New South Wales Council for Civil Liberties

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

10 August 2007

via email: legcon.sen@aph.gov.au

Dear Ms Morris

Re: Inquiry into the Northern Territory National Emergency Response Bill 2007 & Related Bills

The NSW Council for Civil Liberties (CCL) understands that on 9 August 2007, the Senate referred to the Standing Committee on Legal and Constitutional Affairs five bills comprising the legislative package for the Australian Government's response to concerns relating to the welfare of Indigenous children in the Northern Territory. CCL notes that the committee will be holding a public hearing in Canberra on Friday, 10 August 2007 and is required to report on Monday, 13 August 2007.

The lack of time given for proper consideration of this important legislation suggests that there will be many aspects of it which will turn out to have detrimental consequences, but will escape criticism at this stage. CCL asks the Committee, at the very least, to recommend to government that a proper time be allowed for due consultation and consideration of the legislation.

The legislative package

Due to the very short period of time allowed, we have not had sufficient time to consider this lengthy and complex legislative package, but upon the necessarily brief perusal that we have been able to give it, CCL has concerns, at least, in relation to the following aspects of the legislation:

- the suspension of the *Racial Discrimination Act* (RDA)
- the suspension of the permit system,
- compulsory medical examination of children,
- the creation of a number of new criminal offences with the potential to dramatically increase the rate of imprisonment of Indigenous Australians, and

- the suspension of Native Title without compensation on just terms in a manner which may lead to the permanent extinguishment of the rights of Indigenous Australians.

Suspension of the Racial Discrimination Act

There would appear to be no justification for suspension of the provisions of the RDA. To the extent that the proposed laws are contrary to the RDA, they are abhorrent and ought not be enacted.

In 1980 the Fraser government ratified the *International Covenant on Civil and Political Rights* (ICCPR), and in 1990 Australia acceded to the *First Optional Protocol to the ICCPR*. These provisions of the legislation would be contrary to Article 2.1 of the ICCPR, which provides:

> *Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

Suspension of the permit system

The permit system has enabled Indigenous communities to have a degree of self-determination and its removal would be counter-productive in that it will result in the taking away of responsibility from affected communities instead of empowering them. Self-determination has been identified as one of a number of key factors in providing social equity for Indigenous people. This aspect of the legislative package is contrary to Article 1.1 of the ICCPR, which provides that:

> *All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*

By way of example, the Mutijulu community was reported yesterday (Hazel Illin - 9 August 2007) as having expressed its concern that removing the permit system will remove a valuable tool for protecting their communities, saying:

> *We have thrown suspected paedophiles out of our community using the permit system which our government now seeks to take away from us.*

and asking:

> *How will the government keep the grog runners out of our community without a permit system?*

Compulsory medical examination

They also expressed their concern about the proposal that people be medically examined without the necessity for consent, saying:

> *Our women and children are scared about being forcibly examined; surely there is a need to build trust. Even the doctors say they are reluctant to examine a young child without a parent's permission. Of course any child that is vulnerable or at risk should be immediately protected but a wholesale intrusion into our women and children's privacy is a violation of our human and sacred rights.*

CCL shares that concern. The rights of Indigenous women and children with regard to medical examination and treatment should not simply be overruled and ignored in the interest of protecting other rights. Rather, a solution should be sought which respects all of these rights to the greatest extent possible.

Creation of new offences

The proportion of Indigenous people in incarceration is already alarmingly high. The creation of new offences will ensure that more Indigenous Australians than ever will be held in prison. It is contrary to the spirit and recommendations of the Aboriginal Deaths in Custody report.

Suspension of Native Title without compensation on just terms

CCL has had the opportunity to consider the opinion of Mr Brian Walters SC released by Australian Greens Leader Bob Brown with respect to the latter. We note that he is of the opinion that the proposed suspension of Native Title under the legislative package is not on 'just terms' as required by the Constitution. We note his conclusion that "all of the provisions in the legislation providing for acquisition of property other than on 'just terms' would be struck down as void *ab initio* if they were enacted into law in their present form."

Mr Walters SC is of the opinion that the constitutional guarantee set out in s 51(xxxi) of the Constitution of 'just terms' is not upheld by the legislation. The words 'reasonable compensation' are substituted for 'just terms' in some clauses including subsection 60(2) in relation to the acquisition of leases.

In *Newcrest Mining v Commonwealth* (1997) 190 CLR 513 the majority of the High Court held that s 51 (xxxi) of the Constitution provided a "constitutional guarantee" of just terms in relation to the acquisition of property, and that this applied in the Territories as well as the States. In that regard, Toohey J said:

> *Indeed, it seems almost inevitable that any acquisition of property by the Commonwealth will now attract the operation of s 51(xxxi) because it will be*

in pursuit of a purpose in respect of which the Parliament has power to make laws, even if that acquisition takes place within a Territory.

The legislation fails to provide just terms and is therefore not in accordance with s 51 (xxxi).

CCL has also had the opportunity to view the submission to the Committee made by the Gilbert+Tobin Centre of Public Law. CCL endorses their concerns in relation to a number of aspects of the legislative package. CCL agrees that it is difficult to imagine non-Aboriginal people's property rights being diminished in a similar, blanket way by the Commonwealth in pursuit of a child welfare policy objective. In particular:

1. Traditional owners will have to satisfy a number of legal obstacles to obtain compensation, by proving that a *constitutional* 'acquisition of property' has occurred. This will be discriminatory, since other property holders in Australia enjoy a statutory right to compensation by virtue of the *Just Terms Compensation Act*. Further, the Minister has the discretion to determine rent for a s 31 lease without the requirement for a valuation from the Valuer-General (see s 62). These two aspects of the compensation regime appear to be inconsistent with the Government's stated objective that Aboriginal people should derive greater economic benefit from their land rights than has been the case to date.

2. Are improvements on Land Rights Act (ALRA) land that are funded by the Commonwealth, such as buildings or infrastructure, assets owned by the traditional landowners? If not, what is the rationale for s 61(c) of the Bill?

3. Section 57 of the Bill can read as an indication that there is a close relationship between the forced 5 year lease provision (s 31) and the creation of a headlease-sublease arrangement in townships.

4. The Commonwealth will be able to sublease ALRA land to someone else without the consent of traditional owners (s 52(7)) when the *Land Rights Act* provides that such consent is necessary and appropriate (ALRA s 19A(8)).

5. The Bill prohibits Parliament from examining Commonwealth public works on affected Aboriginal land through the Parliamentary Standing Committee on Public Works during the 5 year window. This provision does not apply to land belonging to other Australians and is for that reason discriminatory.

Alternative solutions

On 26 June 2007, CCL joined with 50 other community organisations and individuals in a carefully considered open letter to the Minister for Families,

Community Services and Indigenous Affairs. CCL reaffirms the matters set out in that letter, which can be read at: www.acoss.org.au/News.aspx?displayID=99&articleID=2683.

The proposed legislative package fails to address concerns and proposals for long term solutions that were put to the Minister in the letter. The legislation ought be reconsidered and amended to take into account the following.

The safety and well-being of Indigenous children is paramount and concerns at the severity and widespread nature of the problems of child sexual abuse and community breakdown in Indigenous communities in the NT, as detailed in the *Little Children are Sacred* report, are warranted.

There would appear to be general agreement among the communities affected, Governments and service providers and in the wider Australian community that urgent action is required to address the abuse and neglect of children and to assist those affected by it.

Greater investment in the services that support Indigenous families and communities, the active involvement of these communities in finding solutions to these problems and greater Federal Government engagement in delivering basic health, housing and education services to remote communities would, in our submission, be a better approach to dealing with this problem than that which is reflected in the legislative package. CCL suggests that Government ought to work collaboratively with the communities affected, the NT Government, and the community service, health and education providers to ensure that children are protected.

CCL notes that the services which most Australians take for granted are often not available to remote Indigenous communities, including adequately resourced schools, health services, child protection and family support services, as well as police who are trained to deal with domestic violence in the communities affected. The proposed legislative package would appear to do little to address the recommendations in the *Little Children are Sacred* Report for the Australian and Territory Governments to work together urgently to fill these gaps in services.

A longer term plan is required to address the underlying causes of the problem, including community breakdown, joblessness, overcrowding and low levels of education. Successfully tackling these problems requires sustainable solutions, which must be worked out with the communities, rather than being prescribed from Canberra. Government ought to work with the affected communities and service providers to ensure that in developing and implementing a sustainable solution, support is provided to Indigenous communities' efforts to resolve these problems.

CCL has concerns that the proposed legislative 'emergency response' will have profound and negative effects upon Indigenous people's incomes, land ownership, and ability to decide the kind of medical treatment they receive. Some of the proposed measures will weaken communities and families by taking from them the ability to make basic decisions about their lives, thus removing responsibility instead of providing empowerment.

Because they are to be imposed rather than developed and implemented through consultation with the affected communities and service providers, CCL has concerns that the legislative proposals are unlikely to be effective. There appears to be an over-reliance on punitive measures, and insufficient additional resources to be allocated to improving housing, child protection and domestic violence supports, schools, health services and alcohol and drug rehabilitation programs.

Summary and recommendations

CCL recognises that there are complex issues involved in the proposed federal government direct intervention in Indigenous communities. However, there are rights involved in the issues, which should be respected.

These include the rights of children to protection from those who seek to exploit them, their rights to care and education, the rights of children and their parents to informed consent to medical examination, the rights of Aboriginal nations over their land, and the right of all persons to be consulted concerning decisions which affect their interests.

Rights should not simply be overruled and ignored in the interest of protecting other rights; but a solution sought which respects all of them to the greatest extent possible.

It may be that after a more thorough consideration of the legislative package, CCL will have additional concerns, however, at this stage, our recommendations can be summarised as follows:

- that adequate time be allowed for proper consultation and due consideration of the legislation, which appears in some respects to be contrary to the Constitution
- that the legislative package in its current form be rejected
- that the legislative package be rethought and amended to direct itself towards developing programs that will strengthen families and communities to empower them to confront the problems they face
- that the legislative package be amended to ensure adequate consultation with the communities and NT Government, and community service, health and education providers;

- that the legislative package be amended to ensure the development of a long term plan to address and resolve the causes of child abuse including joblessness, poor housing, education and the commitment of the necessary resources to this.

Yours faithfully,
NSW Council for Civil Liberties

Per:
Pauline Wright
Vice President