

Summary of Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill 2007

Schedule 1 – Prohibited material

This schedule makes amendments to the *Classification (Publications, Film and Computer Games) Act 1995* (Cth) (the 'Classification Act'). There is only one item to the schedule, which will insert a new **part 10** (material prohibited in prescribed areas) in the Classification Act.

The proposed part 10 of the Classification Act will create offences concerning:

- the possession or control of prohibited material in a prescribed area; and
- the supply of prohibited material in, or to, a prescribed area.

Prohibited material is defined as level 1 prohibited material or level 2 prohibited material (s.99, definition of 'prohibited material'). These terms are in turn defined by reference to the existing classification categories in the Classification Act (s.7). In a general sense, level 1 prohibited material is the less seriously restricted material under the Classification Act while level 2 prohibited material is more seriously restricted. Both categories though are properly regarded as highly explicit material.

A prescribed area is that defined by the *Northern Territory National Emergency Response Bill 2007* (Cth) cl.4 which is:

- an area covered by paragraph (a) of the definition of Aboriginal land in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (this is Aboriginal land for which there is an existing grant, rather than certain kind of pending grant called a grant in 'escrow'); and
- roads, rivers streams and the like that are excluded from that Act;
- land granted to an association under the *Lands Acquisition Act* (NT) (these are freehold grants for community living areas); and
- town camps identified in a Ministerial declaration.

Without the amendments presently made, Northern Territory law (*Classification of Publications, Films and Computer Games Act* (NT), the 'NT Classification Act') would regulate the sale, exhibition and possession of some prohibited material although not in the same way, and to the extent proposed, by the amendments in schedule 1. For example, for a publication, film or computer game that is classified as RC (refused classification) the NT Classification Act:

- prohibits the exhibition of a film classified as RC in a public place (s.37);
- prohibits the guardian of a minor permitting the minor to attend the exhibition of a film classified as RC (s.40);

- prohibits the exhibition of a film classified as RC in a private place in the presence of a minor (s.42);
- prohibits the sale or delivery to a minor of a film classified as RC (s.50);
- prohibits the sale or delivery of a publication classified as RC (s.50D);
- prohibits the sale, or demonstration in public, of a computer game classified as RC (s.50M);
- prohibits the demonstration in a private place in the presence of a minor of a computer game classified as RC (s.50Q);
- prohibits the sale or delivery to a minor of a computer games classified as RC (s.50T).

The offence of possession of prohibited material in ss.101 and 102 present risks to those 'innocently' possessing prohibited material, for example a community organisation that has received explicit material in a spam email. The amendments in schedule 1 do not contain any 'safe harbour' provisions that are usually available to computer system operators who innocently receive explicit material (compare NT Classification Act part VII (computer services)). It is illogical that the proposed part 10 offences do not give any protection to persons who have complied with part 3 of the *Northern Territory National Emergency Response Bill 2007* (Cth) and its requirement to install filters and develop an acceptable use policy.

The offence of supplying prohibited material contains two categories – the bare offence of supplying and an aggravated category where the supply involves more than 5 items (s.104(2)). For the latter, the onus of proof is reversed for matters of intention and belief, requiring an accused person to prove the absence of the relevant intention or belief (s.104(3) and (4)). This reverse onus provision violates the civil liberties of citizens by displacing the requirement for the Crown to prove an aspect of its case against the citizen to this extent.

The proposed part 10 also confers upon the Minister a power to repeal some or all of the provisions of part by legislative instrument (s.114). This is an Henry VIII clause and usurps the proper role of Parliament.

The commencement table in cl.2 of the Bill shows that schedule 1 will commence on the 28th day after the Bill receives the Royal Assent. This is an excessively short period of time, given the strict nature of the possession offences under the proposed part 10. Even 'innocent' possessors of prohibited material will have but 28 days from enactment to divest themselves of possession of that material (the possession of which they may not actively be aware of).

Schedule 2 – Law enforcement

This schedule will amend the *Australian Crime Commission Act 2002* (Cth) and the *Australian Federal Police Act 1976* (Cth). In general terms, schedule 2 part 1 makes 'Indigenous violence or child abuse' a matter of responsibility for the Australian Crime Commission (ACC) in addition to its existing role in respect of serious and organised crime (see item 6, amended definition of 'relevant crime').

'Indigenous violence or child abuse is defined by the following compound definitions:

child abuse means an offence relating to the abuse or neglect of a child (including a sexual offence) that is punishable by imprisonment for a period of 3 years or more.

Indigenous person means a person (including a child) who is:

- (a) a person of the Aboriginal race of Australia; or
- (b) a descendant of an Indigenous inhabitant of the Torres Strait Islands.

Indigenous violence or child abuse means serious violence or child abuse committed by or against, or involving, an Indigenous person.

serious violence means an offence involving violence against a person (including a child) that is punishable by imprisonment for a period of 3 years or more.

(see items 2, 4, 5, 9)

Consequently, the amendments in this schedule will authorise the ACC to exercise all of its powers and functions (which include coercive powers) in respect of 'Indigenous violence or child abuse'.

Schedule 2 part 2 amends the *Australian Federal Police Act 1976* (Cth) to confer upon members of the AFP all of the powers of a Northern Territory police officer or special constable under Northern Territory law when the AFP member is performing functions in the Northern Territory. Item 35 makes this amendment retrospective in its application to 21 June 2007. This provision violates the principle against retrospective legislation, which is particularly important in the application of the criminal law power of the Commonwealth.

Schedule 3 – Infrastructure

This schedule will amend the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALR Act). The purpose of the schedule is to introduce provisions into the ALR Act which allow the Commonwealth and the Northern Territory to retain statutory rights (akin to proprietary rights) in infrastructure constructed on Aboriginal land. These amendments are unrelated to the Commonwealth Government's National Emergency and the policy they represent has not been previously announced.

Schedule 3 consists of only 3 items. The first will insert a new **part IIB** in the ALR Act. Under this proposed part, a 'funding body' has extensive statutory rights for a 'construction area' (rights to carry out works, to occupy, use and maintain infrastructure, to occupy and use the construction area, the right to construct minor improvements, the right to provide services to the construction area). The 'funding body' is the Commonwealth, the Northern Territory or one of their authorities (ss.20V and 20ZG). A 'construction area'

is the area identified in a written determination by the Commonwealth or Territory Minister (s.20T, definitions of 'construction area' and 'initial area', ss.20U(1)(a), 20ZA, 20ZF(1)(a), 20ZL).

The divisions of the proposed part IIB (division 2 (Commonwealth rights) and division 3 (Territory rights)) under which these statutory rights arise require the prior consent of the Land Council for the area in which the relevant land is situated (ss.20U(1)(b) and 20ZF(1)(b)).

The statutory rights of the Commonwealth or the Northern Territory can be conferred upon third parties by permit (ss.20Y and 20ZJ) although the rights are not themselves transferable (ss.20X and 20ZI, transfer only between the Commonwealth, the Northern Territory and their authorities permitted).

Where statutory rights exist, the holder of those rights (the government or authority) and the relevant Land Council must negotiate in good faith for the grant of a lease under s.19 of the ALR Act (ss.20ZC and 20ZN). Statutory rights can be suspended where a ALR Act s.19 lease, a town area lease or a Commonwealth compulsory lease under the *Northern Territory National Emergency Response Bill 2007*(Cth) is in place (ss.20ZD and 20ZO). Statutory rights come to an end when the government or authority that holds them makes a written determination at their discretion (ss.20ZE and 20ZP).

Schedule 3 item 3 (by amending ALR Act s.71) makes it clear that the traditional rights of use and occupation of Aboriginal land protected by s.71(1) of the ALR Act are displaced by the statutory rights of a government or authority or a third party with a permit to exercise those rights.

Schedule 4 – Access to Aboriginal land

This schedule amends the ALR Act permit provisions and road access provisions.

Item 10 will amend the ALR Act to permit the Ministerial determination of persons, or classes of persons, who are permitted to enter and remain on Aboriginal land.

Item 11 will amend the ALR Act to create a defence to the offence of unauthorised entering or remaining on Aboriginal land where a person enters and remains on community land (other than a sacred site) with the permission of the occupier of the land. The proposed subsection (2E) would define occupier as including 'a person present at the premises who is in apparent control of the premises'. The term 'occupier' is a term of legal art, and is related to the exercise of physical control over land (whether active or passive, see *Newcastle City Council v Royal Newcastle Hospital* (1957) 96 CLR 493). A visitor relying on this defence may be put in an invidious position when attempting to determine if they have the permission of a person who truly qualifies as an 'occupier'.

'Community land' is defined by s.70A(2), as inserted by item 12, is generally the areas described in the proposed schedule which will become schedule 7 of the ALR Act. It appears that this category is the similar to, although not identical with, schedule 1 part 1 of the *Northern Territory National Emergency Response Bill 2007*(Cth). The proposed s.70A(3) permits the reduction of areas described in schedule 7 by regulation. This is an Henry VIII clause and usurps the proper role of Parliament.

Item 12 will also insert ALR Act s.70B which permits access across roads upon Aboriginal land for the purpose of travelling to and from community land. The Land Trust for the land upon which the road is situated is immune from liability arising from the use of such roads and there is no duty in the Land Trust to maintain the roads (s.70B(9) and (10)). Similar provision is made for access to aerodromes on Aboriginal land (s.70C), landing places for vessels on Aboriginal land (s.70D), roads on community land (s.70E) and 'common areas' on community land (s.70F). The term 'common area' is inadequately defined by the proposed s.70F(20). The ambiguity of this definition makes the scope of the s.70F permission to enter and remain on Aboriginal land that is a common area within community land unreliable. The proposed s.70G authorises entering and remaining on Aboriginal land for the purpose of attending or leaving a court hearing. It is unsatisfactory because it does not clearly demarcate the Aboriginal land to which it applies (and could potentially apply to any Aboriginal land whatsoever).

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