Law Institute Victoria

1 February 2010

Committee Secretary
Senate Standing Committee on Community Affairs
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

By email: community.affairs.sen@aph.gov.au

Dear Committee Secretary,

Re: Inquiry into 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 along with the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Restoration of Racial Discrimination Act) Bill 2009

The Law Institute of Victoria (LIV) welcomes the opportunity to provide a written submission to the Inquiry into 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 along with the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Restoration of Racial Discrimination Act) Bill 2009.

Our submission is attached.

If you would like to discuss any of the matters raised in the submission, please contact Laura Helm, Policy Adviser, Administrative Law and Human Rights Section, on (03) 9607 9380 or lhelm@liv.asn.au .

Yours faithfully

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Inquiry into 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 along with the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Restoration of Racial Discrimination Act) Bill 2009

Committee Secretary, Senate Standing Committee on Community Affairs

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Introduction

The Law Institute of Victoria (LIV) welcomes action by the Government to review and amend the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act* 2007(Cth), *Northern Territory National Emergency Response Act* 2007 (Cth) and *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act* 2007 (Cth) (together, the NT Intervention legislation), which were enacted in haste in 2007 by the former Howard Government.

The LIV has not had the opportunity to comprehensively review the provisions of the Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009, the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Bill 2009 and the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Restoration of Racial Discrimination Act) Bill 2009 (together, the NTER amendment Bills). We have however had the opportunity to review the submission prepared to this Inquiry by the Law Council of Australia (the Law Council) and we fully endorse their comments.

We make the following additional comments based on a number of recent reports, including *Will they be heard? A Response to the NTER Consultations June to August 2009*[1] (the Will they be heard? report) and the Cultural & Indigenous Research Centre Australia *Report on the NTER Redesign Engagement Strategy and Implementation*[2] (the CIRCA report).

Reinstatement of the Racial Discrimination Act

The LIV agrees with the Law Council submission of 2007 that provisions that specifically exclude the operation of the *Racial Discrimination Act* 1975 (Cth) (Racial Discrimination Act) to the NT Intervention legislation are "utterly unacceptable" and place Australia in direct contravention of international law and its obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD).[3]

We note that the United Nations Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Racial Discrimination have also expressed concern with the inconsistency between the NT Intervention legislation and Australia's obligations under CERD.[4]

Mr James Anaya, Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, also raised these concerns at the close of his visit to Australia last year. In a press release Mr Anaya concluded that the Northern Territory Emergency Response is incompatible with Australia's obligations under CERD, the *International Covenant on Civil and*

1 Alastair Nicholson, Larissa Behrendt, Alison Vivian, Nicole Watson and Michele Harris, *Will they be heard? A Response to the NTER Consultations June to August 2009*, (November 2009) (the Will they be heard? report).
2 Cultural & Indigenous Research Centre Australia, Department of Families, Housing, Community Services and Indigenous Affairs *Report on the NTER redesign engagement Strategy and implementation, Final report*, (September 2009) (the CIRCA report).
3 Law Council of Australia, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, *Northern Territory National Emergency Response Legislation*, 9 August 2007, at [19].
4 Committee on Economic, Social and Cultural Rights, Concluding Observations, UN Doc E/C.12/AUS/CO/4 (22 May 2009), < http://www2.ohchr.org/english/bodies/cescr/docs/AdvanceVersions/E-C12-AUS-CO-4.doc>; Letter from Fatimata-Binta Victoire Dah, Chairperson of the Committee on the Elimination of Racial Discrimination to Caroline Miller, Permanent Mission of Australia to the United Nations at Geneva, 22 May 2009, http://www.hrlrc.org.au/files/cerd-letter-to-australia130309.pdf

Political Rights (ICCPR) and the *Declaration on the Rights of Indigenous Peoples*, to which Australia has verified its support.[5]

In its Concluding Observations on Australia in 2009, the United Nations Human Rights Committee noted with concern that aspects of the NT Intervention legislation are inconsistent with Australia's obligations under the ICCPR. The Committee recommended that the Australian Government should redesign NT Intervention measures in direct consultation with the indigenous peoples concerned, in order to ensure that they are consistent with both the Racial Discrimination Act and the ICCPR.

The LIV therefore welcomes action by the Government to reinstate the Racial Discrimination Act in the NT Intervention legislation. This move has been welcomed by the Law Council[6] and the Australian Human Rights Commission[7] and is an important step towards ensuring that the NT Intervention measures comply with human rights standards.

We note, however, that the repeal of provisions limiting anti-discrimination laws in relation to income management will not commence until 31 December 2010.[8] The LIV is concerned with this time delay.

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.[9]

We are extremely concerned by reports of deficient consultation processes with Indigenous communities[10] and about the potential for indirect discrimination brought about by the redesign of measures such as income management.

Government consultation process

The LIV understands that the government undertook a number of consultative methods in relation to amendments to the NT Intervention legislation. The Department of Family, Housing, Community Services and Indigenous Affairs (FaHCSIA) developed an engagement and communication strategy and engaged Cultural & Indigenous Research Centre Australia (CIRCA) to review the strategy and to observe a number of the consultations.[11]

Consultations included meetings with key interest groups (including men, women, youth, community based organisations, families) in each of the 73 prescribed areas; a series of public meetings in each of the prescribed areas; a series of three-day regional workshops targeting Indigenous leaders; and five major stakeholder workshops involving the peak Indigenous organisations in the NT.[12] The government asserts that the consultations were "unprecedented in

5 James Anaya, 'Statement of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, as he concludes his visit to Australia' (Press Release 27 August 2009), http://www.unhchr.ch/huricane/huricane.nsf/view01/98A7FD0C9A5A8181C1257624002B0FBA?opendocument
6 Law Council of Australia media release, "Reinstatement of the Racial Discrimination Act a Welcome Move", 26 November 2009.
7 Australian Human Rights Commission, "Reinstating the RDA in the Northern Territory welcomed", 25 November 2009.
8 Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009, cl.2.
9 See second reading speech, The Hon Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, 25 November 2009.
10 See e.g. Will they be heard? report, above n1.
11 CIRCA report, see above n2.
12 Ibid, p12.

scale", with more than 500 meetings held.[13] All consultations were led by government officials. CIRCA attended and reported on only 15 public meetings and one of the regional workshops.

We note that while CIRCA's evaluation found that the broad objectives of consultation were met and that overall, the public meetings were effective in explaining the Government's current position, they also reported on several factors that limited the openness of meetings, a range of factors that impacted the appropriateness of the content of meetings and aspects of the training for government officials that could have been improved.[14]

The Will they be heard? report assessed transcripts and video records of consultations in three communities, as case studies for assessing the Government consultation process. The report concludes that the Government consultation process was subject to the following deficiencies:

(a) Lack of independence from government on the part of the people undertaking the consultancy;

(b) Lack of Aboriginal input into design and implementation;

(c) Lack of notice;

(d) An absence of interpreters;

(e) The consultations took place on plans and decisions already made by the government;

(f) Inadequate explanations of the NTER measures;

(g) Failure to explain complex legal concepts; and

(h) Concerns about the government's motives in implementing consultation.[15]

The LIV is particularly concerned about the finding that in many cases interpreters were not available, and the bulk of the discussion was conducted in English. CIRCA found that in communities where interpreters were not present, community leaders often informally played the role of interpreter, and that not all information was interpreted.[16] The Will they be heard? report noted that in most cases "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".[17]

Reports on the Government's approach to consultation on income management are concerning. In mid 2009, FaHCSIA commissioned a client survey and focus groups of key stakeholders subject to income management. The Report on the evaluation of income management in the Northern Territory by the Australian Institute of Health and Welfare found that "the overall evidence about the effectiveness of income management in isolation from other NT [Emergency Response] measures was difficult to assess".[18] They found data quality issues, that the research study methods were towards the bottom of the evidence hierarchy in terms of the validity of their findings and that a major problem for the evaluation was the lack of a comparison group, or baseline data, to measure what would have happened in the absence of income management.

Despite these issues in relation to evidence about the benefits of income management, the Government determined to continue the program in some form. In its discussion paper, *Future*

13 Minister for Families, Housing, Community Services and Indigenous Affairs, Second reading speech, 25 November 2009.
14 CIRCA report, above n2, especially pp11, 13 and 15.
15 Will they be heard? report, See above n1, at [38].
16 CIRCA report, above n2, at p19.
17 Will they be heard? report, See above n1, at [48].
18 Australian Institute of Health and Welfare, *Report on the evaluation of income management in the Northern Territory*, (20 August 2009), at (iv).

directions for the Northern Territory Emergency Response, the Government includes only two options for the future of income management: no change to current arrangements, or a new arrangement where individuals may apply for an exemption from income management based on individual assessment. It is questionable whether these two options are founded on a genuine attempt to consult with Indigenous people subject to income management in the Northern Territory. Despite the limited nature of consultation on income management, CIRCA noted that community members were most passionate about the Racial Discrimination Act and income management, and this tended to account for the bulk of the discussion at community meetings.[19]

The LIV is also concerned that a range of significant measures within the NT Intervention legislation were not subject to consultation, including:

- Removal of consideration of customary law or cultural practice in bail applications or in determining sentence in relation to an offence against any law of the Northern Territory;
- Right to terminate the rights, titles or interests underlying five year leases; and
- Right to compulsorily acquire Aboriginal town camps.

These measures significantly affect the rights of Indigenous people in the Northern Territory and should be the subject of genuine consultation with Aboriginal communities.

The Australian Human Rights Commission has developed best practice guidelines for community consultations based on the Government's *Best Practice Regulation Handbook* encompassing a pre-consultation, consultation and post-consultation phase and key elements of free, prior and informed consent.[20] We commend the *Draft Guidelines for ensuring income management measures are compliant with the Racial Discrimination Act* (the Draft Guidelines) to the Inquiry as a model for engaging with Aboriginal communities in relation to NT Intervention legislation generally. Genuine consultation is an essential element to classifying a "special measure" under the Racial Discrimination Act.

Special measures

The reinstatement of the Racial Discrimination Act means that all measures under the NT Intervention legislation must be non-discriminatory or capable of being "special measures". Special measures are temporary measures which are "designed to secure to disadvantaged groups the full and equal enjoyment of human rights and fundamental freedoms".[21]

In the Second Reading speech, the Government indicates that it considers various measures, such as controls on the use of publicly funded computers and business management areas, to be "special measures" under the Racial Discrimination Act. The Draft Guidelines explain that to be classified as a special measure:

- the measure must confer a benefit on some or all members of a class of people;
- membership of this class must be based on race, colour, descent, or national or ethnic origin;

19 CIRCA report, above n2, at p14.
20 Australian Human Rights Commission, *Draft guidelines for ensuring income management measures are compliant with the Racial Discrimination Act,* (11 November 2009) (Draft Guidelines).
21 Committee on the Elimination of Racial Discrimination, General Comment 32: *The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, at [11] (General Comment 32).

- The sole purpose of the measure must be to secure adequate advancement of the beneficiaries so they may equally enjoy and exercise their human rights and fundamental freedoms;

- The protection given to the beneficiaries by the measure must be necessary for them to enjoy and exercise their human rights equally with others; and

- The measure must not have already achieved its objectives.[22]

Under international law, special measures must be "designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities".[23] The case of *Gerhardy* v *Brown*[24] highlights the importance of genuine consultation for the purposes of designing a "special measure". In that case, Brennan J commented that "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".[25]

The LIV is concerned about reports, discussed above, that the redesign of the NT Intervention legislation fails to meet adequate standards for consultation with Indigenous people and we consider that this might impact on the consistency of the relevant Bills with the Racial Discrimination Act.

Potential for indirect discrimination

We understand that the Government has re-designed measures such as income management so that they no longer directly discriminate against Indigenous people. From 1 July 2010, income management will apply to all welfare recipients within specified categories in the Northern Territory. The LIV is concerned that the redesigned measures might constitute indirect discrimination under s9(1A) of the Racial Discrimination Act. 'Indirect discrimination' occurs when a term, condition or requirement is imposed generally that is unreasonable and has a disparate impact on people of a particular race. In the *Draft Guidelines*, the Australian Human Rights Commission notes that in assessing whether actions taken in the implementation of an income management measure may indirectly discriminate against people of a particular race, it is necessary to ask:

(a) Are there any terms, conditions or requirements being imposed that are unreasonable (both in terms of what they require or how they are applied)?

(b) Are there people of a particular race who are unable to comply with the relevant term, condition or requirement?

(c) Does the requirement to comply have a negative impact upon the equal enjoyment of rights in public life by people of that race?

If the answer to all of these questions is 'yes', the implementation of the income management measure is indirectly discriminatory.[26] We refer to our discussion on the adequacy of the government consultation process above and note that, given the concerns with the consultative methods, it may be difficult to justify the measures in the NTER amendment Bills as reasonable.

We urge the Inquiry to consider the impact of amendments and measures proposed in the relevant Bills, to assess whether they might constitute indirect discrimination.

22 Draft Guidelines, above n18, at [81].
23 General Comment 32, above n19, at [18].
24 (1985) 159 CLR 70.
25 Ibid, at [37].
26 Draft Guidelines, above n18, at [20].