LAW COUNCIL OF AUSTRALIA

Submission to Senate Standing Committee on Community Affairs in response to questions taken on notice at public hearings on 29 April 2008 in relation to the Inquiry into the *Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Response Consolidation) Bill 2008*

22 May 2008

The Law Council of Australia provided evidence to the Senate Standing Committee on Community Affairs during public hearings into the *Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Response Consolidation) Bill 2008* (the Bill) on 29 April 2008. During questioning, the Law Council agreed to provide further information to the Committee to assist its inquiries.

The Law Council notes that the final report of the Senate Committee was provided to the Senate on 15 May 2008. Accordingly, the responses contained in this submission may be unable to assist the Senate Committee in its inquiries into the Bill. The Law Council regrets that it was unable to give due consideration to the matters raised in the short time frame for the Inquiry.

However, it is noted that the question, to which this submission responds, is also relevant to the Senate Select Committee on Regional and Remote Indigenous Communities' *Inquiry into the effectiveness of Australian Government policies following the Northern Territory Emergency Response, specifically on the state of health, welfare, education and law and order* (the NER review). Accordingly, it is hoped that this response, while untimely, may be useful, particularly to those Senators who are also directly involved in the NER Review.

Response to the Final Report

While the Law Council generally supports the conclusions reached by the Government Senators on the Committee, the Law Council remains concerned that the Minister is not bound to consult with a relevant community before making a decision to prohibit the broadcast of a particular subscription television service, due to the effect of proposed section 127C(2). Although not addressed in the Law Council's written submissions to the inquiry, the Law Council recommended during oral evidence to the public hearings that:

(a) subsection 127C(2) should be removed in order to require consultation in every instance that the Minister's power is used; and

(b) section 127D should be amended to require the Minister to consider the wishes of the community (among other matters listed in that subsection) before any determination is made under section 127B(1).

The Law Council notes that its recommendations were not followed by the Senate Committee. It is considered however that if consultation is not mandated or carried out by the Minister and the Minister is not required to consider the wishes of the relevant community before making a decision which affects their rights or interests, the decision may

not be characterised as a ‘special measure’ and it is possible that it will be in breach of Australia’s international human rights obligations and the *Racial Discrimination Act 1975* (the RDA).

This issue is relevant to the Law Council’s response below, because (as noted in the Law Council’s previous written submission) discriminatory measures will not be ‘special measures’ simply because the government of the day labels them as such. A ‘special measure’ requires, at the least, prior consultation with the affected minority and their consensus or agreement.

Finally, the Law Council supports the recommendations of the Australian Greens and Australia Democrats Senators, set out in their Minority Report. In particular, the Law Council agrees that:

- it should be made clear under the Bill that Ministerial authorisation to enter Aboriginal land in the Northern Territory does not extend to sacred sites;
- the provisions that suspend application of the RDA and NT Anti-Discrimination Act under the National Emergency Response legislation (NER legislation)[1] should be repealed immediately; and
- any provisions declaring the measures under the NER legislation to be ‘special measures’ should clearly specify that, whilst they are intended to be special measures, they are subject to the provisions RDA. The primary factor for determining whether the measures are ‘special measures’ is the wishes of the relevant community.

Question 1

Senator SIEWERT*—At point 32 in your submission you offer to provide some of the documents that you got from FaHCSIA, if the committee so requests. I request that that information be provided, because I think it would be useful.*

Ms Webb*—Certainly.*

The requested documents were posted to the Committee on 7 May 2008.

Question 2

Senator SIEWERT—That would be great. I am not sure if you were in the room when I asked Professor Altman how you would amend the current legislation to make it comply with the RDA rather than being exempt from the RDA. I should point out that the legislation is exempt in two ways. It is exempt through the government claiming that it is a special measure; and, secondly, if it does not happen to meet special measures requirements, it

[1] This refers collectively to the *Northern Territory National Emergency Response Act 2007*; *Families, Community Services and Indigenous Affairs Amendment (Northern Territory National Emergency Response) Act 2007*; and the *Social Security and Other Legislation Amendment (Welfare Reform) Act 2007*.

exempted all the legislation from the RDA. So there are two ways that it is exempt, or could be dealt with under the RDA. Professor Altman said that his major concern with exemption from the RDA was as it relates to income quarantining. He said that the way you could amend the legislation would be to require a similar sort of consultation process as the government now proposes under this bill in relation to the Austar amendments. Do you think that would be a way that you could ensure that the legislation is compliant with the RDA?

Ms Webb—Senator, that is a very big question. To make it compliant with the RDA, we are asking what we should do now to make what we have done previously comply. That is the difficulty that we have, particularly when you take into account that a special measure is something that generally has its impetus from the community. I would like to give a bit more thought as to how or if the present legislation can be amended or if there should be some consideration as to what can now be done to see if that is what is wanted at all. I would really like to take that one on notice, if I could. Mr Parmeter might feel a bit more confident in answering that, but I think that is a very large question.

Senator SIEWERT—If you could take it on notice, I would very much appreciate it, because the legislation will consist of a series of provisions, some of which are compliant with the RDA and some of which are now against it.

As previously submitted, the Law Council considers that there are a number of aspects of the NER legislation which potentially breach the RDA and Australia's obligations under the United Nations Charter and the Convention on the Elimination of All Forms of Racial Discrimination (CERD). These include provisions which:

- provide for income quarantining in prescribed areas;
- prohibit or place restrictions on sales of alcohol in prescribed areas;
- provide for the compulsorily acquisition of Aboriginal freehold land; and
- prevent consideration by NT courts of the cultural background or customary laws of an offender in sentencing or bail proceedings.

'Special measures'

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.*"

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

The concept of "“informed consent” arises in numerous international texts and instruments.

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* *no decisions directly relating to their rights and interests are taken without their* ***informed consent***”. (emphasis added)

Article 19 of the recently adopted 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.”

The concept of "*free, prior and informed consent*" appears in 5 other articles of the Declaration on the Rights of Indigenous Peoples. It is promising to note that the recently elected Federal Government has evinced an intention to reverse the opposition of the previous Government to the Declaration, a move that the Law Council strongly supports.

In January 2005, the United Nations Permanent Forum on Indigenous Issues convened an International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples. The Permanent Forum had identified the principle of free, prior and informed consent as a major challenge at its first, second and third sessions.

The Permanent Forum released a report following the Workshop[2], setting out recommendations and conclusions, including the following:

- *Free* should imply no coercion, intimidation or manipulation.
- *Prior* should imply that consent has been sought sufficiently in advance of any authorization or commencement of activities and that respect is shown for time requirements of indigenous consultation/consensus processes.
- *Informed* should imply that information is provided that covers (at least) the following aspects:

  (a) The nature, size, pace, reversibility and scope of any proposed project or activity;
  (b) The reason(s) for or purpose(s) of the project and/or activity;

[2] The Report can be accessed at http://daccessdds.un.org/doc/UNDOC/GEN/N05/243/26/PDF/N0524326.pdf?OpenElement

(c) The duration of the above;
(d) The locality of areas that will be affected;
(e) A preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit-sharing in a context that respects the precautionary principle;
(f) Personnel likely to be involved in the execution of the proposed project (including indigenous peoples, private sector staff, research institutions, government employees and others);
(g) Procedures that the project may entail.

- *Consent*

  Consultation and participation are crucial components of a consent process. Consultation should be undertaken in good faith. The parties should establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect in good faith, and full and equitable participation. Consultation requires time and an effective system for communicating among interest-holders. Indigenous peoples should be able to participate through their own freely chosen representatives and customary or other institutions. The inclusion of a gender perspective and the participation of indigenous women are essential, as well as participation of children and youth, as appropriate. This process may include the option of withholding consent.

  Consent to any agreement should be interpreted as indigenous peoples have reasonably understood it.

<u>Consultation under the Bill</u>

Section 127C(1) of the Bill provides:

(1) Before making a determination under subsection 127B(1) in relation to a prescribed area, the Minister must ensure that:
  (a) information setting out:
    (i) the proposal to make the determination; and
    (ii) an explanation, in summary form, of the consequences of the making of the determination;
    (iii) has been made available in the prescribed area; and
  (b) opportunities have been made available to people in the prescribed area to discuss:
    (i) the proposal to make the determination; and
    (ii) the consequences of the making of the determination;
    (iii) with employees or officers of the Commonwealth; and
  (c) opportunities have been made available to people in the prescribed area to discuss their circumstances, concerns and views with employees or officers of the Commonwealth.
(2) A contravention of subsection (1) does not affect the validity of a determination under subsection 127B(1).

The Law Council notes that the consultation process under s.127C(1) appears directed toward canvassing the views of concerned communities. However, s.127C(2) makes plain that the consultation process is not mandatory, and that any failure to consult will not affect the validity of a determination by the Minister under s.127B(1). Of further concern is the absence of any statutory requirement to consider the wishes of the relevant community, together with the other factors set out in s.127D.

The Law Council therefore considers that without an enforceable statutory requirement to consult and consider the wishes of those affected, the consultation process under the Bill is likely to be insufficient to engage the 'special measures' exception in s.8(1) of the RDA, and article 1(4) of CERD.

The Law Council accepts that, in this instance, the welfare of children is also a paramount consideration. However, consideration of the community's wishes, and every effort to obtain the free, prior and informed consent of the community, do not preclude a decision which also takes into account other matters, such as those enumerated in s.127D.

Extension to the NER legislation

It follows from the discussion above that the Law Council does not consider that the consultation process under the Bill, as presently drafted, is adequate to permit a characterisation of other discriminatory measures in the NER legislation as "special measures".

If the provisions in relation to the consultation process were amended as proposed above, a number of the Law Council's concerns would be addressed. However, plainly it will not be possible to obtain *prior* consent retrospectively. Nonetheless, even retrospective consultation with communities affected by alcohol restrictions and income control measures would assist Parliament's understanding about whether those measures are supported, and would represent a significant improvement on the present approach.

Further, consultation with respect to provisions restricting judicial consideration of an offender's cultural background or customary laws in bail or sentencing would not address the Law Council's in relation to these provisions. The Law Council remains strongly of the view that restriction on courts' discretion in this regard has a discriminatory effect on Aboriginal people and must be repealed, both under Part 6 of the *Northern Territory National Emergency Response Act 2007* (Cth) and under changes effected by the *Crimes Amendment (Bail and Sentencing) Act 2006* (Cth).

Similarly, consultation with respect to the compulsory acquisition of 5-year leases over Aboriginal townships and settlements in the NT would be meaningless at this stage in relation to acquisitions which have already been affected. On the other hand, a consultation process may be effective with respect to any acquisitions which have not yet been acquired, with a view to obtaining the free, informed and prior consent of the relevant community.

Further submissions

The Law Council intends to address these matters in a submission to the Senate Select Committee on Regional and Remote Aboriginal Communities. However, if the Senate Committee has any further queries regarding the matters raised in this response, the Law Council would be pleased to provide further information.