Minority Report
Senator Andrew Bartlett, Queensland Democrats

"We are not saying 'don't do it'. We are saying it needs to be done properly[1]"
David Ross, Director of the Central Land Council

Many witnesses and submitters to this disgracefully and unnecessarily brief inquiry spoke of their support for at least some aspects of the legislation, as well as for much of the stated intent behind it. But there is a clear need both for further scrutiny of many parts of the legislation, and for significant improvements to be made to it.

A distinction must be made between the federal government's decision to make the issue a matter of urgent priority, which should be applauded, and those aspects of the plan which are flawed and must be changed.

There is almost universal support amongst Indigenous Australians, and amongst most of the wider Australian community, for strong and urgent government and community action to help Aboriginal children – a fact which provides a solid foundation and a real opportunity for major, long-term positive change. Unfortunately, the government's approach to addressing this issue has caused so much anxiety, distress and anger amongst many Indigenous and non-Indigenous people that there is a real risk that this opportunity will be lost. It is extraordinary that on an issue where there is enormous agreement and huge potential for common ground, deep divisions have been created so quickly as a result of the divisive and disrespectful attitudes and processes that have been followed.

To quote one Aboriginal leader from outside the Northern Territory, "*the difference between disaster and success will depend on whether Brough and Howard will engage with ... the traditional leaders of the NT on a way forward.*"[2]

The crucial task for those of us who want to ensure that disaster is averted and the priority goal of improving the lives and futures of Indigenous children and families is not subverted by partisan politics, is to do whatever is possible to maintain a consultative, common sense, evidence based approach which can be consistently adhered to for the long haul.

No one has a mortgage on concern for children. The public record shows that Aboriginal leaders and their communities have been calling for many years for help and support in tackling the scourge of child abuse; calls that have been regularly supported by the Democrats in the Senate and the general community. It is the height of stupidity, as well as arrogant and rude, to now refuse to listen to and work with

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[1] Senate Committee Hansard, 10 August, 2007, page 51

[2] Noel Pearson, "Tricky Hunt for Common Ground", The Australian – 11 August, 2007

Indigenous people in taking the major actions necessary to create lasting, positive change.

Sadly, anyone who raises any concerns about the details of the federal government's wide-ranging intervention into the lives and communities of Aboriginal people in the Northern Territory is smeared with allegations that they don't want anything done, or they don't care about protecting children. Similarly, people who call for consultation and cooperation in implementing the federal government's measures are criticised as just trying to delay action.

The Committee was subjected to several examples of this form of verballing of those who raised concerns with aspects of the legislation, such as the following:

"We have heard a number of parties give reasons why parts of the legislation should be delayed or changed. It concerns me that many would be happier—it would appear—if nothing happened."[3]

This sort of misrepresentation unfortunately makes it necessary to re-state a fact which should be so obvious as to be beyond dispute. Aboriginal people do want urgent action and major change in the approach of governments and the resources that are provided.

A crucial opportunity for the Government to show leadership in prioritising Indigenous issues and to finally do things right is at serious risk of being lost due to the arrogant and blinkered manner the Government has adopted, as evidenced by their determination to bulldoze this complex, wide-ranging legislation through the Senate as quickly as possible without consideration of the detail or potential consequences.

The extremely short timeframe given to the Senate Committee has been an insult to the Senate, to the electorate who entrust us with doing the job of properly scrutinising important legislation, and especially to Aboriginal people who have had virtually no chance to have a say on legislation and actions which dramatically and directly affect their lives. The language of "emergency" and "crisis" which the government has used has been deliberately employed to stifle debate and prevent scrutiny and consideration of their actions.

The Northern Territory government's lack of response to the *Little Children are Sacred* report was used by the federal government to justify their intervention in the Territory and the need for the legislative changes before this Committee. Yet now the federal government is not responding to the report either, but charging ahead with a separate body of action.

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[3] John Cleary, Committee Hansard, page 83

It is important to note the comments of Pat Anderson, one of the authors of that report:

- *"There is no relationship between their emergency powers and what's in our report.*
- *"We did want to bring it to the government's attention but not in the way it has been responded to by the Federal Government."*
- *"We wrote the recommendations in a such way that they appeared so reasonable that you would feel any government would be absolutely unreasonable not to begin implementing what they said."*
- *"They behaved as though we all have done nothing and we don't know anything and we have all been sitting on our hands."* [4]

Concerns stated by many submitters that the government is more interested in using the issue of child abuse as a cloak for implementing its ideological agenda and grabbing more power will not be alleviated by answers from the Department of Family and Community Services and Indigenous Affairs confirming a total absence of any consultation with the authors of the *Little Children are Sacred* report, despite their expertise and direct knowledge of the issue developed over many months of consultations and extensive discussions with people directly involved with and affected by the issue:

Senator BARTLETT—Could you tell us what consultation your department or any other departments have had with the authors of the *Little children are sacred* report in putting together this legislative response?

Dr Harmer—I am not aware of any consultation with the authors of the report. It was a very long report with many recommendations, most of which were directed towards the Northern Territory government. The Australian government decided on viewing it that this was an emergency and required urgent action. The action that the government decided it needed is spelt out in the appropriation bills and the associated Northern Territory emergency response bills.

Mr Gibbons—We of course studied the report.

Dr Harmer—As Mr Gibbons has pointed out, we did not undertake this exercise without studying the report, but, in a big report such as that, the authors made their views on what is happening pretty clear. We did not feel the need to go back to talk with them. Frankly, in responding quickly to this, we did not feel that that was the highest priority amongst all the other things that we had to do.

Senator BARTLETT—I appreciate the comment about it being an emergency but, in the six weeks since it was announced, has there been no consultation at all with them?

Dr Harmer—No—at least, not that I am aware of.[5]

It is simply inexplicable that the authors of this comprehensive report were not invited by the Committee to give evidence to this inquiry. Despite this, in answers to

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[4] Pat Anderson, as quote in submission 108, Aboriginal Health & Medical Research Council of NSW, page 2

[5] Committee Hansard, 10th August, 2007

questions asked in this inquiry, the federal government repeatedly referred back to the *Little Children are Sacred* report to justify its actions.

As Jon Altman told the Committee:
"There is another way possible: empower and work with communities; support what is working and build on it; address the deep backlogs that are a result of past policy, not Indigenous, failure; and learn from international experience where there has been much more success than here."[6]

Having outlined the serious problems with the government's approach, it is appropriate to outline what should be done instead. I believe that the guiding principals that the Combined Aboriginal Organisations of the Northern Territory have put forward should form the basis of the planning and implementation of any response. These include:

- Relationships with Aboriginal communities must be built on trust and mutual respect. All initiatives must be negotiated with the relevant communities.
- Cultural awareness and appropriateness.
- Actions should draw from and strengthen governance and community capacity.
- Build on the knowledge base already there in communities and in Government.
- Flexibility and responsiveness to local needs rather than a 'one size fits all' approach.
- Aboriginal communities are entitled to receive the same benefits and services and their children the same protections that are available to other Australians.[7]

The Government has failed to respond to or factor in any of these principles in any of their decisions.

Report after report, including the *Little Children are Sacred* report, and statement after statement from Indigenous Australians, reaffirms that the key to success in the implementation of any measures, let alone measures with respect to these bills, must be full and ongoing consultation and cooperation with Indigenous leaders and their communities. This is not technically difficult or complex, but it does take ongoing effort, commitment and respect.

This sweeping legislation seeks to vest the Minister with unprecedented powers of discretion which have the potential to control major aspects of the lives of most Aboriginal people in the Northern Territory. History shows us very starkly that, even when there are the very best of intentions, the exercise of such extreme powers by non-Aboriginal people in a top-down fashion will not work. The inevitable effect will be a further disempowerment of many Indigenous people and communities, which risks making the underlying factors at the heart of the problems worse rather than better.

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[6] Jon Altman, Committee Hansard, 10 August, 2007. page 79

[7] Submission 125, Combined aboriginal Organisations of the Northern Territory, page 4

It is for this reason that its implementation must be done correctly and with the full cooperation of all parties concerned, with appropriate levels of scrutiny at all stages.

Access to and control over Aboriginal land

The most consistent and widely expressed concern by witnesses and submitters to the inquiry, as well as with the many people I have heard from and consulted with in the period following the Government's initial announcement, concerns the measures which will remove aspects of the permit system and give the Federal Government control over key areas of Aboriginal land. Evidence to the inquiry, including from FaCSIA, showed it is also still very uncertain exactly how this will operate in practice and what the consequences will be.

The submission from the Gilbert + Tobin Centre of Public Law gives some indication of the uncertainty and inequality in the approach the legislation takes:
"A non-Aboriginal property holder in the Northern Territory whose property rights are
taken away by government has access to a statutory compensation regime. Why not accord the same respect to Aboriginal property rights in this instance? Why should traditional owners have to climb over numerous additional legal obstacles to obtain compensation, by proving that a constitutional 'acquisition of property' has occurred?
This relegates Aboriginal property rights to a lower level of legal protection. Whether intentional or not, it has the effect of capitalising upon numerous complexities and doubts surrounding the meaning of section 51(xxxi), to the advantage of the Commonwealth and to the disadvantage of Aboriginal people whose sole valuable asset is frequently their property rights."[8]

The importance to Aboriginal people in having control over their own lands is widely recognised. Such rights as do exist in law have been hard won over many years. To take key parts of these away without crystal clear evidence to justify such action is unacceptable, and will dramatically increase the difficulty in building the trust and long-term cooperation with Aboriginal people which is absolutely essential to the chances of success in this area.

Not one of the many reports into child abuse or family violence has ever drawn a link between the permit system on land tenure and child abuse, a view echoed in the majority of submissions. The government has failed to produce a shred of evidence demonstrating any such link, relying at best on simply repeating assertions without providing any material to back these up. My questioning of the Department during the inquiry did not produce any substantial evidence as to what the reasoning for this was.

Senator BARTLETT—I have just had a quick look at the page you put before us trying to indicate links between the permit system changes and combating child sexual abuse, which I note draws on the *Little children are sacred* report at least twice as part

[8] submission 40, Gilbert +Tobin Centre of Public Law, page 2

of its justification. Given that you just mentioned that you have read that report thoroughly, is there any mention in any of their recommendations about the permit system or land changes being linked to child sexual abuse?

Mr Gibbons—I do not think so.

Dr Harmer—No, there is not. I will stand corrected, but I do not think that there are any recommendations about police either in that report.

Senator BARTLETT—You have mentioned in this piece of paper that whoever comes into the community cannot replace an adequate police presence. I am presuming that means a permit. Is anyone suggesting that it is an either/or situation—permits or police?

Mr Gibbons—Up to this point in time, that is what it has been for a lot of communities. There has been an absence of police.

Senator BARTLETT—Are you saying that the communities did not want police?

Mr Gibbons—No. I am saying that, for a long time, there were no police in communities.

Dr Harmer—I will also say, because we now have quite a bit of information about community reaction to the intervention, that there has been a very positive response to the presence of police in the communities.

Senator BARTLETT—I do not think anything I said suggested otherwise. What I asked was why it was being put up as an overall option that you either have a permit or a police presence? I did not know that anyone was putting it up in that way. You put forward a few dot points to underline that the removal of the permit system will promote strong, safe communities. They are basically a few assertions. Is there any actual research or data that you can provide to the committee that demonstrates that those places without permits, either in the Territory or elsewhere, have lower levels of child abuse?

Mr Gibbons—I do not believe so.[9]

The most telling evidence against the Government's insistence that removing permit controls will help tackle child abuse came from the Police Federation of Australia (PFA). They state that operational police on the ground in the NT believe that the permit system is a useful tool in policing communities, particularly in policing alcohol and drug-related crime. Their submission points to the potential that its abolition may undermine police efforts to control grog and drug running and the distribution of pornography.

The PFA is also of the view that the Australian Government has failed to make the case connecting the permit system and child sexual abuse in Aboriginal communities. Therefore, changes to the permit system are completely unwarranted. [10]

Child protection issues

There is no doubt that major action needs to be taken to address child abuse. However, there has been little, other than by way of earnest assertions, to indicate how the majority of the measures in this legislation will address child abuse. The Secretariat of National and Islander Child Care (SNAICC) stated that this suite of bills fails to provide any certainty that the child protection system in the NT will work more effectively to protect children from harm or respond when they have been harmed.

[9] Committee Hansard, 10 August, 2007

[10] Submission 24, page 3. Police Federation of Australia

Responding to child abuse in any part of the country and for any Indigenous community requires a sustained and coordinated response involving statutory child protection, police and community-based agencies with a primary focus on a child's circumstances and family. Without a robust statutory child protection system, notifications are not responded to and communities lose faith in the system. Without appropriate and adequate levels and forms of policing, prosecutions cannot proceed. [11]

The submission by the PFA also noted this aspect and commented on the complexity of penalties and measures that need a strong police presence, yet there has been no discussion or even mention about funding for further ongoing police in the region, nor any indication that much needed training for police to deal with these interventions had been addressed in any meaningful way.[12]

It is also important to note that there has not been any discussion at all about what measures will be put in place to support the development of community-based services to work with families affected by abuse or what shelters or safe houses there will be for families or children to seek refuge in or be adequately supported. There is also no discussion about additional resources for child protection staff or community-based services, nor any consideration given to the development of treatment programs for perpetrators of child abuse.

Discrimination

The exemption of these laws from the ***Racial Discrimination Act 1975 (RDA)*** is a major concern, creating a prima facie case that they will be blatantly discriminatory in their application. Continually repeating the mantra that "it's an emergency" is not sufficient justification for suspending the application of such a fundamental piece of law as the ***RDA***. The lack of consent from the people affected, the clear opposition from many Indigenous people and the lack of evidence to demonstrate that some of these measures will be either necessary or effective, all combine to make the Government's claims that these are "special measures" (that is, positive discrimination) very dubious. It is not good enough to assert that something is a special measure just because the Government says so.

The ***RDA*** is in place as a result of some terrible lessons learnt over a long period of time. It sets a very dangerous precedent to waive its protections on such flimsy pretexts. It is potentially highly destructive to implement laws and policies for which there is so clearly one set of standards for Indigenous people and another for non-Indigenous people. If the Government is serious about implementing positive measures to assist in lifting Indigenous people up and to achieve equality, this is certainly not the way.

[11] Submission 25, page 2. Secretariat National Aboriginal Islander Child Care (SNAICC)

[12] Submission 24, Police Federation of Australia.

Welfare issues

Abolition of CDEP

Concerns about the potential harm caused by the government's abolition of CDEP were also widely voiced. Unfortunately, it is still unclear precisely what actions and resources will be coming from the government in its place. Again, there has been a lot of rhetoric and assertions, but no concrete commitments or funding to indicate what will fill the substantial void which will be created by the scrapping of CDEP.

Quarantining of payments

The proposal to quarantine welfare payments is one I am prepared to give cautious in-principle support to as an idea to be explored in regards to child neglect and education, but I have major concerns about the lack of detail in the legislation about how this will be applied under this legislation. The approach which is being trialled in Cape York in Queensland is worthy of support, as it (a) has been developed with a reasonable degree of local community engagement, (b) is part of a wider package of integrated measures, (c) involves a significant degree of local community control and empowerment, and (d) is a trial. But none of these features apply in regard to the Northern Territory.

It is impossible to tell what will apply with future use of such measures in the wider community, as the detail has yet to be worked out. It is extraordinary that such far-reaching changes and major powers to intervene in the fine details of people's lives are being handed over to the Government with almost no examination of how it will work or consultation with the wider community.

Appeal rights

I am concerned about the fact that the rights of appeal for decisions over the quarantining of payments for Aboriginal people in the Northern Territory will not be subject to an independent review. This is extremely worrying, as the only independent alternative is to appeal to a Federal Court, which would involve significant and unnecessary cost. It should be borne in mind that there is only one Legal Aid office and only one general community legal centre in the NT. It is extremely difficult to accept the Government’s rationale as to why Indigenous communities in the NT should be denied access to review when other Australians in other parts of the country are able to exercise their full review rights. This is outright discrimination and should not proceed.

Resourcing

Whilst the Federal Government has now moved from its original ludicrous assertions that the overall cost of their intervention would be in the "tens of millions of dollars", there is still a major lack of detail about what sort of extra resources are going to be committed to properly tackle this issue. There is now over $500 million committed for this financial year, but unlike almost all other major Government announcements,

there are no forward estimates of anticipated ongoing extra expenditure beyond 1 July 2008. It is crucial that both major parties are held to account for providing further financial follow-up to ensure the job is finally done properly and fully.

KERRY O'BRIEN: Again on the promise made by the Prime Minister that the Commonwealth will pick up the resources, which actually pay and provide presumably the resources for follow up medical treatments.

If screening throws up eye disease, kidney disease, asthma, threat of diabetes, any one of a number of generic health problems throughout the Indigenous population you've undertaken to provide them all with on going treatment. Is that right?

MAL BROUGH: That's absolutely correct.[13]

Whatever form these Bills take when they are passed by the Senate, there must be concerted and continuing efforts made by the Senate and the community to ensure that commitments such as the above are stuck to.

Conclusion

It is an unfortunate fact that there is not a single Indigenous person in the federal Parliament able to speak on this legislation. There is nothing the Senate can do about this in this instance, but the Senate Committee process provided the only formal opportunity for the Parliament to hear directly from Indigenous people, particularly those in the Northern Territory who will be directly affected by the legislation. The calculated refusal of the Senate to enable adequate time for such views and voices to be properly heard and considered is disrespectful. It also compromises both the Senate's ability to make an informed decision on the legislation and the chances of the overall intervention producing a net positive rather than a net negative for Aboriginal children, families and culture.

However, whilst there is much to criticise about this legislation and even more about the deliberately antagonistic, non-consultative approach the Government has taken towards the issue, the opportunity has been created, buttressed by the community’s general support and acceptance of the need for urgent action, to build a genuinely effective action plan, in concert with Indigenous communities, for a sustainable future for Indigenous children that is no less positive than we expect for our own children. There have been far too many false dawns in the past, built on grand promises with too little thought and commitment behind them. The Australian community should seek to take this current opportunity before it too crumbles and force all political parties to match their current earnest rhetoric with long-term properly-resourced commitment to see this issue through and to see it done properly.

[13] 7:30 Report, 27 June, 2007

Recommendation 1

The bills not proceed until there has been proper opportunity for the Senate scrutinise its measures and determine necessary improvements, in consultation with relevant Aboriginal people and organisations.

Recommendation 2

The intervention plan should be fully costed by both the Commonwealth and the Northern Territory Government, with the setting of appropriate benchmarks and measurable targets to be achieved within set time frames.

Recommendation 3

Urgent funding must go into the building of infrastructure of communities in order for them to adequately deal with the measures in the legislation in the long term. There must be a proper roll out of funded programs and projects that is developed with communities that sees that provision of the following:

- adequate and appropriate housing to deal with overcrowding, (currently not addressed in the half a billion dollars of new money allocated to the intervention by the Federal Government);
- improved health care – including an increase in the number of health care providers and the provision of proper health care services that are culturally appropriate;
- the creation of sustainable and meaningful employment for Indigenous people in communities. The abolition of CDEP creates an even greater need for alternative strategies to provide meaningful training and employment for the thousands of NT people who currently receive training or find employment under CDEP;
- increased numbers of centres which provide services to deal with alcohol rehabilitation, safe houses for abused children and families, and half way houses for men which provide adequate counselling and education;
- improved education – which means funding for more teachers and aides who should be culturally trained and more supplies for schools to provide for the sustainable full attendance of every child in school;
- law enforcement – to ensure that all aspects are adequately dealt with, there should be funding that goes into the provision of law enforcement in communities and for officers to be culturally trained to deal with all aspects of penalties introduced by the legislation as well as for reporting provisions to deal with sexual abuse;
- the development and implementation of effective treatment programs for offenders guilty of child abuse and family violence.

Recommendation 4

This legislation should be reviewed by an independent body 12 months (and every 12 months after until the application of the 5 year sunset clause) after its implementation, and its results tabled in parliament.

Recommendation 5

If the Senate insists on proceeding with debating and voting on the legislation immediately, the measures which seek to take control of Aboriginal townships, acquire rights, titles and interests in Aboriginal land and remove key parts of the permit system without the consent of Aboriginal people must be deleted. These measures are unnecessary, bear no linkage to child protection, are ideologically motivated and most importantly present a major barrier to building the trust and cooperation with Aboriginal people that will be needed in order for this intervention to succeed.

Recommendation 6

The sections of the legislation which remove the right of Indigenous people to have their cultural practices taken into account in bail sentencing decisions – a right which is available to non-Indigenous Australians – should be deleted

Recommendation 7

The provisions in the legislation which seek exemptions from the Racial Discrimination Act should be removed.

Recommendation 8

The measures regarding welfare quarantining which apply to the wider Australian community and have nothing to do with seeking to address issues in Indigenous communities in the Northern Territory and Cape York are not in any way urgent and are unlikely to come into force until well into 2007 at the earliest. These measures should be quarantined into a separate piece of legislation so that these far-reaching and potentially very cumbersome and expensive changes can be properly examined.

Recommendation 9

There are key components in the National Emergency Response Bill, the Welfare Payment Reform Bill and the National Emergency Response and Other Measures Bill which must be heavily amended or removed in order to make these Bills acceptable. These include, but are not limited to, the issues raised in my recommendations 5-8 above. If such amendments are not made during the Committee stage of the debate in the Senate, these three Bills should be rejected.

Recommendation 10

Due to the seriously constrained time frame, it has not been possible to properly scrutinise the expenditure of resources contained in the two Appropriation Bills. Whilst some major questions remain over how effectively some of this money will be spent, clearly a national emergency response will continue to be rolled out. The two Appropriation Bills should therefore be supported. The Senate, in cooperation with Aboriginal people and organisations, should do everything possible to maintain

oversight of the expenditure of these monies and seek to ensure it is spent in as effective a way as possible.

Senator Andrew Bartlett
Australian Democrats