Dissenting Report by Coalition Senators

Senator Sue Boyce

Senator Judith Adams

Executive summary

The Coalition remains broadly supportive of income management and retains a steadfast commitment to acting in the interests of all Australians, including those living in Indigenous communities. The *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009* (herein "the Bill") will water down current income management arrangements and weaken the welfare quarantining system.

The application and operation of social welfare reforms in contemporary Australian society is an issue which has been the subject of much debate in recent years and subject to numerous inquiries. Social welfare remains a crucial issue in Australian society which fully demonstrates the powerful impact public policy can have on the well-being of Australians. This is particularly true of the income management arrangements that continue to operate across 73 Indigenous communities in the Northern Territory.

The government has said much on income management. It is now apparent, however, that the government's rhetoric surrounding the potential expansion of the Coalition's successful income management arrangements is yet another hollow commitment, with the proposed expansion applying only to the Northern Territory, before an evaluation of where, and whether, the Minister should apply the system elsewhere.

As part of the Northern Territory Emergency Response (NTER), the Coalition established an income management system to quarantine welfare payments across some 73 remote Indigenous communities. The implementation and ongoing operation of income management measures has been both successful and effective, but the economic security and social harmony afforded to those communities, particularly to women and children, is directly threatened by the government's proposed amendments.

The Bill would not give consistency to the application of income management; rather, it would enshrine arbitrary and subjective approaches.

Coalition Senators encourage the government to amend the proposed legislation to avoid the inherent and now apparent potential legal consequences this Bill may give rise to. This would ensure that the protections currently afforded to those in remote Indigenous communities continue under a system based on dysfunction, not race.

Inviting a legal challenge to the legislation

After considering the evidence provided to the Committee in its entirety, Coalition Senators have formed the view that the proposed Bill is fundamentally flawed.

Indeed, whilst many of the witnesses were opposed to any form of compulsory income management, their evidence suggesting the Bill exacerbates legal uncertainties is a cause for concern.

The expert evidence principally leads to the conclusion that not only will the Bill water-down current arrangements, but more seriously, this Bill could effectively undermine the entire legislative framework by giving rise to a successful legal challenge.

Dr Robyn Seth-Purdie, from Amnesty International Australia, gave evidence that

> *"As for challenging, let the RDA reinstatement come in so that it can be challenged and then we can sort it out in the courts, that is a risk because it is not beyond doubt that, if the RDA exclusions are removed from the Northern Territory intervention legislation, the RDA would prevail over a statute passed subsequent to it. Conflict of laws doctrine: the later statute prevails."*[1]

Mr Vernon Patullo of the North Australia Aboriginal Justice Agency and Ms Suzan Cox QC, the Director of the Northern Territory Legal Aid Commission, also noted that because of the proposed restoration of the *Racial Discrimination Act and* the maintenance of special measures, there was likelihood that the legislation could be challenged.

Indeed, in her evidence to the inquiry, Ms Cox noted that:

> *"If the RDA is reinstated, a lot of the laws remaining are discriminatory—for example, prohibitions on alcohol and other materials in particular areas. So we have those sorts of issues."*[2]

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1 Amnesty International Australia, *Committee Hansard*, 11 February 2010, pp 12–13.

2 NAAJA and NT Law Society, *Committee Hansard*, 15 February 2010, p. 30.

This view was supported by Mr Jared Sharp, also of the North Australia Aboriginal Justice Agency, who gave evidence stating:

> *"Our key concern goes to the characterisation of NTER measures as special measures for those measures that we referred to earlier. If we were to look at those in specifics—for example, the pornography measure—I do not know the precise way in which it would be challenged. It is something that as an organisation we would need to take advice about. What we would be challenging is the designation of the measure as a special measure based on, for example, the fact that for a special measure to be a special measure there needs to be this demonstrated necessity. In our submission, that does not appear to be the case. Similarly, 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 informed consent is perhaps paramount, and we think that has not been demonstrated."*

And Ms Pengilley summarised the situation best when she noted

> *"Surely it has to be, because if the Racial Discrimination Act is reinstated then it becomes open to challenge."*[3]

The Law Society Northern Territory also suggested a challenge was more likely, noting in their submission that:

> *"We are not sure that the measures will in fact comply with the Racial Discrimination Act if they continue, as they are likely to constitute indirect discrimination at the very least if they have a disproportionate impact on Indigenous people."*[4]

Coalition Senators are gravely concerned that the proposed legislative amendments will give rise to grounds for mounting a legal challenge against the legislation.

Special measures

The Law Institute of Victoria, in their submission to the Committee expressed concern about the government's amendments.

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3 Ms Annabel Pengilley, NAAJA, *Committee Hansard*, 15 February 2010, p. 33.

4 Law Society Northern Territory, *Submission 69*, p. 10.

> *"The LIV is also concerned about aspects of the Government consultation process, which raise questions about the Government's contention that all aspects of the NTER Amendment Bills (and therefore amended NT Intervention legislation) are either special measures under the Racial Discrimination Act or non-discriminatory and thus consistent with the Racial Discrimination Act…*
>
> *We are extremely concerned by reports of deficient consultation processes with Indigenous communities and about the potential for indirect discrimination brought about by the redesign of measures such as income management."*[5]

Dr Pritchard of the Law Council of Australia gave evidence that recourse to the UN Racial Discrimination Committee would also be possible where a person or organisation objected to a special measure:

> *"That would depend on the advice one received. It would depend on the full reinstatement of the Racial Discrimination Act in the first instance. It would also depend on the interpretation by the court of the interaction between the NTNER legislation and the Racial Discrimination Act. It would also have regard to whether or not an amendment along the lines proposed by Senator Siewert were enacted. And then it would ultimately depend on whether the question were justiciable or not, and that would be a matter that would need to be determined by a court. In the event that no remedy were available domestically, then there would be recourse to the UN racial discrimination committee."*[6]

Discrimination in the Bill

The evidence before the Committee directly supports the contention that the government's proposed broadening of income management measures does not change the discriminatory nature of the legislation.

Dr Seth-Purdie, gave evidence that:

> *"We are not persuaded by them because, even if the compulsory income quarantining is rolled out across Australia and applies to areas designated by the minister as disadvantaged, this will still affect Indigenous Australians disproportionately, so it will be indirectly discriminatory because Indigenous Australians do live in the most disadvantaged areas. It could be seen as simply a mechanism to ensure that compulsory income quarantining continues. Indirect discrimination is similarly not permissible under*

5 Law Institute of Victoria, *Submission 8*, p. 5.

6 Dr Sarah Pritchard, LCA, *Committee Hansard*, 25 February 2010, p. 15.

> *international human rights treaties. Not only would Indigenous people be subject to this sort of discrimination but chronically disadvantaged non-Indigenous people would also be placed in that category. They would be treated less favourably than their non-disadvantaged counterparts elsewhere in the country by having their income managed. For Indigenous people it is not non-discriminatory nor would it be for other disadvantaged groups.*[7]

This evidence was broadly supported throughout the hearings conducted by the Committee.

Proposed amendments – '*Dysfunction not race*'

Coalition Senators cannot support the Bill in its current form. To do so would be to abrogate our responsibility to protect those vulnerable people in Indigenous communities and to condone the subjective and inconsistent application of welfare quarantining.

Coalition Senators believe several amendments could address the concerns currently held. These amendments would include:

1. Limit qualifying period for the application of income management to thirteen weeks of benefits/payments in the past 26 weeks. Extend applicability to ensure that the measures cover all recipients of Newstart, Youth Allowance, parenting payments and special benefits and to carers and disability pension recipients with children under the age of 18;

2. Remove the evaluation proposal so as to empower the Minister to expand the income management system nationally from the time Royal Assent is issued;

3. Amend the Bill so it does not seek to reinstate the *Racial Discrimination Act*; and

4. Either split the Bill, or sufficiently amend the Bill, so that current arrangements in 73 Indigenous communities are maintained.

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7 Dr Robyn Seth-Purdie, Amnesty International Australia, *Committee Hansard*, 11 February 2010, p. 12.

Conclusion

The Coalition supports the first three recommendations of the Chair's Report, but does not accept the fourth, which recommends that the Senate pass the Government's bills in their current form.

The evidence before the Committee affirms that the Coalition-introduced income management arrangements have delivered significant and substantial benefit to those Australians living in 73 Indigenous communities.

These measures and the income management system were introduced expeditiously and in direct response to the emergency situation which confronted the previous Coalition government.

Watering down those measures and weakening the protections afforded to women and children in these communities is simply counterproductive and detrimental.

Whilst Coalition Senators broadly support income management, such quarantining must be achieved through a system that identifies, and seeks to remedy, welfare recipients based on dysfunction not race. Therefore, unless the Bill is sufficiently amended so as to incorporate and address the concerns held by the Coalition Senators, the Coalition will find it difficult to support the proposed legislation in the Senate.

Judith Adams
Senator for Western Australia

Sue Boyce
Senator for Queensland