Chapter 2

Reinstatement of the Racial Discrimination Act

Background

2.1 The Northern Territory Emergency Response (NTER) legislation introduced in 2007 by the former Howard Government included provisions that suspended the operation of the *Racial Discrimination Act 1975* (Racial Discrimination Act). This was achieved by exempting the NTER measures from Part II of the Racial Discrimination Act, which is the section prohibiting racial discrimination.

2.2 Additionally, the NTER measures were deemed by the legislation to be 'special measures' and hence exempt from the general prohibition on racial discrimination. In short, special measures are measures which apply to a particular racial or ethnic group that assist in the advancement of that group. Special measures are further discussed later in this chapter.

2.3 Using these two different mechanisms, the NTER legislation suspended the Racial Discrimination Act from applying to the NTER measures and income management regimes in the Northern Territory and Cape York.

2.4 At the time the legislation was introduced, the Howard Government stated that an important purpose of these provisions was to ensure that the NTER measures, as well as the establishment and operation of what was the Queensland Commission[1] and changes to approved programs of work for income support, could be implemented without delay and without uncertainty.[2]

2.5 The current government, when in opposition, commented during the parliamentary debate on the NTER bills in 2007 that suspension of the Racial Discrimination Act was unnecessary.[3] When it was elected in November 2007, the current government indicated that it would continue the NTER but that a review would be undertaken after 12 months of operation. As part of this process, the NTER Review Board reported to the government in October 2008. The Review Board found

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1 The Queensland Family Responsibilities Commission was subsequently declared to be the Queensland Commission for the purpose of the relevant provisions of the Welfare Payment Reform Act and the Social Security Administration Act.

2 *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009*, Explanatory Memorandum, p. 3.

3 *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009*, Explanatory Memorandum, p. 4.

the situation in remote Northern Territory communities and town camps remained sufficiently acute to be described as a 'national emergency'.[4]

2.6 The NTER Review Board (the Review Board) made three overarching recommendations in its report, which were that:

- the Australian and Northern Territory Governments recognise as a matter of urgent national significance the continuing need to address the unacceptably high level of disadvantage and social dislocation being experienced by Aboriginal Australians living in remote communities throughout the Northern Territory;
- in addressing these needs both governments acknowledge the requirement to reset their relationship with Aboriginal people based on genuine consultation, engagement and partnership; and
- government actions affecting the Aboriginal communities respect Australia's human rights obligations and conform with the Racial Discrimination Act.[5]

2.7 The government announced on 23 October 2008 that it accepted each of the Review Board's three overarching recommendations, and committed to introducing legislation into the parliament to remove the provisions that exclude the operation of the Racial Discrimination Act.[6] The government released a policy statement on 25 November 2009 which set out the reforms of the welfare system it was introducing and the reinstatement of the Racial Discrimination Act. In relation to the reinstatement, it was stated:

> …the government is moving to reinstate the *Racial Discrimination Act 1975* (RDA) in relation to the operation of the Northern Territory emergency Response (NTER) and related legislation operating in the Northern Territory and Queensland. The removal of the RDA suspension, along with the redesign of relevant measures to ensure they conform with the RDA will strengthen the NTER and assist in resetting the government's relationship with Aboriginal people nationally.[7]

2.8 On the same day, the Minister for Families, Housing, Community Services and Indigenous Affairs, the Hon Jenny Macklin, MP, introduced the Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 and the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Bill 2009. In

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4 *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009*, Explanatory Memorandum, p. 4.

5 NTER Review Board, *Report*, October 2008, p. 12.

6 *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009*, Explanatory Memorandum, p. 4.

7 Australian Government, *Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act, and Strengthening of the Northern Territory Emergency Response*, 25 November 2009.

her second reading speech, the minister stated that the bill was intended to honour the government's commitment to reinstate the Racial Discrimination Act in relation to the NTER. The minister stated that the reinstatement will strengthen the NTER and that 'the government believes that all NTER measures are either special measures under the Racial Discrimination Act or non-discriminatory and thus consistent with the Racial Discrimination Act'[8].

2.9 The explanatory memorandum makes clear that the alcohol, restricted materials, five year lease and community store licensing measures are time-limited in the proposed legislation and will cease in August 2012.[9]

2.10 The proposed reinstatement of the Racial Discrimination Act was the focus of much of the evidence that the committee received.

The need to reinstate the Racial Discrimination Act

2.11 The vast majority of witnesses and submitters before the committee agreed with the government's intention to reinstate the Racial Discrimination Act. For example, the Law Council of Australia (LCA) stressed to the committee the importance of the Racial Discrimination Act in Australia's legal history, stating:

> The prohibition of racial discrimination is not constitutionally entrenched in Australia…When enacted in 1975, the RDA was landmark legislation reflecting the will of the Australian Parliament to join the consensus of the international community in condemning and prohibiting any form of racial discrimination.[10]

2.12 The committee found that the reinstatement of the Racial Discrimination Act was strongly desired by many Indigenous people in the Northern Territory. For example, Mr Samuel Bush-Blenasi, Northern Land Council, stated:

> We are the first Australians in this country and we are citizens of Australia. Australian citizenship was given to us by the federal government a long time ago; I was not even born then. Our rights—we have no rights at the present moment. That is why most of our people are really screaming about the Racial Discrimination Act as we have stated.[11]

2.13 The importance of the Racial Discrimination Act was underscored by suggestions that its suspension had resulted in perceived levels of racism increasing in the Northern Territory with respect to certain NTER measures. For example, some

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8 The Hon Jenny Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, *House of Representatives Hansard*, 25 November 2010, p. 12783.

9 *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009*, Explanatory Memorandum, p. 32, 41, 45 &52.

10 Law Council of Australia, *Submission 83*, p. 9.

11 Mr Samuel Bush-Blenasi, Northern Land Council, *Committee Hansard*, 15 February 2010, p. 74.

witnesses attested to feelings of discrimination as a result of the introduction of the BasicsCard, including segregated shopping lines and embarrassment at the register:

> While there might not be rigorous academic reports on the issue, I can assure you—and you will have a lot of people before you today on this—that anyone who lives in Alice Springs can tell you racism is alive and well and discriminatory practices are alive and well. Certainly the introduction of the BasicsCard and its implementation have assisted to highlight just how different the arrangements are in this town for people who are black and people who are white…I can certainly tell you, from our council meetings and others, that there have been hours and hours of discussions around just how humiliating the administrative arrangements of the BasicsCard are for people.[12]

2.14 More generally, Ms Barbara Shaw, Prescribed Area People's Alliance, stated:

> There has always been racism in this town but, with the suspension of the Racial Discrimination Act, it has come out from under the carpet.[13]

2.15 The committee strongly supports the reinstatement of the Racial Discrimination Act. In the words of Mr Ron Levy, Northern Land Council:

> The whole point about discrimination is that people throughout Australia—black or white—are entitled to go to court and test things if they want to.[14]

2.16 The committee feels that all citizens of Australia deserve the right to challenge legislation and government actions in court.

Issues

2.17 Issues associated with the government's proposed reinstatement of the Racial Discrimination Act fell into two broad categories. Firstly, some witnesses were of the opinion that a mere repeal of the sections exempting the NTER measures from the prohibition on racial discrimination may not go far enough. Secondly, many witnesses commented on the definition and characterisation of special measures, and whether the amended NTER measures would qualify as such.

Repeal of sections suspending the Racial Discrimination Act

2.18 The North Australian Aboriginal Justice Agency (NAAJA) highlighted the desire of residents of prescribed areas to see the reinstatement of the Racial Discrimination Act but also the need for the act to be properly reinstated. Mr Jared Sharp, NAAJA, stated:

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12 Ms Jayne Weepers, Central Land Council, *Committee Hansard*, 17 February 2010, p. 4.

13 Ms Barbara Shaw, Prescribed Area People's Alliance, *Committee Hansard*, 17 February 2010, p. 27.

14 Mr Ron Levy, Northern Land Council, *Committee Hansard*, 15 February 2010, p. 71.

> Ms Pingelly and I did a consultation with our board. We are an Aboriginal-controlled organisation. We travelled around the Territory to consult with our board, and the universal message that our board gave to us was that restoring the Racial Discrimination Act is vital…They did, however, qualify that…by saying that if the Racial Discrimination Act is to be restored it needs to be restored properly.[15]

2.19 A number of witnesses, including the Australian Human Rights Commission (AHRC), expressed concern that as the government bill is currently worded, the Racial Discrimination Act may not prevail over potentially discriminatory measures in the amended NTER legislation. The AHRC stated:

> …if the NTER legislation cannot be read so as to be consistent with the RDA, the NTER legislation, being the later legislation, will prevail. In other words, if NTER measures remain discriminatory, they will not be altered by the 'reinstatement' of the RDA.[16]

2.20 Amnesty International Australia also drew this possible legal issue to the attention of the committee.[17] Additionally, Dr Sarah Pritchard, LCA, noted that:

> It is a fairly standard principle of statutory interpretation that…specific provisions prevail over general provisions, and we consider that there is a real risk that the repeal of the suspending provisions will leave the specific provisions to operate and override the protections intended to be conferred by the Racial Discrimination Act.[18]

2.21 In its submission to the committee, the AHRC also noted two further issues with the repeal of the sections in the NTER legislation that suspended the Racial Discrimination Act, using the example of compulsorily-acquired 5-year leases. Firstly, item 4(a) of Schedule 1 of the government bill specifies that the repeal would not have retrospective effect. Secondly, item 4(b) of Schedule 1 specifies that section 8 of the *Acts Interpretation Act 1901* applies to the repeal and is unaffected by contrary intention. In terms of the section 8 argument, the AHRC stated:

> The effect of this provision is that any rights acquired by the Commonwealth under the leases continue. More generally, anything done under the current legislation will not be affected by the repeal of the provision that suspends the operation of the RDA.[19]

2.22 The AHRC thus concluded that:

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15 Mr Jared Sharp, North Australian Aboriginal Justice Agency, *Committee Hansard*, 15 February 2010, p. 28.

16 Australian Human Rights Commission, *Submission* 76, p. 14.

17 Amnesty International Australia, *Committee Hansard*, 11 February 2010, p. 3.

18 Dr Sarah Pritchard, Law Council of Australia, *Committee Hansard*, 25 February 2010, pp 10–11.

19 Australian Human Rights Commission, *Submission 76*, p. 15.

> It appears, therefore, that the existence of all existing five-year leases will not be able to be successfully challenged under the RDA even if the suspension of the RDA is lifted by the government Welfare Reform Bill. Likewise, nothing already done by the Commonwealth pursuant to the grant of the leases will be able to be successfully challenged.[20]

2.23 In order to ensure that the Racial Discrimination Act would prevail over the NTER legislation, the AHRC, the LCA, and the Northern and Central Land Councils recommended the inclusion of a 'notwithstanding' clause that would expressly state that the provisions of the Racial Discrimination Act prevail notwithstanding anything to the contrary, in the NTER legislation.

2.24 The AHRC informed the committee that:

> 38. Such a clause would require all acts authorised under the legislation to be undertaken consistently with the RDA. To be effective a notwithstanding clause should be unequivocal that the provisions of the NTER legislation are subject to the provisions of the RDA.
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> 39. The consequences of not including a notwithstanding clause are significant. Without such a clause, any provision of the amended emergency response legislation that is inconsistent with the RDA will still override the RDA.[21]

2.25 The AHRC elaborated on this argument in relation to five-year leases. It concluded that 'including a notwithstanding clause in the NTER legislation would serve to give full effect to the government's intention to reinstate the RDA'.[22]

2.26 The Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) rejected the notion that a 'notwithstanding' clause was necessary to ensure the Racial Discrimination Act was fully reinstated and indicated that it would in fact be undesirable to do so. Mr Rob Heferen, FaHCSIA, stated:

> Schedule 1 of the Bill removes all of the provisions that exclude the operation of the RDA and also all of the provisions which state that the measures are 'special measures'.
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> The effect of this is that, following the repeal, the RDA will apply to the NTER, and people will have their rights to bring appropriate proceedings. A complaint in relation to the administration of the NTER can be made in the usual way to the Australian Human Rights Commission, and then to a court, or, if there are disputes about the operation of the legislation itself, these can be raised in proceedings in a court. Of course, whether there has been a breach of the RDA in a particular case will still need to be determined by the Commission or the court…

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20 Australian Human Rights Commission, *Submission 76*, p. 15.

21 Australian Human Rights Commission, *Submission 76*, p. 15.

22 Australian Human Rights Commission, *Submission 76*, p. 16.

> The intention of the Bill is clear from its face and this is supported by the numerous statements of the minister and the government. The Second Reading Speech states that the provisions that modify the operation of the RDA, and the provisions that deem the legislation and acts to be special measures, are to be repealed. The Explanatory Memorandum contains a number of statements about the effect of the repeal, including a clear statement that the RDA will no longer be excluded.
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> …It is not desirable to include a provision stating that the RDA applies in relation to the NTER because it is not good practice to include in legislation provisions that are not necessary and such a provision is not necessary here for the reasons I have outlined above. Inserting such a provision could lead to the argument that similar provisions must be included in all Acts made since the RDA in 1975, which has wide ranging implications. In the circumstance of this Bill, such a provision is not necessary to provide clarity and its interpretation could provide an additional matter for dispute.[23]

2.27 The committee notes that the repeal of the provisions in the original NTER legislation that excluded the measures from the prohibition on racial discrimination will mean that individuals would be able to challenge the measures under the Racial Discrimination Act once the proposed legislation came into force.

2.28 While cognisant of the issues raised, the committee considers the government's legislation to be a strong step forward for the NTER. The AHRC, while critical of some aspects of the legislation, also stated in its submission:

> The Commission notes that, overall, while the proposed changes to the NTER do not address all the concerns of the Commission, they will improve the measures that currently apply to individuals in prescribed communities in the Northern Territory[24]

Special measures

2.29 The existing NTER legislation deems the NTER measures to be special measures and thus exempt from Part II of the Racial Discrimination Act which prohibits racial discrimination. Special measures are defined in the International Convention on the Elimination of All Forms of Racial Discrimination as:

> …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 such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for

23 Mr Rob Heferen, FaHCSIA, *Committee Hansard*, 26 February 2010, p. 51.

24 Australian Human Rights Commission, *Submission 76*, p. 5.

> different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.[25]

2.30 The government's proposed legislation repeals the sections in the NTER legislation that assert that the NTER measures are special measures under the Racial Discrimination Act. However, the minister in her second reading speech and the explanatory memorandum makes clear that the government intends the measures to be 'special'. It is stated in the explanatory memorandum that:

> The repeal of subsection 4(1) of the FaCSIA NTNER and Other Measures Act does not alter the fact that the provisions of that Act, and acts done under or for the purposes of those provisions, are intended to be special measures under the Racial Discrimination Act.[26]

2.31 The definition and scope of special measures has been the subject of debate both internationally and domestically. The LCA noted the importance of the wishes of affected communities in determining special measures, as observed by Justice Brennan in the 1985 High Court case *Gerhardy v Brown*:

> 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.[27]

2.32 The AHRC also noted the importance of free, prior and informed consent under the United Nations Declaration on the Rights of Indigenous Peoples:

> The Declaration while not legally-binding is constituted of human rights standards recognised in existing covenants and conventions that Australia has ratified. Further, the treaty body committees have looked to the Declaration to guide their interpretation of human rights standards, in their application to indigenous peoples. Compliance with the Declaration is therefore an important means of ensuring that the NTER measures are consistent with human rights standards.
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> A critical component of the Declaration is the principle of free, prior and informed consent. This requires appropriate community consultation and

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25 *International Convention on the Elimination of All Forms of Racial Discrimination*, Article 1(4).

26 *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009*, Explanatory Memorandum, p. 6.

27 *Gerhardy v Brown* (1985) 159 CLR 70.

> engagement in the design, development, implementation and review of laws, policies and programs that affect indigenous peoples.[28]

2.33 The AHRC submission commented that, in its opinion, the redesigned measures would not meet the requirements for special measures where:

- the government's redesign consultations do not meet the standard of consultation and consent of the affected group;
- there is insufficient current and credible evidence which shows that the measure will be effective;
- there are alternative means of achieving the objective that are not as restrictive of affected persons' human rights; and
- there are inadequate mechanisms for monitoring and evaluating the measure to ensure if it is working effectively and if its objective has been met.[29]

2.34 NAAJA was highly critical of the characterisation of NTER measures as 'special measures' as they did not feel that an evidence base proving the need for the certain NTER measures existed. Mr Sharp stated:

> We feel that, if the Racial Discrimination Act is to be restored, it needs to be done in a non-discriminatory way. To do otherwise there needs to be the evidence basis, and there simply is not. For example, human rights law is really clear about the criteria that need to be applied if a measure is a 'special measure'. The crucial one to start with is necessity: has the government demonstrated that there is a need for this measure, to justify this special treatment? Our submission is that, in the absence of credible evidence, which certainly has not been made publicly available if it exists, there simply is not the demonstrated necessity to support special measures.[30]

2.35 NAAJA also informed the committee that in its opinion, the redesigned NTER measures, using the example of the pornography restrictions, would not or had not been introduced with informed consent from the affected population, nor had the beneficial effects been proven:

> …it needs to be the case that the government can demonstrate that the measure is for the sole purpose and advancement of the targeted group. Again, in our submission we say that we do not feel that that has been the case. When looking at the key criteria, the standard of free, prior and

28 Australian Human Rights Commission, *Submission 76*, p. 8.

29 Australian Human Rights Commission, *Submission 76*, pp 19–20.

30 Mr Jared Sharp, North Australian Aboriginal Justice Agency, *Committee Hansard*, 15 February 2010, p. 29.

> informed consent is perhaps paramount, and we think that has not been demonstrated.[31]

2.36 The Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council (NPY Women's Council), however, defended the characterisation of the NTER measures as special measures on the grounds that they protected the rights of women and children, stating:

> 4.1 Whilst the suspension of the RDA is touted by opponents of the NTER as something akin to a national disaster, it is very clear that the true disaster is in the previously ignored rights of many, in particular women and children, which have been greatly improved by the Intervention. Presumably if the Act had not been suspended, this attempt to improve people's lives would have become entangled in court applications arguing breaches of the Act.
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> 4.2 The committee members would also be aware of the definitions and Australian case law in relation to special measures. NPY suggests that an argument can be made for such measures to apply to vulnerable people such as aged and disability benefit recipients, and that it is perhaps time to test the potential for the development of the definition of special measures with reference to international conventions.[32]

2.37 The minister, in her second reading speech, noted that the government had given careful consideration to the issue of special measures. The committee notes that the legislation redesigns a number of measures to make them more clearly special measures under the Racial Discrimination Act. The committee notes the minister's statement that:

> Apart from the income management scheme, which is designed to apply in a non-discriminatory fashion to any citizen in the Northern Territory within the specified categories, the government has redesigned a number of the other measures dealt with by this bill so that they are more sustainable and more clearly special measures under the Racial Discrimination Act.
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> The bill removes the provisions that deem the legislation and acts done under the legislation to be special measures, as those provisions could be said to have the indirect effect of suspending parts of the Racial Discrimination Act. However, this does not alter the fact that the government considers that the redesigned measures are special measures under the Racial Discrimination Act.
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> Special measures help people of a particular race to enjoy their human rights equally with others. They are an important part of the Racial Discrimination Act because they allow governments, when it is necessary, to make special laws to ensure the protection of the human rights of the people who need it most.

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31 Mr Jared Sharp, North Australian Aboriginal Justice Agency, *Committee Hansard*, 15 February 2010, p. 31.

32 NPY Women's Council, *Submission 93*, p. 6.

> The government understands the important decisions that need to be made before introducing special measures. The government has given careful consideration to the need for these laws as a necessary and appropriate way to address the challenges facing Indigenous people in the Northern Territory and as part of the transition of the NTER to the long-term development phase. The NTER measures that are special measures are all time limited.[33]

2.38 FaHCSIA informed the committee that with the new legislation and the reinstatement of the Racial Discrimination Act, people who did not feel the measures constituted special measures would be able to challenge this in court. Mr Anthony Field, FaHCSIA, stated:

> In the new legislation we are not saying that they are special measures by force of the act. What is being said in the supporting documents is that the government has redesigned them to be more special measures and that is what they are and that from the repeal of the RDA exemptions, which included provisions that deemed them to be special measures, people will have their rights under the Racial Discrimination Act to bring complaints and court action if they think that they are not.[34]

2.39 The AHRC raised a specific objection to the characterisation of the five year leases as a special measure, stating that measures relating to land could not be special measures for Indigenous communities. Mr Graeme Innes, AHRC, stated:

> We cannot see any way that the five-year leases can be a special measure…Specifically, land and application to land is excluded by section 10(3) of the RDA in relation to Indigenous people.[35]

2.40 Subsection 10(3) of the Racial Discrimination Act reads as follows:

> (3) Where a law contains a provision that:
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> (a) authorizes property owned by an Aboriginal or a Torres Strait Islander to be managed by another person without the consent of the Aboriginal or Torres Strait Islander; or
>
> (b) prevents or restricts an Aboriginal or a Torres Strait Islander from terminating the management by another person of property owned by the Aboriginal or Torres Strait Islander;
>
> not being a provision that applies to persons generally without regard to their race, colour or national or ethnic origin, that provision shall be deemed to be a provision in relation to which subsection (1) applies and a reference

33 The Hon Jenny Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, *House of Representatives Hansard*, 25 November 2010, p. 12784.

34 Mr Anthony Field, FaHCSIA, *Committee Hansard*, 26 February 2010, p. 56.

35 Mr Graeme Innes, Australian Human Rights Commission, *Committee Hansard*, 26 February 2010, p. 34.

> in that subsection to a right includes a reference to a right of a person to manage property owned by the person.[36]

2.41 Subsection (1) refers to the right of persons of any race, colour, nationality or ethnic origin to enjoy the right to equality before the law.

2.42 FaHCSIA did not agree with the assertion that special measures could not involve land. Mr Anthony Field, FaHCSIA, commented:

> That is a proposition with which we just do not agree. We understand that section 10(3) of the Racial Discrimination Act deals with property, but we do not agree with the bold proposition that you cannot have a special measure that deals with land.[37]

2.43 The committee is of the opinion that the government's redesigned measures, other than income management, which is non-discriminatory, are special measures. The committee notes that with the government's intended reinstatement of the Racial Discrimination Act, citizens who disagree will be free to challenge the measures as should be the right of all Australian citizens.

2.44 The committee notes comments by the Australian Human Rights Commission that the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Restoration of Racial Discrimination Act) Bill 2009 instead provides that the NTER legislation in its entirety, and all acts done under the legislation, are intended to constitute special measures, stating:

> 55. The Social Justice Commissioner noted his view in the Social Justice Report 2007 that it is not possible for the entire legislation to be a special measure. This is because a number of the measures in the legislation are not a proportionate response to the problems they seek to address and were introduced without community consent. While the Commission supports the change in legislative language away from special measures being 'deemed', the Commission does not accept the characterisation of the legislation as a whole as a special measure.
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> 56. Further, the Greens' Bill does not include a redesign of the individual NTER measures to be compliant with the RDA. While it leaves individual measures open to legal challenge under the RDA, the Commission suggests that Parliament should seek to make the NTER compliant with the RDA, rather than leave it to individuals to challenge aspects that may be discriminatory.[38]

36 *Racial Discrimination Act 1975*, ss10(3); subsection (1).

37 Mr Anthony Field, FaHCSIA, *Committee Hansard*, 26 February 2010, p. 57.

38 Australian Human Rights Commission, *Submission 76*, p. 17.

Indirect discrimination

2.45 Several witnesses commented that though the proposed legislation would provide for the establishment of income management across the Northern Territory rather than in prescribed Aboriginal communities, the measure would still fall most heavily on Aboriginal people. They therefore argued that the measure would constitute indirect discrimination. For instance, Ms Annabel Pengilley, NAAJA, stated:

> …while the government is saying, 'This measure is not targeted at Aboriginal people; it applies to both Indigenous and non-Indigenous Australians,' the effect on the ground is that it is mostly going to affect Aboriginal people in the Northern Territory. Unfortunately, we do not have access to the data which would allow us to understand how many non-Indigenous people in the Northern Territory would be affected, but we can certainly see that, of the Indigenous people on Centrelink benefits in the Territory, a good two-thirds look like they will remain under the income management scheme.[39]

2.46 The AHRC also raised a concern over the potential for indirect discrimination through the proposed income management categories:

> …the commission is concerned that the broad reach and automatic application of the 'disengaged youth' and 'long-term welfare payment recipient' categories could result in a disproportionate number of Aboriginal people being unnecessarily income managed. This risk stems from the limited access to education, training and employment for Aboriginal people, in particular in remote communities in the Northern Territory, and the consequent high proportion of Aboriginal people accessing welfare payments for extended periods.[40]

2.47 The committee is of the opinion that the use of categories targeted on an objective basis of need rather than on race or ethnic background means that the income management measure will be non-discriminatory. The committee notes statements by the government indicating the non-discriminatory policy basis of the income management categories:

> The new income management scheme will progressively be extended across the Northern Territory, to targeted categories of people that the government believes will particularly benefit from the help income management provides…
>
> The government selected these categories to target assistance to the most disengaged and disadvantaged individuals in the welfare system. The categories provide an objective basis for targeting the benefits of income

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39 Ms Annabel Pengilley, North Australian Aboriginal Justice Agency, *Committee Hansard*, 15 February 2010, pp 29–30.

40 Mr Mick Gooda, Australian Human Rights Commission, *Committee Hansard*, 26 February 2010, p. 29.

> management that is independent of race, and as a result, is intended to be non-discriminatory…
>
> The government has chosen the target groups based on their need for support due to their high risk of social isolation and disengagement, poor financial literacy, and participation in risky behaviours.[41]

2.48 The three new categories of income management are further discussed in the next chapter.

2.49 FaHCSIA noted that the new income management scheme is designed to be non-discriminatory and would operate without the suspension of the Racial Discrimination Act from its commencement on 1 July 2010 if the legislation is passed.[42]

Consultation and special measures

2.50 Some witnesses were concerned that the government was relying on the NTER Redesign Consultations process to provide evidence that informed consent for the NTER measures had been obtained and that this could be used to defend the government claim that certain measures were 'special measures' under the Racial Discrimination Act. For instance, Mrs Barbara Bradshaw, Northern Territory Law Society, made the following statement regarding the redesign consultations:

> We understand that it is very important that the affected people have an opportunity to be heard, particularly when the outcomes of these processes will inevitably have a significant impact on their legal rights and obligations. We agree that the consultations that were held were very important, but we would be concerned if the intention of those consultations was that they would be used to support an argument that the intervention measures are special measures under the Racial Discrimination Act.[43]

2.51 The question of whether the government considered the redesign consultations to have been for the purpose of obtaining prior, informed consent for special measures was put to FaHCSIA. Mr Field responded:

> The answer is no. The reason for that is because the purpose of the consultations is set out in the discussion paper and the other documents. Those purposes related to resetting the relationship continuing the Northern Territory Emergency Response and reinstating the Racial Discrimination Act, which are the three overarching recommendations of the review board that were accepted. That was the purpose that the consultations were

41 Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response, p. 6.

42 FaHCSIA, *Opening statement*, tabled at hearing on 26 February 2010, p. 9.

43 Ms Barbie McDermott, Northern Territory Law Society, *Committee Hansard*, 15 February 2010, p. 27.

> entered into for, and that is the way that they were conducted in an open and transparent way…
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> …The discussion paper that formed the basis for the consultations does not use the expression 'consent' or 'prior informed consent' and the government's position in relation to the measures in the bill is that they are designed to be special measures, the RDA will be restored, and people will have the opportunity should they choose to challenge.[44]

2.52 The committee received a large amount of evidence on the consultation process and explores the issues raised in the next section.

NTER Redesign Consultations

2.53 Between May and September 2009, the government conducted extensive consultations with Indigenous people in the Northern Territory regarding future directions for the NTER. This process was used to inform the government proposals contained in the legislation before the committee.

2.54 Through the redesign consultation process, meetings were conducted in all 73 communities affected by the NTER as well as several other Indigenous communities and town camps, with over 500 meetings in all.[45]

2.55 The consultations, conducted by FaHCSIA, included four different tiers:

- 444 meetings as part of an ongoing process in which individuals, families and small groups in communities met with General Business Managers (GBM) in their communities on an open-door basis (Tier 1);
- 109 whole-of-community meetings led by Indigenous Coordination Centre (ICC) managers and GBMs (Tier 2);
- six regional workshops of two or three days duration involving 176 different people from NTER communities and Indigenous leaders (Tier 3); and
- five workshops with major Indigenous stakeholder organisations in the Northern Territory involving 101 different people (Tier 4).[46]

2.56 On the scale of the consultations, Dr Bruce Smith, FaHCSIA, commented:

> I have been involved in Indigenous affairs for only a few years, but people who have been involved for much longer say it is the largest and most comprehensive consultation they can remember. While there have been communitywide consultations before and workshops, there was something new about this consultation. The 444 tier 1 consultations, which were held on an ongoing basis over three months in communities, were completely

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44 Mr Anthony Field, FaHCSIA, *Committee Hansard*, 26 February 2010, pp 58–59.

45 Report on the Northern Territory Emergency Response Redesign Consultations, p. 7.

46 Ms Cath Halbert, FaHCSIA, *Committee Hansard*, 4 February 2010, p. 3.

> new because of course we had never had government business managers there before. So that kind of open door process where people were able to come in at any time and put their views and the government business manager going to small groups and seeking their views over that three-month period was, to my knowledge, unprecedented.[47]

2.57 FaHCSIA noted that it was difficult to assess exactly how many people were involved with the Tier 1 and 2 meetings, as people moved in and out of meetings and may have attended more than one meeting or tier of consultation. FaHCSIA estimated that there may have been three or four thousand people involved in total, but that it was impossible to give a reliable estimate due to issues of double-counting.[48]

Criticisms of the consultation process

2.58 One of the main criticisms levelled at the government's NTER Redesign Consultations was that the structure of the consultation was biased toward eliciting responses that supported the government's policy agenda. Though not formally part of the redesign consultations, the Central Land Council provided feedback on the process to the committee, noting an issue with the provision of information.

> How you present information is critical to the feedback that you receive. This is where we have concerns about the consultation process. It was designed to emphasise the benefits of the measures. There is no evidence that we can see that shows that there was a balanced approach to try and give people the full suite of information you may need to make, for example, a decision around something like five-year leases or land tenure arrangements.[49]

2.59 Another related criticism was the perceived inability to raise policy suggestions outside of what the government was proposing. The Central Land Council (CLC) was of the opinion that a genuine consultation could have considered alternative policies:

> The CLC has got 30 years of experience in consultation on complex matters with remote communities. There are some things that are very critical, and we do not believe that this consultation process lives up to very high standards on any of those fronts. One of those is transparency about the purpose of the consultations. I think this is where the process was very flawed. We would have expected a process that was looking at a genuine redesign of the NTER, would allow people to look at the full scope of the measures to be presented with data on what the impacts have been, what the costs have been and what other measures have been considered by

47 Dr Bruce Smith, FaHCSIA, *Committee Hansard*, 4 February 2010, pp 14–15.

48 Dr Bruce Smith, FaHCSIA, *Committee Hansard*, 4 February 2010, p. 15.

49 Ms Jayne Weepers, Central Land Council, *Committee Hansard*, 17 February 2010, p. 10.

> governments or by NGOs or by other parties that could perhaps come into play in preference to the measures that we have currently.[50]

2.60 Ms Annabel Pengilley, NAAJA, who had attended several of the consultation meetings made a similar comment in regard to the discussion at those meetings of income management:

> The consultations did not take a step back, as the government has done in formulating its legislation, and say to people: 'What's the role of the delivery of Centrelink benefits in communities? What are the good things about how social security is delivered? How can we use social security to effect positive change in communities? What are the faults? What are the positives? How can we use this to get positive outcomes in communities?' None of that was opened up to communities for discussion or for their ideas or their input. Simply what was put to people was, 'Would you like income management to stay exactly like it is or would you like to be able to opt out?' In summary, that is broadly how those consultations went.[51]

2.61 Ms Clare Martin, Australian Council of Social Services, was also critical of the restricted nature of the consultations, stating:

> Consultations conducted in the Northern Territory were a wasted opportunity to develop real solutions in partnership with Aboriginal communities. Despite the evidence that opinion about income management in communities is deeply divided and that there have been numerous problems with the administration of the scheme, Aboriginal people were not given the option of replacing the scheme with a trigger-based model or a voluntary system. Rather, community members were given very limited options for change. They could choose either to retain compulsory income management in its current form or opt for a system with limited exemptions.[52]

2.62 FaHCSIA disagreed with assertions that the consultations restricted the ability for participants to voice their opinions, stating:

> In terms of open and fair consultations, the discussion paper at page 3 clearly indicates the initial proposals were a starting point for discussion. The discussion paper went on to say that:
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> The government is open to ideas and proposals. It will listen to ideas put forward in consultations.
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> This openness to seeking people's views is reflected in the questions asked in the discussion paper. The questions asked people what they thought about the problems as well as benefits, how key measures could be improved, what difference it would make if the measure was changed,

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50 Ms Jayne Weepers, Central Land Council, *Committee Hansard*, 17 February 2010, p. 4.

51 Ms Annabel Pengilley, North Australia Aboriginal Justice Agency, *Committee Hansard*, 15 February 2010, p. 32.

52 Ms Clare Martin, ACOSS, *Committee Hansard*, 26 February 2010, p. 22.

> whether the change was better than the existing arrangements, whether there were other ways of achieving the same aim and whether people would benefit from a continuation of the measure.[53]

2.63 FaHCSIA also noted that Tier 1 consultations had provided an extra avenue of accessibility to people wanting to participate in the consultations:

> The openness and fairness of the consultations is shown in the steps the government took to be inclusive. Page 17 of the consultation report refers to the opportunities for vulnerable, shy and hard-to-reach people to convey their views in a way that was comfortable, safe and flexible for them. The open door tier 1 meetings with local government business managers, or GBMs, enabled anyone in the community to come and talk with a GBM about their concerns and views. There were over 400 such discussions. This shows that many people took up this opportunity…[Cultural and Indigenous Research Centre Australia (CIRCA)] commented on the importance of the tier 1 consultations for people who might not ordinarily speak up because of their social position and rules about who can speak.[54]

2.64 Several submitters and witnesses referred to the *Will They Be Heard* report, commonly referred to as the Nicholson Report, compiled by the Jumbunna House of Indigenous Learning. The report examined recordings or minutes of three Tier 2 meetings and five Tier 3 meetings and was highly critical of the consultations over all.[55]

2.65 The Jumbunna Indigenous House of Learning summarised the criticisms contained within the report, stating:

> In summary, there was a lack of independence; no Aboriginal input, which is best practice; and no qualified interpreters in some cases. But, substantively—and I think these are the major flaws—it was actually a consultation process about proposals that had already been made and designed. It was not an open process engendering questions about design. There was inadequate explanation and description of some measures—the CIRCA report talks about people not have any knowledge of measures, and they certainly did not understand them—and a failure to explain very important legal concepts like the special measures.[56]

2.66 In response to questions arising regarding the Nicholson Report, Dr Smith, FaHCSIA, made the following statement:

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53 Mr Rob Heferen, FAHCSIA, *Committee Hansard*, 26 February 2010, p. 51.

54 Mr Rob Heferen, FAHCSIA, *Committee Hansard*, 26 February 2010, p. 52.

55 Ms Alison Vivian, Jumbunna Indigenous House of Learning, *Committee Hansard*, 26 February 2010, p. 40.

56 Ms Alison Vivian, Jumbunna Indigenous House of Learning, *Committee Hansard*, 26 February 2010, p. 38.

> …[O]ur broadest response is that the [Nicholson] report was produced before the consultation report was released. In fact, it was released earlier in the day that the consultation report was released. The report is a substantial refutation of a number of the statements in the Nicholson report…The consultation report is a very frank and balanced report. We do not believe that it was, in some sense, angled towards particular outcomes. It is based … on a very comprehensive consultation process within communities over three months—and there were community meetings and workshops with regional stakeholders. There were variations in the findings across all those levels of consultation, as noted in the report, but there was a high degree of consistency. It is those findings which we have gone through in the report.[57]

2.67 FaHCSIA further noted:

> The consultation report recorded criticisms as well as positive comments. Indeed, many of the submissions quote the consultation report to support their arguments opposing the redesign measures. Amnesty International representatives have told the committee that the consultation report 'captured the gist of what people were saying'.[58]

2.68 FaHCSIA also responded to comments in the *Will They Be Heard* report regarding the lack of explanation and description of measures, stating:

> Considerable effort was taken in the drafting of the discussion paper to ensure that it was written in plain English as far as possible, and that measures were clearly explained. GBMs and Indigenous engagement officers were available and willing to explain the consultations to anyone who asked. Further, the tier 1 and tier 2 consultation meetings in communities were occasions to ask about the purpose of the consultation and the measures if people did not understand them.[59]

Lack of interpreters

2.69 The consultations were also criticised for not having provided interpreters at some of the Tier 2 community consultations. FaHCSIA noted that this had been a problem at some meetings, but that on the whole they had achieved a good result despite the difficulties posed by availability of interpreters in the Northern Territory. Dr Smith stated:

> We believe in fact that, whilst there were faults in the process at various points, nevertheless it was by and large a sound process. For example, on the issue of interpreters the process represented in fact a huge step forward in government consultation processes. It is the largest process of its kind where we have actually engaged interpreters on a very wide-ranging basis.

57 Dr Bruce Smith, FaHCSIA, *Committee Hansard*, 4 February 2010, p. 11.

58 Mr Rob Heferen, FaHCSIA, *Committee Hansard*, 26 February 2010, p. 52.

59 Mr Rob Heferen, FaHCSIA, *Committee Hansard*, 26 February 2010, p. 53.

> We believe that, given the circumstances to do with the supply of skilled interpreters, we did the best we could have done.[60]

2.70 Mr Rob Heferen informed the committee that FaHCSIA had worked closely with the Northern Territory Aboriginal Interpreter Service to ensure availability of interpreters in as many places of possible and that interpreters were present at almost two thirds of the Tier 2 consultations.[61]

2.71 The *Will They Be Heard* report was critical of the lack of interpretative services at the redesign consultation meetings it analysed.

> Assistance by way of translators is a minimum requirement of genuine consultation in remote Aboriginal communities, where English is a second or third language. However, a number of the consultations were seemingly conducted with a presumption of English proficiency. Qualified interpreters were not present and attendees were co-opted to interpret complex legal concepts, such as those related to the reinstatement of the Racial Discrimination Act and its provision for special measures.[62]

2.72 However, FaHCSIA refuted this analysis, stating:

> The Nicholson report identifies three communities where it has been said that interpreters were not present when their presence would have been helpful. We have examined each of the three case studies in the Nicholson report. We have been advised that in one of these communities the GBM took advice from the community council. The majority of the community's leaders sit on this council. The GBM advised that the engagement of interpreters was offered and that the council said no interpreter was required.
>
> In the other two instances interpreters were booked and attended the tier 2 consultation meetings but their services were not used as originally planned. We understand that in one case the interpreter assisted in interpreting the women's session while a community leader interpreted the men's session and the initial whole-of-community meeting. In the third case the interpreter did arrive, held a discussion with the community leader and subsequently informed the ICC manager that the community leader would be interpreting at the meeting. There was a range of factors that led to interpreters not been able to be booked or attend consultation meetings. These included other more urgent work, such as assisting a seriously ill person, transport problems, illness and relationships with community members.[63]

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60 Dr Bruce Smith, FaHCSIA, *Committee Hansard*, 4 February 2010, p. 12.

61 Mr Rob Heferen, FaHCSIA, *Committee Hansard*, 26 February 2010, p. 53.

62 Jumbunna Indigenous House of Learning, *Will They Be Heard?* November 2009, p. 11.

63 Mr Rob Heferen, FaHCSIA, *Committee Hansard*, 26 February 2010, p. 53.

2.73 FaHCSIA noted that the Cultural and Indigenous Research Centre Australia (CIRCA) had been engaged to review the consultations from the beginning of the process, which enabled the department to adjust the consultations in line with CIRCA recommendations early in the consultation process.[64] Dr Smith also commented:

> The lack of skilled interpreters is an ongoing problem in the Northern Territory. So there were instances where, because of that, we did not end up with the right person on the day. That was very much a minority of cases and we worked as best we could around that, particularly using Indigenous engagement officers and other means.[65]

2.74 FaHCSIA acknowledged that the capacity of interpreting services and of departments, agencies and officials to use them required further development. FaHCSIA noted that the 2009–10 Commonwealth budget included $8 million over three years to further develop interpreter services in the Northern Territory, and that the Remote Service Delivery National Partnership would include a joint Commonwealth-state investment of approximately $40 million over 5 years to expand the use of interpreters.[66]

2.75 The committee supports initiatives by the government to increase the capacity of interpretive services in the Northern Territory and reemphasises the importance of interpretive services in designing and implementing Indigenous policy. The committee recommends that the government continue to develop the capacity of Indigenous interpretive services in the Northern Territory and across Australia.

Recommendation 1

2.76 The committee recommends that the government maintain its commitment to increase the capacity of Indigenous interpretative services in the Northern Territory and in Indigenous communities across Australia.

2.77 FaHCSIA also elaborated further on the role of CIRCA in strengthening the integrity of the consultation process. Mr Rob Heferen, FaHCSIA, stated:

> Several criticisms have been made of arrangements for CIRCA to observe a number of the consultations. These criticisms include possible lack of independence of CIRCA and that, because the monitoring was only in relation to tiers 2 and 3, it was not comprehensive. In response to comments about independence, while CIRCA has been contracted on other tasks for the department, the relationship is transparent. CIRCA was selected to observe a number of the consultations because officials had over time found that it worked well in remote Indigenous communities and understood the cultural and research protocols involved. The consultations were concerned with resetting the relationship and we needed to be confident that the role

64 Dr Bruce Smith, FaHCSIA, *Committee Hansard*, 4 February 2010, pp 12–13.

65 Dr Bruce Smith, FaHCSIA, *Committee Hansard*, 4 February 2010, p. 13.

66 Mr Rob Heferen, FaHCSIA, *Committee Hansard*, 26 February 2010, p. 53.

> undertaken by CIRCA was conducted by an organisation that understood and was able to work in this frame.
>
> CIRCA's report contains criticisms, praise and sound advice on improvements for the future. CIRCA and its staff conducted their work with utmost professionalism, independence and impartiality through the consultation process.[67]

2.78 The committee is of the opinion that, in addition to providing contemporary feedback as the consultation meetings occurred, the integrity of the consultation process was also improved by the involvement of CIRCA and the publication of their independent report.

2.79 The committee considers that the FaHCSIA consultation process was generally successful and looks forward to further improvements in government consultation processes over time. The committee is encouraged by government investment in interpretative capacity, as interpretation is a key element of successful government consultation and for progress in Indigenous affairs generally.

67 Mr Rob Heferen, FaHCSIA, *Committee Hansard*, 26 February 2010, pp 53–54.