LAW COUNCIL OF AUSTRALIA

Submission to the Senate Standing Committee on Legal and Constitutional Affairs

9 August 2007

Northern Territory National Emergency Response Legislation

1. The Law Council of Australia is pleased to provide the following submission to the Senate Standing Committee on Legal and Constitutional Affairs.

2. This submission comments upon and raises serious concerns about the Federal Government's Northern Territory National Emergency Response Legislation, comprising the following:

   - *Northern Territory National Emergency Response Bill 2007* (the NER Bill);

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

   - *Social Security and Other Legislation Amendment (Welfare Reform) Bill 2007* (the WR Bill).

3. Due to the timetable provided, the Law Council has been unable to assess all aspects of the proposed legislation. If more time is subsequently made available for considering the Bills, the Law Council would be pleased to provide further assistance.

4. In all the circumstances, the Law Council considers that the appropriate course is that when both Houses of Parliament adjourn on 16 August 2007, further consideration of the Bills be deferred until Parliament resumes on 10 September 2007.

Timing and consultation

5. The Law Council condemns the timetable for considering this proposed legislation as disgracefully inadequate and an affront to fundamental democratic principles.

6. As a package, the Bills comprise 500 pages of legislation affecting a range of legislative schemes, including the *Aboriginal Land Rights (Northern Territory) Act 1976* (the ALRA), the *Racial Discrimination Act 1975* (the RDA), the *Native Title Act 1993* (Cth), the Northern Territory *Self-Government Act* and related legislation, the *Social Security Act 1991*, the *Income Tax Assessment Act 1993*, to name just a few.

7. The Bills have been prepared and presented to Parliament with the expressed intention that they will be passed by Parliament with haste that is extraordinary and unjustifiable. On 15 June 2007, the report of the Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, co-chaired by Patricia Anderson and Rex Wild QC was released. The first recommendation of the report –*Little Children are*

Sacred: Final Report of the Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse – was:

> Leadership
> 1.That Aboriginal child sexual abuse in the Northern Territory be designated as an issue of urgent national significance by both the Australian and Northern Territory Governments, and both governments immediately establish a collaborative partnership with a Memorandum of Understanding to specifically address the protection of Aboriginal children from sexual abuse. It is critical that both governments commit to genuine consultation with Aboriginal people in designing initiatives for Aboriginal communities.

8. Less than one week after the report was released, and in disregard of its first recommendation, the Prime Minister announced that in response to the "*national emergency*" revealed by the report, the Federal Government would legislate unilaterally to intervene in the Northern Territory.

9. The 21 June 2007 media release of the Minister for Families, Community Services and Indigenous Affairs called the *Little Children Report* in aid to justify the styling of its response to "*the national emergency*", quoting selectively from the first recommendation:

   > "The immediate nature of the Australian Government's response reflects the very first recommendation of the Little Children are Sacred report into the protection of Aboriginal children from child abuse in the Northern Territory which said: "That Aboriginal child sexual abuse in the Northern territory be designated as an issue of urgent national significance by both the Australian and Northern Territory Governments…."

10. It is clear that the Minister has no patience with the idea that the government should consult with affected communities. He declares that this will only result in undue delay. He overlooks the fact that Messrs Anderson and Wild, whose report demonstrated in the Government's eyes the existence of a national emergency, achieved significant results in the conduct of their inquiry by thoughtful and courteous treatment of the many Aboriginal communities with whom they met. There were no undue delays in completing their inquiry and it has been universally acknowledged that Aboriginal communities were open and candid about the difficulties they faced.

11. The true situation about the government's stance on consultation is that it knows that its approach is over-bearing, intimidatory, discriminatory and designed for electoral consumption in parts of Australia far removed from the Northern Territory. It also knows that many elements of its emergency plan are not likely to be acceptable to the Aboriginal communities who identified the problem in the first place.

12. On 6 August 2007, just 47 days after the announcement of the "*emergency plan*", and less than 24 hours after first providing to the Opposition parties and relevant stakeholders drafts of the proposed legislation, the Government introduced the Bills in the House of Representatives. The Bills were passed in a single afternoon, notwithstanding that the Opposition parties had had less than one day to consider the impact of the proposed legislation on Aboriginal people in the Northern Territory

and the extent to which the measures contained in the package are necessary or appropriate to address child abuse in Aboriginal communities.

13. The Senate has now been given less than one week to perform its function as a house of review.

14. 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. The Law Council considers that a number of the key measures contained in the Bills may contravene the fundamental human rights of Aboriginal people in the Northern Territory and are not necessary or justifiable as measures to address child abuse. These measures include:

    - changes to the Aboriginal lands permit system (the *FaCSIA Bill*, Schedule 4);

    - compulsory acquisition of Aboriginal townships for 5 years (*NER Bill*, Part 4); and

    - preventing consideration of customary law or the cultural background of an offender in sentencing or bail proceedings (*NER Bill,* Part 6).

15. The Law Council also notes there are many provisions in the Bills which, due to the lack of consultation with the communities concerned and the haste with which the Bills were prepared, have potential to contravene the human rights of Aboriginal people in the Northern Territory, and offend Australia's international human rights obligations. These provisions raise issues in terms of individual civil and political rights, compounded by the racially discriminatory singling out of declared relevant Northern Territory areas for such treatment.

16. However, the focus of this submission is upon the most obviously discriminatory aspects of the proposed legislation, which suggest a land reform agenda unrelated to the protection of children from those who abuse them.

Racial discrimination

17. Section 132 of the NER Bill states:

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

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

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

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

19. The Law Council considers the inclusion in legislation proposed to be enacted by the Australian Parliament in 2007 of a provision specifically excluding the operation of the RDA to be utterly unacceptable. Such an extraordinary development places Australia in direct and unashamed contravention of its obligations under relevant international instruments, most relevantly the United Nations Charter and the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"). In addition to its status as a treaty obligation, contained in all major human rights instruments, the prohibition of racial discrimination has attained the status of customary international law, and has been characterised as one of the "least controversial examples of the class" of *jus cogens*. *Jus cogens* or peremptory norms of international law are overriding principles of international law, distinguished by their indelibility and non-derogability. They cannot be set aside by treaty or by acquiescence. Other "least controversial" examples of *jus cogens* include the prohibition of the use of force, the prohibitions of genocide, slavery and apartheid, and the principle of self-determination.

20. 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. Advice available to the Law Council indicates that the proposed laws are, as stated by Former Federal Court Judge Murray Wilcox, "discriminatory in the extreme".

21. Moreover, the Law Council urges extreme caution in relation to the claimed justification of the proposed legislation as a "special measure": s 132(1) of the NER Bill. As Senators considering the Bills will be aware, special measures are:

    "measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure equal enjoyment or exercise of human rights and fundamental freedom, provided that such measures do not lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved (*Convention on the Elimination of all forms of Racial Discrimination (CERD) Article 1(4)*).

22. Further, special measures must be a "reasonable and proportionate means of achieving substantial equality."

23. The Law Council does not consider that the protection of "special measures", or measures of so-called affirmative action, preferential treatment or quota systems, is available to justify a number of critical aspects of the proposed legislation.

24. In particular, proposals to weaken the permit system and to compulsorily acquire Aboriginal land have no demonstrated connection to the problems of sexual and substance abuse, and can not be regarded as related to the purpose of securing the "adequate advancement" of the targeted communities.

25. To the contrary, as the Law Council noted in its letter to the Prime Minister (**Attachment A**), proposed changes to the permit system and Aboriginal land

ownership will involve weakening Aboriginal freehold title, as opposed to the freehold title of other property owners, and will be racially discriminatory at a fundamental level.

26. The Law Council accepts that the concept of "special measures" does potentially provide an avenue to secure the validity of State and Territory laws to protect women and children who are at risk. For more than a decade, the Human Rights and Equal Opportunity Commission (HREOC) has supported the voluntary introduction of alcohol restrictions in some indigenous communities as a 'special measure' on the basis that social benefits are likely to result in reduced violence and abuse and improved public safety. However, this is in the context of seeking to avoid a potential problem of illegality under the RDA in circumstances where Aboriginal communities negotiate with publicans, other distributors of alcohol, the Liquor Commission, local councils and the police to prohibit or restrict purchases of alcohol by their members. Moreover, HREOC has consistently emphasised that such restrictions should be part of a broad range of measures to address the causes of alcoholism, rehabilitation and underlying social disadvantage.

27. Thus, in determining whether such discriminatory restrictions can be saved as "special measures", the wishes of the community to whom the restrictions apply are critical. In its seminal 1995 *Alcohol Report*, HREOC concluded that alcohol restrictions imposed upon Aboriginal groups as a result of government policies which are incompatible with the policy of the community will not be 'special measures'.

28. It is established jurisprudence that the sole purpose of special measures must be securing adequate advancement of the beneficiaries in order that they may enjoy and exercise human rights and fundamental freedoms equally with others. The concept of 'advancement' is not a paternalistic concept, determined by government alone. As Brennan J observed in *Gerhardy v Brown* (1985) 159 CLR 70:

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

29. Relevant, as well, is international jurisprudence in relation to the application of CERD to indigenous peoples. The CERD Committee has confirmed the specific relevance of CERD in securing the distinct rights of indigenous peoples. On 18 August 1997 the Committee adopted a far-ranging and ground-breaking General Recommendation concerning Indigenous Peoples (General Recommendation XXIII(51)). The Committee reaffirmed that the provisions of CERD apply to indigenous peoples, and noted that:

    > "[I]n many regions of the world indigenous peoples have been, and are still being, discriminated against, deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists,

commercial enterprises and State enterprises. Accordingly, the preservation of their culture and their historical identity has been and still is jeopardised."

30. The General Recommendation calls upon States parties to CERD to take a series of measures, including:

   - to provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;

   - 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

   - to ensure that indigenous communities can exercise their rights to practice and revitalize their cultural traditions and customs, to preserve and practice their languages.

31. Of particular significance is paragraph 5 in which:

   > "The Committee especially calls upon States parties to recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories."

32. The United Nations Human Rights Committee, in its 1989 General Comment on "Non-Discrimination" also made plain that the "special measures" provisions in international human rights treaties are intended to permit, for a time, affirmative action or preferential treatment:

   > "10. The Committee also wishes to point out that the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant."

33. In its recent (2004) General Recommendation No 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, the UN Committee on the Elimination of Discrimination Against Women noted:

   > "The Committee recommends that States parties ensure that women in general, and affected groups of women in particular, have a role in the design, implementation and evaluation of such programmes. Collaboration

and consultation with civil society and non-governmental organizations representing various groups of women is especially recommended."

34. Accordingly, the Law Council considers that the proposed Bills must be considered by the Senate Standing Committee on Legal and Constitutional Affairs having regard to:

- whether the wishes of the putative beneficiaries of the measures have been sought to be ascertained;
- whether the putative beneficiaries of the measures have had, and will have, a role in their design, implementation and evaluation;
- whether the measures are, in fact, a reasonable and proportionate means of addressing child abuse and violence occurring in some Aboriginal communities in the Northern Territory; or
- whether the measures, in truth, constitute an assault upon the rights of indigenous people in the Northern Territory to culture, history, language, customs and way of life, including the right to own and control their lands and resources, and are contrary to the equal enjoyment or exercise of human rights and fundamental freedoms.

Changes to the permit system

35. Schedule 4 of the FaCSIA Bill sets out amendments to the *ALRA*, weakening the Aboriginal lands permit system and preventing Aboriginal people from excluding or removing unwanted elements from "common areas" and access roads in their communities and lands.

36. Senators will appreciate that this measure is not related to the "national emergency" declared by the Prime Minister, and is not the subject of any recommendation of the "Little Children Are Sacred" report, which ostensibly sparked the Federal intervention in the Northern Territory. The proposed changes are said to be the outcome of a review of the permit system conducted by the Department of Families, Community Services and Indigenous Affairs (FaCSIA) from October 2006 to February 2007 ("the permit system review"). The Law Council made a submission to that Inquiry (**Attachment B**), which was highly critical of the options put forward by FaCSIA.

37. As noted in that submission, all of the arguments put forward by FaCSIA for change are almost entirely unsupported and have been given no further credence since the Review was apparently finalised (and the decision to amend the permit system announced) on 21 June 2007, along with all other measures in the 'emergency plan'.

38. The Law Council notes that FaCSIA has not released its findings or any report outlining the basis of the Minister's decision to amend the permit system. FaCSIA has also refused to make public any of the submissions to the Inquiry, or report on any of its face-to-face consultations, despite presumably spending a substantial amount of taxpayers' money in carrying out its consultations. The Law Council currently has a request under the *Freedom of Information Act 1982* pending for documents and submissions relating to the Minister's decision.

39. It is noted that the Explanatory Memorandum to the FaCSIA Bill asserts that the amendments to the permit system are intended to "increase interaction with the wider community and promote economic activity". In his Second Reading Speech presenting the FaCSIA Bill, the Minister stated:

> "The current permit system has not prevented child abuse, violence or drug and alcohol running. It has helped create closed communities which can, and do, hide problems from public scrutiny."

40. These comments merely repeat the assertions in the FaCSIA discussion paper, which invited submissions to the review of the permit system. As with the discussion paper, the statements are not supported by any evidence, example or case studies. Instead, the Minister has referred to anecdotal reports of individuals who approached Departmental Officers during the consultation phase with concerns about the permit system. Given that neither FaCSIA nor the Minister has reported on the consultations or provided examples of what Aboriginal people actually said about the permit system (or what they themselves were told when briefed about the Government's reasons for wanting to remove the permit system), these comments are very difficult to analyse.

41. The last time a public inquiry examined the need for the permit system, a review was conducted by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (the HORSCATSIA) in 1999. After taking submissions (oral and written) from a large number of Aboriginal communities and organisations, the HORSCATSIA concluded that every Aboriginal community it had taken submissions from wanted to retain the permit system. Remarkably, this finding put paid to the recommendation of the Review of the Aboriginal Land Rights (Northern Territory) Act, conducted by John Reeves QC in 1998, that the permit system be abolished. The Law Council notes that John Reeves QC has now been appointed to the taskforce implementing the 'emergency plan'.

42. The Law Council has maintained, since abolition or weakening of the permit system was suggested by the Minister, that to do so would be discriminatory. In its submission to the permit system review (Attachment B), the Law Council stated (at paragraphs 83-84):

> "The Department appears to have overlooked that Aboriginal land is freehold land. It is an extraordinary proposition that some owners of freehold land will not have the right to say who may, or may not, come on to their property. Indeed, the question may still be live even if the statutory permit system is changed in respect of some areas, as the deed of grant to the Land Trust itself may carry with it the right to control entry on to land at common law. As is suggested by at least one of the options presented in the discussion paper, proposed legislation would have to go so far as to say an owner of Aboriginal freehold cannot refuse permission to particular persons.
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> The Law Council considers the question of discrimination to be obvious in these circumstances."

43. As Mr Justice Woodward said in his 1974 Royal Commission into Aboriginal land rights:

> "The most important proof of Aboriginal ownership of land will be the right to exclude from it those who are not welcome."

44. Accordingly, the proposed changes to the permit system undermine the very basis of Indigenous ownership of some areas of Aboriginal land in the Northern Territory.

45. If the matters outlined above are considered, the Law Council submits that changes to the permit system could not possibly be regarded as a "special measure" under the CERD:

    - The HORSCATSIA Inquiry found that all Aboriginal communities in the Northern Territory, which made submissions to the Inquiry, supported the maintenance of a strong permit system.

    - Neither the Minister nor FaCSIA has produced evidence suggesting that this view has changed.

46. The Law Council submits that the proposed discriminatory changes to the permit system cannot be properly characterised as special measures in circumstances in which:

    - such changes are not, at the very least, supported by the majority of those affected;

    - neither the Minister nor FaCSIA has established any link between child abuse and the present permit system, or, for that matter, any link between the prevention, detection or prosecution of child abuse and the proposed permit system.

47. The Law Council submits that the changes to the permit system proposed in Schedule 4 to the FaCSIA Bill should be excised, and considered separately at a later time, outside the context of the 'national emergency response', when there can be proper, careful and informed consideration of the proposed changes.

Compulsory acquisition of 5 year leases

48. Part 4 of the *NER Bill* provides for the compulsory acquisition of approximately 70 Aboriginal townships and settlements in the Northern Territory. 5 year leases will be compulsorily acquired by the Commonwealth using powers under s.51(xxxi) of the Constitution.

49. The Federal Government has stated that compulsory acquisition of townships is necessary to allow unfettered access to Aboriginal townships to address the desperate circumstances faced by many living in these communities[1]. To the extent that the Government has undertaken to take concrete steps to address a deplorable

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[1] Mal Brough MP, 2nd Reading Speech, *Northern Territory National Emergency Response Bill 2007*, 7 August 2007.

situation that has confronted Aboriginal communities in the Northern Territory for many years, the Law Council commends the commitment to repair and build infrastructure and provide desperately needed services in these communities.

50. The Law Council also notes with approval that all existing interests will survive following the expiry or cancellation of the 5 year leases. It notes also that native title interests will be suspended for that period, but not be quashed and that the procedures of the *Native Title Act 1993* relating to future acts, requiring notification, consultation etc will not operate.

51. However, the 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 Government's aims could be achieved without compulsorily acquiring a single township.

52. At present, and unlike the situation that relates to other freehold land throughout the nation, police services, health services and any other government service, officer or agency, are able to enter Aboriginal townships without requiring a permit. Whilst the Law Council considers that the Government has not made the case for the compulsory acquisition of a single township, it notes that it would be available to the Government to exercise its power of compulsory acquisition more selectively, by acquiring an interest in smaller parcels of land where government buildings and infrastructure are to be located. No explanation has been provided as to why selective acquisitions would not be adequate to achieve the aims expressed in the Minister for Indigenous Affairs' 2nd reading speech.

53. In his speech, the Minister stated:

> "The leases will give the government the unconditional access to land and assets required to facilitate the early repair of buildings and infrastructure."

54. The Minister has not apparently considered the possibility that Aboriginal communities may wish to co-operate with the Government to obtain these benefits. The Law Council considers that such a high-handed and peremptory approach to property rights would be utterly unacceptable in any other community, and is racially discriminatory at a most fundamental and objectionable level.

55. It is important to consider the Minister's statement again having regard to the first recommendation of the "Little Children Are Sacred" report:

> "That Aboriginal child sexual abuse in the Northern Territory be designated as an issue of urgent national significance by both the Australian and Northern Territory Governments, and both governments immediately establish a collaborative partnership with a Memorandum of Understanding to specifically address the protection of Aboriginal children from sexual abuse. **It is critical that both governments commit to genuine consultation with Aboriginal people in designing initiatives for Aboriginal communities**." [emphasis added]

56. The proposal to compulsorily acquire land is at odds with this recommendation, which should have been the foundation-stone of any response by Australian governments to child abuse and its underlying causes. It is noteworthy that proposals to improve and repair structures and services on Aboriginal land have not been the subject of any consultation with Aboriginal communities in the Northern Territory. Accordingly, the Government cannot properly have reached the view that it is necessary to compulsorily acquire communities in order to gain access and engage in necessary repairs and infrastructure developments.

57. Given unexplored possibilities of partnerships with Aboriginal communities, the Law Council considers that the compulsory acquisition of some 70 Aboriginal townships cannot be characterised as a 'special measure' within the meaning of CERD, and the RDA, and as elaborated upon by Brennan J in *Gerhard v Brown*. The Law Council is not aware of any support within Aboriginal communities for the compulsory acquisition of their townships.

58. Accordingly, the Law Council submits that the proposed compulsory acquisition of townships:

- is racially discriminatory;

- is incapable of being characterised as a 'special measure' within the meaning of the RDA and CERD; and

- is not necessary to meet Australia's obligations under any other treaty, including the Convention on the Rights of the Child (CROC), because the measure is not necessary to address child sexual abuse or ensure adequate police, health care and support services are available.

Cultural background and customary law

59. Part 6 of the *NER Bill* incorporates provisions banning the consideration of the cultural background or customary laws of an offender in mitigation (or aggravation) in sentencing. The provisions effectively mirror the provisions of the *Crime Amendment (Bail and Sentencing) Act 2006,* which were pushed through Federal Parliament following the agreement at the Intergovernmental Summit on Violence and Child Abuse in Aboriginal communities that "customary law in no way justifies, authorises or requires violence or sexual abuse against women and children".

60. The Law Council notes that the Senate Standing Committee on Legal and Constitutional Affairs (SSCLCA) considered those amendments in September 2006 and reported its findings to the Senate on 13 October 2006. Accordingly, the Law Council will not reiterate its arguments or seek to summarise the facts which led to the implementation of that legislation. The Law Council attaches, for the information of the SSCLCA, the Law Council submissions to that Inquiry and to the Council of Australian Governments (**Attachments C, D and F**), and notes the following:

- Government Senators on the SSCLCA recommended that the *Crimes Amendment (Bail and Sentencing) Bill 2006* be amended:

(a) to replace the words 'excusing, justifying, authorising, requiring or rendering less serious' with the words 'mitigating or enhancing the seriousness of' to clarify the scope of their operation; and

(b) to retain the phrase 'cultural background' in the list of factors that a court must take into account in sentencing an offender, if relevant and known to the court, in paragraph 16A(2)(m) of the *Crimes Act 1914*.

- Opposition Senators agreed with all reasons of the Government Senators, but came to the conclusion that the defects in the legislation could not be overcome by the proposed amendments.

- These recommendations were made by the SSCLCA in large part because the amendments were regarded as discriminatory. At paragraph 3.97 of its Report into that Inquiry, the SSCLCA stated:

  "As evidence to the inquiry strongly indicated, the Bill will inevitably impact most on Indigenous Australians and those with a multicultural background. The Committee notes the Department's assertion that the Bill is not discriminatory – that the Bill can be drafted in such a way that it accords with formal equality but, clearly, in practice it is likely to apply only to certain categories of offenders. It does not therefore provide substantive equality to Indigenous offenders or offenders with a multicultural background."

- Subsequently, the legislation was passed with a single amendment to ensure that a customary law or cultural practice not be considered to "aggravate" an offence.

61. The Law Council submits that the provisions of the *Crimes Amendment (Bail and Sentencing) Bill 2006* continue to be discriminatory in their application and permit, or require, substantive discrimination against Aboriginal people or people with a multicultural background.

62. As the provisions in Part 6 of the NER are effectively identical to the operative provisions of the *Crimes Amendment (Bail and Sentencing) Act 2006* (Cth), the Law Council reiterates its submissions to that previous inquiry and considers that the impact of Part 6, if implemented in the Northern Territory, will be significantly worse given the disproportionate numbers of Aboriginal people charged under State and Territory criminal laws. In this regard, the Law Council refers again to its previous submissions (attached), which contain examples of several cases in which the cultural background of the offender was a relevant, but not decisive, consideration.

63. Again, the Law Council submits that the proposed prohibition on taking into consideration any form of customary law or cultural practice in the context of bail applications and in determining criminal sentences cannot be justified as a 'special measure'. As argued in the Law Council's earlier submissions on this issue, Part 6, if implemented, will (among other things):

- require courts to treat Aboriginal and Torres Strait Islanders, and those of different ethnic origins, as if they did not belong to a specific cultural group;

- result in more Aboriginal people being incarcerated, for longer periods and with fewer options for rehabilitation within their communities; and

- undermine the positive achievements of Aboriginal courts, which have relied on flexible sentencing and bail options and community involvement to strengthen compliance with the law, Aboriginal communality and leadership and, ultimately, reduce rates of imprisonment and recidivism.

Miscellaneous provisions

64. The following highlights some other aspects of the proposed Bills which the Law Council considers to be deficient and potentially resulting in breaches of human rights and fundamental freedoms, and Constitutional rights.

65. A preliminary analysis suggests many other aspects of concern which it has not been possible to review carefully in the time available.

<u>"Just" compensation</u>

66. Division 4 of Part 4 of the NER Bill provides for payment of a "reasonable amount of compensation" for any acquisition made in accordance with Part 4 if the constitutional entitlement to "just terms" compensation under s 51(xxxi) of the Constitution applies.

67. The Law Council notes that there is no statutory entitlement to compensation for the compulsory acquisition of 5 year leases. Rather clause 60(2) of the *NER Bill* refers only to a constitutional entitlement (s 51(xxxi) of the Constitution) which, <u>if it applies</u>, would invalidate the 5 year leases whilst clause 60(1) disapplies s 50(2) of the *Northern Territory (Self Government) Act* 1978 which would otherwise have made clear that just terms compensation would apply to the acquisitions.

68. 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.

69. 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.

70. The Law Council makes the following observations:

    - Section 60 appears to be specifically crafted so that on current High Court authority the vesting of the "leases" under section 31 may take place without any payment of compensation to the relevant Land Trust.

    - Under section 35, there is only a voluntary obligation to pay rent, and obligations to pay rent under section 62 are clearly "optional". The Law Council also notes

the comments by the Minister for Indigenous Affairs that all compensation to Indigenous people would be paid "in kind" from services and infrastructure[2] (presumably the same services and infrastructure Australians dwelling in urban areas take for granted).

- Section 60 provisions appear to be framed on the basis that *Teori Tau v The Commonwealth* (as limited by *Newcrest*) will remain good authority on the proposition that s 51(xxxi) does not apply to the Northern Territory where only the Territories power is relied upon, and therefore no compensation is payable. Litigation may be necessary to establish whether there is a legal obligation to pay compensation under the legislation as drafted.

- Accordingly, despite claims that "just terms" compensation will be paid, the legislation has been drafted to pay as little direct compensation as possible, but to ensure the validity of the legislation in the event there is a successful challenge.

- The limitation on compensation for acquisitions also extends to native title rights as the *Native Title Act 1993* future act regime does not apply, as per section 51. The Law Council regards it as extraordinary that an acquisition of native title in Western Australia or Queensland would most probably have to be compensated in these circumstances, but not in the Northern Territory.

71. The Law Council urges that the operation of s 50(2) of the *Northern Territory (Self Government) Act 1978* be reinstated to ensure that compensation will be payable for the acquisitions without the need for a legal challenge.

Loss of control of traditional lands

72. It is noted that section 35(1) gives exclusive possession and quiet enjoyment of Aboriginal townships and designated areas to the Commonwealth through section 31 leases. Section 34 preserves any existing right, title or other interest in a lease area. Section 36 gives the Minister unilateral power to vary terms of leases and section 37 gives a similar power to terminate any interest preserved by s 34. Arguably, the effect of these provisions is that, on a declaration by the Minister, residents of communities (all or some) can be evicted from leased lands.

73. In addition, if section 60 has the effect described above, the Minister would be entitled to take such action without compensating the 'evictees'. Protections for Aboriginal people or residents of communities in these circumstances do not appear to have been contemplated in the legislative package.

Community Services Entities (CSE)

74. Part 5 Division 2 of the NER Bill provides for CSEs and powers in relation to their assets.

[2] 'Fast-track for intervention laws', SMH, 7/8/07.

75. Under section 4, a CSE is defined to be a range of local government entities, incorporated associations, or Aboriginal association or "any other person or entity that performs functions or provides serves in a section 31 leased area".

76. Under section 67(1), if a CSE provides services in a section 31 lease area and "the Minister is satisfied that a service is not being provided …or not being provided to the satisfaction of the Minister, then the Minister can direct the CSE to provide the service". It is noted that there is no requirement that the service in question be one that was at any time previously provided by the CSE.

77. Under section 68, if the CSE owns, controls or possesses an asset (defined to be "movable personal property" the Minister may give a direction to the CSE to transfer possession of the asset to the Commonwealth or a specified person. The compensation provisions of s 134 (equivalent to s 60 – see above) apply to Part 5 and thus on current authority no compensation would be payable.