**Paper submitted by Anna Gibson (Monash Law Student) for assessment in International Human Rights Law, October 2011**

## ESSAY QUESTION

The former Australian Government, with support from the then opposition, introduced the Northern Territory Emergency Response (NTER) in 2007 following the release of a report from an Inquiry into the Protection of Aboriginal Children from Sexual Abuse.[1] The NTER was implemented without consultation with affected communities through a suite of legislation, purportedly designed to address the 'national emergency confronting the welfare of aboriginal children in the Northern Territory'.[2] Notwithstanding the legislation's stated objective of 'improv[ing] the well-being of certain prescribed communities in the Northern Territory',[3] the NTER has been widely criticised by United Nations human rights bodies for violating Australia's obligations under various international human rights conventions.

Since the change in government in 2007 the NTER has been the subject of a review,[4] a discussion paper,[5] a consultation process,[6] and legislative amendment in 2010.[7] However despite the government's purported commitment to 'respect Australia's human rights obligations and conform with the *Racial Discrimination Act 1975*' (Cth) (RDA),[8] which was suspended when the NTER was introduced,[9] the

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[1] Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse ('NT Board of Inquiry'), Ampe Akelyernemane Meke Mekarle – 'Little Children are Sacred' Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (2007) ('*Little Children are Sacred'*).

[2] Mal Brough, 'National Emergency Response to Protect Children in the NT' (Press Release, 21 June 2007).

[3] *Northern Territory National Emergency Response Act 2007* (Cth) ('*NTNER Act*') s.5.

[4]Northern Territory Emergency Response Review Board ('NTER Review Board'), *Report of the Northern Territory Emergency Response Review Board* (2008).

[5] Australian Government, *Future Directions for the Northern Territory Emergency Response: Discussion Paper* (2009).

[6] 'These consultations [held from June to the end of August 2009], involved people across the 73 communities affected by the NTER. More than 500 meetings were held in communities, attended by several thousand people': Australian Government, *Stronger Futures in the Northern Territory: Discussion Paper* (2011) 4. ('*Stronger futures*')

[7] *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of the Racial Discrimination Act) Act 2010* (Cth). Assented to 29 June 2010.

[8] Australian Government, *Changes to the Northern Territory Emergency Response – Community Guide Summary* (2009) <http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/nter_factsheet_dec09.pdf> at 3 October 2011.

[9] To avoid any potential conflict with the RDA each of the Acts comprising the NTER included a provision excluding its application: *NTNER Act*, ss 132(2), 133(2); *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) ('*FaCSIA Amendment Act*'), s 4(2); *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) (*'Welfare Payment Reform Act'*), ss 4(3) and 6(3).

NTER remains 'incompatible with Australia's obligations under the *International Convention on the Elimination of all forms of Racial Discrimination'* (ICERD).[10] With current funding due to expire in 2012 the NTER is now the subject of another discussion paper and consultation process regarding post NTER policy.[11]

*Discuss the changes that would be necessary in order to bring the current legislative framework in line with Australia's international human rights obligations.*

## I INTRODUCTION

After four years of operation it is arguable whether the NTER has 'improved the well-being of communities in the Northern Territory'.[12] At best there may be a small improvement in access to food and in safety for Indigenous women and children, at worst it is cultural genocide.[13] Significant reform would be required not only to comply with Australia's international human rights obligations, but arguably to achieve the legitimate objective of the NTER stated above.[14] Focusing on the current policy and the proposed future directions, this paper will outline the relevant obligations under international law and the criticisms made by United Nations human rights bodies and will argue that the objectives of the NTER can only be achieved by adopting a holistic approach to human rights.

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[10] Letter from Fatimata-Binta Victoire Dah, Chairperson of the Committee on the Elimination of all forms of Racial Discrimination (CERD) to Caroline Millar, Ambassador of the Permanent Mission of Australia to the UN at Geneva, 28 September 2009. <http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Australia28092009.pdf> at 3 October 2011.

[11] See Australian Government, *Stronger Futures,* above n 6. Consultations took place over six weeks from June- August 2011. The legislation is due to expire on 17 August 2012: *NTNER Act*, s.6.

[12] Section 5 of the *NTNER Act* provides: 'The object of this Act is to improve the well-being of certain communities in the Northern Territory'.

[13] Evidence of improvement is 'at best ambiguous': see below n 72. While the term 'cultural genocide' does not appear in the *Convention on the Prohibition of Genocide* (1948), article 7 of the UN *Draft Declaration on the Rights of Indigenous Peoples*, provided that Indigenous peoples had a right not to be subject to cultural genocide, including any action which had the effect of dispossessing them of their lands, territories or resources. Although the term 'cultural genocide' does not appear in the text adopted by the Human Rights Council the text does nevertheless 'recognise the crucial connection between indigenous peoples' survival and land rights': J Gilbert 'Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples' (2007)14 *International Journal on Minority and Group Rights* 207, 224. See also *Central Land Council Statement*, Kalkaringi, (26 August 2011) <http://www.concernedaustralians.com.au/media/Kalkarindji_statement_2011.pdf> at 3 October 2011.

[14] 'The object of this Act is to improve the well-being of certain communities in the Northern Territory': *NTNER Act*, s.5.

## II AUSTRALIA'S HUMAN RIGHTS OBLIGATIONS UNDER INTERNATIONAL LAW

Although Australia has legally binding obligations under a number of conventions that are relevant to the well-being of Indigenous peoples,[15] the *International Convention on the Elimination of all forms of Racial Discrimination* (ICERD),[16] read together with *General Recommendation 23*,[17] identifies specific obligations as they apply to Indigenous peoples,[18] these include:

### A *To ensure that no decisions directly relating to rights of Aboriginal peoples are taken without their informed consent*[19]

This obligation is fundamental to the right of Indigenous peoples to self-determination articulated in the *Declaration on the Rights of Indigenous Peoples* (DRIP).[20] Although declarations are not legally binding,[21] Australia has acknowledged that the DRIP 'reaffirms the entitlement of Australia's

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[15] These include: the *International Covenant on Civil and Political Rights* (ICCPR), the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), the *International Convention on the Elimination of all forms of Discrimination Against Women* (CEDAW) and the *International Convention on the Rights of the Child* (CRC).

[16] *International Convention on the Elimination of all forms of Racial Discrimination*, opened for signature 21 September 1965, 660 UNTS 195 (entered into force 4 January 1969) ('*ICERD*'). 'Australia ratified ICERD on 30 September 1975 and incorporated it "into Australian domestic law on 30 October 1975 with the commencement of the operation of the *RDA*. In particular, ss 9 and 10 were enacted to implement arts 2 and 5" of the ICERD': *Hagan v Australia*, CERD, 62nd sess, Communication No 26/2002, [4.13], UN Doc CERD/C/62/D/26/2002 (2003) in Alison Vivian and Ben Schokman, 'The Northern Territory Intervention and the fabrication of Special Measures' (2009) 13(1) *Australian Indigenous Law Review* 78, 81.

[17] CERD, *General Recommendation 23: Rights of Indigenous Peoples*, 51st sess, [3], UN Doc A/52/18, annex V at 122 (1997). Although *General Recommendation 23* is an authoritative statement by CERD 'on the interpretation of the rights, duties and standards contained within the Convention', the former Australian Government disputed that general recommendations are legally binding thereby allowing it to justify non-compliance with the ICERD as merely a variation in its interpretation rather than a violation. See *Comments by the Government of Australia on the Concluding Observations of the Committee on the Elimination of Racial Discrimination*, [20], UN Doc CERD/C/AUS/CO/14/Add.1. Nevertheless 'CERD has frequently reminded state parties of their specific obligations to Indigenous peoples arising from *General Recommendation 23'*. See, eg, CERD, *Concluding Observations: Australia*, 66th sess, [11], UN Doc CERD/C/AUS/CO/14 (2005); CERD, *Concluding Observations: Australia*, 56th sess, [9], UN Doc CERD/C/304/Add.101 (2000)): Vivian and Schokman, above n 16, 82.

[18] Aside from *General Recommendation 23*, the rights of Indigenous peoples have only been partially recognised in treaty form in *ILO Convention No 169*, to which Australia is not a party and under ICCPR art 27 which 'recognises Indigenous peoples…as minorities – that is, as an integral part of the country's majority community deserving special protection, rather than as a people, a "first nation" in their own right': Peter Bailey, *The Human Rights Enterprise in Australia and Internationally* (2009) 714.

[19] CERD, *General Recommendation 23*, above n 17, [4(d)].

[20] *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/Res/47/1 (2007) ('DRIP'). Article 3 of the DRIP, reproduces in substance the right to self-determination contained in common article 1 of the ICESCR and the ICCPR. However Indigenous peoples do not yet have the status of 'peoples' for the purposes of international law: A Huff, 'Indigenous Land Rights and the New Self-determination' (2005) 16 *Colo J Int'l Envtl L & Pol'y 295*, 313; Bailey, above n 18, 718. See *ILO Convention 169*, UNTS Vol 1650 (1989) No 28383, art 1.

[21] Under international law, a declaration is only legally enforceable to the extent that it is agreed to form part of international customary law: Bailey, above n 18, 721. In Claire Charters, 'Indigenous peoples and International Law and Policy' (2007) 18 *Public Law Review* 22, 34, the author states that: 'the [DRIP], being the product of more than 20 years of negotiations, reflects a degree of states' *opinio juris* and thus go towards establishing customary international law.'

Indigenous peoples to all human rights and fundamental freedoms',[22] and therefore it arguably informs the content of Australia's legally binding obligations as they apply to Indigenous peoples.[23] This includes an obligation to consult in good faith with Indigenous peoples in order to obtain their free, prior and informed consent before implementing measures that may affect them.[24] Although the issue of consent 'raises complex issues' where legislative measures affect the rights of children and the rights of adults differently, this complexity does not eliminate the need for proper consultation.[25]

Despite these obligations the NTER was introduced without 'cooperation or consultation with or even notification to the affected communities',[26] and although the current government promised that affected individuals would be involved in decisions regarding the future of the NTER,[27] the 2009 'consultations' were merely an exercise in ticking off the list, one of the requirements necessary to satisfy the test for 'special measures' critical to the government's plan to reinstate the RDA without substantively changing the discriminatory measures already in place.[28]

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[22] Human Rights Council Working Group on the Universal Periodic Review, *National Report: Australia,* [59], A/HRC/WG.6/10/AUS/1, (2010).

[23] '[H]aving declared its support for the [DRIP, Australia] should… adhere to the principles [therein]': James Anaya, United Nations Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Observations on the Northern Territory Emergency Response in Australia*, UN Doc A/HRC/15 (2010), 30. Furthermore 'states are required to take appropriate measures, including legislative measures, to achieve the ends of the Declaration in consultation and cooperation with Indigenous peoples': DRIP, above n 20, art 38. Note however that Australia declared its support for the DRIP in April 2009, after the NTER had already been introduced by the former Government without consultation in 2007.

[24] DRIP above n 20, art 19. *ILO Convention 169*, UNTS Vol 1650 (1989) No 28383, to which Australia is not yet a party, similarly requires that governments develop processes of consultation, and means for full participation of the peoples concerned, and that the peoples 'have the right to decide their own priorities for the process of development as it affects their lives': arts 6 and 7.

[25] Human Rights and Equal Opportunity Commission, *Submission to the Senate Legal and Constitutional Committee on the Northern Territory National Emergency Response Legislation*, 10 August 2007, [22].

[26]Larissa Behrendt et al, 'Will they be heard? - A response to the NTER Consultations June to August 2009' (2009) *Research Unit Jumbunna Indigenous House of Learning*, 19. Although *Little Children are Sacred* recommended the need for 'immediate and ongoing effective dialogue with Aboriginal people with genuine consultation in designing initiatives that address child sexual abuse': above n 1, 50, lack of consultation was justified on the basis that 'if you have an emergency like a tsunami or cyclone, you do not have time to consult people in the initial phase': Legal and constitutional Affairs Committee, *Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 and four related bills concerning the Northern Territory National Emergency Response: Senate Committee Report* (2007) 83.

[27]ABC Radio National, 'Government's Response to the NTER Review', *Breakfast*, 24 October 2008. One of the three overarching recommendations made by the NTER Review Board and accepted by the Australian Government was the 'requirement for a relationship with Aboriginal people based on genuine consultation, engagement and partnership': NTER Review Board, above n 4, 12; *Australian Government and Northern Territory Government Response to the Report of the NTER Review Board* (May 2009).

[28]The prohibition on racial discrimination under the RDA, pt 2 does not apply to 'special measures' as defined in art 1(4) of the *ICERD*: *RDA*, s.8. Under the *ICERD* art 1(4), 'special measures' are deemed not to be racial discrimination because they involve differential treatment aimed at achieving substantive equality for certain racial groups. However '[s]pecial measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary ... States should ensure that special measures are designed and implemented on the basis of *prior consultation* with affected communities and the active participation of such communities': CERD, *General Recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination* [16], [18] (2009).

The obligation to consult requires more than merely 'going through the motions in order to achieve a predetermined end'.[29] Communities directly affected by policy must have an opportunity to contribute to the development of that policy. Unfortunately the second round of consultations appears to have again failed to provide such an opportunity. The recently released discussion paper *Stronger Futures*,[30] containing thirty-three questions to guide the new round of consultations, was not '…provided in languages common to the five regions of consultation [and nor was it provided] in hard copy for the purpose of circulation to those living in homelands and without computer access.'[31] Furthermore the consultations commenced only six days after they were announced with the release of *Stronger Futures* further impeding the ability of communities to contribute meaningfully.[32]

### B *To ensure that members of Aboriginal peoples have equal rights in respect of effective participation in public life*[33]

In violation of this obligation, the NTER introduced a range of measures allowing the Commonwealth to take control of, suspend or intervene in the operation of 'Indigenous decision-making institutions',[34] and pursuant to these provisions '…the Northern Territory Government set up a system of shire councils, which have taken over functions managed previously by local Aboriginal community councils.'[35] Not only did the 2010 amendment leave these provisions intact,[36] but the Government supports the shire reforms remaining in place after the current legislative provisions expire next year.[37]

In *Stronger Futures*, the Government states that 'It is vital that communities themselves contribute their ideas on the most effective way to [build capacity and leadership].'[38] However despite clear demands

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[29] Larissa Behrendt et al, above n 26.

[30] Australian Government, *Stronger Futures*, above n 6.

[31] Rt Hon Malcolm Fraser AC CH GCL, 'Press Release re "Stronger Futures"' (Press Release, 27 June 2011)

[32] Ibid.

[33] CERD, *General Recommendation 23*, above n 17, [4(d)]. This obligation is also provided for generally in the text of the convention itself under article 5(c). See Also DRIP, above n 20, arts 4, 18, 20 and 23, for specific rights of Indigenous peoples to self-governance.

[34] DRIP, above n 20, art 18.

[35] Australian Government, *Stronger Futures*, above n 6, 24.

[36] See *NTNER Act* Pt 5.

[37] Australian Government, *Stronger Futures*, above n 6, 24.

[38] Ibid 25.

that the Government restore community governance,[39] the Government concludes that '…government employees will continue to live and work with local people in remote communities, to make sure programs and services are effectively delivered…'.[40]

Although the aim of the shire reforms 'is to deliver municipal services in remote communities in the same way they are delivered in other communities',[41] '…inequality cannot be addressed by the removal of control from affected peoples over their lives and land, as is current Government policy.'[42] Rather real self-determination requires that the resources are put in the hands of the communities themselves.[43]

### C *To ensure that Aboriginal people are free from discrimination*[44]

Equality is the norm that underpins international human rights law and this is reflected in the repeated references to human rights being available without distinction of any kind including race,[45] and in the right to non-discrimination.[46] As a party to the *International Covenant on Civil and Political Rights* (ICCPR), Australia has an obligation to prohibit discrimination on the grounds of race and to guarantee to all persons equal and effective protection against discrimination.[47] In addition Australia has an obligation under the ICERD, to 'engage in no act of racial discrimination',[48] and to '…provide for

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[39] *Rebuilding from the ground up – an alternative to the Northern Territory Intervention* ( June 2011) <http://stoptheintervention.org/uploads/files_to_download/rebuilding-from-the-ground-up-working-doc-14-5-11.pdf> at 3 October 2011; *Central Land Council Statement*, Kalkaringi, (26 August 2011) <http://www.concernedaustralians.com.au/media/Kalkarindji_statement_2011.pdf> at 3 October 2011; Rev Dr Djiniyini Gondarra OAM, *Response to the Prime Minister Julia Gillard's announcement of a Second Intervention in the Northern Territory* (2011) http://stoptheintervention.org/facts/consultations-mid-2011/MR-by-Rev-Dr-Djiniyini-Gondarra-OAM-Jun-2011 at 3 October 2011.

[40] Australian Government, *Stronger Futures*, above n 6, 25.

[41] Ibid, 24.

[42] *Statement on Aboriginal Rights by leading Australians* (2011) Concerned Australians <http://www.concernedaustralians.com.au/media/Statement-by-Eminent-Australians.doc> at 3 October 2011.

[43] ABC Radio National, 'Interview with Gary Foley', *Late Night Live*, 28 August 2003 <www.abc.net.au/rn/latenightlive/stories/2003/927329.htm> at 3 October 2011.

[44] CERD, *General Recommendation 23*, above n 56, [4(b)].

[45] *Universal Declaration of Human Rights (UDHR)*, art 2; *ICCPR*, art 2(1), see also art 4(1); *ICESCR*, art 2(2); or 'without distinction as to race, sex, language, or religion': *Charter of the United Nations*, arts 1(3), 13 and 56.

[46] *ICCPR*, art 26.

[47] *International Covenant on Civil and Political Rights*, opened for signature 1966, 999 UNTS 171 (entered into force 23 March 1976) (*ICCPR*), art 26.

[48] *ICERD*, opened for signature 21 September 1965, 660 UNTS 195 (entered into force 4 January 1969) art 2 (1)(a).

equality before the law in the enjoyment of a non-exhaustive range of political, economic, social and cultural rights…'[49]

However the NTER legislation restricts a number of these rights and as these restrictions apply only to 'prescribed areas' populated by Indigenous Australians, it '…does so in a way that in effect discriminates on the basis of race'.[50] Furthermore as the legislation also excluded any acts done under or for the purposes of the NTER, from the operation of the RDA, it removed any protection from, or remedy for, racial discrimination.[51] This inherently discriminatory aspect of the NTER has been the subject of repeated criticism by UN human rights bodies.

In October 2007, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people ('Special Rapporteur')[52], sent a communication to the former Australian Government, expressing concern that the NTER measures would arbitrarily restrict members of Aboriginal communities from exercising their '…individual rights on an equal basis with other sectors of the national population, thus amounting to discrimination prohibited under international and domestic…legislation.[53] Then in March 2009, in response to a request for Urgent Action,[54] the CERD sent an Urgent Action letter to the current Australian Government requesting that it provide information on its progress on lifting the suspension of the RDA and on re-designing the NTER measures, in direct consultation with the affected communities, in order to guarantee their consistency with the RDA.[55]

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[49] Vivian and Schokman, above n 16, 82. See ICERD art 5 and CERD, *General Recommendation 20: The Guarantee of Human Rights Free From Racial Discrimination*, 48th sess, [1], UN Doc A/51/18, annex VIII at 124 (1996).

[50] Anaya, above n 23, 25. Pursuant to *NTNER* Act s.4 (2) 'prescribed areas' are specified 'Aboriginal land' and 'other designated areas that are populated almost entirely by Indigenous people': Anaya, 30.

[51] *NTNER Act*, ss 132(2), 133(2); *FaCSIA Amendment Act*, s 4(2); '*Welfare Payment Reform Act*, ss 4(3) and 6(3).

[52] Together with the Special Rapporteur on violence against women, its causes and consequences, and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance.

[53] Anaya, above n 23, 27.

[54] Barbara Shaw et al, *Request for Urgent Action under the International Convention on the Elimination of All Forms of Racial Discrimination: Submission in relation to the Commonwealth Government of Australia*, 28 January 2009. <http://www.hrlrc.org.au/files/E75QFXXYE7/Request_for_Urgent_Action_Cerd.pdf> at 3 October 2011. Urgent procedures are invoked 'to respond to problems requiring immediate attention to prevent or limit the scale or number of serious violations of the Convention.' Criteria for initiating an urgent procedure includes 'the presence of a serious , massive or persistent pattern of racial discrimination; or a situation that is serious where there is a risk of further racial discrimination.': Office of the High Commissioner for Human rights <http://www2.ohchr.org/english/bodies/cerd/early-warning.htm#about> at 3 October 2011.

[55] Letter from Fatimata-Binta Victoire Dah, Chairperson of the Committee for the Elimination of all forms of Racial Discrimination (CERD) to Caroline Millar, Ambassador of the Permanent Mission of Australia to the UN at Geneva, 13 March 2009<http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Australia130309.pdf> at 3 October 2011.

The *Concluding Observations* of the Human Rights Committee (HRC), in April 2009, also requested follow-up information on recommendations it made to 're-design NTER measures in direct consultation with the Indigenous peoples concerned, in order to ensure that they are consistent with the [RDA] and the [ICCPR]'.[56] The *Concluding Observations* of the Committee on Economic Social and Cultural Rights (CESCR) made similar recommendations in May 2009,[57] and the Special Rapporteur 'powerfully condemned', the discriminatory measures of the NTER after his visit to Australia in August 2009.[58]

The Government responded to the widespread criticism by '…pass[ing] legislation to reinstate the [RDA] in relation to the NTER and [by] mak[ing] necessary changes to NTER laws.'[59] However there is a large disparity between the Government's view on what changes were necessary and those that were necessary according to international law. The Government's approach appears to involve reinterpreting its international obligations in a manner that is consistent with its policy agenda rather than changing its policy agenda to conform to its international obligations.[60] For although the 2010 amendment repealed all of the provisions that limited anti-discrimination laws, the repeal did not apply retrospectively and therefore it 'preserve[d] the legal effect of everything done under the NTER legislation while protecting the Commonwealth from any claims for damages that might have otherwise arisen.'[61] Furthermore whilst the amendment was passed in June, the reinstatement of the

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[56] Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia* (March 2009) UN Doc CCPR/C/AUS/CO/5 [14]. This follow-up information has been overdue since April 2010: Human Rights Council Working Group on the Universal Periodic Review, *Compilation prepared by the Office of the High Commissioner for Human Rights*, A/HRC/WG.6/10/AUS/2, (2010) 5.

[57] Committee on Economic, Cultural and Social Rights, *Concluding Observations on the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/AUS/CO/4 (May 2009) [15].

[58] Alison Vivian, 'Some human rights are worth more than others' (2010) 35(1) *Alternative Law Journal* 13, 16; James Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, UN Doc A/HRC/12/34 (2009) [46]. See also: Anand Grover, United Nations Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, *Addendum: Mission to Australia*, UN Doc A/HRC/14/20/ADD.4 (2010).

[59] Human Rights Council Working Group on the Universal Periodic Review, *National Report: Australia*, above n 22, [64].

[60] See also the comments of the Government on the Special Rapporteur's observations following his 2009 visit: Anaya, above n 23, 37, 39.

[61] Alastair Nicholson, *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of the Racial Discrimination Act) Bill 2009 Notes and Comment* (2009)< http://stoptheintervention.org/rda-new-legislation/notes-and-comment-by-prof-nicholson> at 3 October 2011.

RDA did not take effect until 31 December 2010,[62] the delay allowing the Government to exploit the discriminatory measures left intact and to implement new discriminatory measures without challenge.[63]

The most significant amendment was to the compulsory income management regime.[64] Rather than repealing the existing discriminatory income management measures, whereby 50 per cent of welfare payments are quarantined for the purchase of essentials only,[65] the 2010 amendment extended the regime beyond the prescribed areas, to give it 'a veneer of non-discrimination'.[66] However as the ICERD definition of racial discrimination 'expressly extends beyond measures that are explicitly discriminatory such that policies and practices that are on their face neutral may nonetheless [be] discriminat[ory] in fact and effect',[67] the income management regime arguably continues to violate the right to non-discrimination as the provisions disproportionately affect Indigenous Australians.[68]

The 2010 amendment also includes an objects clause for each of the measures, 'clearly designed to constitute each of the provisions as a special measure within the meaning of [ICERD]'.[69] In maintaining its conviction that the NTER measures are 'special measures', the government persistently refers to the objective of the measures and to the requirement of consultation, as if this were the only criteria necessary to satisfy the test for 'special measures',[70] conveniently ignoring the requirement that

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[62] *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of the Racial Discrimination Act) Act 2010* (Cth), s.2.

[63] Stop the Intervention Collective Sydney, 'New Intervention laws still breach RDA and will spread misery' (Press Release, 26 November 2009). According to the Government, the delay, 'allow[s] time for the passage of legislation through… Parliament, and the necessary time for the redesigned measures to be put in place and for an effective transition from existing to new arrangements': Anaya, above n 23, 37.

[64] See *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of the Racial Discrimination Act) Act 2010* (Cth), sch 2. Minor amendments were also made to the following discriminatory measures introduced in 2007: restrictions on the sale and consumption of alcohol: sch 3; prohibited materials: sch 4; acquisition of rights, titles and interests in land: sch 5 (see further discussion below); licensing of community stores: sch 6; powers of the crime commission: sch 7. In addition to the right to non-discrimination, the special powers accorded to the Australian Crime Commission arguably violate ICCPR art 17.

[65] The income management regime also diverts 100 per cent of advances and lump sum payments to an 'income management account'. The measures were introduced under Schedule I of the *Welfare Payment Reform Act*, which adds pt 3B to the *Social Security (Administration) Act 1999* (Cth). In addition the NTER terminated the Community Development Employment Project ('CDEP'), which provided funding to employers to hire Aboriginal peoples. Payments are now classified as unemployment payments instead, and are therefore subject to compulsory income management: Anaya, above n 23, 29.

[66] *Statement on Aboriginal Rights by leading Australians*, above n 42.

[67] Vivian and Schokman, above n16, 82. See ICERD, art 1(1); *L R v Slovak Republic*, CERD, 66th sess, Communication No 31/2003, [10.4], UN Doc CERD/C/66/D/31/2003 (2005).

[68] Note also that the right to social security, is protected by the ICESCR art 9.

[69] Nicholson, above n 61. The amending Act also repeals previous provisions that had deemed the NTER measures as 'special measures' and which the Special Rapporteur had found had '…not been shown to qualify as "special measures" that may be deemed not to constitute racial discrimination for the purposes of the [ICERD]': Anaya above n 23, 31.

[70] In its response to the report of the Special Rapporteur the Government 'argue[d ] that "legitimate differential treatment" for

differential treatment must also be 'legitimate' in the sense that it is consistent with the objectives and purposes of the ICERD and that it must be 'necessary' to secure the advancement of some or all members of a racial or ethnic group.[71] After four years of operation there is very little evidence of any advancement of some or all members of the affected communities, much less, evidence that the measures are *necessary* to secure such advancement.[72] Furthermore in the words of the Special Rapporteur:

> '…it would be quite extraordinary to find consistent with the objectives of the Convention, that special measures may consist of differential treatment that limits or infringes the rights of a disadvantaged group in order to assist the group or certain of its members. Ordinarily, special measures are accomplished through preferential treatment of disadvantaged groups, as suggested by the language of the Convention, and not by the impairment of the enjoyment of their human rights.'[73]

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particular groups may be permissible under international law in accordance with standards different from those to justify "special measures".' However the Special Rapporteur concluded that the NTER's racially discriminatory aspects could no more qualify as "legitimate differential treatment" than they could as "special measures": Anaya above n 23, 40. See also eg: Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 71–2 (Jenny Macklin, Shadow Minister for Indigenous Affairs and Reconciliation); Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 108–9 (Kevin Rudd, Leader of the Opposition). Jenny Macklin, 'Compulsory Income Management to Continue as Key NTER Measure' (Press Release, 23 October 2008).

[71] ICERD, art 1(4); CERD, *General Recommendation 14: Definition of Discrimination*, 42nd sess, [2], UN Doc A/48/18 at 114 (1994); CERD, *General Recommendation No. 32*, above n 28.

[72] Although 'the Government has reported certain improvements in access to food and in safety for indigenous women and children, on the basis of consultations…': Anaya above n 23, 32, there is no adequate measure of improvement which the government claims has accompanied income management: Rt Hon Malcolm Fraser AC CH GCL, above n, 31. On the contrary 'in its report monitoring NTER activities for the period January 2009 to June 2009, the Government identified data showing significant increases during that period in reported incidents of alcohol-related and domestic violence, and of child abuse, although it could be that these increases are at least in part due to an increase in reporting to the police of such incidences.': Anaya above n 23, 32. Australian Government, Department of Families, Housing, Community Services and Indigenous Affairs, *Closing the Gap in the Northern Territory: January 2009 to June 2009, Whole of the Government Monitoring Report – Part One, Overview of Measures*, 31–33.

[73] Anaya above n, 23, 31.

### D *To recognise and respect distinct Aboriginal culture[74] and ensure that Aboriginal communities can exercise their traditions and customs[75]*

The cultural rights of Indigenous people are also protected in the *DRIP*,[76] which recognises the significance of land to Indigenous culture and that 'control by indigenous peoples over… their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions…'[77] In violation of these rights and that of non-discrimination, '…the Government compulsorily acquired five year leases to the land… in order to provide access to the Government over these areas to improve housing.'[78] However it is arguable whether acquisition of land is necessary to achieve such an objective. Furthermore Indigenous Australians should not be '…forced to abandon their lands and heritage in order to obtain services that are automatically provided to other Australians.'[79]

Arguably the NTER was not only formulated with a complete disregard for Indigenous cultural rights but it was in fact '…implemented with the express objective of undermining certain cultural norms'[80] such as communal ownership and the sharing of resources. The adoption of 'normal' values in 'normal suburbs' was and still is seen as the solution to the disadvantage suffered by those living in remote communities.[81]

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[74]CERD, *General Recommendation 23*, above n 56, [4(a)].

[75]CERD, *General Recommendation 23*, above n 56, [4(e)], [4(c)], see also ICCPR art 27.

[76] *DRIP*, above n 20, arts 5, 7, 8, 11, 15, 20.

[77] *DRIP*, above n 20, preamble.

[78] Anaya, above n 23, 28. These measures contained in the *NTNER* Act, Pt 4 Div 1, are a clear violation of the rights of Indigenous peoples to control the disposition of their lands: *DRIP*, above n 20, arts 10, 26, 32 and to maintain and protect cultural sites: *DRIP*, above n 20, art 12. 'The right of Indigenous people to "own, develop, control and use their communal lands, territories and resources" is also explicitly mandated' in CERD, *General Recommendation 23*: Vivian, above n 58, 13. In addition to the measures under Div 1, there are also discriminatory provisions relating to acquisition of town camps: *NTNER Act*, Pt 4 Div 2, and titles and interest in land arising under the *Native title Act* and the *Aboriginal Land Rights (Northern Territory) Act*: *NTNER* Act, Pt 4 Div 3.

[79] *Statement on Aboriginal Rights by leading Australians*, above n 42.

[80] Vivian above n 58.

[81] Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 18 (Mal Brough, Minister for Families, Community Services and Indigenous Affairs) Second Reading Speech 6-11. Similar views have been expressed by the current Labor Government: ABC Television, 'Govt Responds to Northern Territory Intervention Review', *The 7.30 Report*, 23 October 2008 <abc.net.au/7.30/content/2008/s2399696.htm>at 3 October 2011; Patricia Karvelas and Nicola Berkovic, 'Aborigines told to buy homes by the Rudd Government', *The Australian* (online), 2 January 2009 <theaustralian.news.com.au/story/0,,24863938-2702,00.html> at 3 October 2011. The measures that limit the consideration of Indigenous customary law in bail applications and sentencing under *NTNER Act*, Pt 6, similarly violate Indigenous cultural rights, as well as the right of non-discrimination and *ICCPR* art 14.

## III CONCLUSION

Having sent Australia a second letter under its Urgent Action Procedure in September 2009,[82] requiring Australia to provide information with it periodic report on progress made in bringing the NTER measures in compliance with ICERD and to giving consideration to the findings of the Special Rapporteur, it was unsurprising that in its *Concluding Observations* on Australia in August 2010, the CERD was critical of Australia's failure to restore the rights of Aboriginal people in the 2010 amendment.[83] Nevertheless the Government continues to justify the NTER as necessary to:

> '…ensure that indigenous people in the Northern Territory, and in particular indigenous women and children in relevant communities, are able to enjoy their social and political rights on equal footing with other Australians…[and] to enable all, particularly women and children, to live their lives free of violence and to enjoy the same rights to development, education, health, property, social security and culture that are enjoyed by other Australians.'[84]

However as concluded by the Special Rapporteur these objectives '…can move forward without the racially discriminatory aspects of the NTER and…indeed, they can best succeed without them and by ensuring… that the broader human rights framework is strengthened for Aboriginal peoples in the Northern Territory.'[85] 'Such strengthening cannot occur in the context where different categories of rights are considered to be inherently inconsistent – which is not the case.'[86] On the contrary, the failure of the NTER to improve the well-being of communities in the Northern Territory highlights that all human rights are 'indivisible and interdependent and interrelated'.[87]

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[82] Fatimata –Binta Victoire Dah, above n 10.

[83] CERD, *Concluding Observations of the Committee on the Elimination of all forms of Racial Discrimination: Australia*, UN Doc C/AUS/CO/15-17 (August 2010). The continuing discriminatory nature of the NTER was also scrutinised earlier this year by the Human Rights Council under the Universal Periodic Review and by the UN High Commissioner for Human Rights who visited Australia in May.

[84] Anaya, above n 23, 27. Note however that several Indigenous women with whom Special Rapporteur met explained 'that their rights as Indigenous women are inextricably bound to their capacity to make choices for themselves and to the self-determination and cultural integrity of their communities': Anaya, 32.

[85] Anaya, above n 23, 33.

[86] NTER Review Board, above n 4, 46.

[87] World Conference on Human Rights, *Vienna Declaration & Programme of Action* 1993; GA Res 60/251, UN Doc A/Res/60/251 (2006).

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