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WALES

Jackie Morris
Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

10 August 2007

Dear Ms Morris,

Northern Territory National Emergency Response Legislation

The Indigenous Law Centre is pleased to have the opportunity to provide the following brief comment to the Senate Standing Committee on Legal and Constitutional Affairs on the:

- Northern Territory National Emergency Response Bill 2007 ('NTNER Bill'); and
- Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill 2007 ('FaCSIA Bill').

In the limited time available to review the proposed legislation and comment, the Indigenous Law Centre has been unable to analyse all aspects of the Bill thoroughly. Therefore we limit our submission to consideration of the proposed legislation in the context of the principle of consultation, integral to effectively legislating strategies to combat the issues raised by Pat Anderson and Rex Wild QC in the Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse 2007 ('the Anderson Wild report').

For over three decades many Indigenous people, most notably Aboriginal women, have raised the issue of child abuse and family violence in Aboriginal communities.[1] In fact the

[1] See generally, Boni Robertson, The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report (State of Queensland) 2000; Judy Atkinson, *Trauma Trails* (2002); Sonia

Indigenous Law Bulletin (formerly the *Aboriginal Law Bulletin*) produced by the Indigenous Law Centre for 26 years has an archive of over 60 articles, mostly written by Aboriginal women, detailing the problems of child abuse, family violence, alcoholism in Aboriginal communities and highlighting the inaction of state and Federal Parliaments and the detrimental impact and inflexibility of our adversarial legal system upon Aboriginal culture and consequently Aboriginal women. The failure to gain any political traction on these broad ranging issues raises important questions about our democracy: why is it that Aboriginal women's voices and concerns have elicited very little consideration from Australian public institutions? The historical failure to respond to Aboriginal women's concerns about serious human rights violations and public disorder and the failure to understand the complex trauma that exists in Aboriginal communities despite all the evidence raises serious questions about Australian democracy.

An analysis of Australian democracy through an Aboriginal woman's lens would judge representative democracy inadequate in its present configuration. As Aboriginal people we live in a Western liberal democracy as 2% of a 21 million polity. The representative configuration of our democracy permits only limited citizen's participation in decision-making and a manifestation of this is a public policy culture that generally focuses upon the greatest good for the greatest number, frequently eschewing electorally unpalatable interests of small numbered and powerless minority groups. This reality informs institutional inertia on tackling Indigenous disadvantage yet this dimension has been relatively unexplored in recent public discussion about the Federal government emergency response in the Northern

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Smallacombe, 'Speaking Positions on Indigenous Violence' 2004 (30) *Hecate* 47-55; Judy Atkinson, 'Stinkin' Thinkin' – Alcohol, Violence and Government Responses' (1991) 2 (51) *Aboriginal Law Bulletin* 4; Sharon Payne, 'Aboriginal women and the law' in Chris Cunneen (ed) *Aboriginal Perspectives on Criminal Justice* (1992) 31; Melissa Lucashenko, 'Violence against Indigenous Women: Public and Private Dimensions' in Sandy Cook and Judith Bessant (eds) *Women's Encounters with Violence: Australian Experiences* (1997) 147; Larissa Behrendt, 'Law Stories and Life Stories: Aboriginal women, the law and Australian society' (2005) 20 *Australian Feminist Studies* 245; Hannah McGlade, 'Our Own Backyards' (2003) 5 (23) *Indigenous Law Bulletin* 6; Judy Atkinson, 'Violence against Aboriginal Women: Reconstitution of Community Law – the Way Forward' (1990) 2 *Aboriginal Law Bulletin* 6; Judy Atkinson 'Violence in Aboriginal Australia: Colonisation and its impact and gender' (1990) 3 *Refractory Girl*, 4-9.

Territory. Rather the focus has been solely on forced behavioural change to be imposed from above, by government.

The indifference of our public institutions to Indigenous voices must not be overlooked in fashioning a response to the serious issue of child abuse in the Northern Territory. The lack of consultation with Aboriginal communities and the timeframe provided to respond to the proposed legislation not only undermines the democratic process but continues the deleterious trend of indifference among public institutions toward Indigenous peoples' opinions, ideas and worldviews. We draw the Committee's attention to the first recommendation of the Anderson Wild report,

> 'That Aboriginal child sexual abuse in the Northern Territory be designated as an issue of urgent national significance by both the Australian and Northern Territory Governments, and both governments immediately establish a collaborative partnership with a Memorandum of Understanding to specifically address the protection of Aboriginal children from sexual abuse**.** It is critical that both governments commit to genuine consultation with Aboriginal people in designing initiatives for Aboriginal communities.'

We emphasise that this key recommendation promotes collaboration and the importance of genuine consultation with Aboriginal communities. This reflects international human rights law and the approach of the Committee on the Elimination of Racial Discrimination in its General Recommendation XXIII. Australia, as party to the International Convention on the Elimination of Racial Discrimination ('CERD'), (as domestically expressed in the *Racial Discrimination Act 1975* (Cth)) should 'ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent…'[2]

[2] Committee on the Elimination of Racial Discrimination, General Recommendation XXIII on the Rights of Indigenous Peoples, UN Doc HR1/GEN/1/Rev.5.

In addressing child sexual abuse, the legislative package includes changes to the permit system (FaCSIA Bill, Schedule 4) and compulsory acquisition of Aboriginal townships for five years (NTNER Bill, Part 4), despite there being absolutely no evidence-based research to support a causal link between land tenure and child sexual abuse. With respect to the compulsory acquisition of five-year leases, Part 4, Division 4 of the NTNER Bill states that a reasonable amount of compensation will be provided for the acquisition of the five-year leases by virtue of s 51(xxxi) of the Constitution. This in fact covers only a constitutional entitlement and there is no statutory entitlement for compensation. In fact, High Court jurisprudence clearly infers that there is no automated entitlement for compensation for acquisitions made under the Territories power: s 122 of the Constitution. This is at complete odds with what the Minister for Indigenous Affairs has been informing Aboriginal communities through the media and again, highlights our concern about inadequate consultation.

Equally disturbing is NTNER Bill Part 6, concerning the prohibition on the consideration of customary law or the cultural background of an offender in sentencing or bail proceedings. This provision will be discriminatory in application. Again, in the context of the Indigenous Law Centre's focus on the crucial principle of consultation, we draw the Committee's attention to the Human Rights and Equal Opportunity Commission Sex Discrimination Commissioner who noted in her submission to the Northern Territory Law Reform Commission Inquiry into Aboriginal Customary Law, that 'where women's human rights are at risk, Aboriginal communities should be encouraged to develop their own solutions to these problems and to adapt traditional practices to ensure women's human rights'.[3]

Evidence-based research shows that Indigenous peoples must be included in formulating solutions to the complex problems in their communities and best practice reveals that very few policies and laws are effective if Aboriginal people are not consulted from the outset. Consultation fosters a sense of ownership and that feeling of ownership has been

[3] Sex Discrimination Commissioner, Submission to the NTLRC Inquiry into Aboriginal Customary Law in the Northern Territory (May 2003), 'Part C: Women and Aboriginal Customary Law', [1].

incontrovertible in the success of economic development of indigenous communities globally. It manifests in a sense of control over one's own destiny and life. Evidence-based research shows that all the good intentions in the world are irrelevant if the people affected are not consulted.

An evidence-based response by the Federal Government would instead emphasise the salutary influence of consultation with Aboriginal people on this proposed legislation, with the imperative being that fostering a sense of ownership over solutions will result in real and beneficial outcomes for Aboriginal communities.

The haste with which this proposed legislation is being considered. and the fact that it is discriminatory; in breach of ICERD and the United Nations Charter; and violates the jus cogens norm of the prohibition on racial discrimination is an inauspicious beginning to an ostensibly concerted effort to arrest the problems of child sexual abuse raised by the Anderson Wild report.

Yours sincerely

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