



THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: ssh: MM: 1304217

13 April 2010

The Hon. Kevin Rudd MP
Prime Minister
PO Box 6022
House of Representatives
Parliament House
CANBERRA ACT 2600

Dear Prime Minister,

Re: Reinstatement of the Racial Discrimination Act 1975

The New South Wales Law Society's Human Rights Committee ("the Committee") commends the Federal Government on the stated aims of the package of Bills currently before the Senate that amend the 2007 Northern Territory Emergency Response ("NTER") legislation. However, the Committee has a number of outstanding concerns which I would like to bring to your attention. While an examination of the amending legislation currently before the Senate reveals that legislation to be a substantial improvement overall, it still falls well short of the Government's stated objective of applying the provisions of the Racial Discrimination Act 1975 (RDA) to the NTER.

As you would be aware, the NTER legislation suspended the operation of Part II of the Racial Discrimination Act 1975 ("RDA"), the Part prohibiting racial discrimination. However laudable the NTER legislation's objectives, it deliberately excluded application of the RDA, one of the more important landmark acts of the Federal Parliament, which implemented into Australian domestic law the International Convention on the Elimination of all Forms of Racial Discrimination ("the Convention").

As a result, for the last 35 years, Australia has had an obligation under international law to observe its terms and a further obligation not to repeal or water down the RDA which implemented the Convention into our domestic law in 1975.

The Committee notes that the Human Rights Commission and the Law Council of Australia made detailed submissions to the Senate's Community Affairs Committee that enquired into the legislation and published its report in March this year. Those two submissions both recommended that in order to fully apply the RDA principles to the NTER legislation, a clause needs to be added which states clearly that the RDA applies, notwithstanding any provision of the NTER legislation.

The Committee agrees with the submissions of the Law Council and the Human Rights Commission in this respect and in particular comments:

3. To merely remove the provision in the NTER legislation suspending the application of the RDA does not affect the remaining provisions which are racially discriminatory because the NTER legislation, being later legislation than the

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discriminatory because the NTER legislation, being later legislation than the RDA, overrides that earlier legislation, according to ordinary principles of statutory interpretation;

2. An examination of the provisions of the NTER legislation, as amended by the Government's 2010 Bills, reveals that there are many provisions that remain contrary to the RDA and therefore the Convention.

An important provision of the 2007 NTER legislation allows the Commonwealth to compulsorily obtain 5-year leases of land in Northern Territory indigenous communities without consent. That provision¹ is characterised by the Government in its amending Bills as a "special measure", an exception allowed by the Convention and the RDA where discrimination in favour of an oppressed race is permitted, in a similar way to Affirmative Action programs for women, with the aim of correcting the effects of past discrimination and elevating the status of the oppressed race.

Such positive discrimination is confined to measured, appropriate, short-term measures that are clearly for the benefit of, and consented to by, the relevant racial community. However, the RDA specifically prohibits a measure authorising the management of land without consent or preventing an indigenous population from reclaiming the management of land, from being a special measure (ss 8(1) and 10(3) RDA).

The Committee notes also that the Government's amending Bills propose to continue certain restrictions as additional special measures, namely, alcohol restrictions, prohibited (pornographic) material restrictions, business management areas powers and law enforcement powers. It is difficult to see how any of these measures amount to positive discrimination as each restricts previously available rights and, despite extensive purported consultation with affected indigenous communities, the evidence of consent to the measures is thin.

Professor James Anaya, the United Nations Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous people visited Australia late last year and noted that "any special measure that infringes on the basic rights of indigenous people must be narrowly tailored, proportional and necessary to achieve the legitimate objectives being pursued"².

His view was that the existing NTER measures do not meet the requirements of special measures at all and in view of the fact that each of them is on its face, racially discriminatory, it is very difficult to conclude that any of the special measures are justified without the "free, prior and informed consent" of the communities concerned (Article 19 of the UN Declaration on the Rights of Indigenous People).

Both the Law Council and the Human Rights Commission in their submissions to the Senate inquiry conclude that in the case of each of the special measures that will continue in the NTER legislation, there has been limited consultation about the measures even though a large number of consultation meetings have been held. Both bodies agree that the consultations really amounted to no more than a presentation of the government's preferred position and a discussion about that position.

¹ Section 31(1)(a) of the Northern Territory National Emergency Response Act 2007 (Cth).

² James Anaya, Preliminary Note on the Situation of the Indigenous Peoples in Australia UN Doc A/HRC/12/34/Add.10(2009) par 8.

I would like to acknowledge that one of the proposals in the amending Bills that may improve the NTER legislation is the provision that extends the NTER income management laws, currently affecting only indigenous welfare recipients, to all Northern Territorians. However, there appears to be a danger that the impact of income management will still fall mainly on the indigenous population and may, like the now-repealed NT mandatory imprisonment legislation of the 1990s, come to be regarded as racially discriminatory in impact.

The Committee understands and accepts that there are urgent remedies required for social problems within indigenous communities in the Northern Territory and that this requirement is a prime motivation of all political players in the debate over these changes. Nevertheless, the Committee is very disappointed that the primacy of the need to respect the RDA principles, which directly implement Australia's international legal obligations in this area, has not been recognised.

The Government has not yet accepted any substantial amendments recommended by the Law Council or the Human Rights Commission to its amending legislation. As you would be aware the Federal Opposition, after initially opposing any change, has now indicated its support for the amending Bills. The Greens introduced their own Bill which would, according to the Human Rights Commission in its submission, have resulted in a greater adherence to RDA principles but, by treating as special measures the legislation as a whole and failing to ensure the current NTER measures are RDA compliant, does, to that extent, also breach the RDA principles (para/s 56 and 57).

The Committee regards the package of Bills currently being considered by the Senate, as one of the most important packages of legislation introduced in this Parliament.

A prime aim of the NTER is to remedy the effects of past policies of racial discrimination, which were a shameful feature of Australian life before 1975. Unfortunately, this current legislation runs significantly counter to this crucial aim.

In the circumstances, the Committee urges the Government to reconsider its position in relation to the Bills and to ensure that the NTER legislation is changed so that it complies with the RDA in every respect, without limitation. To do otherwise and continue laws that severely restrict the rights of an indigenous minority on a racial basis would be a retrograde step.

Yours sincerely


Mary Macken
President