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Submission to the Senate Community Affairs Legislation Committee

Inquiry into the Social Security and other Legislation Amendment (Welfare Reform and Reinstatement of the Racial Discrimination Act) Bill 2009 and Related Bills

This submission is provided on behalf of Dr Peter Billings and Dr Anthony Cassimatis (with the assistance of Ms Nikita Tuckett) to the Community Affairs Legislation Committee in relation to the Australian Government's proposed social welfare law reforms, the evidence base for the proposed changes and the costs of the proposed measures. Additionally, this submission considers the proposed reinstatement of the *Racial Discrimination Act 1975* (Cth) (and local analogues in the NT and Qld) in relation to those laws giving effect to the Northern Territory Emergency Response (NTER).

The submission includes references to the proposed laws and their consistency with international law provisions in: the *Convention on the Rights of the Child*; *International Covenant on Economic Social and Cultural Rights*; and *International Covenant on the Elimination of Racial Discrimination*.

A. Proposed Income Management Regime

Introduction

1. The proposed legislation seeks to introduce a new scheme of income management that is non-discriminatory, in order to address 'passive welfare' in disadvantaged regions across Australia. The existing schemes of income management in the NT, pursuant to the NTER laws, are to be repealed. The proposed scheme will operate alongside several other schemes of income management operating in parts of Queensland, WA and the NT. The Australian Government points to evidence that the administration of income management in the NT has yielded positive outcomes for indigenous children, and, furthermore, cites

the NTER Redesign Consultations as confirmation of popular support for the continuation of income support among indigenous communities.[1]

2. By quarantining 50% of regular welfare payments and 100% of lump sum payments the Government is seeking, *inter alia*, to ensure that social security benefits are spent in a manner that serves the best interests of the child. The 'best interests of the child' is a guiding principle of international law (art.3 *UN Convention on the Rights of the Child* (*CRC*)) in respect of actions taken by public bodies, including the legislature. The *CRC* is a child-centred convention that covers a bundle of civil and political, *and* economic social and cultural rights, it is a means of enhancing the recognition of children as autonomous rights-holders, rather than simply operating as a protection mechanism. Because the *CRC* embraces the full range of human rights it provides evidence of the **interdependence and invisibility of human rights** under international law.

3. The 'best interests of the child' is 'a primary consideration' under the *CRC*, a consideration of first importance among other considerations, but they do not have absolute priority or override other considerations.[2]

4. Respect for children's views (art.12 *CRC*): it is a fundamental requirement that where decisions are taken relating to the best interests of the child, and the maturity of the child indicates it is appropriate, the views of the child[ren] should be taken into account.[3] This provision underscores the *CRC*'s emphasis that children are regarded as active subjects of international law.

5. In terms of both the NTER laws and the proposed legislation, the Australian Government has framed its interventions in terms of Australia's human rights treaty obligations.[4] The Minister for Families, Housing, Community Services and Indigenous Affairs has publicly

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[1] Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2009, 13 (Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs)

[2] R Shackel, "The UN Convention on the Rights of the Child" [2003] *Australian International Law Journal*, 21, 36.

[3] *Ibid*., at 37, citing J. Eekelaar in P. Alston (ed) *The Best Interests of the Child: Reconciling Culture and Human Rights* (Clarendon Press, 1994).

[4] E.g. Explanatory Memorandum, Northern Territory Emergency Response Bill 2007 (Cth) 76; and, Evidence to Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, 10 August 2007, 77-79 (Sue Gordon, NTER Taskforce Chairperson).

stated that: "when it comes to human rights the most important human right that I feel as a minister I have to confront is the need to protect the rights of the most vulnerable, particularly children."[5]

6. Aspects of the proposed income management scheme (and those schemes currently in force) relate to *fundamental* requirements in the *CRC*, such as, art.6 (children's survival and development) and to related provisions including, art.19 (protection from... neglect or negligent treatment) art.24 (right to... health) and also art.26 (children's right to benefit from social security). However, it does not automatically follow that the approach taken (the legal and administrative measures) is 'appropriate' (art.19 and art.24 *CRC*) or 'necessary' (art. 26 *CRC*). As the Social Justice Commissioner observed in his 2007 *Social Justice Report* there are a complex range of human rights issues raised by the NTER and it "is important to acknowledge at the outset the overlapping and inter-connected nature of these different human rights. This reflects that human rights are **universal** and **indivisible**."[6]

7. The Social Justice Commissioner's comments apply with equal force in relation to the proposed legislation and the Government's approach should not privilege the enjoyment of one human right over that of another, as if different rights are in competition with each other or subject to a hierarchy of 'more important' and 'less important' rights. The Australian Government has recognized the importance of reforming the NTER with reference to international law requirements[7] and this submission draws attention to particular human rights concerns with the proposed law and its administration. In particular it examines whether the Governments proposals to promote the best interests of the child are consistent with other human rights (social security) and proportionate, or whether they result (or have the potential to result) in breaches of other rights.

Commentary

[5] "Intervention Protects Vulnerable: Macklin" *ABC News* (28 August 2009).

[6] Social Justice Commissioner, *Social Justice Report* (2007) 238.

[7] For example, Explanatory Memorandum, Families, Housing, Community Services, Indigenous Affairs and Other Legislation (Emergency response Consolidation) Amendment Bill 2008 (defeated in the Senate).

8. The proposed repeal of the indiscriminate scheme of income management is to be welcomed. The management of welfare payments of residents in prescribed areas in the NT irrespective of their particular circumstances, their child's health or whether they have child-care responsibilities, is a blunt instrument; it represents a disproportionate means of securing legitimate ends (such as child protection and the promotion of rights to health, education, property and social security). The scheme violates the right to social security without discrimination[8] and equal treatment before tribunals.[9]

9. The proposed scheme of income management, and the other non-voluntary schemes operating in parts of Australia at present, are united by the rationale that moderating peoples' control over their social welfare entitlements will lead to behaviour modification and the regeneration of dysfunctional communities, families and individuals, thereby yielding real improvements in the socio-economic status of children and families. There is little credible **evidence**, publicly available, to support the Government's contention that financial levers (the conditioning of social welfare payments) operate effectively to promote socially responsible behaviour.[10] The Australian Government's approach to social security reform has, in part, been based on third parties' perceptions of income management. With respect, the impartiality of Government Business Managers and their credentials for making assessments about what works are debatable. This concern derives from GBMs citing their own introduction into communities as one of the key measures most extensively perceived (by them) to have had a positive impact on communities.[11] Additionally, the positive assessment of income management is based on the views of

[8] *International Covenant on the Elimination of Racial Discrimination* (*ICERD*) art.5(e)(iv) (non-discrimination in the enjoyment of social security) and *International Covenant on Economic Social and Cultural Rights* (*ICESCR*) art.2(2) (rights shall be exercised without discrimination of any kind as to race ... or other status).

[9] *ICERD* art.5(a) The reinstatement of appeal rights for those people subject to income management (pursuant to the *Family Assistance and other Legislation Amendment (2008 Budget and Other Measures) Act 2009* (Cth) sch.2) is of little practical value. Equal access to justice is still denied because only those individuals subject to welfare quarantining *after* the Act's commencement date (24 June 2009) have access to merits review before the SSAT leaving over 15,000 income managed people already subject to income management unassisted.

[10] Explanatory memorandum, Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Cth), 12.

[11] Department of Families, Housing, Community Services and Indigenous Affairs, *Survey of Government Business Managers relating to the impact of the Northern Territory Emergency Response – Report of Findings* (July 2008) ('*GBM Survey*') 8. Cf Northern Territory Emergency Response Review Board, Department of Families, Housing, Community Services and Indigenous Affairs, *Northern Territory Emergency Response - Report of the NTER Review Board* (2008) ('*Report of the NTER Review Board*') at 44-45, 49.

community store operators.[12] Claims that income management has led to increased purchasing of fresh food derive from surveying stores that "are going to want to show that they have been increasing sales of fresh fruit and vegetables",[13] or risk losing their store licence.

10. The Minister for Families, Housing, Community Services and Indigenous Affairs has also relied on selected parts of an Australian Institute for Health and Welfare (AIHW) evaluation of income management, to buttress the Government's position.[14] This study analysed data gathered from interviews with 76 *selected* residents and 167 stakeholders in four prescribed areas in addition to other studies, including the GBM survey and community store survey. The AIHW report states that the research findings "would all sit towards the bottom of an evidence hierarchy" and "overall evidence about the effectiveness of income management was not strong."[15]

11. In **summary**, there is no satisfactory data available on which to gauge the success of welfare quarantining, it is often anecdotal and it is not independent.

12. What *is* clearer is that **community views** on different facets of the NTER are divergent,[16] although the Government maintain a majority of those asked during part of its NTER redesign consultation process supported the continuation of income management on a non-discriminatory basis.[17] However, the integrity of the process and validity of the consultation processes' results have been undermined by an independent analysis of three

[12] Department of Families, Housing, Community Services and Indigenous Affairs, *Final Stores Post Licensing Monitoring Report* (June 2009) (FaHCSIA, '*Final Stores Post Licensing Report'*); and, Commonwealth, *Questions without notice*, House of Representatives, 25 November 2009, 60 (Jenny Macklin).

[13] Commonwealth, *Parliamentary Debates*, Senate, 18 June 2009, 3668 (Senator Rachel Siewert).

[14] Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2009 13 (Jenny Macklin).

[15] Australian Institute of Health and Welfare, Department of Families, Housing, Community Services and Indigenous Affairs, *The Evaluation of income management in the Northern Territory* (AIHW, '*Evaluation of income management*') www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/nt_eval_rpt/0_summary.htm viewed 3 December 2009.

[16] See generally, Select Committee on Regional and Remote Indigenous Communities, Parliament of Australia, *Second Report 2009* (25 June 2009) at 73.

[17] Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2009, 13 (Jenny Macklin).

community consultations.[18] This *independent* analysis points to the absence of proper consultation with Aboriginal communities.[19] It is not apparent that communities were *asked* how the government could help and support them to deal with and fashion responses to the structural and environmental issues underlying the well-documented problems affecting individuals and families in parts of the NT.

13. Related to the issues around inadequate consultation is the general point about the lack of transparency regarding the summary reports of community meetings and data quantifying the levels of public support for particular NTER measures. Quantitative data (establishing the numbers of community members actually supporting reforms) was used to reveal the level of community support for the Cape York welfare reform trials (in the Cape York Institute's *From Hand Out to Hand Up* report).[20] Although the process was not flawless (there were documented difficulties with community engagement in Aurukun) the careful reporting on the consultative exercise enhanced the trial's legitimacy and may justify its characterisation as a 'special measure'.

14. The different modalities of welfare reform in the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth), *Family Responsibilities Commission Act 2008* (Qld) and *Social Security and Veterans' Entitlements Legislation Amendment (Schooling Requirements) Act 2008* (Cth) share an emphasis on individual's behaviour as the source of their problems, with structural (environmental) issues underlying people's disadvantage downplayed. This behavioural emphasis, which verges on treating welfare dependency as a pathological condition, marginalises the external causes of welfare reliance and disadvantage. In the context of indigenous peoples, the lack of sensitivity to historical legacies (including the effects of inter-generational trauma and poor public service delivery) when formulating social welfare reforms is at odds with

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[18] A. Nicholson, *et al, Will they be heard? – a response to the NTER Consultations June to August 2009* (November 2009) ('*Will they be heard?*'). Cf. Department of Families, Housing, Community Services and Indigenous Affairs, (Cultural and Indigenous Research Centre Australia) *Report on the NTER Redesign and Engagement Strategy and Implementation – Final Report* (September 2009) (FaHCSIA, '*NTER Redesign and Engagement Strategy Report*') 11.

[19] This lack of adequate consultation also imperils the Government's proposals to maintain other aspects of the NTER by characterising them as 'special measures' for the purposes of the *Racial Discrimination Act 1975* (Cth).

[20] *From Hand Out to Hand Up – Volume 2* chapter 2 (CYI: 2007)

the sentiments expressed in the apology to the 'stolen generations' when the Prime Minister acknowledged the state's responsibility for the injustices of the past.

15. The reasons for socio-economic deprivation are complex and attention should be directed to both the structural and individual causes. Accordingly, given that the proposed scheme of income management is intended to "help people order their lives and provide for their children"[21] it is the duty of the Government to assist those it is 'hassling' to meet their social responsibilities. Overseas experience suggests that where welfare management programs combine case management, support services and sanctions they yield a limited but positive impact (on school attendance).[22] Therefore, the Australian Government must ensure the availability of support services (such as parenting support and financial counsellors) alongside income management. In this regard there are important lessons to be learned from the Cape York Welfare Reform Trial. [It is worth noting that in contrast to other income management trials in Australia, the Cape York scheme sought to incorporate supportive interventions to assist people *before* the imposition of income management. Income management is employed as a measure of last resort in that trial].

16. In the Family Responsibilities Commission's *Annual Report* (2008-09), Commissioner David Glasgow observed:

> The availability and quality of services in the communities has been slow to achieve a consistent approach as the Commission's primary referral services of Wellbeing Centres (WBC), Attendance Case Management (ACM) and Financial Income Management (FIM) have taken time to function effectively. The recruitment of staff, and the lack of operational requirements such as offices and staff housing for some service providers impacted significantly on the quality of service delivery, at least in the first six months of operation. Core processes, secondary referrals, Monthly Progress Reports and the preparation of client files have all had to be developed and put in place. This has meant that, unfortunately, some community members showed a lack of confidence in service providers and hence were reluctant to engage initially.[23]
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> Our ability to make early changes to community conduct has been affected materially by the delay in the delivery of services within each community.[24]

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[21] Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2009 13 (Jenny Macklin).

[22] D. Campbell and J. Wright, 'Rethinking Welfare School-Attendance Policies' (2005) 79(1) *Social Service Review* 2.

[23] Family Responsibilities Commission, *Annual Report 2008-09*, 39.

[24] Ibid., at 46.

17. The Cape York experience reveals how important it is to have the appropriate infrastructure in place prior to the commencement of a welfare reform programme. Therefore, prior to the proposed commencement date for the new scheme support services in urban, regional and remote areas must be carefully established and resourced in order that the quality of the support service is sufficient to meet the needs of 'disengaged youth', 'long-term welfare recipients' and those considered to be 'vulnerable' by Centrelink social workers.

18. One of the main problems with the current (indiscriminate) form of income management in the NT is that it symbolizes a 'return to the ration days' – a reversion to the paternalism of the past. This metaphor is rooted in the reported experiences of some Aboriginal people in the NT. Evidently, the loss of autonomy resulting from income management reminds older generations in prescribed communities of their lack of agency during most of the twentieth century. "For old people the intervention is bringing up bad memories of the past, the old days, the ration days, the dog tag days and the mission days."[25] Comparisons are drawn between the long queues at Centrelink for income management purposes and the queues for station rations in the past, and the stored value/debit cards serve as a marker of difference, resembling the "dog-tag" system of the NT welfare board.[26]

19. Aspects of the proposed scheme of income management also bear a striking resemblance to the treatment of indigenous Australians in the past. The proposal that the disengaged youth and long term welfare payment recipients can be 'exempted' from income management, based on their demonstration of socially responsible behaviour, must be evaluated in that context. For example, the provision of welfare benefits to indigenous Australians, under the *Unemployment and Sickness Benefits Act 1944* (Cth), were only payable where the Director-General of Social Services was satisfied that it was reasonable

[25] Prescribed Area People's Alliance ("PAPA"), *Statement from Women at PAPA Meeting* (September 29, 2008) available at <http://rollbacktheintervention.wordpress.com/>; and, P. Gibson, "They're Working for Rations in Tara", *National Indigenous Times*, October 31, 2008.

[26] The so-called "dog-tag" system of the 1930s required each Aboriginal person in the Darwin district to wear a numbered bronze disc to facilitate their medical supervision and restrict their movements. See also A. Vivian and B. Schokman, "The Northern Territory Intervention and the Fabrication of 'Special Measures'" (2009) 13(1) *Australian Indigenous Law Review* 78, 89.

because of the applicant's social development.[27] While the new proposal is not confined to indigenous Australians, it will in practice be applied to those peoples in the majority of cases, at least initially, thereby evoking memories of a humiliating past for older generations. It is worth reiterating the NTER Review Board found that people subject to income management experienced feelings of humiliation and worthlessness,[28] characteristic of those eras when governments dictated the lives of any person of Aboriginal descent targeted for state "care". The new income management scheme may well engender similar feelings of resentment and anger among indigenous Australians, as the current (indiscriminate) scheme has.[29] It is important 'to understand the lessons of the past and to avoid repeating them to the disadvantage of those we seek to help.'[30]

20. ***The Right to Social Security*** – the existing scheme of income management in prescribed parts of the NT constitutes a breach of the right to social security without discrimination. There is differential treatment, based on race, that impairs the enjoyment of social security and the scheme has no reasonable or objective basis.[31] Specifically,

    a) there is differential treatment in the administration of social welfare payments for those living in prescribed NT communities and those welfare recipients not subject to income management elsewhere in Australia;

    b) the legislated scheme of income management was not directly based upon a person's race colour, descent or national or ethnic origin; it was founded on residency in particular communities. However, the *effects* were felt overwhelmingly by Aboriginal peoples who either solely or predominantly inhabited the relevant areas. Aboriginal peoples constitute the majority of the population of prescribed areas.[32] As such it

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[27] Section 19.

[28] See Northern Territory Emergency Response (NTER) Review Board, *Report of the NTER Review Board* (Commonwealth: 2008) 46.

[29] *Ibid.*, 20.

[30] *Ibid.*, 46.

[31] Committee on Economic Social and Cultural Rights', *General Comment No.20*, 42nd Session, E/C.12/GC/20 (10 June February 2009) para 13; see also, for example, *Belgian Linguistics Case*, Series A No.6 (1968) EHRR 252.

[32] Approximately 87% of residents in prescribed areas are Indigenous: Department of Families, Housing, Community Services and Indigenous Affairs, *Communities and Prescribed Areas* (Australian Government: 2008) available at <www.fahcsia.gov.au/nter/docs/factsheets/overview/factsheet_nter_communities.htm>.

disproportionately affects a racial group.[33] Furthermore, references to the over-representation of Aboriginal children in the child protection system served to help justify the character of the intervention, fortifying the view that Aboriginal peoples were the intended targets;[34]

c) the different administration of welfare for people living in "prescribed" communities did *not* nullify the enjoyment of their social security rights, *per se*, by reason of the alternative provision of support, because the right to social security may be realised in cash or in kind.[35] Therefore, a discrimination claim *may* not be sustained "on the grounds that social security was provided to one group in a different way than another *so long as the availability, adequacy and economic and physical accessibility were unaffected*" [added emphasis].[36]

Although the quarantining of welfare entitlement does not, in law, result in a loss of entitlements, it has proved to be inconsistent with the obligation to ensure benefits are available and accessible.[37] The form in which welfare is provided and its administration has led to, *inter alia*: (1) people in Alice Springs being denied money for food and drink for two days because the BasicsCard system broke down;[38] (2) people's unfamiliarity with the scheme resulting in them not realising the full monetary worth of stored value cards; (3) confusion and anxiety among those subject to income management, owing to the absence of clear and transparent information about welfare quarantining, compounded by the fact that English is not the first language for many affected; (4) the expenditure of large sums of money by welfare

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[33] Committee on the Elimination of Racial Discrimination, *General Recommendation No. 14*, 42nd Session, A/48/18 (22 March 1993) para.2, noting that an action that has an unjustifiable disparate impact upon a group distinguished by, *inter alia*, race, is contrary to the CERD.

[34] Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, p.4 (M. Brough MP Minister for Families, Community Services and Indigenous Affairs and Minister Assisting the Prime Minister for Indigenous Affairs)..

[35] Committee on Economic Social and Cultural Rights', fn.23 above, para.2.

[36] J. Tooze, "The Right to Social Security and Social Assistance" in M. Baderin and R. McCorquodale (eds) *Economic, Social and Cultural Rights in Action* (Oxford: Oxford University Press 2007), p.351, discussing the right to social security generally, not in relation to the intervention specifically.

[37] Committee on Economic Social and Cultural Rights', fn.31 above, para.11 (availability) and paras.23-27 (accessibility).

[38] T. Ravens, "Aborigines 'Denied Money For Essentials'", *Australian Associated Press*, January 19, 2009, available at <www.news.com.au/story/0,27574,24933009-421,00.html>.

recipients from remote communities simply to reach designated stores, due to the restrictions placed on the retail outlets where people can spend their welfare payments; and, (5) people living or shopping in the major regional centres suffering humiliation and overt racism because of the difficulties associated with acquiring and using store cards.[39] It has been the circumstances arising from the administration and operation of income management that impairs the exercise and enjoyment of social welfare rights, because the availability and physical accessibility of benefits are adversely affected in many instances;

d) the difference in treatment between welfare recipients in prescribed NT areas and other welfare recipients across Australia was without a reasonable justification. An assessment of "reasonableness" or "necessity" involves the application of a proportionality test in order to determine whether the restriction on the enjoyment of rights is lawful.[40] The former Federal government claimed social welfare quarantining served several important objectives: including, child protection from sexual, physical and mental violence, and the promotion of rights to health, education, property and social security.[41] Those are legitimate aims, however the government appeared to *simply* privilege these rights over the right to non-discrimination, without due consideration as to whether their lawful objectives could be pursued by less intrusive means that did not entail the indiscriminate application of income management. Arguably, the blanket nature of the scheme, irrespective of personal circumstances and culpability, was a disproportionate means to pursue legitimate ends and is not, therefore, reasonably justifiable.

21. **In summary**, the conclusion that welfare quarantining is inconsistent with the right to social security without discrimination stems from the available evidence which documents problems with the administration of a scheme that has not always ensured welfare benefits are available and accessible, and because less invasive means could have

[39] See NTER Review Board, fn.28 above; and Commonwealth Ombudsman, *Annual Report 2007-08* (2008), pp.100-101.

[40] See *Belgian Linguistics Case*, fn. 31 above, and J. Hunyor, "Is It Time to Re-think Special Measures Under the Racial Discrimination Act? The Case of the Northern Territory Intervention" (2009) 14(2) A.J.H.R 39, pp.64-65, where the author outlines the approach endorsed by the Australian Human Rights Commission in respect of the legitimacy of limitations on rights. It is not yet an approach approved by the judiciary in Australia.

[41] Income management may help realise living conditions that promote the enjoyment of some rights in, *inter alia*, the *ICESCR*, for example arts 9, 10, 11 and 12 and the *CRC* (see para.6 of this submission).

been employed to secure the desired outcomes. While the proposed scheme for income management is not based on race, the administration of income management must be monitored. Should the operation of income management create barriers to the availability and physical accessibility of welfare support (note para 18(c)) above) Australia would be in breach of its obligation to respect people's rights to adequate social security and social assistance, contrary to art. 9 *ICESCR*. [See comments on the proposed welfare scheme and 'indirect' discrimination below in Part B].

22. ***Retrogressive measures*** The proposed legislation may conflict with the strong presumption that "retrogressive measures taken in relation to the right to social security are prohibited under the Covenant."[42] In examining whether States Parties have violated this legal obligation the UN Economic Social and Cultural Rights Committee will look at whether: (a) there was a reasonable justification for the action; (b) alternatives were comprehensively examined; (c) there was genuine participation of affected groups in examining the proposed measures and alternatives; (d) the measures were directly or indirectly discriminatory; (e) the measures will have a sustained impact on the realization of the right to social security, an unreasonable impact on acquired social security rights or whether an individual or group is deprived of access to the minimum level of social security; and (f) whether there was an independent review of the measures at national level.

23. The proposed legislation is intended to address child neglect, encourage responsible parenting and to stimulate participation in education or training among the young and long term unemployed in disadvantaged parts of Australia. The Government has used people's reliance on the State for support as additional leverage to encourage behavioural change. The proposed scheme may be reasonably justified on child protection grounds: evidence suggests that children living in poverty have a higher incidence of child abuse and neglect and their parents have poorer parenting skills. There is a marked relationship between the rates of abuse and neglect and socio-economic group: children from the lowest socio-economic groups suffering a greater incidence of abuse and neglect.[43]

[42] Committee on Economic Social and Cultural Rights', fn.31 above, para.42.

[43] Commonwealth, Senate and Community Affairs Committee, *A Hand Up Not A Hand Out – Reviewing the Fight Against Poverty* (2004) 258-259.

24. The administration of income management comes at great cost to the taxpayer and more cost-effective alternatives should be explored that may yield a greater social return than the (at best) marginal benefits that have accrued under the trials occurring within Australia and overseas. For example, Dr Chris Sarra has effectively questioned the cost-effectiveness of the school attendance limb of the Cape York Welfare Reform Trial.[44] Dr Sarra has questioned whether the $48M spent on 600 students is the most cost-effective way of improving school attendance and engagement and pointed to the cheaper and highly effective "strong and smart" philosophy in Cherbourg that yielded a more viable and sustainable improvement in student's engagement in school. By the same token, before committing over $400M of taxpayer's money over five years to income management,[45] more economical and sustainable alternative approaches to child protection and disengagement from the education and the workforce require public scrutiny.[46] Arguably, more material support, rather than more coercive state intervention, is needed to support impoverished families.

25. The proposed amendments to social security laws are intended to apply to all welfare recipients (across the NT in the first instance). To date, it is not clear that the intended subjects of income management have genuinely participated in the development of the proposals and the examination of alternatives. The NTER redesign consultations were with indigenous Australians (accordingly, there does not appear to have been consultations with non-indigenous welfare recipients who are also subjects of the proposed scheme) and the Government has indicated that its options for income management were not prescriptive; rather they served as a starting point for discussions about income management.[47] However, the authors of the *Will They Be Heard* report have noted:

> The consultations were framed within a prescriptive context of asserted benefit, providing no more than a forum for comment on the Government's proposed changes. Such a framework

[44] "Positive Not Punitive the Best Approach" *The Australian* (October 3, 2009).

[45] Explanatory Memorandum, Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 – 'financial impact statement'.

[46] The recent reporting of the Coronial inquiry into the deaths of two children in the NT suggests that, *inter alia*, additional (human) resourcing for the child protection system in the NT is warranted ("Territory Slammed Over Child Deaths" *The Australian* (January 20, 2010).

[47] Explanatory Memorandum, Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009, 11.

> falls a long way short of the requirement that consultations be undertaken in good faith... and providing a genuine opportunity to influence decision-making.[48]

26. Although there is no loss of welfare entitlements under the proposed scheme, the documented problems with the administration of income management (and the BasicsCard) in the NT give rise to serious grounds for concern regarding the impact of income management on individual's ability to realize their right to social security and access a minimum level of support necessary for a dignified life.

27. **In summary**, income management may conflict with the strong presumption that retrogressive measures taken in relation to the right to social security are prohibited under the *International Covenant on Economic Social and Cultural Rights*. Although income management may be justified on the basis of child protection it is unclear whether the viability and cost-effectiveness of alternative measures have been comprehensively considered. Nor is it apparent that those welfare recipients who are to be affected by the proposed regime genuinely participated in examining the proposals (and any alternatives). The Commonwealth Ombudsman's finding that there were more complaints about income management than any other aspect of the intervention in its first year of operation[49] (along with the issues around access and availability of benefits (para. 20(d)) suggest that, the administration of the proposed measures may impact on the realization of social security rights.

[48] A Nicholson et al, *Will They Be Heard?* at 10 [44].

[49] Commonwealth Ombudsman, *Annual Report 2007-08* (2008) 101.

B. The *RDA 1975 (Cth)* non discrimination and the operation of the proposed scheme

28. According to Professor Ian Brownlie:

> [t]here is a growing body of legal materials on the criteria by which illegal discrimination may be distinguished from reasonable measures of differentiation, ie legal discrimination.[50] The principle of equality before the law allows for factual differences such as sex or age and is not based on a mechanical conception of equality. The distinction must have an objective justification;[51] the means employed to establish a different treatment must be proportionate to the justification for differentiation;[52] and there is a burden of proof on the Party seeking to set up an exception to the equality principle. The provisions of Article I of the International Convention on the Elimination of All Forms of Racial Discrimination, 1966 ... , are of particular interest:
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> > 1. In this Convention, the term 'racial discrimination' shall mean 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.
> > ...
> > 4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.[53]

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[50] See *Minority Schools in Albania* (1935), PCIJ, Ser A/B, no 64. *Association Protestante v Radiodiffusion-Television Belge*, ILR 47, 198; *Beth-El Mission v Minister of Social Welfare*, ILR 47, 205. [Footnote in original.]

[51] See Judge Tanaka, ICJ Reports (1966), at 302-316; *Belgian Linguistics* case (Merits), ECHR Judgment of 23 July 1968, ILR 45, 136, 163-166, 173-174, 180-181, 199-201, 216-217; *National Union of Belgian Police* case, ECHR, Ser A, vol 19, 19-92; *Swedish Engine Drivers' Union* case, ibid, vol 20, 1617; *Schmidt and Dahlstrom* case, ibid, vol 21, 16-18; *Case of Engel and Others*, ibid, vol 22, 29-31; *Marckx* case, ibid, vol 87, 12-16; *Abdulaziz* case, ibid, vol 94, 35-41; *James and Others*, ibid, vol 98, 44-46; *Lithgow and Others*, ibid, vol 102, 66-70; *Gillow* case, ibid, vol 109, 25-26; *Mathieu-Mohin and Clerfayt* case, ibid, vol 113, 26; *Monnell and Morris* case, ibid, vol 115, 26-27; *Bouamar* case, ibid, vol 129, 25-26. [Footnote in original.]

[52] *Belgian Linguistics* case, last note; *Societe X, W et Z v Republique Federale d'Allemagne*, Europ.Comm. of HR, Collection of Decisions, vol 35, 1. [Footnote in original.]

[53] Ian Brownlie, Principles of Public International Law, 7th edition, Oxford University Press, Oxford, 2008, 573-574.

29. The Committee on the Elimination of Racial Discrimination emphasised, in 2009, that there existed an "essential unity of concept and purpose" between Article 1(4) and Article 2(2) of the convention.[54] Article 2(2) provides:

> States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

30. Numerous concerns have been raised regarding the Australian legislation, enacted in 2007, to implement the NTER and its consistency with the international legal obligations assumed by Australia under, *inter alia*, Articles 1(1) and 1(4) of the *International Convention on the Elimination of All Forms of Racial Discrimination*, 1966 ("*CERD*"), and the *International Covenant on Civil and Political Rights*, 1966 ("*ICCPR*"). The Human Rights Committee observed, for example, in its 2009 concluding observations to Australia's periodic report under the *ICCPR*:

> The Committee notes with concern that certain of the Northern Territory Emergency Response (NTER) measures adopted by the State party to respond to the findings of the report of the Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse in the Northern Territory ("Little Children are Sacred" of 2007) are inconsistent with the State party's obligations under the Covenant. It is particularly concerned at the negative impact of the NTER measures on the enjoyment of the rights of indigenous peoples and at the fact that they suspend the operation of the Racial Discrimination Act 1975 and were adopted without adequate consultation with the indigenous peoples. (arts. 2, 24, 26 and 27). **The State party should redesign NTER measures in direct consultation with the indigenous peoples concerned, in order to ensure that they are consistent with the 1975 Racial Discrimination Act and the Covenant.**[55]

31. Commenting on the Northern Territory Intervention (as initially implemented), the United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, stressed:

> ... that affirmative measures by the Government to address the extreme disadvantage faced by indigenous peoples and issues of safety for children and women are not only justified, but they are in fact required under Australia's international human rights obligations. However,

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[54] Committee on the Elimination of Racial Discrimination, "General Recommendation No 32 - The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination", Seventy-fifth session, August 2009 [29].

[55] Human Rights Committee, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant - Concluding Observations of the Human Rights Committee - Australia, Ninety-fifth session, New York, 16 March- 3 April 2009, UN Doc CCPR/C/AUS/CO/5, 7 May 2009, 3-4 [14]. [Emphasis in original.]

> any such measure must be devised and carried out with due regard of the rights of indigenous peoples to self-determination and to be free from racial discrimination and indignity. ... In this connection, any special measure that infringes on the basic rights of indigenous peoples must be narrowly tailored, proportional, and necessary to achieve the legitimate objectives being pursued. It is the view of the Special Rapporteur that the Northern Territory Emergency Response does not meet these requirements. As currently configured and carried out, the Emergency Response is incompatible with Australia's obligations under the Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights, treaties to which Australia is a party, as well as incompatible with the Declaration on the Rights of Indigenous Peoples, to which Australia has affirmed its support.[56]

The Special Rapporteur "noted with satisfaction" that:

> ...a process to reform the Emergency Response [was] currently underway and that the Government [had] initiated consultations with indigenous groups in the Northern Territory in this connection. He expresse[d] hope that amendments to the Emergency Response [would] diminish or remove its discriminatory aspects and adequately take into account the rights of aboriginal peoples to self determination and culture integrity, in order to bring this Government initiative in line with Australia's international obligations. Furthermore, the Special Rapporteur urge[d] the Government to act swiftly to reinstate the protections of the Racial Discrimination Act in regard to the indigenous peoples of the Northern Territory.[57]

32. The *Social Security and other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill* 2009 ("the Bill") appears to address some of the concerns expressed regarding compliance with Australia's obligations under international law in respect of the elimination of racial discrimination. Schedule 1 of the Bill, for example, reinstates Federal, State and Territory anti discrimination laws.

33. *Nonetheless*, at least two aspects of the proposed amendments may not go far enough to discharge the burden of proof referred to by Professor Brownlie. Specifically, the proposed welfare quarantining measures appear to still have a **disproportionate effect** upon indigenous Australians by virtue their application in areas with significant indigenous populations, albeit "as a first step in a future national roll out of income management to disadvantaged regions".[58] Although Schedule 2 of the Bill clearly removes a number of the objectionable features of the initial legislation, it is not clear that the bill will not still have a discriminatory "effect" (which is all that is required under art. 1(1) of the *CERD*).

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[56] Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, Addendum, Preliminary Note on the Situation of Indigenous Peoples in Australia, Human Rights Council, A/HRC/12/34/Add.10, 24 September 2009, (Advance Unedited Version), 3 [7-8].

[57] Ibid, 3 [9].

[58] Parliament of the Commonwealth of Australia, House of Representatives, *Social Security and other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill* 2009 - Explanatory Memorandum, 12.

34. Secondly, the Bill addresses significant shortcomings regarding reviewability of decisions made as part of the NTER.[59] Given the isolation and disadvantage of aboriginal communities it is not clear whether the mere establishment of formal legal remedies is sufficient to discharge the burden of proof regarding compliance with Australia's international legal obligations: **access to justice** issues appear to arise and remain a source of concern.

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Dr Anthony Cassimatis

[59] Principally, through the provision of merits review before the Social Security Appeals Tribunal and the Administrative Appeals Tribunal.

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