective of the amendments to the income management regime appears to be to ensure the regime can remain in place in the Northern Territory, without discriminating against Aboriginal people.

27. As income management will be applied to all welfare recipients in the Northern Territory, the SS Bill may achieve that objective. Accordingly, if the amendments proposed in Schedule 1, Parts 2 and 3 are enacted, concerns with respect to the overtly discriminatory impact of the income management regime will to some extent be addressed.

28. However, it remains a concern that the amendments may indirectly discriminate against Aboriginal people, given the new measures will target all welfare recipients in the Northern Territory, a major proportion of whom are Indigenous. Likewise, in addition, the proposal to extend income management initially to identified "disadvantaged" communities in other jurisdictions will almost certainly affect predominantly Aboriginal communities in those jurisdictions.

29. The overwhelming and disproportionate disadvantage of Indigenous Australians in relation to most if not all economic and social indicators is notorious.

Restoration of the Racial Discrimination Act 1975

30. The RDA gives domestic effect to Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).

31. The prohibition of racial discrimination is not constitutionally entrenched in Australia and, as demonstrated throughout the history of this country since colonisation, Aboriginal and Torres Strait Islander peoples have been subject to systemic discrimination and oppression at the hands of Federal, State and Territory Governments.

32. The RDA is therefore landmark legislation, which reflects the will of the Australian people to join the consensus of the International community in condemning and absolutely prohibiting racial discrimination. When enacted in 1975, the RDA was landmark legislation reflecting the will of the Australian Parliament to join the consensus of the international community in condemning and prohibiting any form of racial discrimination. At the same time, CERD and the RDA recognised that the advancement of certain disadvantaged racial groups required positive discrimination to ensure all Australians have the capacity to participate equally in Australian society. "Positive" discrimination is referred to in CERD and the RDA as "special measures".

33. The Law Council submits that any suspension of the RDA in relation to the NT intervention was not and cannot be justified. Suspension of the RDA under the NTNER legislation had the effect of ensuring that any relief in respect of a complaint of unlawful discrimination under the *Australian Human Rights Commission Act 1986* is unavailable (including in the Federal Court). The fundamental right of every person to effective protection and remedies against any acts of racial discrimination is recognised in Article 6 of CERD. The separate question of whether the proposed amendments are special measures and hence consistent with CERD and the RDA is addressed below.

"Special measures"?

34. The concept of "special measures" at international law is complex and has generated debate as to the requirement for consultation and consent.

35. In determining whether such discriminatory provisions can be saved as "*special measures*", within the meaning of s 8(1) of the RDA, and article 1(4) of CERD, the wishes of the affected communities are critical. As Brennan J observed in *Gerhardy v Brown* (1985) 159 CLR 70:

> "*A special measure must have the sole purpose of securing advancement, but what is "advancement"? … The purpose of securing advancement for a racial group is not established by showing that the branch of government or the person who takes the measure does so for the purpose of conferring what it or he regards as a benefit for the group if the group does not seek or wish to have the benefit. The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them.*"

36. James Anaya, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, rejected the notion that the NT intervention measures are "special measures", noting that:

> *"…any special measure that infringes on the basic rights of indigenous peoples must be narrowly tailored, proportional and necessary to achieve the legitimate objectives being pursued. In the view of the Special Rapporteur, the Northern*

Territory Emergency Response does not meet these requirements. As currently configured and carried out, the Emergency Response is incompatible with the country's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights, treaties to which Australia is a party, as well as with the Declaration on the Rights of Indigenous Peoples, for which Australia has affirmed its support."[9]

37. James Anaya also observed in his 2009 Annual Report to the United Nations Human Rights Council that:

> "The strength or importance of the objective of achieving consent varies according to the circumstances of the indigenous interests involved. A significant, direct impact on indigenous peoples' lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples' consent. In certain contexts, that presumption may harden into a prohibition of the measure or project in the absence of indigenous consent."[10]

38. In addition, the Australian Human Rights Commission has stated that any limitation on freedom from racial discrimination must be proportionate to the benefit sought by the measure and must be the least restrictive option available to achieve that benefit.[11]

39. The Law Council submits that in order for *prima facie* discriminatory measures to be capable of being characterised as special measures, and hence not offend the prohibition against racial discrimination, there is a basic requirement to seek the free, prior and informed consent of the affected community.

<u>"Prior, informed consent"</u>

40. The concept of '"prior informed consent" arises in numerous international texts and instruments.

41. On 18 August 1997, the United Nations Committee on the Elimination of All Forms of Racial Discrimination adopted a General Recommendation concerning Indigenous Peoples (General Recommendation XXIII(51)) calling upon States parties to CERD to take a series of measures, including:

> "*to ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that <u>no decisions directly relating to their rights and interests are taken without their informed consent</u>*". (emphasis added)

42. Article 19 of the UN Declaration on the Rights of Indigenous Peoples provides that:

> "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."

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[9] James Anaya, 'Preliminary note on the situation of indigenous peoples in Australia', 28 October 2009, p.3.
[10] James Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people,* UN Doc A/HRC/12/34 (2009), para 47. See http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-34.pdf
[11] AHRC, *Draft RDA Guidelines for Income Management Measures are Compliant with the Racial Discrimination Act*, 11 November 2009, page 6.

43. The concept of "free, prior and informed consent" appears in 5 other articles of the Declaration on the Rights of Indigenous Peoples. It is pleasing to note that the Federal Government has stated its support for the Declaration, a position that the Law Council supports. However, the Law Council is concerned that no commitment has been made to review State/Federal legislation and policy to ensure consistency with the Declaration, despite repeated calls that the Government should do so.

44. There is not yet complete consensus within the international community as to what States party to international conventions must do to discharge their obligations to obtain "prior, informed consent". Whilst some interpretations emphasise actual consent, others conclude that, from the point of view of practicality, it is not required that Indigenous peoples be empowered to 'veto' a Government proposal. Proponents of the latter interpretation emphasise the duty to consult and endeavour, in good faith, to negotiate proposals that are mutually agreeable.[12]

45. If the latter interpretation prevails (which seems closer to the Government's apparent position), then the nature of the consultation process, and the Government's subsequent response, is critical to determining whether the measures can properly be characterised as "special measures".

Limited consultation process

46. As noted above, the Federal Government has engaged in an extensive process of consultation over the measures. This is a positive development in light of the absolute lack of any consultation which preceded the enactment of the NTNER legislation in 2007.

47. It remains a significant concern, however, that the parameters of the consultation process may have limited the extent to which Indigenous communities in the Northern Territory were able to be heard in relation to whether they wish for any continuation of the intervention, or to contribute to the redesign of the intervention in its present form. This concern arises primarily due to the nature of the "Future Directions" Discussion Paper, which limited the reform options available for consideration.

48. The following discussion relates to other measures including alcohol restrictions, pornography restrictions and 5-year leases.

49. Consultations did not canvas the suspension of the permit system or changes to bail and sentencing laws which restrict judicial consideration of an offender's cultural background or customary laws. It is noted that the Government attempted to restore the permit system in 2008 under the *Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Response Consolidation) Bill 2008* (annexed to this submission at **Attachment B**), however that Bill was blocked in the Senate. It is further noted that former Minister for Home Affairs, Bob Debus MP, directed the Attorney-General's Department to conduct a review into the impact of changes to bail and sentencing laws in 2008. The Law Council made a submission to that review in November 2008, but to date the Minister for Home Affairs has not authorised the public release of the report. The Law Council regards the changes to the permit system and NT bail and sentencing laws under the NT intervention as retrograde and submits that Parliament should repeal those aspects of the legislation as soon as possible.

[12] James Anaya, 'Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people', 15 July 2009, A/HRC/12/34. Available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/145/82/PDF/G0914582.pdf?OpenElement.

Alcohol and pornography restrictions

50. The Law Council supports the objectives of recommendations in the 2007 Report of the NT Board of Inquiry into Protection of Aboriginal Children from Sexual Abuse[13] ("the *Little Children Are Sacred* report") and the recommendations of the Report of the Independent 12-month Review of the NT Intervention (the 12-month review). Alcohol abuse in some Aboriginal communities is a serious problem, which often leads to other social problems and must be addressed. However, as recommended in those reports, this problem must be addressed in partnership with the communities concerned, not by top-down imposition of policy solutions developed and implemented by government in isolation. Partnership is also essential if the measures are to be properly characterised as "special measures".

51. In relation to alcohol and pornography restrictions, the measures are, *prima facie*, discriminatory because they are directed exclusively at Aboriginal communities in the Northern Territory. The ambit of the restriction will not change under the legislation. However, minor changes will address concerns reported during the "future directions" consultations, including to minimise the stigmatising effect of large alcohol/pornography prohibition signs/notices posted outside designated communities and to provide for consultation with stakeholders prior to declaration of a prescribed area.

52. These changes should be implemented to ensure the consultation process is aimed at obtaining the free, prior and informed consent of relevant communities before declaring a prescribed area. In its seminal 1995 *Alcohol Report*, the Human Rights and Equal Opportunity Commission concluded that alcohol restrictions imposed upon Aboriginal groups as a result of government policies which are incompatible with the policy of the community will not be 'special measures'. It is not clear that the discretion to declare a prescribed area under the SS Bill will require consent of the affected community. Accordingly it is not clear whether the measure will meet the requirements of a special measure.

53. It should be further noted that the future directions discussion paper appears to approach this issue with a predetermined outcome intended. The "future arrangements" and "description of a possible model" sections on page 14 of the Future Directions discussion paper outline preferred proposals that are almost identical to solutions that appear in the SS Bill. This is despite a clear message conveyed during consultations (as outlined in the Government's report on redesign consultations) that affected communities would prefer solutions designed *by the community*, not imposed by government.

54. Section 18(1) of the SS Bill enables the Minister to declare an area to be a dry zone if a request has been made by a person who ordinarily resides in that area (s 18(2)). It is noted that there appears to have been some effort to allow community participation in decision making over the declaration of prescribed non-drinking areas, as s 18(3) provides for consultation with the community prior to a determination under s 18(1). However, this requirement is substantially undermined by s 18(4), which states that a failure to consult under s 18(3) will not affect a determination under s 18(1).

55. The Law Council submits that this may result in circumstances in which the prior, informed consent of affected Aboriginal communities is not obtained, because a

[13] Wild, R. and Anderson, P., 2007, *Little Children Are Sacred* - "Ampe Akelyernemane Meke Mekarle", Report of the Board of Inquiry into Protection of Aboriginal Children from Sexual Abuse, Northern Territory Government

failure to consult in good faith will not prevent the Minister making a determination which ostensibly infringes the rights of those residing in the community. Accordingly the SS Bill merely establishes a discretion to consult and no requirement that the wishes of affected communities be implemented. This diminishes the likelihood of "good faith" negotiations or attempts to obtain consent where the Government disagrees with the community's view about the nature or ambit of the prohibition, or necessity for prominent signs and notices.

5 year leases

56. The Law Council notes that compulsory acquisition of 5 years leases, a program targeted at Aboriginal people without their consent, is discriminatory and contrary to the RDA and Australia's international human rights obligations. The question remains whether the proposal can be saved at all, with respect to its discriminatory impact, by consultations and attempts at "making the objectives clearer".

57. When considering whether compulsory acquisition of Aboriginal land on 5 year leases can be saved as a "special measure", the action must be proportionate to the benefit being sought, must be the least intrusive measure to achieve the stated objective and must be done with the prior and informed consent of Aboriginal communities affected. At the very least, this requires the Government to ensure affected communities understand why the measure is necessary and to negotiate in good faith to secure their consent to a mutually agreeable outcome.

58. The Law Council queries whether Aboriginal people living in communities that have been compulsorily acquired properly understand the impact that this has had on their property rights, or that Government approval is effectively required whenever they wish to exercise any ownership rights or decisions over their land? It is clear from the Government's report on the NTER redesign consultations that there was "frustration and confusion over lease arrangements" and that the majority of those consulted either did not comment (due to cultural issues), did not understand, or did not see any benefit in 5-year leases to their community. It is difficult to understand how the Government can state that its obligations have been discharged in these circumstances, so as to characterise the continuation of 5-year leases as a special measure.

59. Notwithstanding this, the Government reports (somewhat paradoxically) that generally participants in the tier 3 and 4 workshops supported the Government's proposal to move to long term (i.e. 40 year) voluntary leases. Assuming this assertion is correct, the Government does not comment in its report on whether this response was influenced by the fact that no new houses will be built in communities that do not voluntarily sign up to 40 year leases.

60. Given reports that in some communities housing is so desperately needed that up to 20 people are residing in a single dwelling (and recent estimates that it will take approximately 30 years to build sufficient housing to reduce the average to 7 people to a dwelling – without taking account of the high rate of population growth in NT Aboriginal communities)[14] the Law Council queries what choice Aboriginal communities are being given? Failure to sign a 40 year lease will condemn communities to increasing homelessness and progressively worse overcrowding. However, agreement to a lease means the suppression of land rights for a generation or more.

[14] Little Children Are Sacred, Ibid, *op cit 13*. See also NTER Review Board, Ibid, *op cit 6*.

61. Revelations that FaHCSIA advised the previous Government against consulting with Aboriginal communities over 5-year leases prior to their introduction on the grounds that it would not be worthwhile (because the affected communities would be unlikely to consent)[15] also militates strongly against suggestions that the measures are "special measures". Consultation conducted by the present Government since that time has vindicated the Department's advice that Aboriginal communities do not support or understand the need for 5-year township leases. Having formed the view that compulsory acquisitions of 5-year leases under the NT intervention were likely to be contrary to the RDA, the Government now proposes not to repeal them, but to make virtually no changes, other than to insert new sections which merely state the Government's objectives. This approach continues to sidestep the fundamental objective of engaging in partnership with Aboriginal communities.

62. As noted by the Aboriginal and Torres Strait Islander Social Justice Commissioner, s 10(3) of the RDA specifically requires that any law which authorises property owned by Aboriginal or Torres Strait Islander people to be managed by another person without prior consent, or which restricts an Aboriginal or Torres Strait Islander person from terminating management or control by another person, is a law to which s 10(1) applies. Similarly, s 8(1) prevents any such law being regarded as a special measure under the RDA.[16]

63. Accordingly, given there is no evidence presented by the Commonwealth that NT Aboriginal people have consented to compulsory acquisition of their land, the Law Council submits that measure cannot be characterised as a "special measures" under the RDA or international law.

Effect of repealing RDA suspension

64. If the SS Bill is enacted in its present form, the full operation of the RDA will be restored under the NTER legislation, as well as NT Anti-Discrimination laws.

65. Under Clause 4 of the SS Bill, the reinstatement of the RDA will not have retrospective effect, so any acts contrary to Part II of the RDA committed during the period of the suspension of the RDA will not be capable of being the subject of complaints to the Australian Human Rights Commission or Federal Court.

66. The SS Bill also makes significant amendments to the income management provisions and relatively minor amendments to several other aspects of the intervention. The Explanatory Memorandum states that the amending legislation is intended to ensure the NT intervention will be characterised as a "special measure" for the sole purpose of advancing the human rights of Aboriginal peoples.

67. Accordingly, if the RDA is fully reinstated, as is the case under the SS Bill, great reliance will be placed on the "special measures" exception to uphold the ongoing legitimacy of the NT intervention. As noted above, the Law Council considers there is significant doubt as to whether the measures, including alcohol restrictions and compulsorily acquired 5-year leases, can be characterised as special measures.

68. Symbolically, reinstatement of the RDA will be very significant. It will end a period of unashamed contravention of Australia's international human rights obligations and

[15] Briefing document from the Department of Families Housing Community Services and Indigenous Affairs to the Minister for Families Housing Community Services and Indigenous Affairs (25 March 2009) available at http://www.nit.com.au/downloads/files/Download_211.pdf. Referred to in "Will they be heard" Ibid, op cit 5, page 18.

[16] Ibid, op cit 1. Note discussion at page 266.

may go some way toward rebuilding trust and "resetting the relationship" between Indigenous Australians and the Commonwealth Government.

69. However the Law Council considers that, without explicit application of the RDA to the NT intervention, there will be few substantive remedies for discrimination which continues to occur following passage of the SS Bill. Aggrieved parties may make a complaint to the AHRC and, in turn, upon determination of the complaint by the Commission, to the Federal Court.

70. It is further noted that, regardless of whether the RDA suspension is repealed, Australia may still be in breach of the CERD, the United Nations Charter, and customary international law, on the basis that the overriding measures are discriminatory.

Non-obstante clause required

71. In the Social Justice report 2007, the Aboriginal and Torres Strait Islander Social Justice Commissioner recommended specific amendments to the NT intervention legislation to clarify that the legislation does not authorise conduct that is inconsistent with the provisions of the RDA.[17] This would ensure the RDA protections apply to the exercise of Ministerial discretions, including all delegated powers, under the NT intervention.

72. The Law Council supports the Social Justice Commissioner's recommendation as an immediate measure to ensure Aboriginal people are able to rely upon the protection of the RDA in relation to any discriminatory act carried out under the NER legislation.

73. It is noted that the RRDA Bill, introduced by Senator Seiwert, contains an appropriate provision at clauses 1, 3, and 5.

Recommendations

74. The Law Council recommends that:

(1) The SS Bill be amended to insert a *non-obstante* clause, in accordance with the recommendation of the ATSI Social Justice Commissioner (Recommendation 5, Social Justice Report 2007), to clarify that the RDA is intended to apply to all decisions and actions taken under each of the NTER enactments, along the lines of the model provision set out in the RRDA Bill; and

(2) The SS Bill be enacted to ensure the provisions suspending the operation of the RDA under the NTER legislation are repealed as soon as possible.

[17] Ibid, op. cit. 1, Recommendation 5, page 304.

Attachment A: Profile of the 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.

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

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.

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[18] that the proposed measure is predicated on the findings of the Northern Territory Inquiry into Child Sexual Abuse in Aboriginal Communities (the NT Inquiry).[19] 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

(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."

[18] In the Explanatory Memorandum accompanying the Bill.
[19] 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.

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."[20]

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.[21]

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".

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

[20] Ibid, page 200.
[21] Ibid

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.

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.

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)).

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.