Inquiry into the

Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009

and the

Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Bill 2009

along with the

Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Restoration of Racial Discrimination Act) Bill 2009

1 February 2010

Human Rights Law Resource Centre Ltd
Level 17, 461 Bourke Street
Melbourne VIC 3000
Australia
www.hrlrc.org.au

Prabha Nandagopal and Ben Schokman
Human Rights Law Resource Centre Ltd
Level 17, 461 Bourke Street
Melbourne VIC 3000

Contact : Ben Schokman
T: + 61 3 8636 4451
F: + 61 3 8636 4455
E: ben.schokman@hrlrc.org.au
W: www.hrlrc.org.au

About the Human Rights Law Resource Centre

The Human Rights Law Resource Centre is a non-profit community legal centre that promotes and protects human rights and, in so doing, seeks to alleviate poverty and disadvantage, ensure equality and fair treatment, and enable full participation in society. The Centre also aims to build the capacity of the legal and community sectors to use human rights in their casework, advocacy and service delivery.

The Centre achieves these aims through human rights litigation, education, training, research, policy analysis and advocacy. The Centre undertakes these activities through partnerships which coordinate and leverage the capacity, expertise and networks of pro bono law firms and barristers, university law schools, community legal centres, and other community and human rights organisations.

The Centre works in four priority areas: first, the effective implementation and operation of state, territory and national human rights instruments, such as the *Victorian Charter of Human Rights and Responsibilities*; second, socio-economic rights, particularly the rights to health and adequate housing; third, equality rights, particularly the rights of people with disabilities, people with mental illness and Indigenous peoples; and, fourth, the rights of people in all forms of detention, including prisoners, involuntary patients, asylum seekers and persons deprived of liberty by operation of counter-terrorism laws and measures.

The Centre has been endorsed by the Australian Taxation Office as a public benefit institution attracting deductible gift recipient status.

Contents

1. Introduction and Background

1.1 Scope of this Submission

1. The Human Rights Law Resource Centre (**HRLRC**) welcomes the opportunity to make this submission to the Senate Community Affairs Legislation Committee in relation to the following Bills:

   (a) the Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009; (**Welfare Reform Bill**)

   (b) the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Bill 2009;

   (together, the **Government Bills**);

   and

   (c) the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Restoration of Racial Discrimination Act) Bill 2009 (the **Greens Bill**).

2. The purposes of this submission are:

   (a) to outline the human rights standards and principles that are most relevant to the Northern Territory Intervention and the proposed amendments;

   (b) to assess the compliance of the Bills with international human rights standards; and

   (c) to recommend amendments to the Bills to ensure that the Northern Territory Intervention measures comply with Australia's international human rights obligations.

3. This submission is structured as follows:

   (a) Section 2 is an Executive Summary of the submission;

   (b) Sections 3 and 4 discuss the importance and benefits of ensuring a human rights framework and outline the human rights principles that are most relevant to the Bills;

   (c) Section 5 provides guidance on when, under international human rights law, it is permissible to limit human rights;

   (d) Section 6 discusses the provisions of the Bills relating to the reinstatement of the *Racial Discrimination Act 1975* (Cth);

   (e) Section 7 discusses the proposed amendments to the income management provisions of the Northern Territory Intervention; and

(f) Section 8 discusses the proposed amendments to the income management provisions of the Northern Territory Intervention.

1.2 Background to the Northern Territory Emergency Response

4. In June 2007, the Federal Government announced a "national emergency intervention" into Aboriginal communities in the Northern Territory.[1] Within seven weeks a legislative package[2] was passed with the very broad aim of improving the well-being of certain communities in the Northern Territory (**Northern Territory Intervention**).[3]

5. The provisions of the Northern Territory Intervention legislation were targeted directly at Aboriginal people. As a result, they required the exclusion of the operation of the *Racial Discrimination Act 1975* (Cth) (**Racial Discrimination Act**) in respect of all acts or omissions done under or for the purposes of the Northern Territory Intervention.

6. After one year of operation of the Northern Territory Intervention, the Federal Government established the Northern Territory Emergency Response Review Board (**Review Board**) to conduct "an independent and transparent review of the Northern Territory Intervention".[4] The Review Board released its report on 13 October 2008, concluding that the situation in remote Northern Territory communities and town camps remained "sufficiently acute to be described as a national emergency and that the Northern Territory Intervention should continue".[5]

---

1 Media release by the former Minister for Families, Community Services and Indigenous Affairs, the Hon Mal Brough MP, *National emergency response to protect children in the NT*, 21 June 2007 available at http://www.facsia.gov.au/internet/minister3.nsf/content/emergency_21june07.htm.

2 *Northern Territory National Emergency Response Act 2007* (Cth) ('**NTNER Act**'); *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) ('**Welfare Payment Reform Act**'); *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) ('**FaCSIA Amendment Act**').

3 Section 5 of the NTNER Act.

4 Hon Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, *NT Emergency Response Review Board,* 6 June 2008 at http://www.facsia.gov.au/internet/jennymacklin.nsf/print/nter_measure_23oct08.htm.

5 *Report of the NTER Review Board October 2008* (Commonwealth: 20 September 2008), 10; Hon Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, *Compulsory income management to continue as key NTER measure,* 23 October 2008 at http://www.facsia.gov.au/internet/jennymacklin.nsf/print/nter_measure_23oct08.htm.

7. In making this conclusion, the Review Board made three overarching recommendations:[6]

   (a) there is a continuing need to address the unacceptably high level of disadvantage and social dislocation experienced by Aboriginal Australians living in remote communities in the Northern Territory;

   (b) there is a requirement for a relationship with Aboriginal people based on genuine consultation, engagement and partnership; and

   (c) there is a need for government actions affecting Aboriginal communities to respect Australia's human rights obligations and to conform to the *Racial Discrimination Act*.

8. The Review Board observed that it was told of experiences of racial discrimination and humiliation with such passion and regularity that it felt compelled to advise the Commonwealth Minister for Families, Housing, Community Services and Indigenous Affairs during the course of the review that such widespread Aboriginal hostility to the Federal Government's actions should be regarded as a matter for serious concern.[7]

9. In response to the Review Board's report, the Federal Government acknowledged that the Northern Territory Intervention will not achieve robust long term outcomes if measures do not conform to the *Racial Discrimination Act*.[8] The Federal Government indicated its intention to revise the core measures of the Northern Territory Intervention, such as compulsory income quarantining and compulsory five year leases, so that they are either more clearly "special measures" or non discriminatory, in conformity with the *Racial Discrimination Act*.[9]

10. However, to date, the operation of the *Racial Discrimination Act* continues to be suspended. The purpose of the Government Bills that are the subject of this submission is to bring the Northern Territory Intervention within the scope of the *Racial Discrimination Act*.

---

6 Northern Territory Emergency Response Review Board, *Report of the Northern Territory Emergency Response Review Board* (2008), 12, available at http://www.nterreview.gov.au/report.htm.

7 Ibid 8.

8 Hon Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, *Compulsory income management to continue as key NTER measure,* 23 October 2008 at http://www.facsia.gov.au/internet/jennymacklin.nsf/print/nter_measure_23oct08.htm.

9 Ibid.

2. Executive Summary

11. A significant gap continues to exist between Aboriginal and non-Aboriginal Australians[10] in the realisation of a number of fundamental human rights. The Federal Government is committed to respect the human rights of all Australians and to "Close the Gap" and improve the lives of Australia's Aboriginal peoples. However, regrettably, many aspects of the Northern Territory Intervention continue to have a serious and pervasive effect on Aboriginal communities.

12. The HRLRC is concerned that, despite the amendments proposed by the Government Bills, the Northern Territory Intervention measures will continue to raise serious concerns about Australia's compliance with its human rights obligations.

13. A human rights based approach must be adopted with respect to the Northern Territory Intervention. Specifically, any measures imposed as part of the Northern Territory Intervention must:

    (a) respect the fundamental right to equality and non-discrimination;

    (b) involve the genuine participation of affected Aboriginal communities, respect the right of self-determination, and involve the free, prior and informed consent of those communities; and

    (c) recognise that the rights of Aboriginal communities, women and children are closely linked and that women and children must be protected in a way that is racially non-discriminatory.

14. The Federal Government must demonstrably justify that there is a compelling need for the continuation of the Northern Territory Intervention measures. Any limitation imposed on human rights is only permissible where it is reasonable, necessary and proportionate to do so, and where there is stringent evidence to support the justification for the limitation.

15. The HRLRC is extremely concerned that there is a clear lack of evidence to justify the effectiveness, and thus the necessity, of many of the Northern Territory Intervention measures, particularly income quarantining. The Federal Government's consultations with affected communities were manifestly inadequate and cannot be used to justify the continuation, and indeed the expansion, of the Northern Territory Intervention measures.

[10] Throughout this submission, the term "Indigenous" will be used in reference to international obligations to Indigenous peoples generally, while the term "Aboriginal peoples" will be used to refer to Australian Aboriginal and Torres Strait Islander peoples. The majority of the Indigenous peoples of the Northern Territory are Aboriginal and will be referred to as Aboriginal people or peoples.

16. It is imperative that any amendments to the Northern Territory Intervention measures be made only after adequate participation of and consultation with affected communities. The complete absence of any meaningful involvement by affected Aboriginal communities in both the formulation and the amendment of the Northern Territory Intervention measures is particularly concerning. Such an approach is likely to:

    (a) further alienate Aboriginal communities; and

    (b) as a result, condemn the measures to failure because they do not have the support and buy-in of affected communities.

17. Measures that are designed to address Aboriginal disadvantage must not be blanket and arbitrary. Instead, measures should be sufficiently tailored to suit the individual needs and circumstances of different Aboriginal communities.

18. The HRLRC considers that the Government Bills in their current form will:

    (a) continue to breach a number of Australia's international human rights obligations;

    (b) not be effective in addressing Aboriginal disadvantage;

    (c) continue to undermine the relationship between Australian governments and Aboriginal Australians; and

    (d) arbitrarily impact on the human rights of disadvantaged and vulnerable groups within our society, with the effect that they will become further isolated and excluded.

19. Accordingly, the Government Bills must be amended to ensure that they are compatible with the standards and principles enshrined in international human rights law.

Recommendations:

20. The HRLRC makes the following recommendations to the Senate Community Affairs Legislation Committee:

> ***Recommendation 1:***
>
> A human rights approach must be adopted to the proposed amendments to the Northern Territory Intervention measures contained in the Government Bills in order to:
>
> (a) comply with Australia's international human rights obligations;
>
> (b) enhance policy making and ensure that measures designed to address Aboriginal disadvantage are effective; and
>
> (c) promote a community based approach by empowering and supporting Aboriginal communities.

Recommendation 2:

In ensuring that the proposed amendments contained in the Government Bills are compatible with Australia's international legal obligations, the Senate Community Affairs Legislation Committee should have regard to relevant human rights standards and principles enshrined in international law.

Recommendation 3:

The Senate Community Affairs Legislation Committee's review of the Government Bills should involve an assessment of whether cogent and compelling evidence has been provided which demonstrates that the limitations imposed by the proposed amendments to the Northern Territory Intervention measures are:

(a) for a legitimate and pressing purpose;

(b) strictly necessary and proportionate to the purpose; and

(c) demonstrably justifiable.

Recommendation 4:

The HRLRC strongly recommends that the *Racial Discrimination Act 1975* (Cth) and the Northern Territory and Queensland anti-discrimination laws be reinstated to take effect immediately and without any conditions.

Further, for the avoidance of any doubt, the HRLRC considers that the Government Bills must be amended to include a "notwithstanding clause" to clarify and ensure that the *Racial Discrimination Act 1975* (Cth) is fully reinstated in respect of all Northern Territory Intervention measures.

Recommendation 5:

The HRLRC strongly supports the passage of the Greens Bill.

Recommendation 6:

The HRLRC recommends that the Government Bills be amended to remove the compulsory nature of the income management scheme, and that the scheme be replaced with voluntary income management.

Recommendation 7:

The Government Bills should be amended to ensure that the Northern Territory Intervention measures can be properly classified as "special measures". Such amendments should include:

(a) genuine and effective involvement of affected communities in the design and development of such measures; and

(b) voluntary application of the measures.

3. The Importance of a Human Rights-Based Approach to the Northern Territory Intervention

21. Human rights are fundamental rights and freedoms that belong to everyone in the community. Respect for human rights enables people to be treated fairly, to live with dignity and to be afforded the opportunity to participate in society on equal basis with others.

22. The Northern Territory Intervention raises many issues that relate to Australia's international human rights obligations. The HRLRC considers that the Federal Government must ensure that the Northern Territory Intervention measures comply with human rights standards and principles to ensure that:

    (a) Australia complies with its international legal obligations and acts consistently with its commitment to international human rights leadership;

    (b) measures that are designed and implemented to address serious Aboriginal disadvantage are effective; and

    (c) the relationship between Australian governments and Aboriginal Australians is one of mutual respect and trust, and that Aboriginal communities are empowered and supported.

3.1 Australia Must Comply with its International Legal Obligations

23. Australia is a party to a number of major international human rights treaties, including relevantly:

    (a) the *International Covenant on Civil and Political Rights* (**ICCPR**);[11]

    (b) the *International Covenant on Economic, Social and Cultural Rights* (**ICESCR**);[12]

    (c) the *International Convention on the Elimination of All Forms of Racial Discrimination* (**CERD**);[13]

    (d) the *Convention on the Rights of the Child* (**CRC**);[14] and

[11] The ICCPR was signed by Australia on 18 December 1972 and ratified on 13 August 1980.

[12] The ICESCR was signed by Australia on 18 December 1972 and ratified on 10 December 1975.

[13] The CERD was signed by Australia on 13 October 1966 and ratified on 30 September 1975.

[14] The CRC was signed by Australia on 22 August 1990 and ratified on 17 December 1990.

(e) the *Convention on the Elimination of All Forms of Discrimination against Women* (**CEDAW**).[15]

24. Australia's ratification of these instruments has created international legal obligations that require all arms and levels of Australian government — federal, state and territory — to act to respect, protect and fulfil human rights.

25. The HRLRC also notes that the Australian Government recently expressed its positive endorsement of the United Nations Declaration on the Rights of Indigenous Peoples (***DRIP***).[16] While the DRIP does not have any legally binding force, it is a significant instrument that establishes a framework for the human rights that already exist in international law and their specific application to Indigenous peoples. In this respect, the Declaration has "significant moral force"[17] and represents an important standard for the treatment of Indigenous peoples. Further, as a persuasive soft-law instrument it should inform the concrete interpretation and application of binding international legal norms, such as those under ICESCR and CERD, to Indigenous peoples.[18]

26. Compliance with international human rights obligations would demonstrate the Federal Government's genuine commitment to addressing the serious disadvantage and discrimination that is experienced by many Aboriginal Australians. The need for Australia to take urgent action to ensure that the Northern Territory Intervention complies with international human rights standards, including by immediately reinstating the *Racial Discrimination Act,* has been highlighted by a number of highly respected, independent international human rights bodies and experts over the last year, including:

(a) the Committee on the Elimination of Racial Discrimination;[19]

(b) the Human Rights Committee;[20]

---

15 The CEDAW was signed by Australia on 17 July 1980 and ratified on 28 July 1983.

16 UN GAOR, 61st session, GA Res 61/295, UN Doc A/RES/47/1 (2007).

17 M Davis, *The United Nations Declaration on the Rights of Indigenous Peoples* (2007) 11(3) AILR 55, 55.

18 See, eg, *Commonwealth v Tasmania* (1983) 158 CLR 1, 174-7; *Vance v State Rail Authority* [2004] FMCA 240.

19 UN Committee on the Elimination of All Forms of Racial Discrimination, Urgent Action Letter to the Australian Government dated 13 March 2009 in relation to the Northern Territory Emergency Response, available at http://www.hrlrc.org.au/files/cerd-letter-to-australia130309.pdf.

20 Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia* (March 2009) UN Doc CCPR/C/AUS/CO/5, available at http://www2.ohchr.org/english/bodies/hrc/docs/co/CCPR-C-AUS-CO-5.doc.

(c) the Committee on Economic, Social and Cultural Rights;[21] and

(d) the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people in his recent country visit to Australia.[22]

27. Despite the Government Bills seeking to reinstate the operation of the *Racial Discrimination Act*, the HRLRC considers that the proposed amendments still raise concerns with Australia's international human rights obligations. Some of the specific human rights obligations contained in these treaties that are directly relevant to the Bills are discussed below in section 4.

3.2 A Human Rights Approach Enhances Policy Making and Improves Lives

28. Aboriginal communities throughout Australia are very diverse. Consequently, policy approaches to addressing Aboriginal disadvantage must reflect the different and unique needs of these differing communities. Laws and policies that result in a blanket, arbitrary imposition of measures, such as compulsory income quarantining, lack the ability to ensure that such measures are tailored and appropriate to suit the needs and circumstances of individual communities.

29. 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:[23]

(a) better public service outcomes and increased levels of satisfaction as a result of more participatory and empowering policy development processes and more individualised, flexible and responsive public services;

(b) enhanced scrutiny, transparency and accountability in government;

---

[21] Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia* (May 2009) UN Doc E/C.12/AUS/CO/4, available at http://www2.ohchr.org/english/bodies/cescr/docs/AdvanceVersions/E-C12-AUS-CO-4.doc.

[22] Statement of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya (27 August 2009), available at http://www.un.org.au/files/files/Press%20Release%20-%20Australia%20JA%20final.pdf.

[23] 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).

(c) "new thinking", as the core human rights principles of dignity, equality, respect, fairness and autonomy help decision-makers "see seemingly intractable problems in a new light"; and

(d) the language and ideas of rights can be used to secure positive changes not only to individual circumstances, but also to policies and procedures.

30. The HRLRC supports measures that are intended to protect the human rights of Aboriginal peoples, particularly Aboriginal children and women who may be vulnerable to family violence and sexual abuse issues. However, such measures must and can be consistent with, and promote the furtherance of, Australia's human rights obligations.

31. At the time that the Northern Territory Intervention legislative package was passed, the Australian Human Rights Commission urged the Federal Government to adopt an approach that is consistent with Australia's international human rights obligations and, particularly, with the *Racial Discrimination Act*.[24] The *Social Justice Report 2007*, released by the Australian Human Rights Commission, stated that:[25]

> 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.

32. In May 2009, the Federal Government released a discussion paper, *Future Directions for the Northern Territory Emergency Response*,[26] which presented a strong commitment to adopting a human rights framework. In the paper it was stated that:[27]

> The Australian Government wants to bring the achievements of the Northern Territory Emergency Response (NTER) into a framework that looks to the long-term and respects human rights....
>
> The Australian Government is committed to respecting Australia's human rights obligations. Without this commitment, the Government believes that the improvements already made in the Northern Territory will not last, and the improvements planned for the future will not happen.

---

[24] 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.

[25] Human Rights and Equal Opportunity Commission, *Social Justice Report 2007* (11 February 2008) 3, available at http://www.hreoc.gov.au/social_justice/sj_report/sjreport07/index.html.

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

[27] Ibid, at 1 and 3.

33. The HRLRC urges the Federal Government to fulfil its commitment to complying with Australia's human rights obligations. A human rights approach to the development of law, policy and practice in relation to the Northern Territory Intervention will ensure the development and amendment of laws and policies that will best promote the ends that are sought to be achieved by the proposed reforms to the Northern Territory Intervention legislation.

3.3 Human Rights Promote Participation and Empowerment

34. As discussed in paragraph 29 above, a human rights framework can have a beneficial impact, including empowering individuals and promoting the participation of disaffected groups within the community. In this respect, a human rights framework that is informed by the DRIP will ensure that appropriately adapted policies are developed for Aboriginal communities. Importantly, adherence with the principles and standards contained in the DRIP is likely to:

(a) promote the participation and engagement of Aboriginal peoples in the political process and in matters which directly affect them; and

(b) enhance harmonious and cooperative relations between Australian governments and Aboriginal peoples.

35. A human rights approach to the development, implementation and review of the Northern Territory Intervention measures will send an important, symbolic message to Aboriginal Australians, and indeed to all Australians, that the Federal Government is committed to a renewed relationship of mutual respect, mutual resolve and mutual responsibility with Aboriginal communities. Indeed, the preamble to the DRIP identifies that:

> recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith.

36. A community based approach is essential to ensuring active and informed participation and to empower communities. Such as an approach requires the direct involvement of affected people. In addition to ensuring that policies and measures are effective in addressing Aboriginal disadvantage, the HRLRC considers that the adoption of community based approaches would be a significant first step to begin to address the feelings of "hurt and anger" and "betrayal and disbelief" that the Review Board found to exist among Aboriginal communities and those affected by Northern Territory Intervention measures.[28]

[28] Report of the NTER Review Board, above n 6, 8.

37. Ultimately, such an approach will ensure that laws, policies and practices designed to "Close the Gap" will be effective and beneficial for Aboriginal peoples.

Recommendation 1:

A human rights approach must be adopted to the proposed amendments to the Northern Territory Intervention measures contained in the Government Bills in order to:

(a) comply with Australia's international human rights obligations;

(b) enhance policy making and ensure that measures designed to address Aboriginal disadvantage are effective; and

(c) promote a community based approach by empowering and supporting Aboriginal communities.

4. Human Rights Relevant to the Northern Territory Intervention

38. The Northern Territory Intervention measures and the proposed amendments contained in the Government Bills continue to raise serious concerns in relation to Australia's international human rights obligations. This section discusses the human rights that are most relevant to the Government Bills. Some more specific rights relevant to particular measures, such as the right to social security, are discussed in further detail in sections 7 and 8 of this submission.

4.1 Right to Equality and Non-Discrimination

39. Discrimination is both a cause and consequence of poverty and social exclusion. Indeed, discrimination is at the heart of virtually all human rights violations. Accordingly, the right to equality and non-discrimination is a fundamental tenet of human rights law and is a norm of customary international law.

40. The right of non-discrimination requires States to ensure that all individuals are guaranteed the enjoyment of human rights on an equal basis as others, without any distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[29] States are therefore required to take all legislative, political, administrative and other measures necessary to prohibit discrimination and to guarantee to all persons equal and effective protection against discrimination on the basis of any prohibited grounds.

41. The particular significance of racial discrimination is reflected in the development and adoption of CERD, an entire treaty dedicated to the prevention of racial discrimination. Article 1 of CERD defines the right to non-discrimination 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.

42. Indigenous peoples are entitled without discrimination to all human rights recognised in international law. The Committee on the Elimination of Racial Discrimination has highlighted the particular significance of the right of non-discrimination to Indigenous peoples in issuing a

[29] See, for eg, article 2 of both the ICCPR and ICESCR.

General Recommendation that relates specifically to the human rights of Indigenous Peoples.[30]

43. The particular meaning and content of the right to equality as it relates to Indigenous peoples is also enshrined in the Declaration on the Rights of Indigenous Peoples. Article 15(2) of the Declaration provides that:

> States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

44. Australia's international obligations with respect to the right of non-discrimination have been incorporated into domestic law through the operation of the *Racial Discrimination Act*. Importantly, the *Racial Discrimination Act*, among other things:

(a) prohibits either direct or indirect discrimination on the basis of race;

(i) **direct discrimination** is treating someone less favourably because of his or her race, colour, descent, national origin or ethnic origin than someone of a different 'race' would be treated in a similar situation;

(ii) **indirect discrimination** is making everyone satisfy the same criterion when the effect is that a higher proportion of people of one race cannot satisfy it. Indirect discrimination may be able to be justified if the criterion imposed is reasonable and relevant to the particular circumstances;

(b) provides for **"special measures"** to assist particular disadvantaged groups to achieve substantive equality; and

(c) enables individuals to make a complaint if they have been discriminated against or vilified on the basis of their race.

45. The suspension of the *Racial Discrimination Act* with respect to the Northern Territory Intervention measures in and of itself represents a serious violation of Australia's international human rights obligations. Notwithstanding the proposed reinstatement of the *Racial Discrimination Act* pursuant to the Government Bills (albeit not for another 12 months), the HRLRC remains extremely concerned about the racially discriminatory aspect of the measures contained in the Government Bills. These concerns are discussed in further detail in sections 6, 7 and 8 of this submission.

---

[30] Committee on the Elimination of Racial Discrimination, *General Recommendation 23: Rights of Indigenous Peoples, 51st sess, [3],* UN Doc A/52/18, annex V at 122 (1997).

4.2 Rights of Participation

46. Indigenous peoples all around the world have long suffered from historic injustices, principally as a result of colonisation and the dispossession of their traditional lands. This has prevented many Indigenous peoples from exercising, in particular, their right to development in accordance with their own needs and interests.[31]

47. As a result of their particular vulnerability and the disadvantaged state in which they often find themselves, rights of participation in decision-making processes about matters which directly affect them have a particular significance and meaning for Indigenous peoples. Indeed, the preamble to the DRIP states that:

> control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs.

(a) Right of Self-Determination

48. The right of self-determination has a particular significance for Indigenous peoples and is enshrined in the Declaration on the Rights of Indigenous Peoples.[32] The Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people has commented that the inclusion of the right to self-determination in the Declaration "responds to the aspirations of Indigenous peoples worldwide to be in control of their own destinies under conditions of equality, and to participate effectively in decision-making that affects them."[33] The Special Rapporteur also states that the right of self-determination "is a foundational right, without which Indigenous peoples' human rights, both collective and individual, cannot be fully enjoyed."[34]

49. The importance of the right of self-determination is evidenced by its prominence as Article 1 of both the ICCPR and the ICESCR. Article 1(1) of both Covenants provide that:

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

---

[31] See, generally, Department of Economic and Social Affairs Division for Social Policy Development Secretariat of the Permanent Forum on Indigenous Issues, *UN Report on the State of the World's Indigenous Peoples (2009)*, UN Doc ST/ESA/328, available at http://www.un.org/esa/socdev/unpfii/documents/SOWIP_web.pdf.

[32] See Articles 3, 4, 5, 8(2)(b), 18, 19, 26, 27 and 28 of the *UN Declaration on the Rights of Indigenous Peoples,* UN GAOR, 61st session, GA Res 61/295, UN Doc A/RES/47/1 (2007).

[33] James Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people,* UN Doc A/HRC/12/34 (2009) [41].

[34] Ibid.

50. The recent approach by successive Australian Governments to "consultation" with Aboriginal peoples is a principle that that falls well short of the right of self-determination. Indeed, this attitude towards the right of self-determination by recent Australian Governments has received consistent criticism from various United Nations treaty bodies. Since 2000, the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Racial Discrimination and the Committee on the Elimination of Discrimination against Women have each expressed their concern that insufficient action has been taken in relation to Aboriginal Australians exercising meaningful control over their affairs.[35]

51. Most recently, in March 2009, the Human Rights Committee in its review of Australia's compliance with the ICCPR once again stated that it "remains concerned that Indigenous peoples are not sufficiently consulted in the decision-making process with respect to issues affecting their rights".[36] Similarly, in May 2009, the Committee on Economic, Social and Cultural Rights noted "with regret that the Northern Territory Intervention measures were adopted without sufficient and adequate consultation with the Indigenous peoples concerned".[37]

52. In addition to concerns about the adequacy of the Federal Government's consultations with affected individuals and communities (as discussed in further detail below in section 5.4), the development, implementation and review of the Northern Territory Intervention measures is particularly problematic given that it has occurred at a time when there is no representative body for Aboriginal people in Australia. The absence of a representative Aboriginal body deprives many Aboriginal Australians of the right to participate meaningfully in policy formulation and public debate.

---

[35] See Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, UN GAOR, 55th sess, 1967th mtg, [509], UN Doc A/55/40 (2000); Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, [25], UN Doc E/C.12/1/Add.50 (2000); Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, [11], UN Doc CERD/C/AUS/CO/14 (2005); Committee on the Elimination of Discrimination against Women, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Australia*, [17], UN Doc CEDAW/C/AUL/CO/5 (2006). The Committee on the Elimination of Discrimination against Women recommended that Australia consider the adoption of quotas and targets to increase the number of Indigenous women in political and public life: at [17].

[36] Human Rights Committee, above n 20, at [13].

[37] Committee on Economic, Social and Cultural Rights, above n 21, at [15].

(b) Duty to Consult

53. The duty to consult with Indigenous peoples on decisions affecting them is a fundamental obligation upon States that is firmly entrenched in international human rights law.[38] Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples provides that:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

54. Article 6(2) of *ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries* provides:

> The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

55. Further enshrined in these articles is the right of Indigenous peoples to free, prior and informed consent. This principle reflects the importance of effective participation. Effective participation is a fundamental element to empowering vulnerable and disadvantaged communities and critical to establishing a relationship of mutual respect. The purpose of any consultations undertaken by government must be to obtain the consent of those people who are likely to be affected through meaningful participation.

56. The HRLRC's concerns in relation to both the right of self-determination and the duty to consult with respect to the Government Bills are discussed below throughout sections 5.4, 7 and 8 of this submission.

4.3 Protection of Women and Children

57. The protection of women and children and the consideration of their particular human rights is necessary when addressing issues of family violence and sexual abuse. However, it is important to understand that managing competing rights is a balancing act, and that the rights of women and children do not "trump" other basic rights. Indeed, the rights of women and children can be — and must be — protected in a way that is not racially discriminatory.

58. The CEDAW codifies women's right to non-discrimination and equality with men. These principles are also reflected in the Charter of the United Nations, the *Universal Declaration of Human Rights*, the ICCPR, the ICESCR and other major international human rights instruments to which Australia is a party.

---

[38] James Anaya, above n 33, 38.

59. The goal of CEDAW is the elimination of all forms of discrimination against women. It applies a broad definition of discrimination and focuses on achieving substantive equality, requiring consideration of the underlying issues that contribute to systemic discrimination.[39]

60. The Aboriginal and Torres Strait Islander Social Justice Commissioner (**Social Justice Commissioner**) has noted that:

> Indigenous women's experience of discrimination and violence is bound up in the colour of their skin as well as their gender. The identity of many Indigenous women is bound to their experience as Indigenous people. Rather than sharing a common experience of sexism binding them with non-Indigenous women, this may bind them more to their community, including the men of the community.[40]

61. It is also important that any laws and policies developed to address Aboriginal disadvantage have proper regard to the rights of children. The Social Justice Commissioner identified the following provisions of the CRC as being potentially relevant, directly or indirectly, to issues involving family violence and child abuse:[41]

(a) Governments must respect and ensure the rights set out in the Convention are provided to each child within their jurisdiction without discrimination of any kind, including discrimination on the basis of race.[42]

(b) In all actions concerning children, the best interests of the child is a primary consideration, and the government has a duty of care to ensure that necessary protection is provided taking into account the rights of parents.[43]

(c) The family unit is recognised as fundamental for the growth and well-being of the child, and the government must provide assistance to parents in meeting their child-rearing responsibilities and in the provision of services for the care of children.[44]

---

[39] The Committee has stated that "a purely formal legal or programmatic approach is not sufficient to achieve women's de facto equality with men, which the Committee interprets as substantive equality. In addition the Convention requires that women be given an equal start and that they be empowered by an enabling environment to achieve equality of results": General recommendation No. 25, on article 4, paragraph 1, of the *Convention on the Elimination of All Forms of Discrimination against Women*, on temporary special measures, 30th Session, 2004.

[40] *Social Justice Report 2007*, above n 25, 9.

[41] Ibid, 235.

[42] CRC, article 2.

[43] CRC, article 3.

[44] CRC, articles 5 and 18.

(d) Children have a right to protection from all forms of violence, and governments must take protective measures to prevent, identify, and address violations. These measures include social programmes which provide necessary support for a child and his or her parents.[45]

(e) Children have a right to be protected from all forms of sexual abuse.[46]

(f) Governments must take measures to promote recovery and rehabilitation of children who are victims of neglect and abuse. This should be done in an environment that fosters the health, self-respect and dignity of the child.[47]

(g) Children have the right to the highest attainable standard of health and equal access to health care services. The government has a responsibility to diminish infant mortality, ensure the provision of necessary health care and combat disease and nutrition.[48]

(h) Indigenous children have the right to enjoy and practice their culture, in community with other members of their group.[49]

(i) Children must not be subjected to arbitrary interference with their privacy.[50]

62. While the CRC does provide that children have a right to be protected from all forms of sexual abuse under article 34, that right needs to be considered in the context of both the other provisions of the CRC and also in the context of the human rights set out in other relevant human rights conventions to which Australia is party (as discussed in other sections of this submission), in particular the CERD.

63. Reaching the appropriate balance between the protection of women and children on the one hand, and ensuring that such protections are not racially discriminatory on the other hand, are discussed below throughout sections 7 and 8 of this submission.

---

45 CRC, article 19.

46 CRC, article 34.

47 CRC, article 39.

48 CRC, article 24.

49 CRC, article 30.

50 CRC, article 16.

Recommendation 2:

In ensuring that the proposed amendments contained in the Government Bills are compatible with Australia's international legal obligations, the Senate Community Affairs Legislation Committee should have regard to relevant human rights standards and principles enshrined in international law.

5. Permissible Limitations on Human Rights

64. Under international human rights law, it is well established that some human rights are absolute, while other human rights may be limited. In respect of rights that are not absolute, limitations are only permissible in certain circumstances and subject to particular conditions.

65. Put broadly, any limitation that is imposed on a human right must be reasonable and demonstrably justified in a free and democratic society.[51] This requires any limitation on a right to be:

(a) for a legitimate and pressing purpose;

(b) reasonable, necessary and proportionate; and

(c) demonstrably justified.

66. This section discusses the circumstances in which it may be justifiable to limit human rights. The extent to which the impact that certain measures of the Northern Territory Intervention have on human rights — and whether that impact can be justified as a permissible limitation — is discussed in further details in sections 7 and 8 of this submission.

5.1 Any Limitation Must Fulfil a Legitimate and Pressing Purpose

67. First, the purpose of the limitation on the right must be of sufficient importance to a free and democratic society to justify limiting the right.[52] It must fulfil a compelling, specific and legitimate aim.[53] This might also be described as requiring a "pressing and substantial" objective,[54] reflecting a need to balance the interests of society with those of individuals and groups.

68. The HRLRC notes that there has been a significant policy shift from the initial introduction of the Northern Territory Intervention, which was purportedly introduced to address the issues of child sexual abuse in Aboriginal communities identified in the *Little Children are Sacred*

---

[51] Words to this effect are used in section 7 of the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic), section 1 of the *Canadian Charter of Rights and Freedoms*, section 5 of the *New Zealand Bill of Rights Act* and section 36 of the *South African Constitution*.

[52] *R v Oakes* [1986] 1 SCR 103, [69] – [71] (Dickson CJ).

[53] *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381, [150] (Warren CJ).

[54] The Supreme Court in Canada (Attorney-General) v Hislop [2007] 1 SCR 429, [44]. See also *R v Oakes* [1986] 1 SCR 103, cited with approval by Bell J in *Kracke v Mental Health Review Board* [2009] VCAT 646, [145].

report.[55] While there is no doubt that the protection of children from sexual abuse is a legitimate aim, any measures designed and implemented to combat this issue must be rationally connected to achieving that aim.

69. The HRLRC also notes that there appears to have been a shift in the focus of the Northern Territory Intervention measures away from child protection to addressing Aboriginal disadvantage generally. While, once again, there is no doubt that this is a legitimate aim, the HRLRC considers that any measures that continue to operate must be rationally connected to achieving that aim, and that the Federal Government must be able to demonstrate the connection.

5.2 Limitations Must be Reasonable, Necessary and Proportionate

70. Secondly, the means used by the State to limit rights must be proportionate to the purpose of the limitation. The most widely accepted test of proportionality is derived from the Canadian case, *R v Oakes.*[56] In that case the Supreme Court of Canada set out the three components of a proportionality test:

> There are three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question ... Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance'.[57]

71. The Human Rights Committee has issued the following authoritative statement about limitations or restrictions on human rights:

> 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.[58]

---

55 Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Little Children Are Sacred* (2007), available at http://www.nt.gov.au/dcm/inquirysaac/pdf/bipacsa_final_report.pdf.

56 [1986] 1 SCR 103.

57 Ibid, 43.

58 Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add13 (2004), [6].

72. 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* (***Siracusa Principles***).[59] By way of summary, the Siracusa Principles provide 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) where a limitation is required to be "necessary", it must:

(i) be 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) respond to a pressing need;

(iii) pursue a legitimate aim; and

(iv) be proportionate to that aim.

73. The Committee on Economic, Social and Cultural Rights has also recently issued a General Comment that specifically addresses permissible limitations on the right to non-discrimination. The Committee explains that:

> [d]ifferential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realised and the measures or omissions and their effects. A failure to remove differential treatment on the basis of a lack of available resources is not an objective and reasonable justification unless every effort has been made to use all resources

[59] 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).

that are at the State party's disposition in an effort to address and eliminate the discrimination, as a matter of priority.[60]

5.3 Limitations Must be Demonstrably Justified and Evidence-Based

74. As identified by the Human Rights Committee, where limitations on human rights are made "States must demonstrate their necessity".[61] Thus, the onus rests with government, being the party seeking to rely on the limitation, to establish that a limitation is reasonable and demonstrably justified.[62]

75. Any limitation of a human right requires a "very high degree of probability" and evidence to support the justification for the limitation as being permissible.[63] This imposes a "stringent standard of justification".[64] The evidence should be "cogent and persuasive and make clear the consequences of imposing or not imposing the limit."[65]

76. As identified in the following section, the HRLRC considers that there are major concerns about the extent to which the Federal Government is able to demonstrably justify that the limitations imposed by the Northern Territory Intervention measures and the Government Bills are reasonable, necessary and proportionate, and therefore whether the limitations are permissible.

5.4 Observations on the Government's Consultations

77. The HRLRC is extremely concerned about the adequacy of the consultations that have taken place with affected Aboriginal communities. In particular:

(a) the range of extraordinary "emergency" measures contained in the initial Northern Territory Intervention legislative package was passed without any consultation or involvement of Aboriginal representatives or affected Aboriginal communities; and

(b) subsequent consultations conducted by the Federal Government have been manifestly inadequate.

---

60 Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, UN Doc E/C.12/GC/20 (10 June 2009), [13].

61 Human Rights Committee, *General Comment 31: Nature of the Legal Obligation Imposed on State Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), [6].

62 *R v Oakes* [1986] 1 SCR 103, at [66].

63 See, eg, *R v Oakes* [1986] 1 SCR 103, 105, 136-7; *Minister of Transport v Noort* [1992] 3 NZLR 260, 283; *Moise v Transitional Land Council of Greater Germiston* 2001 (4) SA 491 (CC), [19]. See also P Hogg, *Constitutional Law of Canada* (2004) 795-6.

64 *R v Oakes* [1986] 1 SCR 103, [67].

65 *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381, [147] (Warren CJ).

78. At all times, it is imperative that any review of, and amendments to, the Northern Territory Intervention measures be made only after adequate consultation with and participation of affected Aboriginal communities. Continuing to fail to meaningfully engage Aboriginal communities in this process continues to breach Australia's obligations to promote the realisation of the right of self-determination. This failure in turn has the potential to have a significant impact on the realisation of a number of other fundamental human rights.

79. In May 2009, the Federal Government announced it would conduct consultations with communities affected by the Northern Territory Intervention. The Government, acknowledging the previous failure to consult Aboriginal communities, stated:

> The NTER Review Board said that many of the NTER measures were not as effective as they should have been because Aboriginal people were not involved in their original design. There was no consultation or engagement. This Government is committed to real consultation with Aboriginal people in the Northern Territory so the NTER measures can be improved.[66]

80. From June to August 2009, the Department of Families, Housing, Community Services and Indigenous Affairs (**FaHCSIA**) undertook a series of consultations (**NTER Redesign Consultations**) that were said to be "conducted in the spirit of genuine consultation and engagement with Indigenous people".[67] However, serious concerns have been raised regarding the consultation process that question, inter alia, the Federal Government's motives behind the consultations. In November 2009, the Jumbunna Indigenous House of Learning released the *Will They Be Heard* report that analysed in detail consultations with Aboriginal communities in three affected communities, Utopia, Bagot and Ampilatwatja.[68] The report identified significant procedural and substantive failures of consultation process, including:[69]

(a) a lack of independence;

(b) lack of Aboriginal input into the consultation process;

(c) lack of notice provided to communities about the consultations;

(d) the absence of interpreters;

---

66 *Future Directions Discussion Paper*, above n 26, 3.

67 Policy Statement: *Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency* Response, 5.

68 Nicholson, Behrendt, Vivian, Watson and Harris, *Will they be heard? – a response to the NTER Consultations June to August 2009* (November 2009).

69 Ibid 9.

(e) the fact that the consultations were retrospective in nature, in that:

(i) the initial Northern Territory Intervention measures have already been developed and implemented; and

(ii) the Federal Government had apparently already made its policy decision that compulsory income quarantining is to continue;

(f) inadequate explanations of the Northern Territory Intervention measures and complex legal concepts.

81. FaHCSIA retained the Cultural & Indigenous Research Centre Australia (**CIRCA**) to conduct an independent review of the NTER Redesign Consultations. In September 2009, CIRCA released its report[70] which found that, while overall the consultations were conducted in accordance with the Government's own communication and engagement strategy, there were a number of flaws in the process. The flaws identified in the CIRCA report include:

(a) insufficient time to fully explain all of the Northern Territory Intervention measures;[71]

(b) cases where facilitators were "defensive of the Government's actions to date, challenged participants and provided more emphasis on the positive outcomes of the Intervention rather than the negatives"[72];

(c) in many cases, interpreters were not present at the consultations;[73] and

(d) a failure to report the level on anger and frustration expressed at meetings.[74]

[70] Cultural & Indigenous Research Centre Australia, *Report on the NTER Redesign Engagement Strategy and Implementation Final Report* (September 2009).

[71] Ibid, 6, 13.

[72] Ibid, 12.

[73] Ibid, 13, 19.

[74] Ibid, 21.

Recommendation 3:

The Senate Community Affairs Legislation Committee's review of the Government Bills should involve an assessment of whether cogent and compelling evidence has been provided which demonstrates that the limitations imposed by the proposed amendments to the Northern Territory Intervention measures are:

(a) for a legitimate and pressing purpose;

(b) strictly necessary and proportionate to the purpose; and

(c) demonstrably justifiable.

6. Reinstatement of the *Racial Discrimination Act*

82. As referred to above, the *Racial Discrimination Act* is Australia's legislative response to its ratification of the CERD and is the principal means by which Australia gives effect to the fundamental right to be free from racial discrimination. The *Racial Discrimination Act* protects persons against discrimination and provides a remedy where such discrimination occurs.

83. At the time of its introduction, the Northern Territory Intervention was specifically targeted at Aboriginal communities, with the result that such communities received differential treatment solely on the basis of their race. The former Federal Government's apparent concern that the measures enacted by the Northern Territory Intervention legislation are discriminatory is evident by the blanket suspension of the operation of the *Racial Discrimination Act* (as well as the Northern Territory and Queensland anti-discrimination laws) from applying to the Northern Territory Intervention measures.[75]

6.1 The *Racial Discrimination Act* Permits Differential Treatment

84. The HRLRC observes that not all differential treatment will violate the prohibition against non-discrimination. Indeed, in some circumstances differential treatment will be *required* to ensure that particular groups are able to achieve substantive equality. As the Human Rights Committee has stated that:

> Not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.

85. Indeed, the *Racial Discrimination Act* permits differential treatment on the basis of race in two circumstances:

(a) differential treatment that is directly targeted at a particular treatment will not be discriminatory if such treatment can be classified as a "special measure"; and

(b) differential treatment that indirectly impacts on a particular group is permissible if the treatment is "reasonable" and can be justified as achieving a legitimate and non-discriminatory public goal.

[75] See for example, *Northern Territory National Emergency Response Act 2007* (Cth), sections 132 and 133;*Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth), sections 4 and 5.

86. In situations where differential treatment may be permitted, the State bears the onus of establishing that the aim of such measures is legitimate and that the measures taken to achieve the aims are necessary and proportionate. As discussed above in section 5, for a limitation on a relevant right to be permissible, such a limitation must be "demonstrably justified", which requires a "very high degree of probability" and "cogent and persuasive" evidence.

87. Accordingly, there is absolutely no basis for the continued suspension of the *Racial Discrimination Act*. The Northern Territory Intervention measures are either:

(a) *beneficial* for Aboriginal people, in which case they can be justified as being either a "special measure" or "reasonable" in pursuance of a legitimate and non-discriminatory public goal; or

(b) *detrimental* for Aboriginal people, in which case they cannot be justified and should not be implemented because they are poor policies that will not be effective in addressing Aboriginal disadvantage.

88. The HRLRC notes that at the NTER Redesign Consultations with Aboriginal communities, it was observed that "persistent, vehement demands for reinstatement of the Racial Discrimination Act occupied the majority of meetings, not merely as a vehicle for challenge to discriminatory laws, but as a platform for security, equality, self-worth and entitlement to equal citizenship."[76]

6.2 Reinstatement Must be Immediate and Unconditional

89. The HRLRC welcomes the Federal Government's commitment to reinstate the *Racial Discrimination Act* in compliance with Australia's international obligations. However, we are extremely concerned at the exorbitant length of time it is taking to fulfil this commitment.

90. We are concerned that despite Parliament taking merely ten days to pass the 480 pages of legislation that constituted the Northern Territory Intervention, it is proposed that the reinstatement of the *Racial Discrimination Act* will not take effect until 31 December 2010. This timeframe is nearly three and a half years since the introduction of the Northern Territory Intervention, and well over two years since the current Federal Government announced that it would consider reinstating the *Racial Discrimination Act*.

91. The exclusion of the *Racial Discrimination Act* is in direct contravention of the international customary norm of non-discrimination and Australia's legal obligations under the CERD and other human rights treaties to which it is a party. Indeed, as stated in paragraph 26 above,

[76] *Will They Be Heard?,* above n 68, 17.

serious concerns have been expressed in the last 12 months alone by the Committee on the Elimination of Racial Discrimination, the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, and the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people that the measures of the Northern Territory Intervention are racially discriminatory. Each of these bodies and experts has called for the full, immediate and unconditional reinstatement of the *Racial Discrimination Act*.

92. While the *Racial Discrimination Act* remains suspended, Aboriginal communities in the Northern Territory continue to be subjected to discriminatory measures that impact on a range of their other fundamental human rights. The HRLRC strongly considers that the Government Bills should be amended to ensure that the *Racial Discrimination Act* is immediately reinstated in full and in respect of all aspects of the Northern Territory Intervention.

93. On this note, the HRLRC welcomes the introduction of the Greens Bill and the proposed amendments contained therein to immediately reinstate the operation of the *Racial Discrimination Act* in full and without any conditions.

94. The HRLRC is also concerned that the Welfare Reform Bill appears to limit the ability to use the *Racial Discrimination Act* to challenge the Northern Territory Intervention measures. For reinstatement of the *Racial Discrimination Act* to be meaningful, it must provide unequivocal protection against racial discrimination, which includes the right to a remedy where there is an allegation that a particular measure may be discriminatory.

95. The Welfare Reform Bill repeals provisions from Northern Territory Intervention legislation that explicitly suspend the operation of the *Racial Discrimination Act*, thereby enabling the Northern Territory Intervention measures to be legally challenged under the *Racial Discrimination Act*. However, there is no provision for a "notwithstanding" clause which would ensure that the provisions of the *Racial Discrimination Act* would prevail over any inconsistent provisions in Northern Territory Intervention legislation. This limits the ability to successfully challenge provisions that may be racially discriminatory.

96. In 2007 the Social Justice Commissioner recommended that the Federal Government enact such a clause that would require all acts taken under the Northern Territory Intervention to be consistent with the *Racial Discrimination Act*.[77] The Social Justice Commissioner provided an example of how a notwithstanding clause could be drafted:[78]

---

[77] *Social Justice Report 2007*, above n 25, 305.

[78] Ibid.

> Without limiting the general operation of the *Racial Discrimination Act 1975* in relation to the NTNER measures, the provisions of the *Racial Discrimination Act 1975* are intended to prevail over the NTNER Act. The provisions of this Act do not authorise conduct that is inconsistent with the provisions of the *Racial Discrimination Act 1975.*

97. The HRLRC strongly supports the inclusion of a notwithstanding clause as a fundamental component of entrenching within the Northern Territory Intervention the protection against racial discrimination.

Recommendation 4:

The HRLRC strongly recommends that the *Racial Discrimination Act 1975* (Cth) and the Northern Territory and Queensland anti-discrimination laws be reinstated to take effect immediately and without any conditions.

Further, for the avoidance of any doubt, the HRLRC considers that the Government Bills must be amended to include a "notwithstanding clause" to clarify and ensure that the *Racial Discrimination Act 1975* (Cth) is fully reinstated in respect of all Northern Territory Intervention measures.

Recommendation 5:

The HRLRC strongly supports the passage of the Greens Bill.

7. Income Management Provisions

Current Provisions

98. The *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) establishes a scheme which provides for the compulsory quarantining of between 50 and 100 per cent of welfare payments for people who are live in "prescribed areas" (**Income Management Regime**). Money that is quarantined under the Income Management Regime can only be spent on "priority needs", such food, clothing, household items, household utilities, childcare and development, education and training,[79] and is prohibited from being spent on items such as alcohol, tobacco, gambling and pornography.[80] This compulsory quarantining and control of welfare income continues for a period of 12 months, with a possible extension of up to five years, and applies to almost every form of welfare payment. At 30 June 2009, income management was applied to 73 Aboriginal communities and 10 town camp regions.[81]

99. The Income Management Regime is mandatory and non-discretionary in respect of the persons subjected to it. By contrast, outside "prescribed areas", the quarantining of welfare payments can only be triggered by factors such as risk of neglect or abuse or inadequate school attendance, which is assessed on a case by case basis.[82] The absence of any criteria apart from race (which in practical terms coincides with a person receiving social security in a "prescribed area") for the application of income quarantining makes that measure discriminatory and necessarily results in it failing to satisfy any of the requirements for a special measure.

100. In its review of the first 12 months of the Northern Territory Intervention, the Review Board found that "the blanket imposition of compulsory income management across Indigenous communities in the Northern Territory has resulted in widespread disillusionment, resentment and anger in a significant segment of the Indigenous community" and that support was

---

79 Section 123TH of the *Social Security (Administration) Act 1999* (Cth).

80 Section 123TI of the *Social Security (Administration) Act 1999* (Cth).

81 Australian Government, Department of Families, Housing, Community Services and Indigenous Affairs, *Closing the Gap in the Northern Territory: January 2009- June 2009, Whole of Government Monitoring Report*, 54.

82 The income management scheme also applies nationally where state or territory child protection officers refer a person to Centrelink because their child is considered to be at risk of neglect or abuse; a person's child does not meet school enrolment and attendance requirements; a person, subject to the jurisdiction of the Queensland Commission is recommended for income management; or the person is subject to the voluntary

expressed for a voluntary income management scheme.[83] The Review Board recommended that the blanket application of compulsory income management cease and that a voluntary model of income management should be established where people can choose to have their income quarantined.[84] Furthermore, it was recommended that compulsory income management should only be imposed on the basis of child protection, school enrolment and other relevant behavioural triggers.[85]

Proposed Amendments

101. Despite the clear findings and recommendations of the Review Board, the Government Bills provide for compulsory income management to be retained and to be rolled out across the Northern Territory from 1 July 2010. Schedule 2 of the Welfare Reform Bill introduces a model whereby compulsory income management will apply to people residing in a "declared income management area" and falling within one of the following categories:

(a) people aged 15 to 24 receiving welfare for more than 13 weeks in the last 26 weeks (disengaged youth);

(b) people aged 25 and above who have been receiving welfare in the long-term (long-term welfare recipients);

(c) people assessed as requiring income management for reasons including vulnerability to financial crisis, domestic violence or economic abuse; and

(d) people referred for income management by child protection authorities.

102. Under the proposed amendments, the Minister has power to declare that a specified state, territory or area is a "declared income managed area."[86] While this new model of income management is initially proposed to be rolled out across the Northern Territory, the Federal Government has indicated that this is the first step in a roll out of income management across the whole of Australia.[87]

income management agreement is in force. See ss 123UC to UFA of the *Social Security (Administration) Act 1999* (Cth).

83 Report of the NTER Review Board, above n 6, 20..

84 Ibid, 12.

85 Ibid.

86 Welfare Reform Bill, Schedule 2, item 35 (ss123TFA).

87 Policy Statement, above n 67, 8.

103. The Welfare Reform Bill provides for three circumstances in which a person may be considered an "exempt welfare payment recipient":

(a) persons who fall within a class of people that has been specified by the Minister in a legislative instrument;[88]

(b) persons without dependent children that are engaged in full time study or have been employed for a specific period of time;[89] and

(c) persons with dependent children that satisfy criteria related to responsible parenting.[90]

104. If the Secretary is satisfied that a person is an exempt welfare payment recipient then they cannot be subject to income management. The Federal Government contends that the "exemptions are intended to ensure that the new measures are narrowly targeted to support the most vulnerable and disengaged people, and encourage those on welfare payments to develop the skills and capabilities to engage in productive and social activities as parents, students or employees".[91]

105. The HRLRC is concerned that the proposed amendments to the Income Management Regime contained in the Government Bills raises a number of human rights concerns, which are discussed throughout this section.

7.1 Insufficient Evidence to Justify Income Management

106. The HRLRC considers that there is insufficient credible evidence for the Federal Government to demonstrably justify that there is a compelling need for the continuation of income management, or indeed to justify its expansion across the Northern Territory. As discussed above in section 5, any limitation or restriction on rights must be necessary and proportionate to the pursuance of legitimate objectives.

107. The Federal Government states that "income management is an effective tool for supporting individuals and families reliant on welfare who are living in communities under severe social pressure".[92] However, contrary to this assertion, a number of recent reports on the impact and effectiveness of income management in the Northern Territory have identified the results as being, at best, inconclusive.

---

88 Welfare Reform Bill, Schedule 2, item 37 (ss124UGB).

89 Welfare Reform Bill, Schedule 2, item 37 (ss123UGC).

90 Welfare Reform Bill, Schedule 2, item 37 (ss123UGD).

91 Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009, Explanatory Memorandum, 14, available at http://www.scaleplus.law.gov.au/comlaw/legislation/bills1.nsf/0/2C4C4242759BED6BCA25767A0004E9CE/$file/r4265em.doc.

108. The Federal Government regularly cites the benefits of income management to include increased money being spent on food, less money being spent on alcohol and drugs, and reduced levels of "humbugging". However, the HRLRC considers that the Government has failed to provide sufficient credible evidence to "demonstrably justify" the positive beneficial effects of compulsory income quarantining.

109. Even if some of the benefits pointed out by the Federal Government are accepted, they are arguably significantly outweighed by the widespread negative impact that compulsory income quarantining has on many Aboriginal communities. Indeed, the Federal Government's own Review Board found that the introduction of income management resulted in feelings of anger, resentment, widespread disillusionment, confusion, anxiety, shame, embarrassment and humiliation, severe frustration and overt racism within Aboriginal communities.[93] Evidence adduced by the Review Board also suggests that income quarantining has resulted in:

(a) hunger and people criss-crossing family groups to find food;

(b) inability to travel between communities for ceremony and sorry business;

(c) strain being placed on kinship and family relationships;

(d) people becoming subject to quarantining without their knowledge; and

(e) people contributing to services they don't have access to.[94]

110. Recently, the Federal Government released the *Closing the Gap in the Northern Territory Monitoring Report*.[95] The report provides an analysis of data pre- and post-dating the Northern Territory Intervention and makes the following significant findings:

(a) alcohol, substance abuse and drug related incidents have increased significantly from 2006-07 to 2007-08;[96] and

(b) malnutrition of children aged between 0 and 5 years increased from 2006-07 to 2007-08.[97]

---

92 Policy Statement, above n 67, 5.

93 Report of the NTER Review Board, above n 6, 20.

94 Alison Vivian and Ben Schokman, "The Northern Territory Intervention and the Fabrication of 'Special Measures'" (2009) 13(1) Australian Indigenous Law Review 78, 90.

95 *Closing the Gap* report, above n 81.

96 Ibid 34.

97 Ibid 17.

111. Similarly concerning is a study by Sunrise Health Service in the Northern Territory, which found that the number of children who were anaemic had nearly trebled since the Northern Territory Intervention measures were implemented.[98]

112. Despite these findings, the Federal Government's policy statement refers to findings by the Australian Institute of Health and Welfare (**AIHW**) that children are eating more food and that increased amounts of money are being spent on food.[99] However, such findings must be read in light of substantial limitations in the research methodology including the relatively small sample size and the absence of comparison data.[100] Indeed, it is even noted in the AIHW report that the research methods used would sit at the bottom of an evidence hierarchy.[101] Significantly, the report stated that "the overall evidence about the effectiveness of income management was not strong."[102]

113. Based on the above, the HRLRC submits that there is a clear lack of evidence to justify the effectiveness, and thus the necessity, of expanding the income management provisions of the Northern Territory Intervention. As a result, and as explained in further detail below, the proposed compulsory income management provisions that are contained in the Government Bills represent an unjustifiable limitation on a range of fundamental rights, including

(a) the right to non-discrimination;

(b) the right to social security and the right to an adequate standard of living; and

(c) the right to self-determination.

---

98 Larissa Behrendt and Irene Fisher, "Intervention is hurting health", *The Sydney Morning Herald* (online), 31 March 2009, http://www.smh.com.au/opinion/intervention-is-hurting-health-20090330-9gzm.html.

99 Policy Statement, above n 67, 5.

100 Data was obtained from a client survey of 76 people subject to income management and focus groups involving 167 stakeholders. Data was collected from only 4 locations. Participants in the survey were chosen from only 4 locations and were not randomly selected. As at 31 March 2009 the report stated that there were 15,125 people subject to income management.

101 Australian Institute of Health and Welfare, *Report on the evaluation on income management in the Northern Territory* (20 August 2009), 2.

102 Ibid 3.

7.2 Lack of Adequate Participation by Affected Communities

114. The complete absence of participation and consultation with Aboriginal peoples in both the formulation and the amendment of the compulsory income management scheme raises serious human rights concerns. As identified in section 4.2 above, the right to participate in decision-making about matters which are of direct relevance is a fundamental right that has a particular significance for Aboriginal peoples. Rights of participation are also essential to ensure that laws and policies are effective because they have the buy-in and support of affected communities.

115. The HRLRC considers that there has been manifestly inadequate consultation with Aboriginal people to determine the best means of regulating their social security benefits. As discussed above, from June to August 2009 a series of consultations were undertaken by FaHCSIA with Aboriginal communities in the Northern Territory. The content of consultations were guided by the Federal Government's Discussion Paper, *Future Directions for the Northern Territory Emergency Response*.[103] However, the problem with the Discussion Paper is that the Government only put forward two options regarding income quarantining as "a starting point" for discussion. Option one was to allow for individual exemptions from income management and option two was for no change to income management. If genuine consultation was intended, it is curious that no option to abolish income management or to implement voluntary income management was put forward, despite strong recommendations from the Review Board for such amendments to be made.

116. These narrow options undermine the credibility of the consultations from the outset. Furthermore, restricting discussion in this manner fails to create a climate of confidence which is critical to good faith consultations. As the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people notes:

> the creation of a climate of confidence is particularly important in relation to Indigenous people, given their lack of trust in State institutions and their feeling of marginalization, both of which have their origins in extremely old and complex historic events, and both of which have yet to be overcome.[104]

117. As outlined in section 4.2 above, the purpose of consultations with Aboriginal communities is to ensure their participation in the development of laws and policies that directly them, and should be with a view to obtaining their free, prior and informed consent. The HRLRC is concerned that while Aboriginal communities were provided an opportunity to comment on the

[103] *Future Directions Discussion Paper*, above n 26.

[104] James Anaya, above n 33, 50.

"options" presented by the Federal Government, there was a real lack of participation in the formation of the new income management regime.

118. Genuine and effective consultation does not just involve discussion; it requires active and informed participation in the decision making process. As discussed below, there is no doubt that the new income management regime will disproportionately affect Aboriginal communities. However, these communities have not been afforded the opportunity to participate in the design of this new model, once again undermining their right of self-determination. It is concerning that, despite the Federal Government's stated commitment to re-setting the relationship with Aboriginal communities, genuine consultation and engagement still remains absent.

7.3 Income Management is Discriminatory

119. The HRLRC considers that the proposed amendments to compulsory income quarantining contained in the Government Bills will continue to impact specifically on Aboriginal peoples and breach the right of non-discrimination. The HRLRC considers that the revised income quarantining measures will:

(a) directly discriminate against Aboriginal peoples because compulsory income management:

(i) is targeted specifically at Aboriginal people;

(ii) impairs the equal enjoyment of human rights by affected Aboriginal peoples; and

(iii) cannot be properly classified as being a "special measure"; and/or

(b) indirectly discriminate against Aboriginal peoples because compulsory income management:

(i) disproportionately impacts on Aboriginal peoples; and

(ii) cannot be justified as "reasonable".

120. As explained by the UN Committee on Economic, Social and Cultural Rights in its General Comment No 19, the formulation and implementation of social security strategies and plans of action must respect, among other things, the right of non-discrimination.[105] However, the proposed criteria for individuals to be subject to the income management provisions is based — either directly or indirectly — upon the race of the welfare recipient, which raises serious

[105] Committee on Economic, Social and Cultural Rights, *General Comment No 19: The right to social security* (27 November 2007) UN Doc E/C.12/GC/19, [69].

concerns in the relation to the right to non-discrimination.[106] As the Committee on Economic, Social and Cultural Rights states,

> [s]tates parties should take particular care that Indigenous peoples and ethnic and linguistic minorities are not excluded from social security systems through direct or indirect discrimination.[107]

(a) Income Management Constitutes Direct Discrimination

121. The HRLRC is concerned that the proposed amendments to compulsory income quarantining are predominantly cosmetic in nature and are a technical attempt to remove the discriminatory aspect of the regime. The income management regime under the Northern Territory Intervention was directly targeted at Aboriginal communities. This policy has not changed. Rather, in order to circumvent legal obligations under the *Racial Discrimination Act*, the Federal Government proposes to expand income management.

122. In absence of any clear evidence justifying the necessity of income management, either within the Northern Territory or nationally, it can be argued that the reforms are merely a strategic manoeuvre to continue subjecting Aboriginal communities to income management. In order for a measure that is directly discriminatory to comply with the *Racial Discrimination Act* it must constitute a "special measure". Based on the criteria that are required to be fulfilled for a measure to be classified as a "special measure" (as outlined in section 8.1 below), the expanded income management regime cannot properly be classified as a "special measure" because:

(a) the available evidence does not demonstrate that compulsory income management is beneficial for Aboriginal people; and

(b) affected communities have not been involved in the development of the measure.

123. Accordingly, the compulsory income management regime — both in its current operation and under the proposed amendments contained in the Government Bills — constitutes direct discrimination in violation of the right to non-discrimination.

---

[106] For a discussion of racial discrimination in the income management regime, see the Joint Submission by the Central Australian Aboriginal Legal Aid Service and the North Australian Aboriginal Justice Agency to the Senate Select Committee on Regional and Remote Indigenous Communities, June 2008, Chapter 3.

[107] Committee on Economic, Social and Cultural Rights, *General Comment No 19*, above n 105, [35].

(b) Income Management Constitutes Indirect Discrimination

124. The Federal Government seeks to assert that the new categories of income management form an "objective basis for targeting the benefits of income management that is independent of race, and as a result, is intended to be non-discriminatory."[108] Regardless of the Federal Government's assertion, such an approach may still constitute indirect discrimination. The Federal Government has itself acknowledged that a high incidence of Aboriginal people will be caught by the new regime.[109] As a result, it is apparent that the proposed income management provisions will disproportionately impact on Aboriginal people. In the absence of any evidence to demonstrably justify the measure as reasonable and proportionate, the compulsory income management provisions will constitute indirect discrimination.

7.4 Income Management Unjustifiably Limits the Right to Social Security

125. The HRLRC considers that compulsory income management constitutes an unjustifiable limitation on the right to social security, which is enshrined in article 9 of the ICESCR.[110] Indeed, in May 2009, the Committee on Economic, Social and Cultural Rights called on Australia to review the quarantining of welfare payments "that may have a punitive effect on disadvantaged and marginalised families".[111] According to the Committee's General Comment No 19, an assessment of whether States parties are respecting and promoting the right to social security depends on, among other things, whether implementation of a social security regime is reasonable and proportionate with respect to the attainment of the relevant rights.[112]

126. The HRLRC is concerned that the compulsory quarantining of between 50 and 100 per cent of welfare entitlements is a disproportionate response that is essentially punitive in nature. The HRLRC submits that controlling how a person spends money is a drastic interference with the way that a person manages his or her life and family, and a disproportionate response to the issues faced by Aboriginal communities. The HRLRC considers that the Federal Government must consider less intrusive measures, such as voluntary schemes, as a first response before moving to options as draconian as compulsory income management.[113]

---

[108] Policy Statement, above n 67, 6.

[109] Ibid 7.

[110] See also art 5 ICERD, art 26 CROC, art 11(1)(e) and 144(2)(c) CEDAW.

[111] Committee on Economic, Social and Cultural Rights, above n 21, [20].

[112] Ibid [63].

[113] *Social Justice Report 2007*, above n 25, 278.

7.5 Income Management Denies the Right to an Adequate Standard of Living

127. Access to a secure and adequate income is also an essential aspect of ensuring respect for the right to an adequate standard of living. Although international human rights law does not prescribe minimum welfare payment levels, it does stipulate that benefits must not be reduced below a minimum threshold and must be available to "cover all the risks involved in the loss of means of subsistence beyond a person's control".[114] Comparative law further provides that social security and income support must be sufficient to ensure a dignified human existence and to meet people's needs, particularly in relation to housing and health.[115]

7.6 Income Management Must Be Voluntary

128. The HRLRC submits that if income management is to be retained, the Government Bills must be amended to ensure that the scheme is voluntary. Voluntary income management would ensure that the application of the scheme is assessed on a case by case basis and only applied to individuals and families based on need and their consent. Such an approach would have the advantages of ensuring that the scheme is:

(a) consistent with the *Racial Discrimination Act*, because it could be properly justified as being reasonable; and

(b) likely to be far more effective in addressing Aboriginal disadvantage, because providing people with a choice to have their income quarantined promotes the right of Aboriginal people to self-determination by allowing them to effectively participate in their own lives.

Recommendation 6:

The HRLRC recommends that the Government Bills be amended to remove the compulsory nature of the income management scheme, and that the scheme be replaced with voluntary income management.

---

[114] UN Committee on Economic, Social and Cultural Rights, *General Comment 6: The Economic Social and Cultural Rights of Older Persons*, UN Doc. HRI/GEN/1/Rev.5 (2001), 43.

[115] Benefits Case (1994), Constitutional Court of Hungary, Decision No 43/1995; *V v Einwohrnergemeine Xund Regierunsgrat des Kantons Bern* (1995) Federal Court of Switzerland, BGE/ATF 121 I 367.

8. Other Measures

129. In addition to the income management provisions, the Government Bills seek to make minor amendments to other Northern Territory Intervention measures to ensure their compliance with the *Racial Discrimination Act*.

130. Currently, the Northern Territory Intervention legislation specifies that the provisions of the Northern Territory Intervention legislation, and any acts done under or for the purposes of the legislation, are, for the purposes of the *Racial Discrimination Act*, "special measures".[116] The Welfare Reform Bill repeals those provisions that deem measures under the Northern Territory Intervention legislation to be special measures.[117] Instead, an object clause is proposed that provides "the object of this Part is to enable special measures to be taken".

131. This approach has been adopted with respect to the following Northern Territory Intervention measures:

(a) alcohol restrictions;

(b) pornography restrictions;

(c) five-year leases;

(d) community store licensing;

(e) controls on use of publicly funded computers;

(f) law enforcement powers; and

(g) business and management powers.

132. The Federal Government's policy statement confirms that the measures outlined at paragraph 131 are intended to be special measures for the purposes of the *Racial Discrimination Act*.[118] The HRLRC is concerned that simply altering the objects clause regarding each of the above measures, rather than actually redesigning the measures themselves to ensure that they do, does not satisfy the criteria necessary for the measure to be a "special measure" (as discussed below in the following section).

---

[116] *Northern Territory National Emergency Response Act 2007*, section 132(1); *Families, Community Services and Indigenous Affairs and other Legislation Amendment Northern Territory National Emergency Response and other Measures) Act 2007*, section 4(1); and *Social Security and other Legislation Amendment (Welfare Payment Reform) Act 2007*, section 4(2).

[117] Welfare Reform Bill, Schedule 1 Item 1.

[118] Welfare Reform Bill, Schedule 3.

133. The HRLRC notes that while the core features of most measures have been retained, some positive amendments have been proposed with respect to alcohol restrictions. The Government Bills provide for a move away from blanket alcohol bans to community restrictions which will be tailored on a case-by-case basis following community consultations.[119] The Federal Government has stated that "each community will have a significant say in the form of alcohol restrictions in their community in the future, including in the development of an alcohol management play for their community."[120]

134. While there are still aspects of the proposed amendments that the HRLRC considers to be problematic,[121] and uncertainty whether the criteria for special measures have been met, the amendments signify a positive step toward meaningful participation of Aboriginal people. The HRLRC urges the Federal Government to adopt similar community based participatory approaches to re-designing all the Northern Territory Intervention measures. This would substantially assist in classifying particular measures as "special measures".

8.1 Measures Must be Amended to Ensure they are Properly "Special Measures"

135. Special measures are "positive measures intended to enhance opportunities for historically and systematically disadvantaged groups, with a view to bringing group members into the mainstream of political, economic, social, cultural and civil life".[122] Special measures are an essential component to achieving substantial equality and eliminating racial discrimination.

136. Article 1(4) of CERD provides that:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as maybe 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 to have been achieved.

---

[119] Welfare Reform Bill, Schedule 3.

[120] Explanatory Memorandum, above n 91, 37.

[121] For example, subsection 19(15) set out criteria for community consultations. Subsection 19(6) of the Welfare Reform Bill provides that a declaration made by the Minister about the operation of the alcohol restrictions in certain prescribed areas are not invalid where community consultations in accordance with the criteria have not been complied with.

[122] Rebecca Cook in Ineke Boerefijn et al (eds), 'Temporary Special Measures: Accelerating de facto equality of women under article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women', Transnational Publishers, New York, 2003, 119.

137. In August 2009, the Committee on the Elimination of Racial Discrimination released its General Recommendation No 32 on the meaning and scope of special measures. The Committee states that:

> special measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary.[123]

138. The meaning and scope of special measures has been examined in Australia's domestic law by the High Court of Australia. In *Gerhardy v Brown* (1985) 159 CLR 70, Brennan J stated that four elements must be satisfied to establish a special measure. Those elements are that the measure:[124]

(a) provides a *benefit* to some or all members of a group based on race;

(b) has the *sole purpose of securing the advancement of the group* so the group can enjoy human rights and fundamental freedoms equally with others;

(c) is *necessary* for the group to achieve that purpose; and

(d) *stops once the purpose has been achieved* and does not set up separate rights permanently for different racial groups.

139. Participation of the affected group is a minimum requirement for "special measures".[125] The Committee on Elimination of Racial Discrimination, in its General Recommendation No 23, states that no decisions directly relating to Indigenous peoples' rights and interests be taken without their informed consent.[126]

---

[123] Committee on Elimination of Racial Discrimination, *General Recommendation 32: The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, Seventy-fifth session (August 2009), [16].

[124] *Gerhardy v Brown* (1985) 159 CLR 70 per Brennan J, 133.

[125] Committee on Elimination of Racial Discrimination, 'Committee on Elimination of Racial Discrimination Discusses States' Obligation to Undertake Special Measures' (Press Release, 5 August 2008), available at http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/696149E128473FAFC125749C004A5160?OpenDocument.

[126] Committee on Elimination of Racial Discrimination, *General Recommendation No 23: Indigenous Peoples* (18 August 1997).

8.2 The Measures do not Fulfil the Criteria for "Special Measures"

140. The HRLRC is concerned that the remaining measures contained in the Northern Territory Intervention legislation cannot be properly characterised as "special measures" for two key reasons, namely:

(a) the measures have not been developed with the participation of affected Aboriginal individuals and communities;

(b) there is insufficient evidence to demonstrate that the measures will be for the benefit of Aboriginal people and secure the advancement of the realisation of other human rights.

141. Fundamental to the operation of special measures is that they are "designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities".[127] Furthermore, where measures negatively impact on a particular group, the Aboriginal and Torres Strait Islander Social Justice Commissioner states that it can only be a special measure if introduced with the **consent** of the affected group.[128] An obligation rests with government to ensure that no decisions directly affecting Aboriginal people are taken without their informed consent.[129]

142. The measures introduced under the Northern Territory Intervention all have the potential to impact significantly on the rights and freedoms of Aboriginal peoples. Accordingly, the requirement for consultation, participation and consent of Aboriginal communities is even more relevant to ensuring that the measures can be justified as "special measures".

143. It is clear that the Federal Government's NTER Redesign Consultations were conducted in part to demonstrate participation and consent to support the classification of particular measures as special measures. However, post-implementation consultation, even if adequate, cannot be used to retrospectively justify measures as "special measures".[130] In any event, as discussed above, the HRLRC is concerned about a number of significant deficiencies in these consultations, including their design. Critical to ensuring meaningful participation is involvement of Aboriginal people in the design of the consultation. As highlighted in the *Will They Be Heard Report*, there was a complete lack of Aboriginal involvement the consultation process. This is particularly problematic because, as the

---

127 Committee on Elimination of Racial Discrimination, *General Recommendation 32*, above n 123, [18].

128 *Social Justice Report 2007*, above n 25, 261.

129 See Committee on Elimination of Racial Discrimination, *General Recommendation No 23*, above n 126.

130 Alison Vivian and Ben Schokman, above n 94, 14.

Special Rapporteur on situation of human rights and fundamental freedoms of Indigenous people has observed:[131]

> In many instances, consultation procedures are not effective and do not enjoy the confidence of indigenous peoples, because the affected indigenous peoples were not adequately included in the discussions leading to the design and implementation of the consultation procedures.

144. Having regard to the deficiencies in the consultations process, the HRLRC does not consider that Aboriginal people were adequately consulted. It is noteworthy that the *Will They Be Heard Report* found that:[132]

> the consultation process undertaken by the Australian Government is manifestly inadequate and incapable of facilitating informed consent mandated by General Recommendation 23 and the Declaration for the following reasons:
>
> (i) there are fundamental flaws with the substance of the consultation;
>
> (ii) there has been very limited consultation;
>
> (iii) the consultations process itself is inadequate; and
>
> (iv) (there are concerns about the Australian Government's motives with respect to the consultative process).

145. Putting aside that the legitimacy of the objectives behind these measures, whether they confer any real benefit to Aboriginal communities and the necessity of the measures has not clearly been established by the Federal Government.[133] Aboriginal people have once again not been afforded a genuine opportunity to participate in the re-design of the Northern Territory Intervention measures that adversely affect them. Therefore, there is serious doubt that any of the measures amended by the Government Bills can be classified as special measures. The HRLRC submits that, in absence of genuine consultation and engagement, the Northern Territory Intervention measures continue to be racially discriminatory and unjustifiably impact on a range of other human rights.

---

131 James Anaya, above n 33.

132 *Will They Be Heard?,* above n 68, 36.

133 For extensive analysis of whether particular measures can be considered as special measures, see Alison Vivian and Ben Schokman, above n 94.

Recommendation 7:

The Government Bills should be amended to ensure that the Northern Territory Intervention measures can be properly classified as "special measures". Such amendments should include:

(a) genuine and effective involvement of affected communities in the design and development of such measures; and

(b) voluntary application of the measures.