Senator Siewert's question was in regards to an Indigenous individual living in (for example) Redfern, NSW, or (for another example) in the Kimberley, WA.

In the event that the government's bills were passed (and not senator Siewert's private member's bill), and the minister declared Redfern (or the Kimberley) to be a disadvantaged area and hence enforced income management in that area, as per the government's bills, what chance would the Indigenous individual have of challenging the income management measure on the grounds that it was indirectly discriminatory under the Racial Discrimination Act?

Preliminary Remarks

In response to Senator Siewert's question the following opinion is based on the assumption that there is a full and effective restoration of the *Racial Discrimination Act 1975* (Cth) (RDA). To that end we would endorse the views expressed in the HRLRC submission at paras 94-95.

Absent a 'notwithstanding clause' (or functional equivalent) we consider that the government's bill may represent only a partial reinstatement of the RDA, to the extent that there is any inconsistency between the RDA and the subsequent NTER provisions. The government, in our submission, must be open and transparent with the Federal Parliament and the Australian people (particularly indigenous Australians) about this potential limitation. To omit to do so is to elevate form (the appearance of human rights compliance) over substance.

Assuming that there is a full and effective restoration of the RDA we make the following observations:

1. Notwithstanding that the proposed changes to the income management arrangements are to apply to indigenous and non-indigenous welfare recipients, there is a distinct possibility that the new measures will fall foul of the prohibition on discrimination in section 9(1) of the RDA. This provision, implementing Australia's obligations under the International Convention on the Elimination of Racial Discrimination, relevantly proscribes "any act involving a distinction, exclusion [or] restriction ... based on race ... which has the ... effect ... of ... impairing the ... enjoyment or exercise, on an equal footing" of human rights and fundamental freedoms.

2. 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?[1] 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.

3. Some members of the High Court have suggested that statutory provisions addressing direct and indirect discrimination are mutually exclusive.[2] Whilst it is difficult to defend this view in the context of section 9 of the RDA[3] it is necessary to consider the terms of section 9(1A) of the RDA. This provision was inserted into the legislation in 1990 to avoid any doubt that the RDA applied to indirect discrimination.

4. A strong(er) case can be made that the Federal Government's proposed social welfare measures will fall foul of the terms of section 9(1A) of the RDA. Rolling out income management only in the NT (in the first instance) involves requiring Australian citizens eligible for the affected social security benefits to demonstrate that they are not resident in the NT in order to avoid having relevant benefits income managed. Such a "term, condition or requirement" does not appear "reasonable having regard to the circumstances of the case".[4] The government has referred to concerns regarding long term unemployment, vulnerability and child neglect.[5] Plainly such concerns are reasonable. The government has observed that the NT includes:

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[1] *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165 at 176-177 (per Deane and Gaudron JJ) and 184 (Dawson J).

[2] *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165 at 170-171 (per Brennan J), 175 (per Deane and Gaudron JJ) and 184 (per Dawson J); and *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 392-393 (per Dawson and Toohey JJ) and 400-402 (per McHugh J). Although see the views of Mason CJ and Gaudron J in *Waters* at 357-359; and Deane J at 382. The contending arguments are considered in the context of the RDA in *Australian Medical Council v Wilson* (1996) 68 FCR 46 at 55 (per Heerey J) and 73-74 (per Sackville J).

[3] As early as 1935, a treaty requiring equality of treatment was held to prohibit both direct and indirect discrimination – see *Minority Schools in Albania – Advisory Opinion* (1935) PCIJ , Ser A/B, No 64.

[4] Bowen CJ and Gummow J in *Secretary, Department of Foreign Affairs and Trade v Styles* (1989) 23 FCR 251 at 263 made the following observation on an analogous statutory provision setting out a test of reasonableness:

> "...the test of reasonableness is less demanding than one of necessity, but more demanding than a test of convenience. ... The criterion is an objective one, which requires the court to weigh the nature and extent of the discriminatory effect, on the one hand, against the reasons advanced in favour of the requirement or condition on the other. All the circumstances of the case must be taken into account."

[5] Australian Government, Policy Statement – Landmark Reform to the Welfare System, Reinstatement of the racial Discrimination Act and Strengthening of the Northern Territory Emergency Response ("Policy Statement"), Canberra, 2009, 5.

"... 24 of the 50 most disadvantaged locations [in Australia] measured by the Socio-Economic indexes for Areas (SEIFA)".[6]

5. What appears *unreasonable* is the apparent absence of any governmental justification for why *some* of the 50 most disadvantaged locations in Australia (ie those outside of the NT) will not also be subject to the income management measures that the government believes have already produced positive outcomes.[7] Under the proposed scheme the Minister (or her successor) may simply choose not to exercise the power to declare other areas to be subject to the new scheme of welfare regulation. Accordingly, a national policy in principle would remain wedded to the NT in practice, with indigenous Australians disproportionately affected.

6. Therefore, a case can be made that restricting income management to the NT, in the first instance, with its disparate impact on indigenous Australians, involves indirect discrimination proscribed by the RDA. Addressing the well documented concerns about the administration and implementation of income management (BasicsCard) scheme, (referred to in our written submissions) will not alter this conclusion.

7. It is our view that if income management is rolled out to *all* fifty areas identified as disadvantaged in Australia, contemporaneously (including areas such as those Senator Siewert identifies in her question on notice) it is more difficult to establish indirect discrimination under the terms of the RDA. Treating people in all those particular areas differently (from persons on welfare benefits living elsewhere) may be considered to be justified as 'reasonable' or 'necessary' on the basis that there is objective and persuasive evidence that these are the most disadvantaged areas across Australia. Accordingly, if the impact of such a (authentically) national measure affects indigenous Australians disproportionately, this may not be considered to be (indirectly) discriminatory owing to the legitimate goals underpinning the measure and its nuanced application based on cogent evidence.

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[6] Policy Statement, ibid.

[7] One issue raised by this observation is the onus of proof in such matters. Under the international instruments the onus appears to fall on states seeking to depart from the equality principle – see Ian Brownlie, principles of Public International Law, 7th edition, Oxford University Press, Oxford, 573-574. The position under the RDA may be different – see *Australian Medical Council v Wilson* (1996) 68 FCR 46 at 216 and 221-222 (per Sackville J)

8. Were income management to only extend to Redfern or the Kimberley area in addition to the NT, then there may be a stronger case to be made for indirect discrimination than if it was extended to all 50 disadvantaged areas identified by the government.

9. We do not share the concerns of some witnesses that resolving uncertainty about the proposed law's consistency with the RDA would impose a heavy burden on Aboriginal people. Evidence to date suggests that pro bono lawyers would be willing and able to advocate on their behalf and we evidence this with reference to the litigation involving Barbara Shaw and FaCHSIA in 2009 where the HRLRC represented the applicants.

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