CHAPTER 2

KEY ISSUES

2.1 Virtually without exception, witnesses and submitters welcomed the intent of the Australian Government's intervention package and some were strongly supportive of the package itself. Mr John Moriaty of the National Indigenous Council (NIC) told the committee:

> I think that the intervention, as it is known, is a once-in-a-lifetime opportunity for people like me who have been involved in a long struggle for equality for Aboriginal people and bringing them into the mainstream of Aboriginal society. ...I find this a once-in-a-lifetime opportunity for fighters like me who want Aboriginal rights, and I think it should be supported. We have lost at least two, maybe three, generations in my communities up there in Borroloola.
>
> I think that our leadership has been lacking in the past and there is a lot of confusion as well. This has led to a lot of violence in the community. Also it has led to a dysfunctional community...[1]

2.2 Mr Moriaty further explained why he supported the Government's intervention:

> Under the current system, we have allowed the states to do their thing. Having been involved in Aboriginal affairs over many years, I have found that, in the states, as far as ordinary citizens are concerned, Aborigines do not rate very highly electorally. I find that this intervention is one of those aspects that will dig deep into the real issues and have Aboriginal people brought into the system.[2]

2.3 Similarly, Mr Wesley Aird of the NIC told the committee:

> I think the status quo is a result of a failed model in terms of funding and governance systems. I think it is destroying communities and lives. The obvious manifestation of this is child abuse and neglect as well as alcoholism and violence...
>
> I support the intervention. I think it is important that it is treated as a package.[3]

2.4 In relation to criticism of the intervention, Mr Aird stated:

> I am concerned that the critics of the intervention are losing the real focus here, which is the protection and safety of families and children.[4]

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1 *Committee Hansard*, 10 August 2007.

2 *Committee Hansard*, 10 August 2007.

3 *Committee Hansard*, 10 August 2007.

2.5 The committee also heard that many of the residents of Alice Springs and Katherine were supportive of the intervention package. The Mayor of Alice Springs Town Council, Councillor Kilgariff told the committee:

> I would like to start by saying that many people in this area have welcomed the federal intervention. They see it as a catalyst for change. Over very many years we have seen a deterioration in the quality of Indigenous lives brought about by many things but I would say principally by alcohol and welfare dependency. Although many people around here have tried a lot of initiatives over the years, it seems that the issue has been getting so big and so irreparable that people have been starting to feel that there will never be a change. So from that point of view, I think the intervention is very welcome.[5]

2.6 Similarly, the Mayor of Katherine Town Council, Councillor Shepherd noted that she and most of her community welcome the government's intervention.[6]

2.7 Other submissions and witnesses at the public hearing expressed concerns about the content of the intervention package, or the process by which it was developed and is being implemented. Some of the key issues raised in submissions and by witnesses are outlined below.

Consultation

2.8 Many submissions were critical of the haste with which the legislative package has been introduced into Parliament and argued that there should have been more consultation with those who will be affected by the proposed changes.[7] For example, Oxfam Australia submitted:

> Any truly effective strategy for combating child abuse in Aboriginal communities must involve the commitment and active participation of those communities. The Government's striking lack of consultation with Indigenous organisations and affected communities in the Northern Territory is both disrespectful and contrary to the development of good public policy. Moreover, it has resulted in a package of bills which are not supported by the vast majority of Aboriginal organisations in the Northern Territory. This does not bode well for the successful implementation of the legislation, the prevention of child abuse or the improvement of the health and well-being of Aboriginal people.[8]

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4 *Committee Hansard*, 10 August 2007.

5 *Committee Hansard*, 10 August 2007.

6 *Committee Hansard*, 10 August 2007.

7 See for example Law Council of Australia, *Submission 52*, pp 1-2; Victorian Aboriginal Legal Service, *Submission 92*, p. 1; Central Australian Aboriginal Legal Aid Service, *Submission 93*, p. 1; Be Ward, *Submission 106*, p. 1; Ms V. Burns, *Submission 107*, p. 1.

8 *Submission 51*, p. 2.

2.9 In a similar vein, Australians for Native Title and Reconciliation (ANTaR) argued that:

> Given the seriousness of the problem of child abuse, the scale of these legislative changes and the unprecedented power that they give to the Minister, it is scandalous that there has been so little time for consultation, scrutiny and debate on the Government's Northern Territory National Emergency response.[9]

2.10 Some submissions were also critical of the time allowed for the Senate inquiry process.[10] Catholic Social Services Australia suggested that the inquiry into the bills should be extended:

> Our sole recommendation is that the Committee recommend the further referral of the Bills to committee, for a period of at least two months. This would allow the beginnings of consultation on the far-reaching implications of these hastily conceived Bills – and on how they might be improved.[11]

2.11 The Human Rights and Equal Opportunity Commission (HREOC) accepted the need for urgent action in the Northern Territory but argued that consultation with affected communities is vital if the measures are to be successful in the longer-term:

> HREOC accepts the need for urgent action. However, the success of that action both immediately and in the long term will depend upon effective consultation. And such consultation is fundamental to respecting the human rights of Indigenous people.[12]

2.12 HREOC suggested that, given the complexity of the legislation and the fact that many of the laws will carry serious penalties for non-compliance:

> A culturally appropriate and effective public information campaign is critical to allay fears and ensure Indigenous communities understand how the NTNER measures will impact on them and what their new responsibilities are.
>
> HREOC understands that Centrelink and the Ombudsman's Office intend to provide public information to Indigenous communities. This is welcome but it must be done in a comprehensive and culturally appropriate manner. It is critical that information does not add to the fear and confusion in Indigenous communities about the legislation.[13]

2.13 In response to concerns regarding consultation, Dr Sue Gordon, Chair of the NIC and the National Emergency Taskforce, told the committee that consultation in

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9 *Submission 60*, p. 1.

10 See for example ACOSS, *Submission 97*, p. 1.

11 *Submission 58*, p. 1; see also Ms R Small, *Submission 123*, p. 1; Mr M Ramage QC, *Submission 124*, p. 1.

12 *Submission 67*, p. 3.

13 *Submission 67*, p. 17.

the context of a response to an emergency was necessarily limited and she drew a parallel with the imperative for governments to act swiftly in the face of other emergencies. She submitted that the protection of children, and indeed adults, in communities who suffer violence and abuse had been completely lost in the public debate and noted that in an emergency, like a tsunami or a cyclone, governments do not have time to consult people in the initial phases. In particular, she stressed to the committee that every day there is a delay in acting, means that another child is put at risk.[14] Similarly, Mr Aird from the NIC told the committee:

> [T]here has been so much consultation with Indigenous people over the years on so many topics. I think this one is different because we knew that the abuse and neglect of children was ongoing. So for every day, every week that you were out there consulting…the person who delayed action would knowingly allow more abuse, more neglect, and I think that raises some very serious moral questions about just how long you are going to knowingly allow that abuse and neglect to continue. So I would support the speed at which they have acted…
>
> …Now there must be consultation for the correct, professional, technical implementation of what they are doing. It is appropriate that the action was taken as quickly as it was, but, when it gets down to communities now, we should not be talking to the gatekeepers…we should now be coming up with localised solutions that actually address the core problems.[15]

2.14 Finally, the Northern Territory Emergency Taskforce has requested that the government, as a matter of priority, engage in local information campaigns, regarding the measures to be implemented as part of the intervention package, in order to share information with affected communities.[16]

The need for long term commitments

2.15 Some submissions and witnesses expressed concern that the measures proposed in the bills will not be effective in addressing problems in Indigenous communities unless longer-term solutions are also instigated.

2.16 For example, Oxfam Australia stressed the need for long-term measures to address the root causes of the endemic social problems in Indigenous communities:

> Revelations of deep social problems in many of our Indigenous communities are not new. Indigenous leaders have been warning for the past decade that a social crisis would emerge if federal, state and territory governments failed to provide Indigenous Australians with the opportunities and basic services other Australians take for granted: policing, primary health care, education, housing and real employment opportunities.

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14 *Committee Hansard*, 10 August 2007.

15 *Committee Hansard*, 10 August 2007.

16 Minister for Families, Community Services and Indigenous Affairs, *Media Release: First NT Emergency Response Taskforce Meeting*, 30 June 2007, p. 2.

> We are now reaping what we have sown through the failure of successive governments to address the root causes of this crisis.
>
> Now that this issue is finally on the national agenda, immediate action is required to protect communities – and children in particular – while also addressing the underlying factors contributing to the cycle of abuse. Oxfam Australia advocates both immediate and longer-term measures to tackle child abuse…[17]

2.17 Despite welcoming overall the government's intervention, the Mayor of Alice Springs Town Council, articulated her concern that the reforms contained within the bills will not be sustainable in the longer term:

> I think there is a real danger that, when all these things have gone through and if the enthusiasm and resources are not maintained, things will fall in a hole and Aboriginal people will be in a worse-off situation than they were before all of this started.[18]

Whether the bills are discriminatory

2.18 Many submissions and witnesses argued that the bills are discriminatory. For example, the Law Council of Australia (Law Council) stated that the bills 'raise fundamental and far-reaching issues in relation to racial discrimination, the human rights of Aboriginal people, land rights and 'just terms' compensation'.[19]

2.19 Amnesty International Australia noted its strong concern that:

> …the bills package as currently drafted contains discriminatory measures that have no demonstrated role in protecting Indigenous children. The most notable of these are proposed changes to the permit system and land tenure arrangements.[20]

2.20 In particular, a number of submissions and witnesses commented on the specific exclusion in the three main bills of the operation of the *Racial Discrimination Act 1976* (RDA). While the bills provide that any acts done under or for the purposes of their provisions are 'special measures' for the purposes of the RDA, at the same time the bills are excluded from the operation of Part II of the RDA.

2.21 The Law Council were extremely critical of this aspect of the legislation:

> …[T]he inclusion in legislation proposed to be enacted by the Australian Parliament in 2007 of a provision specifically excluding the operation of the RDA [is] utterly unacceptable. Such an extraordinary development places Australia in direct and unashamed contravention of its obligations

17 *Submission 51*, p. 1.

18 *Committee Hansard*, 10 August 2007.

19 *Submission 52*, p. 3.

20 *Submission 39*, p. 4.

> under relevant international instruments, most relevantly the United Nations Charter and the International Convention on the Elimination of All Forms of Racial Discrimination…
>
> The Law Council notes the claim by both the Government, and by the Leader of the Opposition in the House of Representatives on 6 August 2007, that the proposed legislation is consistent with the RDA. The Law Council rejects this assertion entirely. If such claim were correct, the Government and its advisers would not have considered it necessary to suspend the operation of the RDA.[21]

2.22 The Law Council also urged 'extreme caution in relation to the claimed justification of the proposed legislation as a "special measure"' and argued that 'the protection of "special measures", or measures of so-called affirmative action, preferential treatment or quota systems', does not 'justify a number of critical aspects of the proposed legislation'.[22]

2.23 HREOC submitted that the proposed measures in the bills, while intended for the overall benefit of Indigenous communities, also have a range of potentially significant negative impacts upon the rights of Indigenous people. Accordingly, HREOC argued that:

> The potential for the proposed legislation to breach the fundamental rights of Indigenous people means that, at the very least, the operation of the legislation should it be enacted must be subject to very careful scrutiny.[23]

2.24 Similarly, the Jumbunna Indigenous House of Learning submitted that:

> The measures contained in the Bills have been inappropriately characterised as 'special measures' within the meaning of the Racial Discrimination Act 1975 (Cth). By its nature, a special measure confers a benefit on a particular group, for the purpose of enabling that group to enjoy their human rights on an equal basis with the broader community. However, the measures contained in the…Bills will only limit the ability of Indigenous people in the Northern Territory to enjoy rights ordinarily taken for granted by most Australians, and in particular, the right to exercise control over land that they have property in.[24]

2.25 In response to these concerns about the operation of the RDA and its application to the bills, an officer of FaCSIA informed the committee that:

> The bills make it clear that those measures in relation to the emergency response are special measures, and special measures are based on the Convention on the Elimination of All Forms of Racial Discrimination, which allows concrete measures to ensure the adequate development and

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21 *Submission 52*, p. 4.

22 *Submission 52*, p. 4.

23 *Submission 67*, p. 5.

24 *Submission 47*, pp 1-2.

> protection of individuals. The provisions in the bills are intended to provide a benefit to Indigenous Australians and to secure their adequate advancement and enjoyment of their human rights on the same basis as others.
>
> The exclusion from part II of the RDA is limited to the five years of the emergency response and is necessary so that the special measures in the emergency response can be implemented without delay and without uncertainty. This is to allow the special measures to address the crisis in the communities in the Northern Territory and to build social and economic structures in those communities. The special measures are seen as measures to protect children in a way which is consistent with Australia's international obligations under human rights treaties. So, in short, the provisions are necessary to allow the emergency response to proceed without delay and without uncertainty so that the special measures contained in the legislation in the three bills can be implemented.[25]

2.26 The Explanatory Memorandum (EM) for the National Emergency Response Bill further explains the government's position on this issue:

> The Northern Territory national emergency response announced by the government recognises the importance of prompt and comprehensive action as well as Australia's obligations under international law:
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> • The Convention on the Rights of the Child requires Australia to protect children from abuse and exploitation and ensure their survival and development and that they benefit from social security. The International Convention for the Elimination of All Forms of Racial Discrimination requires Australia to ensure that people of all races are protected from discrimination and equally enjoy their human rights and fundamental freedoms.
>
> • 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. 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.
>
> The impact of sexual abuse on indigenous children, families and communities is a most serious issue requiring decisive and prompt action. The Northern Territory national emergency response will protect children and implement Australia's obligations under human rights treaties.[26]

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25 *Committee Hansard*, 10 August 2007.

26 pp 1 & 76.

Breadth of Minister's powers under the bills

2.27 The Law Council raised concerns regarding the breadth of the Minister's powers under the bills, in particular, the provisions which variously provide for the Minister to repeal provisions in the legislation (proposed section 114 of the National Emergency Response and Other Measures Bill) or to declare that certain Divisions, or specified provisions in Divisions, of the National Emergency Response Bill will cease to have effect (clauses 19, 22 and 24).[27]

2.28 Ms Raelene Webb QC of the Law Council advised the committee in answer to a question on notice:

> These are examples of Henry VIII clauses, so-called because they enable the Minister, simply by a stroke of the pen, to change the legal framework. Henry VIII clauses are regarded as contrary to fundamental legal principles as they give insufficient regard to the institution of Parliament as the supreme legislature; they erode the function of the Parliament to legislate.[28]

Permit system

2.29 Some witnesses criticised the current permit system in relation to Aboriginal lands in the Northern Territory for protecting perpetrators of violence and abuse in Indigenous communities and therefore expressed strong support for the proposed changes to the permit system.[29] The Mayor of Alice Springs Town Council told the committee:

> In regard to the permit system, the Alice Springs Town Council has resolved that it does agree with getting rid of the permit system in major communities and on major roads. It did that about six months or so ago and it did that because it felt that some of the issues that are happening in communities remain hidden because there is a permit system...[30]

2.30 However, others argued strongly against the proposed changes to the system. In a general sense, these submissions and witnesses suggested that a number of key measures in the bills, including the removal of land permits, are not related to the

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27 Ms R Webb QC, member of Law Council of Australia, *answer to question on notice*, received 12 August 2007, p. 1.

28 Ms R Webb QC, member of Law Council of Australia, *answer to question on notice*, received 12 August 2007, p. 1.

29 See, for example, Dr Sue Gordon, Northern Territory Emergency Task Force Leadership Group, *Committee Hansard*, 10 August 2007; the Hon John Cleary, *Committee Hansard*, 10 August 2007.

30 *Committee Hansard*, 10 August 2007.

'national emergency';[31] and their inclusion in this package of bills as a measure to address child abuse is not justifiable.[32]

2.31 More specifically, many argued that the removal of the permit system is inappropriate and will in fact be counter-productive.[33] The Central Land Council (CLC) stated its concerns as follows:

> Opening up road and community 'common areas' on Aboriginal land will open up Aboriginal land and communities more broadly. Once people enter Aboriginal land it is difficult to control their movement. Aboriginal landowners are concerned about the potential flow of visitors onto their land more broadly without permission and without guidance with regard to safety and important sites.
>
> The permit system is an important policing tool in remote communities. Police routinely ask unwanted visitors to leave communities because they do not have a permit. Applying trespass law is simply not practical on vast remote tracts of land. If more unwelcome visitors visit communities, such as grog runners and carpetbaggers, there will be greater demand for policing with fewer powers of enforcement…
>
> From a policing point of view the permit system offers a measure of protection for children, rather than putting them further at risk.[34]

2.32 CLC argued that Indigenous people themselves oppose the proposed changes to the permit system:

> Aboriginal people are totally against forced changes to the permit system because the permit system complements their responsibility for country under Aboriginal law and custom and is consistent with the land title they hold under Australian law.[35]

2.33 In a similar vein, the Milingimbi Community Council expressed its concern at the removal of the permit system:

> The removal of the Permit System is a cause of great concern. The system allows the community to monitor those who live in or visit the community. Milingimbi is very much an 'open' community and legitimate requests to visit are almost always granted. Will the Federal Government guarantee

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31 The proposed changes to the permit system are an outcome of a review of the permit system conducted by FaCSIA from October 2006 to February 2007.

32 See, for example, the Hon Marion Scrymgour MLA, Northern Territory Minister for Family and Community Services, *Committee Hansard*, 10 August 2007; Combined Aboriginal Organisations of the Northern Territory, *Committee Hansard*, 10 August 2007; Amnesty International Australia, *Submission 39*, p. 4; Law Council of Australia, *Submission 52*, p. 9.

33 See, for example, Central Land Council and Northern Land Council, *Committee Hansard*, 10 August 2007.

34 *Submission 84*, p. 3.

35 *Submission 84*, p. 3.

> that it will provide the appropriate level of law enforcement to ensure that the removal of the Permit System does not lead to 'rivers of grog' flowing into this community?[36]

2.34 ANTaR argued that removal of the permit system may actually increase instances of child abuse:

> No evidence has been provided to support the Minister's claims that scrapping the permit system will help overcome child abuse. In fact, Australia's leading expert on child abuse in Aboriginal communities, Professor Judy Atkinson considers that scrapping the permit system may actually increase the risk of child abuse by restricting the ability of communities to remove suspected paedophiles from Aboriginal land. Fears have also been expressed that removing the permit system will make communities more vulnerable to grog running.[37]

2.35 In response to concerns about the proposed changes to the permit system, the Secretary of FaCSIA told the committee that the review of the permits system conducted by FaCSIA revealed problems with the system:

> We did do a review of the permits system. The government announced last year a review of the system. We have received 100 submissions, including quite a lot of consultation. We had access to that information before making the decision. In Minister Brough's visits around the north of Australia, talking to people in many communities, in the community meetings, when everyone was present, rarely did the permit system being a problem come up. A number of times in private meetings after that, with Mr Gibbons and me, individuals certainly came up to him and talked about the permit system being a problem.[38]

2.36 The Combined Aboriginal Organisations of the Northern Territory gave evidence that the group had not made a submission to this review on the basis that it considered the issue of permits to be within the expertise of the Northern Territory land councils.[39]

2.37 In his second reading speech on the National Emergency Response and Other Measures Bill, the Minister noted that:

> After consultation the government has decided on balance to leave the permit system in place in 99.8 per cent of Aboriginal land in the Northern Territory.[40]

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36 *Submission 32*, p. 1.

37 *Submission 60*, p. 4.

38 *Committee Hansard*, 10 August 2007.

39 *Committee Hansard*, 10 August 2007.

40 *House of Representatives Hansard*, 7 August 2007, p. 8.

2.38 FaCSIA also provided the committee with a fact sheet explaining how the modifications to the permit system are linked to combating child sexual abuse. Importantly, the fact sheet notes that the proposed changes do not apply to sacred sites, private land or to the vast majority of Aboriginal land:

> They apply to towns only – places with roads, shops and public places like other towns. Currently, access to town is closed, with no justification. This sets these towns up as somehow different, and encourages the people who live there to have different expectations and aspirations – to think that because they are different they don't need to worry about having a job or sending their kids to school.[41]

2.39 The fact sheet suggests that the removal of the permit system will promote strong and safe communities in a number of different ways. It argues that allowing closed communities can allow bullies to dominate and stand over people, and even intimidate people so that they do not report abuse. Further, it makes the following case for changing the system:

> The question is often asked why we are removing the permits system in these towns, but a more pertinent question is: why would you have such a system in the first place? Why set up Indigenous people living in towns as different and prevent them from having access to normal experiences that see most Australian communities prosper and thrive?
>
> It would be easier to understand why some people argue so strongly for the permit system if these towns were well functioning havens. But the *Little Children* report clearly tells us this is not the case. The permit system has been one of the culprits in hiding an ever-worsening situation of child abuse from the public gaze.[42]

Compulsory acquisition of five-year leases

2.40 The Law Council queried whether the provisions providing for compulsory acquisition of five-year leases in the National Emergency Response Bill were necessary to achieve the aims of the intervention package:

> [T]he Law Council questions why compulsory acquisition is necessary to address child abuse, and notes that the Government has provided no adequate justification for compulsory acquisition on the scale proposed, or at all. Around 70 settlements have been designated for compulsory acquisition either now or at some stage in the future. The Government has excluded itself from NT town planning and building ordinances to accelerate the process of improvement. The Law Council submits that the

41 FaCSIA, *Fact sheet: How does changing the permit system link to child sexual abuse?*, tabled on 10 August 2007.

42 FaCSIA, *Fact sheet: How does changing the permit system link to child sexual abuse?*, tabled on 10 August 2007.

> Government's aims could be achieved without compulsorily acquiring a single township.[43]

2.41 Professor Jon Altman from the Centre for Aboriginal Economic Policy Research raised concerns about the practicality of the provisions relating to the compulsory acquisition of leases, particularly with respect to how those provisions will interact with the statutory rights to assets created by Schedule 3 of the National Emergency Response and Other Measures Bill:

> [T]he issue of compulsory acquisition of leases and the construction of assets on people's land that they will not own at lease expiry will leave a planning and real estate contestation nightmare.[44]

2.42 The committee also received evidence suggesting that the compulsory acquisition provisions in the bills may be unconstitutional.[45] Senator Bob Brown submitted legal advice prepared by Mr Brian Walters SC which stated that:

> Although some provisions in the legislation do require acquisition of property on "just terms", several provisions in the legislation refer to the acquisition of property but subject to the payment of "a reasonable amount of compensation", as distinct from "just terms"…
>
> No substantial guidance is contained in the legislation in respect of what is "reasonable" compensation.[46]

2.43 Mr Walters SC submitted that:

> In some cases, "a reasonable amount of compensation" probably would, in terms of content, amount to "just terms", but much will depend on factual detail. For example, the provision of educational services – which normally are available to all Australians of learning age – is unlikely to be seen as something which satisfies the requirement of "just terms".[47]

2.44 He concluded that:

> The present legislation in some places uses the expression "just terms", but in other places, in contradistinction to that expression, deliberately chooses

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43 *Submission 52*, p. 10.

44 *Opening statement of Professor Jon Altman*, provided to the committee secretariat on 10 August 2007, p. 1. Schedule 3 of the National Emergency Response and Other Measures Bill allows the Commonwealth, Commonwealth authorities, the Northern Territory and Northern Territory authorities to retain an interest in buildings and infrastructure constructed or upgraded on Aboriginal land in the future where they fund the construction or major upgrade. Schedule 3 also provides a mechanism for the statutory rights to come to an end once the buildings and infrastructure are no longer required.

45 There are several provisions in the bills which relate to compensation for the compulsory acquisition of property. Perhaps the most significant are proposed sections 60 and 134 of the National Emergency Response Bill.

46 *Submission 101*, pp 4-5.

47 *Submission 101*, p. 5.

> to use the term "a reasonable amount of compensation" rather than "just terms". This evinces a drafting intention to provide protection other than the constitutional guarantee of "just terms".
>
> In my opinion the legislation purports to authorize the acquisition of property on terms other than the "constitutional guarantee" of just terms.
>
> In those circumstances, the courts would not have a role of correcting the legislation by inserting just terms. Rather, the legislation purporting to authorise the acquisition of the property would be struck down as void.
>
> In my opinion all of the provisions in the legislation providing for acquisition of property other than on "just terms" would be struck down as void ab initio if they were enacted into law in their present form.[48]

2.45 By contrast, the Law Council submitted that the drafting of the National Emergency Response Bill may shield the Commonwealth from a requirement to pay compensation:

> The application of s 51(xxxi) of the Constitution to provide compensation for an acquisition of property in the Northern Territory is not a foregone conclusion. Under current High Court Authority there is no requirement to pay compensation for an acquisition of property referable only to the s 122 Territories power under the Constitution. The Bill makes it apparent (through reference to the non-application of s 50(2) of the Northern Territory (Self Government) Act 1978) that the power relied upon for the acquisitions is pursuant to the Commonwealth's s 122 Territories power.
>
> The Law Council notes that the legislation appears to shield the Commonwealth from its obligation to compensate the relevant Land Trust or pay rent, in circumstances where a lease is issued under section 31.[49]

2.46 FaCSIA rejected arguments that the compulsory acquisition provisions are unconstitutional and stated categorically that the National Emergency Response Bill provides for just terms compensation:

> Senator SIEWERT—Can you clarify whether we are talking about just terms compensation or reasonable compensation.
>
> Mr Gibbons—Just terms compensation.
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> …
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> Senator SIEWERT—There is also confusion about whether infrastructure or making your child healthy or being provided with a house equate to just terms.
>
> Mr Gibbons—We are talking about the lease-back of townships for five years and applying the constitutional provision about just terms compensation to the owners of the land, which are the relevant lands trusts.

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48 *Submission 101*, p. 6.

49 *Submission 52*, p. 13; see also Gilbert and Tobin Centre of Public Law, *Submission 40a*, pp 4-6.

> It is unrelated to what we do to repair houses or provide other infrastructure in the context of the intervention.[50]

2.47 FaCSIA also submitted that the phrase 'a reasonable amount of compensation' is used in existing Commonwealth legislation including the *Customs Act 1901* and the *Commonwealth Radioactive Waste Management Act 2005*.[51]

2.48 Some parties have sought to characterise the National Emergency Response Bill as a 'land grab'.[52] The Secretary of FaCSIA responded to this assertion:

> We do not believe that it is at all correct to characterise this as a land grab. We are acquiring, temporarily, leases over the 73 communities to allow us to intervene on behalf of the children by putting police in there, by putting government business managers in there, by looking at the state of the housing et cetera. We need to do this to stabilise the communities such that they are safe places for the kids, basically. We are only doing it for a very small proportion of the land and for five years only.[53]

2.49 An officer of FaCSIA further explained:

> …[W]e are going to make an investment in these towns. Many of them are a liability in their current state. We will be improving the basic infrastructure, particularly that part of it that is relevant to environmental health as well as houses, such that when they are returned they will be in vastly better condition than when we took them over.[54]

Changes to CDEP program

2.50 Several submissions and witnesses expressed concern about the proposed abolition of the CDEP program in the Northern Territory, particularly with respect to the capacity to find enough 'real' jobs for the approximately 8000 CDEP program participants once the program is wound up.

2.51 For example, the Mayor of Alice Springs Town Council told the committee that:

> On the question of CDEP, we have felt for quite some time that the welfare system has been a poison for Aboriginal people and there has been intergenerational damage over the last 20 or 30 years. We support the removal of CDEP but in the context that real jobs must be created. Many of the communities depend very heavily on CDEP because there is, apart from

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50 *Committee Hansard*, 7 August 2007.

51 FaCSIA, *answer to question on notice 64*, 12 August 2007.

52 Australian Broadcasting Corporation, *Lateline*, 26 June 2007, transcript accessed at: http://www.abc.net.au/lateline/content/2007/s1962845.htm on 11 August 2007; see also Staff of Kingfisher Organic Foods, *Submission 103*, p. 1.

53 *Committee Hansard*, 10 August 2007.

54 *Committee Hansard*, 10 August 2007.

> that, little or no economic activity. You probably would have a copy of the [Local Government Association of the Northern Territory] survey, which showed that out in the bush there are around 3,000 real jobs. But if you look at those which are on CDEP and having a top-up, there are around 1,500 jobs. But there are jobs available in most communities. My concern is that there will not be enough jobs for people to move into when CDEP disappears…[55]

2.52 The Hon Marion Scrymgour MLA, Northern Territory Minister for Child Protection, noted that the Australian Government will create only 2000 jobs and expressed her concern that the remaining 6000 participants will not be provided with jobs. She also suggested that the abolition of the CDEP program would have a 'devastating' impact on the Indigenous art community.[56]

2.53 The Laynhapuy Homelands Association Incorporated (LHAI) was highly critical of the proposed changes to the CDEP program:

> LHAI is extremely concerned that the abolition of CDEP has not been undertaken in the best interests of the Aboriginal people affected. It is not being driven by the opportunities for 'real jobs' – but driven by the belief that it is necessary to 'strip the communities of CDEP cash' and so the government can legally quarantine payments to those forced onto Welfare.[57]

2.54 LHAI argued further that the CDEP program has served a valuable purpose, particularly in remote communities:

> The government has criticized CDEP as a 'destination' – we would strongly argue that we have secured 28 full time jobs off CDEP in 12 months, and that Work for the Dole will not have this employment success rate. Work for the Dole, rather than CDEP, is what will be the ultimate destination for many living in the remote communities.
>
> We question the Government's insistence CDEP must cease in remote areas, as it can work extremely well and services community needs effectively, and has been successful in placing participants into off CDEP work. We question why government feels the need to 'reinvent the wheel' when you have all the mechanisms already in place for community development, training and developing jobs off CDEP.[58]

2.55 In his second reading speech on the Welfare Payment Reform Bill, the Minister outlined the policy rationale for the changes to CDEP:

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55 *Committee Hansard*, 10 August 2007.

56 *Committee Hansard*, 10 August 2007.

57 *Submission 38*, p. 17.

58 *Submission 38*, p. 18.

> While CDEP has been a major source of funding for many Northern Territory communities, it has not provided a pathway to real employment, and has become another form of welfare dependency for many people.
>
> Instead of creating new opportunities for employment, it has become a destination in itself.
>
> It has also in too many cases been used as a substitute for services that would otherwise be the responsibilities of governments—services that should be provided through full-paid employment.[59]

2.56 A representative from the Department of Employment and Workplace Relations told the committee that, with the phased removal of CDEP, community brokers and transition officers will work on a one-on-one basis with each of the CDEP organisations to ensure a smooth transition:

> [W]e will have a group of people to work very closely with the organisations to make sure that we can track participants, that we can move participants into work and undertake the necessary actions to work with organisations to make sure that they can manage the change. We are also putting in place community brokers for this financial year. Hopefully most of the community brokers will be living within the community itself. Because there are significant changes to the CDEP and also the accelerated lifting of the remote area exemptions, we want to put people in place who can broker solutions between the new service providers that are coming through, work with the organisations to think about what they need to do to actually participate in that new service space and also work closely with participants to make sure that they are aware of their obligations. Particularly with the remote area exemptions, there is a new participation requirement for a lot of people. We need to make sure that we minimise the impact on those people and ensure that they do understand what their new obligations are. So there is one-off staffing required for this financial year for both of those obligations.[60]

2.57 Further:

> We also have some additional staffing in to manage the build-up of the new contracts. Part of the CDEP changes but also the acceleration of the lifting of remote area exemptions will involve putting in place an expanded provider of Australian government employment services contracts. There will be a lot more people accessing those services. We need to make sure that we have contract management staff that are working closely with all of those providers to make sure that they are actually undertaking services and delivering the services that we need. Also embedded is travel.[61]

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59 *House of Representatives Hansard*, 7 August 2007, p. 5.

60 *Committee Hansard*, 10 August 2007.

61 *Committee Hansard*, 10 August 2007.

Income management regime

2.58 Some submissions and witnesses expressed concern at the income management regime provisions of the Welfare Payment Reform Bill.[62]

2.59 For example, the Australian Council of Social Service (ACOSS) submitted that the proposed changes would be ineffective: the establishment of a compulsory income management regime will not, in and of itself, change the way people behave at a fundamental level; rather, Indigenous people should be encouraged to take responsibility for their own lives by adoption of voluntary approaches to welfare.[63] Indeed, ACOSS expressed the view that the proposed system of income management 'is unlikely to contribute to the solutions and would in a number of ways contribute to the underlying problems'.[64]

2.60 ACOSS also argued that:

> The Bill implements an apparently simple solution to a complex set of problems – attaching new conditions to social security payments and taking over family budgets to combat child abuse and truancy generally, and prolonged joblessness and social breakdown in remote communities. In practice, the income management system outlines in the Bill is very complicated. It is of concern that despite the complexity of this legislation, there is still a lack of precision as to who will be subject to income management, under what circumstances and for how long.[65]

2.61 Several submissions and witnesses also expressed concern about the practical impact of quarantining welfare payments. For example, HREOC submitted that quarantining measures designed to encourage school attendance may disproportionately impact on families in areas without adequate schools and teachers.[66]

2.62 Submissions and witnesses were also critical of the provisions of the Welfare Payment Reform Bill relating to the removal of rights to appeal to the Administrative Appeals Tribunal (AAT) and the Social Security Appeals Tribunal (SSAT). The Welfare Rights Network argued that the removal of appeal rights 'adversely discriminates' against people living in declared relevant areas in the Northern Territory:

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62 As outlined in Chapter 1, Schedule 1 of the Welfare Payment Reform Bill establishes income management regimes nationally, as well as specific regimes which are applicable only in the Northern Territory and Cape York.

63 *Committee Hansard*, 10 August 2007.

64 *Submission 97*, p. 4.

65 *Submission 97*, p. 4.

66 *Submission 67*, pp 11-12.

> The right to appeal has always been a fundamental protection for Social Security recipients against bureaucratic neglect and error. However, the Government intends to remove the rights to external appeal to the Social Security Appeals Tribunal (SSAT) for Northern Territorians who are subject to the Income Management of their welfare payments. This sets a very dangerous precedent to strip away this protection for an entire group of Australians based solely on where they live. These decisions could have huge implications for families.
>
> …
>
> It is difficult to accept the Government's rationale as to why Indigenous communities in the Northern Territory are to be denied access to independent review of decisions relating to the quarantining of welfare payments when other Australians in other parts of the country will be able to exercise their full appeal rights. [67]

2.63 In response to these concerns, a FaCSIA officer explained that:

> The primary purpose of the income management regime as it applies [in] the Northern Territory is, in those prescribed areas, to have an income management approach to all government welfare payments going into a community, to ensure that the flow of government assistance into the community is able to be managed as a whole to encourage expenditure on those services and goods that will lead to better outcomes for the children in those communities. On that basis, the government took the decision to apply the income management regime not just to payments associated with children themselves.[68]

2.64 On the question of removing appeal rights, FaCSIA advised that:

> There are standard appeal rights that apply to all decisions relating to social security. They involve an authorised review officer in Centrelink reviewing a decision, then appeals to the SSAT and the AAT and subsequently to the courts. In the case of the Northern Territory response, because it is time limited, 12-month quarantining, it was decided that the authorised review officer review would remain but that appeals to the SSAT and the AAT would take too long and would consequently undermine the timing of the emergency response. People will only have their income quarantined to the extent of 50 per cent of their income from welfare payments and for 12 months only.[69]

2.65 The committee also questioned FaCSIA about what is meant by the term 'unsatisfactory school attendance' in the income management provisions of the Welfare Payment Reform Bill. FaCSIA advised that the applicable state and territory

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67 *Submission 44*, p. 2.

68 *Committee Hansard*, 10 August 2007.

69 *Committee Hansard*, 10 August 2007.

laws would be used as a basis for assessing whether school attendance was unsatisfactory.[70]

Funding to address inadequate housing

2.66 The Northern Territory Minister for Child Protection raised concern that little of the $580 million in appropriations to be made as part of the intervention package was going towards addressing the backlog of Indigenous housing in the Northern Territory.[71]

2.67 In response to these concerns, the Secretary of FaCSIA pointed to existing government funding commitments in relation to housing:

> There is some money in this for the maintenance and the fixing up of houses and, as Mr Gibbons said, the government announced in the budget this year $1.6 billion for Indigenous housing over the next four years. A large proportion of that the minister has already made it clear will be available for the Northern Territory. We have considerable resources for housing already appropriated in the budget.[72]

Restrictions on the availability of alcohol

2.68 The Mayor of the Alice Springs Town Council gave evidence that 85 per cent of police work in Central Australia is alcohol related.[73] However, the Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council told the committee that the availability of alcohol through outlets in Indigenous communities was only part of the problem; the supply of alcohol from the major towns in the Northern Territory also presents a significant problem.[74] The submission of the Bawinanga Aboriginal Corporation similarly noted that the ready availability of alcohol in centres located close to Indigenous communities can undermine the effectiveness of prohibition measures:

> The majority of illegal drugs and alcohol are brought in by road during the dry season. By opening the roads and townships, there is significant evidence to suggest that these problems will be exacerbated. Another impact of prohibition experienced by Maningrida was an out-migration of residents to Darwin. This had the effect of significantly disrupting local

70 *Committee Hansard*, 10 August 2007.

71 *Committee Hansard*, 10 August 2007.

72 *Committee Hansard*, 10 August 2007.

73 *Committee Hansard*, 10 August 2007.

74 *Committee Hansard*, 10 August 2007. It should be noted that the initiatives relating to reducing the availability of alcohol in the National Emergency Response Bill extend beyond Indigenous communities – see for example proposed sections 20 to 22.

> employment outcomes, family structures and also resulted in a number of alcohol related deaths in Darwin.[75]

2.69 The mayors of the Alice Springs and Katherine Town Councils gave evidence regarding the number of takeaway liquor licences in each town:

> Councillor Shepherd—In Katherine there are probably eight or 10 where there is takeaway alcohol, and of course there are restaurants and other areas like that, and the clubs too. I do not really think the clubs are a problem, but the other takeaway outlets certainly are.
>
> Councillor Kilgariff—In Alice Springs we have over 90 outlets. Twelve of those are takeaway and the rest are restaurants. I agree with Mayor Shepherd that the restaurants are not really the point at issue here, but certainly the takeaway outlets are.[76]

2.70 The mayors were asked whether compulsory acquisition of some takeaway licences was being considered as a means of reducing the number of outlets:

> Councillor Kilgariff—It has certainly been the case in Alice Springs. We had a crime summit yesterday and that was strongly brought forward. For instance, there is a service station here which has a liquor licence for historical reasons. That would seem an obvious target for such a buy back. There are a couple of corner shops that have liquor licences. So there is a strong suggestion—and I think a growing suggestion—that those sorts of liquor licences should be bought back.
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> Councillor Shepherd—I would say that is the same in Katherine. It certainly has been discussed at some length in Katherine.[77]

2.71 The Mayor of Katherine Town Council gave evidence that additional drug and alcohol rehabilitation services are needed in Katherine:

> While we do have a lot of agencies addressing alcohol concerns, we do not have the facilities to cope with the number of people. We need a rehabilitation centre that can house 50 or 60 people. We also need that follow-on care when they are reintroduced into the community as sober people so that there is help for them to maintain that. We desperately need better services. We in Katherine have been calling for a long time for better services to cope with the alcohol problems and the people who are victims of alcohol abuse.[78]

2.72 Under clause 20 of the National Emergency Response Bill, 1350 millilitres of pure alcohol is the threshold amount at which obligations to collect information about takeaway liquor sales in the Northern Territory are imposed. This clause also creates

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75 *Submission 3*, p. 20.

76 *Committee Hansard*, 10 August 2007.

77 *Committee Hansard*, 10 August 2007.

78 *Committee Hansard*, 10 August 2007.

associated offences for failure to meet those obligations.[79] A submission from Woolworths Ltd expressed concern about the difficulty involved in calculating the amount of alcoholic beverages which equates to 1350 millilitres of pure alcohol.[80]

Restrictions on pornography

2.73 The Festival of the Light and the Australian Christian Lobby argued that the provisions in Schedule 1 of the National Emergency Response and Other Measures Bill should go further.[81] The Festival of Light recommended extending the prohibitions on possession and supply of X18+ films across the Northern Territory:

> Those who live in the prescribed areas are not, nor should they be, prohibited from travelling outside these areas. The Northern Territory, unlike the six States, currently permits the sale of X18+ films to any person over the age of 18. If this is allowed to continue then it will seriously undermine the prohibitions being put in place in the prescribed areas.
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> Furthermore, the Northern Territory's Classification of Publications, Films and Computer Games Act (NT) Section 50 (2) provides that "A person shall not sell or deliver to a minor a film classified X 18+ or R 18+, unless the person is a parent or guardian of the minor." This extraordinary provision means that it is not unlawful for a parent or guardian to give any child under their care an X18+ film. Videos and DVDs are very portable items. Unless their sale is prohibited not just within the boundaries of the prescribed areas but throughout the Northern Territory then X18+ films will most likely continue to play a role in the premature sexualisation and sexual abuse of indigenous children.[82]

2.74 Part 3 of the National Emergency Response Bill requires filters accredited by the Minister to be installed and maintained on publicly-funded computers as well as the maintenance of records regarding computer usage and six-monthly auditing of computers. Laynhapuy Homelands Association Inc expressed concern regarding the administrative burden imposed on organisations in order to implement these requirements:

> The recording of computer usage by staff can be automated through the server software. However there will be significant cost in installing 'filter' software because of the labour and travel costs (this will run to several thousands of dollars).

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79 See also subclause 12(6) which imposes harsher penalties in relation to possession or supply of alcohol in prescribed areas where the volume of alcohol exceeds this amount.

80 *Submission 41*.

81 Australian Christian Lobby, *Submission 2*; Festival of Light, *Submission 37.*

82 *Submission 37,* p. 3.

> The 'auditing' requirement would likewise impose a cost of several thousands of dollars, if physical inspection of the computers was required to be undertaken.[83]

2.75 On 10 August 2007, the Prime Minister announced new initiatives in relation to the provision of free online content filters to Australian families and public libraries, as well as access to Internet Service Provider filtering on request.[84] In relation to these new measures, the Minister for Communications, Information Technology and the Arts, Senator the Hon Helen Coonan, noted that Tasmania and the ACT have existing filtering strategies in their respective public libraries and she called on the other remaining premiers and the NT Chief Minister to 'take this matter seriously'.[85]

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83 *Submission 38*, p. 8.

84 Prime Minister of Australia, *Media Release*, 10 August 2007, accessed at: http://www.pm.gov.au/media/Release/2007/Media_Release24485.cfm

85 Minister for Communications, Information Technology and the Arts, *Media Release*, 10 August 2007, accessed at: http://www.minister.dcita.gov.au/media/media_releases/netalert_-_protecting_australian_families_online