



## Northern Territory National Emergency Response Bill 2007

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### Contents

Purpose.....	4
Disclaimer .....	5
Background.....	5
History.....	6
Earlier reports .....	6
Earlier initiatives.....	7
The Anderson/Wild report and the federal government response .....	12
Crisis and Consultation .....	16
The Commonwealth, the Territory and the Constitution.....	18
Crisis and Consultation (Part II) .....	20
<i>Racial Discrimination Act 1975</i> .....	22
International Scrutiny .....	26
Just terms .....	27
What are just terms? .....	28
Section 51(xxxi) of the Constitution.....	29
Northern Territory National Emergency Provisions.....	30
Summary of just-terms issues .....	31

What is the meaning of <i>reasonable amount of compensation</i> ? Does it equate to <i>just terms</i> ? .....	31
What happens if the court finds the provisions constitutionally invalid? .....	33
Financial implications .....	33
Main provisions .....	36
Part 1—Preliminary .....	36
Part 2—Alcohol .....	37
Background .....	37
Provisions .....	39
Division 1 .....	39
Division 2—Prescribed areas .....	39
Division 3 .....	40
Part 3—Filtering of publicly-funded computers .....	41
Background .....	41
Computer filtering .....	41
Pornography in Aboriginal communities .....	43
Provisions .....	45
Part 4 – Acquisition of rights, titles and interests in land .....	46
Background to the lease issue .....	46
Division 1 – Grants of leases for 5 years .....	49
Division 2 – Acquisition of rights, titles and interests relating to town camps .....	50
Division 3—Effect of other laws in relation to land covered by this Part etc. ....	52
Native Title Act .....	52
Public Works Committee .....	53
Division 4—Miscellaneous .....	53
Part 5—Business management areas .....	53
Division 1—Funding agreements .....	55
Divisions 2—Directions for business management areas .....	55
Subdivision A—Directions relating to services .....	56
Subdivision B—Directions relating to assets .....	56
Division 3—Observers of community service entities .....	57
Division 4—Commonwealth management in business management areas .....	57
Subdivision A—Commonwealth management of community government councils .....	58

Part 6—Bail and sentencing.....	59
Part 7—Licensing of community stores.....	61
Basis of policy commitment .....	61
Provisions.....	61
Comment.....	63
Part 8—Miscellaneous .....	63
Concluding comments .....	64
Acknowledgements.....	64

## Northern Territory National Emergency Response Bill 2007

**Date introduced:** 7 August 2007

**House:** House of Representatives

**Portfolio:** Families, Community Services and Indigenous Affairs

**Commencement:** The day after Royal Assent, although sections 32 and 33, affecting certain provisions governing the 'Grants of leases for 5 years', will commence on proclamation or within six months of Royal Assent.

**Links:** The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>. See also the [Senate inquiry into the Bill](#).

### Purpose

The provisions of the Bill will operate within the Northern Territory. The Bill contains various Parts which:

- discourage the use of alcohol in Aboriginal communities by using various penalty provisions
- require the installation of filters on publicly-funded computers
- create certain grants of leases to the Commonwealth for a period of five years and enable the Commonwealth to acquire certain rights, titles and interests in certain town camps
- facilitate Commonwealth management of business management areas
- remove customary law as a basis to be considered in sentencing or bail applications and require the impact on (alleged) victims and witnesses to be taken into account in bail applications, and
- provide for closer management by the Commonwealth of community stores.

These provisions are to operate in the context of modified provisions regarding compensation for the acquisition of property and provisions which modify or suspend the operation of the *Racial Discrimination Act 1975* (RDA).

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## Disclaimer

As with the interim Digest, we note that the unusually short time-frames involved in this debate have precluded the writing of a more considered Digest. Furthermore, to paraphrase Blaise Pascal, we have made this Digest longer than usual, only because we have not had the time to make it shorter.<sup>1</sup>

## Background

The provisions in the present legislative package flow from measures announced by the Prime Minister and the Minister for Families, Community Services and Indigenous Affairs on 21 June 2007, in response to *Ampe Akelyernemane Meke Mekarle* “*Little Children are Sacred*”: *The Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse*, authored by Pat Anderson and Rex Wild (the Anderson/Wild report).<sup>2</sup> The report had been provided to the Government of the NT on 30 April 2007, and the Federal Government was given a copy of the report on its public release on 15 May 2007.

The Bill was introduced to the Parliament along with four other Bills as a package on 7 August 2007. The other Bills are:

- Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill 2007 (the Families Bill)
- Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 (the Welfare Payment Bill)
- Appropriation (Northern Territory National Emergency Response) Bill (No. 1) 2007-2008, and
- Appropriation (Northern Territory National Emergency Response) Bill (No. 2) 2007-2008.

Due to the short time-frame, the Library produced an [interim Bills Digest](#) on the package of Bills on 7 August,<sup>3</sup> and is now issuing a separate Bills Digest on each Bill.

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1. Blaise Pascal, *Lettres provinciales*, no. 16 (1657): ‘Je n’ai fait celle-ci plus longue que parce que je n’ai pas eu le loisir de la faire plus courte’.

2. [http://www.nt.gov.au/dcm/inquirysaac/pdf/bipacsa\\_final\\_report.pdf](http://www.nt.gov.au/dcm/inquirysaac/pdf/bipacsa_final_report.pdf).

3. Law and Bills Digest Section and Social Policy Section, ‘Northern Territory national emergency response Bills 2007—interim Bills Digest’, *Bills Digest*, no. 18, Parliamentary Library, Canberra, 2007–08, <http://www.aph.gov.au/library/pubs/bd/2007-08/08bd018.pdf>.

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The quick passage of these Bills has been unusual, if not unprecedented. The second reading debate in the House of Representatives occurred cognately (all five Bills were debated together), and they were passed on the evening of the date of introduction. The Hansard can be accessed [here](#), on pages 1–18 and 45–84.

On 7 August it was also announced in the media that the Bills as a package would be sent for a Senate inquiry. The Senate began the second reading debate on the Bills soon after their introduction on 8 August (the Hansard can be accessed [here](#), see pages 1–8 and 23–43).

The Bills were referred ‘at whatever stage they have reached by 12:45pm on Thursday 9 August’ for [inquiry](#) to the Senate Legal and Constitutional Affairs Committee for a [hearing](#) on Friday 10 August, with the report to be tabled on Monday 13 August. As of 13 August, the Committee had received 154 [submissions](#). The Bills are listed for debate on Monday 13 and Tuesday 14 August and could be passed by the Tuesday.

The Democrats and Greens did propose to send the Welfare Bill to the Community Affairs Committee (which technically covers the FACSIA portfolio), and nominated longer reporting dates, but these motions were defeated (see Senate Hansard for 8 August at pages 95–9).

## History

Flowing on from a history of violence and dispossession, many Indigenous communities have in their turn had a lengthy history of problems, including violence in various forms. As Amnesty International’s submission to the Senate inquiry says:

Factors associated with poverty and social inequality do [...] increase the likelihood of maltreatment. These factors include stress, a sense of powerlessness, and the lack of money and other resources. Political and economic decisions can increase poverty and worsen its effects, or they can alleviate poverty and provide support for children and families, particularly in times of economic difficulty.<sup>4</sup>

## Earlier reports

From the late 1980s to the early 1990s, while the sexual abuse of Indigenous children was not widely identified as a problem in its own right, it was reported in the context of general Indigenous family violence.

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4. Amnesty International, [submission no. 39](#) to the Senate inquiry, p. 3, quoting from J. A. Cashmore, *Framework for Building a Child-Friendly Society*, NSW Child Protection Council, 1997–98, p. 26.

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On this wider problem of violence in Indigenous communities there have been many reports:

- the 1986 Western Australian Task Force on Domestic Violence
- the 1991 Royal Commission into Aboriginal Deaths in Custody
- the Secretariat of the National Aboriginal and Islander Child Care's 1991 *Through Black eyes: a handbook of family violence in Aboriginal and Torres Strait Islander communities*
- Audrey Bolger's 1991 *Aboriginal women and violence: a report for the Criminology Research Council and the Northern Territory Commissioner of Police*
- the *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, Bringing them Home*, Human Rights and Equal Opportunity Commissioner, 1997
- the Queensland Government's December 1999 *Aboriginal and Torres Strait Islander Women's Task Force on Violence Report*—to which the Queensland Government responded with *The next step: Queensland government response to the Aboriginal and Torres Strait Islander Women's Task Force on Violence report* (2000)
- A study by Jenny Mouzos indicated an over-representation of Aboriginal/TSI people as both victims and offenders of femicide in *Femicide: An Overview of Major Findings*, AIC Trends and Issues, no. 124, 1999
- Paul Memmott et al., *Violence in indigenous communities*, Crime Prevention Branch, Attorney-General's Dept., 2001
- Peter Sutton's 'The politics of suffering: indigenous policy in Australia since the 1970s', *Anthropological Forum*, v.11, no. 2, 2001, pp. 125–73.

#### Earlier initiatives

Reports such as those mentioned above and accompanying media attention led to such Commonwealth initiatives as:

- the Aboriginal and Torres Strait Islander Family Violence Intervention Program, announced in 1991 and administered by ATSIC
- the Violence against Aboriginal Women National Project and the Aboriginal and Torres Strait Islander Gender and Violence Project, announced in 1994
- the Indigenous Initiatives Family Relationships Support Services, announced in 1997
- *Beyond these walls : report of the Queensland Domestic Violence Task Force*, 1998
- a Briefing Paper by the Queensland Centre for Domestic and Family Violence Research, 12 February 2004, and

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- [\*Breaking the Silence: Creating the Future. Addressing child sexual assault in Aboriginal communities in NSW\*](#), Aboriginal Child Sexual Assault Taskforce, 2006 – released 2007.<sup>5</sup>

In July 1999 Senator Herron convened a round table on family violence in Indigenous communities, the outcomes of which formed part of a national strategy developed jointly by ATSIC and the Commonwealth, and endorsed by the Ministerial Council on Aboriginal and Torres Strait Islander Affairs (MCATSIA) on 10 September 1999. A MCATSIA working group was established to implement the strategy. Federal money was committed in subsequent budgets.

It was not until 2002 and 2003 that the issue of sexual abuse of children started to emerge from the general community violence and dysfunction issue as warranting special attention.

On 15 January 2002 the Premier of Western Australia appointed Magistrate Sue Gordon, Kay O’Hallahan and Darryl Henry to inquire into the response by government to reports of child abuse and family violence in Aboriginal communities. The Inquiry ran for six months and heard from 45 witnesses. Its report, [\*Putting the picture together, Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities\*](#), was tabled in the WA Parliament on 15 August 2002.<sup>6</sup> The report made 197 recommendations grouped around four main themes:

- strengthening the responses to child abuse and family violence
- strengthening responses to vulnerable children and adults at risk
- strengthening the safety of communities, and
- strengthening the governance, confidence, economic capacity and sustainability of communities.

More generally, the Gordon Inquiry found that:

- family violence and child abuse occur in Aboriginal communities at a rate that is much higher than that of non-Aboriginal communities
- better responses are needed when family violence and child abuse occur
- the Government needs to provide a coordinated ‘joined-up’ approach to service delivery that responds to each community’s need for integrated service provision, and
- there is a need to increase the capacity of workers to be responsive to abuse and violence in Aboriginal communities and the needs of Aboriginal people.

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5. <http://www.lawlink.nsw.gov.au/acsat>

6. [http://www.premier.wa.gov.au/feature\\_stories/gordoninquiryreport.pdf](http://www.premier.wa.gov.au/feature_stories/gordoninquiryreport.pdf).

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Upon receiving the report, the Government formed a taskforce that prepared a response which was considered and adopted by the WA Cabinet and was published. The [Response](#) included \$75 million of new expenditure over five years and a commitment by the WA Government to do things differently and better.<sup>7</sup>

The particular issue of Indigenous child abuse was given further attention when, on 11 June 2003, Professor Mick Dodson, of the ANU Institute for Indigenous Australia, a former Social Justice Commissioner, made an address at the National Press Club entitled [Violence Dysfunction Aboriginality](#), in which he observed:

Child violence includes neglect, incest, and assault by adult carers, paedophilia, and rape of infants by youths. Our children are experiencing horrific levels of violence and sexual abuse beyond comprehension.

I cannot bring myself to relate the extent and the detail of some of the violent encounters endured by children and babies that I have read in process of writing this paper.

Others also have written about how this is ‘threatening the future of the community as a viable social entity’.

The Aboriginal and Torres Strait Islander Women’s Taskforce Report said that:

“When a community has to deal with the tragic deaths of 24 young men in one year, most of which were suicides, there can be no stronger cry for help. Indeed, it is a deafening roar that something is desperately wrong. When the same Community reports three men raping a three year old child, who was raped by another offender ten days later, there is a crisis [of] huge proportions. This same community has a \$6 million tavern.”<sup>8</sup>

In July 2003, the Prime Minister held a national roundtable on Indigenous family violence. Following the roundtable, a working group was established to advise the Prime Minister on ways of advancing strategies to address family violence in Indigenous communities. On 28 August 2003, the Prime Minister announced a commitment of \$20 million as a ‘down payment’ to address the consequences of violence in Indigenous communities.<sup>9</sup>

For all the above reports and administrative action, public discussion of the issue of child abuse remained almost taboo until Tony Jones of the ABC TV Program *Lateline* reported on 15 May 2006 that:

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7. <http://www.dia.wa.gov.au/gordon/faq.html#whatis>

8. Professor Mick Dodson, ‘Violence Dysfunction Aboriginality’, address to the National Press Club, 11 June 2003, <http://law.anu.edu.au/anuiia/dodson.pdf>.

9. Hon. J. Howard, Prime Minister, [Government tackles violence, in Indigenous communities](#), media release, 28 August 2003.

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Lateline has obtained a confidential briefing paper originally intended for only a small number of senior police. It was written by the Crown Prosecutor for central Australia, Nanette Rogers. Her paper exposes the extent of the problem and how Indigenous male culture and the web of kinship have helped create a conspiracy of silence.<sup>10</sup>

Crown prosecutor Nanette Rogers had handled hundreds of cases of sexual assault in 12 years as a prosecutor, and had prepared a graphic dossier which revealed an epidemic of abuse, rape and murder of women and children in Indigenous communities in Central Australia. The dossier included a description of how a six-year-old girl was drowned while being raped by an 18-year-old man, as horrified children cried for help, of how a 12-year-old girl was taken from her community by a traditional owner, tied to a tree for several weeks and repeatedly raped, of how a two-year-old girl required “internal and external” surgery after being sexually abused by a young man while her mother and the father had been drunk.

In an interview on *Lateline*, Ms Rogers said witnesses and victims were often forced to retract evidence because of intense cultural pressure and, as a result, many cases went unprosecuted. Rather than blame alcohol and substance abuse for what she says are staggering levels of domestic and community violence, Ms Rogers said Indigenous communities, especially the men, must accept responsibility for the violence. She said the causes of the violence could be traced to a culture that promoted male authority over women. Ms Rogers told the ABC of another case in which a small baby was stabbed twice in the leg by a man attempting to kill her mother. In another case a teenager witnessed his grandfather being stabbed repeatedly in the throat.<sup>11</sup> “These kids see violence as an everyday part of their life and many of them become violent themselves,” she said.

She said that out of this culture often emerged a pattern where the boys “beat their wives” and their sisters were “beaten by their husbands”. Asked if violence was a built into the culture she said: “Yes.”

She said that young men were given a status in the community where they were not made accountable for their actions.

Ms Rogers said she had given up being a public defender after becoming “sick of acting for violent Aboriginal men”.

“Small children become so inured to the violence. It doesn’t augur well for Aboriginal people to be functional human beings with the attributes for turning around and caring for children themselves,” she told the ABC.

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10. ‘Paper reveals sexual abuse, violence in NT Indigenous communities’, *Lateline*, ABC TV, 15 May 2006, <http://www.abc.net.au/lateline/content/2006/s1639133.htm>.

11. ‘Crown Prosecutor speaks out about abuse in Central Australia’, *Lateline*, ABC TV, 15 May 2006, <http://www.abc.net.au/lateline/content/2006/s1639127.htm>.

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*Lateline's* exposé set in motion events which led, in August 2006, to the creation by the Northern Territory Government of a Board of Inquiry to research and report on allegations of sexual abuse of Aboriginal children and to recommend better ways to protect Aboriginal children from sexual abuse. Rex Wild QC and Pat Anderson, an Alyawarr woman, co-chaired the Inquiry, assisted by a small team of staff. Rex is a former Northern Territory Director of Public Prosecutions and senior lawyer. The Inquiry collected information by listening, learning and drawing on existing knowledge. Handling such a sensitive issue was challenging for the Board, so they created settings where people felt safe and found it easy to talk. Travelling all over the Territory, the Inquiry gathered feedback from more than 260 meetings with individuals, agencies and organisations, and visited 45 communities to talk with local people. The Inquiry received 65 written submissions. An Expert Reference Group was appointed to assist the Inquiry and a vast amount of information collected. The report was completed in April 2007 and released by the NT Chief Minister Claire Martin on 15 June 2007.<sup>12</sup>

The report's findings included:

- Child sexual abuse is serious, widespread and often unreported.
- Most Aboriginal people are willing and committed to solving problems and helping their children. They are also eager to better educate themselves.
- Aboriginal people are not the only victims and not the only perpetrators of sexual abuse.
- Much of the violence and sexual abuse occurring in Territory communities is a reflection of past, current and continuing social problems which have developed over many decades.
- The combined effects of poor health, alcohol and drug abuse, unemployment, gambling, pornography, poor education and housing, and a general loss of identity and control have contributed to violence and to sexual abuse in many forms.
- Existing government programs to help Aboriginal people break the cycle of poverty and violence need to work better. There is not enough coordination and communication between government departments and agencies, and this is causing a breakdown in services and poor crisis intervention. Improvements in health and social services are desperately needed.
- Programs need to have enough funds and resources and be a long-term commitment.

The Inquiry recommendations included:

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12 For full documentation (media releases, the report, summary etc.), see:  
<http://www.nt.gov.au/dcm/inquirysaac/>.

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- improving Aboriginal education systems, including local language development, to make education more effective for Aboriginal children.
- conducting education campaigns to inform people about child sexual abuse and what to do about it, mandatory reporting of child sexual abuse, the impact of alcohol, pornography and gambling on communities, families and children, and encouraging a culture of parental and community commitment to sending children to school.
- reducing alcohol consumption in Aboriginal communities.
- having Family and Community Services (FACS) and the Police work more closely with each other and with communities. The Inquiry has also proposed an Advice Hotline so anyone who is concerned about possible child sexual abuse can call someone for confidential information and advice.
- improving family support services need to be improved, particularly in Aboriginal communities, as this will help to strengthen families and keep children safe and healthy.
- empowering communities to take more control and make decisions about the future. The Inquiry's report suggests ways in which this can happen including the role which men and women can play, the introduction of community justice groups and better dialogue between mainstream society and Aboriginal communities.
- appointing a senior, independent person who can focus on the interests and wellbeing of children and young people, review issues and report to Parliament.

### The Anderson/Wild report and the federal government response

At the 21 June 2007 joint press conference of the Prime Minister and the Minister for Families, Community Services and Indigenous Affairs, the following measures were announced:

- Firstly in relation to alcohol the intention is to introduce widespread alcohol restrictions on Northern Territory Aboriginal land for six months. We'll ban the sale, the possession, the transportation, the consumption and (introduce the) broader monitoring of take away sales across the Northern Territory.
- We will provide the resources and we'll be appealing directly to the Australian Medical Association to assist. We will bear the cost of medical examinations of all Indigenous children in the Northern Territory under the age of 16 and we'll provide the resources to deal with any follow up medical treatment that will be needed.
- We're going to introduce a series of welfare reforms designed to stem the flow of cash going towards alcohol abuse and to ensure that the funds meant to be used for children's welfare are actually used for that purpose. The principal approach here will be to quarantine as from now through Centrelink, to be supported by legislation, 50 per cent of welfare payments to parents of children in the affected areas and the obligation in relation to that will follow the parent wherever that parent may go so the obligation

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cannot be avoided simply by moving to another part of Australia; and effectively the arrangements will be that that 50 per cent can only be used for the purchase of food and other essentials.

- We're going to enforce school attendance by linking income support and family assistance payments to school attendance for all people living on Aboriginal land. We'll be ensuring that meals are provided for children at school with parents paying for the meals.
- The Commonwealth Government will take control of townships through five year leases to ensure that property and public housing can be improved and if that involves the payment of compensation on just terms as required by the Commonwealth Constitution then that compensation will be readily paid.
- We'll require intensive on ground clean up of communities to make them safer and healthier by marshalling local workforces through Work for the Dole arrangements.
- We will scrap the permit system for common areas and road corridors on Aboriginal lands.
- We're going to ban the possession of x-rated pornography in the proscribed areas and we're going to check all publicly funded computers for evidence of the storage of pornography....
- There will be an immediate increase in policing levels, they're manifestly inadequate. The existing laws even with their shortcomings are not being adequately enforced. We'll be asking each state police service to provide up to 10 officers who'll be sworn as police in the Northern Territory. We will provide the additional cost and we'll provide special incentives and bonuses for the police around Australia to participate in this activity.
- We're going to provide additional resources to set up an Australian Government sexual abuse reporting desk and we'll appoint managers of all government businesses in all communities....
- our Minister will ask the ministerial council to formally refer this issue to the Australian Crime Commission to allow the crime commission to locate and identify perpetrators of sexual abuse of Indigenous children in other areas of Australia. And this is will be a precursor we hope to the effective prosecution of those people by the relevant state and territory law enforcement authorities.
- I should also indicate to you that Mr Brough is bringing to Cabinet at its next meeting some proposals to further extend the conditionality of welfare payments to all Australians receiving income support to ensure that these payments are used for the benefit of their children.<sup>13</sup>

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13. <http://www.pm.gov.au/media/Interview/2007/Interview24380.cfm>

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Further information was issued by the Government,<sup>14</sup> and, while not all the measures discussed came to pass (for instance ‘compulsory’ health checks announced by the government seem to have become voluntary health checks) these Bills represent the implementation of many of the announcements.

Many commentators have noted that there appears to be very little overlap between the 97 recommendations of the Anderson/Wild report and the measures which the Federal Government announced and to which it now seeks to give effect.<sup>15</sup> Most of the recommendations in the Anderson/Wild report were addressed to the NT Government. The Federal Government has said that it is responding to the issue raised in the Anderson/Wild report, not to its recommendations. The Federal measures may not be called for in the Anderson/Wild report, but that need not have meant that the measures were inconsistent with those being recommended in the report. It is noted that the authors of the report have indicated their discontent with the federal Government’s response.<sup>16</sup>

Anderson and Wild repeatedly stressed the ‘critical importance of governments committing to genuine consultation with Aboriginal people in design initiatives for Aboriginal community, whether these are in remote, regional or urban settings’ (see Recommendation 1). Such consultation has not featured prominently in the Federal intervention.

Professor Ian Anderson has summarised the Anderson/Wild report recommendation, saying:

The Anderson/Wild report found that Aboriginal people wanted to engage with this process and were “committed to solving problems and helping their children” in the face of a serious, widespread and often unreported problem of sexual abuse. They

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14. See for instance the release *National emergency response to protect Aboriginal children in the NT*,

[http://www.facsia.gov.au/Internet/Minister3.nsf/content/emergency\\_21june07.htm](http://www.facsia.gov.au/Internet/Minister3.nsf/content/emergency_21june07.htm)

NT Emergency Response Taskforce, 25/06/2007, announcing the Taskforce which will advise the Minister on issues surrounding the emergency response strategy to protect children in the Northern Territory.

[http://www.facsia.gov.au/internet/Minister3.nsf/content/taskforce\\_25jun07.htm](http://www.facsia.gov.au/internet/Minister3.nsf/content/taskforce_25jun07.htm)

Government outlines Phase One of NT reform, 26/06/2007 outlining the concept of operations for the next few days and weeks as part of the Howard Government’s NT reform package to protect children.

[http://www.facsia.gov.au/internet/Minister3.nsf/content/phaseone\\_26jun07.htm](http://www.facsia.gov.au/internet/Minister3.nsf/content/phaseone_26jun07.htm)

15. See a wide range of such comments in the submissions to the Senate inquiry into the Bill at [http://www.aph.gov.au/senate/committee/legcon\\_ctte/nt\\_emergency/submissions/sublist.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/nt_emergency/submissions/sublist.htm)

16. ‘Authors of NT child abuse report “betrayed” by crackdown,’ AAP, 5 August 2007.

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found the situation to be a “reflection of past, current and continuing social problems which have developed over many decades,” and that the “combined effects of poor health, alcohol and drug abuse, unemployment, gambling, pornography, poor education and housing, and a general loss of identity and control have contributed to violence and to sexual abuse in many forms”. They highlighted the need for existing programs to work more efficiently to “break the cycle of poverty and violence,” and to improve “coordination and communication between government departments and agencies” to end the current “breakdown in services and poor crisis intervention.” Further, they declared that these programs must have adequate resources and a long-term commitment from all governments if they are to succeed.

A number of recommendations were specific to Northern Territory institutions. For example, recommendations were made with respect to the structural reorganisation of the DHCS Family and Community Services Program, and the creation of a Commissioner for Children and Young People. The report also focused considerable attention on problems concerning the connection between disclosure and the legal processes. Attention was also given to dealing with some of the social determinants of health such as the lack of employment opportunities and inadequate housing as well as strategies to produce more resilient communities with a particular focus on the role of education.<sup>17</sup>:

Professor Anderson went on to argue that ‘None of the ... measures announced by Prime Minister Howard are... to be found in the strategies recommended by the Anderson/Wild report’:

The Australian government response is framed as a top-down crisis intervention ... It is characterised as a short-term response to be followed by medium- and long-term strategies – none of which are clear at this stage. So, for example, whilst the Anderson/Wild report recommended strategies to increase policing in remote communities in the long term the Howard plan only extends for six months. ... Many of the government’s proposals – for instance, scrapping the permit system, assuming control of Aboriginal land and instituting welfare reform – are simply not raised in the Anderson/Wild report. No reason is given as to how measures such as scrapping the permit system will address the problem of child sexual abuse. Conversely, a number of the issues that are raised in the report – in relation to community justice process, education/awareness campaigns in relation to sexual abuse, employment, reform of the legal processes, offender rehabilitation, family support services or the role of communities, for example – have not, as yet, been addressed by the Australian government response.

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17. Ian Anderson, Professor of Indigenous Health and Director of the Centre for Health & Society and Onemda VicHealth Koori Health Unit at the University of Melbourne. Australian Policy Online, 26 June 2007, [http://www.apo.org.au/webboard/comment\\_results.chtml?filename\\_num=161613](http://www.apo.org.au/webboard/comment_results.chtml?filename_num=161613). For a different comparison between the NT report’s recommendation and the Federal intervention measures, see <http://www.crikey.com.au/Politics/20070622-gov-vs-report.html>.

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There are significant differences in the recommendations that relate to those issues that are canvassed both in the Australian government approach and the Anderson/Wild report. For example, there are nine recommendations in the Anderson/Wild report – with numerous sub-components in relation to alcohol – none of which include an immediate introduction of widespread alcohol restrictions. Many remote communities are already dry and this strategy could be incorporated into the recommended development of community alcohol plans. Current evidence suggests that enforced alcohol restrictions, in the absence of broader strategies to deal with addictions, simply reduce supply and tend to shift problem drinking into unregulated areas, such as Alice Springs town camps. As a result, a single measure such as enforced alcohol restriction may, in fact, result in increased harm from violence and abuse in these communities.

### Crisis and Consultation

The lack of consultation has been identified again and again as a problem with the government's approach to the issues. SNAICC, the Secretariat of National Aboriginal and Islander Child Care, which has been involved in the child protection field for many years and is the national peak body representing the interests of Aboriginal and Torres Strait Islander families says:

We have to state however that we believe the legislation has been developed without the considered input of a range of Aboriginal communities and organisations and without the input of the Northern Territory government who have primary responsibility for child protection.<sup>18</sup>

Minister Brough, however, says he has consulted. In a letter to *The Australian* he challenges the assertion that there's been a 'failure even to pretend to consultation over issues as sensitive as land rights and the permit system for communities.' He says both issues have been the subject of extensive consultation. He 'flagged changes to the permit system last year when [he] launched a review...' and 'Land rights were the subject of extensive consultation in the lead-up to the introduction early last year of amendments to ALRA.' With respect to the permit system he says

The period for consultation was extended at the direct request of indigenous organisations, including the Northern Land Council. More than 80 submissions were received and, as a consequence of this consultation, I decided that the permit system should be retained for 99.9 per cent of Aboriginal land in the Northern Territory. The permit system will only be lifted for townships and public access roads/airstrips, which account for 0.1 per cent of Aboriginal land in the Territory.

The concluding paragraph of Minister Brough's letter says

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18. Submission [no. 38](#) to the Senate inquiry.

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The NT National Emergency Response package is the cumulative result of extensive consultation with those directly affected by the issues raised by the Little Children Are Sacred report, particularly with women in remote communities. That that consultation has focused on listening to real people in real communities rather than self-proclaimed and vocal agitators who present themselves as ‘indigenous leaders’ is something I’m very pleased about.

There can be no disputing the proposition that the parliamentary consultation is being compressed to a significant extent. The matter is being treated as sufficiently urgent that it cannot await meaningful Parliamentary consideration.

From the initial announcement of the national emergency to the titles of the Bills the government has appealed to a sense of urgency in this matter. The OED defines an emergency as a ‘sudden state of danger etc; (political) condition approximating to that of war.’ The word is also defined in two Commonwealth Acts as:

- (a) a natural disaster; (b) a conflict involving an armed force; (c) a civil disturbance; (d) an accident; (e) a serious illness; (f) any similar matter.<sup>19</sup>

and, in relation to a facility, ‘an urgent situation that presents, or may present, a risk of death or serious injury to persons at the facility.’<sup>20</sup>

The *Defence Act 1903* outlines situations in which State and territory police may request assistance from the military forces in situations which may be seen as an emergency and in which the local police cannot control the situation. Circumstances which are designated ‘emergency’ situations in legislation usually include the words ‘serious’ and: ‘immediate’ or ‘urgent’ or ‘imminent’.<sup>21</sup>

While elements of an emergency do exist – the serious threats to the life and safety of member of the community—other elements of an emergency—that is a sudden or an abnormal occurrence are, sadly, missing, as the above history demonstrates.

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19. *Fringe Benefits Tax Assessment Act 1986* s. 136(1)

20. *Petroleum (Submerged Lands) (Management of Safety on Offshore Facilities) Regulations 1996* reg 5

21. *Aboriginal And Torres Strait Islander Heritage Protection Act 1984 - s. 9 Emergency Declarations in Relation to Areas.*

*Aged Care Act 1997 - s. 92.5 Seizures Without Offence-Related Warrant In Emergency Situations.*

*Biological Control Act 1984 - s. 30 Emergency Declarations.*

*Crimes Act 1914 - s. 3T. Searches Without Warrant in Emergency Situations.*

*Gene Technology Act 2000 - s. 72B Minister May Make Emergency Determination.*

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The use of the term, as in a 'state of emergency,' is also associated with increased legislative powers passing to the State. It is not clear the assumption of these additional powers is entirely appropriate to the situation.

### The Commonwealth, the Territory and the Constitution

Relations between the NT and the Commonwealth have been strained during the development of a response to the Anderson/Wild report, and issues of consultation and communication have arisen.

The Prime Minister opened the joint press conference (21 June 2007) with the following indictment on what he called the inaction of the Northern Territory:

Anybody who's read or examined the report prepared by Pat Anderson and Rex Wild entitled *Little Children Are Sacred* will be sickened and horrified by the level of abuse. They will be deeply disturbed at the widespread nature of that abuse and they will be looking for the responsible assumption of authority by a government to deal with the problem. We are unhappy with the response of the Northern Territory Government. It is our view that if it hadn't been for the persistence of Mr Brough in elevating this as an issue, the inquiry conducted by Rex Wild and Pat Anderson would never have been commissioned. The report was in the hands of the Northern Territory Government for some eight weeks before it was released and subsequently the Chief Minister has indicated that they would have a response in a period of six weeks and it's only today that I've received a letter from the Chief Minister and Mr Brough has, indicating that there is a desire on the part of the Northern Territory Government to work with us to deal with the issue.

At a later stage Mr Howard commented:

We have decided to act. We will work with the Northern Territory Government but the decisions we have taken are non negotiable and I made that clear to the Chief Minister this afternoon. But she has my goodwill and I want to work with her but we are determined to implement the decisions I've announced.<sup>22</sup>

The relationship (or lack thereof) between the two governments has been fraught as the saga has continued to evolve.

Section 122 of the Constitution allows the Commonwealth Parliament to make laws for the government of the Northern Territory. In *Australian National Airways Pty Ltd. v. Commonwealth* Chief Justice Barwick said:

The power given by s. 122 is not only plenary but is unlimited by reference to subject-matter. It is complete power to make laws for the peace, order and good government

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22. Lateline, 'Prime Minister discusses federal intervention to take control of Aboriginal townships in Northern Territory' 21 June 2007

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of the Territory. It is non-federal in character in the sense that the total legislative power to make laws to operate in and for a territory is not shared in any way with the States.<sup>23</sup>

The Australian Parliament has used its powers under section 122 to coercively effect laws operating in both the NT and the ACT.

For example, the *Euthanasia Laws Act 1997 (Clth)* overrides any laws which permit the form of intentional killing of another called euthanasia or the assisting of a person to terminate his or her own life. In this Act the *Rights of the Terminally Ill Act* (NT) was specifically declared to have no force.

In relation to the ACT Civil Unions Bill 2006, the Commonwealth disallowed the Bill by a different mechanism.<sup>24</sup>

The Prime Minister has referred to 'Constitutional niceties' being secondary to the urgency and seriousness of the situation being faced. However, the measures being proposed could not be implemented in the States with the ease that they can be implemented in the NT, and, while the Commonwealth's constitutional power to effect changes to any area of NT law, the approach raises questions about the wisdom of such a policy. It involves the Commonwealth intervening in the affairs of a self-governing territory to modify or disapply its laws. There are principles that suggest interfering with, and adding layers of complexity to the laws of, a self-governing polity, is inappropriate. Furthermore it can be argued that the legislature (which is answerable to Northern Territorians) should have the freedom to legislate in a particular way. These arguments have been rehearsed with respect to other decisions to over-ride Territory laws, but there is an unusually complex set of issues that the Commonwealth is intervening in through these Bills (issues of compensation for the acquisition of property, a range of property laws, criminal laws, including those governing alcohol to name a few).

Local councils are not a traditional area of Commonwealth involvement. The Federal Government has recently engaged in two areas of local government – Queensland and the Northern Territory. The Commonwealth Government's involvement in Queensland's local government issues has not been legislative. Mr Howard expressed his view that the Queensland government's proposed changes to local councils should be the subject of local plebiscites and he offered to fund these plebiscites. This intervention has become the subject of an on-going political debate, with the Queensland Government threatening to sack any councils which hold referendums, and Professor Greg Craven, generally regarded as a more conservative commentator, was reported as commenting that 'federal

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23. [\*Australian National Airways Pty Ltd. v Commonwealth\*](#) (1945) 71 CLR 29.

24. Under subsection 35(2) of the *Australian Capital Territory (Self Government) Act 1988*, a declaration of the Governor-General rendered the Bill ineffective.

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involvement in the Queensland council merger plan sets a dangerous precedent... The Commonwealth has no constitutional capacity in a very real way over local government. It's not its responsibility...'<sup>25</sup>

In contrast to the situation in Queensland there is no question regarding the Commonwealth's constitutional power to legislate in the Territories, including covering local government issues, nor has there been any suggestion from Mr Howard that he would countenance funding or holding local plebiscites regarding the changes to be implemented by this legislation.

### Crisis and Consultation (Part II)

A wide range of commentators have criticised the lack of consultation with either the Indigenous or the broader community.<sup>26</sup>

The submission from the Gilbert and Tobin Centre of Public Law comments that,

A concerted commitment to make long term improvements, backed by the necessary resources, in itself is a welcome thing ... *how* governments go about the task is vital. That is so for reasons of principle, because human beings and their fundamental rights are at stake. And it is so for pragmatic reasons as well. Hard-headed analysts such as the Secretary of the Treasury, Dr Ken Henry, the Chairman of the Productivity Commission, Mr Gary Banks, and the Commonwealth Grants Commission have all emphasised that top-down approaches in Indigenous affairs that lack a long-term partnership approach are extremely unlikely to achieve their stated objectives.<sup>27</sup>

Dr Ken Henry's comments reflect on the degree to which consultation and engagement have been missing from the setting of the policy direction:

To achieve progress in Indigenous development, there is a need for increased ownership, by Indigenous people, of both the problems and the policy solutions...

People who are affected by policy have a *right* to be involved in its development – that is no more than a statement of the primary rationale for democracy. And... people

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25. ABC News, 'Further intervention in Qld amalgamations 'threatens federalism'', 9 August 2007, <http://abc.net.au/news/stories/2007/08/09/2001190.htm>
  26. Of the first 70 submissions to the Senate Committee inquiry, 67 have concerns with the Bill and feel it needs further work and consultation or it should be rejected out of hand. Of the three favourable submissions, who have no concerns over consultation, one is strongly in favour of ending the permit system (Mr Chris Tangey, Submission No. 1), and two are in favour of the ban on pornography, although they believe it should go further (Australian Christian Lobby, Submission No. 2 and Festival of Light, Submission No. 37).
  27. Mr Sean Brennan, Submission No. 40, p. 1.

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who are affected by policy also have a *responsibility* to be involved in its development.

Mr Tom Calma, the Aboriginal and Torres Strait Islander Social Justice Commissioner has made similar observations:

The greatest irony of this is that it fosters a passive system of policy development and service delivery while at the same time criticising Indigenous peoples for being passive recipients of government services!<sup>28</sup>

He also suggested that the Federal Government's response had left many questions unanswered. For example:

**First, on what basis will the government intervene in one community as opposed to another?** As Rex Wild and Pat Anderson's report reveals, there is a lack of statistics that reveal the true extent of the problem. So, in the absence of any situational and needs analysis, how does the government decide?

**Second, and related to this question, is how will the government decide the appropriate approach for the specific needs of individual communities?** I am concerned about a mismatch that has already revealed itself between the public debate on these issues and the findings of the *Little Children are sacred* report.

**Third, and of critical importance, is what role does the community have in this process?** I think it is intentional that the government has described its announcements as an 'intervention' as opposed to a 'partnership' with Indigenous communities. We are now coming on three years since the introduction of the new arrangements – so why has the government not built relationships with communities sufficiently that they can approach the announcements as a partnership?

**Fourth, if the government intends to make lasting change – how will it know when such change has occurred?** In the absence of regional and local level planning how will the specific issues facing communities, and the connections between communities on a regional basis, be addressed? This is something that incidentally was intended to be a key feature of the new arrangements but which has by and large failed to materialise as yet.

**And fifth, how does the NT announcement fit with the processes that are continuing to be introduced as part of the 'new arrangements' to date?** Will it require another re-engineering of processes that are yet to be bedded down? For example, the government has released an evaluation plan for whole-of-government activities to address the critical problem of lack of baseline data. The evaluation plan

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28. In his speech 'Continuity and change through the new arrangements – Lessons for addressing the crisis of child sexual abuse in the Northern Territory', launch of the Social Justice Report and Native Title Report 2006, Tuesday, 3 July 2007, Turner Hall, Sydney Institute of TAFE, Ultimo.

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identifies that in the coming year there will be reviews of some of the communities who have previously been designated as communities in crisis, and baseline data will be established for some new priority communities. What is the impact of the NT announcement on this plan? Does it re-direct these evaluation activities for new communities to the NT rather than to communities in other states, or will there be an expansion of the scope of the evaluative framework? This would appear necessary to be able to effectively understand the success or otherwise of the measures to be taken.

Similarly, will the government seek to utilise and expand its program of Shared Responsibility Agreements and Regional Partnership Agreements as tools to implement its NT announcements? It has previously foreshadowed the importance of these as primary mechanisms for engagement. As the *Social Justice Report* notes, these processes offer the potential to embed a community development approach into the new arrangements, but there is no evidence of this occurring to date.

The suite of NT emergency legislation does not appear to answer any of these questions.

Commissioner Calma also noted that ‘We are not starting from scratch in dealing with this issue – despite the rhetoric’ and suggested that the government was failing ‘to utilise the planning tools and action plans developed by the ATSIC Regional Councils and through other planning forums for health, housing, criminal justice and so on’. Many ATSIC Region Councils had, for example, produced a detailed Family Violence Policy and Action Plan.

The question of consultation is crucial to establishing the existence of a ‘special measure’ under anti-discrimination legislation, as outlined further below. A defining feature of a special measure is that the relevant community has been consulted and has accepted the measure. The Bill proposes, however, to suspend the operation of the RDA.

### *Racial Discrimination Act 1975*

There is a legislative prohibition on racial discrimination contained in the *Racial Discrimination Act 1975* (the RDA). The substantive provisions of the RDA have not been amended or suspended since it passed through the Parliament. There were lengthy debates regarding its status during the Native Title amendments but it survived intact. However this package of legislation suspends part of the operation of the RDA. The part suspended is Part II— Prohibition of racial discrimination (**subclause 132(2)**).

The proposed Act treats people differently on the grounds of race (the reliance on geographic location as the feature differentiating among Australian residents would fall within the definition of prohibited ‘indirect discrimination’ – i.e. the geographic feature will predominantly affect members of a particular race). The general prohibition has always contained a recognition that ‘special measures’ are legitimate to promote the position of members of a particular race when that race is disadvantaged. Special measures are also referred to as ‘affirmative action’ or ‘positive discrimination.’ **Subclause 132(1)** defines all the provisions of the Act as special measures under the RDA.

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Accepted special measures have been policies or actions by organisations or governments which recognise that the past or present disadvantage suffered by certain groups based on their race has affected their access to equality of opportunity and basic human rights.

The Human Rights and Equal Opportunities Commission (HREOC) has used the restriction of sales of alcohol to some Aboriginal people in the Northern Territory as a classic example of a special measure. The agreement they have recognised was established between the local Pitjantjajara people, the relevant roadhouse proprietor and the federal Race Discrimination Commissioner and was in response to a request from the Pitjantjajara Council to the Commission to seek assistance in dealing with the escalating problem of alcohol abuse within its community. It is important to note that this special measure was made with the acceptance, and at the request of, the community involved.<sup>29</sup>

Special measures are generally kept in place until the group affected has been able to reach 'substantive' equality with other members of the community.

The measures in the Welfare Payment Bill, the Families Bill and this Bill are all defined by their respective provisions as special measures.

The provisions of this Bill will preclude judicial scrutiny of the question as to whether the measures qualify as a special measure, pre-empting the matter with the declaration that they are a special measure. To the extent that a subsequent Bill has the legislative capacity to over-ride the original RDA this is clearly within the legislative power of the Commonwealth, however it certainly undermines the *raison d'être* of the Act, which was to implement the UN's *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD).<sup>30</sup>

Article 1(4) of CERD, from which the RDA's special measures were taken, provides as follows:

Special 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 such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, 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.

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29. Human Rights and Equal Opportunity Commission, 'Frequently asked questions: What are 'special measures' and why do we have them?', <http://www.humanrights.gov.au/faqs/general.html#5>, accessed on 13 August 2007.
  30. Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965, entry into force 4 January 1969. Australia ratified on 30 Oct 1975.

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The Australian courts have interpreted this definition as containing four elements:

- a special measure must confer a benefit on some or all members of a class;
- the membership of the class must be based on race, colour, descent, or national or ethnic origin;
- a special measure must be for the sole purpose of securing adequate advancement of the beneficiaries in order that they may enjoy and exercise equally with others human rights and freedoms; and
- the circumstances of the special measure must provide protection to the beneficiaries which is necessary in order that they may enjoy and exercise human rights and freedoms equally with others.<sup>31</sup>

Furthermore a special measure must not be continued after the objectives for which it was taken have been achieved.

Looking at these criteria we see the central question is: does the measure confer a benefit on some or all members of a class. The class to be benefited must be a racial group or individuals belonging to the group. In making this assessment, courts have looked to both the benefits of a measure and any costs or disadvantages borne by the beneficiaries of the measure.

In this Bill the government is not relying on the proposed Act's definition of itself as containing only special measures. It is also suspending the central operative provision of the RDA prohibiting race discrimination.

In the case of the Welfare Bill it takes the option of defining its measures as special measures. The Welfare Bill proposes to prevent Indigenous families from having unfettered access to their social security payments. The assessment of whether this will confer a benefit on an Indigenous community or on individuals in that community would traditionally be an assessment conducted by the courts, which would consider the impact of the conditions imposed by the agreement on individuals and on the community.

The Government's choice to use a stipulative definition regarding 'special measures' would circumvent any court's consideration. A stipulative definition is a definition based on the case in point rather than relying on criteria which can be articulated or specified.

There is an argument that the provisions of this Bill are themselves discriminatory. It preferences other property holders over native title holders when it provides that if a lease is granted to the Commonwealth under section 31, then existing rights and interests, in

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31. *Gerhardy v Brown* (1985) 159 CLR 70 at 126, as adapted, and quoted by the Human Rights Commission,  
[http://www.hreoc.gov.au/social\\_justice/sjreport04/Appendix2RDAandSRAs.html](http://www.hreoc.gov.au/social_justice/sjreport04/Appendix2RDAandSRAs.html)

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general, are preserved – except for native title rights and interests (which only revive once 5 years have elapsed). It also provides that where the Commonwealth has a section 31 lease it is not liable to pay rent to the relevant owner. In making these provisions it treats native title rights as inferior property rights. Finally it could be seen to remove protections (ie native title rights; the future act regime) that are themselves special measures under the RDA and CERD.

Were a court to conclude that there was, in fact, no benefit conferred it would be inconsistent with the character of a special measure. Difficult issues of fact would arise here, and close scrutiny of the arrangement and its impact would be required to consider such an argument.

A special measure must have the sole purpose of securing adequate advancement of the beneficiaries. There are a number of sources from which the purpose of a special measure can be discerned. The purpose of a measure is discerned from its terms and from the operation which it has in the circumstances to which it applies. Any fact which shows what the persons who took the measure intended it to achieve casts light upon the purpose for which it was taken provided the measure is not incapable of achieving what is intended.

The purpose of securing adequate advancement for a racial group is not necessarily established by showing that the person who takes the measure does so for the purpose of conferring a benefit, if the group does not seek or wish to have the benefit. In *Gerhardy v Brown*, Brennan J stated that 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’. Brennan J went on to state:

The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them. An Aboriginal community without a home is advanced by granting them title to the land they wish to have as a home. Such a grant may satisfy a demand for land rights. But an Aboriginal community would not be advanced by granting them title to land to which they would be confined against their wishes.

'Advancement' is not necessarily what the person who takes the measure regards as a benefit for the beneficiaries. 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 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.

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The difference between land rights and apartheid is the difference between a home and a prison.<sup>32</sup>

We see the terms and conditions upon which the benefit is conferred have been relevant to the court's assessment of the purpose of the agreement. The wishes of the Indigenous community with whom the agreement was made may also be relevant. Difficult issues have arisen for a court's consideration where the wishes or views of the Indigenous community are not uniform. There is also the distinction to be made that the Welfare Bill's measures do not immediately constitute a 'material benefit', although it may be seen as giving a benefit to those children with inadequate financial resources due to parental mismanagement of their funds.<sup>33</sup>

Different communities may be feeling differently about these measures, but the government's initial imposition of the measures across the board will not differentiate. This is likely to put some quarantine measures outside the usual understandings of a special measure. The changes to the RDA proposed in this suite of Bills could be seen as severing the connection between the legislative head of power used to enact the RDA (i.e. an implementation of an international treaty under the foreign affairs power), however there are other heads of power under which the legislation could be supported.<sup>34</sup> By re-defining 'special measures' according to its own legislative criteria the Government may be stepping outside of the international understandings regarding what constitutes a 'special measure' and, while it is well established that the Commonwealth is not bound to comply with international law, the implications for Australia's international reputation and for our historical support for CERD are less clear.

#### International Scrutiny

Ironically at Australia's most recent reporting session to the UN Committee overseeing the Convention, there were comments passed regarding the lack of an entrenched protection for the principle of non-discrimination:

The Committee, while noting the explanations provided by the delegation, reiterates its concern about the absence of any entrenched guarantee against racial discrimination that would override the law of the Commonwealth. (article 2)

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32. *Gerhardy v Brown* (1985) 159 CLR 70 at 135.

33. Considerable amounts of the above material have relied on the Human Rights and Equal Opportunities Commission's material, particularly from ATSIJ Social Justice Report 2004 at [http://hreoc.gov.au/social\\_justice/sjreport04/Appendix2RDAandSRAs.html](http://hreoc.gov.au/social_justice/sjreport04/Appendix2RDAandSRAs.html)

34. The well established constitutional principle that the stream cannot rise above its source maybe applicable in this case, *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* [2003] HCA 18; *Residual Assco Group v Spalvins* [2000] HCA 33; 202 CLR 629; 172 ALR 366; 74 ALJR 1013 (13 June 2000).

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The Committee recommends to the State party that it work towards the inclusion of an entrenched guarantee against racial discrimination in its domestic law.<sup>35</sup>

Relations between the Government and the Committee have had some well-publicised difficulties, with the Committee challenging a number of Commonwealth policies over the last decade.<sup>36</sup> It is unlikely that the measures suspending or modifying the operation of the RDA are likely to find favour with the Committee.

## Just terms

There are two provisions relating to the acquisition of property in the National Emergency Response Bill. Some of the relevant issues are discussed here. There are also acquisitions of property dealt with in the Families Bill. Further discussion of the matter is contained in that Bills Digest.

For the purposes of the National Emergency Response Bill, two statutes are important. The first is the Commonwealth Constitution, which states in section 51(xxxi), that the Commonwealth can make laws for the acquisition of property on just terms.<sup>37</sup>

The second is the Northern Territory (Self-Government) Act 1978, a Commonwealth law, which provides for acquisition of property to be on just terms as follows:

### **50 Acquisition of property to be on just terms**

(1) The power of the Legislative Assembly conferred by section 6 in relation to the making of laws does not extend to the making of laws with respect to the acquisition of property otherwise than on just terms.

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35. Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Concluding observations of the Committee on Australia CERD/C/AUS/CO/14, March 2005. Committee on the Elimination of Racial Discrimination, Sixty-sixth session, 21 February - 11 March 2005. The source of the Concluding Observations are the advance unedited version issued by the Committee, <http://www.humanrights.gov.au/cerd/report.html>.
36. See, for instance, the Committee's Decision 2 (54) of 18 March, pursuant to Article 9 (2) of the Convention, issued in 1999 and the Government's response at <http://www.faira.org.au/cerd/government-comments.html>; and Decision 2 (54) on Australia, 18/03/99 A/54/18, para.21(2) at <http://www.unhcr.ch/tbs/doc.nsf/MasterFrameView/a2ba4bb337ca00498025686a005553d3?Opendocument>
37. The Commonwealth can make laws with respect to (xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws

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(2) Subject to section 70, the acquisition of any property in the Territory which, if the property were in a State, would be an acquisition to which paragraph 51(xxxi) of the Constitution would apply, shall not be made otherwise than on just terms.

The Bill proposes to suspend the operation of ss 50(2), see further discussions below.

### What are just terms?

There is a well developed jurisprudence regarding the meaning of ‘just terms’ compensation. In [Grace Bros Pty Ltd v Commonwealth](#), Dixon J said that the inquiry should not be directed only to the question of whether the individual owner is placed in a situation in which in all respects he will be as well off as if the acquisition had not taken place.

The inquiry must rather be whether the law amounts to a true attempt to provide fair and just standards of compensating or rehabilitating the individual considered as an owner of property, fair and just as between him and the government of the country. I say “the individual” because what is just as between the Commonwealth and a State, two Governments, may depend on special considerations not applicable to an individual.<sup>38</sup>

According to Blackshield and Williams, ‘just terms’ does not necessarily require that a compensation package be presented as part of the acquisition scheme.<sup>39</sup> It is sufficient that the scheme provides adequate procedures for determining fair compensation. The High Court can scrutinise such procedures. Thus in the *Tasmanian Dams Case* Deane J found the compensation provision in the *World Heritage Properties Conservation Act 1983* inadequate because of the intrinsic unfairness in the procedure which in effect ensured that unless a claimant agreed to accept the terms offered, he will be forced to wait years before he could get a court determination. He said that section 17:

is quite unacceptable and unfair according to the ordinary standards of “fair dealing between the Australian nation and an Australian State or individual in relation to the acquisition of property for a purpose within the national legislative competence”: *Nelungaloo Pty Ltd v Commonwealth*<sup>40</sup>

Quick and Garran<sup>41</sup> have remarked that it was legitimate to take into account any offsetting benefits the owner realised as a result of the scheme involving the expropriation,

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38. [Grace Bros Pty Ltd v Commonwealth](#) (1946) 72 CLR 269 at 290.

39. A.R. Blackshield and G. Williams, *Australian Constitutional Law and Theory*, 4th edition, Federation Press, Annandale, 2006, p.1289.

40. [Commonwealth v Tasmania](#) [1983] HCA 21; (1983) 158 CLR 1 at 291.

41. J. Quick and R. Garran, *The annotated constitution of the Australian Commonwealth*, Angus & Robertson, Sydney, p. 641.

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but in some cases the High Court has taken a view more favourable to the property owner. For example in *Georgiadis*, Brennan J stated:

In determining the issue of just terms, the court does not attempt a balancing of interests of the dispossessed owner against the interests of the community at large. The purpose of the guarantee of just terms is to ensure that the owners of property compulsorily acquired by government presumably in the interests of the community at large are not required to sacrifice their property for less than its worth. Unless it is shown that what is gained is full compensation for what is lost, the terms cannot be found to be just.<sup>42</sup>

### Section 51(xxxi) of the Constitution

The law surrounding section 51(xxxi) of the Constitution is complex in relation to its application to the territories. This is for two reasons, that section 51(xxxi) is not expressed to apply to territories, only the states, and secondly because of the plenary nature of section 122 of the Constitution, which allows the Commonwealth unlimited power to make laws for the government of any territory.

For example, it was long thought that section 51(xxxi) had no application to acquisitions of property in the Northern Territory. This flowed from the High Court's interpretation of section 122 ('the territories power') in *Teori Tau*, a unanimous 1969 decision which was upheld in a number of subsequent cases well into the 1990s.<sup>43</sup> However, in the *Newcrest* decision in 1997, a majority of four to three held that the constitutional requirement of 'just terms' could apply in the Northern Territory. Three judges over-ruled *Teori Tau*, while Toohey J refused to do so but substantially narrowed its application.<sup>44</sup> The upshot is that the application of section 51(xxxi) in the Northern Territory is not a foregone conclusion, but that present authority leans heavily towards its application to acquisitions under Commonwealth law where they are referable to a legislative power other than the territories power in section 122.

This issue was recently discussed in *Bennett v Commonwealth* (2007) 234 ALR 204 at paragraph 194 of the decision showing that the area is still open for debate.

*Teori Tau v The Commonwealth* was considered in *Newcrest Mining (WA) Ltd v The Commonwealth*, which was concerned with mining leases over land in the Northern Territory. Commonwealth legislation purported to operate on the land contained within those leases. A majority of the Court (Toohey, Gaudron, Gummow and Kirby JJ) held that s 51(xxxi) fettered the Commonwealth's legislative power

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42. [Georgiadis v Australian and Overseas Telecommunications Corporation](#) [1994] HCA 6; (1994) 179 CLR 297 at 310–1.

43. [Teori Tau v Commonwealth](#) [1969] HCA 62; (1969) 119 CLR 564.

44. [Newcrest Mining \(WA\) Limited v Commonwealth](#) [1997] HCA 38; (1997) 190 CLR 513.

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generally, while three Justices of the majority (Gaudron, Gummow and Kirby JJ) would have overruled *Teori Tau v The Commonwealth* and found that s 51(xxxi) fettered s 122 as well. Toohey J, however, thought “it would be a serious step to overrule a decision which has stood for nearly thirty years and which reflects an approach which may have been relied on in earlier years”. His Honour was therefore unwilling to overrule it.<sup>45</sup>

### Northern Territory National Emergency Provisions

There are two provisions relating to compensation for acquisition of property in the main bill, the National Emergency Response Bill, namely **clause 60** and **clause 134**. The latter is a provision to cover the entire Bill apart from **Part 4**, which deals with the acquisition of rights, titles and interests in land and Part 4 is covered by **clause 60**. **Clause 134** is in similar terms and will not be dealt with at this stage.

**Clause 60** disapplies subsection 50(2) of the Self Government Act. This means that the in lieu of a provision that reflects the standard Constitutional position a new formula which has not been the subject of judicial scrutiny in this context is being proposed.

**Subclause 60(2)** states:

However, if the operation of this Part, or an act referred to in paragraph (1)(b) or (c), would result in an acquisition of property to which paragraph 51(xxxi) of the Constitution applies from a person otherwise than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation to the person.

This subsection seems to have three possible distinctions:

- It does not specifically apply paragraph 51 (xxxix) to the acquisition
- It does not require just terms
- If the acquisition is otherwise than on just terms, the Commonwealth is liable to pay a ‘reasonable amount of compensation’, as distinct from ‘just terms’

**Subclause 60(3)** provides that in the event that agreement cannot be reached on the amount of compensation, the owner of the property can commence proceedings.

**Clause 61** requires the court to take into account certain things in determining what is a reasonable amount of compensation that is payable in relation to land including rent paid by the Commonwealth, amounts of compensation paid under the Special Purposes Leases Act or the Crown Lands Act and any improvements to the land funded by the Commonwealth, including improvements to buildings or infrastructure.

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45. [Bennett v Commonwealth](#) [2007] HCA 18 at 195.

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The proposed compensation scheme could be read as providing that the Commonwealth should provide just terms but if not, then a reasonable amount of compensation is to be paid. Clause 61 gives some guide as to how this can be determined.

Note that when the Valuer-General is tasked to determine what is a reasonable amount of rent to be paid by the Commonwealth the Valuer-General must not take into account the value of any improvements in the land (**subsection 62(4)**).

### Summary of just-terms issues

If subsection 50(2) were not suspended, acquisition of property in the NT would be on just terms pursuant to subsection 50(2) of the Self Government Act. This would be interpreted in accordance with the common law, that is, it must be fair and even if an amount is not specified, there should be a fair and just procedural framework for the determination of compensation.

Subsection 50(2) has been suspended by the Commonwealth (which can be done as the Self Government Act is a creature of the Commonwealth Parliament). There is some strong judicial comment that section 51(xxxi), the just terms provision of the Constitution, may have application in the NT, despite *Teori Tau* not being explicitly overturned.

It is open on the drafting that just terms should be paid in accordance with the common law meaning of the expression, and that the reasonable compensation must be paid. The Court must take into account the matters referred to in **clause 61** in deciding this question.

What is the meaning of *reasonable amount of compensation*? Does it equate to *just terms*?

The proposed compensation scheme could therefore be read as providing that the Commonwealth should provide just terms but if not, then a reasonable amount of compensation is to be paid. Providing a list of issues for the court raises the question of whether the Government is trying to displace the judicial discretion of *solatium*.

*Solatium* is a term basically meaning compensation to a person for non-financial disadvantage resulting from the necessity of the person to relocate his or her principal place of residence as a result of its acquisition.

*Solatium* in the context of compulsorily acquiring Aboriginal land has been considered very [complex](#) by property valuers.<sup>46</sup>

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46. John Sheehan, 'Compensation for the Taking of Indigenous Common Property: The Australian Experience', 2000, <http://dlc.dlib.indiana.edu/archive/00000577/00/sheehanj061500.pdf>, accessed on 10 August 2007.

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The Minister has been reported in the media referring to the notion of in-kind compensation—such as education grants, renovations and so forth—as reasonable.

Mr Brough said “rent and improvements”, including infrastructure programs, could count as compensation. And he conceded some traditional owners might have to wait a long time until they received any compensation.<sup>47</sup>

In the Senate hearing on 10 August, a Federal Government official refused to say what form the compensation will take when more than 70 Aboriginal communities are taken over for five years.

Greens Senator Rachel Siewert asked senior government bureaucrat Wayne Gibbons what form it would take.

What’s been implied in the media is that provision of infrastructure may be used as compensation and I’ve just asked you to guarantee to me that that is not the case and that the issues around compensation are completely separate from the other interventions.

The other provision of infrastructure and things like that and you’ve just said to me [that] you’re not prepared to talk about it now?

Mr Gibbons replied: ‘No, because I believe I’d be prejudicing the Commonwealth in those negotiations, Senator’.<sup>48</sup>

In summary:

- There is no way of knowing what view the High Court would take of in-kind compensation.
- There is also clearly an argument, in fact necessitated by the rules of statutory interpretation, that there could be a divergence between compensation on just terms and reasonable compensation.

This means that if the High Court finds that section 51(xxxi) applies, there is certainly a question around the invalidity of the formula ‘reasonable amount of compensation’.

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47. Patricia Karvelas, ‘[Right to tribal law scrapped](#)’, *The Australian*, 7 August 2007, p. 1.

48. ‘Govt under fire over ‘patronising’ intervention push’, ABC News, 10 August 2007, <http://www.abc.net.au/news/stories/2007/08/10/2001459.htm>. Quotation should be checked against Committee Hansard when available.

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What happens if the court finds the provisions constitutionally invalid?

A challenge to section 51(xxxi) is not designed to get the applicant more compensation. If the court finds that the provisions authorise an acquisition on terms that are unjust, they will be rendered void *ab initio*.

There has been commentary to the Senate inquiry as to whether the acquisition of property rights proposed by the NT Bills is open to constitutional challenge and if so, on what grounds.<sup>49</sup> Senator Bob Brown submitted an opinion by Brian Walters QC to the inquiry,<sup>50</sup> which finds the provisions invalid.

This will not be an immediate effect. A High Court challenge can take some time and the right case, as the court does not provide advisory opinions. As ANU academic Jennifer Clarke has stated in relation to the compulsory acquisition provisions:

This is like putting up a sign saying, “If you want the money, you’ll have to take us to the High Court”, which is not what you’d expect in an emergency.<sup>51</sup>

In explaining the operation of the similar compensation provision, **clause 134** the Explanatory Memorandum states:

Therefore, where an acquisition of property that occurs as a result of the operation of the terms of this bill is excluded from the requirement under subsection 50(2) of the *Northern Territory (Self Government) Act 1978*, **subclause 134(2)** nevertheless requires the payment of a reasonable amount of compensation.

This suggests that the intention is for reasonable compensation as distinct from just terms.

## Financial implications

On 21 June 2007, the Hon. Mal Brough, Minister for Families, Community Services and Indigenous Affairs, announced the emergency response measures and a three-phase strategy of ‘stabilisation’, ‘normalisation’ and ‘exit’.<sup>52</sup> At a joint press conference, the Prime Minister stated there was no estimate of the total cost but said:

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49. See especially the submissions by the Gilbert and Tobin Centre of Public Law, submission nos. [40](#) and [40a](#), plus evidence presented by the Law Council of Australia based on submission [no. 52](#). The Committee Hansard for the 10 August 2007 hearing will be available [here](#).

50. [Submission no. 101](#).

51. Jennifer Clarke, ‘[The great federal land grab](#)’, *Canberra Times*, 13 August 2007, p. 11.

52. Quoted in Tim Colebatch, ‘Learning a purpose in life’, *The Age*, 26 June 2007.

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It will be some tens of millions of dollars. It's not huge but there could be some costs in relation to the extra police. There'll be costs in relation to the medical examinations of children, that is [a] very extensive task.<sup>53</sup>

Public debate on the cost of the response followed the announcement, with estimates of up to \$5 billion to meet the costs of unmet demand in health, housing, education and employment.<sup>54</sup> Although the Minister for Finance disputed such estimates, the Treasurer was reported as saying the extra intervention will be costly:

It's having people on the ground, it's having law enforcement officers on the ground, it's having medical specialists on the ground and over a long period of time, it will be a very substantial cost.<sup>55</sup>

The dispute over costs is largely explained by different estimates for needs of the short-term 'stabilisation' phase or the longer-term 'normalisation' phase, and failure to define what the term cost means.<sup>56</sup>

The total amount sought under Bill (No. 1) and Bill (No. 2) is \$587.3 million, which the Minister described as 'money required in 2007-08 for the stabilisation phase of the response'.<sup>57</sup>

More than half of the total appropriation—\$320.8 million—is departmental expenditure and capital expenses to meet the costs of increased personnel, staff accommodation, infrastructure upgrades and improved IT capacity across a number of agencies. Major costs are:

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53. The Hon. J. Howard (Prime Minister), *Joint Press Conference with the Hon. Mal Brough, (Minister for Families, Community Services and Indigenous Affairs)*, transcript, 21 June 2007, <http://www.pm.gov.au/media/Interview/2007/Interview24380.cfm>.
  54. Lenore Taylor 'Crisis plan could cost \$5bn', *The Australian Financial Review*, 27 June 2007.
  55. '[Minchin rejects costs of NT intervention](http://www.abc.net.au/news/stories/2007/06/27/1963664.htm)' ABC news, 27 June 2007; <http://www.abc.net.au/news/stories/2007/06/27/1963664.htm>. 'AFP team arrives in NT for Indigenous plan', ABC news, 27 June 2007, <http://www.abc.net.au/news/stories/2007/06/27/1963744.htm>.
  56. There are at least three concepts of cost. First, there is the addition to government spending resulting from the response. The opportunity cost is what could be done with the resources devoted to the response. Finally, there is what might be called the cost-accounting measure, which seeks to measure the total cost of resources used, directly and indirectly (for example, overhead costs), to implement the response.
  57. Hon. M. Brough (Minister for Families, Community Services and Indigenous Affairs), 'Second reading speech: Northern Territory National Emergency Response Bill 2007', House of Representatives, *Debates*, 7 August 2007, p. 11.

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- \$15.5 million in logistics support (Defence)
- \$7.4 million for police deployment (Australian Federal Police)
- \$13.9 million for staff housing (FaCSIA)
- \$34.3 million for short-term staff accommodation (FaCSIA)
- \$25.7 million for police deployments, police stations and houses (FaCSIA)
- \$71.4 million for the Northern Territory Emergency Response Taskforce Operations Centre, Business Managers and volunteers (FaCSIA)
- \$25.9 million for infrastructure upgrades (FaCSIA)
- \$14.5 million for child-protection workers (FaCSIA)
- \$41.9 million for outback stores (Indigenous Business Australia)
- \$10.1 million for staff deployment (Centrelink) and
- \$14.3 million for improved IT capacity (Centrelink).<sup>58</sup>

A total of \$266.4 million is administered expenses largely to implement the welfare payments measures (\$52.2 million), child-health-check teams, follow-up medical teams and drug and alcohol response teams (\$72.7 million), improve childhood support services and fund alcohol diversionary programmes (\$91.2 million), improve teacher workforce capacity and increase the number of classrooms (\$16 million) and fund extra legal services and night patrols (\$10.7 million).

There is, as yet, no commitment to funding beyond 2007–08, nor is there any forecast of what time the ‘stabilisation’ phase might require. Although the appropriations are largely directed at the immediate need to fund the personnel and infrastructure requirements of the child-protection measures, significant amounts are appropriated for implementing and managing the welfare-payment reforms such as the Income Management Regime, removal of all Remote Area Exemptions, Community Development Employment Projects transition payments, Government Business Managers and providing new or upgraded outback stores. These measures might be seen as longer-lasting and flowing on to a ‘normalisation’ phase.

Although there is some funding aimed at achieving long-lasting outcomes—such as funding for new classrooms, initiatives to retain teachers, community health assessments, night patrols, ongoing jobs and training—a greater funding commitment might be required to achieve ‘normalisation’ and ongoing improvements in outcomes in education, housing, health and employment for Aboriginal peoples in the Northern Territory. Estimates

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58. All amounts are sourced from the Minister’s second reading speeches for Bill (No. 1) and Bill (No. 2) and the second reading speech for Bill (No.1) circulated by the House of Representatives Table Office with the Bill.

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include \$1.4 billion to provide housing, at seven persons per house, (some communities now average 15 or 16 people per house, a family per bedroom);<sup>59</sup> \$460 million extra over five years for health; \$690 million over five years for remote community schools and teachers, and \$1.4 billion over five years for converting CDEP jobs to ‘proper’ jobs.<sup>60</sup>

## Main provisions

### Part 1–Preliminary

**Clause 3** contains many definitions used and referred to later in the Bill’s provisions. A central definition of a ‘prescribed area’ is contained in **clause 4**. This definition is used in other accompanying Bills and it is sufficiently broad as to encompass any area of the Northern Territory, if the Minister chooses to utilise his or her broad discretions. Subclause 4(2) describes prescribed areas as

- ‘aboriginal land’ as defined in subsection 3(1) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (the ALRA).<sup>61</sup> **Schedule 1, Part 1** names these areas and contains extensive and precise definitions of geographical descriptions.
- roads, rivers, streams, estuaries etc that are excluded by Schedule 1 of ALRA or those that are excluded because of other provisions in that Act.
- land granted under the *Lands Acquisition Act 1978* (NT).
- town camps declared by the Minister (these are also names and described extensively in **Schedule 1, Part 4**) and
- any area in the NT declared by the Minister that was not previously covered.

The Minister also has an unfettered discretion to declare areas to be excluded from the definition (**paragraph 4(4)(a)**).

**Clause 5** declares the object of the Act to be

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59. In the 2007–08 Budget the Government committed \$293.6 million over four years to start up the new Australian Remote Indigenous Accommodation (ARIA) Programme, additional to funding of \$380 million per year for Indigenous housing. This is not, however, committed specifically to the Northern Territory.

60. J.C. Altman, ‘Stabilise, normalise and exit = \$4billion. Cheap at the price?’, Centre for Aboriginal Economic Policy Research, ANU, Topical Issue No. 8/2007, 29 June 2007, [http://www.anu.edu.au/caepr/Publications/topical/Altman\\_Costing.pdf](http://www.anu.edu.au/caepr/Publications/topical/Altman_Costing.pdf).

61. ALRA 3(1) defines aboriginal land as

- (a) land held by a Land Trust for an estate in fee simple; or
- (b) land the subject of a deed of grant held in escrow by a Land Council.

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to improve the well-being of certain communities in the Northern Territory.

**Clause 6** contains the sunset provisions of the Act which will apply to end most of the legislation after 5 years, but will not end the operation of **Parts 4, 6 and 8**. **Part 4** covers the acquisition of rights, titles and interests in land (some provisions of which are defined to have a time limit and some which do not), **Part 6** deals with provisions regarding bail and sentencing, and **Part 8** covers miscellaneous provisions, including the general exemption of the proposed Act from Part II of the *Racial Discrimination Act 1975* (the RDA). It is Part II of the RDA which functions to prohibit racial discrimination. **Part 8** also deals with the provisions governing compensation for the acquisition of property. These three named parts and associated mechanical provisions will continue on after the sunset provisions come into operation.

## Part 2–Alcohol

### Background

Around Australia there has been a developing use of alcohol free zones (‘dry zones’ or ‘restricted areas’).<sup>62</sup> Such areas have been heavily utilised in the NT. In March 2006 the Territory had 97 restricted areas.

The NT Government has previously announced the Alcohol Framework project as part of the Government’s Five Point Plan on Alcohol (September 2003). The Framework was intended to provide a broad structure for Government, individual agencies, community interests, licensees and other industry participants to work together to regulate the use of alcohol in the Northern Territory, and to minimise alcohol-related harm to individuals and the community.

There was an Interim and Final Report on the Northern Territory Alcohol Framework in 2004.<sup>63</sup> The reports detailed a proposed Framework for Government action in relation to alcohol and considered a number of specific issues including the liquor licensing system, improved compliance and enforcement of liquor licensing laws, treatment and other interventions for individuals with alcohol problems and other strategies to reduce alcohol related harm. The interim report noted that there has been little formal evaluation of

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62. See generally *Australian Local Government: Alcohol Harm Minimisation Projects: A good practice guide*, A report prepared by Trevor King and Jennifer Richards, Turning Point Alcohol And Drug Centre, Melbourne, 2003 for the National Drug Strategy Local Government Subcommittee.

[http://www.health.gov.au/internet/wcms/publishing.nsf/Content/health-publth-publicat-document-metadata-alc\\_harm.htm/\\$FILE/alc\\_harm.pdf](http://www.health.gov.au/internet/wcms/publishing.nsf/Content/health-publth-publicat-document-metadata-alc_harm.htm/$FILE/alc_harm.pdf)

63. The report can be viewed at [http://www.nt.gov.au/ntt/licensing/alcohol\\_framework/AlcoholFrameWorkInReportFinal1.pdf](http://www.nt.gov.au/ntt/licensing/alcohol_framework/AlcoholFrameWorkInReportFinal1.pdf).

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restricted areas legislation in the Northern Territory or other parts of Australia. What information there was suggested that the Northern Territory restricted areas legislation should be considered a qualified success, with reductions in alcohol-related harms found in many but not all communities studied.<sup>64</sup>

The Final Report contained a recommendation regarding the need to undertake research on the effectiveness of the restricted areas legislation:

The Office of Alcohol Policy and Coordination in cooperation with the Division of Racing Gaming and Licensing should undertake research on the effectiveness of restricted areas and the benefits of, and harm flowing from, social clubs in restricted areas. Such research should respond to the needs of local communities and the outcomes should be used to assist in planning local community action to enhance the ability of restricted areas to achieve harm minimisation goals. [Rec. 56]

On 11 October 2005, the Minister for Racing, Gaming and Licensing delivered an Alcohol Ministerial Statement to the Legislative Assembly which outlined the government's approach to addressing alcohol issues in the community. A significant initiative of the new approach was the establishment of the Office of Alcohol Policy and Coordination.

The Office was designed partly on these recommendations in the Final Report. The primary role of the Office is to help monitor, develop, support and integrate government policies, services and programs to reduce alcohol-related harm in the community. Related to its role within government, the Office also supports communities to develop local alcohol management plans. In addition to providing expert advice and critical input to those plans, the Office was designed to ensure local communities are linked into appropriate Departments and that Departments deliver as much as possible to enable the plans to be implemented.

The Anderson/Wild report identified the regulation of alcohol as crucially important in the drive to prevent child abuse:

Alcohol remains the gravest and fastest growing threat to the safety of Aboriginal children. There is a strong association between alcohol abuse, violence and the sexual abuse of children. Alcohol is destroying communities. The Inquiry recommended urgent action be taken to reduce alcohol consumption in Aboriginal communities.<sup>65</sup>

The report's recommendations on alcohol (numbers 61-69) recommend that, 'as a matter of urgency,' the established Alcohol Framework be implemented and that the NT

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64. Peter D'Abbs, *Dry areas, alcohol and aboriginal communities: a review of the Northern Territory restricted areas legislation*, 1990 (revised).

65. Summary of the Anderson/Wild report, [http://www.nt.gov.au/dcm/inquirysaac/report\\_summary.html](http://www.nt.gov.au/dcm/inquirysaac/report_summary.html).

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government consult with Aboriginal communities to identify ‘culturally effective strategies’ to reduce alcohol related harm. It was recommended the NT government should make greater efforts to reduce access to takeaway liquor, increase responsible behaviour in the area and support ‘Aboriginal community efforts to deal with issues relating to alcohol.’ There were recommendations with respect to a range of matters for the NT administration, including that the Licensing Commission take into account the effect of licensing decisions on child protection issues. Finally there was an emphasis on education and the promotion of a healthy approach to alcohol through the media and a recommendation that options for delivering alcohol counselling be explored.

## Provisions

**Proposed Part 2** introduces new provisions which would apply to the Northern Territory’s *Liquor Act 1978*, *Liquor Regulations* and *Police Administration Act 1978*. These provisions ban the consumption, possession or supply of liquor within prescribed areas. The central definition of a ‘prescribed area’ is contained in **clause 4**, which relies on definitions of ‘Aboriginal land’ in the ALRA, and also gives the Minister discretion to exempt or add any area in the NT to the category of a prescribed area.

### Division 1

**Clauses 9** and **10** establish that the NT legislation continues on under the Commonwealth regime as if the modified Acts were NT laws. **Clause 8** requires the NT Commissioner for Licensing and the Director to supply to the Commonwealth Minister any information he or she requests.

### Division 2—Prescribed areas

**Clause 11** provides that notices must be posted at customary access routes into a prescribed area explaining it is an offence to bring liquor into, to be in possession of, to consume or to sell liquor within a prescribed area.<sup>66</sup> Possible penalties must also be specified in the notice. The Northern Territory Licensing Commission must also publish notices in newspapers circulating in the area describing the relevant areas and specifying the offences and penalties.

The NT Liquor Act’s penalties are replaced by **clause 12**. This provision would make it an offence to bring alcohol into a prescribed area, or to possess it or consume it (**subclause 12(2)**). The penalty for a first offence is \$1100 and \$2200 for a second offence and subsequent offences.<sup>67</sup> It is also an offence to supply alcohol to someone in a prescribed area or to supply it or possess it with an intention of giving it to someone who, in turn,

66. **Clause 16** would make it an offence to wrongly remove or damage a notice.

67. \$1100 is 10 penalty units, and \$2200 is 20 penalty units. Section 4AA of the *Crimes Act 1914* defines penalty unit as \$110.

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intends to give it to a person in a prescribed area (**subclause 12(4)**). If the amount of alcohol involved in such a situation is more than 1350ml there is a significantly more serious penalty attached (\$74 800 or 18 months imprisonment – **subclause 12(6)**).

There is an exemption proposed for people engaged in recreational boating or commercial fishing activities (**subclauses 12(3) and (5)**). Such people are not to be subject to the prohibitions in **subclauses 12(2) and (4)**. However the Commonwealth Minister may declare a specified area of waters in a prescribed area and the exemption will no longer be effective. Once again the Northern Territory Licensing Commission must advertise the fact that the waters in question are subject to the penalty provisions.

Licences to sell alcohol in prescribed areas will continue to be effective although the Commonwealth Minister will be able to counteract their effect and stipulate (by notice in writing) that a permit holder cannot bring alcohol into the prescribed area, possess it or consume it (**clauses 13 and 14**).

### Division 3

If the licensee of licensed premises sells pure alcohol of more than 1350ml in a single transaction, knowing that it is for consumption away from the premises (or reckless that it might be) then an offence is committed under **clause 20** with a maximum penalty of \$37 400. A lesser penalty applies to a parallel offence by an employee of the licensee. If the name and address and the place where it is proposed that the alcohol will be consumed are recorded by the employee or licensee then (as long as identification has been shown, for example a passport or driver's license) an offence is not committed by selling the alcohol. These records must be kept for at least 3 years after they are made (**clause 21**).

The provisions of this Part are subject to the Act's sunset provisions (**clause 6**), which stipulate that the Part's provisions will cease to have effect after 5 years.

In an almost comical submission to the Senate Committee Inquiry into the provisions of the Bill, the Woolworths Liquor Group poses a question as to how the implementation of the prohibition on the sale of 1350 mls of pure alcohol is to be monitored:

[1350 mls of pure alcohol] is stated as equating to just over 3 cases of full-strength beer, but this holds true only in the case of 24x375ml cartons. This calculation becomes extremely complex when mixed sales of beer, wine and spirits take place.

The alcohol content of beer varies between 2% alcohol by volume and 7% alcohol by volume (some beers are lower and higher but this range would catch 99% of transactions). Liquid volume in a full case of beer varies from just under 4 litres (24x250ml) to 11.25 litres (30x375ml) consequently the pure alcohol content of a case of beer varies between 120ml to 540ml. This ignores other possible permutations caused by different alcohol volumes and pack sizes.

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The alcohol content of a bottle of wine varies between 5% and 20%, although most bottles are 750ml our stores stock sizes varying between 187ml and 2000ml. In any given 750ml bottle of wine, pure alcohol content can vary between 37.5ml and 150ml. In addition to this the alcohol content of the same brand and variety of wine can vary from vintage to vintage. This ignores other possible permutations caused by different alcohol volumes and pack sizes.

In the case of spirits, alcohol content can vary between 20% and 57% for commonly stocked brands. Common bottle sizes range from 50ml to 1125ml, although a number would fall outside this range. The pure alcohol content of a standard 700ml bottle of spirit could vary between 140ml to 400ml. This ignores other possible permutations caused by different alcohol volumes and pack sizes.

A typical supermarket liquor store would stock approximately 1,300 different products. We understand that there is a proposal to produce some kind of “ready reckoner” to calculate the potential alcohol content in any transaction. The number of possible combinations of products in any given transaction makes it difficult to contemplate how this could be achieved.<sup>68</sup>

The submission makes it quite clear Woolworths is anxious to comply with the requirements of the legislation (particularly because non-compliance entails a fine of \$37 000 for the company and \$6 600 for the individual employee) but needs guidance on how this is to be achieved.

### Part 3—Filtering of publicly-funded computers

#### Background

##### Computer filtering

In 2004 a government report concluded that filtering ‘can limit the internet content end-users can access by preventing or blocking access to specified pieces of types of content’.<sup>69</sup>

The government has argued that forcing Internet Service Providers (ISPs) to filter websites at server level is less effective than filtering individual computers, and slows down the internet. The Minister for Communications, Information Technology and the Arts, Senator the Hon. Helen Coonan, has stated that:

PC-based filters are more effective at blocking all manner of offensive content, provide greater control to parents of the content their children are exposed to and do not affect the performance of the Internet for all users.<sup>70</sup>

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68. [Submission no. 41](#) to the Senate inquiry.

69. Department of Communications, Information Technology and the Arts, [Review of the operations of schedule 5 to the Broadcasting Services Act 1992](#), Canberra, 2004, p. 15.

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In March 2007, the government was expecting to undertake trials of PC and ISP filters over the following few months.<sup>71</sup>

In the meantime, it was expected that a National Filter Scheme would receive \$93.3 million over three years, so that Australian families would be offered a filtered service or a free filter for their home computer, either for download from a dedicated website or delivered on CD-ROM. All ISPs would be required to offer filters to new and existing customers at no additional cost.<sup>72</sup> The Prime Minister made an announcement about this NetAlert system in his webcast address—organised by the Australian Christian Lobby—from the National Press Club on 9 August 2007.<sup>73</sup>

Discussion of the filter scheme has been inclusive of all Australian families and has made no specific reference to any particular group. One academic has noted however, that:

Once a national filtering system is in place, governments may be tempted to use it as a tool of political censorship or as a technological “quick fix” to problems that stem from larger social and political issues.<sup>74</sup>

As to the effectiveness of filtering systems, a US report last year found that:

filters are still seriously flawed. They continue to deprive their users of many thousands of valuable Web pages, on subjects ranging from war and genocide to safer sex and public health.

...

the widespread use of filters presents a serious threat to our most fundamental free expression values. There are much more effective ways to address concerns about

70. Senator the Hon. Helen Coonan, Minister for Communications, Information Technology and the Arts, *Labor very late to the Internet filtering debate*, media release, 21 March 2006.

71. R. LeMay, ‘Coonan’s PC porn filter six months late’, ZDNET, 16 March 2007, <http://www.zdnet.com.au/news/communications/soa/Coonan-s-PC-porn-filter-six-months-late/0,130061791,339274289,00.htm>.

72. Senator the Hon. Helen Coonan, Minister for Communications, Information Technology and the Arts, *\$116.6 million to Protect Australian Families Online*, media release, 21 June 2006.

73. D. Shanahan and J. Rowbotham, ‘Howard’s net porn crusade’, *The Australian*, 10 August 2007, p. 1.

74. N. Villeneuve, ‘The filtering matrix: Integrated mechanisms of information control and the demarcation of borders in cyberspace’, *First Monday*, vol. 11, no. 1, January 2006, [http://firstmonday.org/issues/issue11\\_1/villeneuve/](http://firstmonday.org/issues/issue11_1/villeneuve/).

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offensive Internet content. Filters provide a false sense of security, while blocking large amounts of important information in an often irrational or biased way.<sup>75</sup>

#### Pornography in Aboriginal communities

The Anderson/Wild report concluded that pornography was one of the main factors that:

lead inexorably to family and other violence and then on to sexual abuse of men and women and, finally, of children.<sup>76</sup>

The report noted that:

children in Aboriginal communities are widely exposed to inappropriate sexual activity such as pornography, adult films and adults having sex within the child's view. This exposure can produce a number of effects, particularly resulting in the "sexualisation" of childhood and the creation of normalcy around sexual activity that may be used to engage children in sexual activity. It may also result in sexual "acting out", and actual offending, by children and young people against others.<sup>77</sup>

The report concluded that the availability of pornography and children's exposure to it is the result of 'poor supervision, overcrowding in houses and acceptance or normalization of this material'.<sup>78</sup>

However, it is noteworthy that there is no mention in the report of internet pornography in Aboriginal communities. The main forms of pornography that are discussed are videos and DVDs, as well as the Austar and SBS television channels.<sup>79</sup> Furthermore, the report makes no recommendations in regard to internet filtering. Rather, its recommendation in relation to pornography is to conduct education campaigns in communities about the film classification system, the illegality of exposing children to indecent material, and the harm that such exposure produces.<sup>80</sup>

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75. M. Heins, C. Cho and A. Feldman, *Internet Filters: A Public Policy Report*, Brennan Center for Justice at NYU School of Law, 2006, <http://www.fepproject.org/policyreports/filters2.pdf>, p. ii.

76. Anderson/Wild report, op. cit., p. 6.

77. *ibid.*, p. 65.

78. B. Johnstone and C. Grahame, 'No progress on stamping out porn in NT's black towns', 26 July 2007, <http://www.nit.com.au/news/story.aspx?id=12164>.

79. Anderson/Wild report, op. cit., p. 199.

80. *ibid.*, p. 200.

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Given this apparent disjuncture between the Anderson/Wild report and the government's response, it is legitimate to ask some general questions about the computer-filtering provisions in this Part:

- Do mandatory filters on publicly-funded computers represent a justifiable infringement of free speech, especially when filtering may well hinder access to material that is perfectly legal—as seems to be recognised by the exemption for study purposes? In the United States, where the protection of free speech is much more entrenched, public libraries have strenuously opposed the installation of filters on public-access computers.
- Is there a constitutional issue involving the implied freedom of political communication? Subclause 28(3) says that the policy must state that a publicly-funded computer cannot be used to access or send a communication containing material or a statement that, for example, contravenes or forms part of an activity contravening Commonwealth, state or territory law or incites a person to contravene such a law. Nor can the computer be used to send an anonymous or repeated communication designed to annoy or torment. Many forms of political protest and also some political lobbying might be caught by these prohibitions.
- Is it discriminatory to impose filtering and auditing on publicly-funded computers in Aboriginal areas of the Northern Territory, but not in Australia in general, and would the courts have considered the discrimination legally justifiable as a special measure under the *Racial Discrimination Act 1975*? The Bill's definition of anything it proposes as a special measure, and the Bill's proposed suspension of Part II of the RDA, might function to make this question superfluous, however it is instructive to consider how the provisions would have traditionally fit with the provisions of the RDA.
- Is it appropriate to use the Australian Crime Commission—a body that was set up to fight serious and organised crime—to police the use of computers by individuals, when this could be done by a local police force—or even by administrative action? To put it another way, is this an example of unnecessary legislation?
- Does the need to conduct regular audits mean that filters are not really effective? A recent report that the Government's \$116 million NetAlert project to provide nationwide ISP-level internet filtering would get off the ground 'within weeks', although the same report stated that technical trials were scheduled to go ahead later this year, and that the internet industry believed that the system would be unworkable.<sup>81</sup>
- Is it appropriate to mandate filtering, user logs and audits of all *publicly-funded* computers in these Aboriginal communities, or should these measures be confined to

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81. Andrew Colley, 'Internet predator protection "in weeks"', *The Australian*, 31 July 2007, p. 32.

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*publicly-accessible* computers? Under the Bill's proposals, if a single person is responsible for a computer that is used solely for work purposes, that person may have to write his or her own acceptable-use policy and keep a log of his or her own use of the computer.

- Who bears the costs of the exercise? As submissions to the Senate Committee show, it can be difficult to manage these matters at the best of times.<sup>82</sup>
- There are privacy issues involved in keeping an extensive database for three years—a database from which personal details would presumably be ascertainable.

## Provisions

This Part requires filters accredited by the Minister to be installed and maintained on publicly-funded computers within prescribed areas (**clause 26**). Included are computers owned or loaned by bodies or individuals that receive government funding, or that directly or indirectly receive funding for employment programs. There is an exemption for a period if—for purposes of work, research or study—a person needs to access material that would otherwise be blocked by a filter (**sub-clause 26(3)**). Presumably the regulations will specify more detail about the requirement to maintain and update filters.

Records must be kept for three years about each person who uses such a computer, and the time when it was used (**clause 27**).

The Minister may determine matters that must be included in acceptable-use policies. These policies must state that the computers may not be used for illegal purposes, notably for criminal activity or incitement, obscenity, harassment or stalking. There is no defence for not developing an acceptable-use policy (**clause 28**).

These computers must be audited twice a year, on specific days, and audit reports must be given to the Australian Crime Commission within two weeks. If a person knows or is reckless that illegal material has been accessed or stored on a computer, an additional audit must be performed as soon as practicable (**clause 29**).

Strict liability offences with fines of up to \$550 apply to failures to filter a computer, keep records, develop and publish an acceptable-use policy, or perform audits. Fines of up to \$1100 apply when a person fails to ensure a computer audit with the result that illegal material is not identified. These offences commence 28 days after Royal Assent, giving computer administrators one month to install filters, create user logs and prepare acceptable-use policies (**clause 30**).

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82. Laynhapuy Homelands Association Incorporated, submission [No. 38](#) to the Senate inquiry.

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## Part 4 – Acquisition of rights, titles and interests in land

### Background to the lease issue

Part 4 provides for the acquisition of right, titles and interests in land, and Division 1 for the grants of leases for 5 years. ‘Acquiring townships prescribed by the Australian Government through five year leases including payment of just terms compensation’ had been one of the measures announced by the Government on 21 June 2007.<sup>83</sup>

Although this measure has been presented in the context of responding to child abuse in the Northern Territory, it comes in the context of a long debate over the merits of offering Indigenous individuals in the Northern Territory the possibility of subleasing back as ‘private land’ communal land that a community has agreed to lease out long-term to a government body or agency. It is also in the context of the Federal Government’s long-expressed interest in making this possible.

As long ago as 1998 John Reeves’, in his *Review of the Aboriginal Land Rights (Northern Territory) Act 1976, Building on Land Rights for the Next Generation*,<sup>84</sup> recommended, among other things, giving the Northern Territory Government power to compulsorily acquire Aboriginal land for public purposes, and the development of leasing arrangements to enable Aboriginal people to own their homes on communal land. The Reeves report prompted several further reviews, including one by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (HORSCATSIA); and a joint response to the Reeves Report by the NT Government and Land Councils.

The NT Government was also developing its own model for township leasing, and in July 2004 sent an options paper to the four NT Land Councils for consideration. However, the Commonwealth’s amendments to the ALRA overtook this plan and in 2005 the NT Government wrote to the Australian Government suggesting a voluntary leasing plan which would recognise the right of traditional owners to make decisions over their land.

In April 2005 the Prime Minister stated:

I believe there is a case for reviewing the whole issue of Aboriginal land title, in the sense of looking towards private recognition. ... I certainly believe that all Australians should be able to aspire to owning their own home and having their own business. Having the title to something is the key to your sense of individuality; it’s the key to

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83. Minister Brough, *National emergency response to protect Aboriginal children in the NT*, media release, 21 June 2007.

84. <http://www.austlii.edu.au/au/journals/AILR/1999/6.html>

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your capacity to achieve, and to care for your family and I don't believe that indigenous Australians should be treated any differently in this respect.<sup>85</sup>

In June 2005 the National Indigenous Council (the NIC, the advisory body to the government on Indigenous matters) presented its [Indigenous Land Tenure Principles](#) to Government. While acknowledging that communal interest in land is fundamental to Indigenous culture and should be inalienable, the Council considered that 'individuals and families [should be able] to acquire and exercise a personal interest in those lands, whether for the purposes of home ownership or business development.' Further, it said, the consent of traditional owners should not be unreasonably withheld to requests for individual leasehold interests and that 'involuntary measures should not be used except as a last resort.'<sup>86</sup>

A number of Indigenous leaders have criticised these proposals. Noel Pearson has commented:

The concern from the indigenous community that I'm hearing is that the legitimate issue of home ownership might be used as a Trojan horse for a reallocation of land rights – a taking of rights away from Aboriginal people.<sup>87</sup>

In his *Native Title Report 2005*, Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma pointed to existing leasing provisions in statutes like the ALRA and commented:

As a consequence, it is not necessary to put the communal tenure of Indigenous land at risk as the NIC Principles propose. ...

The NIC Principles are premised on the idea that private land ownership will lead to economic development because the land owners will have an economic interest in seeing land value improved. The NIC Principles also assume that communal land ownership will not lead to development, and the interests of the land will not be protected. ...

International experience demonstrates that individual title does not lead to improved economic outcomes.<sup>88</sup>

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85. Transcript of the Prime Minister, the Honourable John Howard MP, Doorstop interview, Wadeye, Northern Territory, 6 April 2005,

<http://www.pm.gov.au/news/interviews/Interview1305.html>.

86. National Indigenous Council, *Indigenous Land Tenure Principles*, reproduced in Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*, Annexure 2. Accessible at: [http://www.humanrights.gov.au/social\\_justice/ntreport05/](http://www.humanrights.gov.au/social_justice/ntreport05/)

87. 'Pearson warns PM on home title fears', *The Australian*, 14 April 2005.

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In a 2005 Oxfam Australia report, an Australian National University team found ‘no evidence to suggest that individual land ownership is either necessary or sufficient to increase economic development or housing construction.’<sup>89</sup> They concluded:

The evidence does not support the notion that private individual ownership of low-value land in remote settings can be the driving force in addressing housing or other needs. The principal issues for any new policy framework continue to be contemporary Indigenous poverty, and the historic lack of services, housing and associated infrastructure. The notion that land rights reform can be the main driver for economic development should be reconsidered in light of the legacy of disadvantage, cultural difference and structural factors faced by these communities. Such debates must also recognise that there are fundamental Indigenous cultural reasons for attachment to land, irrespective of its commercial potential, as well as unique and diverse Indigenous perspectives on what development is appropriate for their communities and country.

The report concludes that very significant structural issues must be addressed to encourage economic development and address housing needs, including the remoteness of communities from mainstream markets; relatively low populations and population densities; the need for greater investment in education and vocational skills; poor infrastructure; and the generally economically marginal nature of most Aboriginal lands.<sup>90</sup>

A contrary view was put by researchers at the Centre for Independent Studies. In *A New Deal for Aborigines and Torres Strait Islanders in Remote Communities*, Professor Helen Hughes and Jenness Warin argue:

Communal ownership of land, royalties and other resources is the principal cause of the lack of economic development in remote areas. Commonwealth, State and Territory legislative and regulatory frameworks have to make it possible for Aborigines and Torres Strait Islanders who choose to do so to become individual land owners and entrepreneurs. Royalties from mining, fishing, telecommunications and other sources must become transparent and flow to individuals. An end to communal ownership and asset management would cut into the power of councils, associations and their ‘big men’, making income distribution more equitable and greatly reducing the need for bargaining and political power plays that make life miserable and lead to incessant violence. Investment in land and other assets has to become viable. With

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88. Aboriginal and Torres Strait Islander Social Justice Commissioner, ‘Chapter summary’, *Native Title Report 2005*, [http://www.humanrights.gov.au/social\\_justice/ntreport05/summary.html](http://www.humanrights.gov.au/social_justice/ntreport05/summary.html).

89. Jon Altman, Craig Linkhorn and Jennifer Clarke, assisted by Bill Fogarty and Kali Napier, *Land rights and development reform in remote Australia*, Oxfam Australia, 2005, p. 5.

90. *ibid.*

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individual property rights, land could be used for collateral to borrow for business, allowing the application of capital and technology to create productive enterprises with employment capacity. Private property rights in land are essential to attracting outside investment that is a pre-requisite to a major expansion in employment opportunities.<sup>91</sup>

In the course of 2005 the Government committed itself further to reform in the area of Indigenous home ownership, offering additional funding for purchasing homes, and a scheme to facilitate township leasing was included in the 2006 ALRA amendments. Under section 19A of the ALRA, a Land Trust may grant a 99 year lease of a township to an 'approved entity', which means either a Commonwealth or NT entity, if both the Minister and the Land Council agree to the granting of the lease. The Commonwealth was added at the last moment, with Federal doubts mounting as to the NT's commitment to the plan. After 69 years, the Land Trust may grant another lease to the same entity, to ensure certainty for home owners and other lessees (subsection 19A(5) of the ALRA).

The *Aboriginal Land Rights (Northern Territory) Amendment (Township Leasing) Bill 2007*, 24 May 2007, sought to establish the office of Executive Director of Township Leasing, to enter into and administer township leases on Aboriginal land in the Northern Territory, under the [Aboriginal Land Rights \(Northern Territory\) Act 1976](#).

For more on concerns raised with respect to these recent development see, inter alia, Jennifer Norberry and John Gardiner-Garden's Bill Digest on the Aboriginal Land Rights (Northern Territory) Amendment Bill 2006.<sup>92</sup>

Although the 5-year lease being proposed in the current bill may in the short term have a very different purposes to that of the above discussed 99 year leases, given the above context, it is not surprising that one of the main concerns raised with respect the proposed compulsory 5-year leases is that it may prove a stepping stone to 99 year leases – with failure to solve all community problems inside five years being used down the track for extensions of the arrangement.

#### Division 1 – Grants of leases for 5 years

This Division sets out the conditions under which the Commonwealth will assume five-year leases of Aboriginal lands.

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91. '[A new deal for Aborigines and Torres Strait Islanders in remote communities](#)', *Issue Analysis*, Centre for Independent Studies, no. 54, 1 March 2005, p. 15.

92. <http://www.aph.gov.au/library/pubs/bd/2005-06/06bd158.pdf>. Another useful resource is Sean Brennan, 'Economic Development and Land Council Power: Modernising the Land Rights Act or Same Old Same Old?', *Indigenous Law Bulletin*, 2006 10(4), pp. 1-34.

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**Clause 31** grants to the Commonwealth a five-year lease over all Aboriginal land as defined by the ALRA, land granted to an association under subclause 46(1A) of the *Lands Acquisition Act* of the Northern Territory, and some other lands already subject to leases (surrounding Finke, Kalkarindji, Daguragu and Pine Creek).

Land which is already covered by a registered lease, for example a 99-year township lease as introduced in the 2006 ALRA amendments, is excluded from the five-year Commonwealth lease (**clause 31(3)**).

If, during the Commonwealth's five-year lease, a Land Trust decides to enter into a 99-year township lease (under section 19A of the ALRA), then the Commonwealth's lease under proposed section 31 is terminated at the time the township lease takes effect (**clause 37(6) to (9)**).

Any existing rights, title or other interests in land (excluding native title rights) are preserved by **subclause 34(3)**. **Subclause 34(4)** provides that if the land owner has granted any rights, title or interests to another party, it is taken to be in force as if the Commonwealth had granted that right, title or interest on the same terms and conditions. However, **clause 34(5)** allows the Minister to determine in writing that the existing grant of rights, title or interests in land, as allowed in s. 34(4) do not have effect during the five-year lease. The Minister's determination is not a legislative instrument (therefore cannot be disallowed by Parliament) and there is no avenue of appeal.

Land Trusts may continue to grant leases according to s. 19 of the ALRA, however the consent of the Minister will be required (**clause 52**) during the five-year Commonwealth lease period. If the Minister consents to such a lease, then the s. 31 Commonwealth lease covering that area of land will be varied to exclude that part.

The Northern Territory laws regarding subdivision will not apply to the Commonwealth leased land (**clause 57**). **Clause 58** would allow the Commonwealth to make regulations modifying Northern Territory law relating to planning, infrastructure, subdivision or transfer of land, local government, or other matters, for land covered by the provisions of this Bill.

Finally the Commonwealth and its employees and agents are given the right to use the shortest practicable route between areas of land covered by a lease under s. 31 (**clause 42**).

## Division 2 – Acquisition of rights, titles and interests relating to town camps

Under the Northern Territory [\*Special Purposes Leases Act\*](#), the NT Government has granted leases in perpetuity to entities to administer Aboriginal town camps which surround urban areas. For example, the Tangentyre Council, on behalf of 18 Indigenous Corporations, manages a Special Purpose lease for town camps surrounding Alice Springs, and the Julalikari Aboriginal Corporation administers the Tennant Creek camps.

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Management of the town camps has been a contentious issue and the Commonwealth Government has attempted to negotiate with town camp leaseholders to return the leases to the Northern Territory government, in exchange for Commonwealth funding for housing and other services.

Upon the Commonwealth Government's announcement that it was considering whether it could compulsorily acquire leases for town camps, the Northern Territory Government responded that it would be 'working with town camps to see if the Australian Government's objectives can be achieved without compulsory acquisition.'<sup>93</sup>

Under **clause 44**, references in the *Special Purposes Leases Act* to the Northern Territory Minister or the Administrator will also be taken to be references to the Commonwealth Minister.

**Subclause 44(2)** states:

To avoid doubt, the Commonwealth Minister forfeits a lease of land, or resumes a land, under the Special Purposes Lease Act on behalf of the Northern Territory Minister or the Administrator of the Northern Territory.

Under section 28(a) of the *Special Purposes Leases Act*, the Administrator may, by Proclamation resume any land comprising, or included in, a lease...for any public purpose which he thinks fit. Section 29 of the Act requires six months' notice of a resumption of a lease. However, **clause 44(b)(i)** would reduce the notice time to 60 days.

Therefore, the Commonwealth Minister, empowered to act as the NT Minister or Administrator can, under the *Special Purposes Leases Act*, acquire town camp leases.

**Clause 46** makes the same arrangements for the NT [Crown Lands Act](#), under which some town camp leases are granted.

**Subdivision C of Division 2, Part 4** vests rights, titles and interests in land in the Commonwealth. Upon giving the Northern Territory government a notice that it is acquiring a lease under the Special Purposes Leases Act or the Crown Lands Act, all rights, titles and interests are taken to be vested in the Commonwealth and freed and discharged from all other rights, titles and interests and any trusts, obligations, mortgages etc (**clause 47**). The notice given under s. 47 may recognise that some rights, titles and interests are to be preserved (**clause 48**). However the Commonwealth reserves the ability to terminate any such rights, titles or interest in land by writing (**clause 49**).

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93. <http://www.stopabuse.nt.gov.au/facts.shtml>.

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The Commonwealth has the power to interpret, modify and use Northern Territory legislation, as it has done in this section dealing with town camp leases, via the Territories power in the Constitution (s. 122).

### Division 3—Effect of other laws in relation to land covered by this Part etc.

#### Native Title Act

**Clause 51** sets out the parts of the Bill to which Division 3 of Part 2 of the *Native Title Act 1993* (the ‘future act’ provisions) does not apply. This effectively excludes anything done under Part 4. The Native Title Act’s non-extinguishment principle is preserved (**subclause 51(2)**).

The future act regime is found in pt 2, div 3 of the NTA. The future act regime is explained in the 2005 Native Title Report:

Under the NTA, proposed activities or development on land or waters that affect native title rights are classed as ‘future acts’. Because claimant applications may take years in mediation or court proceedings before a final decision is reached, the NTA provides registered claimants with procedural rights in relation to future acts while native title applications are being resolved.

Before the NTA was amended in 1998, registered native title claimants had the same procedural rights in relation to future acts as freehold owners of property would have. Plus, the ‘right to negotiate’ applied over the grant of a mining lease or compulsory acquisition for the purpose of grants to private parties. This matched the ‘underlying title’ view of native title, and was consistent with the fact that traditionally Aboriginal and Torres Strait Islander peoples had sovereign power over their land which translated into a right to have a say in future developments over land today.

The 1998 amendments gradated the procedural rights that claimants could enjoy, according to what the future act was. For example, the creation of a right to mine still triggers the right to negotiate but the grant of additional rights to the lessees of non-exclusive agricultural and pastoral land gives native title parties only the opportunity to comment. The construction and operation of facilities for services to the public (such as roads, railways, bridges, wharves and pipe lines) give native title parties the same rights as other land owners; while the grant of ‘minor licences and permits’ do not give any procedural rights to native title parties.

The future act regime has implications for how native title parties might use their rights economically by limiting the ‘right to negotiate’ to certain types of activities, thereby setting up a certain relationship between developers and native title parties.

The 1998 amendments effectively removed the right to negotiate about mining and compulsory acquisition in certain circumstances, and instituted a right of consultation, comment, objection or mere notification instead. Specifically, the amendments removed the ‘right to negotiate’ on non-exclusive pastoral and agricultural lease land and reserved land (including Aboriginal reserves), where the state or territory

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provided legislative rights of consultation and objection instead (the ‘alternative state regimes’). It also removed the right in relation to any grant or other act relating to land or waters within a town or city.

#### Public Works Committee

**Clause 53** would suspend the normal functioning of the *Public Works Act 1969*. Under this Act the Parliament’s Joint Committee of Public Works must recommend that the Parliament approve expenditure on Commonwealth-funded capital works above \$15 million. **Clause 53** would stipulate that this requirement would not apply to any work carried out on land covered by a s.31 lease agreement, land in which a Commonwealth interest exists, or town camp land resumed under the *Special Purposes Leases Act*.

This Part gives the Minister a broad discretion to suspend the normal operation of any Commonwealth law affecting actions done with respect to land covered by **clause 31** or land in which a ‘Commonwealth interest’ exists or which has been taken under **proposed Division 2**.

#### Division 4—Miscellaneous

There are several provisions in this Division that are the subject of controversy. For example, compensation for property acquired (**clause 60**) and the suspension of the operation of subsection 50(2) of the *Northern Territory (Self-Government) Act 1978*, which previously provided for ‘just terms compensation.’ These provisions are discussed further in the [Background section on just-terms compensation](#).

#### Part 5—Business management areas

In 1978 the Northern Territory Government introduced legislation (the *Northern Territory Association and Incorporation Act*) which gave community councils the ability to directly qualify for Northern Territory Government funding, thus giving these elected local councils the dominant responsibility for the management, administration and delivery of municipal services. Community Government Councils—established pursuant to the *1979 Local Government Act 1979 (NT)*—sought to extend the governance responsibilities of community councils. These areas of responsibility include:

- the provision of housing, medical, power, water, sewage and other services
- the issuance of permits for visiting these communities
- management of community assets
- acting as agent for the post office, Centrelink, power and water authorities, and other agencies.

Historically, these governance arrangements reflected both the Northern Territory and Commonwealth government’s policy and support for self-determination. Today, a small

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number of community councils remain incorporated under the old Associations Act, however, all community councils in the Northern Territory rely on direct funding from the Northern Territory Government.

The governance dilemmas, their causes and attendant social problems in these communities have been the subject of commentary and concern for sometime.<sup>94</sup> Information regarding some of this troubled history is contained in the general background above. There are currently pressing and urgent problems, including failures relating to the provision of Commonwealth or Northern Territory funded services and attendant community dysfunctions. The disturbing and chilling findings of the Anderson/Wild report have provided the Commonwealth with a catalyst, and these proposed amendments would modify the current governance arrangements in Indigenous communities. The challenges faced by these communities (as identified in the report) include:

- general lawlessness
- the struggle by small organisations to develop and sustain their service capacity
- frail administrative systems
- difficulties with the continuity of professional staffing
- difficulties in the delivery of positive and sustained tangible outcomes for community members<sup>95</sup>
- overcrowding in communities
- overcrowded and inadequate housing<sup>96</sup>

**Proposed Part 5** introduces stringent Commonwealth control over a number of aspects of community governance in Indigenous communities. These controls are to apply in business management areas. **Clause 3** (in **Part 1** of the Bill) defines business management areas as an area of land

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94. See for example, Will Sanders, '[Being a good senior manager in Indigenous community governance: Working with public purpose and private benefit](#)', Seminar paper, August 2005, Centre for Aboriginal Economic Policy Research, Australian National University; Peter Gale, '[Decades of Neglect: Remote Indigenous Communities and the Myths about Money](#)' Centre for Policy Development, 2006; Janet Hunt & Diane Smith, '[Strengthening Indigenous Community Governance: A step towards advancing Reconciliation in Australia](#)', Paper presented at Peace, Justice and Reconciliation in the Asia-Pacific Region Conference, April 1-3, 2005, Queensland University.

95. J Hunt & D E Smith, '[Building Indigenous Community Governance in Australia: Preliminary Research Findings](#)', Working Paper No. 31/2006, Centre for Aboriginal Economic Research, The Australian National University, p. xi.

96. Anderson/Wild Report, p. 12.

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- that is covered by a five-year lease granted under **proposed paragraph 31(1)(b)**;
- that is referred to in **Parts 1 to 3 of Schedule 1** to this Bill (covering an extensive number of Indigenous communities); or
- a place in the Northern Territory that is specified in **Schedule 2**; or
- a place in the Northern Territory that is declared by legislative instrument to be a business management area.

This final power to create business management areas by legislative instruments is unlimited by reference to any particular legislative criteria and gives the Commonwealth unrestrained power to create business management areas in the Northern Territory. The combined effect of the provisions means that the few remaining Indigenous communities which are not business management areas could easily be made so.

#### Division 1—Funding agreements

**Proposed Division 1** gives the Commonwealth the powers to vary and terminate Commonwealth funding agreements so as to permit adjustments to be made in the allocation, reporting requirements and management of funding provided to communities in business management areas.

Under **subclause 65(2)** these Commonwealth powers would extend to

- the ability to stipulate the ways funds are to be spent,
- the capacity to impose reporting requirements,
- the appointment of a person to control the funds to be paid under an agreement, and
- the use, management or security of assets purchased with the funding

**Subclause 65(3)** will insert a clause into funding agreements which allows the Commonwealth to unilaterally terminate or reduce the scope of funding agreements. This clause specifically states that the Commonwealth will not be liable for loss of profits or benefits as a consequence of such actions (see **Schedule 3, clause 1(7)**).

#### Divisions 2—Directions for business management areas

According to the Explanatory Memorandum:

The purpose of **Division 2** is to allow the Minister to make directions with respect to the provision of Commonwealth and Northern Territory funded services and assets required for the delivery of those services in business management areas. These powers will allow the Minister to respond to a failure on the part of a relevant entity

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to provide the services for which it is responsible and to ensure that the resources of the entity are efficiently employed for the benefit of the community.<sup>97</sup>

#### Subdivision A—Directions relating to services

The proposed clauses and subclauses in this division specify the scope and terms of the power of the Minister to give direction to a *community services entity* in relation to the delivery of services in a business management area. A community services entity is defined in **clause 3**. The definition covers community councils, incorporated bodies, anyone or body offering services in the area and any person or entity specified by the Minister through a legislative instrument.

The Minister may exercise the power to give directions if the Minister is satisfied that either the services are not being provided in a business management area or they are not being provided in the business management area to the Minister's satisfaction. The Minister must also be satisfied that Commonwealth or Northern Territory funding has been provided that the funding could be used by the community services entity to provide the service –**subclause 67(1)**.

**Subclause 67(2)** goes further and provides that a direction may be given to a community services entity either to provide a service, or to deliver it in a specified way. This power includes a capacity to direct that a specified person is to do a specified thing in relation to that service within a specified period of time.

The Commonwealth believes that this capacity for micromanagement will enable it to ensure consistent and appropriate standards in service delivery over time.<sup>98</sup>

#### Subdivision B—Directions relating to assets

The proposed clauses and subclauses in this division specify the scope and terms of the power of the Minister to give direction to a community services entity in relation to non-fixed assets that are required for the purpose of delivering a Commonwealth or Northern Territory funded service in a business management area.

Where a community services entity owns, controls or possesses an asset, and the entity provides services in a business management area, the Minister may exercise this power if the Minister is satisfied that the use of the asset is required for providing services in that business management area. The Minister must be satisfied that funding has been provided by the Commonwealth or Northern Territory, and that the funding could be used to provide those services – **subclause 68(1)**.

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97. *ibid*, p. 41.

98. *ibid*, p. 42.

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**Subclause 68(2)** goes further and provides that for the purposes of providing funded services, a direction may be given to a community services entity in a business management area, to use or manage an asset in a particular way, or to transfer ownership or possession of an asset to another community service entity, the Commonwealth or a specified person.

**Clause 71** allows the Minister to publish a direction in a way he or she considers ‘appropriate’. Usually publication by Government is by way of *Gazette* but could also be by way of press release or media publication.

**Proposed Subdivisions C and D** introduce civil penalties for failure to comply with directions (this will include a power to obtain injunctions through the Federal Court) and other provisions which stipulate that the Commonwealth’s directives under these provisions take precedence over the constitution of the community services entity, the laws of the Northern Territory and the directives of Northern Territory personnel.

### Division 3—Observers of community service entities

According to the Explanatory Memorandum:

The purpose of **Division 3** is to enable the Commonwealth to have access to, and knowledge of, the workings of community services entities that perform functions or provide Commonwealth or Northern Territory funded services within business management areas. This will be done by allowing the Commonwealth to appoint observers of such entities.<sup>99</sup>

The rationale for the appointment of observers has a consistent logic and the Government regards it as suited to achieving its aims. However concern has been expressed about the absence of details regarding the basis of selecting such observers in terms of professional qualifications and experience. It has also been pointed out that powers of an observer may be open to abuse.<sup>100</sup> This could be addressed in part by including an explicit code of conduct in either the proposed legislation or regulations associated with such an appointment.

### Division 4—Commonwealth management in business management areas

The most significant amendments in **Part 5** are contained in this Division.

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99. *ibid*, p. 43.

100. Nicole Watson, Jumbunna Indigenous House of Learning, University of Technology, Sydney, [Submission No. 47](#), Senate Inquiry into the Northern Territory Emergency Response Bill 2007, 9 August 2007, p. 3.

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The proposed amendments contained in **Division 4** modify Northern Territory legislation in so far as it is necessary to provide the Commonwealth with the same powers as the Northern Territory, though with appropriate adaptations. These amendments are designed to bring particular types of community services entities under external administration. The Commonwealth explains this initiative as being a response to the failures relating to the provision of Commonwealth or Northern Territory funded services in business management areas.

Subdivision A—Commonwealth management of community government councils

Subdivision A relates to Commonwealth management of community government councils.

*Community services entities* charged with providing services in *business management areas* by and large tend to be community government councils which are incorporated either under the Local Government Act or the Associations Act. The changes proposed in Division 4 modify the Local Government Act and the Associations Act so as to give powers under that legislation to the Commonwealth Minister. However, the powers given to the Commonwealth Minister under that legislation are necessarily, though not without difficulties, delimited.

**Subclause 78(1)** gives the Commonwealth Minister the same powers as the Northern Territory Minister under Part 13 of the *Local Government Act*, which deals with the suspension and dismissal of council members and the appointment of external managers. This provision only applies in relation to community government councils.

**Subclause 78(2)** limits the Commonwealth Minister's power to suspend all the members of a community government council and assume the exercise of power to circumstances relating to: the provision of services in a business management area, where the Commonwealth Minister is satisfied that the Commonwealth or Northern Territory funding has been provided to the council that could be used to provide the services.

**Subclause 78(3)** gives the Commonwealth Minister powers already in existence under the Local Government Act -- as if that Act were modified (as set out in **Table 1** in **Schedule 4**,<sup>101</sup> and as if references to the Northern Territory Minister were references to the Commonwealth Minister. However, it is noteworthy that **subclause 78(4)** permits amendments to **Table 1** in **Schedule 4** by regulations. This could raise issues in terms of the levels of scrutiny of and accountability for such changes.

Subdivision B gives the Commonwealth parallel powers over incorporated associations. Similar issues regarding accountability and scrutiny may arise.

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101. This table provides for specific modifications to Part 13 of the *Local Government Act* (NT).

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## Part 6—Bail and sentencing

**Part 6** is brief but significant. The Explanatory Memorandum says

Part 6 amends Northern Territory law to prohibit the relevant authority, when exercising bail or sentencing discretion in relation to Northern Territory offences, from taking into consideration any form of customary law or cultural practice to lessen or aggravate the seriousness of the criminal behaviour of offenders and alleged offenders. Part 6 also strengthens Northern Territory bail provisions to better secure the safety of victims and witnesses in remote communities.<sup>102</sup>

Clause 90 stipulates that, when considering whether to grant bail, the relevant authority must have regard to the decisions effect on (alleged) victims and witnesses, and must not take into account customary law. Clause 91 prohibits a sentencing authority from taking customary law into any account when devising a sentence.

Clauses 90 and 91 are modelled closely on the *Crimes Amendment (Bail and Sentencing) Act 2006* which amended the sentencing and bail provisions in the *Crimes Act 1914* in accordance with the decisions made by the Council of Australian Governments (COAG) on 14 July 2006.

COAG agreed that ‘no customary law or cultural practice excuses, justifies, authorises, requires, or lessens the seriousness of violence or sexual abuse. All jurisdictions agree that their laws will reflect this, if necessary by future amendment’. COAG also asked the Standing Committee of Attorneys-General (SCAG) to report to the next COAG meeting on the extent to which bail provisions and enforcement take particular account of potential impacts on victims and witnesses in remote communities and to recommend any changes required.

The COAG meeting followed the recommendations of the Intergovernmental Summit on Violence and Child Abuse in Indigenous Communities on 26 June 2006.

For full background on the Commonwealth measures, see the Senate Standing Committee on Legal and Constitutional Affairs [report on the Crimes Amendment \(Bail and Sentencing\) Bill 2006](#), tabled on 16 October 2006, and [Bills Digest no. 56](#), 27 November 2006.

The Bills Digest explains in detail the political impetus for the Summit and the Bill originated in public debate around the sentencing decision in the *GJ v R* case involving customary law in the Northern Territory.

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102. *Explanatory Memorandum*, p. [iii].

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The Bill was clearly framed by the Government as an attempt to provide leadership and set an example to the States in the context of ongoing negotiations. But it also was linked to funding. The Minister for Families, Community Services and Indigenous affairs, the Hon Mal Brough MP, has indicated that state and territory funding for Indigenous programs will be linked to states and territories amending their laws so as to remove cultural background from mandatory consideration when sentencing offenders. The funding linkage was opposed by ACT Chief Minister, Jon Stanhope and the WA Attorney-General.<sup>103</sup>

The Senate report noted a series of criticisms of that Bill, including that the Bill's focus was misdirected, because of the 'absence of any Federal laws relating to violence or sexual abuse in Indigenous communities that will be affected or changed as a result of the Bill'. These current amendments will, however, clearly affect NT Indigenous residents. At present, the sentencing guidelines under section 5 of the *Sentencing Act 1995* (NT) merely allow the judge discretion to consider the offender's background in the context of the seriousness of the offence. Under section 104A of that Act, only the way the judge receives any information on customary law is regulated.

HREOC has previously argued that there needs to be formalised recognition inserted into the *Sentencing Act 1995* (NT) to require the courts to always consider whether customary law is a relevant consideration and to apply it consistently with human rights principles.

The Senate Committee also voiced concerns about 'the haste with which the proposals in the [Crimes Amendment] Bill have been drafted and introduced into Parliament, without adequate, if any, consultation with Indigenous and multicultural groups'.

Finally, the Committee considered that 'the most concerning feature of the Bill is the symbolic message that it sends to the judiciary (and the community at large), and the judicial uncertainty it may create'.

As well as those general concerns which are also relevant to the present amendments, other constitutional questions arise. The Commonwealth Parliament does not have a general power to legislate with respect to criminal law in a manner which would bind the states and territories. However, the Commonwealth Parliament does have a plenary power in respect of *territories*. The proposed policy measures would limit judicial discretion in sentencing matters. The constitutionality of this arose in the mandatory-sentencing debate as to whether limiting or completely usurping judicial discretion in sentencing constitutes an impermissible interference with the judicial power. This occurs when the legislature

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103. R. Peake, 'Stanhope to defy Brough on law', *Canberra Times*, 10 July 2006, p. 3.  
A. Buckley-Carr, 'State stands firm as controversy rages', *The Australian*, 16 June 2006, p. 24.

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vests in a court capable of exercising the federal judicial power, a power which is incompatible with the judicial process.<sup>104</sup>

The Law Council of Australia has made a strong submission arguing that these provisions are an abuse of appropriate criminal proceedings.<sup>105</sup>

## Part 7–Licensing of community stores

### Basis of policy commitment

The Explanatory Statement states that Part 7 aims to address:

long-standing concerns that some stores in Indigenous communities are poorly managed and have low quality goods sold at high prices. Many Indigenous communities in the Northern Territory have only one community store. In very remote communities there may be no other store within hundreds of kilometres and even these may not be accessible during the wet season. Hence, the way community stores operate and the quality of the food that they provide are critical to the Australian Government's efforts to improve the lives of Indigenous people in the Northern Territory.<sup>106</sup>

In effect, it appears that Part 7 of the Bill, which introduces a new licensing regime for community stores, aims to maximise the relative 'value' of Government welfare payments, in comparison to the cost of living in remote Indigenous communities in the Northern Territory. By closely regulating the quality, quantity and range of groceries sold by licensed stores, the Bill also seeks to achieve an ancillary effect of increasing the quality of produce available to the communities, which may have a direct impact on the health and lifestyle.

### Provisions

Part 7 of the Bill deals with licensing of community stores. It introduces a new licensing regime, empowering the Secretary of the Department to grant 'community store licences'. The licensing regime is designed to enable the Secretary to assess a community stores' practices, including:

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104. See further D. Manderson and N. Sharp, '[Mandatory sentences and the Constitution: discretion, responsibility and the judicial process](#)', *Sydney Law Review*, vol. 22, no. 4, 2000.
  105. Law Council of Australia, submission [no. 3](#) to the Senate inquiry into the Crimes Amendment (Bail and Sentencing) Bill 2006.
  106. *Explanatory Memorandum*, p. [iii].

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- the capacity to comply with the *income management regime*<sup>107</sup>
- the quality, quantity and range of groceries and consumer items, with an express inclusion of healthy food and drink
- the business practices of the store, including pricing and other financial aspects (such as wages), and
- other matters considered relevant at the Minister's discretion, or those later specified by the Minister.

**Clause 92** outlines the meaning of 'community store', to broadly include any business which provides grocery items and drinks as one of its main purposes. The definition expressly excludes takeaway and fast food shops, roadhouses, and other kinds of business expressly excluded by regulation. As the definition is broadly defined, it might also include businesses such as petrol stations (although if this were unintended, they could be expressly excluded later by regulation).

Under the Bill, community stores would not be licensed until they are assessed by appointed authorised officers (**proposed Division 2**). Assessment occurs in the community store, with the store operator being given at least 7 days notice that the assessment will occur (**clause 95**).

Community store licences are granted (or refused) by the Secretary, following assessment of the community store(s) (**clause 98**). The Secretary may, having regard to the outcome of the store assessment (and any other relevant matters), refuse to grant a licence.

**Clause 104** states that it is a condition of any community store licence that the holder of the licence must operate the store in a satisfactory manner (having regard to the assessable matters, above). Other licence conditions are dealt with in **clauses 102–105**. The Bill also provides for licence revocation, variation, surrender and transfer (**clauses 106–111**), and stipulates that the Commonwealth may acquire all the assets and liabilities of a community store if a licence has not been continued (**clause 112**). Acquisition of property compensation is payable under **clause 134**.

**Clause 119** creates strict liability offences for store operators who refuse to produce documents and material that are 'reasonably necessary' for the store assessment (\$6 600-60 penalty units), or who fail to provide assistance and facilities which are necessary and reasonable for the assessment (\$1 100-10 penalty units).

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107 Explanatory Memorandum, p. 56. The income management regime, a statutory scheme which Government intends to establish under what will be the Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007, may involve arrangements where a portion of a welfare recipient's payment will be paid to an account established for this purpose by a community store so that the recipient can use the amounts credited to purchase food and other goods from the store.

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The Bill also provides the Secretary with a power to request information (**clause 120**), within a specified time and in a specified form or manner (at the Secretary's discretion), should the Secretary suspect that a person possesses information that relates to the assessment of a community store. Non-compliance with the request attracts a penalty of \$1 100-10 units; provision of false or misleading information attracts a penalty of \$6 600-60 units. The clause provides an exemption for people with a 'reasonable excuse' for non-compliance (however, this does not include excuses relating to the commercial sensitivity or confidentiality of the information).

### Comment

The problems with community stores clearly have a significant impact on those dependant on the store, however Parliament may wish to consider the extent of discretionary power that the proposed new licensing regime provides to the Secretary and officers. The Bill lacks the balance that could be provided by the inclusion of appeal provisions and less discretion (for example, at **subclause 120(2)**). This is particularly important for those provisions which impose a criminal penalty.

The Part is defined as over-riding all other Commonwealth laws (**clause 122**). While businesses are required to be satisfactorily assessed at the time of licensing, it is unclear how the proposed legislation will ensure that the 'satisfactory state' of business practices is maintained, given that the entire Part is subject to the sunset clause in **clause 6**.

Overall, the licensing regime does not sit comfortably with general concepts of fair trading. Parliament may wish to consider the wider implications of imposing Government control upon the practices of small business operators.

### Part 8–Miscellaneous

As well as a range of more technical provisions this Part allows the Minister to delegate any of their functions or powers under the proposed Act to the Secretary or an SES level officer (**clause 128**, although not the powers with respect to the Commonwealth management in business management areas).

As well as excluding the operation of any law of the NT which deal with discrimination (**clause 133**), **Part 8** also suspends the operation of the Self-Government Act's section 49 (**clause 131**). The Self-Government Act's provisions seeks to duplicate the Constitution in so far as its provisions protecting free trade between the States may not apply to the Territory. Section 49 stipulates that 'Trade, commerce and intercourse between the Territory and the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.' The other provision of the Self-Government Act which is to be suspended is subsection 50(2). This subsection deals with compensation for the acquisition of property. Once again the Self-Government Act's provision sought to duplicate Constitutional provisions ensuring just terms compensation. The Commonwealth is replacing this provision with its own modified version, which depends

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on a concept of reasonable compensation. There are discussions of the implications of these provisions in the body of this Digest.

## Concluding comments

The grim histories of violence outlined above would impel most people to support actions being taken to prevent recurrences of these problems.<sup>108</sup> The question which must arise when considering this legislative package is whether it contains the most effective actions to achieve the commonly desired outcome. Is the ‘something’ which must be done the most effective ‘something’.

In determining what will achieve the best possible outcome, it can be useful to consult those familiar with the problems and familiar with measures that have been taken previously and their relative levels of success.

Minister Brough is clear that he has consulted regarding the provisions of the package. The submissions flowing in to the one-day Senate inquiry are also clear that there has been insufficient consultation regarding the package.

The measures which modify standard provisions regarding just-terms compensation and racial discrimination have been discussed above and are a frequent source of concern amongst contributors to the inquiry.

The changes introduced by the Bill are really quite profound and impact in so many different ways that it certainly seems to need further consideration to determine whether or not the measures are best adapted to achieving the desired changes.

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108. It is interesting to note, however, that Vince Kelly, the President of the NT Police Association, has cast doubt on the Anderson/Wild report and has said there was still no concrete evidence to support claims child sex-abuse was rampant in Aboriginal communities territory-wide. (AAP, NT: Child abuse report lacks evidence and substance – police, 13 August 2007).

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