



amnesty international australia

Submission to the

The Senate Select Committee on Legal & Constitutional Affairs
regarding

***INQUIRY INTO THE NORTHERN TERRITORY EMERGENCY
RESPONSE BILLS PACKAGE***

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Submitted by

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The global defender of human rights

About Amnesty International

Amnesty International is a worldwide movement of more than 2.2 million people across 150 countries working to promote the observance of all human rights enshrined in the Universal Declaration of Human Rights and other international standards. In pursuit of these goals, Amnesty International undertakes research and action focused on preventing grave abuses of human rights including rights to physical and mental integrity, freedom of conscience and expression, and freedom from discrimination.

Amnesty International is independent of any government, political ideology, economic interest or religion. It does not support or oppose any government or political system, nor does it support or oppose the views of the victims whose rights it seeks to protect. It is concerned solely with the impartial protection of human rights.

Amnesty International has been at the forefront of work on the development and fulfilment of human rights standards for over 45 years. In addition to its work on specific abuses of human rights, Amnesty International urges all governments to ratify and implement human rights standards and works to create a human rights culture throughout society.

1. Summary

Amnesty International Australia supports measures genuinely designed to protect the rights of the children and other vulnerable people. However, it is concerned that policy interventions, including those designed to provide urgently needed protection, operate in accordance with human rights treaty obligations.

Treaties such as the International Convention on the Elimination of all forms of Racial Discrimination (CERD) make adequate provision for “special measures” which allows for discriminatory measures in certain circumstances to provide relief from human rights violations. These provisions also provide important safeguards to ensure that ‘special measures’ are not abused. The Racial Discrimination Act 1975 (RDA) incorporates CERD into Australia’s domestic law.

Amnesty International Australia is concerned by the Australian Government’s intention to exempt the current measures from the operation of the Racial Discrimination Act, thereby evading its obligations under CERD. Amnesty International Australia would support the introduction of ‘special measures’ for a limited time if they met the standards required by the RDA. This must include demonstrating that the measures will progress the social and economic wellbeing of the people it seeks to help.

Amnesty International Australia questions whether certain measures contained in the Northern Territory Emergency Response Bills Package will further the protection of Indigenous children. We believe the plans to override the permit system for control and use of Indigenous land as ‘special measures’ would require particularly clear justification.

Amnesty International Australia is also concerned that the lack of consultation with Indigenous peoples affected by these measures represents a further derogation of their rights.

In light of the limitations to consultation and that these measures are without precedent Amnesty International Australia believes that a sound, independent and comprehensive

monitoring and review process is needed to examine the impact of these measures on the safety and well-being of Indigenous children and their communities.

2. Child protection

Amnesty International Australia records its support for Government initiatives genuinely designed to improve the health and well-being of Indigenous children. Amnesty International Australia is aware of the extent of the disadvantage suffered by many Indigenous communities. We are also conscious of the way in which the risk of child abuse and other family violence is raised in communities characterised by disempowerment, disruption of social support networks, and extreme poverty. The ongoing consequences of the Stolen Generation exacerbate these effects. The Little Children are Sacred Report, is the most recent addition to the documentation of serious rights violations experienced within Indigenous communities.

Sound policy interventions need to provide urgent protection for children at risk and their mothers, but it also needs to mitigate the known population risk factors and to promote known population prevention measures, particularly those which strengthen the social support and economic capacity of vulnerable communities.

Factors associated with poverty and social inequality do [...] increase the likelihood of maltreatment. These factors include stress, a sense of powerlessness, and the lack of money and other resources. Political and economic decisions can increase poverty and worsen its effects, or they can alleviate poverty and provide support for children and families, particularly in times of economic difficulty". (Extract from NSW Child Protection Council's *Cashmore J A Framework for Building a Child-Friendly Society*, NSW Child Protection Council, 1997-98 p26).

3. A human rights policy framework

Human rights are best protected when government legislation and policy respect the provisions of those treaties designed to give effect to them. The International Convention on the Elimination of all forms of Racial Discrimination (CERD) is one such treaty.

Article 1(4) of the CERD makes an allowance for "special measures" - actions that would otherwise constitute discrimination under that Convention - if those actions are essential to protect or promote the human rights of certain individuals or groups. Such actions must not result in parallel rights systems for different racial groups and they must not continue beyond the point where the rights in question have been secured.

Amnesty International Australia is concerned that the bills package seeks exemption from the application of the Racial Discrimination Act 1975 (RDA). Such exemption is not necessary if the measures can be shown to constitute "special measures" within the meaning of Article 1(4) of CERD, as has been claimed by the Government – that is, if they are essential to achieving bona fide human rights objectives. Any measures taken under the Emergency Response should thus have clear, measurable objectives, their impact should be independently monitored, assessed and reported, and they should operate for the minimal period necessary for their objectives to be achieved.

On the other hand, any measures in the Bill that did not meet the definition of “special measures” would be discriminatory, and would be violations of Australia’s obligations under the CERD.

The Government should honour its treaty obligations. It should allow application of the RDA to all the legislation constituting the Northern Territory National Emergency Response, and withdraw measures that are found to be inconsistent with that Act, including measures that purport to be, but are not, “special measures”.

4. Changes to permit system and land use

By seeking exemption from the RDA, the Government has signalled that it doubts all measures in the Bill would qualify as “special measures”. In fact Amnesty International Australia is strongly concerned 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. Land rights are of particular importance to Indigenous peoples in Australia for cultural and spiritual reasons and also because their enjoyment of other rights has been so limited. Interventions that affect Indigenous people’s control and use of their land thus require the strongest justification. The United Nations Committee on the Elimination of Racial Discrimination in its General Recommendation No. 23: Indigenous Peoples called upon States parties:

“to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands”.

Changes to the permit system or other aspects of Indigenous land control do not appear amongst the 97 recommendations of the *Little Children are Sacred* Report on which the Australian Government has based the need for the emergency provisions.

In reaching a judgement about the justification for the permit and land use measures, that the communities affected by the legislation are particularly affected by, or vulnerable to child abuse, the distribution of cases of children at risk through the rest of Australia is worth noting. According to the Australian Health and Welfare Institute publication *Child Protection 2004-05* there were 319 cases of substantiated protection notifications of Northern Territory Indigenous children in that period, a rate of 13.7 children per thousand, which was lower than the rate for Indigenous children in all other states or territories except Tasmania, and equal to the rate for non-Indigenous children in Queensland. The rate of substantiated notifications was certainly higher for Indigenous children than for non-Indigenous children in all states and territories except Tasmania, and in Victoria it was more than 10 times higher. The highest number of affected children was in Queensland – 1,186 Indigenous and 11,700 non-Indigenous children. Although official notifications and substantiations may not accurately reflect real prevalence, these figures do indicate that serious problems of child protection are not confined to the Indigenous population, or to Indigenous communities living on Indigenous controlled land. The Australian Government’s assertion that Indigenous land rights must be suspended even in the short-term to combat child abuse therefore requires further consideration and clear justification.

5. Lack of consultation infringes Indigenous rights

Amnesty International Australia registers its concern that interventions of the scale represented by the Emergency Response, have been developed on the basis of extremely limited consultation, particularly with the Indigenous peoples affected. At the very least, the right to self determination under Articles 1 of both the International Covenant on Civil and Political Rights, and of the International Covenant on Economic, Social and Cultural Rights, means the right of peoples to have a say in matters concerning their own welfare.

The Committee on the Elimination of Racial Discrimination General Recommendation No. 23 of 18 August 1997 calls on States parties 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;”

And call on them to:

“recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands.”

6. Need for independent monitoring and review

To ensure human rights obligations are upheld in the Australian Government’s response to protect Indigenous children in the Northern Territory it must establish an independent, comprehensive monitoring and review process. ‘Special measures’ as stipulated by the RDA must not be continued after the specified objectives have been achieved. To ensure that this requirement is met Amnesty international Australia recommends that an ongoing reporting process by an independent body outlining genuine human rights outcomes and impacts of the bills package be required.