LAW COUNCIL OF AUSTRALIA

SENATE COMUNITY AFFAIRS LEGISLATION COMMITTEE INQUIRY INTO THE PROVISIONS OF THE SOCIAL SECURITY AND OTHER LEGISLATION AMENDMENT (WELFARE REFORM AND REINSTATEMENT OF THE RACIAL DISCRIMINATION ACT) BILL 2009 AND RELATED LEGISLATION

SUPPLEMENTARY SUBMISSION

1. Law Council of Australia representatives appeared before the public hearings of the Senate Community Affairs Legislation Committee (**the Senate Committee**) into the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of the Racial Discrimination Act) Bill 2009* (**the SS Bill**) and related legislation on 25 February 2010.

2. At the public hearings, the Law Council was asked to respond to a question on notice in relation to how the Government might ensure leasing arrangements under Part 4 of the *Northern Territory National Emergency Response Act 2007* (Cth) (**the NTNER Act**) comply with the *Racial Discrimination Act 1975* (Cth) (**the RDA**). The apparent concern is to ensure secure tenure in relation to a number of buildings erected in Aboriginal townships since the commencement of the NTNER Act.

3. This supplementary submission addresses that question, and makes some brief comments in relation to evidence subsequently provided to the Senate Committee by the Department of Families, Housing, Community Services and Indigenous Affairs (**FaHCSIA**) and the Attorney-General's Department (**AGD**).

Compulsory leases and the RDA

4. As noted in testimony before the Senate Committee, the Law Council considers that the provisions of Part 4 of the NTNER Act which provide for the compulsory acquisition by the Commonwealth of 5 year leases in Northern Territory Aboriginal communities are racially discriminatory, and are likely to be inconsistent with the RDA (if it is restored to its full effect).

5. Assuming the compulsory acquisition of 5 year leases to be discriminatory, the question becomes whether it can be characterised as a special measure for the purposes of the RDA and, more broadly, the Convention Against All Forms of Racial Discrimination (**CERD**).

6. Section 10(3) of the RDA provides:

> "*Where a law contains a provision that:*
>
> *(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 in that subsection to a right includes a reference to a right of a person to manage property owned by the person." (Emphasis added)

7. Section 8(1) then precludes actions falling under section 10(3) from being a special measure, as follows:

"*This Part does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies except measures in relation to which subsection 10(1) applies by virtue of subsection 10(3).*"

8. Accordingly, any provision of a law which authorises property owned by an Aboriginal or Torres Strait Islander person to be managed by another person without their consent is not a special measure.

9. The only way such a law might be capable of being characterised as a special measure is if consent to the acquisition of property is provided by affected Aboriginal communities. This means that leases agreed to with the relevant Aboriginal communities, which are negotiated freely and in good faith, are likely to satisfy the criteria of special measures.

10. Section 19 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (**the ALRA**) provides in part as follows:

"*(3) With the consent, in writing, of the Minister, and at the direction, in writing, of the relevant Land Council, a Land Trust may, subject to subsection (7), grant an estate or interest in land vested in it to the Commonwealth, the Northern Territory or an Authority for any public purpose or to a mission for any mission purpose.*

…

(5) A Land Council shall not give a direction under this section for the grant, transfer or surrender of an estate or interest in land unless the Land Council is satisfied that:

(a) the traditional Aboriginal owners (if any) of that land understand the nature and purpose of the proposed grant, transfer or surrender and, as a group, consent to it;

(b) any Aboriginal community or group that may be affected by the proposed grant, transfer or surrender has been consulted and has had adequate opportunity to express its view to the Land Council; and

(c) in the case of a grant of an estate or interest—the terms and conditions on which the grant is to be made are reasonable."

11. Therefore, provision already exists under the ALRA for the negotiation of leases that would meet the requirements of the Commonwealth in relation to security of tenure, and

achieve compliance with the RDA. So much was acknowledged by Departmental officials during the public hearings into the SS Bill on 26 February 2010.[1] However, rather than focussing on addressing concerns in relation to 5 year leases and engaging in a process of negotiating voluntary leases targeted at relevant public works, the Commonwealth has prioritised its efforts in other areas.

12. The Law Council considers that the necessity for the Commonwealth to acquire entire township leases in order to obtain secure tenure over a limited number of buildings has not been demonstrated. Such an interference in the property rights of Aboriginal people in the Northern Territory is unlikely to satisfy any accepted test of proportionality: see for example the observation of the United Nations Human Rights Committee in its General Comment No 31 "*The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*" at [6] that where restrictions are made on recognised human rights, "*States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of … rights*".

13. The only alternative strategy that is apparently being pursued is the negotiation of very long term (40+ year) leases over townships and other areas. As noted in the Law Council's earlier submission to this inquiry, there are significant concerns about the manner in which those lease negotiations are being approached, and the invidious choice being offered to communities between agreeing to a long term lease or foregoing desperately needed investment in housing and community infrastructure.

Comments on matters raised during questioning of Departmental officers

<u>"Notwithstanding" clause</u>

14. The Law Council reiterates its comments with respect to the desirability for a "notwithstanding" clause, which would clarify that the RDA is intended to apply notwithstanding any inconsistency with the NTNER Act or related legislation. Such a clause would put beyond doubt any argument concerning the implied repeal of the RDA by the SS Bill (if enacted).

15. Numerous submissions to the Senate Committee have raised concerns that the SS Bill (if enacted) might be interpreted to effect an implied repeal of the RDA: see for example the submissions of the Australian Human Rights Commission, Law Society of the Northern Territory, the Northern Territory Legal Aid Commission, the North Australian Aboriginal Justice Agency, the Central Land Council, the Northern Land Council, Amnesty International Australia, and the Human Rights Law Resource Centre.

16. Notwithstanding such a body of opinion, it is apparent that the Government is content to see legal challenges brought to resolve the uncertainty and refers generally to legal advice held by the Minister (and not available for consideration by this Inquiry).

[1] See Senate Community Affairs Committee Hansard, 26 February 2010, page CA57.

17. In their evidence to the Senate Committee, Departmental officers did not address the desirability of certainty. Nor did they address possible arguments invoking conventional principles of statutory interpretation in relation to the implied repeal of the RDA by the SS Bill, given the latter's specific treatment of the subject matter.

18. The Law Council queries the appropriateness of this position. 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.

Ongoing discrimination

19. The Law Council also makes the following comments on FaHCSIA's response to questions as to whether the NTNER Act and related legislation may continue to be contrary to the RDA following passage of the SS Bill.

20. The Law Council doubts whether mere assertions, that alcohol restrictions, pornography restrictions and 5 year leases are *intended* to be special measures, are sufficient to qualify those measures as special measures within the meaning of the RDA and CERD. The clearest example is in relation to 5 year leases to which s 10(3) of the RDA applies.

21. Notwithstanding statements by the Opposition and Australian Greens that they will not support the legislation, it is of fundamental importance that the Senate Committee gives these matters full and proper consideration.

22. In this regard, the Law Council refers to its recently adopted (February 2010) *Policy Statement on Indigenous Australians and the Legal Profession* which confirms that "*Indigenous Australians have the right to be consulted about and participate in decision-making concerning legislative and policy changes affecting their rights and interests*" (preambular para 10), and commits to "*challenging legislation, policies and practices that discriminate against and violate the human rights of Indigenous Australians, and impede substantive equality before the law".*