

Response to Questions on Notice from Senator SIEWERT and others

Question 1

(From Senator SIEWERT) If we remove sub-section (3), the intent of the Bill obviously is to restore the RDA and remove the discrimination from any measures that are supposed to be addressing Aboriginal disadvantage in the NT. In your opinion, would that achieve that aim?

Providing the operation of the *RDA 1975* is restored, in the way provided by Senator Siewert's *FaHCSIA (Restoration of RDA) Bill 2009*, to the:

- *FaCSIA (NTNER) Act 2007*, as per proposed s4(1), s4(2), s4(4) and s4(5) but excluding proposed s4(3); and
- *NTNER Act 2007*, as per proposed s132(1), s132(2), s132(4) and s132(5) but excluding proposed s132(3); and
- *SS (Welfare Payment Reform) Act 2007*, as per proposed s4(1), s4(2), s4(4) and s4(5) but excluding proposed s4(3);

then it is likely that this would be sufficient to allow the *RDA 1975* to prevail over these 3 Acts. However, the additional inclusion of a 'notwithstanding clause' in those 3 2007 Acts would be the most effective means of ensuring the *RDA 1975* prevails over them, and in removing any ambiguity as to the proper construction of the 2007 Acts that may be caused by the inclusion in those 2007 Acts of measures that arguably breach the *RDA 1975* (for instance, by being unable to qualify as 'special measures').

Jo-Anne Weinman

Question 2

What chance would an Aboriginal person:

- **in Victoria** (as per Senators BOYCE and SIEWERT in proof Hansard transcript); **or**
- **in Redfern, NSW or the Kimberley, WA** (as per email dated 250210 from Bill Baner, after discussions with Senator SIEWERT clarifying her question)

who lives in an area that the Minister declares to be a 'disadvantaged area' (and therefore subject to the compulsory income management regime) have of challenging the income management measure on the grounds that it was indirectly discriminatory under the RDA?

This is a complex and difficult question to answer, largely because it raises many issues (some of which interact with each other) as to how this would actually be achieved, and partly because some of those issues raised are beyond our expertise to consider. A few of the questions it raises about the extension of the 'disadvantaged area' category include:

1. Whether the 'disadvantaged area' declaration would extend compulsory income management to disadvantaged people in **one** State/part of a State or in **all** the States/parts therein?
2. Whether the 'disadvantaged area' declaration would extend compulsory income management to areas with exclusively or predominantly **Indigenous** people?
3. How the 'disadvantaged area' declaration extending compulsory income management could be characterised (eg as a law with respect to addressing poverty)?
4. With respect to **1.** to **3.**, whether the attempt to extend the 'disadvantaged area' declaration to areas other than the Northern Territory is constitutionally valid: which head/s of power under the Commonwealth Constitution could be invoked?
 - 4.1 s99?
 - 4.2 s51(xxiiiA)?
 - 4.3 s51(xxvi)?
 - 4.4 s51(xxix)?
 - 4.5 s51(xx)?
5. Whether it can be said that the operation of the *RDA 1975* has now been reinstated over the NTER Acts 2007 (as amended by the government's two 2009 Bills)? If so, whether this means that:
 - 5.1 the *RDA 1975* prevails over the NTER Acts 2007 except regarding those specific measures in those Acts which are inconsistent with the previous general provisions of the *RDA 1975*? or
 - 5.2 the *RDA 1975* prevails over the NTER Acts 2007, including over those measures in the NTER Acts 2007 which are inconsistent with the *RDA 1975*?
6. Whether there is an intention to make the 'disadvantaged area' declaration comply with the *RDA 1975* as a special measure?

It should be noted that if only the two government Bills – ie the *FaHCSIA (2009 Measures) Bill 2009* and the *SS (Welfare Reform & Reinstatement of RDA) Bill 2009* – are enacted, there is real doubt as to whether the *RDA 1975* would apply to the NTER Acts 2007 even to Indigenous peoples living in the Northern Territory. The government Bills do not actually 'reinstate' the *RDA 1975*; rather, they merely propose repealing provisions of the 3 NTER Acts 2007 which currently exclude the operation of the *RDA 1975* and which deem acts to be special measures under the *RDA 1975*. We refer to the **Australian Human Rights Commission submission (Sub-76)** in particular for its discussion of a 'notwithstanding clause', and of indirect discrimination or discrimination in substance. As mentioned by Mr. Willheim and others before this Committee, the preferred method is to revise each of the substantive provisions in the NTER Acts 2007 so that they do not discriminate.

For these reasons, we endorse the view of Mr. Willheim that policy and legal issues are involved and have listed factors that need to be taken into account rather than attempting a substantive 'answer'.

Professor Peter Bailey
Jo-Anne Weinman