Parliament of Australia

Senate

Community Affairs Committee

Inquiry into the provisions of the Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 and associated bills

Northern Land Council Submission

15 February 2010

SOCIAL SECURITY AND OTHER LEGISLATION AMENDMENT (WELFARE REFORM AND REINSTATEMENT OF RACIAL DISCRIMINATION ACT) BILL 2009 AND ASSOCIATED BILLS

The Northern Land Council (NLC) welcomes the opportunity to provide a submission to the Senate Community Affairs Committee regarding its enquiry into the provisions of the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009* and associated bills.

The bills propose to amend the *Northern Territory Emergency Response Act 2007* and related laws, including by restoring the application of the *Racial Discrimination Act 1975* (RDA).

This submission focuses on the fundamental importance that the application of the RDA is restored.

On 10 August 2007 the NLC appeared before the Senate Legal and Constitutional Affairs Committee in relation to the original legislation. The NLC welcomed the Commonwealth Government's commitment to proactively intervene to establish acceptable socio-economic conditions and outcomes in Aboriginal communities, but emphasised that existing dysfunction derived from government neglect and was not caused by the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), native title or the permit system.

The NLC also raised serious concerns as to racial discrimination:

> *It is deeply disappointing, however, and appears discriminatory, that the Commonwealth government has chosen to intervene without any consultation with communities, without good faith negotiations and informed consent, and by compulsion.*

The importance of consultation in ensuring community support for the implementation of complex social policy cannot be underestimated. This is the approach ordinarily taken by governments when proposing and implementing reform, including because it optimises both community support and successful outcomes.

On 28 June 2007 the NLC wrote to the then Prime Minister, John Howard, and emphasised that, properly consulted, traditional owners of many communities may well consent to the involvement of the Commonwealth government (through five year leases) in the administration of their communities. In return traditional owners, for the first time in the history of the *Land Rights Act*, would receive compensation on just terms for the use of their country for communities.

The former Indigenous Affairs Minister, Mal Brough, rejected this submission. In a letter to the NLC dated 3 August 2007 he stated that compulsion was required in relation to five year leases of Aboriginal communities which were “an essential element in enabling the intervention to succeed”, and that he was “not persuaded that such action can wait for further discussion.”

The unfortunate outcome of the former Minister's approach is that the community, both Aboriginal and non-Aboriginal, were polarised regarding complex questions of social policy. Further, Aboriginal people and their rights to land were stigmatised, and they were implicitly characterised as the architect of their own misfortune.

The former Minister's approach also encouraged High Court litigation by aggrieved traditional owners rather than focus on negotiating leases in communities, and provided grounds for

complaint to the United Nations as to breach of the International Convention on the Elimination of All Forms of Racial Discrimination.

This in fact occurred, with litigation in the High Court (*Wurridjal v Commonwealth*) and the lodgement of a complaint to the United Nations (which is unresolved).

The attached opinion dated 18 December 2008 from Sturt Glacken SC, of the Melbourne Bar, confirms that the original legislation breached the Convention (this opinion deals only with the five year lease laws, not with income quarantining or other matters). Mr Glacken SC stated (par 4.26):

> *In my opinion, the circumstances are such that it is not possible to be positively satisfied that Part 4 of the* NER Act *bears the character of a special measure in the sense that term is used in article 1(4) of the* Convention.

Another difficulty identified by Mr Glacken SC was that "there is no positive requirement that a lease granted to the Commonwealth be used for the benefit of the groups affected" (par 4.18).

It is fundamental to the ongoing success of the Commonwealth's initiatives to improve socio-economic conditions in Aboriginal communities that the discriminatory nature of the original legislation is removed.

It is also fundamental to Australia's international reputation that discriminatory laws are removed.

The NLC calls on all political parties, and all parliamentarians, to support and implement this objective.

To that end the Government's proposed legislation restores the RDA with effect from 2010, but as presently drafted it leaves open the real prospect that the amended intervention laws nonetheless impliedly repeal the RDA. To ensure that this is not the case, there should be an express provision that the amended intervention laws are not intended to override the RDA.

The Government's proposed legislation appropriately responds in relation to the second point raised by Mr Glacken SC, such that the Commonwealth is required to exercise its functions in relation to the five year leases to achieve the beneficial object of the legislation.

The NLC supports the insertion of s 37A which enables traditional owners of communities, if they wish, to effectively extend current five year leases by consent.