Law Council
OF AUSTRALIA

Ref: NP:1625

Committee Secretary
Senate Select Committee on Regional and Remote Indigenous Communities
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Secretary,

TWELVE MONTH REVIEW INTO NORTHERN TERRITORY INTERVENTION

I **enclose** the Law Council of Australia's submission to the Senate Select Committee on Regional and Remote Aboriginal Communities' 12-month review into the Federal Government's "emergency intervention" in the Northern Territory.

If there are any queries concerning the submission, please contact Nick Parmeter on (02) 6246 3733 or nick.parmeter@lawcouncil.asn.au.

Yours sincerely

Bill Grant
Secretary-General

15 August 2008

Review of the Northern Territory 'Emergency Intervention' in Regional and Remote Aboriginal Communities

Senate Select Committee on Regional and Remote Aboriginal Communities

15 August 2008

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Introduction

1. The Law Council of Australia is pleased to make submissions to the first Senate Select Committee Review of the Northern Territory National Emergency Intervention (the Review).

2. The Law Council is the peak body for the Australian legal profession, representing over 50,000 lawyers through the law societies and bar associations of the Australian states and territories. A list of the Law Council's "constituent bodies" is provided at Attachment A.

3. This submission focuses on legal issues arising from Federal legislation implementing the NT "emergency intervention". The Law Council's primary concern is that provisions suspending the operation of the *Racial Discrimination Act 1975* (Cth) in respect of the National Emergency Response legislation should be repealed. The remainder of the submission considers specific concerns with respect to existing measures and, where possible, suggests measures to improve the intervention. Invariably, these suggestions require that:

   - there be appropriate consultation with Aboriginal communities in the Northern Territory concerning the key aspects of the intervention;
   - the prior, informed consent of Indigenous communities be obtained before embarking on measures that affect them; and
   - where appropriate, indigenous people be involved in the development of measures designed to assist them.

Legislation implementing the NT intervention

The NER legislation

4. The relevant legislation affecting the matters considered by the Review include the following (collectively referred to as "the NER legislation"):

   (1) *Northern Territory National Emergency Response Act 2007* (the NTNER Act);

   (2) *Families, Community Services and Indigenous Affairs Amendment (Northern Territory National Emergency Response) Act 2007* (the FACSIA Act); and

   (3) *Social Security and Other Legislation Amendment (Welfare Reform) Act 2007* (the WR Act).

5. The NER legislation, among other things:

   - contained provisions suspending the *Racial Discrimination Act 1975* (Cth) in relation to a number of the discriminatory measures;
   - provided for the compulsory acquisition of approximately 70 Aboriginal townships and settlements;

- weakened the NT Aboriginal land permit system;
- restricted the sale and possession of alcohol in prescribed areas;
- established an income management regime for welfare recipients; and
- changed NT criminal laws to prevent consideration of Aboriginal customary laws or cultural background in sentencing and bail proceedings.

6. The 41st Parliament and indigenous Australians were allowed just 5 days to consider the three principle NER Bills, which comprised more than 500 pages and caused amendments to a myriad of Commonwealth and Territory legislative schemes.

7. During that extraordinarily truncated period, the Law Council prepared a submission to the Senate Standing Committee on Legal and Constitutional Affairs (which carried the invidious responsibility of reviewing the legislation), stating that:

   - the time permitted to consider the NER legislation, which totalled over 500 pages, was disgracefully inadequate and amounted to a glaring breach of standards in Parliamentary scrutiny of legislation;
   - suspension of the operation of the *Racial Discrimination Act 1975* is utterly unacceptable under any circumstances and should be removed from the NER legislation;
   - compulsory acquisition of around 70 Aboriginal townships and settlements was unnecessary and discriminatory;
   - changes to the Aboriginal lands permit system had no demonstrated connection with the protection of Aboriginal children;
   - changes to Northern Territory criminal laws, restricting the courts' discretion in bail and sentencing decisions, would do nothing to address child sexual abuse in Aboriginal communities; and
   - the legislation may have been drafted to enable the Commonwealth to avoid its obligations to pay compensation to Aboriginal communities on 'just terms' for compulsory acquisitions of townships, or to at least weaken the bargaining position of affected communities.

8. The legislation was passed unamended, with bi-partisan support, notwithstanding widespread criticism of many of its provisions.

The FaHCSIA Amendment Bill

9. In March 2008, the Federal Government introduced the *Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Response Consolidation) Bill 2008* (the FAHCSIA Amendment Bill), which, if enacted, will amend the NT emergency response in order to:

   (1) enable the Minister for Indigenous Affairs to ban the broadcast of a television service for which the total amount of R18+ classified content exceeds 35 per cent;

(2) enable carriage of prohibited material through prescribed areas; and

(3) repeal changes to the permit system implemented by the former government.

10. The Law Council made a submission to the subsequent Inquiry into the Bill by the Senate Standing Committee on Community Affairs, generally supporting the provisions, but noting that:

- the exercise of the Ministerial discretion to ban the broadcast of a particular service in a designated area may be discriminatory if the relevant community is not first consulted and their wishes considered before the discretion is exercised; and

- documents obtained under the *Freedom of Information Act 1982* (Cth) by the Law Council demonstrate that the majority of Aboriginal people in the NT opposed the changes to the permit system introduced by the former government.

11. The Senate Standing Committee on Community Affairs handed down a final report with opposing views from government and opposition Senators. At the time of drafting this submission the FaHCSA Bill had not passed the Senate.

The IALA Act

12. In addition, the *Indigenous Affairs Legislation Amendment Act 2008* (the IALA Act) was passed in July 2008 and gives effect to the following (among other things):

(1) Amends s 19A of the *Aboriginal Land Rights (Northern Territory) Act 1976* (the ALRA) to change the township leasing scheme, enabling the grant of leases for between 40-99 years (presently, only leases for 99 years may be granted). The amendments will also provide for rights of renewal of leases on expiry, up to a maximum of 99 years, and will enable the Executive Director of Township Leasing, on request, to enter into and hold a lease or sub-lease on behalf of the Commonwealth.

(2) Makes certain technical amendments to the 5-year leasing scheme established under the NER legislation, including amendments to facilitate negotiations over compensation to traditional owners for compulsorily acquired interests.

(3) Enables the costs of administering township leases to be drawn from the Aboriginal Benefits Account.

13. In relation to the proposed amendments to enable township leases for between 40 and 99 years, the Law Council submits that promises of investment in housing, schools and other incentives, which are clearly designed to induce traditional owners to enter into township leasing schemes, should not be a condition of negotiated agreements. Funding for essential housing and services should be unconditional, and should be made outside the negotiations over the terms of township leases.

14. The Law Council notes that it is far from clear whether any benefits will in fact flow from the township leasing scheme. Given the unequal negotiating power of traditional owners compared with the Commonwealth, it is unconscionable to

cloud negotiations with the prospect of desperately needed investment, conditional on agreement to the terms put forward by the Minister.

15. The Law Council supports amendments that will facilitate 'just terms' compensation for compulsorily acquired 5 year township leases.

Aboriginal Benefits Account (ABA)

16. The Law Council strongly objects to the use by the Federal Government of ABA funds to support the township leasing program.

17. The ABA was established for the benefit of Aboriginal people in the Northern Territory and to foster self-determination, by funding the operation of the Land Councils and other entities and supporting Aboriginal commercial and development opportunities.

18. ABA funds are accumulated from equivalent compensatory payments in lieu of mining royalties, paid to the Northern Territory and Federal Governments in respect of commercial mining activities on Aboriginal freehold land. The Commonwealth pays funds into the ABA equivalent to amounts that are earned through royalties. The fact that the monies held in the fund are directed from consolidated revenue has apparently led to a view that the fund is to be used for public purposes. However, in reality the Federal contributions to the fund are compensatory payments and should be regarded as the property of indigenous people of the Northern Territory.

19. It is noted that when the township leasing provisions were incorporated into the ALRA in 2006, it was done in the midst of significant controversy.[1] During the Senate Standing Committee on Community Affairs' Inquiry in the *Aboriginal Land Rights Amendment (Township Leasing) Act 2006* (the Township Leasing Act), all non-government stakeholders, including all indigenous participants, recommended that the amendments not proceed. Those who made submissions to that Inquiry were (at best) uncertain as to any real benefits that might arise from the township leasing scheme and (more generally) highly concerned that the scheme would lead to disenfranchisement of Aboriginal communities which agreed to enter into the scheme.

20. The amendments were devised and deliberated with unjustified haste, allowing less than one month for public consultation on the most significant reforms since the ALRA was established. This timeframe left most Indigenous Territorians completely unaware that the amendments had even been debated.[2]

21. During that Senate Committee process, the then Labor Opposition Senators expressed strong dissent in relation to the amendments, noting that the amendments

[1] Juli Tomaras and Pao Yi Tan, Indigenous Affairs Legislation Amendment Bill 2008 – Digest, 2008, Parliamentary L brary, Commonwealth of Australia, pp 7-8

[2] As noted by Land Council representatives during public hearings into the Township Leasing Bill. This point was apparently acknowledged by representatives from the Office of Indigenous Policy Coordination, who responded that they were not responsible for ensuring Indigenous communities were informed about the changes. Note discussion in Ibid.

"…have the potential to undermine the long-term viability and independence of Land Councils and deny cultural, social and economic enjoyment of land by traditional land owners."[3]

22. The former Minister for Indigenous Affairs sought to characterise the township leasing scheme as a benefit to indigenous people, which the ABA could legitimately fund. The Township Leasing Act put this beyond doubt, by granting the Minister almost unbridled discretion to use the funds in the ABA for whatever purpose deemed appropriate, and in the process stripping Land Council's of their financial independence by subjecting their ongoing funding to 'performance' outcomes.

23. The Human Rights and Equal Opportunity Commission has stated that:

"The use of ABA funds to pay for headleases is contrary to its purpose. The purpose of the ABA is to provide benefit to Indigenous people *above and beyond* basic government services. The administrative costs of land-leasing are basic government services. Furthermore, the use of the ABA for headleases is targeted distribution of funds to communities that sign to the leases, while others will not benefit at all."[4]

24. The changes under the IALA Bill adopts the same approach, with funds continuing to be withdrawn by the Minister to meet the expenses of Government appointed 'township administrators' and costs associated with administering leases.

25. The Law Council considers that money derived from royalties earned on Aboriginal freehold land should not be used for such purposes. The ABA is not derived from public contributions or consolidated revenue, which is the ordinary source of funds for expenses associated with the administration of a public leasing scheme.

26. The Law Council urges the Government to repeal changes brought into effect under the Township Leasing Act, which gave the Minister absolute discretion over the funds, and cease requisitioning monies from the ABA for the administration of Federal Government schemes.

Revisiting the Law Council's primary concerns

27. As noted above, the Law Council outlined several fundamental concerns with respect to the NT intervention legislation

28. Those concerns included:

- Suspension of the operation of the *Racial Discrimination Act 1975*.
- Compulsory acquisition of Aboriginal land.

[3] Opposition Dissenting Report, *Inquiry into the Aboriginal Land Rights Amendment (Township Leasing) Act 2006*, Senate Standing Committee on Community Affairs, Commonwealth of Australia, p 20

[4] Mr Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006*, Human Rights and Equal Opportunity Commission, Commonwealth of Australia, p 58.

- Changes to the Aboriginal lands permit system.
- Changes to Northern Territory criminal laws.
- Payment of just terms compensation to Aboriginal communities.

29. The focus of the Law Council's concerns has evolved as the intervention has proceeded and the following comments reflect that position.

Suspension of the RDA

30. Section 132 of the NER Bill states:

    (1) The provisions of this Act, and any acts done under or for the purposes of those provisions, are, for the purposes of the *Racial Discrimination Act 1975*, special measures.

    (2) The provisions of this Act, and any acts done under or for the purposes of those provisions, are excluded from the operation of Part II of the *Racial Discrimination Act 1975*.

    (3) In this section, a reference to any acts done includes a reference to any failure to do an act.

31. The FaCSIA and WR Bills each contain generally equivalent provisions.

32. In a submission in September 2007 to the Senate Standing Committee on Legal and Constitutional Affairs concerning the Inquiry into the NER legislation, the Law Council made the following statement with respect to the suspension of the RDA:

> "The Law Council considers the inclusion in legislation proposed to be enacted by the Australian Parliament in 2007 of a provision specifically excluding the operation of the RDA to be utterly unacceptable. Such an extraordinary development places Australia in direct and unashamed contravention of its obligations under relevant international instruments, most relevantly the United Nations Charter and the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD")."

33. The Law Council has not changed its view in this regard and considers that the damaging impact of these provisions will grow the longer the suspension of the RDA is allowed to persist.

34. Whilst the express suspension of the RDA under the NER legislation may be superfluous, given the RDA would have no impact on the interpretation or validity of legislation passed subsequent to its enactment, the express repudiation by a national government of the fundamental rights of its Indigenous population is a cause for deep concern in any liberal society.

Competing human rights obligations?

35. In the debate surrounding the measures suspending the RDA under the NER legislation, it has been claimed that the measures represent a 'balance' between Australia's international treaty obligations to protect the human rights of women and children, who may be subject to abuse, and the rights of Aboriginal and

Torres Strait Islander people to freedom from discrimination. Such statements appear to suggest that these important objectives are inconsistent or competing in some way.

36. Australia's relevant international obligations arise under the:

- Convention on the Rights of the Child (CRoC);
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);
- CERD;
- International Covenant on Civil and Political Rights (ICCPR); and
- International Covenant on Economic, Social and Cultural Rights (ICESCR).

37. The international community has repeatedly confirmed that:

> "…all human rights are universal, indivisible and interdependent and related. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis."[5]

38. International human rights jurisprudence confirms that States party to human rights instruments should not establish any form of hierarchy of human rights.

39. This principle is relevant to the underlying basis for suspending the RDA. When questioned about the necessity of an express suspension of the RDA during the Senate Standing Committee Legal and Constitutional Affairs' inquiry into the NER legislation, representatives from the Department of Families, Community Services and Indigenous Affairs (as it was then known) referred to Australia's important international obligations to protect Aboriginal women and children from violence and noted that a balance had been struck between protection from racial discrimination and other obligations to protect the health and safety of women and children.

40. This appears to reveal an attitude that some tension exists between these fundamental principles; that the full protection against racial discrimination is somehow inconsistent with the protection of Aboriginal women and children (at least, in the context of what the intervention is attempting to achieve). However, as pointed out by the Social Justice Commissioner in the Social Justice Report 2007, Article 5 of the ICCPR binds State parties to the principle that implementation of laws protecting certain human rights cannot be used as justification for offending, repudiating or failing to observe other human rights.[6]

41. The Law Council submits that it will never be appropriate to refer to specific measures protecting human rights as justification for implementing measures that are both *prima facie* and substantively racially discriminatory.

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[5] *Vienna Declaration and Programme of Action 1993*; and confirmed by the resolution adopted by the General Assembly at the 2005 United Nations World Summit, UN Doc. A/res/60/1 (24 October 2005) , New York, paragraph 121.

[6] Calma, T, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007*, Human Rights and Equal Opportunity Commission, Commonwealth of Australia, page 238.

Is suspension of the RDA necessary?

42. When the NER legislation was enacted, the Government stated that suspension of the RDA was necessary to achieve the overarching aim of securing and "normalising" Indigenous communities in the context of a declared 'national emergency'.[7]

43. In a cursory attempt to assuage anticipated widespread concern about Australia's disregard for its international human rights obligations, the legislation stated that the measures were intended to be 'special measures', necessary for the advancement of Aboriginal people in the Northern Territory.

44. As noted above, the RDA cannot affect the validity of a provision of the FaHCSIA Amendment Bill or NER legislation by virtue of any inconsistency. This is because subsequent legislation overrides existing legislation, which makes s 132 of the NER legislation somewhat superfluous.

45. However, the Law Council considers that the recent decision by the Australian Government not to expressly suspend the operation of the RDA in relation to any new provisions under the FaHCSIA Amendment Bill reflects a view within the Government that suspension of the RDA is inappropriate and unnecessary. In her second reading speech to the House of Representatives, introducing the Bill, Minister for Housing, Tanya Plibersek MP, stated:

> "…the bill contains some amendments to existing measures which continue to be covered by the operation of the racial discrimination provisions in the legislation for the Northern Territory emergency response. Importantly, the bill contains no new provisions which exclude the operation of the Racial Discrimination Act. The new R18+ measures have been designed as special measures and do not have a provision excluding the operation of part II of the Racial Discrimination Act…"[8]

46. In addition, Kerry Rea MP, speaking in favour of the Bill, correctly stated that:

> "Not only do I think that engaging with, dealing with and forming partnerships with members of those communities is actually a very practical, reasonable and logical step, it is actually a requirement under the Racial Discrimination Act. There is very clear advice that the original legislation, which was introduced by the previous government, could well have been subject to quite successful legal challenges under the Racial Discrimination Act because they had not actually addressed the special measures provisions, which include time limits and consultation with the particular community where it is proposed to introduce these measures."[9]

47. Both of these statements indicate the view of the present Labor Government that the RDA should continue to apply to the new measures brought forward under the FaHCSIA Amendment Bill. It is also worth remarking that none of the Parliamentarians who rose to speak against the Bill petitioned the government to suspend the RDA (as the previous Parliament had done) or suggested any amendment to ensure the RDA would not apply.

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[7] NTNER Bill Explanatory Memorandum, pp 76-77

[8] House Hansard, 21 February 2008, page 1091.

[9] Ibid, page 2424.

48. The positive reinforcement of the importance of the RDA during the Parliamentary debate surrounding the FaHCSIA Amendment Bill appears to demonstrate a bi-partisan view that the RDA should apply to the measures put forward under the Bill.

49. The Law Council welcomes this apparent recognition of the importance of the RDA and the international legal instruments from which its principles are derived.

"Special measures"?

50. The NER legislation declares the provisions of the NER legislation to be "special measures" within the meaning of the RDA and the CERD. The FaHCSIA Amendment Bill provisions are also apparently designed to be "special measures", as noted by Ms Plibersek MP in her second reading speech (extracted above).

51. In determining whether such discriminatory provisions can be saved as "*special measures*", within the meaning of s 8(1) of the RDA, and article 1(4) of CERD, the wishes of the affected communities are critical. As Brennan J observed in *Gerhardy v Brown* (1985) 159 CLR 70:

> "*A special measure must have the sole purpose of securing advancement, but what is "advancement"? … The purpose of securing advancement for a racial group is not established by showing that the branch of government or the person who takes the measure does so for the purpose of conferring what it or he regards as a benefit for the group if the group does not seek or wish to have the benefit. The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them.*"

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

"Informed consent"

53. The concept of '"informed consent" arises in numerous international texts and instruments.

54. On 18 August 1997, the United Nations Committee on the Elimination of All Forms of Racial Discrimination adopted a General Recommendation concerning Indigenous Peoples (General Recommendation XXIII(51)) calling upon States parties to CERD to take a series of measures, including:

> "*to ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent*". (emphasis added)

55. Article 19 of the UN Declaration on the Rights of Indigenous Peoples provides that:

> "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."

56. The concept of "*free, prior and informed consent*" appears in 5 other articles of the Declaration on the Rights of Indigenous Peoples. It is promising to note that the Federal Government has stated its support for the Declaration, a position that the Law Council supports.

Consultation

57. As noted above, meaningful consultation and the opportunity to participate in the decision making process are critical components of the determination as to whether measures are in fact "special measures". Accordingly, it might be argued that ostensibly discriminatory measures under the NER legislation and subsequent amending Bills can be saved if affected communities are consulted and their views are considered in the decision making process.

58. It is clear that no such standard is currently met under any of the original NER enactments. There is no requirement under the NER legislation to consult with affected communities before compulsorily acquiring land or imposing income quarantining or alcohol restrictions. Nor is there any capacity to seek review of the Minister's decision.

59. There are provisions under the FaHCSIA Amendment Bill requiring consultation before a decision is made by the Minister to prohibit the broadcast of a particular service in an affected area. It is also a requirement that a member of the affected community make a complaint or advises the Minister that children may be being subjected to inappropriate content.

60. However, the requirement to consult under the FaHCSIA Amendment Bill is not mandatory and the views of the relevant community are not listed as a relevant consideration for the Minister in making a decision under the Bill to prohibit a broadcast. For example, the consultation process under s 127C(1) of the Bill is directed toward canvassing the views of concerned communities. However, s 127C(2) makes plain that the consultation process is not mandatory and that any failure to consult will not affect the validity of a determination by the Minister under the Bill. In addition, there is no statutory requirement that the wishes of the relevant community be considered at any stage and little basis on which the Minister's decision could be subject to independent judicial or merits review. Whilst there is a list of factors that must be considered before any determination is made (set out in s 127D of the Bill), the absence of any requirement under that subsection to consider the wishes of the affected community appears to negate the intention that the community's wishes will ever be considered, or even sought.

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

62. The Law Council therefore considers that without an enforceable statutory requirement to consult and consider the wishes of those affected, the consultation process under the FaHCSIA Amendment Bill is likely to be

insufficient to engage the 'special measures' exception in s 8(1) of the RDA, and article 1(4) of CERD.

63. In submissions to the Senate Standing Committee on Community Affairs in April 2008, the Law Council recommended that the FaHCSIA Amendment Bill should be amended to:

    (1) require the Minister to consult with affected communities in every instance that the use of the power to prohibit a broadcast in a designated area; and

    (2) include the wishes of the affected community in the list of relevant considerations under s 127D of the Bill.

64. The Law Council believes that these changes should be implemented to ensure the consultation process is aimed at obtaining the free, prior and informed consent of relevant communities in respect of any decision which might adversely affect them.

65. This submission considers below the effect of repealing the RDA suspension and whether similar provisions for consultation (i.e. as recommended above by the Law Council) would be effective in addressing concerns about the racially discriminatory impact of the NER legislation.

Effect of repealing RDA suspension

66. The suspension of the RDA under the NER legislation suggests that there existed significant doubts about whether the measures could be properly characterised as 'special measures'. These doubts appear to be well founded, given ss 8(1) and 10(3) of the RDA make clear that a law which requires Aboriginal and Torres Strait Islander people to give up control over their land cannot be regarded as 'special measure'.

67. As noted by the Aboriginal and Torres Strait Islander Social Justice Commissioner, s 10(3) specifically requires that any law which authorises property owned by Aboriginal or Torres Strait Islander people to be managed by another person without prior consent, or which restricts an Aboriginal or Torres Strait Islander person from terminating management or control by another person, is a law to which s 10(1) applies. Similarly, s 8(1) prevents any such law being regarded as a special measure under the RDA.[10]

68. It is also clear that other provisions of the NER legislation may be difficult to interpret as measures which discriminate positively. This is because:

    - There is no obvious or apparent benefit for Aboriginal people in respect of provisions amending the NT *Criminal Code* to prevent courts considering an offender's 'customary laws' or cultural background in sentencing. Those measures are discriminatory, as their substantive effect is to prevent a court from giving due recognition to the background of an Aboriginal offender, or offenders of multicultural descent.

    - Economic and social benefits from so-called 'open communities', which proponents of removal of the permit system argue will arise from changes

[10] Ibid, op cit 1. Note discussion at page 266.

to the permit system, are theoretical at best and were in any event opposed by a vast majority of Aboriginal people in the NT[11] during consultations prior to the announcement of the emergency intervention.[12]

- Blanket, non-consensual alcohol restrictions and welfare quarantining clearly infringe the human rights of those affected and it is unclear if the measures have in fact resulted in any benefit for affected communities. It may be argued to the contrary that prohibition, by itself, is an ill-considered measure for addressing the root causes of alcohol and drug abuse and may simply shift the problem to areas outside the designated 'dry' zones. It must also be noted that, prior to the declaration of a national emergency, there were a number of voluntarily 'dry' Indigenous communities, demonstrating that the end result (of reducing alcohol abuse and related violence in Aboriginal communities) is achievable by means other than imposing top-down restrictions, without prior consultation.

- Welfare quarantining restricts the places at which affected people can spend their money and which goods they can purchase. To the extent that the measure is aimed exclusively at Aboriginal communities, is discriminatory in effect. This also gives rise to possible concerns about the effect of the provisions on Constitutional protections against restraint of trade and freedom of movement (discussed below).

69. However, it must be conceded that removing the provisions which suspend the RDA will have limited impact on the validity of the provisions of the NER legislation, regardless of their discriminatory effect, because of the overriding status of subsequent federal legislation (as noted above).

70. It is further noted that, regardless of whether the RDA suspension is repealed, Australia may still be in breach of the CERD, the United Nations Charter, and customary international law, on the basis that the overriding measures are discriminatory.

71. The Law Council considers it is highly unsatisfactory that the NER legislation, as presently drafted, overrides any protection that the RDA would otherwise provide Aboriginal people in the NT with respect to decisions and actions taken under the legislation. There is significant potential for discrimination against Aboriginal people in the exercise of the powers created by the legislation and there is no reasonable remedy for those communities that are negatively affected by discriminatory actions or measures (particularly given the exercise of many Ministerial powers under the legislation is exempt from merits review).

72. The lack of any entrenched protection in Australia against discrimination, by way of Constitutional guarantee or otherwise, was criticised in 2005 by the UN

[11] As noted by the Law Council in its submission to the Senate Standing Committee on Community Affairs' Inquiry into the Provisions of the *Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Response Consolidation) Bill 2008,* documents obtained from the Department of Families, Community Services and Indigenous Affairs in November 2007 revealed that, of 80 separate consultations and submissions with/from Indigenous communities, individuals and organisations in the NT, 100 per cent opposed any change to the permit system. Just 17 out of 124 supported amendment or complete repeal (all of whom were non-indigenous).

[12] In 2006/2007, the federal Government carried out a Review of Access to Aboriginal Land under the NT Aboriginal Land Rights Act, which involved wide consultation to determine not whether the permit system should be changed, but how the permit system should be changed and to what extent. No report was released outlining the findings of the review prior to the decision to change the permit system being announced along with other measures in the NER legislation.

Committee on the Elimination of Racial Discrimination.[13] The Committee recommended that the Australian Government "…work towards the inclusion of an entrenched guarantee against racial discrimination in its domestic law."

73. In the Social Justice report 2007, the Aboriginal and Torres Strait Islander Social Justice Commissioner recommended specific amendments to the NER legislation to clarify that the legislation does not authorise conduct that is inconsistent with the provisions of the RDA.[14] This would ensure the RDA protections apply to the exercise of Ministerial discretions, including all delegated powers, under the NER legislation.

74. The Law Council fully supports the Social Justice Commissioner's recommendation as an immediate measure to ensure Aboriginal people are able to rely upon the protection of the RDA in relation to any discriminatory act carried out under the NER legislation.

Recommendations

75. The Law Council recommends that:

(1) the provisions suspending the operation of the RDA under the NER legislation should be repealed immediately;

(2) the NER legislation and the FaHCSIA Amendment Bill should be amended to incorporate provision for robust consultation with affected communities and a requirement that their wishes be given due consideration in any decision that might affect their interests;

(3) the NER legislation and the FaHCSIA Amendment Bill be further amended to insert a *non-obstante* clause, in accordance with the recommendation of the ATSI Social Justice Commissioner (Recommendation 5, Social Justice Report 2007), to clarify that the RDA continues to apply to all decisions and actions taken under those instruments.

Other human rights concerns

Freedom of movement

76. Article 12 of the ICCPR requires State parties to protect their citizens' freedom of movement. However, it is arguable that the income management and quarantining provisions of the NER legislation seriously restrict the capacity of affected individuals to travel or migrate to different areas of the country.

77. Presently, those subject to income quarantining must use half their income on groceries and essential items, which must be purchased at their designated town

[13] 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. This is referred to the Australian Parliamentary Library Digest for the Northern Territory National Emergency Response Bill, Commonwealth of Australia, 13 August 2007, no. 28, 2007–08, ISSN 1328-8091

[14] Ibid, op. cit. 1, Recommendation 5, page 304.

store. This prevents affected individuals from spending the quarantined portion of their welfare payment at any other store, either in the NT or any other jurisdiction.

78. Article 12 may only be departed from by States party to the ICCPR in exceptional circumstances, such as to protect national security, public order, public health or morals and the rights and freedoms of others. In addition, restrictive measures must conform to the principle of proportionality, be appropriate to achieve their protective function and must be the least intrusive instrument amongst those which can achieve the desired result.[15]

79. The right to move freely refers to the freedom to move throughout the entire territory of a State, including within and between jurisdictions of federated territories such as Australia.

80. The income management regime currently in place may restrict the movement of affected individuals both within and between jurisdictions, as they are required to use 50 per cent of their income at a designated community store.

Natural justice

81. Under the NER legislation, individuals and communities affected by a determination of the Minister have no right to seek external review of the decision under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The relevant provisions restrict review of decisions by the Minister in relation to:

    (1) determinations with respect to Indigenous land;

    (2) income management for a welfare recipients in designated areas;

    (3) suspending members of a community government council.

82. Similarly, individuals and communities are prevented under the legislation from seeking review of a decision by the Secretary of the Department of Families, Housing, Community Services and Indigenous Affairs to revoke or renew a community store's licence.

83. The exclusion of any right to seek review of a decision by the Minister may result in a denial of natural justice to those affected. Communities and individuals, in relation to whose land a decision is taken, financial freedom restricted or governing powers suspended or revoked, should be entitled to have the decision reviewed to ensure procedural fairness.

[15] *General Comment No. 27: Freedom of Movement (Art.12):.02/11/99 CCPR/C/21/Rev.1/Add.9*, United Nations Human Rights Committee

Further Comments

Arbitrary nature of acquisition and control

84. The Law Council notes certain other stakeholders have voiced concerns that compulsory acquisition of land, income quarantining and alcohol restrictions appear to have been implemented arbitrarily.

85. For example, the fact that income quarantining and alcohol restrictions apply in 'designated areas' does not resolve problems that occur outside those areas, in close proximity.

86. Moreover, the measures appear to be short term solutions to problems that have emerged over decades. The deep-seeded nature of the underlying problems which have given rise to violence and sexual abuse will require greater than the 5-year time frame set down for the intervention. The effective sunset for the intervention will arrive around September 2012 and there is no clear guidance for indigenous Australians as to what the intervention taskforces objectives are during that period (beyond a general reduction in child sexual abuse).

87. The Law Council urges the Senate Select Committee to inquire into the objectives of the intervention taskforce over the remaining 4 years and consider whether the existing measures, including welfare restrictions, alcohol restrictions, compulsorily acquired land are effective in achieving those objectives.

88. The Law Council also notes that the recommendations of the *Little Children Are Sacred* report have been virtually ignored up until this point, despite being the basis upon which the NT emergency intervention was launched. The Law Council recommends that the Senate Select Committee inquire into the extent to which the recommendations of the *Little Children Are Sacred* are being implemented and report on measures taken to date.

Bail and sentencing

89. The Law Council strongly opposes the provisions of the *Crimes Amendment (Bail and Sentencing) Act 2006* (Cth), which are replicated in Part 6 of the NTNER Act. Those amendments are designed to prevent the courts considering the cultural background or customary laws observed by an offender when reaching sentencing decisions or determining bail applications.

90. In fact, the Crimes Act amendments overturned changes implemented in 1994 with bi-partisan support, following a recommendation by the Australian Law Reform Commission, to require a court to consider the cultural background of an offender in sentencing.

91. The former Howard Government implemented the changes to the *Crimes Act* in 2006, declaring that the changes were necessary to ensure the protection of Aboriginal women and children from men claiming that their violent or offensive behaviour was justified under Aboriginal customary law. This was, ostensibly, in response to isolated cases of violent sexual assaults, in which an apparently

lenient sentences were imposed at trial level.[16] The former Federal Government also claimed that the amendments simply implemented the Commonwealth's understanding of the agreement reached by Australian governments at the Council of Australian Governments (COAG) 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."[17]

92. At the time the amendments were implemented, the Law Council provided clear evidence to the Council of Australian Governments (COAG) that Australian courts had been generally consistent in sentencing decisions for violent and sexual offences. This evidence was also provided to the Senate Standing Committee on Legal and Constitutional Affairs, which concluded following its inquiry into the *Crimes Amendment (Bail and Sentencing) Bill 2006* (Cth) that "the term 'cultural background', inserted into the Crimes Act in 1994 and based on a recommendation by the ALRC in its 1992 report, *Multiculturalism and the Law*, is a relevant matter to be considered by the courts in the sentencing of Federal offenders where appropriate".[18]

93. The Coalition Senators on the Senate Committee reached the view that the amendments were discriminatory, as the amendments did not "…provide substantive equality to Indigenous offenders or offenders with a multicultural background".[19] Labor Senators agreed, but went further to state that "…the Bill will lead to increased racial discrimination against Indigenous Australians and those with a multicultural background."

94. It is noted (with some irony) that in rejecting claims that the measures under the NER legislation are racially discriminatory, the Explanatory Memorandum to the NTNER Act states that:

> "Preventing discrimination and ensuring equal treatment does not mean treating all people the same. Different treatment based on reasonable and objective criteria and directed towards achieving a purpose legitimate under international human rights law is not race discrimination. <u>In fact, the right not to be discriminated against is violated when Governments, without objective and reasonable justification, fail to treat differently people whose situations are significantly different</u>." (emphasis added)

95. The Law Council fundamentally agrees with this statement. There are relevant differences between people in our society which policy makers, legislators and the judiciary must be able to consider.

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[16] The primary example was *The Queen v GJ* [2005] NTCCA 20, referred to as the "promised bride case". In all such cases, the Law Council found that the prosecution appealed against the sentence and, almost invariably, a sentence was imposed sufficient to mollify public opinion. Numerous other examples raised by Dr Nanette Rogers with the release of her 'dossier' in May 2006, whilst alarming in the extreme, had nothing to do with customary law and generally demonstrated that the criminal courts and appeal system is operating well.

[17] COAG Communiqué, 14 July 2006.

[18] Senate Standing Committee on Legal and Constitutional Affairs, *Report of the Inquiry into the* Crimes Amendment (Bail and Sentencing) Bill 2006, October 2006, Commonwealth of Australia, p.32

[19] Ibid, p.31

96. The effect of the provisions banning consideration of cultural background evidence, or customary laws observed by an offender, is to require the courts, for example, to treat an Aboriginal man – who has resided his entire life in a remote community, barely speaks English and has little or no knowledge or comprehension of the system of laws in this country – to be treated in the same way as an educated Anglo-Australian man living in the suburbs of Sydney. There are clearly differences in the personal characteristics of individuals which may affect their relative culpability or provide context to the crime that has been committed.

97. The Law Council submits that Part 6 of the NTNER Act and the *Crime Amendment (Bail and Sentencing) Act 2006* should be repealed.

'Just terms' compensation

98. The Law Council raised concerns at the outset of the intervention that the provisions of the NER legislation providing for compensation for compulsory acquisition of 5-year leases, may have been framed to enable the Commonwealth to avoid its obligations to pay compensation on 'just terms', as required under s 51(xxxi) of the Constitution.

99. This concern arises from the decision of the High Court in *Teori Tau*[20], in which it was held that the s 122 Territories power precluded any obligation of the Commonwealth to pay just terms compensation for compulsory acquisitions made in a Territory. Although that decision was subsequently revised in *Newcrest*[21], there continues to be some debate about the application of s 51(xxxi) to acquisitions made in a Territory.

100. As the provisions of the NTNER Act are framed, the legislation excludes the operation of s 50(2) of the *Northern Territory (Self Government) Act 1978* (Cth), which provides for the application of s 51(xxxi) in the Northern Territory, as if the acquisition were made in a State. This creates reasonable basis to suggest that the Commonwealth has left room to avoid obligations to pay compensation on 'just terms' for and acquisitions made under the NTNER Act. However, it is noted that this assertion was ostensibly rejected by FaCSIA representatives at the Senate Standing Committee on Legal and Constitutional Affairs' Inquiry into the NER legislation.

101. Notwithstanding the assurances by the FaCSIA representatives, the Law Council is not aware of a single instance in which 'just terms' compensation has been paid. This perhaps arises from the absence in the legislation of any statement in the legislation that 'compensation will be paid', or a mechanism for determining and paying compensation.

102. The provisions of the IALA Act may provide such a mechanism and, following consultation with the Northern Territory Land Council's, the Law Council is reassured that the Commonwealth does not intend to avoid paying compensation on Constitutional grounds (though the negotiating position of the indigenous parties may be somewhat weaker).

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

[21] *Newcrest Mining (WA) Limited v Commonwealth* [1997] HCA 38; (1997) 190 CLR 513.

103. The Law Council recommends that the Senate Select Committee examine progress toward agreements over 'just terms' compensation payments to traditional owners.

Sacred sites

104. In relation to the FaHCSIA Amendment Bill, the Law Council has previously expressed opposition to provisions that may allow authorised entry onto Aboriginal sacred sites.

105. Proposed section 70(2BBA), to be inserted into the *Aboriginal Land Rights Act 1976* (Cth) (the ALRA) provides that a Ministerial authorisation under section 70(2BB) for access to Aboriginal land may be subject to conditions. The Explanatory Memorandum gives, as an example of a condition of Ministerial authorisation, that sacred sites may not be entered.

106. Section 69 of the ALRA makes it an offence for any person to enter or remain on land in the Northern Territory that is a sacred site, except in accordance with Aboriginal tradition. It is a defence if a person enters or remains on the land in accordace with the ALRA or a law of the Northern Territory (s 69(2A)).

107. Sacred sites are protected under the *Northern Territory Aboriginal Sacred Sites Act* 1989 (NT) ("the *Sacred Sites Act*"). A procedure is established which involves consultation with traditional owners in respect of sacred sites and what can be done in respect of those sites.

108. The Law Council opposes any amendment which might purport to allow the Minister to authorise access to sacred sites and recommends that the legislation make clear that a Ministerial authorisation under section 70(2BB) to enter Aboriginal land does not authorise entry upon a sacred site contrary to the procedures of the Northern Territory *Sacred Sites Act .*

Attachment A

Profile – Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.

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