



Law Council  
OF AUSTRALIA

*From the Office of  
the President*

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The Hon John Howard MP  
Prime Minister  
Parliament House  
Canberra ACT 2600

Dear Prime Minister,

I write to you concerning your recent announcement of an 'emergency plan' to address child sexual abuse in Aboriginal communities in the Northern Territory.

The Law Council welcomes action by the Federal Government to address child sexual abuse in Aboriginal communities in the Northern Territory. The Law Council has long been concerned about the dire circumstances faced by many living in Aboriginal communities and, in particular, the lack of government services available in remote areas, including a lack of adequate police services, health services, education and housing.

In June 2006 the Law Council called on the Intergovernmental Summit on Violence and Child Abuse in Aboriginal Communities that was then about to convene, "to address serious problems faced by Indigenous communities, including improved provision of housing, social infrastructure and services".

In October 2006 the Law Council said "The Government should stop demonising Aboriginal culture and work together with State and Territory Governments, Indigenous community leaders and other key stakeholders to address Aboriginal disadvantage".

As you have now correctly identified, the prevalence of child sexual abuse in Aboriginal communities in the Northern Territory is an issue deserving of your Government's intervention. This has been the situation for some years.

The report of the Board of Inquiry into Child Sexual Abuse in the Northern Territory (the Inquiry), which directly stimulated your Government's emergency plan announcement, clearly identified that the Aboriginal social structures that protect children have been compromised and that government has failed to assist communities to restore or create protective structures for children. Consequently there has been a failure by all relevant law enforcement authorities to prevent and detect child sexual abuse.

Creating protective structures and restoring protection for children in the short term should be a relatively straightforward proposition. Addressing the social conditions that have led to the deterioration of structures that protected children will be a much more demanding task.

The Law Council also believes that your Government's intervention must result in positive and long term outcomes for Aboriginal people, without fracturing or destroying the culture of the communities the Government says it is seeking to save.

I would like to bring to your attention some serious concerns about the present approach, which I hope will be urgently considered by your Government. We note that the plan appears to be evolving over time and it is quite possible that some of the Law Council's concerns will be overtaken by events and that other concerns will emerge as the plan develops.

**1. The recommendations of the Inquiry should not be ignored.**

While the Law Council supports immediate action to address alleged child abuse in Aboriginal communities, the 97 recommendations of the Inquiry must not be ignored. These recommendations were largely directed at effecting long term social change within Aboriginal communities, with primary emphasis on education, support services and community involvement in action to address general disadvantage along with violence, alcoholism and abuse. It is clear that it is the intention of the report that all 97 recommendations are to be followed if the situation is to be properly addressed. With the exception of alcohol restrictions, which are already in place in approximately 95 communities in the Northern Territory, the Federal Government's response addresses very few of the Inquiry's recommendations. It must be acknowledged that the recommendations have been made following an 8 month, in-depth investigative process, which included consultations with 45 communities, 260 meetings and 60 written submissions, and have generated a groundswell of support from many organisations and citizens in the Northern Territory.

It should be noted that among those organisations is the Law Society of the Northern Territory, one of the Law Council's constituent members. The President of the Law Society, Allison Robertson, has recently written to you about these matters. As she points out many members of the Society work in fields affecting the Territory's Aboriginal population and many have made a long-term commitment to improving the well-being of persons in those communities. There is among the Law Society's members, whether Crown Prosecutors, defence lawyers, domestic violence legal service providers or those working with various community bodies, a considerable degree of expertise and cultural understanding that could be made available to your Government and that of the Northern Territory to the benefit of many Aboriginal communities. I would urge both Federal and Northern Territory Government authorities to contact Ms Robertson and her colleagues in the Society to see what practical assistance they may be able to offer.

The Law Council also urges your Government, and the Government of the Northern Territory, to respond to and implement the recommendations of the Inquiry as a matter of priority.

## **2. There must be consultation and partnership with Aboriginal people and the Northern Territory Government.**

Consultation and partnership with Aboriginal people is a key aspect of several recommendations of the Inquiry. The Law Council is concerned that the long term success of the 'emergency plan' can only be assured by consultation and partnership with Aboriginal leaders and the Northern Territory Government, notwithstanding that government's failure to provide an appropriate system of law enforcement in the Territory's Aboriginal communities. In particular, for proposals to be effective, the Law Council believes that Aboriginal communities must be empowered, have ownership of the relevant programs and sufficient support to enable them to run effectively.

The report makes it clear that there was a strong call from communities visited by the inquiry for governments to become involved in meaningful and effective consultation with them. The Law Council is concerned that the present plan may jeopardise any opportunity for government to successfully work with communities to protect children.

The Government might bear in mind that the report of the Inquiry, which was the crucial factor in the announcement of your Government's emergency plan, was the product of thoughtful consultation with Aboriginal communities by Mr Wilde and Ms Anderson. That consultation produced significant evidence of child sexual abuse in a timely way and clearly demonstrates that Aboriginal communities can and will readily cooperate with government authorities when approached in an appropriate fashion.

Of course, as with the Law Society of the Northern Territory, there are many other community groups in the Northern Territory which could also be of considerable assistance to government because of their long and honourable record of service provision to the Aboriginal disadvantaged. These bodies constitute a valuable resource that government should not lightly overlook and I strongly recommend the use of their expertise.

## **3. The Law Council opposes the proposed changes to the permit system.**

No justification or evidence has been provided to support any link between the permit system and child abuse or drug trafficking. The Law Council notes that the Department of Families, Community Services and Indigenous Affairs (FaCSIA) recently conducted a review of the permit system but has not made public any findings or reports arising from its consultations. The Law Council believes that the Government should publish the findings of the FaCSIA review and allow an informed debate about its importance and relevance before proceeding further with this particular proposal.

Weakening of the permit system was not among the recommendations of the Inquiry. Accordingly, there is little understanding within the broader community as to why removing or amending the permit system has now been announced.

The Law Council has noted Government statements to the effect that Aboriginal communities need to be opened up so that many people, including media organisations, can visit those communities whenever they wish to do so. The Government seems to feel as though this process will help ensure in some way that child sexual abuse is avoided, but the Law Council knows of no justification for drawing a connection between the proposed process and the abuse. The Law Council understands that law enforcement authorities and government officials have unfettered access to the Northern Territory's Aboriginal

communities. It is therefore apparent that the law enforcement failure cannot be attributed to the permit system.

The Law Council notes that Northern Territory courts are committed to the principles of open justice and in January 2007 the Chief Justice of the Supreme Court of the Northern Territory confirmed that hearings would not be held on-country where there was any concern about permits being denied to journalists or others who wished to attend.

If the Government asserts a direct connection between the permit system for communally held land and child sexual abuse the Law Council would be pleased to know what it is and to examine it.

Without more by way of justification for the proposed changes the Law Council considers that removal of, or amendment to, the permit system is unlikely to have any positive effects for affected communities. Moreover, the Law Council notes that the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs found in 1999 that abolition or weakening of the permit system is unanimously opposed by affected communities. Given the finding of the Inquiry, and several other studies of which the Law Council is aware, that a significant proportion of these “bad elements” come from outside Aboriginal communities, the Law Council is also concerned that Aboriginal communities will no longer have a tool to expel or repel unwanted elements such as drug and alcohol dealers, alcoholics and child abusers. The Law Council considers that the permit system will be effective in assisting social and cultural stability in Aboriginal communities, provided adequate police and other services are available to ensure the wishes of the community are enforced.

#### **4. The Law Council does not support compulsory acquisition of Aboriginal townships.**

The Law Council notes that approximately 60 Aboriginal communities in the Northern Territory are to be compulsorily acquired by the Commonwealth under the ‘emergency plan’. The Minister for Indigenous Affairs has explained that this measure is necessary to overcome a range of procedural hurdles associated with implementing the remainder of the measures announced by your Government.

The Law Council regards compulsory acquisition of land as an extreme measure which conflicts with the fundamental rights of land owners and, accordingly, should only be used where absolutely necessary. In particular, the Law Council can see no explanation for compulsory acquisition of Aboriginal land on the scale currently proposed. The Law Council considers that if the consultative approach recommended by the Inquiry were adopted, the proposed large-scale compulsory acquisition of land would not be necessary.

The Law Council notes your Government’s assurances that compensation on just terms will be provided for any compulsory land acquisition, although land acquisition may only last a few years. Talk of compensation on just terms invokes speculation that your government intends to use powers conferred on Parliament by section 51(xxxi) of the Constitution to acquire property on ‘just terms’, which implies that there may be no eventual return of the land to its communal owners. The reality seems to be that once any such land is compulsorily acquired by your Government it may never revert to Aboriginal ownership. Such a drastic step should only ever be contemplated when there are persuasive and

compelling reasons to take it, and, to date, no justification even approaching that standard has been provided in support of your proposal.

This measure is particularly concerning when read in light of the government's existing policy of encouraging communities to enter into 99-year leases over their land, in exchange for essential services.

Your Government clearly has a view that Aboriginal land tenure changes are the key to correcting Aboriginal disadvantage but it has not provided any supporting justification for that view and it is now incumbent on the Government to do so. We look forward to examining your Government's reasoning.

The Law Council notes the recent passage of the *Aboriginal Land Rights (Township Leasing) Act 2007* makes clear that the administration of the township leasing scheme will be paid for with funds from the Aboriginal Benefits Account (ABA). The ABA is constituted by funds derived from mining royalties paid for mining activities carried out on Aboriginal freehold land in the Northern Territory and, accordingly, belongs to Aboriginal people. The Law Council opposes the use of ABA funds to meet the costs of a leasing scheme, for which there has been no explanation of how economic advantages will accrue for Aboriginal people. In particular, the Law Council strongly rejects any proposal to use ABA funds to meet the federal Government's undertakings to "pay rent", by way of just terms compensation for leases over Aboriginal land, if that is what is now being contemplated.

#### **5. The Law Council opposes any move to limit courts' discretion in sentencing and bail proceedings.**

The Law Council is opposed to any plan to impose current Federal restrictions on a State or Territory court's discretion in sentencing or bail proceedings, by preventing consideration of the cultural background or the Aboriginal laws observed by an offender. This is not an issue of courts applying a law other than those of an elected parliament: there is no case, of which the Law Council is aware, in which Aboriginal law has been recognised and applied by an Australian court to determine guilt or innocence.

Banning consideration by a sentencing court of a defendant's cultural background or evidence that that person may live according to Aboriginal law will only disadvantage those whose cultural background differs from 'mainstream', white, Anglo-Australians. As you are aware, Aboriginal people are 11 times more likely to be incarcerated in their life time, a statistic which has worsened since the findings of the Royal Commission into Aboriginal Deaths in Custody were released.

Moreover, there is mounting evidence that Aboriginal courts are having a very positive impact in reducing recidivism rates and bringing young Aboriginal offenders away from a life of crime and back into contact with their communities. The Law Council regards Aboriginal courts as an important initiative, support for which will be undermined by banning consideration of relevant factors in sentencing and bail proceedings. The Law Council supports the commencement of a pilot Aboriginal Court program in the Northern Territory, based on existing models in NSW, Victoria, South Australia, and Queensland.

## **6. There may be issues raised under the *Racial Discrimination Act 1982*.**

The Law Council notes that there has been significant commentary on the possibility that your Government's response may breach the *Racial Discrimination Act 1982* (the RDA). The Law Council also notes the claims by the Attorney-General that the various elements of the response amount to "special measures" under the RDA to protect a vulnerable group within the community.

With respect, the Law Council regards the Attorney-General's view as incorrect. Sexual abuse is prevalent in all communities across Australia. Therefore special measures directed at the problem should apply equally to all Australians and not be aimed at a single minority group in a certain area, as these proposals appear to be. In particular, proposals to weaken the permit system and compulsorily acquire Aboriginal land have no demonstrated connection to the problems to be addressed and could not possibly be regarded as falling within the "special circumstances" provisions of the RDA.

Proposed changes to the permit system will necessarily involve weakening of Aboriginal freehold title, as opposed to all other forms of freehold, and will be discriminatory at this basic level.

## **7. The Law Council is concerned about compulsory medical examinations for Aboriginal children.**

The Law Council notes the 'emergency plan' announced by the Federal Government referred to "compulsory health checks for Aboriginal children to identify and treat any health problems and any effects of abuse". It was subsequently clarified in public interviews that this was to apply to all Aboriginal children under the age of 16 in prescribed communities in the Northern Territory.

The Law Council has serious concerns about this initial announcement. The Law Council considers that mandatory health examinations conducted without the consent of the child or their parents may constitute assault, particularly where the examination is concerned with sexual organs.

The Law Council is also concerned that there is no provision in this announcement for a more extensive investment in health services in Aboriginal communities, which is a key recommendation of the Inquiry and has been recommended in numerous other government-funded inquiries over the last 15 years. This is despite the recent revelations of reports (some of which recur annually) by several government and non-government entities, including the Australian Medical Association, the Productivity Commission and the United Nations, that the state of Aboriginal health is the worst of any Indigenous population in the developed world, and life-expectancy trails 20 years behind the average in the broader Australian community.

The Law Council notes that your Government's proposals on Aboriginal health may have altered since this initial announcement and the Law Council would welcome more detail on the proposals to address Aboriginal health. We note today's comments by your Health Minister in the Sydney Morning Herald that "(h)health teams will seek a detailed personal and family history, conduct a standard physical examination and take blood tests where indicated. They will not conduct forensic examinations but will report any serious evidence of abuse as required by law. Health checks will be available to all children in remote

townships...". The Law Council would be pleased to know if this statement is evidence that your Government has substantially modified the original emergency plan to remove both the element of compulsion and the requirement for sexual abuse checks.

**8. Legal counsel and interpreting services must be made available.**

The Law Council concurs with the government that the rights of children to safety, security and innocence must be the paramount consideration. However, the rights of parents and other community members must also be protected.

In particular, all people subject to police interview or assisting police with investigation must have access to legal counsel, and interpreting services must be provided for those people who speak English as a second language. This will certainly require a rapid investment in Aboriginal language interpreting services, cultural awareness training for investigating officers and a boost in funding for Aboriginal legal aid services in the Northern Territory.

I would be pleased to provide more information about the Law Council's concerns and I am pleased to offer any assistance the Law Council can reasonably provide in implementing the recommendations of the Inquiry.

Because of various comments, suggestions and recommendations made in this letter I have also copied it to the Chief Minister of the Government of the Northern Territory, the Attorney-General, the Minister for Health, the Minister for Families, Community Services and Indigenous Affairs, and the President of the Law Society of the Northern Territory.

I look forward to your reply.

Yours sincerely,



Tim Bugg