Dissenting report by Senator Rachel Siewert, Australian Greens

The whole approach being pursued by the Rudd Government to the need to reform the problems of the Northern Territory Emergency Response (NTER) as reflected in the Government's bills is fundamentally flawed. The government is attempting to simultaneously pursue contradictory and incompatible policy objectives. It made a firm commitment in opposition to restore the application of the Racial Discrimination Act to the NTER legislation and went to the election advocating the progressive social policy of social inclusion. However, since coming to government it has become enamoured with a punitive model of conditional welfare targeting disadvantaged Indigenous communities (despite the enormous cost and a lack of evidence for its efficacy) which is incompatible with social inclusion and basic human rights. While these kinds of deep philosophical and moral contradictions can be glossed over in the short term with creative public messaging, the victory of spin over substance is always short-lived.

What is particularly concerning is the manner in which the government is proposing to resolve this contradiction by pursuing what is arguably the biggest change to Australia's welfare system since the Second World War – the introduction of a national scheme of indiscriminate mandatory income quarantining. It is particularly concerning that the Rudd Government has not sought and does not have a public mandate for such major reforms. This is very different from the social policy platform they took to the last election – in fact it seems to be at direct odds with their campaign about the rights of working families – and there has been no real effort made to inform the Australian public about these intentions. These bills were introduced in the last sitting of the year during a major public debate concerning climate change without even a press conference or a media release to announce them.

The best thing for the government to do at this point would be to drop this approach, continue on with reforming the negative aspects of the NTER and shift to a more consultative community development approach to addressing the underlying causes of disadvantage and social exclusion in Aboriginal communities.

The starkest outcome of this inquiry by the Community Affairs Legislative Committee was the lack of any substantive evidence to support the government's assertions of the efficacy of its approach after two and a half years of the intervention, and the overwhelming concern expressed by experts and community organisations with the approach being taken. This lack of hard evidence is a serious indictment of the government of a Prime Minister who

continues to expresses his commitment to 'evidence-based policy'. In relation to the efficacy of income management, the analysis provided by AIHW[1] of data collected by FaHCSIA highlighted serious deficiencies in the evidence, including: the lack of any comparison group or baseline data, the over-reliance on anecdotal evidence, perceptions and opinions; the absence of hard empirical evidence to back up any of these claims; the relatively small number of clients interviewed and the lack of random selection of interviewees; the limited amount of quantitative data collected for evaluation purposes, and the difficulty in isolating the effects of income management to other effects from increased investment in affected communities. They characterised all of the data collected as falling towards the bottom of an evidence hierarchy and were highly critical of its reliability and validity. It is very clear that this evidence does not provide a basis for continuing or extending income management, and the failure to collect meaningful empirical data undermines any claim that these were 'trial' measures.

Inadequacies of the majority report

The Community Affairs committee has in recent years undertaken a number of inquiries relating to the circumstances and well-being of Aboriginal communities. In these instances I have been impressed by the candour and rigour with which it has approached these complex and sensitive issues and by the manner in which the Committee has worked to uncover the underlying issues and deliver comments and recommendations in which the best interests of those affected communities were paramount. It is in this context that I wish to express my disappointment with this current inquiry and report. There has not been enough time to consider these very important issues, and the large amount of evidence outlining major concerns with the proposals has been largely dismissed. The approach pursued appears to be one where the legislation will be supported come what may, despite all the evidence to the contrary.

The report seeks to make the case for government policies and commitments for which there is neither compelling evidence nor a convincing argument. On a large number of points the report has not even made a convincing attempt to argue the case for the government's policy position, but has simply relied on departmental assertions that well argued criticisms and opposing evidence are not true, and that the department believes or the Minister has stated something to the contrary. The most striking example of this relates to the debate concerning whether the proposed income management measures are discriminatory – where in the face of detailed and compelling argument from constitutional and human rights law experts the report falls back on assertion that the government intends these measures to be non-discriminatory and so

[1] I believe it is misleading to refer to this analysis as 'the AIHW report', particularly given evidence to the committee in Senate Estimates in February that the AIHW Ethics Committee had previously refused to participate in the study.

therefore they are non-discriminatory. The Government did not seek to argue its case and has refused to release their legal advice.

I do not support the recommendation that this legislation should proceed, and I do not consider that the evidence presented to the committee supports this conclusion.

The current approach does not restore the RDA

The two bills proposed by the government do not fully restore the application of the Racial Discrimination Act[2] to the measures taken under the Northern Territory Emergency Response. The evidence presented to the committee by constitutional and human rights law experts (including LCA, HRLRC, NACLC, AHRC, Jumbunna, CAALAS, Professor Peter Bailey, Mr Ernst Willheim, Ms Jo-Anne Weinman, Dr Anthony Cassimatis and Dr Peter Billing[3]) was overwhelming in this regard.

The government bills in their current form continue to breach a number of Australia's international human rights obligations[4] and continue to be condemned by international human rights bodies[5]. The recent report by the UN *Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples*, Professor James Anaya was highly critical of the ongoing approach taken by the Rudd government in the NTER, and it is clear that the proposed legislative changes do not address the recommendations he has put forward and the substantive issues of concern he has raised. I fully expect that if the legislation proceeds in its current form it will be criticised and condemned internationally as incompatible with Australia's international human rights commitments.

The Government bills take three different approaches to the non-compliance of current NTER measures with the Racial Discrimination Act. In the case of the proposed changes to income management, the government has (unsuccessfully) sought to change the measures so it can claim that they do not directly discriminate on the basis of race. In relation to alcohol restrictions, prohibited

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[2] Nor the Anti-discrimination Acts of the Northern Territory and Queensland

[3] See for example *submissions 18, 52, 57, 74, 76* and *83* or *Committee Hansard*, 25 February 2010, pp 10–28.

[4] Including the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the United Nations Declaration on the Rights of Indigenous Peoples (DRIP)

[5] Including more recently, the Committee on the Elimination of Racial Discrimination in March 2009, the Human Rights Committee in March 2009, the Committee on Economic, Social and Cultural Rights in May 2009, and the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people in February 2010

material (pornography and violence) and five year leases the government has introduced minor amendments to allow it to continue to assert these are 'special measures'. In the case of suspension of consideration of 'customary law' in sentencing, the government has conveniently ignored the ongoing suspension of the Racial Discrimination Act and continues to deny Aboriginal people in the Northern Territory the right to have all relevant matters considered in a court of law. In all three instances the evidence to the committee makes a compelling case that the Racial Discrimination Act is not being fully restored and that Aboriginal Australians in the Northern Territory will not be able to exercise their right to be free from discrimination in the same manner they could prior to the introduction of the NTER laws.

Permissible limitations on human rights

Under international human rights law it is very clear that any limitations placed onto human rights must be reasonable and demonstrably justified. They need to be for a legitimate and pressing purpose, they must be clearly necessary to achieve that purpose and the limitation of human rights needs to be proportionate to the benefit conferred and limited for only as long as is necessary.[6] It is clear that the onus is on states to demonstrate the necessity of such human rights limitations and to establish them as both reasonable and demonstrably justified. I agree with the majority of witnesses to the inquiry who clearly stated that they did not believe that the government had made a compelling case for these reforms.

Failure to qualify as 'special measures'

When the previous Howard Government introduced a number of measures under the NTER that clearly contravened the Racial Discrimination Act they got around this issue in two ways – by deeming these measures to be "special measures" within the legislation and by suspending the application of the RDA to the NTER. These measures have been assessed by UN human rights bodies[7] as discriminatory and "incapable of being characterised as special measures."[8]

In seeking to partially restore the application of the RDA to those NTER measures (concerning alcohol and prohibited material, compulsory five year leases and the special powers given to the Australian Crime and Corruption Commission to compel evidence), the government continues to assert its belief that these measures constitute 'special measures'.

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[6] Human Rights Law Resource Centre, *Submission 18*, p18-21.

[7] United Nations Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, CCPR/C/AUS/CO/5, May 2009 & United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *Observations on the Northern Territory Emergency Response*, Advance Version, February 2010.

[8] Jumbunna Indigenous House of Learning, University of Technology, Sydney, *Submission 57*, p. 5.

The definition of special measures under Article 1(4) of CERD is quite clear:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as maybe 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 different racial groups and that they shall not be continued after the objectives for which they were taken to have been achieved.[9]

CERD makes it very clear that, irrespective of whether or not the state considers any particular discriminatory measure to be a 'special measure', it is the opinions and desires of those affected that actually matter, particularly for measures that impact negatively on peoples' rights. The measures must be understood to be beneficial and desired by those affected by them – that is, 'special measures' require full informed consent.

It is very clear from the evidence presented to the committee from Aboriginal organisations within the Northern Territory that they were not consulted prior to the introduction of the original NTER measures, nor were they properly consulted on the new measures proposed by the Government to 'reform' the NTER. It is also abundantly clear that there is not widespread support for the continuation of these measures, and that they are not considered to be either necessary or proportionate to tackle the original objective of the NTER – tackling child abuse and neglect.

The duty to consult

The fact that 'special measures' require the prior informed consent of those affected is one of the main reasons why the adequacy of the NTER Redesign Consultations has become a contested issue. We note that in evidence to the committee FaHCSIA clearly stated that the consultation process was <u>not</u> designed or intended to serve the purpose of providing 'informed consent' for these 'special measures'.[10] While this may address some of the criticisms of the consultation process[11] (although we remain highly critical of the consultation process itself), it does not get the government out of the problem that it still requires prior informed consent. In any case, such consultation and consent cannot be achieved retrospectively and so any consultation concerning special

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[9] International Convention on the Elimination of All Forms of Racial Discrimination (CERD), Article 1(4).

[10] Mr Anthony Field, FaHCSIA, *Committee Hansard*, 26 February 2010, p. 58.

[11] Jumbunna House of Indigenous Learning, *Will They Be Heard report*, August 2009.

measures would have to concern itself with new measures and initiatives to address child abuse and neglect (or locational disadvantage[12]).

While the government has addressed one of the criteria for special measures by time-limiting some of the measures, it has failed to address consent, necessity and proportionality.

The measures relating to alcohol and prohibited materials and the ACC still leave themselves open to challenge as being discriminatory if the Racial Discrimination Act is partially restored as proposed.

Land is a special case

The issue of compulsory five year leases is more complicated still, as the right to land is considered a special case under CERD, and a number of witnesses have suggested that it is unlikely that compulsory leases could ever be considered as 'special measures'.[13] It is also arguable that the government could make a compelling case for the need to over-ride the rights of Aboriginal communities to negotiate the uses to which their land is put. If the purpose of the compulsory five year leases is to over-ride the right to negotiate so the government can quickly deliver benefits which communities have been crying out for over decades – then surely communities will either want to expeditiously agree on the delivery of services, or the government has seriously missed the mark on the communities priority needs (perhaps as a result of the lack of prior consultation).

The Law Council of Australia addressed this issue specifically in answer to a question on notice from the committee, and concluded that Section 8(1) of the RDA precludes the management of Aboriginal land without consent.[14] The LCA noted that provision already exists under Section 19 of the Aboriginal Land Rights (Northern Territory) Act 1976 for the negotiation of such leases (i.e. to obtain consent and therefore qualify as a 'special measure'), and that Departmental officials acknowledged this during the committee hearings.[15] We support the finding of the Law Council that on this basis the necessity for compulsory acquisition of 5 year leases without consent has not been demonstrated.[16]

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[12] *Noting the discussion further below that suggests the objective of the income management measures has changed from child abuse and neglect to locational disadvantage as measured by Socio-Economic Index for Areas.*

[13] See for example evidence presented by the Northern Land Council, *Committee Hansard*, 15 February 2010, p. 70 or the Australian Human Rights Commission, *Committee Hansard*, 26 February 2010, p. 34.

[14] Law Council of Australia, *supplementary submission 83a*.

[15] *Committee Hansard*, 26th February 2010, p. 57.

[16] Law Council of Australia, *supplementary submission 83a*, p3.

The need for a 'notwithstanding' clause

A number of witnesses to the inquiry (including Australian Human Rights Commission, Law Council of Australia, Law Society of Northern Territory, Northern Territory Legal Aid Commission, Northern Australian Aboriginal Justice Agency, Northern Land Council, Central Land Council, Human Rights Law Resources Centre, and Amnesty International) supported the inclusion of a 'notwithstanding' clause in the legislative amendments to expressly state that, in the event of any uncertainty or contradiction between the NTER legislation and the RDA, the provisions of the RDA should prevail. A 'notwithstanding' clause is included in my private Senator's bill, and was endorsed by the Law Council of Australia[17].

Without the inclusion of such a clause the Australian Human Rights Commission argues that "… any provision of the amended emergency response legislation that is inconsistent with the RDA will still override the RDA"[18] As such, without the inclusion of a 'notwithstanding clause' or some functionally equivalent mechanism the Government bills can only represent a partial reinstatement of the RDA and does not deliver on the Government's promise to fully restore the RDA.

In response to these concerns, FaHCSIA sought to argue that the inclusion of a 'notwithstanding' clause was unnecessary and therefore somehow legislatively undesirable, arguing:

> "…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.[19]"

This contradicts the considered opinion of a number of witnesses to the inquiry, (including Australian Human Rights Commission, Law Council of Australia, Law Society of Northern Territory, Northern Territory Legal Aid Commission, Northern Australian Aboriginal Justice Agency, Northern Land Council, Central Land Council, Human Rights Law Resources Centre, and Amnesty International) all of whom suggested that the provisions of the Social Security bill raised significant doubts as to whether it was repealing parts of the RDA. FaHCSIA did not seek to address these concerns, but merely referred generally to legal advice held by the Minister which it refused to release or discuss in any detail. I am inclined to consider this line of argument is specious and agree

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[17] Law Council of Australia submission 83, *Committee Hansard*, 25 February 2010.

[18] Australian Human Rights Commission, *Submission 76*, p 15.

[19] Mr Rob Heferen, FaHCSIA, *Committee Hansard*, 26 February 2010, p. 51.

with the objections to it raised by the Law Council of Australia in their supplementary submission.[20]

The Law Council makes the compelling point that: "…notwithstanding such a body of opinion, it is apparent that the Government is content to see legal challenges brought to resolve the uncertainty" and noted that Departmental officers did not address the desirability of certainty nor did they argue against conventional principles of statutory interpretation relating to the implied repeal of the RDA (that is, that the more recent specific measures in the bill will override older, more general ones of the RDA).

In light of the singular nature of the suspension of the RDA, and the widespread condemnation of the Parliament for enacting such legislation, it is unfortunate that the Government has chosen to eschew an approach to legislative drafting which would enhance certainty and minimise the potential for dispute, and for which, as the Departmental officers accepted in their evidence, there exists precedent.[21]

Legal challenge is inevitable

From the evidence to the committee it seems clear that, if the partial restoration of the RDA continues as proposed, then there are several grounds on which a legal challenge can be mounted. While there were mixed opinions on the likelihood of success of such a challenge, with a number of witnesses suggesting that ultimately such a challenge may not succeed[22], it is also clear from the strength of feeling on this issue and other recent challenges that a challenge or challenges are highly likely if not almost certain.

The government would be either naïve or negligent to think that the uncertainty around of the ultimate success of such challenges is likely to make them any less likely – particularly given the strong desire demonstrated by a number of stakeholders to establish these issues of discrimination and social justice in principle, and the moral and political ground to be made in publicly airing these issues.

Parliament should resolve legislative problems, not the courts

The point was made strongly in evidence to the committee that, given knowledge of this series of issues and the likelihood of challenge, there is what amounts to a moral obligation on the Parliament to seek to address and resolve these issues legislatively, rather than proceed with this legislation and leave it up to the courts to resolve these contradictions through time-consuming and costly litigation.

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[20] Law Council of Australia, *supplementary submission 83a* p3

[21] Law Council of Australia, *supplementary submission 83a* p. 4.

[22] for instance on the grounds that the Constitution in fact allows the Parliament to make laws that are contrary to international conventions such as the Convention on the Elimination of All Forms of Racial Discrimination; Mr Ernst Willheim, *Committee Hansard*, 25 February 2010, pp 24–25.

There are a couple of fundamental points that any judicial consideration of such a challenge may hinge upon. Firstly there will be the issue of the government's stated intent in moving this legislation – that is, if it intends to fully and effectively restore the RDA and achieve compliance with our international human rights commitments. The Minister, in her second reading speech stated that: 'This bill honours the government's commitment to reinstate the Racial Discrimination Act 1975…in relation to the NTER legislation.'[23] The response to date from the government to fulfil this intention has been both equivocal and contradictory – in that they continue to assert that they are restoring the RDA and that their new measures are non-discriminatory, but at the same time they refuse to countenance inclusion of provisions that would resolve a contradiction between the RDA and NTER measures when one inevitably emerges… and have stated a strong intention to press on with their income management plans despite warnings that it is likely to be considered indirect discrimination.

The second key issue for judicial consideration is likely to revolve around whether or not the Act discriminates either directly or indirectly on the basis of race. Billings & Cassimatis argue that the issue for consideration is likely to be the "true basis' of the application of income management (and other measures) to prescribed areas in the 2007 legislation. They suggest both that under Section 18B of the RDA 'race' would be considered the dominant or substantial reason, and that "…expansion of the scope of income management to the entire Northern Territory does not relevantly alter the position."[24]

> Section 9(2) of the RDA makes it clear that such human rights and fundamental freedoms include the right to "social security and social services". In assessing whether an action involves a distinction "based on" race, members of the High Court of Australia have suggested, in an analogous context, that the question becomes - what is the "true basis" of an act? What was the true basis of applying income management to the prescribed areas in the 2007 legislation? All indicators suggest "race" was a dominant or substantial reason (consider the terms of section 18B of the RDA). Arguably, the proposed expansion of the scope of income management to the entire Northern Territory does not relevantly alter the position.[25]

That is, according to this argument, if the true basis of the original Act is discriminatory then the proposed changes to extend income management to

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[23] The Hon Jenny Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, *House of Representatives Hansard*, 25 November 2009, p. 12783.

[24] Dr Peter Billings and Dr Anthony Cassimatis, answer to question on notice received 4 March 2010, p. 2.

[25] Dr Peter Billings and Dr Anthony Cassimatis, answer to question on notice received 4 March 2010, pp 1–2.

include some other groups within the Northern Territory are insufficient to alter the likelihood of the laws being found to be discriminatory.

It is interesting to note the difference between the Minister's publicly stated intention that income management is only being extended within the Northern Territory in the first instance, and the lack of any provisions within the proposed legislation that specify any geographic or temporal restrictions. There is nothing in the bills that limits income management to the Territory, that sets up any sort of sunset clause or requirements for a review, or puts any such conditions on how, when and where income management can be extended to other communities across Australia.

It is questionable whether the Government is trying to walk a fine political line between (on the one hand) avoiding any mention of the national introduction of conditional welfare laws (which may be unpopular in disadvantaged urban and regional electorates in the run up to a 2010 Federal Election) … and (on the other hand) putting forward a legislative package which gives a *prima facie* appearance of not discriminating on the basis of race, by failing to specify an intention to disproportionately target Indigenous communities. I believe it is disingenuous for the government to seek to claim that the proposed legislation in not discriminatory because it applies *in potentia* to any Australian on income support payments, while continuing to assert it intends to initially target these laws geographically at areas where Aboriginal people predominate. This does nothing, as stated above, to change the 'true basis' of income management laws which were clearly designed and implemented on the basis of race.

Such a strategy will also not prevent a challenge which asserts that the selective application of these laws to the Northern Territory is discriminatory, irrespective of whether their national scope *in potentia* might mean that they are not on the face of it discriminatory. On this basis it might be that those affected by the application of the new scheme of income management in the Northern Territory might take a case directly against the Minister for applying these laws in a discriminatory fashion, rather than challenging the laws themselves.

The national introduction of indiscriminate mandatory income management

Fundamental issues of principle

The proposed extension of non-discriminate mandatory income management to classes of income support recipients across the country represents a major shift in social security policy. In my view and in the view of the vast majority of

social service providers who gave evidence to the committee, [26] this represents a fundamental shift in values which goes to the very heart of the concept of social security as an entitlement designed to reduce poverty by delivering an adequate income and assistance to find work. In doing so it violates the principle of inalienability of the social security safety net which has been the cornerstone of modern welfare law.

For instance, Australian Council of Social Services (ACOSS) asserts that:

> "The primary and proper role of the social security system is to reduce poverty by providing adequate payments and supporting people into work. Appropriate activity requirements to assist people into employment are consistent with this objective. Compulsory income management which does not increase payment levels and removes individual autonomy does not further this objective. Rather, it locks people into long-term dependence on others to make financial decisions for them without enabling them to manage their finances independently."[27]

Catholic Social Services Australia (CSSA) also agrees that:

> "Adequate income support is an entitlement. It should not be a tool for governments or public sector managers to grant, withhold or modify in an effort to achieve 'outcomes'. Increasingly, it seems policy makers regard the right to income support as itself a cause of disadvantage and as an impediment to the efficient and effective pursuit of policy goals.[28]

Anglicare Australia points to the principles of social inclusion articulated by the Social Inclusion Board including the *aspirations* of "…reducing disadvantage, increasing participation and matching greater voice with greater responsibility" and the *approaches* of "… building on individual and community strengths, building partnerships with key stakeholders, and developing tailored and joined up services" concluding that "the blanket approach to income management that this legislation pursues is not consistent with these approaches."[29]

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[26] Including evidence from ACOSS, Anglicare, CSSA, UCA, St Vincent de Paul, FRSA, and NWRN.

[27] Australian Council of Social Services, *Submission 17*, p. 4.

[28] Catholic Social Services Australia, *Submission 63*, p. 2.

[29] Anglicare Australia, *Submission 33* pp 7-8.

The National Welfare Rights Network argues that the proposed legislation breaches well established principles of the inalienability of Social Security and Family Assistance law, saying that:

> "Section 60 of the Social Security (Administration) Act 1999 provides principal protection of a person's legal right to receive a Social Security payment where they are qualified and entitled to the payment. Inalienability enshrines the person's legal right to the payment, as it cannot be given to someone else. The principle gives legal force to the intention that the payments are designed to provide income support."[30]

The Australian Council of Trade Unions (ACTU) Indigenous Committee indicated that the recent ACTU Congress expressed concern about the violation of the inalienability of social security payments, indicating that the ACTU Congress Policy 2009 - Aboriginal and Torres Strait Islander Policy states:

> "Congress believes that income management provision under the NTER and the further national roll out of income management in other Aboriginal and Torres Strait Islander communities are contrary to well established social security principles under Australian legislation. Under the Social Security (Administration) Act 1999 social security payments and the right to appeal decisions, pertaining to the provision of an individual's social security, are absolutely inalienable and this inalienability applies to all forms of entitlements. Congress believes that the nature of the income management reforms, which target specified geographical locations, mostly populated by Aboriginal and Torres Strait Islander peoples, are inherently discriminatory and calls on the government to cease this arbitrary legislation."[31]

The ACTU Indigenous Committee went on to point out that:

> "Aboriginal and Torres Strait Islander women are particularly disengaged from the workforce and the [ACTU Indigenous] Committee feels that undermining their decision to be dedicated mothers, particularly in the early stages of child's life will do little to encourage entering or re-entering the workforce. The [ACTU Indigenous] Committee also submits that the direct discrimination against a certain type of mother based on their socio-economic circumstances is not within the spirit Australia's commitment under the Convention on the Elimination of all Forms of Discrimination against Women."[32]

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[30] National Welfare Rights Network, *Submission 77*, p. 8.

[31] Australian Council of Trade Unions Indigenous Committee, *Submission 65*, p. 7.

[32] Australian Council of Trade Unions Indigenous Committee, *Submission 65*, p. 7.

I recognise that income support recipients have obligations that go along with those entitlements, as do the organisations whose evidence I have discussed above. However, as they argue, those obligations are primarily to be actively looking for work and to take advantage of programs and services which improve their ability to find it (which in the case of youth aged 15-24 now includes participation in full-time study or vocational training). However the point, which is strongly made by Catholic Social Services Australia, is that the current indiscriminate approach to mandatory income management "*... removes the entitlement to income support from entire groups of people without considering whether or not they are meeting their obligations.*[33]"

In these terms it is clear that the current blanket mandatory income management measures together with the proposed new national measures represent a significant reduction in the ability of those on affected categories of income support payments, without delivering corresponding proportional benefits in terms of services and supports and without offering a clear pathway 'up and out' of income management.

The policy is clearly indiscriminate – in that it fails to discriminate in any manner between those in declared 'disadvantaged communities' on affected payments who are caring and providing for their children and managing their money well, and those who are not. Australian citizens should not be asked to forgo basic entitlements simply because of where they live or which income support category they fall into.

The lack of pathways 'up and out' of income management

The weight of the evidence of the use of income management and the strength of expert opinion presented to the committee is that income management alone will not help those in disadvantaged communities to better manage their finances, expenditure and their lives. As ACOSS argues, despite the Government Policy Statement framing these measures as 'reforms' to 'fight passive welfare' and 'welfare dependency' the scheme is in fact "… likely to increase the dependency of affected recipients on government to make decisions about their individual finances."[34]

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[33] Catholic Social Services Australia, *Submission 63*, p. 2.

[34] ACOSS, *Submission 17*, p. 5.

If the government's intention is to promote personal responsibility and a more 'active' model of welfare, then it needs to be actively targeting services and supports to increase the capacity of those particular individuals who lack this capacity… and offer them a pathway out of income management.

As Catholic Social Services Australia argue "…a sure way to undermine social inclusion and create division is to arbitrarily apply different rules to different people regardless of their individual circumstances."[35]

No evidence income management has resulted in better nutrition

The Government asserts that one of the primary reasons for the introduction of income management and the BasicsCard, and for the provisions relating to the licensing of community stores was to address child neglect (and to close the gap on health outcomes) by ensuring more money was spent buying healthy food. However, in practice, the initial roll-out of income management in many centres involving the use of store cards issued for major retailers such as Coles, Woolworths and Kmart meant that affected Aboriginal people were deprived of the opportunity to shop at smaller retail and specialty stores such as greengrocers, butchers, bakeries and health food stores. It remains to be seen if this reduction in shopping options to places with a wider range and greater focus on processed foods over fresh ones actually resulted in healthier or less healthy food choices.

Evidence presented to the Senate Select Committee into Regional and Remote Indigenous Communities (RRIC committee) in May 2009 by the Sunrise Health Service indicated an alarming rise in the rates of anaemia in young children:

The data indicates anaemia rates in children under the age of five in the Sunrise Health Service region jumped significantly since the Intervention. From a low in the six months to December 2006 of 20 per cent—an unacceptably high level, but one which had been reducing from levels of 33 per cent in October 2003—the figure had gone up to 36 per cent by December 2007. By June 2008 this level had reached 55 per cent, a level that was maintained in the six months to December 2008.

As Sunrise Health Service noted in their submission to the RRIC committee:

This means that more than half of the children under the age of five in our region face substantial threats to their physical and mental development. In two years, 18 months of which has been under the Intervention, the anaemia rate has nearly trebled in our region. It is nearly double the level it was before the Sunrise Health Service was established, and more than twice the rate measured across the rest of the Northern Territory.

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[35] CSSA, *Submission 63*, p. 3.

> According to the World Health Organisation, levels of anaemia above 40 per cent represent a severe public health problem. At 55 per cent, the Sunrise Health Service results must be seen as particularly severe. On that basis, the latest Sunrise figures can be equated to early childhood anaemia levels in Brazil, Burundi, Iraq and Zambia; and are worse than Zimbabwe, Swaziland, Pakistan, Peru, Jamaica, Indonesia, Bangladesh, Algeria and Equatorial Guinea."[36]

In contrast to these reports, the government has relied on reports from store owners and operators that they are of the opinion that they are selling more fresh food without any solid quantitative data on fresh food sales to back it up. The Government has not been able to provide any breakdown or analysis of expenditure which could differentiate the types of items purchased. In response to media reports last week that alleged that 72% of BasicsCard expenditure was being spent on food and 17% on clothing it has been revealed that Centrelink do not have an actual breakdown of expenditure by category and that the figures were derived by assigning the amount of money spent in particular stores to particular categories (for instance a Community Store could be categorised as only selling food and K-Mart as only selling clothes).

A letter to the inquiry from the Menzies School of Health Research tabled by Outback Stores reports on research currently in publication that found no increase in the purchase of fresh foods and a significant increase in the purchase of soft drinks and junk food.[37]

Outback Stores themselves were unable to document to the inquiry any information on whether there had been an increase in food purchased as they had no baseline data on which to compare current purchases.[38]

Income management does not improve financial capacity

The government continues to claim that income management will improve the capacity of affected individual's to manage their financial affairs. Not only has the government failed to make the case that the current measures are actually doing so … but evidence presented to the inquiry strongly suggest that the opposite is the case, as the manner in which income management is implemented reduces the ability of those affected to monitor and actively manage their finances and spending patterns.

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[36] Sunrise Health Service, submission 85 to the Senate Select Committee into Regional and Remote Indigenous Communities, May 2009, pp 34-35.

[37] Letter from Menzies School of Health Research, tabled by Outback Stores, 15 February 2010.

[38] Outback Stores, *Committee Hansard*, 15 February 2010, p. 60.

Income management statements that detail allocations to the Basics Card and to third parties (such as rent or utilities) are only provided to Aboriginal people every quarter – meaning they have limited opportunity to check they have received the correct allocation of funds and that funds have been directed or agreed by them. Basics Cards transaction statements setting out all transactions are only sent out to social security recipients every six months – giving Aboriginal people very limited opportunity to reconcile their expenditure against a statement or to check for unauthorised transactions. Such long gaps between statements provide minimal opportunity for Aboriginal people to actively review their spending habits and make informed decisions about their money management.

Perhaps the most compelling case against the indiscriminate roll-out of mandatory income management as a means of improving the capacity of those affected was that put by the Australian Financial Counselling and Credit Reform Association (AFCCRA) –the professional association of financial counsellors. AFCCRA members have had direct experience of both providing assistance to those involved in the various income management schemes in NT and WA, as well as with other alternative approaches and initiatives to improve the financial literacy and day-to-day budgeting skills of disadvantaged families and other people under financial stress. It is important to note that AFCCRA does support both voluntary 'opt in' approaches to income management and appropriate trigger-based compulsory income management (based on evidence such as a child protection notification).[39]

AFCCRA were however highly critical of mandatory income management schemes and indicated their opposition to the proposed measures. They strongly recommended that referral to financial counsellors or money management courses for those having their income managed should not be compulsory, stating that this 'fundamentally alters' the way financial counselling is delivered, undermining its success. They went on to state:

> "We understand that referrals of clients to financial counselling or money management programs, under income management as it operates at present, are on a voluntary basis. There is strong evidence however that the opposite is happening in practice. It appears for example that Centrelink staff, particularly in Western Australia, tell people that they must see a financial counsellor."[40]

[39] Australian Financial Counselling and Credit Reform Association, *Submission 79*.

[40] Australian Financial Counselling and Credit Reform Association, *Submission 79*, p5.

AFCCRA go on to argue that effective financial counselling depends on the relationship between the client and counsellor. Where clients are concerned that whether they attend a referral and how they perform at it will be reported back to their case manager undermines the trust that is paramount to the success of the financial counselling. Placing such requirements onto financial counsellors is, they argue *"...contrary to our ethical standards and over 30 years of professional practice."*[41]

While we note that some additional resources have been provided in the Northern Territory, there remains a big gap between the total number of those on income management and the number and location of financial counsellors, meaning that a very limited number of those currently on income management have access to financial counselling support. It is also important to note that a high proportion of those currently income managed in the Northern Territory have English as a second or third language, have had limited access to education and below average numeracy skills.

The prospect of a national roll-out of mandatory income management is of particular concern both because of the national shortage of properly trained and qualified financial counsellors, and because it is highly unlikely that there will be the substantial increase in the overall welfare budget that would be needed, firstly to administer this complex and administratively intensive system, and secondly to provide the case management, financial counselling and other wrap around support services that are essential to make income management work effectively as a part of a wider case management approach.

Income management costs reduce investment in social services

One of the problems with a blanket mandatory approach to income management is that, without a massive increase in associated resources, the roll-out of such an expensive system will ultimately result in a net reduction of services and supports available to disadvantaged communities. Any government that takes it upon itself to reduce the rights of its citizens supposedly 'for their own good' in this manner should then be obliged to deliver on its side of the bargain, and guarantee access to the supports and services necessary to give those on income management a real path 'up and out' of welfare quarantining. This hasn't happened to date in Northern Territory or Western Australia.

A number of social service providers and community organisations within the Northern Territory complained that the problems with the roll-out of income

[41] Australian Financial Counselling and Credit Reform Association, *Submission 79*, p6.

management measures under the NTER meant that they were effectively left to carry the can, with a significant increase in those coming to them for assistance or emergency support, and no concomitant increase in the resources from the commonwealth.

While some additional resources for financial counselling and money management training have been provided, there has been nowhere near enough to provide the necessary services and support. It is also not clear why those currently on income management would want to pursue these options, in the absence of any provisions that would guarantee that demonstrated money management skills would lead to financial independence.

The Commonwealth Government is not providing additional resources to assist with support services and the Northern Territory Government reported to the inquiry that they are yet to decide what additional resources will be contribute by the NT Government.

The $350m that the rollout will cost in NT alone would be better invested in addressing the underlying causes of disadvantage and increasing the capacity of community-based support services with a demonstrated track record of delivering results.

Intensive case management, not IM alone, produces results

It was interesting to note the responses from the WA Department of Child Protection on the limited application of the targeted income management for child protection scheme in WA. They characterised targeted compulsory income management as only one of several case management and client support tools and noted that the evaluation report had not yet been released. Income management in WA was embedded in existing case management structures. As the WA Department for Child Protection noted, for their purposes income management is:

> '…a case management tool that we have streamlined into all of our other case management support. It is just another initiative or another measure that case workers can invoke when it is appropriate. In terms of the additional support that people have received, as I said earlier, it does depend on the case. If it is a fairly significant case but it does not meet the threshold of a child protection concern then we would obviously wrap more support around that family than just income management, and they would be

> referred for non-government service provision, responsible care and a host of other services.'[42]

The Western Australian Council of Social Services noted that income management alone was a simple tool, stating:

> 'Income management is a simple way of trying to deal with the money issue when in actual fact for many of these people who are vulnerable to being put on compulsory income management their circumstances are such that they really need longer term, more intense and complex intervention in order to be able to achieve the outcomes. Compulsory income management will only achieve a short change in terms of their financial situation but it will not actually lead to the long-term outcomes that we are all desiring.'[43]

Absence of assessment framework and baseline data

I remain concerned that, while the Minister has spoken publicly to indicate an intention that there will be some form of assessment of the proposed new income management measures before they are rolled-out beyond the Northern Territory, there is nothing in the legislation requiring or setting out the timeframe and terms of reference for such an inquiry and there is no evidence to date that there is either sufficient baseline data, ongoing protocols for collecting relevant data nor any evaluation framework. This does not fit well with the government's ongoing claims of its commitment to evidence-based policy, nor does the fact that there has been no consultation with affected communities on the evaluation fit well with their claims of 'resetting the relationship' and undertaking greater consultation with Aboriginal people.

I agree with the recommendations put forward by ACOSS in their supplementary submission responding to questions on notice that, should the legislation be passed (which we do not support), a full independent evaluation should be conducted along the lines they have suggested:

- The evaluation should be designed and conducted by a respected research organisation which is independent of government.
- Affected communities should be consulted about the evaluation design.
- The evaluation should seek to measure the impact of income management on a range of clearly defined outcomes that relate to policy objectives. It should also seek to measure any unintended effects.
- As a pre-condition to further evaluation, benchmark data needs to be collected and collated to enable meaningful comparison.

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[42] WA Department for Child Protection, *Committee Hansard*, 22 February 2010, p. 4.

[43] WACOSS, *Committee Hansard*, 22 February 2010, p. 14.

- The evaluation should take into account, if not control for, the impact of other variables (including other NTER measures) on the outcomes.
- The evaluation should include reliable quantitative as well as qualitative data. Existing evidence is too reliant on qualitative data.[44]
- If it is the government's intention that income management should not be extended beyond the NT until such an evaluation has been conducted, then the geographic and temporal limits and terms of reference of the evaluation should all have been clearly outlined within the legislation.

Conclusion

The Government bills do not fully restore the operation of the RDA to the NTER. The bills represent an unacceptable fundamental shift in social security policy, an approach that there is no evidence to support and about which the Government has not consulted the Australian community.

Recommendations:

- **The legislative package is separated so that the restoration of the RDA is dealt with separately to changes to social security that expand income management.**

- **The Commonwealth amend the NTER Act to revoke the provisions relating to compulsory leases, and negotiate leases in good faith under the existing provision of the Aboriginal Land Rights (Northern Territory) Act 1976.**

- **The legislation is amended to include a 'not withstanding' clause which clearly indicates that the Racial Discrimination Act is intended to prevail over the provisions of the NTER.**

- **All existing discriminatory measures are amended to ensure that they comply with the provisions of the Racial Discrimination Act, and that those intended to be special measures legitimately meet the requirements of 'special measures' through a process that ensures full informed consent in the development of new community-based measures.**

[44] ACOSS, answer to question on notice, 26 February 2010, received 5 March 2010.

- **If these changes are not made, then the legislation should be opposed.**

Senator Rachel Siewert

Australian Greens