COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

COMMUNITY AFFAIRS LEGISLATION COMMITTEE

Reference: Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009

THURSDAY, 25 FEBRUARY 2010

CANBERRA

BY AUTHORITY OF THE SENATE

THIS TRANSCRIPT HAS BEEN PREPARED BY AN EXTERNAL PROVIDER

INTERNET

Hansard transcripts of public hearings are made available on the internet when authorised by the committee.

The internet address is:

http://www.aph.gov.au/hansard

To search the parliamentary database, go to:
http://parlinfo.aph.gov.au

SENATE COMMUNITY AFFAIRS

LEGISLATION COMMITTEE

Thursday, 25 February 2010

Members: Senator Moore *(Chair)*, Senator Siewert *(Deputy Chair)*, Senators Adams, Boyce, Carol Brown and Furner

Participating members: Senators Abetz, Back, Barnett, Bernardi, Bilyk, Birmingham, Bishop, Boswell, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Collins, Coonan, Cormann, Crossin, Eggleston, Farrell, Feeney, Ferguson, Fielding, Fierravanti-Wells, Fifield, Fisher, Forshaw, Hanson-Young, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Ludlam, Ian Macdonald, Marshall, Mason, McEwen, McGauran, McLucas, Milne, Minchin, Nash, O'Brien, Parry, Payne, Polley, Pratt, Ronaldson, Ryan, Scullion, Sterle, Troeth, Trood, Williams, Wortley and Xenophon

Senators in attendance: Senators Adams, Boyce, Crossin, Furner, Moore and Siewert

Terms of reference for the inquiry:

To inquire into and report on: Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009

WITNESSES

Committee met at 4.12 pm

BEAUMONT, Ms Katherine, President, National Welfare Rights Network Inc.

BOLTON, Ms Genevieve, Delegate, National Welfare Rights Network Inc.

THOMAS, Mr Gerard, Delegate, National Welfare Rights Network Inc.

TURNBULL, Ms Liz, Delegate, National Welfare Rights Network Inc.

CHAIR (Senator Moore)—I hereby open this hearing of the Community Affairs Legislation Committee. The committee is continuing its consideration of the Social Security and Other Legislation Amendment (Welfare Reform and the Reinstatement of the 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. I welcome the representatives of the National Welfare Rights Network. I know that you are all experienced in this process and know how it works. Thank you very much for your very detailed submission. I would invite some opening comments and then we will go to questions.

Ms Beaumont—I wish to thank the committee for providing us with the opportunity to talk to you today. We are appearing on behalf of the National Welfare Rights Network, a national network of 14 community legal centres which specialise in delivering information and advice about social security law and policy to clients all around Australia, including those who have been impacted by the already introduced aspects of welfare reform in the Northern Territory, Western Australia and Queensland. We wish to set out some of the key issues we have identified in relation to the provisions of the proposed three bills in the areas of our expertise.

Whilst the focus of the majority of other submissions and evidence to this inquiry has been on welfare reforms, we consider that the proposed changes to the Social Security Appeals Tribunal will have the potential to change the fundamental nature of that tribunal. We fear that the changes will make the Social Security Appeals Tribunal more adversarial, which may act as a barrier to individuals challenging Centrelink decisions, and that they will jeopardise the tribunal's ability to be fair, just, economical, informal and quick. At the outset the National Welfare Rights Network is supportive of the move to reinstate the full operation of the Racial Discrimination Act, which was removed with the introduction of the Northern Territory emergency response. This is a long-overdue measure which should occur immediately rather than from 1 January 2011.

The National Welfare Rights Network is pleased with the repeal of the Northern Territory income management category although considers this should occur from 1 July 2010, rather than from 1 July 2011. The National Welfare Rights Network wishes to express its opposition to an expansion of compulsory income management which breaches well-established principles of social security and family assistance law based on the inalienability of these entitlements which are intended to provide income support. The National Welfare Rights Network is therefore opposed to the introduction of the three new proposed national income management categories. We question the existence of an evidence base that the rollout of income management to disengaged youth and long-term welfare recipients will address the issues of what the government has called the destructive intergenerational cycle of passive welfare. The National Welfare Rights Network considers that those receiving income support payments are already required to satisfy participation obligations in order to receive payments and that potentially the proposed new income management categories will provide further confusion as to what requirements a person has to comply with to continue to receive payment or to not be income managed. For those deemed to be vulnerable people, who will be subject to this category, we have a real fear that this will impact on greater numbers than anticipated. Although the new thrust of income management is upon those on working-age payments such as the Newstart allowance, Youth Allowance and the parenting payment, a significant number in the vulnerable category will include those on age and disability support pensions. The existence of this category may well deter vulnerable people from seeking support services and assistance for fear of being placed on income management. Additionally, it could compromise nominee and support arrangements for the frail, disabled and aged.

The initial rollout of these new income management categories is to occur in the Northern Territory from 1 July 2010, in metropolitan, regional, rural and remote locations. At the same time, child protection income management is to commence in the Northern Territory, as will voluntary income management. Additionally, there will be transitional arrangements which permit continuation of the Northern Territory income management category until the new income management is rolled out and in six Indigenous communities the

schooling enrolment and attendance measures trials will continue. The National Welfare Rights Network is particularly concerned about the confusion which is likely to prevail in the rollout and as to whether many who have been subject to the Northern Territory income management category will understand that they do not have to be compulsorily income managed from 1 July 2010. We would proffer that the evidence base regarding all of these measures is very weak and that the rollout of additional new income management categories will compound the difficulties and result in an unjustified, arbitrary interference with the lives of our clients. In the absence of a clear evidence base and given questionable consultations and evaluations to date to assess the real impact of the current measures, including child protection, SEAM and the Cape York trials, these additional measures should not be rolled out.

We are also justifiably concerned about the huge costs associated with these measures if implemented in the Northern Territory, quite apart from the significant amount of additional resources which would be required for a national rollout, in the absence of any clear evidence base that these measures actually work. The additional resources would be better directed to investment in community based services and programs which actually provide practical assistance and support to individuals and families to help them deal with the complex social issues which impact on their lives. It is clear from the evidence provided by the Northern Territory government that there are insufficient case management and other key support services, apart from additional funding for financial counselling and money management, to assist those who may fall under the child protection and SEAM trials. Both of these measures rely on families receiving the right type of support to address underlying issues and the desired behaviours that the measures were intended to encourage.

One of the other government bills being considered by this committee will, if passed, enable the Social Security Appeals Tribunal to convene prehearing conferences. This proposal must be considered within the broader set of Social Security Appeals Tribunal reforms, which are currently contained in another bill before parliament, which will enable Centrelink to make oral and written submissions before the tribunal, either with the leave of the tribunal or at the SSAT's request. We believe that the combined effect of the package of reforms will significantly disadvantage social security and family assistance recipients due to increased procedural complexity and the substantial elevation of the role of the respondent—that is, the department or Centrelink—in the Social Security Appeals Tribunal process. What appears to have been overlooked in the proposed package of reforms is the value of the present SSAT and AAT process, which operates as a two-tiered system whereby the SSAT provides a quick, informal, non-adversarial mechanism of review and on the second tier the AAT provides a more formal review with departmental representation. This is of paramount importance given that the majority of review applicants in this jurisdiction are more likely to be disadvantaged and unrepresented.

In conclusion, the National Welfare Rights Network calls on the Senate committee to recommend that the provisions relating to the introduction of the new income management categories and the proposed changes to the Social Security Appeals Tribunal not be passed.

Senator SIEWERT—You just made a comment about those matters not passing. You are largely focused in your submission on the welfare quarantining side of the bills. You are not commenting on the other side of the bills—the suspension of the Racial Discrimination Act and those issues.

Ms Beaumont—We regard that the Racial Discrimination Act should come back into force fully and immediately, without any sorts of special measures or considerations. We did include that in our submission and also in our opening statement. We think that is a given in terms of what should occur.

Senator SIEWERT—We have received a number of submissions that go into quite a lot of detail about whether the provisions fully restore the act, but I will leave that to later.

Mr Thomas—We are concerned about indirect discrimination in the Northern Territory as the rollout occurs, given the large numbers of Indigenous people who are going to be affected initially by the changes. We do not have the exact numbers but they are going to be pretty significant. I think 75 per cent are going to be Indigenous when this rolls out in the Northern Territory. That is really a concern.

Senator SIEWERT—Working with income quarantining in the Northern Territory and issues in Western Australia and Cape York, what has been your experience in supporting people who have been income-quarantined, in terms of case management and how your clients have interacted with Centrelink on an individual basis so they feel supported and that they are getting adequate case management?

Ms Beaumont—There is probably a difference in the way income management has been rolled out in various places. In the Northern Territory it has been a different experience than in Western Australia, with the

child protection income management. There were quite substantial resources put into the child protection trial in Western Australia. In the first 12 or 18 months of that trial, few have actually come under that regime, less than were anticipated in the original trials. Similarly, with the Cape York trial the number who have had income management orders placed on them by the Family Responsibilities Commission has been much smaller than anticipated. Ms Turnbull is in a better position to comment, because she worked in Katherine with the Welfare Rights Outreach Project on the ground.

Senator SIEWERT—If you could describe some of your experiences with income quarantining in Katherine, that would be really useful.

Ms Turnbull—I commenced up in Katherine 12 months after the intervention had started—that is, when people's payments were being quarantined. At that time, 12 months into it, people were still really confused about why it was happening and how the system worked. That was quite clear. People found it could be very inconvenient in terms of things like getting money transferred and getting their priority needs allocated. There could be additional costs. For example, in Katherine there was quite a concern that there was a 10 per cent surcharge when people had to get taxis out to communities if they used their BasicsCards. There were some people who thought income management was a good thing, but there were certainly many people who did not and who did not understand why it was happening.

Senator SIEWERT—In terms of your experience with change that has been achieved, and I am playing devil's advocate, because I think people already know my opinion about income quarantining—

CHAIR—I think you have been fairly clear!

Senator SIEWERT—If income quarantining was to work—and it is supposedly about behavioural change—what are the sorts of resources that you think would be needed to accomplish the behavioural change, in terms of case management, et cetera. You talked about the resources that went into Western Australia. Through our inquiry earlier in the week it appeared that not a lot of additional resources went into supporting those who had been income quarantined—from the state; the federal government has put in a lot of money. But there have not been a lot of additional resources. I am wondering about your experience with working with clients, and what additional resources would be needed.

Ms Beaumont—I am based in Western Australia. Prior to the commencement of the trial a lot of support services were put in place. Whether or not there was additional funding provided—I know it was to do with the Department for Child Protection. They had a particular initiative. That is why the Cannington trial—

Senator SIEWERT—This is the supporting parents—

Ms Beaumont—Yes. The initiative was to provide those on-the-ground services. It was similar in the Kimberley—the provision of additional services for those particular clients who were involved in the trial. It was predicated on a very intensive case management model and that is probably why there were so few clients who were referred into child protection income management in the first instance. That is probably why the trials were expanded because they really did not have the numbers that they anticipate would be involved in it. In a way I think they used a fairly softly, softly approach. Our concern, especially with the rollout in the Northern Territory, is whether there are those services on the ground. I know the evidence to this inquiry from the Northern Territory government suggested that even for things like the school enrolment and attendance measures there needed to be additional assistance provided on the ground to support parents and families to get young people to school. There was also the need for additional services, apart from just financial counselling, emergency relief and those sorts of money matters training. There were other support services that were probably needed—for example, drug and alcohol parent services. All of those types of things actually need to be there to support the child protection initiative. We would be concerned if those support services were not there and there was an intervention or compulsory income management. The parent could potentially be set up for failure.

Senator SIEWERT—What is your experience in Western Australia of people going on and off income support? We had evidence from the Western Australian government that people had gone onto income quarantining and they had come off income quarantining. There were some who had gone back on. They are getting back to us on how many have been on and off. What is your experience working with people in Western Australia of their interaction with income quarantining? We were told in evidence on Monday by the department that people who had been income quarantined were very happy with the process, they had adjusted very well and that overall they seemed to think it was okay. I am paraphrasing but that is definitely the impression we took away from the evidence. Is that your experience?

Ms Beaumont—It would be the experience because they are getting very intensive assistance. They are provided with financial counselling and emergency relief. Anyone who might be subject to either the child protection income management or voluntary income management will actually have additional support services. That obviously can augment their fortnightly payments. Additional money has actually gone in to support them, and because the take-up numbers have been so small it is a Rolls-Royce service. We would question how it could be replicated in the Northern Territory.

Senator SIEWERT—That is my next question. As you know, this bill has the capacity to be expanded across the rest of Australia. This is going to be rolled out across the Northern Territory. In your opinion what would be the level of support that would need to be given for this to work?

Ms Turnbull—I think there would need to be significant resources, particularly given that there are not only the new income measures but also the SEAM—the Schooling Enrolment and Attendance Measure—and the rollout of voluntary income management in child protection management. I think there is going to be a lot of confusion for people about what the reason is that their money being income managed. I think that will be really confusing; even things like their appeal rights and being able to access them will be really difficult for people because they may not understand the basis of why their payment is income managed.

Mr Thomas—Just on the basis of some of the practical things around the BasicsCard; many have got simply no idea about electronic banking and PIN numbers. When you use the BasicsCard you have got a 12-digit number and then a PIN and things like that, then you have got to call telephone numbers and there are balances that you can get. There are huge problems in terms of financial literacy and understanding that you have got to keep those things secret. So you need to start a whole range of basic electronic banking services in a community that is often not very literate in English and the written language as well. It is going to be an enormous job just to make sure that people are up to scratch on some of those basic practical things of using the technology and the service.

The ombudsman said that after two years they were frustrated and could not really cope with the level of inquiries. One of the problems is that people have said in the NT that some of these things about income management are fantastic. It is good because, for the first time, they have actually got access to some basic services that have never been provided. Centrelink, until recently, has never had a fundamental presence in many of these communities. So of course, if you are given the option to lose income management, 'Well, if I lose income management maybe we are going to lose these services.' They found out that 30 per cent of people were on the wrong sorts of payments in the Northern Territory. You should not have had to have the intervention take place to find out that those sorts of things were going on.

This idea that there has been overwhelming support for the intervention needs to be dug into a bit to see that without that, people did not get access to any of those services before the intervention and so of course they are linking support for those things to support for the intervention.

CHAIR—Do you have any evidence that that has occurred? Or are you just raising that as a possible query?

Ms Beaumont—I think the 30 per cent amount is actually in a *Closing the gap* report, so it actually shows that—

CHAIR—I am talking about the particular allegation that Mr Thomas has made, that people were confused by it and did not understand. If you have specific evidence that people were confused between the advantage of the system and the provision of the services—it is a perfectly reasonable thing for you to say—I am just seeing whether you have that—

Mr Thomas—Sure. I suppose that the evidence is that we have the regular feedbacks from the Welfare Rights Outreach Project—we have link ups once a month or so with people who have been in the Northern Territory for the last two years and they give us feedback.

CHAIR—And they have made the statement that people actually did not differentiate between the new services and the other changes that came in?

Mr Thomas—I suppose people—

CHAIR—In terms of the general statement, I am just trying to see whether that is something that you believe has happened because of process or whether it is something that has been told to you has happened.

Mr Thomas—It has been told to me by people up there; people see these services come in and, naturally, all these services arrive with the intervention so in their minds these services are part and parcel of what the intervention can bring.

CHAIR—Right.

Mr Thomas—That was the point I was making.

CHAIR—I am sorry, I thought you felt that people were saying that they did not actually differentiate the things that you felt were harmful to them from the good things, and that they did not understand the difference. That is how I interpreted your statement.

Senator BOYCE—I want to refer to page 14 of your submission, where you talk about that with the new system there could be compulsory income management—new income management for the three new categories, so to speak: voluntary income management and child protection income management as well as SEAM. Obviously, you are trying to make the point there that people are going to get a little confused. Could you explain to us what you think the problems of that will be, or the consequences?

Ms Beaumont—I guess some of the consequences are that, with the rollout going from blanket income management in the Northern Territory in particular communities and outstations, some people may not really understand the offer that is made to them by Centrelink—for example, if Centrelink says, 'You do not actually have to be on income management.' If the offer is: 'Hey, you can go onto voluntary income management and get the incentive allowance for going onto voluntary income management', people may say, 'Okay, I will go from this over to this.' It is a matter of whether people will actually have the choice to go off income management, whether they will realise that or whether when a proposition is made they will just take the path of least resistance.

Senator BOYCE—That has $250 attached to it, I guess.

Ms Beaumont—Yes, it is $250 after six months, and that it is a recurring thing. So for every 26 weeks that you are involved with it you get more. But, even with the matched savings scheme, someone who is a voluntary income management person might go along and do the money management course to learn how to budget their money and think at the end of it, 'I'm going to save for 13 weeks and the government is going to match it.' So a level of confusion could arise even around those sorts of measures. Some are for voluntary income management, some are for compulsory income management and then, in the Cape York trial, people are actually excluded from the matched savings provisions. We are not quite sure why that has occurred. So it is all of these different provisions.

Ms Turnbull said she had clients who went along to the SEAM information sessions and afterwards did not necessarily understand what they had been attending—the information and also the implications if their children were not enrolled in school or attending school. There is compulsory income management and voluntary income management. We have seen there is the potential for suspension, and there are also the opt-out provisions for compulsory income management for a parent, which are about being a responsible parent. So all of these layers could be very confusing for a person on the ground.

Mr Thomas—And given that you are talking about moving people through the system—they might spend their time on income management but things will improve in their life circumstances and they will move off that—the confusion where you might have four people in the same household under different categories of income management could mean that there may be confusion about how they can exit from income management. Is it study? Is it employment? Is it looking after the child? All of those things are going to be very difficult when you throw them in with a population that is ill informed at times and where there is not a lot of awareness about appeal rights, time limits and the other sorts of time frames that come with review of income management, review of exemptions and things like that. That can make it all a bit difficult, so people throw their hands up and accept whatever they are given.

Senator BOYCE—You just used the example of four people in the same household on different income management systems, so to speak. Presumably they would all be giving different advice about how to get off it. That would be accurate advice; it just would not be common advice. Is that what you are saying?

Mr Thomas—Yes, that is right. It is a matter of how they interpret that advice.

Senator BOYCE—Generally people will say, 'The Centrelink bloke told me to —' and that sort of thing. But that will not apply in another situation.

Mr Thomas—But someone will say, 'They told me something different.' So then how are they going to decide?

Senator BOYCE—Yes. You just mentioned appeal rights. I note that in your submission you also dealt with the changes to the Social Security Appeals Tribunal and the prehearing provisions et cetera. With this combination of lots of new types of income management and the appeal system, do you think there are going to be a lot more appeals? Do you think the system is going to be clogged up with appeals? Is it going to have an effect?

Ms Beaumont—If we are looking directly at welfare reform and the appeal system, they are two separate measures. We are aware that the social security appeal rights were restored to people under Northern Territory income management last year. We do not know how many people have appealed against those decisions, but I guess at that time the exemptions from the Northern Territory income management categories were very limited, so there were very narrow avenues for appeals and we would probably not anticipate that there would have been many appeals. However, we think the changes to the Social Security Appeals Tribunal will impact broadly across the whole of the Australian community and not just on clients impacted by these new income management categories. That is what we are very concerned about.

Senator BOYCE—I was thinking that, given what you are saying about people being confused about what to do or not to do next, their individual path, there might be a lot more appeals or attempts to appeal by people who are not entirely certain about what to do.

Mr Thomas—That would possibly be a good thing, because in about 2004-05—

Senator BOYCE—That would be a good thing in your view?

Mr Thomas—In 2004-05, at Senate estimates, I think, the last time I saw figures, there was one appeal by an Indigenous client to SSAT, so appeal levels are significantly low.

CHAIR—They are very low and always have been.

Mr Thomas—I think that is certainly a challenge for all of us, but it is just a thing to place on the table.

Senator BOYCE—I appreciate that your background is not strictly academically legal, but would you anticipate that there would be more scope for legal action around discrimination because of the interaction of the special measures with the changes to the RDA?

Ms Bolton—I am not sure whether we are in a position to answer that question. That is a highly specialised area of law. We do not have direct expertise in the area of discrimination law.

CHAIR—Ms Bolton, I think that is right and we have other witnesses coming—

Senator BOYCE—I was nevertheless interested to see whether the systemic area was—

Ms Beaumont—I guess we are concerned that the new income management categories will be indirectly racially discriminatory because of the numbers of Indigenous clients who will be impacted by those new measures. Also it is subject to evaluation subsequently and we do not know about rollout to the rest of the country. It is only going to be introduced in the Northern Territory in the short term and therefore it will have an unfair impact on Indigenous people.

Senator BOYCE—Thank you.

Senator ADAMS—Thank you for your submission. Regarding the Racial Discrimination Act, if this legislation is not passed, what do you consider the practical consequences would be—the consequences on the ground?

Ms Beaumont—We would have significant concerns because it would potentially mean that the Northern Territory emergency response as it is—so, the current income management categories—would continue and that we would not be fulfilling our obligations around human rights on a continuing basis. I think we would have abdicated that responsibility since the Northern Territory intervention commenced if those measures were not passed. The right to social security is part of those human rights, so we would have issues around that.

Senator ADAMS—We were recently in Alice Springs and Darwin and heard evidence from people who are working in communities and have been involved for the whole time the income management has operated in the Northern Territory. We have also had evidence from Western Australia's Department for Child Protection, and those people have also been on the ground in the area. A lot of the evidence is that people are getting used to income management. They are opting to have voluntary income management.

You are saying that, if the Racial Discrimination Act continues, these people are going to be worse off. A lot of them are getting used to doing that and for the first time in their lives they are actually able to save money and be accountable for what they are doing. I get a little confused. I am a very practical person. I am a nurse. I have worked in the Kimberley and have been around the Northern Territory a fair bit. When we first started, it was new and scary, but people are getting used to it. A lot of the women are finding that, with the BasicsCard, they are really not being—I used the word 'humbug' and got told off in Alice Springs for that—

CHAIR—I think it is a bit harsh. I think they pointed out that is a different thing. I do not think you can say you were told off.

Senator ADAMS—I was.

CHAIR—I do not agree, Senator.

Senator ADAMS—We will read the transcript and see. Every other witness used the same terminology later on and yet I was the one who was taken to task. Still, we will not worry. I will continue to use the word 'humbug' because I think you recognise, I recognise and people on the ground recognise what that is all about. In talking to a number of the women, who are the people who usually do the shopping, they say they are not having nearly as much trouble because they have the BasicsCard. That has become a bit of a security thing for them. I really want to see how on the ground whether this legislation goes through or does not go through is going to make a difference. That is my question.

Mr Thomas—Welfare Rights are on record as saying we are not opposed to voluntary income management. That certainly has a place in the range of measures that may assist people. What works for a few people though should not be extended to many compulsorily in the absence of clear evidence that it actually works and is effective. Let us take your point about people saving. I would like to see what evidence the committee has received or what evidence FaCSIA may be able to give the committee about who can save on Newstart payments of $32 a day or Youth Allowance payments of $18 a day. It would be pretty tough to be able to save on that. It should be about allowing people options—and Centrepay weekly payments is another mechanism which Welfare Rights has championed for many years. Often we were a lone voice saying that that was a good option for people. I suppose it is the compulsory nature of these measures which we are opposed to.

Senator CROSSIN—I have a couple of questions and want to ask about the application of section 60 you mentioned in your submission. Do you think that this bill complies with section 60 of the Social Security (Administration) Act if we are looking at a person's legal right to receive social security payments?

Ms Beaumont—We would question whether it does uphold that legislation in social security administration law, because it is about the person having that right to social security whereas, once they are under one of these compulsory income management programs, they are basically only eligible for 50 per cent and someone else determines what happens to the rest of the money basically.

Senator CROSSIN—But this legislation does not determine your eligibility to a social security payment. It does not vary the amount you are going to get. This legislation only varies the way in which that amount is paid to you. Section 60 is just about your right to receive the payment, but this legislation does not question or vary your right to receive that payment; it only varies the way in which that payment is made to you.

Ms Beaumont—It is about control of that money, about a person's ability to determine it. I am aware that where people's payments go into bank accounts there are provisions by the Banking Ombudsman to say that, if a bank is recovering an amount that is owed to the bank, the maximum they are allowed to take is 10 per cent, just because they get access to the money before the client does. There are those sorts of processes that are there to support it, and it is in the legislation. There are some very small exceptions to it, but we would see that it goes against the income management process.

Senator CROSSIN—I still cannot follow your argument though in respect of section 60 because we are not varying the amount people are being paid, we are not withholding that amount and it is not decreased or increased. If you are on an aged pension, for example, whether you opt to have that income managed or paid to you in cash, you still maintain your right to that social security benefit and the amount you get will not vary. I would not have thought that section 60 goes to the various ways it can be paid to you.

Ms Bolton—Our interpretation of section 60 is that it provides a clear obligation to provide the money directly to the person who is entitled to receive that benefit under the act rather than to provide it in another third-party mechanism or to another third party. Our concern about the income management system is that an amount is quarantined that can only be utilised through a determination as to how that money can be spent and

through a third-party mechanism rather than it going directly to the person to determine how to spend the money.

Senator CROSSIN—Your interpretation of section 60 is that your right to a social security benefit means that you get all of it in cash?

Ms Bolton—That it is paid directly to you in a way in which you nominate the money to be paid. The general method of payment is into a nominated bank account.

Senator CROSSIN—Into your nominated bank account?

Ms Bolton—Yes.

Senator CROSSIN—But that is not what section 60 of the social security act says; that is your interpretation of it. This money is paid directly to you, isn't it? It is paid directly to you on your BasicsCard and into your bank account.

Ms Beaumont—I guess it is not necessarily just onto your BasicsCard; it goes into your income management account, so some money will be put onto a BasicsCard and some money might go off to pay the electricity and rent—some of your discretionary funds might go off to those things because you may have Centrepay arrangements as well. It is quite complex. If there is money left over from those priority needs in the income management account, a person then has to go back to Centrelink to negotiate. Some of that has been quite problematic for clients even to do things like having fines paid, which I would have thought would be a priority need—staying out of prison for fines enforcement should be a priority need, but people have to go back almost each fortnight to ask for the need to be met when they have money left in their income management account. It is not necessarily as straightforward as 'everything goes onto the BasicsCard' because the BasicsCard can only do certain things.

Senator CROSSIN—Sure. But it will not go to pay your electricity or your rent unless you give Centrelink that amount and you know about that essentially.

Ms Beaumont—There is usually a negotiation with Centrelink about what the priority needs are and, if someone is part of the Department for Child Protection trial, it is actually the Department for Child Protection that works out what your priority needs are and what should be allocated to each of those things. It is not necessarily a person determining it, and lots of people had Centrepay arrangements in place before income management came in so that their rent was paid and their electricity was paid. Those things were actually occurring.

Senator CROSSIN—This legislation does not prevent that from happening, does it? If you have got two children, and they are going to school and you are then eligible to have your payment in cash, you could opt to have it income managed. But you could also have a mixture of cash payment and Centrepay, could you not? It does not prevent that from happening under this legislation?

Ms Beaumont—If a person is a long-term welfare recipient under this legislation—if they go into that category—they would have to apply for an exemption to show that they were a responsible parent as such—I gather from what the department has said that if their child was attending school then they may be exempt from income management for a 12-month period. They would not necessarily have to be income managed. But whether or not people know that they can be exempted from income management by virtue of their children attending school—how those processes occur on the ground and how people know about their ability to opt out by showing those things—that is questionable.

Senator CROSSIN—If this is actually a change in the way in which this country now deals with welfare payments—let us set aside Indigenous or non-Indigenous—what we are now saying in this country is, 'We acknowledge your right to social security payments, we acknowledge there is eligibility and certain thresholds which make you eligible and we have set the amount, but now we are actually going to put a fourth criteria there and that is that for some categories you will be income managed.' Do you think there is a need to amend section 60 of the social security act?

Ms Beaumont—We would not advocate for a change to section 60 of the Social Security (Administration) Act 1999 because people already qualify for a social security entitlement because of age, participation, disability or whatever the requirement is. We do not think there should be extra levels of, I guess, behaviour that are attached to it beyond those participation requirements that are already in existence.

Senator CROSSIN—You are saying to us that, fundamentally, you do not agree with this policy—income management for certain categories of social security recipients?

Mr Thomas—Most people on social security manage their money down to the last cent very well, and are very good at managing their finances. Some do not do that; some do not know how and some have difficulties doing that. Our view is that the resources of government and of support services—financial counselling, financial literacy, drug and alcohol assistance, parenting courses and mental health assistance for clients who have got mental health problems et cetera are where the focus should be rather than a blanket approach with compulsory management for large categories of people who are on income support.

There is no evidence that just because you are a young person—you could have finished a university degree—who has been unemployed for three months that you should suddenly be on disengaged youth. How the hell does that happen? I just do not know why we have got these new labels on groups of people at the moment. It is certainly not an approach that the National Welfare Rights Network would support.

CHAIR—I have one question to take on notice—and I would like this back, if you would not mind—we know that there is little evidence, and that has been going through so many of the submissions. I am interested to know whether the process that is being proposed in the Northern Territory, and an appropriate evaluation, could be used as a process for looking at some formal evidence of an approach to social welfare in the country? I will ask the welfare organisations that tomorrow. Consistently, we have little evidence on a whole range of programs.

The proposal the government has is to change the way that social security will be paid to certain groups of people across the community, taking away the Racial Discrimination Act, over a period of time with a clear commitment to a review process that will have to be established at the very beginning. I am asking you, as an organisation that works in the field, your opinion on whether this could be used as a way to establish benchmarks and evidence to look at this way of handling social security processes, because we are short of anything on an evidence base for any proposal. We are short on having a review of how social security payments operate.

I know there is short time, and I would like you to have a think about that and come back to us. And at another time, I am very interested to talk with you about the SSAT and how you feel about that. We just do not have time to do that this afternoon. Thank you very much and for your patience at the beginning, where we held you up while we had to go and do the process. Thank you, as always to the National Welfare Rights Network.

[5.01 pm]

PARMETER, Mr Nicholas, Senior Policy Lawyer, Law Council of Australia

PRITCHARD, Dr Sarah, Member, Indigenous Legal Issues Committee, Law Council of Australia

CHAIR—Welcome. I know the Law Council is a regular witness in these processes and I am sure you know the information about evidence and confidentiality. If not, you can get more information from the secretariat. We have your submission. Thank you very much. Were either of you involved in writing it?

Mr Parmeter—Both of us.

CHAIR—So you are also speaking as authors of the submission. I always like to clarify that. Would either or both of you like to make an opening statement before we go to questions?

Dr Pritchard—First of all, thank you very much for the opportunity to address you this afternoon. You have a copy of our written submission. There is, however, a corrigendum, which you will find in the bundle of materials that has been handed up. One of those is of a minor nature. That is referred to in paragraph 5 of the corrigendum. There is a typographical error at paragraph 32 and the first sentence should have been deleted in its entirety. There are some inelegancies of formulation in the first sentence of paragraph 32, which are sought to be addressed in the second sentence. Paragraph 32 says:

The RDA is therefore landmark legislation, which reflects the will of the Australian people—

It should have been 'Australian parliament'. The first sentence refers to the 'Australian people'. There are a number of other little inelegancies, so we intend to delete in its entirety that first sentence if that could be deleted.

The second is something of more substance. Senators, you will see at paragraph 61 there is a reference to revelations of FaHCSIA providing advice to the previous government. In fact, when one looks at the relevant document, it is dated 25 March 2009, so the relevant advice was provided to the current government, not the previous one. We think it is very important that that matter be corrected for the record. It is proposed, in light of that, to reformulate paragraph 61 in its entirety, and the new text for 61 is contained in the corrigendum. The relevant briefing document from FaHCSIA to the minister is also attached to the corrigendum so it is before the committee.

Senators, you will also find in the bundle of documents the policy statement on Indigenous Australians and the legal profession that the Law Council has recently launched. The Law Council takes some pride in this document, which was developed in consultation with relevant bodies over quite a period of time. For the peak body of Australian lawyers to approve such a document is, we consider, quite a significant event. This was launched in Darwin a couple of weeks ago by the president of the Law Council, and we would like to put that before the committee. You will note in particular that the Law Council is guided by the rights contained in the United Nations Declaration on the Rights of Indigenous Peoples adopted by the UN General Assembly in the approach it takes to issues concerning the rights of Indigenous Australians.

You will also find in the bundle, if it has not already been brought to your attention, a document that was published yesterday by the UN Special Rapporteur on the rights of indigenous people, Professor James Anaya. Does the committee have a copy of that document? It was only published yesterday, so we thought, out of an abundance of caution, that we would provide a copy because there is material in that document that we wish to take the committee to.

Very briefly, by way of an opening statement, the Law Council strongly supports Senator Siewert's initiative in introducing the RRDA bill, as we refer to it in the submission. We strongly support the repeal of the provisions suspending the Racial Discrimination Act. We regard it as a fundamental right that one has remedies in respect of acts of racial discrimination that is enshrined in many international instruments, most relevantly for present purposes, article 6 of the racial discrimination convention CERD, which, as senators know, is reproduced as a schedule to the Australian Racial Discrimination Act. However, our concern is that the mere repeal of the suspending provisions does not go far enough and we consider that the legislation needs to be further amended to make plain that the general provisions of the Racial Discrimination Act prevail over the specific provisions of the NTNER legislation to the extent of any inconsistencies. As we understand it, that is the intended effect of the bill introduced by Senator Siewert. It is a fairly standard principle of statutory interpretation that the provision that specific provisions prevail over general provisions, and we consider that there is a real risk that the repeal of the suspending provisions will leave the specific provisions to operate and

override the protections intended to be conferred by the Racial Discrimination Act. There is a Latin expression for that principle of statutory construction, which is lex generalis non derogat lex specialis, and it is a very well-known one to lawyers.

As senators would be aware, there is a precedent for such a level of protection. The Commonwealth Social Security Legislation Amendment (Newly Arrived Resident's Waiting Periods and Other Measures) Act 1997 contained a section along these lines, clarifying for an abundance of certainty the interaction between the Racial Discrimination Act and the social security legislation and, in general terms, it is similar to the model proposed by Senator Siewert. For example, it provides, without limiting the general operation of the Racial Discrimination Act in relation to provisions of the Social Security Act 1991, that provisions of the RDA are intended to prevail over the provisions of this act and the provisions of this act, the Social Security Act, do not authorise conduct that is inconsistent with the provisions of the Racial Discrimination Act. Senators will recall in the Native Title Act case, for example, that Western Australia and the Commonwealth High Court had something to say about the potential for inconsistent provisions of the Native Title Act with the Racial Discrimination Act, and there are very difficult issues of the interaction of acts emanating from the same parliament and we think it needs to be made abundantly clear.

As we have stated in the written submission, the application of the income management regime across the Territory will go some way in addressing concerns in relation to direct discrimination against Aboriginal communities. One point that is raised in quite a number of the submissions that have been made to the committee, which we share, is that there remains a concern in relation to indirect discrimination. Members of the committee will appreciate that the Racial Discrimination Act and CERD, upon which it is based, proscribe both direct and indirect discrimination and as we heard from the previous witnesses, given that the Aboriginal and Torres Strait Islander peoples in this country are notoriously disadvantaged in the enjoyment of every economic and social right, it seems to us almost inevitable that the rollout will have an indirect discriminatory effect.

We consider that, consistent with the report yesterday of the special rapporteur, there is potential for key aspects of the intervention to remain discriminatory, including those in relation to income management, alcohol restrictions and especially the compulsory acquisition of five-year leases. Our submission addresses quite a deal of the international jurisprudence out of the UN human rights treaty bodies and special rapporteurs and their criticism of key elements of the intervention legislation as enacted. We also refer to the independent review chaired by Peter Yu and his concerns about the manner in which the intervention was introduced.

A key issue which is raised in many of the submissions and about which the Law Council is unable to comment, other than to make some observations in relation to general principle, is the issue of consultation. This is an issue raised in a number of the submissions. A key aspect of this criticism is the framing of extremely limited options to amend income management: the identification in the discussion paper of two options, namely status quo or the possibility of applying for exemptions. The committee would be aware of the report which is quoted in almost every submission, the *Will they be heard?* report, and the introductory words of Alastair Nicholson, the former Chief Justice of the Family Court of Australia, in which he observed:

> … the Government is not offering any choice. It is simply telling the people what it proposes to do. The consultation is nothing more than going through the motions in order to achieve a predetermined end.

As well as the *Will they be heard?* report there are identified, in the reports of the Australian Institute of Health and Welfare and the CIRCA review of the consultation process, some limitations in the nature of the consultation process that was undertaken. We refer in this regard to the recommendation the government has not accepted of the NTER Review Board that mandatory income management ought be replaced by voluntary income management. That is an approach that we consider to be consistent with international human rights standards, especially those in relation to indigenous peoples contained, in particular, in articles 3, 18 and 19 of the Declaration on the Rights of Indigenous Peoples.

As the *Will they be heard?* report identifies, there are a number of issues arising from the intervention which are not addressed in the key issues paper and were not addressed in the consultations. The Law Council considers it regrettable that the legislation which is under consideration here does not address the issues of reinstating the permit system and reintroducing considerations of customary law in sentencing and bail decision making. They were not issues which were the subject of consultation.

The question of special measures is one which is raised in quite a few of the submissions as well. Almost every submission which a lawyer has had any involvement with refers to the well-known passage from Justice Brennan in Gerhardy v Brown about special measures:

The dignity of the beneficiaries is impaired … by having an unwanted … benefit foisted on them.

We address in our submission some of the international material in relation to concepts of consent.

There are two particular matters in the bill that we would like to speak about very briefly. We accept of course that Indigenous communities have long recognised that issues of alcohol abuse need to be addressed in their communities and that issues arise in interaction with the Racial Discrimination Act when it comes to addressing those issues. Of course the seminal alcohol report published by the Human Rights Commission in 1986 recognised the difficulties in that regard, and we regard the amendments to section 18 of the NTNER Act to be a positive step in providing for consultation with communities prior to a determination as a dry area. However, we regard subsection (4) of the proposed amended section 18 to be regrettable. That states that a failure to consult under section 18(3) will not affect a determination under section 18(1). The effect of that, as we see, it is merely to establish a discretion in effect to consult, and it has no consequences in terms of invalidating a declaration which is made without any consultation. That is an area in which we see real potential for strengthening the bill.

The other area of particular concern to us is in relation to five-year leases. Consistent with the UN Special Rapporteur, we consider that compulsory acquisition of five-year leases is inherently discriminatory in terms of an interference with the property rights of Indigenous Australians. The question then becomes whether the proposal can be saved as a special measure. Even the government's own report on the redesign consultations concludes that there was 'frustration and confusion over lease arrangements' and that the majority of those consulted did not comment, did not understand or did not see any benefits in five-year leases to their communities. We find it very difficult to comprehend how they can conceivably be characterised as special measures in circumstances where a majority of those consulted simply did not understand or did not see any benefit in them.

We also note in our submission that, somewhat inconsistently perhaps, the government's report in the very next paragraph goes on to note that generally participants supported the proposal to move to long-term voluntary leases, but we do not find any trace of information provided at the consultations throughout the various documents in relation to long-term leases. We raise, just for consideration, whether participants were advised that no new houses will be built in their communities unless they sign up to so-called voluntary leases.

If I might conclude the thrust of our statement, there are two recommendations that we conclude with. The first is that we consider that the provision suspending the operation of the RDA should be repealed as soon as possible. We note in this regard that in the second reading speech the minister suggested that the repeals will be effective from July 2010. As we read schedule 1, it is intended that those provisions become operative from 31 December 2010. We simply do not see any justification for a delay until December 2010. Our second recommendation is that a provision along the lines of that suggested by Senator Siewert be introduced.

CHAIR—We have limited time, so I propose to give everyone five minutes.

Senator CROSSIN—Dr Pritchard, thank you for your attendance today. I want to talk about the five-year leases. We had evidence given to us in Darwin from the NLC. I am not sure whether you have been able to read it by now. They certainly had a view that they did not believe there was a need for the five-year leases now, because most of them are being translated into 20- or 40-year leases so that houses can be provided.

A contrary view might be that the government still need five-year leases so that they can move in and put GBMs' accommodation on those leases where they can. Does the Law Council have a view about how you balance wanting to put more government buildings and people in the community to deliver some of this change and doing that if you do not have a five-year acquisition?

Dr Pritchard—First of all, can I say that I am not aware of the evidence of the NLC but there are of course different views amongst Aboriginal organisations in the Territory. The CLC has a different position in relation to compulsory leases. The Law Council's view about it is that these things need to be negotiated and as consensual as possible because they do represent a significant invasion of Indigenous property rights in a discriminatory fashion. The government's own report suggests that the people consulted simply did not understand the significance of the leases and those who spoke spoke against them.

Senator CROSSIN—Two years on, if we abolish the five-year lease component of all of this legislation, despite the fact that this legislation says it is a special measure, how do we then accommodate the fact that government business managers have extensive capital works in these communities and now live in these communities? Would you suggest we should go back and negotiate just that particular parcel of land as a section 19 lease?

Dr Pritchard—Mr Parmeter has done a lot of work on this as well. I think it is appropriate for him to speak.

Mr Parmeter—A starting point might be that the negotiations be recommenced. Certainly in relation to the original acquisitions the legislation was passed very quickly, as you are aware, and there was no time for negotiation over the leases that the Commonwealth wished to acquire over the land on which these public works were to take place. So a starting point may be the commencement of good faith negotiations with the relevant communities in which these public works are being undertaken—

Senator CROSSIN—It is in all of them.

Mr Parmeter—and to acquire consent and agree to compensation on just terms.

Senator BOYCE—So the negotiating terms would be not just a different type of compensation but also whether those buildings could stay there.

Mr Parmeter—I think it is unrealistic to say that the buildings, now they have been built, are going to be knocked down to—

Senator BOYCE—I am not suggesting that; I am asking you what you see the terms of these negotiations to be.

Mr Parmeter—The terms on which these negotiations take place are those which are required by the Constitution, which are just terms. Because they are leases, one would expect that some form of rent would be paid or some other in kind negotiated settlement, as agreed between the Commonwealth and the communities concerned. But that is a matter for the communities concerned.

Senator BOYCE—Can I just clarify this. It is not just the compensation, whether that be rent or something else, that you are saying should be renegotiated.

Mr Parmeter—I am sorry, could you repeat the question.

Senator BOYCE—You said there should be new negotiations for the leases. Are you suggesting that the leases themselves should be renegotiated or that the compensation for the use of the land, whatever form that might take, is what should be the subject of the negotiation?

Mr Parmeter—I think the point to remember, and the starting point of our submission, is that we regard the five-year leases, as they have been acquired at this stage, as having been acquired in contravention of the Racial Discrimination Act and the principles underlying the Racial Discrimination Act, which are in international law. The Racial Discrimination Act specifically excludes dealings with land from being characterised as special measures. So, in our view, in this context it is not possible to characterise the measures as special measures.

Starting from that point the question then is: how do we make the leases non-discriminatory? That is a very difficult question and the answer will obviously be difficult. But where I am getting to with this is that one would expect that there would be just terms compensation paid following good faith negotiations with the communities concerned over the continuation of those leases.

Dr Pritchard—But of course one is not talking about renegotiating; one is talking about negotiating in the first instance, because compulsory acquisition occurred in the first instance without any negotiation. That is the fundamental conceptual problem with the leases, which senators are obviously grappling with. They proceeded without any negotiation and of course were critical to the concept of special measures. This is confirmed in the general recommendation, which was adopted in August 2009, by the racial discrimination committee, that there has to be prior consultation in the design and implementation of special measures in the affected communities involved in the active participation. That is why the Law Council and other bodies of lawyers in the country are so uncomfortable with the aspects of what is proposed in this bill because, underlying so much of it, is a non-consensual approach in the first instance. That is why some of the points made in James Anaya's most recent report give us all cause for reflection.

Senator CROSSIN—There is no issue of just terms compensation and payments with respect to lease arrangements. The minister has committed to doing that. Can you chart a path forward for me? If you remove the five-year leases from this legislation altogether—and we said there was no need to make a special mention of them—how do you get around the fact that, prior to us coming into government and even now, accommodation has been built in these communities. The introduction of this legislation in 2007 enabled the previous government, and us, to put demountables in communities where GBMs now live, where Centrelink can operate from—a whole lot of stuff is happening. They are essentially liveable compounds. If we remove

the five-year leases from this legislation, what do we do with the land on which the Commonwealth has now built? Are you suggesting that those particular sections of the communities should be negotiated under the land rights act? How would you do that quickly? How do you move forward? If you remove the five-year leases out of this legislation, how do you deal with what has already been built in the communities?

Dr Pritchard—Perhaps if we take that one on notice, because it raises a significant issue of policy. We have sought to identify the relevant legal standards and you are asking us to propose some policy response that minimises—

CHAIR—You are asking her to give a legal opinion—

Senator SIEWERT—Maybe fix a problem the government is finding difficult to fix.

CHAIR—I think I should step in.

Senator CROSSIN—That is not fair, Senator Siewert. I am asking you for a legal view. You are saying to us that you do not believe the five-year leases constitute a special measure under this legislation. I am saying to you that, if we are convinced by your argument, we as a committee should recommend five-year leases be removed from this legislation. But it does not solve the problem completely because there are parcels of land in these communities that the Commonwealth has moved onto and built on and is using.

Dr Pritchard—Can I say, again, subject to what Mr Parmeter has to say, that we should take that on notice because we have not had sign-off from the Law Council to say something about it. To engage in the spirit of dialogue, obviously what has been built could remain the subject of a very narrow acquisition. But that does not mean that townships in their entirety need to be the subject of compulsory acquisition. I note one of the positive amendments proposed is to narrow the area that has been the subject of—

Senator CROSSIN—That is one response.

Dr Pritchard—We also noticed that a positive aspect of what is proposed is that the Valuer General is now engaged in a process of quantifying rental to be paid. That was a very long time coming and was something that the Law Council had previously commented upon—so that is something positive as well.

Mr Parmeter—We will take that on notice. The answer, as Dr Pritchard has pointed out, is very complex. We will seek the advice of our committee about how to deal with this. I might also add that the Commonwealth, in terms of its general approach to long-term leases, seems to be attempting to obviate this concern in any event, because, once a lease is consented to, it may be that the concern is resolved. Taking away the compulsory aspect of these leases may be the key. The effect of that would be negotiated with the relevant communities as to how these five-year leases would proceed. I will not say any more about that at this point; I think it is probably best if we provide our views to you in writing.

Senator SIEWERT—Returning to the issue that you mentioned, Dr Pritchard, regarding the July to December process, is the interpretation that the current intervention measures do not wind up until December, yet the other provisions come into effect in July—

Dr Pritchard—Clause 2 of the bill, in relation to commencement, provides in column 1 that schedule 1 will commence at the end of 31 December 2010. Schedule 1, of course, is the schedule containing the repealing provisions. We just note that the minister in her second reading speech expressed the view that the Racial Discrimination Act will apply in relation to the new scheme from commencement of implementation in July 2010. There is just an inconsistency between what was said in the second reading speech and what appears on the face of the bill. Quite a few of the submissions from human rights and lawyers bodies comment that there is no justification for delaying it until 31 December 2010.

Senator SIEWERT—Thank you. It is a matter we can take up with the department. Regarding the comments in your submission around the provisions of the bill that the Greens have put forward and its differences with this bill, if I understand both your submission and other submissions we have had, the special measures that are contained here—and the extension of income quarantining—could be inconsistent with a fully restored RDA. Is that a correct interpretation on my part?

Dr Pritchard—We have refrained from expressing a view on that because it is not appropriate for the peak body of Australian lawyers to come here and provide legal advice in relation to likely litigation or things like that. All we are saying is that serious issues have been raised in relation to the consultation process.

Senator SIEWERT—I appreciate that, and I am not try to catch you out; I am trying to get—

Dr Pritchard—And that special measures necessarily involve a consensual dimension.

Senator SIEWERT—That is where you referred to the consultation process.

Senator BOYCE—The body of consultation is important to something being a special measure.

Dr Pritchard—Yes, and that options are not presented as a fait accompli.

Senator SIEWERT—That is where I was going next—the issue that Senator Boyce just raised and the issue around whether you have to have a specific process or a process that would meet certain criteria to engage in consultation for a special measure. Is that a correct interpretation?

Dr Pritchard—That is correct.

Senator SIEWERT—If I have understood correctly what you have said in your submission, you do not think that consultation process meets those criteria.

Dr Pritchard—No, what we are saying is: that is a matter for the committee to make findings about. What we are saying is that there is considerable material before the committee in relation to deficiencies in that process, and there are relevant standards in relation to the parameters and quality of consultation.

Senator BOYCE—Can I just ask—

CHAIR—You can follow up on that, Senator Boyce, and then that effectively completes your five minutes.

Senator BOYCE—I have one more question.

CHAIR—No, you don't; you have this one and then we go back to Senator Crossin and then—

Senator BOYCE—I do not think I have had five minutes, Chair. But, if I could just follow up on that, my question, when I remember it, relates to where a Northern Territory group would go, or how it would proceed, if its view were that those consultations were not of sufficient quality to be covered by a special measure. How would I proceed if I were a group that wanted to challenge that?

Mr Parmeter—So you are asking how you would appeal a decision that had been made under the Northern Territory intervention legislation if you thought it was discriminatory?

Senator BOYCE—No, I am saying: if I thought that a consultation process that had been conducted in this current round were of not sufficient quality to meet the requirements of the special measures—I am probably phrasing that the wrong way round, but do you understand what I mean?

Mr Parmeter—I—

Senator BOYCE—Special measures require a particular standard of consultation. If I did not think that had occurred, and I were an aggrieved individual or organisation in the Northern Territory that was affected by this legislation, what would I do next?

Dr Pritchard—That would depend on the advice one received. It would depend on the full reinstatement of the Racial Discrimination Act in the first instance. It would also depend on the interpretation by the court of the interaction between the NTNER legislation and the Racial Discrimination Act. It would also have regard to whether or not an amendment along the lines proposed by Senator Siewert were enacted. And then it would ultimately depend on whether the question were justiciable or not, and that would be a matter that would need to be determined by a court. In the event that no remedy were available domestically, then there would be recourse to the UN racial discrimination committee.

Senator SIEWERT—In your submission, in your key points where you sum up, you say:

> It is not clear that reinstatement of the RDA will have any impact on actions or decisions authorised by NTNER legislation.

Could you expand on that a bit? What do you mean by that statement?

Dr Pritchard—I will put it really crudely, if I may.

Senator SIEWERT—Yes. At 20 to six on a Thursday night, after our week, I need it!

Dr Pritchard—I will put it crudely: minds may well differ about whether the bill, the amendments proposed, cure the existing legislation of its racially discriminatory aspects. Minds may differ. So, on the assumption that there remain racially discriminatory aspects to it, there would arise to be interpreted questions of the interaction between two pieces of legislation of the same parliament. On the one hand you have the Racial Discrimination Act which says, 'No discriminatory Commonwealth legislation; no discriminatory actions by Commonwealth agencies et cetera.' So on the one hand you have the general Racial Discrimination Act and on the other hand you have the NTNER legislation which deals with very specific issues. And it is that

principle of statutory interpretation that I referred to—where you have a specific treatment of a particular issue coming from the same parliament, that specific treatment prevails to the extent of any inconsistency with the general treatment in the Racial Discrimination Act.

Senator SIEWERT—So it gets back to which one overrides?

Dr Pritchard—Yes, because they both emanate from the same parliament. And that is why, with respect, the amendment that you propose is one that enjoys the support of the Law Council.

Senator ADAMS—I think you probably heard my previous question, going back to the practicality on the ground if the Racial Discrimination Act completely goes back to what it was originally. What differences would you expect to see on the ground for the practical running of the community day by day, and for the people within it? And if there is no income management, how would you see that working out?

Dr Pritchard—We do not express a view on the policy of income management or not; we hope that is clear from our submission. What we find is inconsistent with human rights standards is the non-voluntary aspect of it. So, to the extent that you apprehend that we are suggesting that no conceivable form of income management is consistent with international human rights obligations, that is not what we are saying. We say that it is the non-voluntary aspect of it which is so offensive in terms of offending international standards.

Senator ADAMS—Senator Crossin was talking about the leases. If that whole lease component of the bill were to be removed, what would you see there? I am really trying to see how this is going to work on the ground, practically—going from what we have now to what we would have if Senator Siewert's bill were to be successful.

Dr Pritchard—We have taken Senator Crossin's question on notice and will endeavour to provide something in writing, perhaps by—Chair, we are in your hands: when would that be?

CHAIR—Early next week, if possible.

Dr Pritchard—early next week; yes.

CHAIR—Senator Boyce, you have your question now, because Senator Adams was so fast.

Senator BOYCE—Okay; thank you. In paragraph 8 of your submission you talk about, as to the Northern Territory intervention and international human rights, the interaction being more complex after the passage of these bills, and that the special measures remaining special measures was going to be an important aspect of the government's ability to rely on this legislation. We have already talked about one of the special measures. Would you like to go through what you perceive to be the special measures that could be affected by this legislative change—of taking the RDA away from the Northern Territory?

Dr Pritchard—In terms of other human rights standards, perhaps it would be useful for the committee to read paragraph 16 of Professor Anaya's report of yesterday where he identifies the relevant provisions of the International Covenant on Civil and Political Rights and the Declaration on the Rights of Indigenous Peoples that he says are potentially infringed—well, I think he eventually comes down on the side of 'are infringed'—by aspects of the intervention.

Senator BOYCE—Does the Law Council have a view on that paragraph?

Dr Pritchard—We think it raises matters of serious concern, yes.

Senator BOYCE—Would you support that view?

Mr Parmeter—I do not think the Law Council is in a position to state a position on a report that was released yesterday. But certainly, in our submissions to this inquiry and in our previous submissions in relation to the issue of special measures under the Northern Territory intervention, we have expressed some serious concern about whether the measures as they currently stand—and, under this legislation, as they are intended to stand—will meet all of the criteria of special measures. To that extent, as Dr Pritchard has said, we think paragraph 16 of Professor Anaya's report raises very serious considerations for this committee in reviewing the legislation.

Dr Pritchard—If I might for the transcript note that paragraph 16 of Dr Anaya's report refers to:

> ... the differential treatment of indigenous peoples in the Northern Territory involves impairment of the enjoyment of various human rights, including rights of collective self-determination, individual autonomy in regard to family and other matters, privacy, due process, land tenure and property, and cultural integrity.

He thereafter sets out a list of relevant international conventions.

Senator BOYCE—One last question from a nonlawyer: the Convention on the Rights of the Child is not used in any comparative way within your submission; can you explain why not?

Mr Parmeter—For starters under international law various standards of international rights are indivisible. So it is not appropriate to—I suppose, for want of a better expression—trade them off against one another. The current legislation as we see it has not called for the Law Council to consider the impact of this legislation under the Convention on the Rights of the Child. Do you have anything to add?

Dr Pritchard—Yes. Senator, you have drawn my attention to a significant omission from the submission. We ought to have referred to article 30 of the Convention on the Rights of the Child, which refers to the—

Senator BOYCE—Do you in your submission? I'm sorry, I missed it.

Dr Pritchard—No, we don't. I am apologising for the omission of a reference to article 30. Article 30 refers to:

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist,—

so, relatively, persons of Indigenous origin—

a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

So there is a specific recognition of the rights of Indigenous children to cultural—

CHAIR—Dr Pritchard, we are going to have to end there, but I would very much like on notice for you to see where anything in this legislation affects culture, religion or language—the three things you have just quoted. If we are going to use that as the reference as the rights of a child—they or their groups to use those three things—I would be very keen to know where in this legislation it breaches those three aspects. I take the Law Council's submission, but you have actually raised three particular things from the convention. If you are claiming that this particular legislation breaches those three, that has not been addressed in your submission.

Dr Pritchard—No, Senator, with respect, one of the issues identified by Professor Anaya are the provisions of the declaration relating to integrity of indigenous communities, and obviously—

CHAIR—If that is your answer, that you are linking it back to Anaya's comments, fine, we do not need any more.

Dr Pritchard—That was it.

CHAIR—Thank you very much for your evidence. We are running terribly over time. Thank you very much.

[5.48 pm]

BILLINGS, Dr Peter, Private capacity

CASSIMATIS, Dr Anthony, Private capacity

BAILEY, Professor Peter Hamilton, Adjunct Professor, ANU College of Law, Australian National University

WEINMAN, Ms Jo-Anne Maryze, Research Associate, National Centre for Indigenous Studies, Australian National University

WILLHEIM, Mr Ernst, Visiting Fellow, ANU College of Law, Australian National University

CHAIR—Welcome. Is there anything about the capacity in which you appear?

Mr Willheim—My submission is in a personal capacity.

Prof. Bailey—Likewise, my submission is from the College of Law but on my own behalf. I might add, Madam Chair, that Mick Dodson is in Perth and is unable to be here. He is very disappointed and wants his apologies to be made known and for it to be said that he is supporting the submission, particularly the parts that Ms Weinman and I have put in.

CHAIR—Thank you, Professor. We did try to fit Mick into the program but we could not do it. Is there anything else about the capacity in which you appear?

Ms Weinman—My submission is made on my personal behalf, even though I am on the staff at the ANU National Centre for Indigenous Studies.

CHAIR—Thank you all for your submission. The committee had to start a little late because of a Senate vote. I am sorry that we have had to keep you waiting and I apologise for that. We do have limited time so I suggest that if anyone has opening comments we would like to hear those but it would be on the understanding that the opening comments will then be the core evidence that you are giving to us and we will limit question time accordingly. Mr Willheim, you said that you have comments particularly relating to the previous evidence. It might be useful to start with that, so please go ahead.

Mr Willheim—Thank you, Chair, and thank you for the opportunity to appear before the committee. You will see from our submission that each of us has contributed to different parts of the submission. We will each speak to the parts that we have prepared. I wish to clarify the part that is attributed to me, which is at page 6. In particular I wish to clarify the last paragraph on page 6. I want to focus on a key difference between the government bill and Senator Siewert's bill. It is a difference which has been the subject of previous evidence to the committee.

Senator Siewert's bill contains the provision that the Racial Discrimination Act, the RDA, is to prevail. That is not in the government bill. So a key question for the committee is whether the committee should recommend amendment of the government bill to include a provision along these lines. That does have a strong superficial attraction. As the government bill stands, if, as many critics have said, the 2010 legislation is inconsistent with the Racial Discrimination Act, then this later specific 2010 legislation would prevail over the earlier general Racial Discrimination Act. If you adopt the approach in Senator Siewert's bill, then the Racial Discrimination Act would prevail over the 2010 legislation. That, on its face, seems a desirable outcome: Australia would be compliant with the Racial Discrimination Act, and that is to be welcomed. But I invite the committee to think of how this would work in practice. Officials administering the legislation would proceed in good faith on the basis that the legislation is valid. Aboriginal people who may say that some of the provisions of the 2010 legislation are inconsistent with the RDA would say that the RDA prevails and that those provisions are inoperative. So you have uncertainty when certainty is clearly desirable. That is the first problem. Of course uncertainty can be resolved by a legal challenge, but is that a good way of resolving these issues? A legal challenge would impose a very heavy burden on Aboriginal people. That is the second problem: do you want to impose this sort of burden on Aboriginal people to resolve these issues? And how would the litigation be conducted? The plaintiff would be putting to the court that a particular provision is inconsistent with the RDA and therefore it fails. The defendant—I suppose that would be the government or some government authority—would be saying there is no inconsistency. In support of the arguments for and against inconsistency, each side would be putting to the court the various sorts of arguments about special measures that witnesses are putting to this committee—for example, has there been proper consultation?

These are big public policy issues. The question I pose for the committee is: is it right for the parliament to, in effect, duck these issues by a legal formula? Is it right for the parliament to leave these issues for the courts to resolve? The view I put to the committee for its consideration is that these are great public policy issues that should be resolved in this parliament. If you accept the view that provisions of the legislation—and many have been identified, such as the income management scheme and the five-year leases—are not really special measures then surely the responsibility of the parliament is to seek appropriate changes to the bill to ensure compliance with the Racial Discrimination Act. I put it to you that you should not duck these issues by a legal formula which creates uncertainty, which puts a huge burden on Aboriginal people who want to pursue the issue in the courts and which leaves resolution of these big public policy issues to the courts.

CHAIR—Thank you. Professor Bailey and Ms Weinman, do you have comments you wish to share with us?

Prof. Bailey—Yes, and thank you for the opportunity to appear. I want to make one simple point, but it has three implications. It really is to support the reinstatement of the Racial Discrimination Act, which is what the government indicates it wants to do. There are complications, as Mr Willheim has mentioned, but I would go to the bill which was moved by Senator Siewert. It seems to me that it picks out in three places the key aspect of difficulty in terms of reinstating the act itself. My one problem with that is that subclause (3) of the three substantive provisions in Senator Siewert's bill provides:

… this Act, and any acts done under—

the act—

… are … intended to qualify as special measures.

That gets you into a whole heap of controversy, as Mr Willheim has raised. If we could drop subclause (3) and leave (1), (2), (4) and (5) in the new legislation—instead of repealing the sections that Senator Siewert's bill addresses, which is what the present legislation does—that would have the effect, as near as is possible, of reinstating the Racial Discrimination Act as it was prior to 2007.

Ms Weinman—I would like to begin with some errata. On pages 9 and 10 of our submission under the heading 'Proposed new Sub-clause 132(3), Northern Territory National Emergency Response Act 2007 (Cth)', what is marked as No. 5 should read No. 3 and what is marked as No. 6 should read No. 4. There is a similar numbering error on page 11 under the heading 'Proposed new Sub-clause 4(3), Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (Cth)'. What is marked as 2.3 should read 2.1, and 2.4 should be 2.2.

CHAIR—Sure—got you. Now it makes sense.

Ms Weinman—I am going to deal mainly with special measures, as Ernst and Peter have already mentioned—I am going to elaborate a little bit on those and then end with a couple of comments that I would like to draw attention to from our submission about the other two bills.

With regard to Senator Siewert's bill, the FaHCSIA (restoration of RDA) bill, it proposes, as Professor Bailey mentioned, inserting an intended to qualify special measures provision into three relevant NTER acts from 2007. Senator Siewert introduced this bill, and in her second reading speech talked about the criteria that must be fulfilled in order for special measures to qualify in fact as special measures and, therefore, to constitute a permissible exemption from the prohibition on racial discrimination.

These criteria are drawn from the Racial Discrimination Act 1975, which refers to CERD, the Convention on the Elimination of All Forms of Racial Discrimination, and also to judicial interpretation in Australian case law. Senator Siewert states in her second reading speech:

If particular actions undertaken as part of the Northern Territory Intervention are intended to be to the benefit of the Indigenous communities involved then they should stand or fall on their own merits as 'special measures' under the Racial Discrimination Act 1975.

The intention in these comments are also echoed in the explanatory memoranda, the name of the bill and in other provisions in the bill—the provisions in subsection (1), (2), (4) and (5), which Professor Bailey talked about.

However, this intended to qualify as special measures provision in subsection (3) invites legal challenge when read together with other proposed amendments restoring the full operation of the RDA and allowing it to prevail over the NTER acts of 2007. It does so in a few ways: firstly, by creating ambiguity and uncertainty if we accept that there are measures within the 2007 acts that would still not qualify as special measures on their

own merits, even if they were to be amended by these 2009 bills; and secondly, if this intention clause is read as an objects clause, and a mere indication of parliament's intention, it exposes various measures of the 2007 NTER acts that may not constitute special measures on their own merits to the risk that they could be severed to the extent that they are found to be invalid within the RDA, which is to prevail over them. Alternatively, it threatens to subvert the intention previously mentioned to allow measures in the 2007 acts to stand or fall on their own merits as special measures.

Just to clarify: if you do not accept that this is a mere indication of parliament's intention—if you give more value to this intention clause than as a mere indication of parliament's intention—then it could undermine what seems to be the object of the bill. I will just explain how: despite replacing the previous deeming provision, this provision may be open to be construed as an effective deeming provision. I am using the word 'deeming' lightly here because many would argue that it is not a deeming provision, it is an objects clause. But I am saying that it is open to argue that the effect of it is similar to what the original deeming provision would be.

When read together with the provisions enabling the operation of the RDA and allowing it to prevail over the 2007 acts, this later provision may be interpreted as an additional and lawful exception to racial discrimination such that the RDA's allowable exemptions on the basis of special measures are now to be read in light of this provision, contained in subsequent legislation which is to prevail. I would submit that if this is in fact the intention behind this bill, then it should be more explicitly stated. And if it is not the intention behind this bill, then this 'intended to qualify' provision unnecessarily muddies the waters and leaves this interpretation open to a court in the event of a challenge.

Next I will deal briefly with the FaHCSIA (2009 measures) bill, before concluding with some comments on the inadequacies of the three bills read together. With regard to income management and compulsory provisions, I was listening just then when the representatives from the Law Council of Australia spoke, and I actually would like to refer to the Law Council of Australia submission, as well as to the Australian Human Rights Commission submission, in this section. My submission is that, while the proposed amendments to the FaHCSIA (2009 measures) bill appear to attempt to administer compulsory income management in a non-discriminatory way by extending it to all welfare recipients in the Northern Territory and allowing some exemptions, given the Territory's high population of Indigenous people and given that the disadvantaged communities that these measures are likely to be applied to will very likely contain a high proportion of Indigenous people—because they suffer the lowest socioeconomic circumstances in the Territory—then the application of these amendments would very likely result in a disproportionately detrimental effect on Indigenous Territorians. They would therefore be open to challenge through litigation as unlawful indirect discrimination under the RDA, again provided of course that the full operation of the RDA were restored.

Lastly, I would like to talk about some measures from the original NTER 2007 acts which are either not addressed at all by these three bills or which are addressed, I would submit, inadequately and which would be highly likely to be considered unlawful discrimination under the RDA, again provided that full operation were restored. I would like to mention in this regard the provisions relating to customary law—and refer to the Law Council of Australia submission in this regard—and provisions relating to compensation, especially for the harm suffered for infringements on rights to date under the 2007 NTER acts.

CHAIR—Thank you, Ms Weinman. Dr Billings and Dr Cassimatis, do either of you have some comments you wish to share with us at this stage?

Dr Billings—We would like to make a few preliminary comments. I will go first and then my colleague Dr Cassimatis will make some comments of his own. Thank you very much for the invitation to give evidence. I would like to begin by pointing to the Australian government's commitment to reforming the Northern Territory emergency response laws with reference to international law requirements. Our submission draws the committee's attention to particular human rights concerns that we have with the proposed laws and their administration. In particular I would like to draw the committee's attention to issues surrounding the right to social security under article 9 of the International Covenant on Economic, Social and Cultural Rights. My colleague Dr Cassimatis will raise issues around nondiscrimination.

I would like to begin by pointing to the fact that the universal right to social security is enshrined in several declarations and treaties, and it is accepted as a basic human right in international law. At its core, it is concerned with the preservation of human dignity and economic security, and states that have signed up to the convention must realise the right without discrimination. It should be stressed at the outset that legal objections to income management are not based on some a priori rejection of the concept of income

management. The UN Committee on Economic Social and Cultural Rights has made clear in its recent general comment, No. 19, from February 2008, that benefits required under article 9 can be provided in cash or in kind.

In respect of article 9, the committee may know that the Committee on Economic, Social and Cultural Rights has reported its concerns in relation to the NTER, noting that existing conditionalities for the payment of benefits have a negative impact on disadvantaged and marginalised individuals and groups. We would also reiterate the findings of the UN Special Rapporteur, Professor James Anaya, who after his visit to Australia in September 2009 concluded that some of the intervention measures, including income management, were discriminatory and stigmatising.

From an international human rights law perspective, the proposed amendments to income management remain problematic in our view, and I will go through the reasons why we take that view. There is a strong presumption that retrogressive measures taken in relation to the right to social security are prohibited under the International Covenant on Economic, Social and Cultural Rights. Measured against the criteria which are set out in our written submission at paragraph 22, arguably the proposed amendments are contrary to international law. In particular, the alternative systems of income management currently trialled in Cape York and in parts of WA have not yet been assessed by an independent body. The proposed scheme and the current scheme of income management come at a great cost to the taxpayer, and in our view more cost-effective alternatives should be explored that may yield a greater social return than the marginal benefits that have accrued under the trials occurring within Australia to date, particularly the marginal returns under the Cape York institute trials—and I can talk more about that later if the committee desires.

Secondly, there does not appear to have been genuine participation by affected groups, Indigenous and non-Indigenous Australians, in relation to the proposed scheme, which purports to apply to all Territorians in principle. We would draw the committee's attention to the findings of the *Will they be heard?* report and the oral evidence of earlier witnesses before this committee who pointed to the problems with the consultations that were carried out by the government last year. So there does not appear to have been genuine participation by affected groups, in our view.

Thirdly, while the object of the new scheme is not directly or indirectly discriminate against Aboriginal people, the proposed income management measures may still be discriminatory in effect, given their application to the Territory in the first instance. Although there is formally no loss of welfare entitlements under the proposed scheme, the documented problems with the administration of income management in the Territory give rise to serious grounds for concern regarding the impact of income management on people's ability to realise their right to social security and to access the minimum level of support necessary for a dignified life. The evidence to date suggests there is a real risk that social security beneficiaries are likely to be disadvantaged by the administration of the proposed scheme, in so far as the state fails to meet its obligation to ensure social security benefits are available and accessible. The alternative form in which benefits have been provided in the last 2½ years has given rise to considerable problems that have been documented in the last two annual reports by the Commonwealth Ombudsman and were also documented in the NTER Review Board's report, the Yu report.

We would also draw the committee's attention to the comparative experience of the United Kingdom, when it rolled out a cashless voucher system for the administration of social security benefits for asylum seekers for a two-year period between 1999 and 2001. It was abandoned after two years, following a Home Office review that found it was undignified and beset by operational difficulties. It seems to me that there are striking parallels between the problems that have beset income management in the Territory and the discredited voucher system used for asylum seekers in the United Kingdom.

The final point I would like to make before handing over to my colleague Dr Cassimatis is that aspects of the proposed scheme of income management seem to bear a striking resemblance to the treatment of Indigenous Australians in the past. The proposal that disengaged youth and long-term welfare payment recipients can be exempted from income management based on their demonstration of socially responsible behaviour should be evaluated in that historical context. There was, in the Unemployment and Sickness Benefits Act 1944, a provision whereby Indigenous Australians were paid benefits only where the Director-General of Social Services was satisfied that it was reasonable because of the applicant's social development. So I would just draw the committee's attention to the policies of the past and how they resonate with the proposals that are before us today and to the fact that, for many Indigenous Australians, their experience of

income management to date has marked a return to the ration days, to use their own words. I will pass on now to my colleague Dr Cassimatis.

Dr Cassimatis—Thank you for the opportunity to address the committee this evening. I will address just one particular point, the issue that was actually dealt with a moment ago in one of the earlier submissions: indirect discrimination and whether or not the proposed income management arrangements will comply with the requirements of the Racial Discrimination Act, in particular in section 9 subsection 1A. Serious concerns arise in our view in respect of the proposed income management arrangements in that they will fall foul of the terms of subsection 1A of section 9 of the Racial Discrimination Act. Rolling out income management only in the Northern Territory involves requiring Australian citizens who are eligible for social security benefits to demonstrate that they are not resident in the Northern Territory in order to avoid having the relevant benefits income-managed. Such a term, condition or requirement, to use the term of the statute, does not appear reasonable having regard to the circumstances of the case, which is the relevant test.

The government has referred to concerns regarding vulnerability, and of course these concerns are reasonable. The government has observed in the relevant report issued in terms of the reappraisal of the arrangements that 24 of the 50 most disadvantaged locations in Australia measured by socioeconomic indices for areas are in the Northern Territory. What appears unreasonable is the apparent absence of any governmental justification why some of the 50 most disadvantaged locations in Australia, that is those outside the Northern Territory, will not be subject to income management measures that the government believes have already produced positive outcomes. In other respects aspects of the Northern Territory intervention have been replicated in Western Australia and Queensland. A strong case can therefore be made, in our opinion, that restricting income management to the Northern Territory, with its disparate impact on Indigenous Australians, involves indirect discrimination proscribed by the Racial Discrimination Act. Addressing concerns regarding problems in the implementation of income management schemes referred to by Dr Billings will not alter this particular problem.

CHAIR—Thank you, Dr Cassimatis. We do have limited time, so I am going to suggest we will go over time but each senator gets five minutes. I am going to be extraordinarily strict on this. I do apologise beforehand. If people wish to cut in on other senators I will be counting the time and it will be going against their time. Senator Siewert first.

Senator SIEWERT—Thank you very much. I must admit it is doing my head in a bit, the interaction between the different bills and the legalities here. Ms Weinman, I realise it is a complex legal argument but if I distil your argument down, and I think Professor Bailey's argument is essentially the same, it is that subsection 3 of the Greens bill may in fact undermine the intended purpose of the bill. Is that a correct interpretation?

Ms Weinman—I think that is one possibility, that it is open to a court to decide that.

Senator SIEWERT—So if we amend it and remove subsection 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. Mr Willheim, I am going to come to your comments in a minute. In your opinion, would that achieve that aim?

Ms Weinman—I think we would probably like to answer separately on that. If you are asking whether it would achieve the aim of restoring the RDA to the way it was before 2007, I would have to take that on notice.

Senator SIEWERT—I realise it is complicated. If you could, that would be appreciated.

Ms Weinman—Right. But my intuition, if I can answer in that way, is that it seems that it would. I have seen other instances in legislation that not only restores the operation of the RDA and clarifies that it is to prevail over the current legislation but goes further with a second clause corroborating or strengthening the idea that in the event of inconsistency it is the RDA that is to prevail. But I am going to have to look that up and get back to you about it. I would also like to note that, even if the RDA were to be fully restored, without subsection (3) possibly altering the idea of special measures, it still would not prevent things in the '2007 acts', either as they currently stand or as amended by the 2009 bills, from not qualifying as special measures in their own right.

Prof. Bailey—I would like if I may to add to that precise last point. It does seem to me that without subsection 3 there is a risk that some of the measures will not be what we would term special measures. We are getting rid of that term in a sense but we are still going to have perhaps some aspects of income management or some aspects of the lease or some aspects of business arrangement or some aspects of various other controls on movement and so, maybe still contrary, I think, to the Racial Discrimination Act. But it

seems to me to free the Racial Discrimination Act so that it says specifically in section 2 that the provisions do not authorise conduct that is inconsistent. It should be possible quite quickly to get to the point of saying, 'Well, if that action in income management, or whatever it is, is inconsistent with the RDA then it should cease.' And if it does not cease then you have left open the provision for going to the court. But if you leave in subsection 3, and it is difficult to know quite what it means but it is intended to qualify—it should not be there. Just leave the act intact.

Senator SIEWERT—I take your point. Mr Willheim, I must say I entirely agree with you, or think I do if I interpret what you said correctly, and that is that these are very complex policy issues and they should be decided by the parliament. If we were to do that, what should we do with all of the bills? Obviously the Greens bill is an attempt to rectify what we see as very significant problems with the intervention. What should we be doing?

Mr Willheim—What I prepared was addressed to this particular technique. I applaud the sentiment behind the technique, which is to make Australian law consistent with the Racial Discrimination Act and the racial discrimination convention. I think all of us think that to discriminate against people on the grounds of race is absolutely abhorrent. For the reasons I have explained, I do not think this technique is the right way to go about it. The proper way to go about it, in my view, is to look at each of the substantive provisions and to revise them so that they no longer discriminate. That is the principle. I do not think there is time and I am not really skilled enough to go through each of the provisions like income management or five-year leases one by one to discuss how each of those might be amended. Indeed, I am not an expert on each of those provisions but I have some knowledge of the principles that one would apply. But to my mind that is the proper course, to go through the provisions and to eliminate discriminatory aspects in each of the substantive provisions.

Senator SIEWERT—I must say I agree with you also. I am trying to be fair here. In the event of a government, and the previous government and now we have got another government, not been willing to do that, surely we need to provide a mechanism where people can then have the right to challenge. I agree with all your comments about difficulties of challenging it, but surely we should provide people with the right to challenge it if a government is unwilling to make those amendments.

Mr Willheim—To fall back is not, as I would put it, an ideal solution, and I think particular provisions can and should be addressed as a matter of substance.

Prof. Bailey—Might I add something to that?

CHAIR—Certainly, Professor Bailey.

Prof. Bailey—The Australian Human Rights Commission of course is able to take complaints, and it seems to me that a lot of the fuzziness in the middle that Mr Willheim and Ms Weinman have referred to can be sorted out a bit. If the Australian Human Rights Commission manages to get the complaint and make a report to the government, or even conciliate with the government a settlement, then a lot of the fear of huge litigation could be avoided.

Senator SIEWERT—Can I ask a supplementary question?

CHAIR—No, because that is 7½ minutes.

Senator CROSSIN—I am happy with one question. I am trying to grapple with five-year leases and I think we have dealt with that with the Law Council. There has been a suggestion in quite a lot of the submissions about the clause 'notwithstanding anything in this legislation, provisions of the RDA should apply', for example—I think you mentioned it in your opening statement, Mr Willheim. I want to ask any of the five of you: what are the negative aspects of not having that in there? Or, conversely, what benefit does it have for the legislation if as a committee we suggest that it should be put there? Let me give you a minute to think about it. Some people are saying, 'We don't think you need it. It doesn't actually provide any benefit to the legislation. It's quite clear—income management will no longer be a special measure. It's not discriminatory, setting aside the indirect discrimination. But the three other aspects are special measures. They will comply with the RDA because they are special measures.' Yes, that could well be tested, but at the end of the day, what advantage is there in adding the clause you are suggesting?

Mr Willheim—If I can begin, the committee will understand that I am not suggesting that clause. I think the proper approach is to amend the substantive provisions so they are no longer discriminatory. If that view is not adopted, then including a clause along the lines of the one that is in Senator Siewert's bill does provide an opportunity for people to challenge provisions which they regard as contrary to the Racial Discrimination Act, and earlier I went through that process. Professor Bailey has suggested a complaint to the Human Rights

Commission. That is an avenue, but of course the Human Rights Commission does not have executive power; it cannot overturn the legislation. So if it goes to court then you would be litigating in a court the sorts of issues that have been canvassed before this committee. Let us say that one of the issues is whether there was proper consultation. Then people would be arguing in a court: what are the requirements for consultation and have those requirements been complied with? To my mind, that is not the best way for a democratic country to resolve big policy issues relating to Indigenous people.

Senator CROSSIN—So are you suggesting that, unless that clause is inserted, this legislation does not fully comply with the statement 'the restrictions on the RDA have been lifted'?

Mr Willheim—Take, for example, the five-year leases. These were imposed by statute without any prior consultation. Just think of the public outcry if a government suddenly imposed five-year leases on properties in Sydney or Melbourne out of the blue in this way. It would be completely unacceptable. It was done in the Northern Territory, and I think most people would see that as completely discriminatory. I do not see why the government cannot go to the communities and say, 'We wish to provide you with better services. To do that we need some land, some infrastructure, and we would like to negotiate for that', and if the community does not wish to have those services, then the community may not agree. But to take land away from Aboriginal people in this way is something quite extraordinary.

Senator BOYCE—Could I ask the people here and the people on the phone what I hope will be one question. If the government's version of this legislation is passed, is there the likelihood of more legal challenge, more legal misapprehension and confusion around how the special measures operate currently in the NT and, in the long-term, elsewhere?

Ms Weinman—Can I clarify: when you say the government's legislation—

Senator BOYCE—The legislation the government is proposing. Not Senator Siewert's legislation, the government's proposed legislation.

CHAIR—May I suggest that we get the people on the phone to answer first so that there will not be people cutting over each other. Dr Billings or Dr Cassimatis, have you understood Senator Boyce's question?

Dr Cassimatis—Yes, I think I have. I do think that litigation is likely. There has already been litigation—the High Court's decision in the Wurridjal case and also the NTD8 litigation involving the Australian Crime Commission. In relation to something as important and as vexed as the rights of Indigenous persons, given the appalling human suffering that is occurring in the Northern Territory and other parts of Australia, I think it is only natural that there will be quite diametrically different views and that that will produce conflict, including legal conflict. So, yes, if the amendments the government is proposing are passed then I would expect that there will be legal challenge. Some legal challenge is unavoidable. The Wurridjal case involved the taking of property on just terms. Obviously that is enshrined in the Constitution. That type of litigation is unavoidable and cannot be removed without amendment of the Constitution.

CHAIR—Dr Billings, do you have a comment?

Dr Billings—I think that there is every chance that there will be litigation. If private lawyers can be found to do it pro bono, as they were prepared to do with respect to Barbara Shaw's recent litigation in the Federal Court, then I think there is every chance that a case will be brought on behalf of Indigenous peoples to challenge the special measures that the government claim in relation to alcohol management and the prohibition of pornography and so forth.

Senator BOYCE—Do you think it will be just in relation to those special measures or will there be a more blanket approach, Dr Billings?

Dr Billings—I think there will be challenges in relation to the special measures and I think there will be challenges in relation to income management via section 9 of the Racial Discrimination Act, as my colleague outlined some moments ago.

Mr Willheim—I do not think one can exclude the possibility of challenges. I am very much aware of the Wurridjal case. I was a counsel in the High Court in that case. But, unlike the two previous witnesses, I do not think there is a great likelihood of successful challenges. To my mind, the legislation is authorised to under the territories power and possibly the races power, but particularly the territories power. Under the territories power, the Commonwealth parliament has a plenary power to legislate in relation to the Territory and it is clear that the parliament can legislate contrary to an international obligation under an international convention. Whether it is morally right to do that is a different question, but I think that the parliament, as a matter of

constitutional power, can legislate contrary to the international Convention on the Elimination of All Forms of Racial Discrimination and it can override the Racial Discrimination Act, as has been done.

Senator BOYCE—Nevertheless, the government has said that this legislation is to apply not just in the Northern Territory, over time.

CHAIR—Professor Bailey or Ms Weinman, do you have any comments on Senator Boyce's question?

Prof. Bailey—I have a short comment. I support exactly the legal position that Mr Willheim has just enunciated. I have been trying to think how one could at least ease the pressure on litigation. It did seem to me that the amendments, absent subclause (3) of Senator Siewert, would help, because they would reassure the Aboriginal people that it was the intention of parliament that they comply with the act. I would have thought that in that context it was easier to foresee at least some complaints.

Senator BOYCE—Nevertheless, the government legislation is likely to be the legislation that will be dealt with by this parliament. So that is what we need to assess, primarily.

Prof. Bailey—If so, I would say there is, as Mr Willheim says, some prospect of success. But I really do not think there is great prospect of success.

Ms Weinman—Senator Boyce, you said that the provisions are extended beyond the Northern Territory. I think you mentioned that, in relation to the two heads of powers that Ernst mentioned—

Senator BOYCE—Simply the fact that it will eventually be not just the territories where this—

Senator SIEWERT—The bill is not restricted to the NT.

Senator BOYCE—Yes.

Ms Weinman—As I understand it, an act only needs to come under one head of power in order for it to be constitutionally valid. So you could rely on the other head of power, apart from the territories power.

Senator BOYCE—So a Victorian could not challenge compulsory income management, because of the Northern Territory act.

Ms Weinman—Sorry, I am not understanding—

Senator BOYCE—The government's intention is that this legislation will be used in Victoria, New South Wales and throughout Australia. Mr Willheim made the point that he does not believe the government needs the RDA to do as it wishes in the Northern Territory. I am saying: yes, but what happens in the rest of Australia?

Senator SIEWERT—If I am in Redfern and I am subject to income management, could I challenge it?

CHAIR—Legally, that is—not inside the social security system.

Ms Weinman—Just to clarify the point of law again, if the other head of power apart from the territories power was considered a valid head of power to legislate under, the Victorian would not be able to challenge it either, because it would be constitutionally valid if only one head of power applied. Would that be correct, Ernst?

Mr Willheim—Yes, and I do not have—

Senator BOYCE—You had better expand a little bit for me.

CHAIR—You are talking to a committee of nonlawyers.

Ms Weinman—I defer to Ernst. He is actually the constitutional lawyer among us, so he would probably clarify it better.

Mr Willheim—I acknowledge that, yes, the legislation is intended in the long term to apply beyond the Territory. I do not have a copy of the Constitution with me, but I think it is section 51(xxiiiA)—

CHAIR—I thought you would have it in your pocket!

Mr Willheim—introduced shortly after the Second World War, which enables the Commonwealth to legislate for the provision of social services. To pick up the point on which Ms Weinman was asked, if there is one head of power which is available—in this case, presumably the social services power—then it does not matter if another head of power is not available.

Senator BOYCE—So, in the example of the Victorian, you would suggest that it is the ability to legislate around social services that would apply.

Prof. Bailey—Yes.

Ms Weinman—I have not examined the legislation in terms of which heads of power would be applicable—

Senator BOYCE—I guess that then brings in the sort of thing Dr Billings has been talking about: how do human rights and access to income fit within this scale? Could I not, as a Victorian, challenge that compulsory income management is affecting my rights as a human being, given the evidence of Dr Billings and Dr Cassimatis?

Ms Weinman—Are you opening this to all five of us?

Senator BOYCE—Dr Billings and Dr Cassimatis might like to respond. Do you see the constitutional power to make laws regarding social services as completely protecting the Commonwealth in regard to this proposed government legislation?

Dr Billings—I would take the constitutional question on notice because my submissions speak to compliance with international human rights law with what the government has proposed in its legislation. My submissions speak to the potential incompatibility with income management vis a vis international law and vis a vis article 9 of the International Covenant on Economic, Social and Cultural Rights. I think at bottom the point that I am making is that the government is exposing itself to censure again before the United Nations, as it has been censured in the past month or so by a variety of actors at the UN. That is the point that I want to get across: that the government has committed itself to reforming the intervention in a way that is compliant with international law and, from my perspective, the income management provisions are certainly in conflict with article 9 of that provision as interpreted by the Committee on Economic, Social and Cultural Rights.

Dr Cassimatis—I should clarify: I understood the question that was asked initially to be broader than just constitutional challenge. My expertise is in the area—

Senator BOYCE—It was, yes.

Dr Cassimatis—It seems plain to me, based on the explanatory memoranda, that the intention is that the proposed amendments be consistent with the Racial Discrimination Act. In terms of legal challenges, I would have thought the more likely avenue would be administrative challenges in terms of the legality of executive action, where the argument essentially is that the particular official is acting outside of power and the power is interpreted in a manner that ensures consistency between the amendments and the Racial Discrimination Act. Given the clear statements from the government that the intention is not to depart from the standards enshrined in the act, and given as well the international obligations Australia has assumed under the International Convention on the Elimination of All Forms of Racial Discrimination—amongst other treaties—there are strong interpretative indicators there for the courts as to how to interpret the legislative power that would be applied then in assessing the legality of executive action. That is where I think the most litigation is likely to occur.

CHAIR—Just in terms of that last series of interactions, which were very interesting: if you have a look at the *Hansard* from the Northern Land Council in Darwin, in not as long a conversation the comment was, 'Doesn't every citizen have the right to challenge?' In terms of process, it would seem that it was a threshold issue with the legislation. My simplistic understanding is that the previous legislation made it beyond legal challenge in Australia and by reinstating the RDA there is a process where things like special measures are being claimed as special measures, and then people would be able to see whether they were. That would be my interpretation—is that correct?

Ms Weinman—I would say it was beyond legal challenge under the RDA, but not on other grounds, for instance, Wurridjal was under the just terms provision of the Constitution.

CHAIR—But anything related to the RDA, which is what the proposal—

Ms Weinman—Yes.

CHAIR—The reason that this legislation is being brought forward under its title is the reinstatement of the RDA—that is my understanding?

Ms Weinman—Yes.

CHAIR—Seeing that was processed, does anyone have final questions?

Senator SIEWERT—Not that would not open up a whole lot—and then I would get into trouble! Maybe—

CHAIR—One, Senator Siewert.

Senator SIEWERT—I will put it on notice. Just following up from the comments that were made before: if I am an Aboriginal person in Victoria and I am under the discrimination element of what a lot of people are saying is disproportionately impacting on Aboriginal people, not just in the NT, but outside the NT, can I take action under the Racial Discrimination Act? Can you take that on notice?

Ms Weinman—Could I just clarify: could you take action if these three bills together were enacted?

Senator SIEWERT—If the government's bills were.

Ms Weinman—Just the government's?

Senator SIEWERT—Even though I will argue very eloquently, I have a sneaking suspicion that the parliament is not going to support my bill if the government's bills—

CHAIR—That is a lack of hope, Senator.

Senator SIEWERT—Hope remains eternal, but I am a realist. If the government's bills were supported, would someone who is not in the NT be able to challenge them?

CHAIR—So, if these bills are passed now and come into law, could someone not living in the NT, taking particularly Dr Cassimatis's view that there is maybe a challenge if you are in the NT, but if you are outside the NT—

Senator BOYCE—On what basis?

CHAIR—Discrimination. That would be the basis of the process.

Prof. Bailey—Just to clarify further, is this assuming that this spread to Queensland and Western Australia, which has happened, has spread to Victoria, or is it that Victoria has not got it?

CHAIR—No, we are using Victoria because it is not been there before.

Senator SIEWERT—Yes. The government has indicated that after two years, depending on their evaluation, they will then consider rolling out across Australia to disadvantaged communities. A lot of the submissions and a lot of our evidence has been that those communities will be disproportionately Aboriginal communities or there will be a disproportionate number of Aboriginal people in that community and therefore it would disproportionately impact on Aboriginal people—not just in the NT, because we have heard evidence that around 75 per cent of people impacted by the new changes will be Aboriginal. Outside the argument also holds.

Ms Weinman—I will take that on notice.

CHAIR—Even though Mr Willheim has found his copy of the Constitution? Did you want to comment, Mr Willheim?

Mr Willheim—Picking up the point that the Northern Land Council made to the committee that everyone has the right to challenge, of course people can seek to challenge, but I interpret questions along these lines more as: would a challenge be successful? Of course you cannot exclude people from having a try—

Senator SIEWERT—From doing it, yes.

Mr Willheim—I was involved in the challenge in Wurridjal and it was unsuccessful.

Senator BOYCE—I suppose one is foolish to bring a challenge if one does not have some hope of success, but it was nevertheless whether more challenges were likely. We have heard about the complexity of the interaction of the RDA and special measures et cetera. Are more legal challenges likely if the government's legislation is passed?

Mr Willheim—I would answer the question this way: the sorts of arguments about the right to social security and other rights that have been raised are really moral and political arguments. They do not establish to my mind a legal right under Australian domestic law which would provide a basis for a successful challenge. They may provide a legal argument for a complaint to, for example, the United Nations Committee for the Elimination of All Forms of Racial Discrimination.

Senator BOYCE—And this is because the special measures are less protected from litigation when the RDA is taken away? Is that correct?

Mr Willheim—It is because the constitution does not confer a right to a particular benefit. But Australia's international legal obligations may be breached and a complaint can be brought to the Committee for the Elimination of All Forms of Racial Discrimination. So these are legal issues in that sense, but I do not think they establish an effective remedy in an Australian domestic court.

Senator BOYCE—Thank you.

CHAIR—Thank you all very much for your evidence and also your patience in working with us at this time. I know we have given something to you on notice. We are due to report on 9 March, so there is a time process. If there is something you really want us to have, could you be back in contact with us. We appreciate all your evidence. For the two gentlemen on the phone, I know it is particularly difficult to engage when you are sitting looking at a phone. Thank you again.

Dr Billings—Thank you.

Dr Cassimatis—Thank you.

Dr Billings—Could we ask that that last question that you put on notice be emailed to us by the secretary to the committee?

CHAIR—Certainly, Dr Billings. That is how we operate—we do not expect you to remember things; we are expected to remember things. We will email you the questions we have asked you on notice.

Dr Billings—That is very kind. Thank you.

CHAIR—I feel as though I have just been at a university seminar.

Senator SIEWERT—I am going out of here like I used to go out of my lectures!

Committee adjourned at 6.49 pm