



Central Land Council

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SUBMISSION TO SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

INQUIRY INTO COMMONWEALTH EMERGENCY RESPONSE BILLS 10 August 2007

INTRODUCTION

The Australian Government announced its emergency response to the “Children are Sacred” report on 21 June 2007. The emergency measures are wide ranging and severe.

The Central Land Council wholeheartedly supports measures to improve the welfare of children and communities in general. In relation to the Government package the CLC broadly supports the measures to curb alcohol and pornography, increased services through health checks and policing, linking education to welfare, and measures to improve community stores. The CLC does not support the land measures relating to leases and permits, business management powers in communities, blanket quarantining of welfare and scrapping CDEP.

The Australian Government has included land measures relating to community leases and changing the permit system as part of the package to “improve the well-being of certain communities in the Northern Territory”. Both through the permit review process and in the response to the “Children are Sacred” report, the Government has sought to link land measures with child abuse. No evidence has been provided to support this assertion. The CLC rejects the link.

The “Children are Sacred” report makes 97 recommendations but none relate to land issues. The report focuses on long term measures to improve education outcomes and reduce alcohol harm. Yet the Government persists in promoting the link between land holding and child abuse and the CLC is concerned about the way the Government is using the “Children are Sacred” report to justify broad ranging changes.

In dealing with this process the Australian Government has been disrespectful to Aboriginal people. The Minister has not made time to meet with the Central Land Council, a statutory authority to deal with Aboriginal land, and the Government has failed to engage in any meaningful way with the people most affected by the proposed changes.

The CLC is also seriously concerned that the intervention lacks any long term plan or vision and lacks any benchmarks or evaluation process. The appropriation Bills focus heavily on staff and program administration and a significant appropriation to improve infrastructure and services such as housing and education is lacking.

One week to consider and pass over 500 pages of complex implementing legislation is a joke.

OVERALL RESPONSE TO BILLS

The Bills give the Commonwealth Minister an unprecedented level of discretion in the affairs of the NT. The Commonwealth Minister can unilaterally alter funding agreements, direct how services are to be provided, seize community assets (including community stores), sack community councils [NTNER Bill clause 78(2)], amend NT legislation through regulation [NTNER Bill clause 58] and potentially evict Aboriginal landowners from their own communities [NTNER Bill Part 4 Division 1].

In addition, blanket quarantining means Centrelink will administer the spending of money by nearly all Aboriginal people and leasing of Aboriginal communities means that all community land will be held by the Commonwealth.

The effect of this legislation is that almost every aspect of Aboriginal life will be able to be controlled by the Commonwealth. This could well lead to arbitrary and sweeping interventions in community life. While these additional powers may be lawful, they offend all principles of good governance and offer no checks and balances. They are also discriminatory. It is not credible to argue that these Bills, taken in their entirety, could be considered to be a 'special measure' for Aboriginal people under the *Racial Discrimination Act 1975* (RDA).

Overall position

While there are a numerous areas that remain of concern to the CLC, the key concerns of CLC are:

- deeming of five year 'leases' over prescribed communities [NTNER Bill Part 4]
- scrapping of permits in prescribed communities on Aboriginal land [FaCSIA Bill Schedule 4]
- far reaching powers relating to business management in communities [NTNER Bill Part 5]
- blanket quarantining of welfare without incentives to encourage responsible behaviour [Social Security Bill], and
- exclusion of operation of Part II of the RDA [NTNER clause 132]

The CLC could only support the Bills if the above elements were removed. Without these changes the CLC rejects the Bills in their entirety.

NTNER BILL PART 4 – LEASES

NTNER Bill Part 4 deems 'leases' in favour of the Commonwealth over all main Aboriginal communities "by force of this subsection". However, far from being a negotiated lease, in reality the Commonwealth has compulsorily acquired a leasehold interest in the land from the owners. The Bill confers rights in favour of the Commonwealth to exclusive possession, to terminate the 'lease' at any time and to determine any other rights. There are no rights noted in favour of the landowner.

The ostensible purpose of the leases is to allow the Commonwealth control over assets so that urgent repairs can be made to houses and other infrastructure. However, it is not clear that a lease will give the Commonwealth unfettered control of all assets on the land. At the same time, no security of tenancy is guaranteed to the residents of communities. This could only occur if residents held a "right, title or other interest" in the land that is preserved under clause 34 of the Bill. "Right, title or other interest" is not defined.

It is difficult to reconcile the Commonwealth's right to exclusive possession with the lack of rights of Aboriginal landowners who will continue to reside in communities. On the face of it the

Commonwealth will hold authority to exclude people who hold both the title to the land under Australian law and who are the owners of the land in accordance with Aboriginal tradition. This is a potentially absurd result which is not corrected by the reservation of rights to use or occupation of Aboriginal land under s 71 of the Land Rights Act – this section can't apply where the Commonwealth holds a right to exclusive possession to the land.

The Bill also does not guarantee that Aboriginal landowners will be compensated but rather states that compensation will be provided *if required* by the Constitution. The Constitution is ambiguous on the point of acquisition of property in a territory and the Commonwealth has left open the possibility to reargue this ambiguity. Operation of s 50(2) of the *Self Government (Northern Territory) Act 1978* is excluded by the Bill but leaving it in place would have meant that compensation would be treated similarly to such acquisitions in a state and thus ensured that Aboriginal landowners would be entitled to “just terms” compensation [see NTNER Bill clause 60].

The ‘leases’ are in name only and the CLC cannot support an arrangement where Aboriginal landowners do not have any guaranteed rights over their own community land. The benefits of such ‘leases’ for Aboriginal landowners have not been demonstrated.

Recommendation

- Reject NTNER Bill Part 4.
- Particular need to amend clause 35 to recognise rights for Aboriginal landowners even if they do not live in that community [see s 71 of Land Rights Act] and amend clause 60 to ensure Aboriginal landowners are entitled to “just terms” compensation.

FaCSIA BILL SCHEDULE 4 – PERMITS

FaCSIA Bill Schedule 4 changes the permit system by broadening the classes of people who may enter Aboriginal land and removing permits from access roads, airstrips and ‘common areas’ in communities. ‘Common areas’ are defined as areas “generally used by members of the community” but does not include a building or a sacred site. The definition of ‘common areas’ is imprecise and might arguably include all ‘community land’ as that term is defined in the Bill [proposed Land Rights Act s 70A(2)].

Opening up roads and community ‘common areas’ on Aboriginal land will open up Aboriginal land and communities more broadly. Once people enter Aboriginal land it is difficult to control their movement. Aboriginal landowners are concerned about the potential flow of visitors on to their land more broadly without permission and without guidance with regard to safety and important sites.

The permit system is an important policing tool in remote communities. Police routinely ask unwanted visitors to leave communities because they do not have a permit. Applying trespass law is simply not practical on vast remote tracts of land. If more unwelcome visitors visit communities, such as grog runners and carpetbaggers, there will be greater demand for policing with fewer powers of enforcement. Existing police resources are already overstretched. The permit system is strongly supported by the NT Police Association:

“The Federal Government has failed to make a case in my view, about the connection between sexual assault in Indigenous communities and the permit system. These communities aren't like anywhere else in Australia, otherwise the Federal Government wouldn't be intervening in this matter. So to simply roll up the permit system I think is going to lead to problems that have probably been identified by indigenous people around the Northern Territory.”

From a policing point of view the permit system offers a measure of protection for children, rather than putting them further at risk.

The Commonwealth continues to argue that permits prevent media scrutiny and hinder economic

development but has not provided any evidence to back up these claims. The media rarely visit remote communities because of the lack of stories and the time required. This is confirmed by the lack of media interest in ‘open’ communities such as Kalkarindji, Canteen Creek and Finke. Poor education, poor health, poor infrastructure, and poor opportunities are the real barriers to economic development faced by all communities on and off Aboriginal land.

The permit system is simply one of the tools under the Land Rights Act for negotiating third party access to Aboriginal land for miners, pastoralists, developers and visitors. Aboriginal landowners are entitled to regulate access for visitors to their land subject to reasonable provision for access by persons with a need such as government employees and politicians; the current system already strikes this balance. Where Aboriginal landowners have identified a need for more open access for visitors – for example at the heritage precinct in Hermannsburg and the tourist facilities at Wallace Rockhole – permits have been relaxed.

Aboriginal people are totally against forced changes to the permit system because the permit system complements their responsibility for country under Aboriginal law and custom and is consistent with the land title they hold under Australian law.

Recommendation

- Reject FaCSIA Bill Schedule 4.

NTNER BILL PART 5 – BUSINESS MANAGEMENT AREAS

Part 5 of the NTNER Bill gives the Commonwealth unprecedented and sweeping powers in communities to:

- unilaterally alter funding agreements
- direct how services are to be provided
- acquire community assets from service providers
- appoint observers to attend meetings of service providers in communities
- suspend community councils on service related issues provided funds have been received by the Commonwealth or the NT that could be used to fund those services
- appoint a statutory manager to administer associations on service related issues provided funds have been received by the Commonwealth or the NT that could be used to fund those services.

There are potentially many ambiguities and unintended consequences related to these powers. For example the power for the Minister to direct services could capture services delivered by volunteer organisations and the Minister’s power to acquire assets could extend to seizure of assets that were not funded by the Commonwealth. Such perverse results serve to highlight the nature of these powers.

More critically, these powers break legal norms, procedural safeguards and principles of fair dealing. For example, unilateral variation of contracts by legislative authority is against the usual presumption against legislative interference in contracts and seizure of assets could affect the property interests of third parties if assets are shared without notice. There are simply insufficient checks and balances in these provisions and the powers could well result in arbitrary and pernicious interventions in community affairs.

Recommendation

- Reject Part 5 of the NTNER Bill.

WELFARE

The Social Security Bill introduces income management for welfare recipients through a series of triggers: child neglect, school enrolment, school attendance and the Northern Territory emergency. The CLC is broadly supportive of linking welfare and education and welfare and child neglect. In relation to education, increased enrolments and attendance will necessitate a major and urgent investment in education in remote communities. It is also critical that the reform be evaluated to ensure it is achieving the intended objective and that other successful programs generating improved school attendance continue to be supported.

There may be some benefits in reforming the welfare system more generally, however, blanket quarantining in all prescribed communities is unfairly discriminatory and does not provide positive incentives to reward responsible behaviour. The reform does not offer any plan or benchmarks for moving beyond quarantining.

The somewhat arbitrary nature of blanket quarantining highlights the need for a considered, evidence based approach with clear objectives and evaluation processes. The Government has not demonstrated that this is a thoughtful, strategic or evidence based approach. The CLC does not support it.

Recommendation

- Reject blanket quarantining in Social Security Bill.

NTNER BILL PART 7 – COMMUNITY STORES

NTNER Bill Part 7 introduced a licencing system for community stores. The system includes assessment, licencing, revocation and acquisition of stores.

The CLC is broadly supportive of this initiative to improve community stores. However, the CLC believes the store assessment process would be improved by inclusion of an assessment measure for the capacity of the store to train and employ local community members. In relation to acquisition, given community stores are often the only viable business in communities, it is particularly onerous acquire stores and there are many alternative options for dealing with store management issues without resorting to seizing assets. The CLC cannot accept this measure.

Recommendation:

- Amend NTNER Bill clause 93 on assessable matters by adding new assessable matter for community store capacity to train locally employed community members.
- Reject NTNER Bill Division 4 on acquisition of community stores.

COMMUNITY DEVELOPMENT EMPLOYMENT PROGRAM

Separately, the Government has announced it will phase out CDEP over this financial year and replace it with mainstream STEP training and Work for the Dole programs. Consistent with this announcement, the Social Security Bill includes provisions to allow for quarantining of CDEP transition payments.

The CLC is concerned that the motivation for the Government's decision to scrap CDEP is the inability of the Government to be able to quarantine CDEP because it is wages. Minister Brough has been quite upfront:

“Because of the way it is handled, the quarantining of the 50 per cent of welfare payments can't be achieved if we leave it the way it is.”

CDEP is the backbone of many remote communities and the phasing out of CDEP so quickly is likely to put many thousands out of work, greatly reduce the income of communities, and put significant strain on local initiatives, essential services and communities as a whole. In the case of the CLC, the organisation employs over 70 people in ranger programs and it is very uncertain how many of the positions in this successful program will be able to be funded beyond CDEP.

The CLC is especially concerned that the change is taking place in circumstances where the Standing Committee on Aboriginal and Torres Strait Islander Affairs is yet to report on its inquiry into indigenous employment. The inquiry has received many favourable submissions on the positive benefits of the CDEP program.

Recommendation

- Reject scrapping of CDEP.