AMNESTY INTERNATIONAL

Submission to the

Senate Standing Committee on Community Affairs

regarding the

INQUIRY INTO 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

January 2010

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1. Summary

Amnesty International has welcomed the government's proposed repealing of clauses in Northern Territory Intervention legislation that remove anti-discrimination protections for some 45,000 Indigenous residents of prescribed communities. This is an important step towards reversing human rights violations brought about by the Intervention and ensuring that acts done under it are no longer immune from the reach of the *Racial Discrimination Act* 1975 (Cth) (RDA) and from Northern Territory anti-discrimination laws.

However, Amnesty International remains concerned that the Bills will not act retrospectively to invalidate any racially-discriminatory actions already taken under the *Northern Territory Emergency Response* (the Intervention). They will also not provide remedy or redress for people whose rights have been violated or continue to be violated by Intervention measures while measures continue until 2011.

Amnesty International also does not believe that the Bills will effectively address the human rights violations that contribute to the underlying causes of Indigenous disadvantage or the risk factors for violence against children. In many respects, Intervention measures will continue to deepen the insecurity and deprivation of affected communities. Amnesty International continues to call on the government to move away from imposed, blanket policy approaches in addressing the underlying disadvantage of Indigenous people in Australia.

The Bills do not effectively demonstrate the government's commitments to the pursuit of evidence-based policy, upholding United Nations-recognised human rights standards, and the harnessing of Indigenous decision-making power in the development and implementation of policy.

Importantly, the Bills do not go far enough to ensure fulfillment of rights contained in the United Nations Declaration of the Rights of Indigenous Peoples - endorsed by the current Government in 2009. The Declaration affirms the rights of all Indigenous peoples, seeks to acknowledge injustices suffered and sets minimum standards for their survival, dignity and well-being. The rights to self-determination and participation in decisions affecting Indigenous peoples are entrenched in international law and practice.

In order to meet its obligations under human rights treaties, the government needs to check its legislation, policy and practice to conform to each article. This means taking steps to enable all individuals within its jurisdiction to enjoy the rights recognised in those treaties on the basis of equality. Treaties present governments with the need to develop a program of action so that they are constantly moving towards the goal of substantive equality in the enjoyment of rights.

Some rights can be temporarily suspended in times of emergency, some can be realised progressively as resources become available. Others, including the right to be free of discrimination on the grounds of race, must be protected at all times.

Amnesty International has taken a consistent stance that racially discriminatory measures under the Intervention violate Australia's human rights treaty obligations and should cease. Those whose rights have been violated should, in accordance with treaty obligations, have an avenue for redress and compensation. Australia is remiss in failing to provide such avenues for a wide range of human rights, including the right to protection from racial discrimination.

Considerations of an administrative or political nature do not excuse delay in ending violations of the right to non-discrimination, violations that themselves violate the principle of equality before the law.

An intention to address housing, child protection, economic development and other welfare issues does not excuse violating the right to protection from racial discrimination.

The government's view that certain measures would be beneficial for those subjected to them does not mean that they are "special measures" under the RDA or the Convention on the Elimination of all forms of Racial Discrimination.

Similarly, the Bill's claim that the government can declare certain measures "special measures" following the consultations it has now held in the Northern Territory is unsustainable. Measures that restrict access to or enjoyment of rights cannot qualify as "special measures" even if the government considers or intends that they do so. And government-imposed, arbitrary restriction or limitation of rights without the free, prior and informed consent of the communities concerned, as required by Article 19 of the Declaration on the Rights of Indigenous Peoples, remains discriminatory.

The proposal to solve the problem of making compulsory income management compliant with the RDA by imposing it on the basis of membership of a disadvantaged community, rather than membership of an Indigenous community, does not bring it into line with Australia's human rights obligations. First, it is likely to affect Indigenous Australians disproportionately, because of their prevalence in the most disadvantaged communities and their higher rate of reliance on welfare payments. Second, government imposition of regressive measures that place limitations on the enjoyment of social security entitlements for marginalised or disadvantaged communities, based on their area of residence, are not compatible with authoritative interpretations of how states need to implement the right to social security.[1] In all such cases, states must justify such regressive measures and show that they have considered alternatives.

Governments are also obliged to ensure that individuals' enjoyment of the right to social security is not put at risk by others.[2] In other words, it is the obligation of the government to provide protection against humbugging and loan sharking. Compulsory income quarantining as a policy response to vulnerability fails to meet the obligation to enable vulnerable people to enjoy the right to social security, without limitation, in comparison with others in the community.

It is then misleading to claim that the Bill will "reinstate" the RDA. Removing the RDA overrides is necessary, but not sufficient, to reinstate protections against discrimination, given that a significant number of ongoing Intervention measures are still discriminatory. The Bill, if anything, increases the powers of the Minister, and, through delegation, extends the powers of bureaucrats over the lives of Indigenous people and other disadvantaged groups. The Bill does so without adequate regard for human rights obligations or evidence of what actually works to improve the life expectancy and well-being of the most vulnerable.

[1] Article 9 of the International Covenant on Economic, Social and Cultural Rights, at www2.ohchr.org/english/law/cescr.htm (accessed 27/01/10) and General Comment on the Right to social Security at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/403/97/PDF/G0840397.pdf?OpenElement (accessed 27/1/10)

[2] See General Comment above, particularly para. 45, which deals with the Obligation to Protect.

However, Amnesty International notes some positive signs in the Bill – the provision for community-developed plans to supersede blanket bans on alcohol and incentives for people to undertake financial literacy courses and to save.

Genuine consultation with communities helps them realise the rights to participation and self-determination. It also improves the authority and the effectiveness of government policy.

Responding to the urgent needs of Aboriginal and Torres Strait Islander communities requires mutual respect, constructive dialogue and negotiation.

The government-commissioned review of the Intervention recommended a new approach based on partnership. The *Little Children Are Sacred* Report[3] made a number of recommendations to address the factors underlying high rates of child abuse and substance abuse in remote communities. Few of its 97 recommendations have been implemented. Similarly, the report of the Royal Commission into Aboriginal Deaths in Custody[4] also provides a thorough analysis of the factors underpinning high rates of contact with the criminal justice system, along with evidence based policies to address them.

International human rights law and practice also shows the way. It is incumbent on Australia as a responsible member of the international community to reject racially discriminatory laws affecting its Indigenous peoples. The Intervention was conceived in haste and significant aspects of it are bitterly resented by Aboriginal peoples. It is time to rescind the Intervention and to invigorate and resource the partnership with Indigenous communities. Such a partnership must have as its basis the fundamental equality of all Australians, regardless of race, before the law.

2. About Amnesty International

Amnesty International is a worldwide movement of more than 2.8 million people across 150 countries, including over 100,000 in Australia. Its supporters work to promote the observance of all human rights enshrined in the Universal Declaration of Human Rights and other international standards. In pursuit of these goals, Amnesty International undertakes research and action focused on preventing grave abuses of human rights including rights to physical and mental integrity, freedom of conscience and expression, and freedom from discrimination.

Amnesty International is independent of any government, political ideology, economic interest or religion. It does not support or oppose any government or political system, nor does it support or oppose the views of the victims whose rights it seeks to protect. It is concerned solely with the impartial protection of human rights.

Amnesty International has been at the forefront of work on the development and fulfilment of human rights standards for more than 45 years. In addition to its work on specific abuses of human rights, Amnesty International urges all governments to ratify and implement human rights standards and works to create a human rights culture throughout society.

[3] *Ampe Akelyernemane Meke Mekarle Little Children are Sacred*, Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse 2007 at www.inquirysaac.nt.gov.au/pdf/bipacsa_final_report.pdf (accessed 27/01/10)

[4] Available at www.austlii.edu.au/au/other/IndigLRes/rciadic/ (accessed 27/1/10)

3. A human rights perspective on the Intervention

3.1 Why rights matter

Amnesty International seeks the application of international human rights standards to law, policy and practice because they represent the conditions that all people need to flourish. These standards are set out in the human rights treaties that Australia has ratified, as well as in international jurisprudence – particularly the decisions and guiding comments of the treaty monitoring bodies.

The NT Intervention highlights the interdependence and inter-relatedness of rights in the lives of Aboriginal people and the multiplying effect of violations that drive and deepen deprivation, insecurity, exclusion and voicelessness. The rights inhibited by the Intervention and described in this brief include:

- Rights related to deprivation: rights to food, housing
- Rights related to exclusion: rights to non-discrimination and free, prior and informed consent
- Rights related to insecurity: rights to land
- Rights related to voicelessness: rights to information and participation

Many Indigenous communities in the Northern Territory provide stark examples of poverty within a wealthy country. The contrast between Australia's economic capacity and its inability to effectively fulfil the rights of the country's Indigenous peoples clearly demonstrates poverty as a function of exclusion and discrimination.

The problem of the potential "tyranny of the majority" in parliamentary democracies is widely recognised amongst political commentators, as it is among those marginalised by poverty, disability or mental illness. It is felt keenly by those who belong to minorities of sexual preference, religious beliefs or cultural practice.

Human rights establish minimum standards designed to promote substantive equality. When they are integrated into the legal framework of a country they can provide real constraints against political pressure of all kinds to treat members of particular groups less favourably than others. They can also provide avenues for those whose rights have been violated to seek relief or redress.

A rights-based perspective encourages responsibility. For example, by meeting the emotional, physical and educational needs of the growing child – that is by giving effect to the rights of the child – that child has the best chance of becoming a responsive and capable individual. The child is confident, sensitive to rights of others, resilient and able to make the most of available opportunities to lead a productive and fulfilling life. Adults must be free of unnecessary restrictions and the power of well-meaning but interfering bureaucrats if they are to have real agency in their lives and be able to plan and work for the welfare of their families and communities. A rights-based approach ensures that arbitrary interference with rights is limited, and that all members of society are treated as full citizens.

Rights-based policies must be based on the best evidence – otherwise the measures taken to assist the disadvantaged, injured or traumatised may impede rather than assist realisation of their right to the highest achievable standard of health and welfare.

There are many aspects of Indigenous policy part of and connected to the Intervention that reflect a return to policies of 'protection' or 'assimilation'. These were the policies that held sway in an era where Indigenous Australians were not recognised as citizens, had no rights to traditional land, had their wages stolen and their families torn apart.

3.2 International recognised human rights standards

Whenever Australia ratifies an international human rights treaty, it promises to recognise and protect the relevant rights for all those within its jurisdiction. It is accountable before the UN human rights system – treaty bodies, experts and the Human Rights Council, for its performance.

Between them, two of the treaties ratified by Australia - the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic Social and Cultural Rights, articulate the rights set out in the Universal Declaration of Human Rights. Other treaties can be seen as either elaborations of particular rights – the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment elaborates Article 7 of the ICCPR – or rights that have not been realised equally by particular groups – like women (Convention on Discrimination Against Women), racial groups (Convention Against Racial Discrimination), people with Disabilities (Convention on the Rights of Persons with Disabilities), or children (Convention on the Rights of the Child).

For reasons relating to historical dispossession, subjugation and the experience of ongoing discrimination and other human rights violations, Indigenous peoples are acutely in need of human rights protections. They lack the political and economic power to assert their own interests where those interests conflict with those of the majority. Their culture and distinctive ways of life, with its close relationship to customary land, is neither widely understood nor respected by non-Indigenous Australians.

The principles of the Declaration on the Rights of Indigenous Peoples, a document developed with the strong participation of Indigenous peoples themselves, and publicly endorsed by the government in April 2009, provide essential guidance on how human rights standards need to be interpreted when applied to the situation of Indigenous peoples. The authority of the Declaration in representing both the aspirations of Indigenous peoples and a set of internationally-agreed norms place the government under a strong obligation to implement it.

3.3 Australian Labor Party (ALP) human rights commitments

In its platform of 2007, the ALP promised to:

> cooperate with the States and Territories to **ensure that comprehensive and consistent human rights protection and enforcement mechanisms are available to all Australians**.[5]

It undertook to comply with its obligations as a state party to international human rights treaties by introducing them into domestic law. Failure to do so has drawn consistent criticism from the UN's treaty monitoring mechanisms in the past.

> Labor supports both the promotion of human rights internationally and the development of international standards and mechanisms for the protection and enforcement of these rights. **Labor will adhere to Australia's international human rights obligations and will seek to have these incorporated into the domestic law of Australia and taken into account in administrative decision-making.**[6]

In paragraph 44, chapter 13 of the platform there are a number of undertakings on Indigenous rights. The following are of special relevance to the Bills under consideration.

A Labor Government would take:

> an evidence-based approach to improve the social, cultural and economic well-being of Indigenous Australians,

will introduce:

> a national policy framework with transparent goals and timeframes based on research and statistical data and hold all governments accountable to it,

will harness:

> Indigenous decision-making power in relation to the formulation and delivery of programs,

and will require that:

> all policies and programs increase independence and self-reliance in Indigenous communities.[7]

It expresses commitment to the belief that:

> Government is best placed to act as an enabler, investor and monitor in Indigenous affairs,

and to the principle that:

> all Indigenous communities are entitled to access equitable standards of infrastructure, amenities and services.

It "understands" that:

> historical policies are a fundamental cause of poverty and marginalisation today.[8]

Finally, it also promises that a Labor Government would:

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[5] ALP 2007 Platform, Chapter 13 Respecting Human Rights and a Fair Go for All, Principle 3, emphasis added.
[6] Ibid. Principle 4, emphasis added.
[7] Ibid, Principle 44.
[8] Ibid.

> endorse the Declaration on the Rights of Indigenous Peoples **and be guided by its benchmarks and standards.**[9]

These policies, promises and approaches are in keeping with Australia's international human rights obligations and with international norms. While the Intervention was introduced by the previous government, the current government has failed to implement these directions and promises. For the most part, the government has, to date, not delivered real outcomes in terms of addressing Indigenous disadvantage.

3.4 Which human rights standards are violated by the Intervention?

The laws, policies and practices initiated by the former government under the Intervention suite of legislation violate Australia's treaty obligations and international norms. Their retention by the current government perpetuates those violations and breaches the principles set out in its own election platform.

In brief, it does so because the Intervention: targets, on the basis of race, policy measures that diminish rights; does so without the free prior and informed consent of those subjected to them; and without evidence that such measures are proportionate and appropriate to address their stated purpose – originally protecting children from abuse, now characterised as 'closing the gap'.

Amnesty International has consistently criticised compulsory income quarantining and other discriminatory elements of the Intervention in its submissions to the Inquiry into the Intervention Bills, the government review of the Intervention, the Human Rights Committee and the Committee on Economic, Social and Cultural Rights.

Commencing with the Committee against Racial Discrimination, a series of UN human rights experts last year condemned the Intervention as a violation of human rights standards that prohibit discrimination on the grounds of race. The Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya,described his concerns:

> These [Intervention] measures overtly discriminate against aboriginal peoples, infringe their right of self-determination and stigmatize already stigmatized communities[10].

The government made an undertaking to the CERD Committee to introduce legislation to reinstate protections against racial discrimination in the spring sitting of Parliament in 2009. This undertaking has yet to be fulfilled.

Indigenous Australians need human rights protection. Instead of constitutional protection against race-based discrimination, Australia has a constitutional power – s.51(xxvi) - that enables it to discriminate on the basis of race.

As the ALP policy platform acknowledges, historical policies are a fundamental cause of poverty and marginalisation. Evidence, rather than prejudice or uneducated guesswork, needs to be the basis of policy. Evidence shows the strong links between poverty,

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[9] Ibid.

[10] Statement of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, as he concludes his visit to Australia Canberra/Geneva, 27 August 2009 at http://www.un.org.au/files/files/Press%20Release%20-%20Australia%20JA%20final.pdf (accessed 29/01/10)

marginalisation and increased risk of child abuse[11] and other criminal behaviour, as well as increased prevalence of physical and mental health problems, reduced life expectancy, lower educational achievement and reduced economic activity[12]. For Indigenous communities, policy also needs to "be guided by the benchmarks and standards" of the Declaration on the Rights of Indigenous Peoples. In particular, it needs to ensure that Indigenous peoples are active participants in the design and implementation of measures that affect them and their communities, and no longer passive subjects of measures developed and imposed by others, no matter how well-meaning. Government needs to be an enabler, acting to empower Indigenous communities and assist them to realise their own aspirations.

The Intervention as originally conceived and implemented does not meet international human rights standards.

The Intervention as proposed to continue under the government Bills also fails, as it too will not meet international human rights standards and ALP election commitments.

3.5 How the Intervention legalises a range of discriminatory measures

The stated aims of the Intervention have evolved over time. When the national emergency was first announced, its stated aim was to protect children vulnerable to violence, abuse or neglect:

> All action at the national level is designed to ensure the protection of Aboriginal children from harm.[13]

However, the measures taken under the Intervention not only bear no relationship to the recommendations of the *Little Children are Sacred* report that prompted them, they bear no obvious causal relationship with the stated aim of protecting children. They are extraordinary measures that treat Indigenous people as a group whose rights do not need to be respected through genuine consultation, or through the adoption of measures known from research to be important in addressing the underlying causes of child abuse.

The Intervention's measures are not compatible with human rights standards or the election commitments of the government for reasons discussed below.

The measures are racially discriminatory. They undercut self-determination and self management at a community level, leaving these communities in a governance vacuum. The measures strike at the heart of Aboriginal personal autonomy and responsibility. Through compulsory and so-called voluntary leases they undermine the achievements of land rights. Through winding back CDEP they undercut successful community initiatives, self-management and enterprises built up over many years. As the Government's review of the Intervention reported, the measures have been widely resented and have had a demoralising effect on many communities. This is hardly what was intended, but can be seen as the direct consequence of attempting to engineer outcomes at the expense of established rights.

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[11] See for example *Crisis for Children* Background Briefing, Radio National, 9 November 2008, Transcript at www.abc.net.au/rn/backgroundbriefing/stories/2008/2409656.htm (accessed 27/1/10)

[12] See chapters of Royal Commission on Aboriginal Deaths in Custody (Footnote 2) on influence of historical factors.

[13] Mal Brough,then Minister for Families, Community Services and Indigenous Affairs, "National Emergency", Media Release, *25/06/2007*
www.lgant.nt.gov.au/lgant/layout/set/print/content/view/full/1755.html (accessed 27/01/10)

3.6 The Intervention undermines the principle of equality under the law.

Targeting on race not need

Intervention measures are targeted on the basis of race and not on need, therefore undermining the principle of equality before the law.

The discriminatory and perverse aspects of the policy are well evidenced in this current Department of Families Housing, Community Services and Indigenous Affairs (FaCSHIA) guideline on exemptions from blanket income quarantining;

> Individuals may occasionally ask the delegate to be exempted from income management on the grounds that they are behaving in a socially responsible manner and are capable of meeting their priority needs without income management. It is not in line with the whole of community policy intent of income management for the delegate to consider exempting an individual purely on these grounds.[14]

This clearly illustrates why Australia's human rights protections need to be entrenched. It shows that the policy is not to protect children at risk, not to assist those who cannot meet their family needs through responsible income management, but to limit enjoyment of the right to social security.

What message does this send to those subjected to such a policy? What does it say about Australia's respect for human rights and for the government's announced intention of developing a new relationship with Indigenous Australians based on respect and mutual responsibility?

The indignity and implicit stigmatisation of compulsory welfare quarantining measure remain – at least until an exemption has been approved – for those who have always treated these payments in a responsible manner.

In the light of post-colonial history, exemption from income management is a very sensitive proposal. Aboriginal administration in Australia has, until relatively recently, seen blanket restrictions on rights and tight administrative control - often arbitrary - across most life decisions. Exemption from such controls was available for individuals who could show themselves 'responsible' against criteria established by government agencies. These exemption processes were bitterly resented.

The psychological wounds run deep – perhaps other than the Stolen Generations, nothing was more resented than these exemption processes.

In January 2009, a number of Aboriginal people from a Prescribed Area sent a Request for Early Action to the Committee on the Elimination of Racial Discrimination (CERD). In an update to the complaint in August, this 'opt out' option was described:

> "This is highly offensive to a number of Aboriginal people, given the invocation of schemes throughout Australia in the early 1900s that allowed for 'mixed blood' Aboriginal people who fulfilled certain criteria to apply for exemptions to

[14] Guide to Social Security Law , Version 1.159 - Released 4 January 2010 FAHCSIA http://facs.gov.au/guides_acts/ssg/ssguide-11/ssguide-11.4/ssguide-11.4.5/ssguide-11.4.5.40.html (Accessed 21/1/10)

> Protection Acts and regulations … The exemption certificates [were] commonly known as 'dog tags'.[15]

Section 132 of the Northern Territory Emergency Response Act 2007 (Intervention) "excludes from the operation of the RDA":

(1) all its own provisions

(2) any action or inaction done under or for the purposes of those provisions".

The Intervention needed to do this to avoid being caught by s.10 of the *Commonwealth Racial Discrimination Act* 1975 (RDA), which articulates a right to equality before the law. Section 10(1) of the RDA nullifies the effect of Commonwealth, State or Territory law that denies or reduces the enjoyment of a right to individuals based on their race, colour, national or ethnic origin[16].

It also makes explicit that this protection applies to law that interferes with management by Indigenous owners of their land.[17]

The RDA is intended to reflect Australia's obligations under the Convention on the Elimination of all forms of Racial Discrimination (Race Convention), where racial discrimination is defined in Article 1(1):

> In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

By targeting residents of "prescribed communities", the Intervention undermines equality before the law.

Through treaty obligations, the norms of international customary law, and values that urge us to treat each other with respect, there is never an excuse for racially-discriminatory law. This is the lesson that history has taught us. Racially-based laws can always find their justification (eg apartheid) but they are never just. Even where based on the best of intentions, race-based legislation sets a

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[15] See Aboriginal People residing in Prescribed Areas in the Northern Territory and subject to the Northern Territory Intervention, *Request for Urgent Action under the CERD in relation to the Commonwealth of Australia, Update 11 August 2009*, para 9..

[16] s. 10(1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first‑mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

[17] S. 10 (3) Where a law contains a provision that:
(a) authorises property owned by an Aboriginal or a Torres Strait Islander to be managed by another person without the consent of the Aboriginal or Torres Strait Islander; or
(b) prevents or restricts an Aboriginal or a Torres Strait Islander from terminating the management by another person of property owned by the Aboriginal or Torres Strait Islander;
not being a provision that applies to persons generally without regard to their race, colour or national or ethnic origin, that provision shall be deemed to be a provision in relation to which subsection (1) applies and a reference in that subsection to a right includes a reference to a right of a person to manage property owned by the person.

dangerous precedent and introduces a moral ambivalence into the national legislative corpus.

Intervention measures not "special measures", just discriminatory

Despite the exclusion of the RDA, the Intervention declared its measures to be "special measures" within the meaning of s.8(1) of the *Race Discrimination Act 1975*(Cth), which reflects Article 1(4) of the Race Convention:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Under international human rights standards, "special measures" are a valid departure from the requirement for formal equality before the law. They can be taken to correct situations of entrenched inequality of the sort to be found among Australia's Indigenous communities. In such cases, adherence to strict equality before the law can serve to perpetuate inequality.

However, as observed in the Amnesty International publication on Special Measures (see Attachment A), a search of material published by independent UN human rights mechanisms, which contribute authoritative guidance on the interpretation of human rights treaty norms and standards, reveals:

> no indication that the concept [of special measures] can be used to limit or restrict, on the basis of race, entitlements enjoyed by citizens. Indeed there is an emphasis that special measures should never be discriminatory. ….To nullify or impair rights on the basis of race under the rubric of "special measures" would be incompatible with their purpose.[18]

Moreover, the fact that the government claims or intends that the measures will be beneficial to those subjected to them – in particular, that they will help protect children from abuse and reduce violence against women – does not make them "special measures". As discussed, "special measures" have the character of affirmative action, offering incentives or additional services or assistance.

The Government's RDA Bill repeats the false claim that racially discriminatory measures introduced under the Intervention and to be retained in the RDA Bill are special measures. This is not the case. These measures continue to restrict rather than expand the enjoyment of rights by Indigenous residents of prescribed communities.

No prior consultation and consent

Measures that restrict access by an Indigenous community to enjoyment of a particular right might be consistent with the prohibitions against racial discrimination, provided that they represented a genuine initiative of the community in question and that the community has given its informed consent to the measures.

[18] *Race Discrimination, Special Measures and the Northern Territory Intervention,* prepared by consultant Greg Marks, Amnesty International Australia, November 2009, p.5.

The relevant human rights standard when applied to the situation of Indigenous peoples is set out in Article 19 of the Declaration on the Rights of Indigenous Peoples [19] which says that Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own Indigenous decision making institutions. The Intervention was imposed without either consultation with, or consent from, those whose lives it affects.

Even in cases where there is convincing evidence that certain restrictions on rights need to be put in place to achieve a certain public policy objective, human rights standards, including equality before the law, do not permit this to be done in a racially-discriminatory way. The right to protection from racial discrimination cannot be bargained away as the price of achieving protection of the rights of children and women.

When the UN states that human rights are universal, inter-related and indivisible, it means that violation of one right affects the enjoyment of all other rights. Rights cannot be traded off against each other or certain rights protected at the expense of others. Australia, as a signatory of the Universal Declaration of Human Rights must uphold all rights. Social and medical research supports the principle that priority should be given to narrowing gaps in the enjoyment of rights, as those societies where the gaps are narrower are generally more productive, higher achieving and healthy.[20]

Lack of evidence to demonstrate appropriateness and proportionality

In any case where restriction of rights is considered, there needs to be a transparent debate about the alternatives, and methods chosen should be the least restrictive to achieve the aim as well as fit-for-purpose. There should be a demonstrated causal mechanism between the restriction of rights and achievement of the policy aim.

There is no such link in the case of Intervention measures. For each measure, there are non-discriminatory alternatives that could meet the criteria of being evidence-based and rights-based. These are discussed below.

4. The real impact of the Intervention

The Intervention measures will continue until the legislation expires in July 2012, unless the Parliament adopts legislation to modify or cancel them, or the Minister for Families, Community Services and Indigenous Affairs exercises their power under s.5 of the Intervention to "de-prescribe" all prescribed areas.

The latter action would be subject to disallowance by the Senate and would not affect activities in Queensland, where the State protections against racial discrimination have been suspended to enable compulsory income quarantining.

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[19] See also General Recommendation No. 23: Indigenous Peoples:18/08/97 at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/73984290dfea022b802565160056fe1c?Opendocument (accessed 28/01/10)

[20] See for example *The Spirit Level : Why More Equal Societies Almost Always Do Better* by Richard Wilkinson and Kate Pickett, Allen Lane 2009, and *Closing the gap in a generation: Health equity through action on the social determinants of health*, Report of the Commission on the Social Determinants of Health, WHO, 2008 at http://whqlibdoc.who.int/publications/2008/9789241563703_eng.pdf (accessed 28/01/10)

Amnesty International Australia's preceding human rights analysis shows clearly that as long as measures continue that create inequality before the law and are therefore in breach of the RDA and CERD, Indigenous Australians continue to suffer significant violations of their right to protection from racial discrimination.

Furthermore, the significant costs of imposing discriminatory measures waste scarce and urgently needed resources. They also squander chances to capitalise on the Prime Minister's apology to the Stolen Generations to create a new partnership with the Indigenous community, and to "harness Indigenous decision-making power in relation to the delivery of policies and programs" as expressed in the ALP Platform.[21]

4.1 Evidence of the real impact of the Intervention

The Request for Urgent Action sent to the CERD Committee by a group of concerned residents from prescribed areas spells out the stigmatising and humiliating impact of the Intervention on them and their communities[22].

The report from the Indigenous Affairs Minister's own Review Board[23] described how the effects of discrimination in the Intervention were undermining the relationship between Indigenous people and the government, and recommended immediate re-instatement of RDA protections. It also recommended that welfare quarantining be provided solely on a voluntary basis. The government has so far failed to implement that recommendation.

The Review Board said that despite these very significant drawbacks, there have been definite gains as a result of the Intervention. It heard widespread, if qualified, community support for many Intervention measures.

Aboriginal people welcome police stations in communities previously dependent on periodic patrols. They want to work cooperatively with police to build greater security and stability in their homes.

Similarly, the review found there is support for measures designed to reduce alcohol-related violence; to increase the quality and availability of housing; to improve the health and wellbeing of communities; and to advance early learning and education, leading to productive and satisfying employment. These matters were described as uncontentious.

Throughout Amnesty International's consultations in the Northern Territory, Aboriginal people were overwhelmingly supportive of commitments by the government to alleviate these problems.

Closing the Gap report

Following announcement of the Intervention in 2007, actual expenditure on Indigenous policy for the financial year exceeded budget estimates by $620 million – most of that

[21] See text of the Prime Minister's Apology to the Stolen Generations, February 13 2008 at http://www.theage.com.au/articles/2008/02/12/1202760291188.html (accessed 28/01/10) and Footnote 8 above.
[22] http://www.hrlrc.org.au/files/Update-to-CERD-11-August-2009.pdf (accessed 1/2/10)
[23] Report of the NTER Review Board at http://www.nterreview.gov.au/docs/report_nter_review.PDF accessed 28/01/10.

attributable to Intervention measures[24]. For 2008–2009, an amount of $807.4 million over four years was ear-marked for activity under the Intervention, now re-named "Closing the Gap in the Northern Territory".[25] These are substantial resources – have they protected children and improved the lives of community residents?

In October 2009, a review of the Intervention's effects for the period January to June 2009 was posted on a government website. Monitoring the effects of the Intervention is not easy. The intervention was introduced without an evaluation framework – without baseline measurements of the major population characteristics, and without any control group that would allow causal impact of measures to be assessed. As a consequence, most of the report is devoted to recording outputs of expenditure and of services provided, without providing the information needed to assess whether or not the intervention is meeting its stated aims. Furthermore, the government's evaluation does not measure the Intervention's effects on the material conditions, social functioning and wellbeing of community members.

However, many of the results that are available are discouraging. Childhood diseases and risk factors caused by poor living environments have not changed significantly. Housing stress has not been addressed. There has been barely any change in low rates of school attendance. Convictions for child sexual abuse went from 15 in the two years prior to the Intervention to 22 in the two years following – and in four of these latter cases, perpetrators were not Indigenous.

The level of domestic violence reported to police rose 61 per cent in the period since the Intervention; substance abuse was up 77 per cent; and there was a 34 per cent increase in alcohol-related crime. The extent to which these rises reflect increased reporting or increased police presence is not known. The National Crime Commission found no evidence of paedophile rings, but funding for the Taskforce on Indigenous communities has been continued.

Purchases of fresh fruit and vegetables at community stores were up, but cigarette sales were unaffected. There is no systematic, as opposed to anecdotal report on the overall effect of income management on residents, but "the overall impact of income management has been positive for stores".[26]

Child protection needs are most prevalent in communities marked by long-standing and widespread socio-economic disadvantage. In individual families, a parent's loss of a sense of control over their own environment has been identified as a particularly strong risk factor.[27] The factors underlying high rates of violence, abuse and imprisonment in Indigenous communities have been recognised for some time – including in the ALP's policy platform:

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[24] Gardner-Garden J & Park M *Commonwealth Indigenous-specific expenditure 1968–2008* Research Paper No. 10, 26 September 2008, Parliamentary Library, at http://www.aph.gov.au/Library/pubs/rp/2008-09/09rp10.pdf (accessed 5/10/09)

[25] Gardner-Garden J, Dow C & Klapdor M "Budget 2009–10: Indigenous affairs" Parliamentary Library at http://www.aph.gov.au/library/Pubs/RP/BudgetReview2009-10/IndigenousAffairs.htm#_edn10 (accessed 5/10/09)

[26] *Closing the Gap in the Northern Territory, January 2009 to June 2009, Whole of Government Monitoring Report, Part Two: Progress by Measure*, Department of Families, Community Services, Housing and Indigenous Affairs, p 56. http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/closing_the_gap_nter/NTER_monitoring_report_p2.pdf (accessed 28/01/10).

[27] See Footnote 11 above.

> Labor understands that historical polices are a fundamental cause of poverty and marginalisation today. [28]

5 The Rights and welfare of Indigenous Children

As noted above, the public justification for initiation of the Intervention was the need to protect children from abuse and neglect. The expansion of compulsory income quarantining has been justified on the same basis.

However, the evidence used to justify continuation and expansion of income management is flawed and incomplete. There is simply not enough data to assess whether income management is having an impact on child abuse and neglect in the Northern Territory and whether it serves to build strong, resilient and safe communities. When held up to a number of international standards, including human rights standards, and standards for food security and child nutrition, the evidence is hopelessly inadequate. In no way does it justify the continuation of punitive measures that discriminate directly or indirectly on the basis of race.

Child Abuse in the Northern Territory

The Northern Territory Intervention was predicated on the Little Children Are Sacred Report's findings that there were high rates of child sexual abuse in many Indigenous communities in the Northern Territory. This reflects similar trends throughout Australia. Aboriginal and Torres Strait Islander children are over-represented in the child protection system. Indigenous children aged 0–16 years were more than 6 times as likely to be the subject of substantiations than other children [29] and the rate of Indigenous children in out-of-home care was almost 9 times the rate of other children.[30]

In the Northern Territory, the most common type of maltreatment is neglect, with emotional abuse the second most common type of maltreatment substantiated.[31] However, this data is not disaggregated by region. There is no data differentiating between child abuse rates in a prescribed community as opposed to a community outside a prescribed area. The 2009 Closing the Gap in the Northern Territory monitoring report states, "Actual child protection data are not available at the Intervention community level. However data for 2007-08 are available for Indigenous children across the whole Northern Territory."[32] Therefore, there is no way to measure the impact of income management on child abuse rates.

Nevertheless, child abuse is an urgent issue throughout the NT and is of a particular concern for Aboriginal and Torres Strait Islander peoples. The definition of what constitutes child abuse and neglect has changed and broadened over time, shifting away from the identification and investigation of narrowly defined incidents of child abuse and neglect towards a broader assessment of whether a child or young person

[28] ALP 2007 Platform, Ch. 13, Principle 44.
[29] Australian Institute of Health and Welfare 2009 *Child protection Australia 2007–08.* Child welfare series no.45 Cat. no. CWS 33. Canberra: AIHW. p.viii
[30] Australian Institute of Health and Welfare 2009, above. p.ix
[31] Australian Institute of Health and Welfare 2009, above.p.26
[32] FaCSHIA 2009 *Closing the Gap in the Northern Territory January 2009 to June 2009 Whole of Government Monitoring Report Part Two Progress by Measure*. p 40.

has suffered harm.[33] Neglect refers to the failure (usually by the parent) to provide for a child's basic needs, including failure to provide adequate food, shelter, clothing, supervision, hygiene or medical attention.[34]

The report Bringing them Home (National inquiry into the separation of Aboriginal and Torres Strait Islander children from their families) noted that some of the underlying causes of the over-representation of Aboriginal and Torres Strait Islander children in the child welfare system include:

- the legacy of past policies of the forced removal of some Aboriginal children from their families
- intergenerational effects of previous separations from family and culture
- poor socioeconomic status
- perceptions arising from cultural differences in child-rearing practices.[35]

In order to deal with high rates of abuse in Aboriginal communities, programs that address the issues outlined above have the best chance of successfully protecting children. Specific recommendations are outlined in the Little Children are Sacred report.

Income Management

Income management is "a central measure of the NTER".[36] The stated aim of welfare reform is to protect children, reduce reliance on welfare and build stronger communities. The operation of income management through the licensing of community stores is to enhance community food security to ensure a percentage of certain income support and family payments to be spent on priority goods and services such as food, housing, clothing, education and health care.[37] The evidence used to support the efficacy of this approach is seriously flawed.

Measuring the impact of Income Management

The Australian Institute of Health and Welfare was contracted by the government to assess whether the measures that are part of the Intervention do what is intended; to protect children and make communities safe, and create a better future for Indigenous people in the Northern Territory and measure the impact of income management on the health and wellbeing of prescribed communities. The AIHW themselves note the paucity of their own evidence. They state:

> The research studies used in the income management evaluation (point-in-time descriptive surveys and qualitative research) would all sit towards the bottom of an evidence hierarchy.

[33] Australian Institute of Health and Welfare 2009. *Child protection Australia 2007–08*. Child welfare series no.45 Cat. no. CWS 33. Canberra: AIHW. p.5
[34] Beckett, above.
[35] Australian Institute of Health and Welfare 2009, above. p.31
[36] FaCSHIA 2009 *Closing the Gap in the Northern Territory January 2009 to June 2009 Whole of Government Monitoring Report Part Two Progress by Measure*. p 54.
[37] FaCSHIA 2009, above. p.58.

> A major problem for the evaluation was the lack of a comparison group, or baseline data, to measure what would have happened in the absence of income management.[38]

Furthermore, 'the absence of a comparison group meant that the evaluation was dependent on the perceptions and views of various stakeholders (clients, community members, store owners, community sector employees, Centrelink staff and GBMs) about whether there had been changes due to income management." [39] There were also other data quality issues in relation to client interviews because there was a "relatively small number of clients (76) from 4 locations, who were not randomly selected for interview. The stakeholder focus group report did not attribute many of the findings to particular stakeholders. It was therefore often difficult to identify whose views were reported, or whether they applied to the majority of stakeholders in the focus groups."[40]

This clearly demonstrates that the evidence within the government's own assessment is unreliable.

Food Security and Child Nutrition

Similarly, the specific measures used to assess food security and child nutrition in prescribed communities do not stand up against international standards. Food Security is a concept that has been of central concern to development specialists for decades. In 1996, the World Food Summit defined Food Security as existing when "all people, at all times, have physical and economic access to sufficient safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life."

The World Health Organization outlines three dimensions of food security:

Food availability: sufficient quantities of food available on a consistent basis
Food access: having sufficient resources to obtain appropriate foods for a nutritious diet
Food use: appropriate use based on knowledge of basic nutrition and care, as well as adequate water and sanitation[41]

A fourth element, added by the UN's Food and Agriculture Organisation (FAO) includes the stability of the other three dimensions over time. This means that even if an individuals' food intake is adequate today, they are still considered to be food insecure if they have inadequate access to food on a periodic basis, risking a deterioration of your nutritional status. For food security objectives to be realised, all four dimensions must be fulfilled simultaneously.[42]

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[38] Australian Institute of Health and Welfare and Department of Health and Ageing *Progress of Report on the evaluation of income management in the Northern Territory* Australian Institute of Health and Welfare 20 August 2009
http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/nt_eval_rpt/NT_eval_rpt.pdf
[39] Australian Institute of Health and Welfare and Department of Health and Ageing, above.
[40] Australian Institute of Health and Welfare and Department of Health and Ageing, above.
[41] World Health Organization 2009 *Food Security* (online)
http://www.who.int/trade/glossary/story028/en/print.html
[42] Food and Agriculture Oranisation 2008 *An Introduction to the Basic Concepts of Food Security* (online)
http://www.foodsec.org/docs/concepts_guide.pdf

Food security for children is a special case. To ensure that children are food secure, their food must also be developmentally appropriate. Children's nutritional needs are different to adults and need specific interventions to ensure their nutritional needs are met. For example, a one-year-old has between two and four times the energy, fat and protein requirements per kilogram of bodyweight than an average adult.[43]

Malnutrition results from deficiencies, excess or imbalances in the consumption of macro and/or micro nutrients. Malnutrition may be an outcome of food insecurity alone. A major cause of malnutrition is poor diet, referred to as hunger. But malnutrition may also be related to non-food factors such as inadequate care practices for children insufficient health services and an unhealthy environment.[44] Illness plays an important part. While all young children get infections in their early years all those with a good diet lose less weight when they get sick and then recover any illness-induced weight loss. Those with a poor diet do not.[45]

There are 3 measures of child malnutrition:

- Chronically malnourished or stunted children are too short for their age
- Acutely malnourished or wasted children are too thin – their weight is too low for their height
- An underweight child has low weight for their age and could be chronically and or acutely malnourished.

There is also a hidden aspect of hunger and malnutrition; deficiencies in vitamins and minerals (known as micronutrients).[46]

None of these international standards were used to measure malnutrition rates in prescribed communities. There is no data collected to measure child malnutrition. Instead, the research measure food security and nutrition by asking parents and store owners (who clearly had a conflict of interest) whether they were buying more fruit and vegetables. Even if people were buying 'more' fruit and vegetables, there are no baseline data for comparison purposes. Nor does it measure food utilisation. It does not address whether an increase in vegetables and fruit purchasing translates into an increase in fruit and vegetable consumption. Nor does it address the specific needs of children's diets to also include higher levels of fat and protein. Under no circumstances does the evidence show that food security and child nutrition has improved.

Human Rights standards

Human rights standards provides a way forward to ensure food security and child wellbeing. The inherent right to life of every human being (ICCPR Art 6) is linked this provision to the right to food. The right to food is also central to the right to an adequate standard of living (ICESCR Art 25). The purpose of the right to adequate food is to achieve nutritional well-being for all human beings. The full realisation depends of

[43] Save the Children Fund 2009 *Hungry for Change: An eight-step, costed plan of action to tackle global child hunger*, Save the Children, London p.7
[44] Food and Agriculture Oranisation 2008 *An Introduction to the Basic Concepts of Food Security* (online) http://www.foodsec.org/docs/concepts_guide.pdf
[45] Save the Children Fund 2009, above p.1
[46] Save the Children Fund 2009, above p.3

health, care for the vulnerable, land/income security and education.[47] The CESCR and the Special Rapporteur on the Right to Food recognise food security as a necessary corollary of the right to food. Important elements linked to food security are:

- Sustainability (long term availability and accessibility)
- Adequacy (cultural and consumer acceptability) of the availability and access to food
- Accessiblity encompasses both 'economic accessibility' and physical accessibility'.[48]

The human rights of Indigenous peoples need to be interpreted in the light of the Declaration on the Rights of Indigenous Peoples. They are seen as particularly vulnerable because access to their ancestral lands may be threatened. [49] States must guarantee security of land tenure and other productive resources, and guarantee the traditional rights of Indigenous communities regarding their natural resources as against violation by others.[50] States need to give particular attention to preventing discrimination in access to food or resources for food and water by Indigenous people, and should include special legislation to protect the land rights of Indigenous peoples and guarantee equal access to economic resources particularly for women.[51] This should be done with full participation of affected groups. Cultural acceptability is a core aspect of the right to adequate food. When a community's ability to secure their traditional food is curtailed, elements of their cultures may also be threatened.[52]

Children's health is closely linked to children's rights. All children have the inherent right to life (CRC Art 6). Additionally, all children have the right to "the enjoyment of the highest attainable standard of health" (Art 24). The CRC recognises the important relation between health and education and access to information in Article 17 and 24.2(e)(f). In its General Comment No. 4 on adolescent health and development, the Committee on the Rights of the Child stresses the concept of health and development go beyond the right to survival (Art 6) and the right to health (Art 24).[53]

Ensuring food security and child nutrition

According to AusAID, poverty is the main cause of food insecurity. As such, sustainable progress in poverty reduction is critical to improve access to food and rates of nutrition.[54] Economic growth alone will not take care of the problem of food security. Issues such as whether households get enough food, how it is distributed within the household and whether that food fulfils the nutrition needs of all members of the household show that

[47] Margot E. Salomon (ed) 2005 *Economic Social and Cultural Rights: a guide for minorities and indigenous peoples* Miniroty Rights Group International p. 18
[48] Margot E. Salomon (ed) 2005, above. p. 18.
[49] Margot E. Salomon (ed) 2005, above. p. 18
[50] Margot E. Salomon (ed) 2005, above. p. 22
[51] Margot E. Salomon (ed) 2005, above. p. 22
[52] Margot E. Salomon (ed) 2005, above. p. 22
[53] Child Rights Network 2009 Child Rights and Health (online) http://www.crin.org/themes/ViewTheme.asp?id=13
[54] AusAID Food Security Strategy May 2004

food security is clearly linked to health.[55] Not only do individuals need access to sufficient, safe and nutritious food, they also need adequate health services and a healthy and secure environment, including a safe water supply. What is needed is a combination of income growth supported by direct nutrition interventions and investment in health, water and education.[56]

Specific, targeted nutrition interventions for children are required. UNICEF and the Micronutrient Initiative emphasises that child nutrition can be addressed relatively affordably and simply through strategies such as fortification of staple foods, supplementation for vulnerable groups, dietary education and control of diseases that compromise the body's ability to absorb and retain minerals and vitamins.[57] A Lancet study on for maternal and child undernutrition and survival describes the following as core interventions:

- educational and promotional strategies for breastfeeding
- complementary feeding support and educational strategies without food supplements or conditional cash transfers
- complementary feeding support, including education, with food supplements or conditional cash transfers
- WHO-recommended case management of severe acute malnutrition
- Vitamin A supplementation
- Zinc supplementation (preventive and therapeutic)
- Maternal calcium supplementation
- Hygiene interventions (hand washing, water quality treatment, sanitation and hygiene).[58]

These are the relevant standards. There is to date no plausible evidence that compulsory income management is either necessary or sufficient for improving child health and well-being.

[55] World Health Organization 2009 *Food Security* (online) http://www.who.int/trade/glossary/story028/en/print.html

[56] Food and Agriculture Oranisation 2008 *An Introduction to the Basic Concepts of Food Security* (online) http://www.foodsec.org/docs/concepts_guide.pdf

[57] Micronutrient Initiative and UNICEF 2004 *Vitamin and Mineral Deficiency: A Global Damage Assessment Report (2004)* (online) http://www.micronutrient.org/English/View.asp?x=614

[58] Zulfiqar A Bhutta, Tahmeed Ahmed, Robert E Black, Simon Cousens, Kathryn Dewey, Elsa Giufliani, Batool A Haider, Betty Kirkwood, Saul S Morris, HPS Sachdev, Meera Shekar Maternal and Child Undernutration 3 What worls? Interventions for maternal and child undernutrition and survival The LancetJanuary 17 2008 pp. 44-45

6 How to stop the rights violations in the Intervention

In his 2007 report, former Social Justice Commissioner, Tom Calma, clearly stated that the Intervention conflicts with international human rights standards. He provided a 10 point plan to make it compliant with those standards:

Box 2. 10 point plan to improve the Intervention

1. Restore all rights to procedural fairness and external merits review under the NT intervention legislation.
2. Reinstate protections against racial discrimination in the operation of the NT intervention legislation.
3. Amend or remove the provisions that declare that the legislation constitutes a "special measure".
4. Reinstate protections against discrimination in the Northern Territory and Queensland.
5. Require consent to be obtained in the management of Indigenous property and amend the legislation to confirm the guarantee of just terms compensation.
6. Reinstate the CDEP program and review the operation of the income management scheme so that it is consistent with human rights.
7. Review the operation and effectiveness of the alcohol management schemes under the intervention legislation.
8. Ensure the effective participation of Indigenous peoples in all aspects of the intervention – Developing Community Partnership Agreements.
9. Set a timetable for the transition from an 'emergency' intervention to a community development plan.
10. Ensure stringent monitoring and review processes.

This 10 point plan is based on evidence of what works, as well as analysis of how the Intervention violates the rights of those subjected to it.

This Amnesty International Australia submission has not provided analysis of the effects of dismantling of the CDEP program. Neither has it considered the impact of the decision to not provide the outstations/homelands with adequate resources. This policy has not been publicly discussed but appears to have been implemented through the Council of Australian Governments. The Indigenous Australians who will be affected by it have been denied the right to consultation and consent. Both of these policies provide an impact context for the committee's deliberations, as they also have a profound effect on the enjoyment of human rights by Indigenous Australians, particularly those who live in remote communities in the Northern Territory.

6. Response to Terms of Reference and Recommendations

The foregoing provides essential background for understanding the following summary responses to Part 1 of the specific terms of reference for this Inquiry.

1. Assess the effectiveness of the amendments proposed in the Bills to:

(a) improve the social and economic conditions, social inclusion and life outcomes of all the disadvantaged individuals and communities affected by the measures, including but not limited to the Northern Territory;

A rights-based approach will ensure that disadvantage is addressed in a way that is respectful of difference and works for communities rather than against them. The most effective policy is that which engages the individuals it is supposed to help in its design and implementation. The Intervention as originally designed has failed to do this in many areas. The proposed amendments also fail this test. The residents of remote Indigenous communities have not effectively participated in the redesign of the Intervention – in fact most measures will continue as before – although there is some provision for communities to seek the assent of the Minister to a few changes. Non-Indigenous residents of disadvantaged communities have not been consulted to determine what measures would assist them to live with dignity and meet the developmental needs of their children whilst subsisting on welfare payments.

(b) deliver measurable improvements in protecting women and children, reducing alcohol related harm, improving nutrition and food security, promoting community engagement and strengthening personal and cultural sense of value in all affected communities, including but not limited to Indigenous communities in the Northern Territory;

The restrictive measures in the Intervention were not based on evidence and no baseline data was collected when it was started to enable proper evaluation. The Government's evaluation is thus insufficient to justify continuation of imposed and intrusive measures that cannot be expected to achieve the aims above. See in particular the discussion in Section 5 on child nutrition.

(c) reinstate the Racial Discrimination Act 1975 and deliver on our international commitments under the UN Convention on the Elimination of All Forms of Racial Discrimination in the operation of relevant legislation, particularly the Northern Territory National Emergency Response Act 2007;

In order to achieve compliance with treaty requirements the RDA Bill would need to guarantee those subjected to the Intervention protection against further racial discrimination and provide for redress for those rights that have been violated.

The Bill does neither. It provides for continuation of leases acquired under compulsion or other forms of duress. It enables the continuation of bans on alcohol, gambling and pornography that are not in place in non-Indigenous communities. It does not restore the permit system. It does remove the stigmatising reference to the ACC Taskforce – Indigenous children are statistically more at risk of child abuse, but in numerical terms

many more non-Indigenous children are at risk It does not restore Aboriginal land rights that have been undermined by compulsory lease acquisition.

Further, it does not put an immediate halt to race-based compulsory income quarantining – permitted in its current form until the end of 2011. Those who escape compulsory income quarantining will then go straight on to a new "trial" in which up to 100% of income can be quarantined – regardless of personal history. Those subjected to this trial must then seek exemption.

The use of compulsory income quarantining is inconsistent with Australia's obligation under the International Covenant on Economic, Social and Cultural Rights to give effect to the right to social security to marginalised and disadvantaged groups on the basis of equality with others. As a regressive measure, it should only be introduced after extensive analysis of alternatives and active participation of those affected. This has not taken place. Nor is there any evidence that imposed income quarantining without other forms of assistance is likely to be beneficial.

Finally, even where the Bill removes the RDA over-ride in the Intervention, it does not put beyond doubt the intention that the RDA should bind all aspects of the amended Bill. The Bill does not contain a clause that would expressly state that the provisions of the RDA prevail notwithstanding anything to the contrary in the Intervention legislation. The absence of this clause may mean that the RDA will not be able to be used to challenge or correct all potentially discriminatory elements of the Intervention. This needs to be put beyond doubt.

2. Assess the evidence that the proposed measures will deliver their stated policy objectives in an appropriate and cost effective manner.

As discussed throughout, there is no evidence that the original or the amended Intervention will improve the enjoyment of rights, and hence the health and well-being of Indigenous communities. There is no evidence that imposed welfare quarantining rather than case management and services will improve disadvantage amongst welfare recipients generally. Particularly where policy has been developed without input from those affected by it, there is small chance that it will be effective or efficient.

3. Consider the relative merits of alternative measures in achieving these outcomes.

The Government should acknowledge that the policy approach towards addressing Indigenous disadvantage is heading in the wrong direction. It needs to be put on the footing promised in the ALP 2007 Platform – namely, rights respecting, evidence based and harnessing the initiative of Indigenous people in its development and implementation.

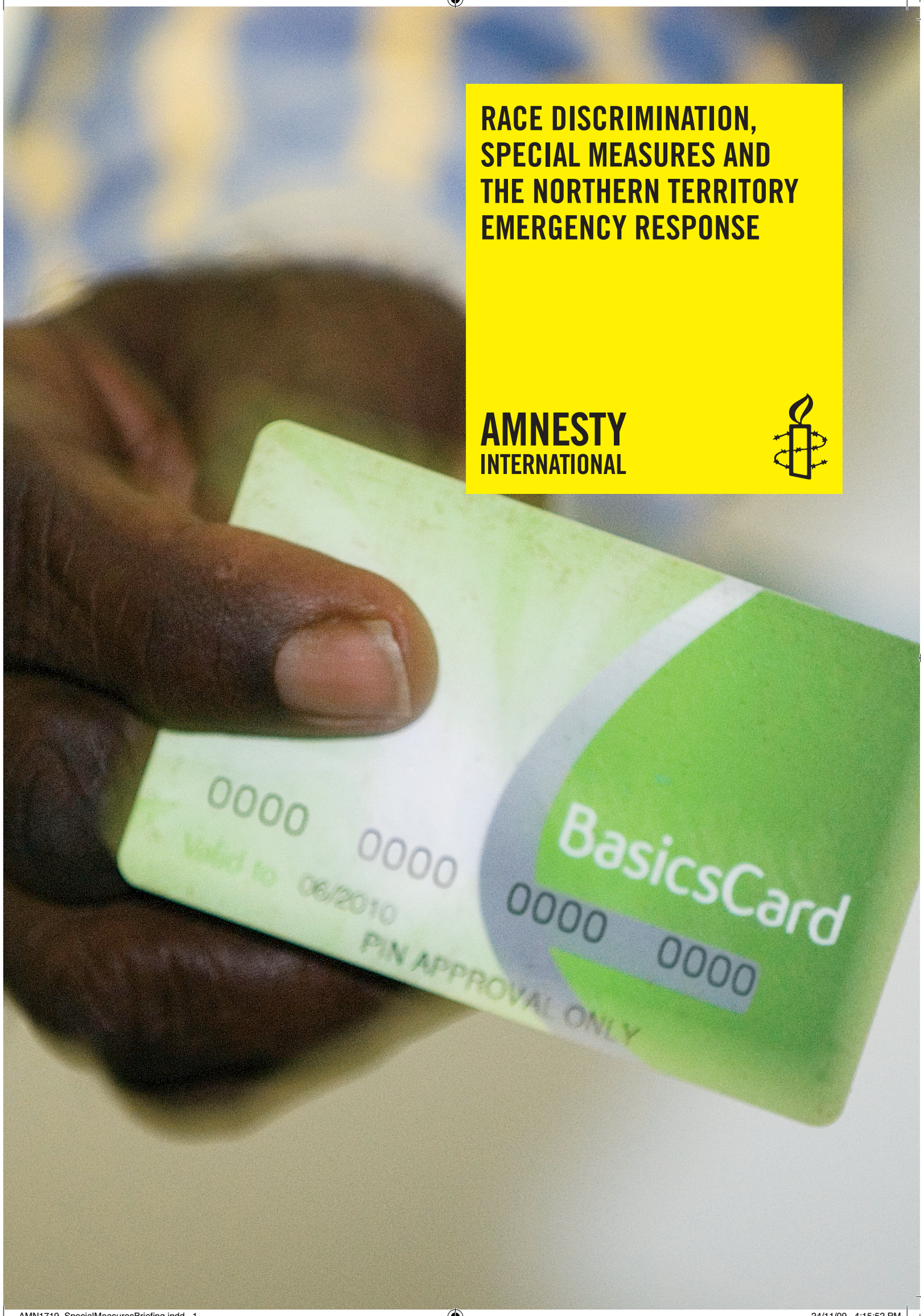
Amnesty International recommends that:

1. The government Bill be reformulated to ensure that it prevents any further race-based discrimination under the Intervention, including the continued effect of discriminatory actions initiated before commencement. The Bill should make clear that the RDA is to apply **notwithstanding** any provisions in the original or amended Intervention legislation that may be inconsistent with it. All exclusions of the application of the RDA should be removed from the Intervention legislation concurrently.

2. Redress, including compensation for victims of rights violations under the Intervention, be provided in accordance with Australia's human rights obligations.
3. The public policy objective that the Government seeks to achieve through the rollout of compulsory welfare quarantining for "vulnerable" groups be clearly spelt out, and non-regressive alternatives be considered in collaboration with those likely to be affected, in accordance with Australia's obligations under the International Covenant on Economic, Social and Cultural Rights.
4. Public housing and infrastructure should continue to be provided to all Aboriginal communities, including community living area communities and smaller homeland and outstation communities, as was done prior to the Intervention, without insisting on long term lease arrangements that are seen to amount to loss of recently gained land rights.

RACE DISCRIMINATION, SPECIAL MEASURES AND THE NORTHERN TERRITORY EMERGENCY RESPONSE

AMNESTY INTERNATIONAL



This paper was prepared for Amnesty International Australia by consultant Gregory Marks
November 2009

Cover: A community member from a prescribed area shows his BasicsCard.
The number has been changed to protect his identity © Rusty Stewart/AIA

EXECUTIVE SUMMARY

Australian and international law prohibit discrimination on the grounds of race. The related principles of equality and non- discrimination are bedrock human rights norms of the inter national community. No restrictions of or derogations from these principles are acceptable and they are enshrined in a number of legally binding treaties to which Australia is party.

The international community has recognised the human rights of Indigenous peoples in a series of standards culminating in the United Nations Declaration on the Rights of Indigenous Peoples. The Declaration was endorsed by Australia this year. It is non-binding but provides authoritative guidance on the interpretation of internationally recognised human rights as applied to Indigenous peoples.

The Declaration recognises, *inter alia*, the collective right of Indigenous peoples to own, occupy and enjoy their traditional territories. It also recognises the rights of self-determination and of free, prior and informed consent in relation to decisions affecting their interests. International law recognises the right of Indigenous peoples to be protected from racially discriminatory laws and policies.

The principle of non-discrimination has been incorporated into Australian domestic law in the *Racial Discrimination Act 1975* (Cth). This should protect Indigenous Australians from racial discrimination. However, it is possible to legislatively override this protection, as has happened in the case of Indigenous Australians on more than one occasion.

The Commonwealth Government has through the Northern Territory Emergency Intervention implemented a number of measures that apply only to Aboriginal people living in prescribed areas in the Northern Territory. These areas include 73 communities, associated outstations and town camps. In all, more than 45,000 Aboriginal people are subject to measures on the basis of their race.

Some of these measures are wide in scope and have significant effects on the lives and interests of Aboriginal people. The fact that they are racially targeted means that they are inconsistent with the prohibition against racial discrimination, unless they qualify for exemption as 'special measures'.

To protect it from challenge, the Northern Territory Emergency Response (NTER) legislation specifically excludes the operation of the *Racial Discrimination Act 1975*. However, the legislation also claims that the measures are 'special measures', for the benefit of Aboriginal people. International and Australian law allow, and in some cases even require, racially targeted special measures if they are designed to provide additional benefits to a disadvantaged group that would otherwise be unable to move towards substantive equality with the rest of the community. Such measures are often referred to as 'affirmative action'.

Treaty provisions and related jurisprudence set out strict criteria that special measures need to satisfy, including that they must be for a sole purpose (i.e. a specified and not a general purpose), be necessary, proportional to the problem, limited in scope and of a temporary nature.

Those affected by a special measure, even if it is for their clear advantage, should be consulted and should give their agreement to it. A measure that takes away rights cannot be classed as a special measure. The NTER and associated measures clearly fail to meet the criteria established for special measures in international law and jurisprudence. Accordingly, they are discriminatory and in breach of Australia's international obligations. This was confirmed this year by the United Nations Committee on the Elimination of Racial Discrimination that monitors the International Convention on the Elimination of All Forms of Racial Discrimination when it expressed its concerns in a response to a Request for Early Intervention on the NTER, and by the United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people after his visit to Australia.

Options put forward by the present government to modify the NTER in certain respects do not appear adequate to cure the NTER of its racially discriminatory character. They also rest on the untenable proposition that policy developed and implemented without the participation and consent of those affected by it can be effective.

This paper concludes that it would be best to abandon the NTER approach and develop a new policy based on free, prior and informed consent and other human rights standards using the Declaration on the Rights of Indigenous Peoples to provide guidance. Such a policy should use the best available evidence to build individual and community capabilities.

There are deep problems of disadvantage and dysfunction in many Aboriginal communities. These need to be addressed through a process of constructive engagement between government and Indigenous people.

1. THE HUMAN RIGHTS CONTEXT

Since the end of World War II the international community has progressively expanded the scope of international law. No longer simply the law governing relations between sovereign states, international law now also protects the right of individuals to life, liberty and security of the person. It outlaws slavery and prohibits torture and cruel, inhuman or degrading treatment. It asserts the equality of all before the law. International law affirms the fundamental importance of human rights to relations between nations. As Steiner and Alston have observed:

> Over a mere half century, the human rights movement that grew out of the Second World War has become an indelible part of our legal, political and moral landscape.[1]

The Charter of the United Nations[2] is based on the principles of the dignity and inherent equality of all human beings. The 1948 Universal Declaration of Human Rights[3] makes it clear that the rights and freedoms proclaimed in the Declaration are available to everyone, 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.[4]

Guarantees of human rights were further developed and elaborated through a number of key international instruments.[5] Almost all of these instruments have been ratified by Australia, which has sought to demonstrate a strong commitment to the rule of law in the international as well as the domestic sphere. Such a commitment was reflected in Justice Brennan's judgment in *Mabo*, where he drew attention to the influence of international human rights standards on the common law:

> If the international law notion that inhabited land may be classified as terra nullius no longer commands general support, the doctrines of the common law which depend on the notion that native peoples may be "so low in the scale of social organisation" that it is "idle to impute to such people some shadow of the rights known to our law" […] can hardly be retained. If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination.[6]

Australia's standing and reputation consequently relies on maintaining its compliance in good faith with the range of international obligations that it has freely entered into, and in providing constructive support for international bodies charged with monitoring and developing international human rights standards.

1 Henry J Steiner and Philip Alston (eds), *International Human Rights In Context – Law, Politics, Morals* (2000) 2.

2 United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

3 *Universal Declaration of Human Rights,* GA Res 217A, 3UN GAOR at 71 UN Doc A/180 (1948).

4 ibid, Article 2.

5 Including the *Convention on the Elimination of All Forms of Racial Discrimination* 1965, 660 UNTS 195; the *Covenant on Civil and Political Rights* 1966, 999 UNTS 171; the *Covenant on Economic, Social and Cultural Rights* 1966 993 UNTS 3; the *Convention on the Elimination of All Forms of Discrimination Against Women* 1979, 1249 UNTS 13; the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 1984, UN Doc A/39/51; 24 ILM 535 (1985); and the *Convention on the Rights of the Child* 1989, UN Doc A/44/49; 28 ILM 1448 (1989).

6 Brennan J in *Mabo v Queensland* (No 2) ('Mabo case') [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992), para. 41 at http://www.austlii.edu.au/au/cases/cth/HCA/1992/23.html (accessed on 28 October 2009).

2. INDIGENOUS RIGHTS

As the international law of human rights developed in the post World War II era, so has understanding of its relevance to the situation of the world's Indigenous peoples. Indigenous peoples themselves have played a key role in this process, with the Indigenous Peoples' Working Group having an active role in drafting the Declaration on the Rights of Indigenous Peoples ('the Declaration').

International law principles concerning Indigenous peoples have incorporated modern human rights norms such as self-determination and non-discrimination. The Declaration itself creates no new rights but elucidates how universal human rights norms apply to Indigenous peoples, taking into account their historical and cultural contexts.

Indigenous peoples are now clearly established as non-state actors in international law. This trend has been confirmed by the appointment in 2001 of the United Nations (UN) Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples,[7] the establishment of the UN Permanent Forum on Indigenous Issues, which first met in 2002,[8] and the overwhelming support at the UN General Assembly in 2007 for the UN Declaration on the Rights of Indigenous Peoples.[9] Elaboration and clarification of international standards in respect of Indigenous peoples are to be found in the jurisprudence of UN human rights treaty bodies, in the practices of international agencies such as the World Bank[10] and in international instruments that deal specifically with the situation of Indigenous peoples, for example International Labour Organisation Convention 169 dealing with Indigenous and tribal peoples.[11]

The various international instruments, and the understandings that have developed around them, provide a web of normative principles that are relevant to states with Indigenous populations such as Australia. International norms and best practice provide authoritative guidance in respect of policy and legislation, program implementation and service delivery in respect of Indigenous communities. The implementation of these principles will be responsive to local circumstances but Australia must interpret them in a manner consistent with international jurisprudence.

7 UN Office of the High Commissioner for Human Rights, Commission on Human Rights Resolution 2001/57 of the 76th Meeting 24 April 2001.

8 The UN Permanent Forum on Indigenous Issues was established by the United Nations Economic and Social Council (ECOSOC) resolution 2000/22 on 28 July 2000.

9 Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, UN Doc A/Res/47/1 (2007). As a UN organ resolution, the Declaration on the Rights of Indigenous Peoples has 'significant moral force and may contribute to emerging customary international law on Indigenous rights': M Davis, *The United Nations Declaration on the Rights of Indigenous Peoples* (2007) 11(3) AILR 55, 55.

10 See, for example, The World Bank Operational Manual – Operational Policy – Indigenous peoples January 2005.

11 ILO Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries, adopted 1989.

3. DISCRIMINATION BASED ON RACE

It is clear that the notion of equality and its correlative principle of non-discrimination are at the heart of the international human rights regime. The international community's abhorrence of the scourge of racism and associated acts of barbarism in the 20th century has been encapsulated in the norm of non-discrimination. As the UN Special Rapporteur on contemporary forms of racism has observed:

> … the principle of non-discrimination … is the reverse formulation of the principle of equality [and is] one of the most – if not the most – fundamental of human rights.[12]

Accordingly, the proscription of race-based discrimination is a bedrock rule of the international order.[13] The principle of non-discrimination is contained in a number of widely ratified international and regional human rights instruments, including the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 1965 ratified by Australia in 1975, monitored by the Committee on the Elimination of Racial Discrimination (the Committee).

Definition of discrimination

The preamble to ICERD affirms 'that all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination'. The Convention then defines racial discrimination [Article 1 (1)] as follows:

> In this Convention, the term 'racial discrimination' shall mean *any* distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the *purpose or effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. [*Emphasis added*]

Further, ICERD requires that 'States parties' engage in no act or practice of racial discrimination [Article 2 (1) (a)] and that they take effective measures to remove from policies, laws and regulations at all levels of government anything that would create or perpetuate racial discrimination [Article 2 (1) (c)].

12 *The Concept and Practice of Affirmative Action*, final report by UN Special Rapporteur, Mr Marc Bossuyt, 2002, E/CN.4/Sub.2/2002/21.

13 See S Blay, R Piotrowicz and BM Tsamenyi (eds), *Public International Law – An Australian Perspective* (Melbourne: Oxford University Press, 1999) 69. Non-discrimination is generally considered to be a peremptory norm of international law. See Article 53 of the Vienna Convention on the Law of Treaties 1969, which describes a peremptory norm, or *jus cogens*, as a norm from which no derogation is allowed.

4. SPECIAL MEASURES

However, past patterns of discrimination and dispossession can result in structural inequalities, including on the basis of race, within a society. Such inequalities can become self-perpetuating unless corrective action is taken. To insist simply on formal equality before the law would in fact only serve to entrench such historic inequalities. The need for a proactive and constructive approach to seek substantive equality through positive measures of assistance has been recognised by the international community. Indeed, preference may need to be shown in some situations to a particular racial group to ensure its advancement. Thus the UN Human Rights Committee, which monitors the International Covenant on Civil and Political Rights, has observed that:

> … the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant … Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population.[14]

Accordingly it is permissible, the norm of non-discrimination notwithstanding, to take s*pecial measures*, often termed affirmative action, to meet a specific need of a particular group. In fact, such special measures are provided for under the ICERD [Articles 1 (4) and 2 (2)]. These articles also identify the objectives, criteria and restrictions on such measures that need to be met to avoid infringing on the norm of non-discrimination.

Such special measures are concerned with providing *additional* benefits, or preferential treatment, in one form or another (for example preference in employment) on a temporary basis, to assist groups achieve equality of outcomes in the enjoyment of their basic rights. The close linkage between the concepts of 'affirmative action' and 'special measures' is recognised by the Special Rapporteur:

> The concept of affirmative action is generally referred to in international law as 'special measures'.[15]

A clear example of a special measure in Australian law is the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (the CATSI Act).[16] Indigenous organisations needing to incorporate may, if they wish, do so under the CATSI Act, which is a special statute of incorporation for Aboriginal and Torres Strait Islander peoples that provides a strong but flexible legislative framework. It maximises alignment with the Corporations Act where practicable but provides sufficient flexibility for Indigenous corporations to accommodate specific cultural practices. Indigenous people are able to design corporate structures and rules that best suit their specific needs, whether by reference to cultural practices or otherwise. The Corporations Act, through the Office of the Registrar of Indigenous Corporations, provides additional resources, training and support.

Such a measure is uncontroversial. It provides a special regime but one that provides additional services, resources and flexibility not fully available under corporations law. It was enacted after an extensive and thorough review and consultation process with Indigenous people and organisations.[17] The scheme takes nothing away from the rights available to Indigenous people and participation is voluntary. This is a characteristic special measure, that is a constructive measure developed through consultation and accessed on a voluntary basis.

There has been considerable elaboration within the UN system of the concept of 'special measures'. [18] A survey of these materials reveals no indication that the concept can be used to reduce, limit or restrict, on the basis of race, entitlements enjoyed by citizens. Indeed, there is an emphasis that special measures should never be discriminatory, in the sense of the definition of discrimination in ICERD Article 1 (1) (see above). To nullify or impair rights on the basis of race under the rubric of 'special measures' would be incompatible with their purpose. As the Special Rapporteur has pointed out, 'affirmative action measures must always comply with the principle of non-discrimination'.[19]

14 Human Rights Committee, General Comment No. 18, para 10, in HRI/GEN/1/Rev.4 (2000).

15 Bossuyt, footnote 12 above, para 40.

16 *Corporations (Aboriginal and Torres Strait Islander) Act* – see http://www.comlaw.gov.au/comlaw/management.nsf/lookupindexpagesbyid/IP200626899?OpenDocument accessed 13 October 2009.

17 See Corporations (Aboriginal and Torres Strait Islander) Bill 2005, 'Explanatory Memorandum', para 3.8, *Consultations,* at http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/0/F1DD374CF2A6D46ECA25702F0082754C/$file/test05104EM.pdf accessed 13 October 2009.

18 See, for example, CERD, *Thematic Discussion on Special Measures* 5 August 2008; CERD General Recommendation No 32, *The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination,* 75th session August 2009 at http://www2.ohchr.org/english/bodies/cerd/docs/GC32.doc accessed 6 October 2009; CEDAW, 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 at http://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20(English).pdf accessed 6 October 2009.

19 Bossuyt, para 71.

5. CRITERIA FOR SPECIAL MEASURES

To avoid confusion and unintentional discrimination, special measures are subject to specific criteria and limitations. Thus the sense of 'special' in the term 'special measures' is that such measures must target a specific or 'special' circumstance or problem. They cannot be employed as a 'catch all' solution to wider social issues.

As ICERD Articles 1 (4) and 2 (2) make clear, four elements must be satisfied to establish a special measure. Those elements are that the measure:[20]

(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.

These requirements have been further elaborated by the ICERD, which has emphasised 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.[21]

Special measures and Indigenous consent

The other main safeguard that has been elaborated in respect of 'special measures' is the participation of those affected in the design, implementation and ongoing monitoring of the special measures concerned, viz.:

> States parties should ensure that special measures are designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities.[22]

The requirement for consultation is especially compelling in the case of Indigenous peoples. The need for full consultation leading to free, prior and informed consent has been set out by ICERD [23] and in Article 19 of the Declaration[24]. Failing to undertake such consultation on proposed action that would directly affect the interests of Indigenous peoples, including measures purported to be special measures, is a form of racial discrimination in itself, irrespective of the merits of the proposed actions.

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

21 CERD Committee, *General Recommendation No. 32*, (footnote 15 above) para 16.

22 ibid, para 18.

23 CERD Committee, *General Recommendation XXIII: Indigenous Peoples,* 51st sess 1997, annex V [4(d)], UN Doc A/52/18.

24 Article 19 states: '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'.

6. SPECIAL MEASURES IN AUSTRALIAN LAW

The International Convention on the Elimination of All Forms of Racial Discrimination was legislated into Australian law by the *Racial Discrimination Act 1975* (RDA). As has been noted:

> … the *Racial Discrimination Act 1975* (Cth), the first major piece of [Australian] human rights legislation, is an almost complete enactment of CERD'.[25]

and relevant jurisprudence of the Committee, which oversights the implementation and development of the Convention.

In its provisions concerning special measures the RDA effectively incorporates Article 1 (4) of the ICERD.[26] Special measures fall outside the RDA's prohibition of racial discrimination in Australia – governments may take special measures without falling foul of the RDA (or of the ICERD). However, the linkage between the RDA and the Convention is explicit. Given the brief reference to special measures in the RDA, it is clear that their meaning is to be derived from the ICERD.

Special measures have been considered in Australia by the High Court in *Gerhardy v Brown* (re the *Pitjantjatjara Land Rights Act*). This case provides some indication of the criteria to be applied to the application of special measures in Australia. The case highlights the fact that, regardless of any stated beneficial intent by government, purported special measures may nevertheless constitute discrimination. Justice Brennan noted:

> … the wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement … the dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them.[27]

and

> The purpose of securing advancement for a racial group is not established by showing that the branch of government or the person who takes the measure does so for the purpose of conferring what it or he regards as a benefit for the group if the group does not seek or wish to have the benefit.[28]

Justice Brennan's comments are authoritative whether, strictly speaking, they constitute precedent or not. They reflect a commonsense approach, are consistent with ICERD understandings and provide guidance in these matters.

25 S Blay, R Piotrowicz and BM Tsamenyi, footnote 13 above, 291.

26 RDA s 8 (1) This Part [defining unlawful discrimination] does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies.

27 *Gerhardy v Brown* (1985) 159 CLR at 135.

28 ibid, at 521, para 37.

7. IS THE NTER RACIALLY DISCRIMINATORY?

Since 1998 Australia has had disagreements with the Committee and, to a degree, with other UN human rights committees, over whether Australia's treatment of Indigenous Australians should be modified in order to comply with Australia's obligations under human rights treaties.[29]

Actions condemned by the Committee in its decision of March 1999 as being non-compliant with Convention obligations were particularly damaging to Australia's international reputation. Amongst other findings, the Committee made it clear that Australia could not continue to deem the *Native Title Act 1993* (Cth), as amended in 1998, as a special measure: the legislation had lost that character as a result of significant discriminatory amendments by the Howard Government. The lack of informed consent of the Indigenous people affected by those amendments was considered particularly pertinent.[30]

Thus, it is not within the power of 'States parties' to make a proposed measure a special measure merely by deeming it so. The measure must prove to be 'fully justifiable in the light of the principles of the Convention'.[31] Whilst the particular circumstances of 'States parties' are to be taken into account, this has to be 'without prejudice to the universal quality of the norms of the Convention'.[32]

In 2007 the Howard Government maintained that the Northern Territory Emergency Response (NTER) legislative package[33] was not discriminatory in that the measures were 'special measures' under the RDA and ICERD. In essence, the NTER legislation states that all of the measures introduced are to be characterised as 'beneficial' and therefore exempt from the prohibition of racial discrimination in the RDA[34]. However, the lack of confidence in this position is shown by the fact that each of the statutes enacting the NTER explicitly excludes the application of the RDA.

As the Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma, has noted:

> This exemption from the RDA is extremely broad as it relates not only to the provisions of the legislation but also to 'any acts done under or for the purposes of those provisions'. This means that there can be no challenge to any exercise of discretion by officials purporting to act in accordance with the legislation (for example, decisions of government business managers, variations of contract conditions, seizure of assets and so on).[35]

Each of the NTER acts also exempts the operation of anti-discrimination laws of the Northern Territory. This means there is also no right to review or a remedy through the *Northern Territory Anti-Discrimination Act*. Moreover, normal administrative review and appeal avenues were removed from those measures that imposed income quarantining on social security payments.

Whilst it is not a measure enacted under the NTER legislation, the establishment of an Australian Crime Commission Task Force to investigate allegations of widespread child sexual abuse in prescribed communities formed part of the government's Emergency Response. The Australian Crime Commission is a body normally engaged in the investigation of organised crime: it has a range of unusual, coercive powers (sometimes referrred to as 'Star Chamber' powers) that enable questioning in secret and remove the protection against self-incrimination. As a Request for Early Action to the Committee of January 2009 from Aboriginal people from Prescribed Areas noted, 'it is unprecedented that coercive powers in relation to an investigation of criminal offences are defined by race'.[36]

29 See G Marks, *Australia, Indigenous Rights and International Law,* Indigenous Law Bulletin, October 2006, Volume 6/Issue 22.

30 CERD, Decision 2(54) on Australia 18 March 1999, UN Doc A/54/18.

31 CERD, General Recommendation 32, para 5.

32 ibid.

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

34 Prohibiting direct and indirect discrimination and providing for rights to equality before the law in the enjoyment of rights, regardless of race, colour, national or ethnic origin.

35 Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007,* Chapter 3, Part 3, at http://www.hreoc.gov.au/social_justice/sj_report/sjreport07/chap3.html#part1 accessed 6 October 2009.

36 Aboriginal People residing in Prescribed Areas in the Northern Territory and subject to the Northern Territory Intervention, *Request for Early Action under the International Convention for the Elimination of Racial Discrimination*, 28 January 2009, section 3.7 'Coercive powers of the Task Force'http://www.hrlrc.org.au/files/E75QFXXYE7/Request_for_Urgent_Action_Cerd.pdf accessed 5 October 2009.

The basic protections of the RDA and other legislation are either not available or significantly reduced in respect of the very broad scope of the NTER. As the NTER directly affects approximately 45,500 Aboriginal people this is a major denial of rights normally available to all Australian citizens. Whilst some aspects of the NTER have been accepted by some Aboriginal people, it has generated significant overall distress. The NTER Review Report observed:

> There is intense hurt and anger at being isolated on the basis of race and subjected to collective measures that would never be applied to other Australians. The Intervention was received with a sense of betrayal and disbelief. Resistance to its imposition undercut the potential effectiveness of its substantive measures.[37]

The NTER approach contrasts with that expressed in the findings and recommendations of the report that provided the justification for the Intervention, namely the *Little Children are Sacred*[38] report into child sexual abuse in the Northern Territory. The first recommendation of the report, whilst reflecting the need for immediate action, stressed the need for ongoing effective dialogue with Aboriginal people in designing initiatives to address child sexual abuse. As this Recommendation stated:

> It is critical that both [Commonwealth and Northern Territory] governments commit to genuine consultation with Aboriginal people in designing initiatives for Aboriginal communities.[39]

The communities affected by the NTER should, under international norms, have had the opportunity of prior consultation, active participation and the choice of freely giving or withholding consent to the measures that affect their interests. This is what is meant by free, prior and informed consent. As a result of the lack of consultation surrounding its introduction, the NTER is fatally flawed, both in a legal sense and in terms of a souring of relations between government and Aboriginal communities. An inescapable message underpinning the NTER approach is that all Indigenous communities in the Northern Territory are socially dysfunctional and all parents are negligent or abusive. This stigmatisation does not reflect the true state of affairs. Many Indigenous communities, especially those located on community living areas (pastoral properties), outstations and homelands have, often against considerable odds, created communities that are viable, cohesive and show initiative and resolve in developing a degree of economic independence through various enterprises, artistic production and land management programs.

A clear case of discrimination

If the government genuinely believed that the NTER provisions amount to special measures, it is difficult to understand why, given that they so clearly violate non-discrimination standards. The Human Rights Law Resource Centre (HRLRC) in its submission to the NTER Review Board argued, *inter alia*, that the provisions fail to adequately satisfy the requirements of special measures, viz.:

> Critically, the HRLRC considers many aspects of the Intervention to be regressive and detrimental to Indigenous peoples, rather than providing a benefit. Specifically the NTER infringes the rights of Indigenous people in relation to non-discrimination, self-determination, protection of families and children, an effective remedy, social security and freedom of movement. These wide-spread and serious limitations on human rights are not consistent with the purpose of special measures, which is to accelerate the equal enjoyment of human rights by a minority group with the aim of achieving substantive equality.[40]

Similarly, in the Request to the Committee (see above) Aboriginal people residing in the NTER Prescribed Areas have dismissed the claim that the NTER legislation meets the requirements for special measures. They argue, *inter alia*, that 'the measures are not demonstrably for the advancement of Aboriginal people' and that 'the measures are largely arbitrary and provide for discrimination at the discretion of the State party without reasonable or appropriate criteria for or limitations on the exercise of this discretion'.[41]

The UN Special Rapporteur on the situation of the human rights and fundamental freedoms of Indigenous peoples, Professor James Anaya, recently drew the following conclusions in respect of the NTER after a visit to Australia, including to the Northern Territory:

> These measures [key provisions of the NTER] overtly discriminate against Aboriginal peoples, infringe their right to self-determination and stigmatise already stigmatised communities.

He further observed that:

> In my opinion, as currently configured and carried out, the Emergency Response is incompatible with Australia's obligations under the Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights, treaties to which Australia is a party, as well as incompatible with the Declaration on the Rights of Indigenous Peoples, to which Australia has confirmed its support.

This is a damning indictment.

37 ibid, p 8.

38 Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle 'Little Children are Sacred'* (2007) at http://www.inquirysaac.nt.gov.au/ accessed 6 October 2009.

39 ibid, 22.

40 HRLRC, *Submission to the NTER Review Board,* 15 August 2008, pp 15, 16 at http://www.hrlrc.org.au/files/YE0PPFCQTT/HRLRC%20Submission%20on%20NTER.pdf accessed 5 October 2009. For the specific references re infringements see the submission.

41 *Request for Early Action under the International Convention for the Elimination of Racial Discrimination*, see footnote 34 above, para 130 (a) and (d).

8. WHERE TO?

In March this year the Committee, having expressed concern about the provisions of the NTER, noted the assurances of the Australian Government that it was engaged, in consultation with affected Indigenous communities, in the process of redesigning key NTER measures, in order to guarantee their consistency with the *Racial Discrimination Act*.[42] In May 2009 the government released a Discussion Paper[43] that stated that Amendment Bills would be introduced in the Spring 2009 Sittings of Parliament to remove those provisions in the three pieces of NTER legislation that exclude the operation of the RDA and the Northern Territory anti-discrimination laws. The Discussion Paper also set out proposals for the NTER measures affected by the RDA with a view to reconfiguring these provisions to bring them into line with the requirements of special measures. The specific measures under discussion were income management, alcohol bans, prohibited (pornographic) material and the audit of publicly funded computers, five-year leases, community stores' licensing and the powers of the Australian Crime Commission.

However, the understanding of special measures reflected in the government's Discussion Paper, viz.:

> Special measures are an important part of the RDA, this Convention [CERD] and other international conventions dealing with discrimination. They enable governments to make special laws to protect the people who need it most.

… does not reflect the interpretation required under internationally accepted human rights standards or Australia's treaty obligations. It is curiously dated and hearkens back to an era of protectionist and paternalistic policies. As discussed above, special measures are affirmative measures. They express the principle that through constructive beneficial measures substantive equality can be achieved over time. This has little to do with the concept of 'protection' or with the loss of rights enjoyed by other Australians.

The consultation process currently being undertaken around the Discussion Paper may itself be unsatisfactory. It will fall short of the required standard if it does not offer communities free, prior and informed consent. An inadequate consultation process would perpetuate inadequacies in the original development and implementation of the NTER.

In an Update of their complaint to the Committee, Aboriginal people resident in the Prescribed Areas have submitted that the consultation process is 'manifestly inadequate and incapable of facilitating informed consent mandated by [CERD] General Recommendation 23'.[44]

42 CERD, letter to the Australian Government, 13 March 2009 under the CERD Early Warning and Urgent Action Procedure at http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Australia130309.pdf accessed 13 October 2009.

43 Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA),'Future Directions for the Northern Territory Emergency Response – Discussion Paper, 2009' at http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/future_directions_discussion_paper/Pages/default.aspx accessed 6 October 2009.

44 See Aboriginal People residing in Prescribed Areas in the Northern Territory and subject to the Northern Territory Intervention, *Request for Urgent Action under the CERD in relation to the Commonwealth of Australia, Update 11 August 2009*, para 9.

9. WILL THE GOVERNMENT'S OPTIONS FOR RECONFIGURING THE NTER MEET THE CRITERIA FOR SPECIAL MEASURES?

The government's attitude to changing the NTER is shown in the following extract from its Discussion Paper:

> The Government will work closely with Aboriginal people to improve the measures. It believes the success of the NTER depends on individuals and communities having a say in how the measures should work.
>
> Because of the improvements made so far, the Government believes it is important that each of these measures continue. Governments have an obligation to protect children from violence, abuse and neglect, and to improve their chances for a better life.
>
> The Government currently proposes that the individual measures should continue to operate in much the same way as they have been operating. For some measures, proposals for possible change are presented to assist discussion.
>
> The Government wants to hear any suggestions about whether or not changes should be made to the measures to improve the way they work to deliver even greater benefits for people and communities.[45]

The message is clear enough – Indigenous people can have a say and as a result there may be modifications. But the thrust of the measures will remain. There are no guarantees that community views will be acted upon. The discretion to act remains solely in the hands of government. Such an approach lies well outside normal understandings of what is required for consultation with Indigneous communities.

Income management

Income management has been one of the most contentious of the NTER measures and the subject of much public discussion. The current arrangements under the NTER are that people in Prescribed Areas and associated outstations and in town camps have part of their welfare and family payments income managed so that they can be spent on priorities, such as food, clothing and rent. Money set aside includes:

- 50 per cent of most income support and family assistance payments; and
- 100 per cent of most advances and lump sum payments, and of the Baby Bonus (which is paid in instalments).

Centrelink staff help individuals to work out what priority needs their income managed funds will be spent on. Income managed funds can be made available on the BasicsCard for buying essential and everyday items. Other income managed funds can be used to pay bills, rent and other expenses. Funds that are income managed cannot be used to buy excluded goods such as alcohol, tobacco, pornography and gambling products.

Whilst some people have welcomed income management, others have found it irrelevant and a nuisance. Where people have responsibly used such monies (which no-one denies is often the case) it is perceived as insulting, degrading and patronising. Many people are acutely aware that income management on the basis of race not behaviour sets them apart from their fellow Australian citizens. The government claims that income management has led to significant benefits in that welfare benefits are spent more responsibly and more nourishing food is being purchased for children. It is to be hoped that this is the case; however, at this stage we simply do not know. There is virtually no reliable quantitative data. Most evidence supporting the contention that income management has been helpful is subjective, piecemeal and often anecdotal or indirect.

45 'Future Directions for the Northern Territory Emergency Response – Discussion Paper, 2009' (see footnote 41 above), 4, 'Individual NTER measures'.

The government has noted a number of criticisms of the scheme and as a starting point for discussions is seeking community views on two options.

Under the ***first option*** income management would continue in its current form – that is, income management would still be compulsory for all welfare recipients in prescribed communities, outstations and town camps. The difference, however, would be that individuals could apply to Centrelink for an exemption from income management. Getting an exemption would require an assessment of the person's circumstances against set criteria. People who can show that they do not need income management would then be exempted from further participation in income management.

Under the ***second option*** income management would continue to be compulsory for all welfare recipients in the areas where it currently applies. This is the no change option. It should be noted that in these options there is no clear indication that the government intends to end the imposition of income management. There has always been a facility in regard to social security whereby individuals could 'opt in' to access management of their social security payments, to help them set aside money for rent, utility payments and the like. However, this facility does not oblige individuals to access money through a card that stigmatises the holder, or severely limits the places where they can make purchases. Compulsory income management necessarily precludes such an 'opt in' possibility.

Would the first option meet the requirements of a special measure? This is a key question given the government's stated intention to reinstate the RDA in respect of the NTER. Once the RDA is reinstated, a failure to meet the criteria of a special measure in respect of income management could only mean that the provisions are racially discriminatory.

Under the proposed changes in the first option, NTER arrangements for social security support would still be different from, and less favorable than arrangements in place for other Australians. It continues to target *all* Aboriginal people in the designated areas and subjects them to income management. It places the burden of proof that this imposition is not needed on the appellant.

What the criteria will be, and, apart from Centrelink involvement, what the process will be, are not set out in the Discussion Paper. Will the criteria be reasonable and appropriate? Will it be possible to appeal to an independent tribunal against an unfavourable assessment by Centrelink? Without further detail it is difficult to provide a full assessment of the extent to which this proposed exemption process addresses defects in the current arrangements.

However, one thing is clear. The proposal to require members of Indigenous communities to seek exemption from income management is a very sensitive one. The history of Aboriginal administration until relatively recently has been one of blanket restrictions on rights and tight administrative control, often arbitrary, across most life decisions of Indigenous people. Exemption from such controls was available for individuals who could show themselves 'responsible' against criteria established by government agencies. These exemption processes were bitterly resented. The psychological wounds run deep. With the possible exception of the Stolen Generations policy, there was nothing more resented than these exemption processes. Thus, there is enormous sensitivity about such an approach. As the Update Complaint to CERD has put it in respect of this 'opt out' option:

> This is highly offensive to a number of Aboriginal people, given the invocation of schemes throughout Australia in the early 1900s that allowed for 'mixed blood' Aboriginal people who fulfilled certain criteria to apply for exemptions to Protection Acts and regulations … The exemption certificates [were] commonly known as 'dog tags'.[46]

An exemption option within the income management regime appears unlikely to bring it within the purview of special measures. Besides its likely rejection by many Aboriginal people, it will do little to demonstrate the *necessity* of income management and it will only marginally reduce the wide *scope* of the measures. There is no indication that the measures will be *temporary*. Arguably, such an option could actually intensify the discriminatory nature of the income management regime by ignoring Aboriginal unease and discomfort. It will do little to reduce the coercive aspect of the measures and may place Aboriginal people even more at the discretion of officialdom.

There are also proposals in the Discussion Paper to modify other aspects of the NTER. There is not space in this paper to analyse those suggested changes. It should be noted that they contain a number of complex and significant matters (for example in respect of the five-year compulsory leases and the coercive powers of the Australian Crime Commission). For Aboriginal communities to get to grips with these issues, have time to consider them within their own communities and reach a degree of consensus, and then to engage in a meaningful dialogue with government does not seem possible under the consultation arrangements in place. Yet the agreement of Indigenous peoples to special measures is of the highest priority.

46 Complaint to CERD Update, footnote 44 above, para 12.

10. CONCLUSION

Conditions in a number of Northern Territory Aboriginal communities exhibit significant disadvantage and dysfunction. A great deal needs to be done to remedy the social and economic problems facing Indigenous communities throughout Australia, in remote, rural and urban situations. These are matters that rightly require the urgent attention of government and the application of significant resources to catch up on the huge backlog in the provision of housing, infrastructure and services. For years Indigenous and human rights organisations have called for action around disadvantage and the associated problems of substance abuse, domestic violence, child neglect and high rates of incarceration.[47]

However, it is essential that respect for the dignity and equality of all persons be recognised at all times. There is no need and no excuse for racial discrimination. Nor should the important concept of special measures be distorted to provide justification for discrimination. Responding to the urgent needs of Aboriginal society requires mutual respect, constructive dialogue and negotiation. Policy to address these urgent needs must be developed with the participation and consent of those it is intended to benefit – it will not be effective otherwise.

International human rights law and practice show the way. t is incumbent on Australia as a responsible member of the international community, and out of simple justice for its Indigenous peoples, to eschew racially discriminatory laws. The NTER was conceived in haste. Significant aspects of it are bitterly resented by Aboriginal people. It does not and cannot meet the criteria for special measures. It is time to reformulate the NTER and to invigorate and resource the partnership with Indigenous communities. Such a partnership must have as its basis the fundamental equality of all Australians, regardless of race, before the law.

47 See, for example, Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Ending family violence and abuse in Aboriginal and Torres Strait Islander communities – Key issues,* 2006.

>> Echo Irene Khan's call for a new approach, grounded in a genuine respect for traditional culture and with human rights principles at its core, to tackle the complex problem of the entrenched poverty and discrimination faced by Indigenous peoples in Australia.

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