

Understanding the Amendments to the NT Emergency Response Legislation

There are over fourteen pieces of legislation including amended past Acts and future Bills that one needs to get across in order to try and understand the implications of the proposed amendments. All up there are over 2,700 pages of legislation as well as the *Senate Inquiry* report and the *Report of the NTER Review Board*. This paper will concentrate on the major Acts and Bills.

Legislation covering the 2007 Intervention (The Old Regime: The Howard Govt Response)

1. *Northern Territory National Emergency Response Act 2007*
2. *Social Security (Administration) Act 1999 (as amended)*
3. *Racial Discrimination Act 1975*
4. *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 No. 130, 2007)*

Proposed Legislation (Bills) and applicable Acts, (The New Regime)

5. ***Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (The main Bill in the Senate as at 25/02/10)***
6. *Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Bill 2009 (Passed the Senate 15/03/10, waiting Royal Assent)*
7. *Family Assistance and Other Legislation Amendment (2008 Budget and Other Measures) Act 2009*
8. *Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Restoration of Racial Discrimination Act) Bill 2009 (Private member's Bill, Senator Siewert)*

1. The Old Regime

The original 2007 legislation was mainly enshrined in two of the above Acts, the *Northern Territory National Emergency Response Act 2007* and the amended *Social Security (Administration) Act 1999*. The response resulted from a crisis identified by the authors Rex Wilde QC and Indigenous health expert Pat Anderson in their report, *Little Children are Sacred*, commissioned by the NT Government and released in 2007. The report while based largely on anecdotal evidence identified areas of serious sexual abuse. Despite the report's strong emphasis contained in its 97 recommendations that any response required consultation with the prescribed communities, the Howard Government chose to completely ignore such recommendations.

The NT National Emergency Response (NTER) Act 2007

The 226 pages of this legislation deal mainly with alcohol restrictions, restrictions on the use of publicly-funded computers (pornography restrictions), 5-year leases and the Racial Discrimination Act (RDA). The compulsorily acquired leases cover **any** land whether Aboriginal virtual freehold under the *NT Land Rights Act 1976*, or other land such as that granted to associations. (Note there is virtually no Native Title land (as distinct from Land Rights land) in the prescribed areas).

5-Year Leases.

s31 (1) *A lease of the following land is, by force of this subsection, granted to the Commonwealth by the relevant owner of the land...land referred to in Schedule 1 (Schedule 1 contains over 100 pages of scheduled land subject to compulsory acquisition.)*

Rent.

s35 (2) stipulates that *[t]he Commonwealth is not liable to pay to the relevant owner of land any rent in relation to a lease....except in accordance with s62.* However, s62 states that, *The Commonwealth Minister may, from time to time, request the Valuer-General to determine a reasonable amount of rent to be paid...*

Compensation.

s60 (1) states that the Commonwealth is not obliged to pay compensation in *relation to, any act done in relation to the following land: (i) land covered by a lease granted under s31.* However just to confuse matters, s60 (2) states that, *if such compulsory acquisition, would result in an acquisition of property to which paragraph 51(xxxi) of the Constitution applies from a person otherwise than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation to the person.* I have been unable to discover whether any rent or compensation has been paid to date, although according to Senator Siewert, the government is currently looking at the compensation issue.

Racial Discrimination Act 1975. (& Special Measures)

Can the Commonwealth override the RDA?

It may come as a surprise to some that the Commonwealth can legally override the RDA . For example, HREOC states, *The principle of parliamentary sovereignty means that the Commonwealth Parliament may pass subsequent legislation which overrides previous legislation. According to this principle, an amendment to the NTA [Native Title Act] (or indeed any other legislation) [such as the NTER] which is **clearly inconsistent** with the RDA overrides the latter. Such legislation would be inconsistent with the **principles** of the RDA **but would not necessarily be invalid for this reason alone.** There is no domestic remedy against the Commonwealth for legislating inconsistently with the RDA, although "remedies" may be pursued at the international level.* [Comments in square brackets, mine]

The doctrine of parliamentary sovereignty has long been regarded as the most fundamental element of the British Constitution. It holds that Parliament has unlimited legislative authority, and that the courts have no authority to judge statutes invalid. ('History and Philosophy', Jeffrey Goldsworthy)

Parliamentary sovereignty, sovereignty of Parliament, parliamentary supremacy, or legislative supremacy is a concept in constitutional law that applies to some parliamentary democracies [including Australia]. Under parliamentary sovereignty, a legislative body has absolute sovereignty, meaning it is supreme to all other government institutions (including any executive or judicial bodies as they may exist). Furthermore, it implies that the legislative body may change or repeal any prior legislative acts. (Wikipedia)

As one wit has observed, *If Parliament enacted that all men should be women, they would be women as far as the law is concerned!*

The following Act shows how it took precedence over the RDA by limiting or removing the RDA's effect.

Families, Community Services, and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007

s4 (1) ...[t]he provision of this Act, and any acts done under or for the purposes of those provisions, are, for the purposes of the Racial Discrimination Act 1975, special measures (emphasis mine)

s4 (2) ...[t]he provisions of this Act, and any acts done under or for the purposes of those provisions, are excluded from the operation of Part II of the Racial Discrimination Act 1975.(emphasis mine)

Part II of the RDA contains a clause that deems discriminatory, any law that,
s10 (3)(a) *authorizes property owned by an Aboriginal or a Torres Strait Islander to be managed by another person without the consent of the Aboriginal or Torres Strait Islander;*

Northern Territory National Emergency Response Act 2007

This Act at s132 and s133 contains identical wording to s4 (1) and (2) above, thus confirming the overriding of the RDA.

What is a Special Measure?

Article 1(4) Part I of the UN *International Convention on the Elimination of All Forms of Racial Discrimination*, (CERD) [to which Australia is a signatory] states,

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

This simply means that a Special Measure must be seen as beneficial (positive discrimination).

Income Management (Quarantining)

Social security (Administration) Act 1999 (Also part of the original Emergency Response)

This Act (relevant sections of which are amended by the later Bill before the Senate - see below) deals primarily with Income Management. In what follows, the different categories, A to S, relate to the kind of welfare payments involved, eg, social security benefit, pension, orphan pension, carer allowance, child disability allowance, ABSTUDY etc.

The main features of the original Act were,

- *s123UB. A person (unless exempt) is subject to income management if the person or the person's partner is a recipient of a category A welfare payment living in a 'declared area' (one of the 73 prescribed communities) and is not exempt under s123UG. The income management period is for 5 years.*
- *s123UC. A child protection officer of a state or territory may give a written notice to the Secretary requiring that the person or the person's partner be income managed if in receipt of a category H welfare payment.*
- *s123UD. School enrolment. If a person or the person's partner has an 'eligible care child' and they are in receipt of a category H welfare payment, and the child is not enrolled in a 'declared primary or secondary school' if available, then the Secretary can determine that the person's/partner's income be income managed.*

The Secretary may determine that a person be exempt from income management.

- *s123UE. School attendance. If a person or the person's partner is a recipient of a category H welfare payment and 'an unsatisfactory school attendance situation exists' they will be subject to income management.*

The Secretary may determine that a person be exempt from income management.

- *s123UFA. Voluntary Income Management. A person may enter into a voluntary agreement to have their normal social security payment subject to 'the income management regime'.*

2. The New Regime: Bills before the Senate or waiting Royal Assent

Although as indicated above, the federal government may override the RDA without breaking the law, it is obvious that intense criticism has caused it to have a re-think. In addition, the independent report of the NTER Review Board called for by the Howard Govt (the co-authors of which included Peter Yu and Marcia Ella-Duncan), while calling for a form of intervention to continue, was highly critical of much of the original legislation especially as it related to compulsory income management. As a result, steps have been taken to make the legislation more acceptable, although as will be seen, some of the legislation will remain discriminatory at least until 30 June 2011 and probably beyond.

The current Bill, ***Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009*** is expected to be debated sometime after parliament resumes in May. It includes the following,

Reinstatement of the RDA

Shedule1 s1 Repeals sections 4 and 5 of the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory Emergency Response and Other Measures) Act 2007* (see above)

s2 Repeals sections 132 and 133 of the *Northern Territory National Emergency Response Act 2207* (see above)

s3 Repeals sections 4, 5, 6, & 7 of the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Repeals sections relating to the limitation of the RDA)

Theoretically this removes all reference to Special Measures and the exemption from Part II of the RDA. However, s4(a) states, the repeal of sections of an Act by this Schedule does not have retrospective effect. (emphasis mine). In other words those impacted by the current discriminatory legislation will remain impacted for at least 12 months as from July 2010. It would seem that after July 2010, those on income management (IM) will have to apply to be exempted otherwise they will remain on IM under the new regime.

New Income Management Scheme (IM)

All sections of the *Social Security (Administration) Act 1999* that are specific to a 'NT Relevant Area' (the 73 prescribed areas) are repealed. However, as with the RDA amendments, the repeals aren't retrospective so that a person in a prescribed area who is on income management will remain so for a period of 12 months from July 2010 as the following section states.

s23 *Despite the amendments and repeals made by items 1 to 7, 9 to 12 and 15 17, 19 and 20 of this Part and subject to subitems (3), (4), (5) and (6): (a) a determination that was in force under subsection 123TE(1) of the Administration Act immediately before the commencement time continues in force after that time in relation to the person; and (b) the person continues to be subject to the*

income management regime under section 123UB of the Administration Act after the commencement time; and (c) Part 3B of the Administration Act applies in relation to the person after the commencement time; **as if those amendments and repeals had not happened**. (Original text, emphasis mine))

S 23 (6) If the person has not ceased to be subject to the income management regime under continuing section 123UB before the end of the transition period, the person ceases to be subject to the income management regime under that section at the end of that period.

The transition period is the period between 1 July 2010 (when (and if) the Bill is enacted) and 30 June 2011. That is, the person on income management will remain on the regime until June 2011 (unless the Bill is amended in the Senate.) However, the person may remain under IM because he or she may be classified as a 'Vulnerable Welfare Payment Recipient' under s123UCA. (see below)

Additional categories of Income Management (IM)

While the original IM arrangements will continue for 12 months, there are three additional categories that will come into force in June 2010. These are,

s123UCC, Long-Term Welfare Recipients. Applies to persons at least 25 years old (but below pension age) in a 'Declared Income Management Area' who have been on welfare for 52 weeks out of 104 weeks.

s123UCB, Disengaged Youth. Applies to persons 15 to 25 years old in a 'Declared Income Management Area' who are recipients of a Category E welfare payment for 13 weeks out of 26 weeks.

s123UCA, Vulnerable Welfare Payment Recipient. S123UGA (1) *The Secretary may, by writing, determine that a person is a **vulnerable welfare payment recipient** for the purposes of this Part.*

Note: there is a bewildering list of different welfare payments (Categories A to S) with a high degree of overlapping.

Transitional arrangements

As a consequence of these changes, people subject to the current comprehensive scheme of income management in the Northern Territory will either transition to the new income management scheme or move off income management altogether, within 12 months of the commencement of this Schedule. There will be a staged transition process, and people will be able to transition to the new scheme, or seek to exit from the existing scheme, once the new scheme is operational in their area. The amendments made by this Schedule commence on 1 July 2010. (Explanatory Memorandum p.14) (emphasis mine)

How do they seek to exit the existing scheme?

The person will remain subject to income management under this arrangement until: the person ceases to meet the criteria in former section 123UB (for example, if the person is no longer an eligible recipient of a category A welfare payment); the Secretary determines that the person should not continue to be subject to income management under former section 123UB (this determination can be in response to a direct request of the individual or through the planned transition process); or the person becomes subject to income management under another provision in Subdivision A of Division 2 of Part 3B of the Social Security Administration Act 1999 (including the new situations in which a person can be subject to income management, as inserted by this bill). (Explanatory Memorandum p.17) (emphasis added)

The only way a person 'should not continue to be subject to income management' would be for that person to be employed and thus not eligible for welfare.

Declared Relevant NT Area changed

The original 'Declared Relevant NT Area', in s123TE(1) of the *Social Security (Administration) Act 1999* is preplaced by a new section, s123TFA 'Declared Income Management Area'. *The Minister may, by legislative instrument, determine that: (a) a specified State; or (b) a specified Territory; or (c) a specified area; is a declared income management area for the purposes of this Part.*

This means that any part of Australia could be a Declared Income Management Area. Could this mean that a certain postcode area or portion thereof, could be so declared?

CDEP

CDEP is (was?) a payment for work, not a welfare payment. Around 35,000 Indigenous people were employed through CDEP. When Minister Brough found out that it couldn't be quarantined, the only solution was to close it down. No legislative instrument was required to do this. An arrangement was then put in place (CDEPPI) whereby employment providers were paid an incentive to get people off CDEP onto paid employment. However as the DEEWR Website still posts, *The Community Development Employment Projects Placement Incentive (CDEP PI) will cease ? from 1 July 2009.* (That's how up-to-date DEEWR's website is!)

FaHCSIA Website says, *Under the reform model, CDEP will cease to be available in non-remote locations from 1 July 2009, with the universal employment services to be the primary provider of employment services for Indigenous job seekers in urban and regional areas.*

The Senate Hansard, 28 April 2009 records,

- *There will be a capped total of 15,000 allocated places for the reformed CDEP.*
- *There are approximately 5,000 allocated places ceasing in locations where CDEP will no longer be available.*
- *There is an additional 2,000 allocated places which will be converted into jobs created from previously CDEP funded positions in government service delivery in remote areas.*

The operation of the new subsection in conjunction with such an agreement that will be in force on 1 July 2011 will automatically result in continuing CDEP participants being transferred onto income support. (House of Reps Explanatory Memorandum, *Family Assistance & Other Legislation Amendment (2008 Budget and Other Measures) Bill 2009*)

This is probably a mixed blessing. I have personally witnessed some excellent CDEP programs in the NT and Queensland, however, even the Community and Public Sector Union has questioned the disincentive that CDEP provides in seeking mainstream jobs¹

Permit System (to enter Aboriginal Land)

As from 18 August 2007, there is no longer a need for government officials, politicians and Commonwealth or Northern Territory officers to hold a permit in respect of Aboriginal land granted pursuant to the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth).

*Under the Northern Territory Emergency Response legislation, access to common areas of major communities is allowed without a permit from 17 February, 2008. Legislation will be introduced during the current sitting of Parliament to **re-instate the permit system** in common areas of major communities.*

¹ CPSU Submission to: [Increasing Indigenous Economic Opportunity](#) A Discussion Paper On The Future Of The CDEP and Indigenous Employment Programs June 2008

The legislation will also include provision to allow journalists and government contractors to enter Aboriginal communities without permits, to carry out their work.

People undertaking government business on Aboriginal land, including police and child protection officers, can already enter communities without obtaining a permit. The changes will not restrict any activity of staff involved in the NT Emergency Response. (FHaCSIA Website)

Refused Classification (RC) and X 18+ Material

The Government is aware that the link between exposure to pornography and sexual abuse is contested. However, the Government has decided to take a harm-minimisation approach to this issue. Although material classified X 18+ is restricted in the Northern Territory, the sale and hire of X 18+ material, unlike in the States, is permitted in parts of the Northern Territory. (Explanatory Memorandum p.40)

Alcohol

This Schedule amends the NTER alcohol measures so that, instead of being a blanket set of restrictions applying across predominantly Indigenous areas of the Northern Territory, community restrictions are able to be tailored to the circumstances of each area following consideration, on a case by case basis, of evidence about alcohol-related harm in each community, community consultation about the effectiveness of restrictions, and consideration of whether alternative restrictions, including alcohol management plans, are appropriate for communities. (Explanatory Memorandum p.322)

3. Senator Siewert's Private Member's Bill

Senator Siewert's Bill seeks to make the RDA prevail over all other relevant legislation. It is intended as a 'Special Measure' but this is defined as a measure which is beneficial. Given the current make-up of the Senate, and the Coalition's assertion that the government Bill will 'water down' the intervention, the chances of Senator Siewert's Bill succeeding must be miniscule. A summary of the Senator's legislation is as follows,

Racial Discrimination Act

- (1) Without limiting the general operation of the *Racial Discrimination Act 1975* in relation to the following Acts:
 - (a) *Aboriginal Land Rights (Northern Territory) Act 1976*;
 - (b) *Australian Crime Commission Act 2002*;
 - (c) *Australian Federal Police Act 1979*;
 - (d) *Classification (Publications, Films and Computer Games) Act 17 1995*; the provisions of the *Racial Discrimination Act 1975* are intended to prevail over the provisions of this Act
- (2) The provisions of this Act do not authorise conduct that is inconsistent with the provisions of the *Racial Discrimination Act 22 1975*.
- (3) The provisions of this Act, and any acts done under or for the purposes of those provisions, are, for the purposes of the *Racial 25 Discrimination Act 1975*, intended to qualify as special measures.
- (4) Any act done, any decision made and any discretion exercised under 27 or for the purposes of this Act must be consistent with the intended beneficial purpose of this Act.
- (5) In this section, a reference to any act done includes a reference to any failure to do an act.

The STICS meeting

At the STICS (stop the intervention) meeting in Sydney on 29 March where Senator Siewert and Professor Alistair Nicholson addressed the meeting, the following points were noted.

1. The government's so-called consultation process prior to the Bill (now before the Senate) was flawed, because only a small number were consulted, interpreters were not provided and the proceedings of the consultation process were not made public, despite requests for them to be released.
2. The Special Measures were simply imposed from above without consultation.
3. The provision of more police, more nutritious food, better housing and child protection could have been accomplished without the need for the kind of intervention that took place.
4. Claims by the government that over 70% of Basiccard money was being spent on food and clothing avoided detailing amounts spent on essential services (water, electricity etc.) and lacked any baseline data)

Conclusion

Clearly, assuming the ***Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009*** passes (unamended by the Coalition and independents), there will be *some* improvements compared to the original NTER legislation. The partial re-introduction of the permit system and the retention of CDEP in remote areas are positive albeit limited steps in the right direction. The Coalition who have stated their opposition to what they see as a 'watered-down Bill' will attempt to reject it or make it conform to the original legislation.

The Bill as it stands continues to discriminate against those in the prescribed communities until at least 30 June 2011. After June 2011, compulsory IM will continue under the new regime for everyone who is a welfare recipient unless they apply for exemption or the Secretary determines they should be exempt. This sounds like business as usual. The government's claim that the RDA is to be restored is disingenuous since the suspension will continue for another year after which Aboriginal and non Aboriginal welfare recipients will be targeted.

The proposed universal non-discriminatory income management policy to be applied across Australia is questioned, if not opposed, by almost all social service agencies. How it would work is guesswork at the moment and if it is going to target 'areas', what does this mean?

Tom