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**Submission to the  
Senate Community Affairs Committee**

**Inquiry into the Families, Housing,  
Community Services and Indigenous Affairs  
and Other Legislation Amendment  
(Emergency Response Consolidation) Bill 2008**

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**About the Human Rights Law Resource Centre**

The Human Rights Law Resource Centre (**HRLRC**) is an independent community legal centre that is a joint initiative of the Public Interest Law Clearing House (Vic) Inc and the Victorian Council for Civil Liberties Inc.

The HRLRC provides and supports human rights litigation, education, training, research and advocacy services to:

- (a) contribute to the harmonisation of law, policy and practice in Victoria and Australia with international human rights norms and standards;
- (b) support and enhance the capacity of the legal profession, judiciary, government and community sector to develop Australian law and policy consistently with international human rights standards; and
- (c) empower people who are disadvantaged or living in poverty by operating within a human rights framework.

The four 'thematic priorities' for the work of the HRLRC are:

- (a) the content, implementation, operation and review of the Victorian Charter of Human Rights and Responsibilities;
- (b) the treatment and conditions of detained persons, including asylum-seekers, prisoners and involuntary patients;
- (c) the importance, interdependence, indivisibility and justiciability of economic, social and cultural rights; and
- (d) equality rights, particularly the right to non-discrimination, including on the grounds of race, religion, ethnicity, disability, gender, age and poverty.

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## 1. Introduction and Executive Summary

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1. This submission is provided by the Human Rights Law Resource Centre (**HRLRC**) to the Senate Community Affairs Committee in relation to the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Response Consolidation) Bill 2008 (**Bill**).
2. The purpose of this submission is to identify to the Committee particular human rights issues that the HRLRC considers are raised by the Bill. While it is acknowledged that the Bill covers very limited aspects of the Northern Territory Intervention, this submission seeks to provide a human rights approach to be applied to some of the issues surrounding the Bill and the Northern Territory 'emergency intervention'.
3. The HRLRC is particularly concerned about the following human rights issues in respect of the Bill, which are discussed in further detail throughout this submission:
  - (a) the right to non-discrimination and equality before the law;
  - (b) the right of self-determination and to participate meaningfully in policy formulation and public debate;
  - (c) the rights of the child and the importance of using a children's rights framework;  
and
  - (d) the right to an effective remedy.
4. The HRLRC makes the following recommendations in relation to the Bill:

**Recommendation 1:**

Proposed reforms to the Northern Territory Intervention, including the Bill, must be consistent with Australia's international human rights obligations.

**Recommendation 2:**

The recommendations contained in the *Little Children are Sacred* report should be implemented as a matter of priority.

**Recommendation 3:**

The HRLRC considers that the provisions of the Bill must comply with both the *Racial Discrimination Act 1975* (Cth) and the Northern Territory anti-discrimination legislation. It is not appropriate to seek to justify discriminatory measures on the basis that they are undertaken in furtherance of another right.

**Recommendation 4:**

Measures that relate to Indigenous communities must be culturally sensitive and conscious of the meaningful connection that Indigenous people have to the land. This requires the recognition of the right of self-determination of Indigenous peoples and the need for a high level of consultation with and participation of Indigenous people about matters which directly affect them.

**Recommendation 5:**

The UN *Convention on the Rights of the Child* and the notion of children as 'rights bearers' should be used as benchmarks against which to develop, implement and monitor laws and policies that aimed at protecting children in Indigenous communities from sexual abuse.

**Recommendation 6:**

Affected individuals must have available to them effective remedies to be able to review decisions under the Northern Territory Intervention 'emergency' measures that impact on the human rights of Indigenous peoples.

## 2. Background

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5. In June 2007, the Northern Territory Government released a report on the protection of children from sexual abuse in Indigenous communities, entitled *Ampe Akelyernemane Meke Mekarle: Little Children are Sacred*.<sup>1</sup> The report detailed the 'extent, nature and factors contributing to sexual abuse of Aboriginal children' and the obstacles and challenges associated with effective child protection mechanisms.<sup>2</sup> The report made 97 recommendations, which were intended to offer advice to the Northern Territory Government on how best to support and empower communities to prevent child sexual abuse now and in the future. The recommendations spanned a wide range of areas, including in relation to school education, awareness campaigns, improving family support services and the empowerment of Indigenous communities.
6. In response, the former Australian Government announced a 'national emergency intervention' into Indigenous communities in the Northern Territory and passed a legislative package<sup>3</sup> (**Northern Territory Intervention**) that raises significant concerns in relation to Australia's international obligations to respect and promote the human rights of Indigenous Australians. The Northern Territory Intervention consists of a range of extraordinary measures, including the compulsory acquisition of Indigenous land, the quarantining of social security payments, the banning of alcohol and the deployment of military and police in traditional lands. There was very little relationship between the recommendations to the Northern Territory Government contained in the *Little Children are Sacred* report and the former Australian Government's 'national emergency intervention'.
7. The Bill amends provisions within the *Northern Territory National Emergency Response Act 2007* (Cth) and the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth).

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<sup>1</sup> Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Little Children Are Sacred* (2007).

<sup>2</sup> Ibid 5.

<sup>3</sup> *Northern Territory National Emergency Response Act 2007* (Cth); *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth); *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth); *Appropriation (Northern Territory National Emergency Response) Act (No. 1) 2007-2008* (2007) Cth; and *Appropriation (Northern Territory National Emergency Response) Act (No. 2) 2007-2008* (2007) (Cth).

8. In summary, the Bill:
- (a) repeals the permit system that gave public access to certain Indigenous land and clarifies the power of the Minister to authorise people to enter communities covered by the emergency response;
  - (b) requires pay television licensees not to provide television channels that contain a large amount of R 18+ programming into certain prescribed areas;
  - (c) permits prohibited pornographic material to be transported through a prescribed area to a place outside the prescribed area; and
  - (d) ensures that if a roadhouse effectively takes the place of a community store in a remote area, it can be treated as a community store in having to meet new licensing standards.

### 3. A Human Rights Framework

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9. Human rights are fundamental rights and freedoms that are recognised as belonging to everyone in the community. They include freedom of speech, the right to privacy, freedom of movement, the right to vote, the right to a fair trial and the right to be free from discrimination. Human rights are about the fair treatment of all people and they enable people to live lives of dignity and value.
10. The HRLRC considers that the Bill raises certain issues that relate to Australia's international human rights obligations, including in particular the responsibility to respect and promote the human rights of Indigenous peoples. These obligations are found in a number of the major international human rights treaties to which Australia is a party, including:
  - (a) the International Covenant on Civil and Political Rights (**ICCPR**);<sup>4</sup>
  - (b) the International Covenant on Economic, Social and Cultural Rights (**ICESCR**);<sup>5</sup>
  - (c) the International Convention on the Elimination of All Forms of Racial Discrimination (**CERD**);<sup>6</sup> and
  - (d) the Convention on the Rights of the Child (**CRC**).<sup>7</sup>
11. Australia's ratification of these instruments has created international law obligations that require all Australian governments, both federal and state and territory, to act to respect, protect and fulfil human rights.
12. The experience in comparative jurisdictions, such as the United Kingdom, Canada and New Zealand, is that a human rights approach to the development by governments of laws and policies can have significant positive impacts. Some of the benefits of using a human rights approach include:<sup>8</sup>
  - (a) a 'significant, but beneficial, impact on the development of policy';

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<sup>4</sup> The ICCPR was signed on 18 December 1972 and ratified on 13 August 1980.

<sup>5</sup> The ICESCR was signed on 18 December 1972 and ratified on 10 December 1975.

<sup>6</sup> The CERD was signed on 13 October 1966 and ratified on 30 September 1975.

<sup>7</sup> The CRC was signed on 22 August 1990 and ratified on 17 December 1990.

<sup>8</sup> See, generally, Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (July 2006); British Institute of Human Rights, *The Human Rights Act: Changing Lives* (2007); Audit Commission (UK), *Human Rights: Improving Public Service Delivery* (October 2003).



- (b) enhanced scrutiny, transparency and accountability in government;
  - (c) better public service outcomes and increased levels of 'consumer' satisfaction as a result of more participatory and empowering policy development processes and more individualised, flexible and responsive public services;
  - (d) 'new thinking', as the core human rights principles of dignity, equality, respect, fairness and autonomy can help decision-makers 'see seemingly intractable problems in a new light';
  - (e) the language and ideas of rights can be used to secure positive changes not only to individual circumstances, but also to policies and procedures; and
  - (f) awareness-raising, education and capacity building around human rights can empower people and lead to improved public service delivery and outcomes.
13. The HRLRC supports measures that are intended to protect the human rights of Indigenous peoples, particularly Indigenous children and women, that relate, directly or indirectly, to family violence and sexual abuse issues. However, such measures must be consistent with, and indeed promote the furtherance of, Australia's human rights obligations.
14. Indeed, at the time that the Northern Territory Intervention legislative package was passed, the Human Rights and Equal Opportunity urged the Australian Government to adopt an approach that is consistent with Australia's international human rights obligations and, particularly, with the *Racial Discrimination Act 1975* (Cth).<sup>9</sup> More recently, the *Social Justice Report 2007*, released a short time ago by the Human Rights and Equal Opportunity Commission, stated that

Aside from Australia's international obligations, these issues are important because measures that violate human rights are more likely to work in ways that undermine the overall well-being of communities in both the short and long term.<sup>10</sup>

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<sup>9</sup> Human Rights and Equal Opportunity Commission, 'A human rights based approach is vital to address the challenges in Indigenous communities', *Press Release*, 26 June 2007, available at [www.humanrights.gov.au/about/media/media\\_releases/2007/45\\_07.html](http://www.humanrights.gov.au/about/media/media_releases/2007/45_07.html).

<sup>10</sup> Human Rights and Equal Opportunity Commission, *Social Justice Report 2007*, Chapter 1, available at [http://www.hreoc.gov.au/social\\_justice/sj\\_report/sjreport07/index.html](http://www.hreoc.gov.au/social_justice/sj_report/sjreport07/index.html).

15. The HRLRC submits that a human rights approach to the development of law, policy and practice in relation to the Northern Territory Intervention will not only ensure that Australia's international obligations are fulfilled, but will also assist to develop laws and policies that will best promote the ends that are sought to be achieved by the Northern Territory Intervention legislation.

***Recommendation 1:***

Proposed reforms to the Northern Territory Intervention, including the Bill, must be consistent with Australia's international human rights obligations.

***Recommendation 2:***

The recommendations contained in the *Little Children are Sacred* report should be implemented as a matter of priority.

## 4. The Right to Non-Discrimination

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16. The HRLRC is concerned that the measures provided for in the Bill, and indeed the Northern Territory Intervention more generally, are directed at and will impact specifically on Indigenous people. The HRLRC considers this to raise concerns in relation to the right to equality and freedom from discrimination, which is an integral component of the international human rights normative framework.

### 4.1 Content of the Right to Non-Discrimination

17. Equality is the most important principle that inspires the concept of human rights.<sup>11</sup> The right to equality and freedom from discrimination is a norm of international human rights law. The fundamental nature of the principle of equality of treatment is not only recognised in international law, but also fundamentally underpins the common law and is enshrined in the constitutions of many common law jurisdictions.<sup>12</sup>

18. Both the *ICCPR* and the *ICESCR* contain comprehensive prohibitions on discrimination. Article 2(1) of the *ICCPR* provides:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

19. Article 2(1) of the *ICCPR* prohibits discrimination on certain grounds in the exercise of the Covenant's enumerated rights. However, article 26 of the *ICCPR* extends considerably further than article 2(1):

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

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<sup>11</sup> M Nowak, *CCPR Commentary* (2nd ed, 2005), 598.

<sup>12</sup> Lord A Lester and D Pannick QC, *Human Rights Law and Practice* (2nd ed, 2004), 414.

20. Article 26 is a free-standing non-discrimination clause that is not confined to the enjoyment of the rights enumerated in the *ICCPR* but prohibits discrimination – in fact or in law – in all aspects of public life.<sup>13</sup>
21. 'Discrimination' has been authoritatively stated by the UN Human Rights Committee to imply any distinction, exclusion, restriction or preference which is based on any ground identified in the Covenant and which has the purpose or effect or nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.<sup>14</sup>
22. Similarly, the term 'racial discrimination' is defined in article 1 of the *CERD* as:
- any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.
23. The UN Committee on the Elimination of Racial Discrimination has also made particular reference to the rights of Indigenous peoples by recommending that States Parties:
- ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity.<sup>15</sup>

#### 4.2 Permissible Limitations

24. Not all differentiation of treatment will constitute discrimination. The criteria for assessing the lawfulness of any different treatment is that it must be reasonable and objective and must be in order to achieve a purpose which is legitimate under the *ICCPR*.<sup>16</sup> Similarly, under the *ICESCR*, article 4 provides that a State Party's laws may limit rights only insofar as they are compatible with the *ICESCR* and only for the purpose of promoting the general welfare in a democratic society.
25. Contrary to article 4 of the *ICCPR*, article 2 of the *ICESCR* and article 2(2) of the *CERD*, legislative measures associated with the Northern Territory Intervention contain provisions exempting them from the application of the federal *Racial Discrimination Act 1975* (Cth) and the Northern Territory's *Anti-Discrimination Act 1992* (NT).

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<sup>13</sup> UN Human Rights Committee, General Comment No. 18: Non-Discrimination (1989), [1].

<sup>14</sup> Ibid [7].

<sup>15</sup> UN Committee on the Elimination of Racial Discrimination, *General Recommendation No. 23: Indigenous Peoples*, UN Doc A/52/18 (1997), [4].

26. International human rights law provides that, in respect of rights that are not absolute, limitations are only permissible in certain circumstances and subject to particular conditions. In particular, limitations are not permissible when they are applied in a blanket and arbitrary way.
27. In *General Comment No. 31*, the UN Human Rights Committee stated that, where limitations or restrictions are made,
- States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.<sup>17</sup>
28. The general principles relating to the justification and extent of limitations have been further developed by the UN Economic and Social Council in the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*. The Siracusa Principles include that:
- (a) no limitations or grounds for applying them may be inconsistent with the essence of the particular right concerned;
  - (b) all limitation clauses should be interpreted strictly and in favour of the rights at issue;
  - (c) any limitation must be provided for by law and be compatible with the objects and purposes of the *ICCPR*;
  - (d) limitations must not be arbitrary or unreasonable;
  - (e) limitations must be subject to challenge and review;
  - (f) limitations must not discriminate on a prohibited ground;
  - (g) any limitation must be 'necessary', which requires that it:
    - (i) is based on one of the grounds which permit limitations (namely, public order, public health, public morals, national security, public safety or the rights and freedoms of others);
    - (ii) responds to a pressing need;

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<sup>16</sup> UN Human Rights Committee, General Comment No. 18, above n 13, [13].

<sup>17</sup> UN Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add13 (2004) [6].

- (iii) pursues a legitimate aim; and
- (iv) is proportionate to that aim.<sup>18</sup>

#### 4.3 'Special Measures'

29. The Northern Territory Intervention legislation states that the responses are 'special measures' and therefore not unlawful discrimination.<sup>19</sup> However, such 'special measures' are supposed to benefit, rather than disadvantage, the targeted group. In providing evidence to a Senate Committee inquiry into the intervention, John von Doussa, President of the Human Rights and Equal Opportunity Commission, raised concerns regarding the measures being exempted from the *Racial Discrimination Act 1975* (Cth).<sup>20</sup>
30. Even where international law allows differential treatment, such as the 'special measures' provisions within article 1 of the *CERD*, the obligation is on the state to establish that the aim of such measures is legitimate and the measures taken to achieve the aim is necessary and proportionate. It is difficult to see how some of the existing provisions meet this test, particularly as there is no evidence of an analysis of the connection between the measures and the rights they might infringe. In addition, the provisions raises issues in relation to the requirement in the Siracusa Principles, as discussed in paragraph 28 above, that limitations must not discriminate on a prohibited ground.
31. The HRLRC considers that, prior to the enforcement of any of the provisions contained in the Bill, the requirements for a 'special measure' under the *Racial Discrimination Act 1975* (Cth) must be satisfied. If a measure is to be considered a 'special measure', then the measure must be for the sole purpose of the advancement of human rights, rather than the regression of those rights.

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<sup>18</sup> UN Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (1985).

<sup>19</sup> *Northern Territory National Emergency Response Act 2007* (Cth) s 132.

<sup>20</sup> Address to Senate Standing Committee on Legal and Constitutional Affairs, *Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 and Four Related Bills concerning the Northern Territory National Emergency Response*, Parliament of Australia, Canberra, 10 August 2007, 49 (John von Doussa).

#### **4.4 Specific Issues raised by the Bill**

##### **(a) Repeal of the Permit System**

32. Amendments introduced as part of the Northern Territory Intervention to give public access to certain Indigenous land raised issues in relation to, among other rights, the right to freedom from discrimination. In particular, no reason was provided as to how measures such as abolishing the permit system would address the problem of child sexual abuse.
33. The blanket removal of the permit system on roads, community common areas and other places is not an appropriate measure and does not have sufficient relationship to the purpose of the legislation to qualify as a special measure. As such, while the HRLRC supports provisions of the Bill that seek to repeal the permit system amendments that gave access to certain Indigenous land, the HRLRC remains concerned that sufficient consultation has not taken place with affected Indigenous communities to determine the most appropriate measures to achieve this end. This issue is discussed further in the next section in relation to the right of self-determination.

##### **(b) Prohibition on R 18+ Programming**

34. New clause 12 of Schedule 2 to the *Broadcasting Services Act 1992* (Cth) is said to be a special measure to protect communities from violence and sexual abuse. According to the Explanatory Memorandum, the clause acts to the exclusion of Northern Territory discrimination laws and should be read as a 'special measure' for the purposes of the *Racial Discrimination Act 1975* (Cth).
35. These provisions that require particular pay television licensees not to provide television channels that contain a large amount of R 18+ programming into certain prescribed areas are, on their face, discriminatory in that they apply specifically to Indigenous communities. As a result, whether they come within the special measures provisions needs to be comprehensively assessed. This assessment can only be made by reference to a human rights framework which, as discussed in the next section in relation to the right of self-determination, includes meaningful participation and consultation.

***Recommendation 3:***

The HRLRC considers that the provisions of the Bill must comply with both the *Racial Discrimination Act 1975* (Cth) and the Northern Territory anti-discrimination legislation. It is not appropriate to seek to justify discriminatory measures on the basis that they are undertaken in furtherance of another right.



## **5. The Right of Self-Determination**

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36. The HRLRC is particularly concerned about the lack of participation and consultation with Indigenous peoples in the formulation and implementation of the provisions of the Bill, and indeed the Northern Territory Intervention more broadly. This lack of consultation and ability for Indigenous peoples to participate in the decision-making process raises serious issues in relation to the fundamental right of self-determination for Indigenous Australians.

### **5.1 Content of the Right of Self-Determination**

37. Demonstrating its importance for the achievement of all civil, political, economic, social and cultural rights, the right of self-determination is common to both the *ICCPR* and the *ICESCR*. *General Comment No 12* issued by the UN Human Rights Committee recognises that the realisation of the right of self-determination is particularly important for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights.

38. The right of self-determination recognises that the 'human person is the central subject of development and should be the active participant and beneficiary of the right'.<sup>21</sup> Self-determination requires the free and meaningful participation by affected Indigenous people in defining the objectives of development and the methods used to achieve these objectives.

### **5.2 Lack of Consultation with and Participation of Indigenous Peoples**

39. The Northern Territory Intervention legislation was passed without consultation with Indigenous representatives and affected communities. Of particular concern is the haste with which the Northern Territory Intervention legislation was prepared, and enacted. The legislative process took only 10 days, despite the fact that it introduced 480 pages of new legislation.

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<sup>21</sup> Human Rights and Equal Opportunity Commission, *Social Justice Report 2007*, above n 10, 241.

40. The Northern Territory Intervention undermined the fundamental right of Indigenous peoples to participate meaningfully in decisions which affect them. In addition, this approach by the Australian Government also contravenes its obligation under *CERD* to:

ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent.<sup>22</sup>

41. Particularly in light of the lack of consultation with affected Indigenous communities from the outset of the Northern Territory Intervention, the HRLRC considers that it is essential that Indigenous peoples be provided with the opportunity to participate in the formulation of legislation that will amend those measures, such as those contained in the provisions of the Bill. Indigenous people have the right to full and effective participation in decisions which directly or indirectly affect their lives, including participation and partnership in program planning, development, implementation and evaluation.

42. The informed and active participation of people who are marginalised or disadvantaged in the development and implementation of laws, policies and practices to address that disadvantage is crucial in both an instrumental and developmental sense. In an instrumental sense, the participation of stakeholders is more likely to result in the development and implementation of laws and policies that are targeted, efficient, effective and meet people's needs. In a developmental sense, the participation of stakeholders can contribute to individual and community empowerment.<sup>23</sup>

43. As the UN Office of the High Commissioner for Human Rights has written in their Guidelines on a Human Rights Approach to Poverty Reduction Strategies:

Lack of political rights is both a cause and a consequence of poverty. Socially and politically excluded people are more likely to become poor, and the poor are more vulnerable to social exclusion and political marginalization...Active participation in political decision-making processes plays a role in expanding political freedoms and empowering people, which in turn contributes towards combating social exclusion and political marginalization.<sup>24</sup>

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<sup>22</sup> UN Committee on the Elimination of Racial Discrimination, *General Recommendation No. 23: Indigenous Peoples*, UN Doc A/52/18 (1997), [4].

<sup>23</sup> See, generally, Mark Considine, *Making Public Policy: Institutions, Actors, Strategies* (2005) 186–206.

<sup>24</sup> UN Office of the High Commissioner for Human Rights, *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies* (2002) 48.

44. For strategies to be effective, Aboriginal communities must be empowered, have ownership of the programs and be provided with sufficient support to enable them to run effectively. A report of the Combined Aboriginal Organisations of the Northern Territory warned that if the Australian Government's measures are implemented without community consent and ownership, there is a risk that problems such as alcohol addiction

will be driven underground and that initiatives to help prevent child sexual abuse and family violence will be resisted.<sup>25</sup>

45. The HRLRC considers that there should have been significant consultation with Indigenous people to determine the best measures to address the issues considered by the Bill.

### **5.3 Specific Issues raised by the Bill**

#### **(a) Repeal of the Permit System**

46. Amendments introduced as part of the Northern Territory Intervention to give public access to certain Aboriginal land raised issues in relation to, among other rights, the right of self-determination for Indigenous peoples. The proposal of the current Bill to repeal the provisions that abolished the permit system is a commendable removal of provisions which were disproportionate and had little connection to the stated aim of the Northern Territory Intervention. However, returning to the previous permit system without full and comprehensive consultation with Indigenous people once again imposes legislative changes on Indigenous people without their involvement in the decision-making process.
47. The HRLRC also notes that the provisions of the Bill enable the Minister to make authorisations providing access to Indigenous land to certain people for the period of the Northern Territory Intervention. The HRLRC considers that Indigenous communities should be consulted about the adequacy of this provision. In particular, the HRLRC notes that there appears to be no requirement for the Minister to consult with Indigenous communities about whether to grant a permit to a non-Indigenous person to enter Indigenous land, nor are there any criteria which the Minister should consider when making an authorisation or imposing a condition on an authorisation. This once again raises concerns in relation to the right of self-determination; if decisions are made in relation to accessing Indigenous land, Indigenous people must be involved in that decision-making process.

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<sup>25</sup> Combined Aboriginal Organisations of the Northern Territory, *A proposed Emergency Response and Development Plan to protect Aboriginal children in the Northern Territory: A preliminary response to the Australian Government's proposals* (July 2007), 8.

**(b) Prohibition on R 18+ Programming**

48. For the same reasons that are discussed above, the HRLRC is concerned that Indigenous peoples have not been adequately consulted and provided with the opportunity to participate in decision-making processes in relation to the proposed amendments concerning the prohibition of access to declared subscription television services and the declaration of prescribed areas. While the amendments provide that the Minister ensure that there has been adequate community consultation once a request has been made for such a determination, the HRLRC notes that this consultation is 'after the fact' and does not relate to the development and implementation of such laws and policies. Indigenous people must be consulted and participate in the development of appropriate and adapted laws in the first place to best address this issue.
49. The HRLRC also notes that the community consultation requirements contained in the Bill only have a limited application in that a contravention of the requirement of the Minister to consult will not affect the validity of his or her determination. This issue is discussed further in relation to the right to an effective remedy.
50. Finally, the HRLRC is also concerned that the provisions of the Bill do not address the recommendations contained in the *Little Children are Sacred* report. Recommendation 87 of the report emphasises that education is the key to helping children and communities foster safe, well adjusted families. However, the Bill fails to provide for measures for schools and education campaigns to address issues of sexual abuse and the impact of alcohol and pornography.

**Recommendation 4:**

Measures that relate to Indigenous communities must be culturally sensitive and conscious of the meaningful connection that Indigenous people have to the land. This requires the recognition of the right of self-determination of Indigenous peoples and the need for a high level of consultation with and participation of Indigenous people about matters which directly affect them.

## 6. The Rights of the Child

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51. In introducing the NT intervention legislation, the Australian Government clearly stated that the emergency measures were intended to protect the rights of Indigenous children as set out in the *CRC*, and were undertaken in furtherance of Australia's human rights obligations. The Explanatory Memorandum for the Northern Territory National Emergency Response Bill 2007 (Cth) sets out the Australian Government's position on how the measures announced are consistent with Australia's human rights obligations:

The impact of sexual abuse on indigenous children, families and communities is a most serious issue requiring decisive and prompt action. The Northern Territory national emergency response will protect children and implement Australia's obligations under human rights treaties.<sup>26</sup>

52. Despite its purported aims, the Northern Territory Intervention legislation entirely fails to use a children's rights framework to address the complex issue of the protection of children from sexual abuse in Indigenous communities. Notwithstanding its descriptor as a 'national emergency intervention', the Australian Government has made no effort to use children's rights and human rights principles to frame its response. In this respect, there has been little or no attempt to use the *CRC* or the notion of children as 'rights bearers'.

### 6.1 A Children's Rights Framework

53. The Bill, as well as the Northern Territory Intervention legislative framework, while attempting to protect children, should not undermine the protection of children's rights more broadly. The right to survival and development outlined in article 6 of the *CRC* must be interpreted in the 'broadest sense as an holistic concept, embracing the child's physical, mental, spiritual, moral, psychological and social development'.<sup>27</sup> This holistic approach includes respect of and support for the important role that the family and community play in a child's life.<sup>28</sup> This approach requires that full consideration of the impact of legislation be considered, not just on the child but also on their family and their community.

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<sup>26</sup> Northern Territory Emergency National Response Bill 2007, Explanatory Memorandum, 76, available at [www.austlii.edu.au/au/legis/cth/bill\\_em/ntnerb2007541/memo\\_0.html](http://www.austlii.edu.au/au/legis/cth/bill_em/ntnerb2007541/memo_0.html).

<sup>27</sup> Committee on the Rights of the Child, *General Comment No.5 (2003) General Measures of Implementation for the Committee on the Rights of the Child*, CRC/GC/2003/5, [12].

<sup>28</sup> *Convention on the Rights of the Child*, art 5.

54. It also requires that any approach gives consideration to the views of the child with regard to the child's age and maturity. This right not only to participate in decision making but also to have an impact on the outcome is clearly set out in article 12 of the *CRC*. In circumstances where legislation will have such a substantive impact on the lives of children, a human rights framework demands that it is formulated through a meaningful consultation process.
55. Finally, and most importantly, article 3(1) of the *CRC* requires that in all actions concerning children the 'best interests' of the child must be a paramount consideration. This overarching principle within the children's rights framework requires that any actions are based on evidence and can be objectively demonstrated to be in the best interests of the child. This assessment cannot rely on speculation, assumption or conjecture; it must be assessed using objective criteria and, wherever possible, by considering the views of children.

## **6.2 Specific Issues raised by the Bill**

### **(a) *Repeal of the Permit System***

56. Given that legislative measures relating to the permit system over Indigenous land have been enacted, purportedly to curb the issue of child sexual abuse, it is essential that such legislative measures are determined by reference to a children's rights framework. However, those provisions of the Bill that relate to the permit system entirely fail to even consider the rights of children.

### **(b) *Prohibition on R 18+ Programming***

57. New section 127D of the *Northern Territory National Emergency Response Act 2007* (Cth) provides a number of matters that the Minister must have regard to when determining whether to declare a prescribed area for the purposes of prohibiting the broadcast of R 18+ programs. The HRLRC notes that, according to the Explanatory Memorandum, these matters are to ensure that the sole purpose of making such a determination is to help secure the adequate enjoyment or exercise of the human rights of the *residents* of the particular prescribed area.
58. The HRLRC is particularly concerned that the matters to which the Minister must have regard are not framed in a children's rights framework but instead by reference to the residents of the prescribed area.

***Recommendation 5:***

The UN *Convention on the Rights of the Child* and the notion of children as 'rights bearers' should be used as benchmarks against which to develop, implement and monitor laws and policies that aimed at protecting children in Indigenous communities from sexual abuse.

## 7. The Right to an Effective Remedy

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### 7.1 Content of the Right to an Effective Remedy

59. The requirement to provide an 'effective remedy' as part of a state's obligations in relation to particular human rights is found in many human rights conventions, including under the *ICCPR*, *CERD* and *CRC*. For example, under article 2(2) of the *ICCPR*, states undertake to 'adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant', and article 2(3)(a) further provides that states must ensure that people whose rights are violated have an 'effective remedy'. The right to an effective remedy is particularly important in situations where 'special measures' exist to ensure the development and protection of fundamental freedoms of particular vulnerable groups.
60. In *General Comment No. 31*, the UN Human Rights Committee addressed the implementation obligations that article 2 of the *ICCPR* imposes on states parties.<sup>29</sup> The Committee observed the 'unqualified' nature of the obligation expressed in article 2(2), stating that a failure to comply with the obligation 'cannot be justified by reference to political, social, cultural or economic considerations within the State'.
61. In relation to article 2(3), the UN Human Rights Committee stated that states must provide individuals with accessible domestic remedies, which should be appropriately adapted so as to take account of the 'special vulnerabilities of certain categories of person, including in particular children'.<sup>30</sup> The Committee also considers that the right to an effective remedy imposes on the state a duty to investigate allegations of human rights breaches, and the failure to discharge that duty may itself constitute a separate breach of the *ICCPR*.<sup>31</sup>
62. One particular concern in relation to the Bill, and indeed the Northern Territory Intervention more broadly, is the absence of many of the ordinary protections and safeguards, such as the right to external review of the decision making processes, that exist in our system of government. Indeed, the Senate Standing Committee for the Scrutiny of Bills reported a number of concerns about the Northern Territory Intervention legislation to the Parliament, including the potential exercise of significant executive power without parliamentary

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<sup>29</sup> UN Human Rights Committee, *General Comment No. 31*, above n 17.

<sup>30</sup> *Ibid* [15].

<sup>31</sup> *Ibid* [18].



scrutiny and the exclusion of a merits review system. The concern in relation to the absence of a right to review is exacerbated by the absence of consultation with Indigenous peoples in relation to the Bill and the Northern Territory Intervention.

63. The description of the Northern Territory Intervention as an 'emergency' measure has also been relied upon by the Australian Government to justify the absence of many of the ordinary democratic protections and safeguards, such as rights to external review of decision making processes. In fact, the legislation explicitly *disentitles* Indigenous peoples to many of these protections.

## 7.2 Specific Issues raised by the Bill

### (a) *Repeal of the Permit System*

64. Amendments to the Land Rights Act by the Bill provide for the Minister to allow access to Indigenous land. The HRLRC notes that there is no requirement for the Minister to consult with Indigenous land owners and that, in particular, there are no avenues by which an affected Indigenous community may seek a review of the Minister's decision.

### (b) *Prohibition on R 18+ Programming*

65. The HRLRC notes that while the new section 127C of the *Northern Territory National Emergency Response Act 2007* (Cth) provides that the Minister must ensure that there has been adequate community consultation before declaring a prescribed area for the purposes of prohibiting the broadcast of R 18+ programs, a failure of the Minister to consult adequately with the community does not affect the validity of a determination. This raises concerns in relation to the right to an effective remedy.

#### **Recommendation 6:**

Affected individuals must have available to them effective remedies to be able to review decisions under the Northern Territory Intervention 'emergency' measures that impact on the human rights of Indigenous peoples.