



Submission to the Australian Senate's Community Affairs
Legislation Committee's Inquiry into the *Welfare Reform
and Reinstatement of Racial Discrimination Act Bill 2009*,
the *Other Legislation Amendment Act Bill 2009* and the
Restoration of Racial Discrimination Act Bill 2009

February 2010

Executive Summary

1. This submission is provided by the National Association of Community Legal Centres ('NACLC')¹ in response to the Australian Senate's Community Affairs Legislation Committee's Inquiry ('Senate Committee') into the *Welfare Reform and Reinstatement of Racial Discrimination Act Bill 2009*, the *Other Legislation Amendment Act Bill 2009* and the *Restoration of Racial Discrimination Act Bill 2009* ('the Bills').
2. The Bills propose to restore operation of the *Racial Discrimination Act 1975* (Cth) ('RDA') to measures taken under and for the Northern Territory Emergency Response ('NTER'). The Bills also repeal the current income management category and propose the extension of compulsory income management to new categories of social security recipients in both NTER proscribed areas and other disadvantaged areas in the Northern Territory, with possible national roll out following a review in 2011.
3. The Senate Committee is specifically charged to consider the Bills' effectiveness for improving social inclusion and life outcomes, the protection of women and children and the reinstatement of the RDA.
4. NACLC welcomes the opportunity to make a submission. The invitation for public participation is in contrast to the previous Government's lack of consultation during its formation and implementation of the NTER, and is commendable.
5. This submission was developed in consultation with NACLC members and draws on the submissions of the National Welfare Rights Network of community legal centres ('NWRN') and the Australian Council of Social Service ('ACOSS').
6. NACLC has consistently voiced its concern that the measures introduced by the NTER breach Australia's obligation to respect and promote human rights, particularly the right to non-discrimination. The measures, which include the suspension of the RDA and the imposition of compulsory income management, were targeted at Aboriginal people implemented without consultation or consent. NACLC was accordingly pleased to hear of the current Government's proposed legislative change to the NTER measures.
7. NACLC strongly supports the proposed reinstatement of the RDA.
8. Unfortunately, the Bills do not rectify a number of fundamental breaches of Australia's human rights obligations that are manifest in the NTER:

NTER amendments

- a. The Government's justification for restricting the right of Aboriginal people to non-discrimination on the basis that the disparate effects of the NTER have been 'balanced' against the objective of child protection is not recognised by law;
- b. the NTER, as amended by the Bills, will breach the RDA. Although the Government has pre-emptively deemed the NTER initiatives 'special measures' and therefore consistent with the RDA, it has failed to demonstrate that the NTER satisfies the legal criteria for a special measure;

¹ Information about NACLC and community legal centres is at Appendix A.

Social security reform

- c. The new compulsory income management framework and its extension beyond NTER proscribed communities will contravene the Australian Government's international obligation to uphold and protect the rights of social security and non-discrimination.

Recommendations

9. NACLC believes that the Government's aim and obligation to protect children from sexual abuse and violence can be achieved in a manner that is consistent with its international human rights obligations by:
 - a. implementing the recommendations of the *Little Children are Sacred Report*;
 - b. passing those parts of the Bills that support the reinstatement of the RDA;
 - c. redesigning the NTER measures to ensure that they are consistent with the RDA and Australia's international obligations to uphold and protect the rights of Aboriginal people, including by ensuring that any measures are appropriate and adapted to achieving their express purpose, but in balance and complementary with Australia's other human rights obligations; particularly non-discrimination. As part of ensuring the legality of its special measures, the Government must demonstrate the need for each measure and justify clear criteria against which the progress and outcomes of the measures can be independently and objectively assessed;
 - d. ensuring that the redesign, development and implementation of any measures is done with the full participation and informed consent of affected communities, in accordance with best practice community consultation for Australia. NACLC endorses and supports the use of the Australian Human Rights Commission's Draft Income Management Guidelines' model for community consultation for this purpose:
 - e. amending the Bills imposing compulsory income management to ensure that income management is voluntary and part of a broader strategy to improve pathways out of poverty, social exclusion and unemployment. The redesign of income management must be done in consultation with affected communities.

Amendments to the NTER

The Government's justification for restricting the right of Aboriginal people to non-discrimination on the basis that the disparate effects of the NTER have been 'balanced' against the objective of child protection is not recognised by law

10. The NTER was introduced in response to a report by the Northern Territory Government on the protection of children from sexual abuse, entitled *Little Children are Sacred*.² The report made a number of recommendations to improve protection of children, including school education, awareness campaigns, imposing family support services and empowering Aboriginal communities.³
11. The NTER measures have limited connection to the 97 recommendations made in the *Little Children are Sacred* report. Rather, the NTER introduced a suite of extraordinary measures which included compulsory quarantining of social security payments, compulsory acquisition of Indigenous lands, banning of alcohol and pornography and the deployment of military and police on traditional lands. Most concerning, the legislation suspended the operation of the RDA for measures made for or under the NTER.⁴
12. In the four years since the introduction of the NTER, much has been written about the detrimental impact of the measures on the human rights of targeted Aboriginal communities; particularly with respect to the NTER's failure to protect and promote their rights to non-discrimination, self-determination, social security and effective remedy. A snapshot⁵ of the criticism includes:
 - the Australian Human Rights Commission ('AHC') has described various NTER measures as both punitive and racist and found that the legislative package contravened a number of Australia's human rights obligations and the RDA;⁶
 - the 2008 independent Northern Territory Emergency Response Review Board (the 'Review Board') recommended that Government actions which have an impact on Aboriginal communities must respect Australia's human rights obligations and conform to the RDA;⁷
 - the UN Special Rapporteur for the Rights of Indigenous Peoples found that measures introduced as part of the NTER are 'overtly' discriminatory against Aboriginal people, infringe their right to self-determination and 'stigmatise already stigmatised communities';⁸ and

² Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse ('NT Board of Inquiry'), *Ampe Akelyernemane Meke Mekarle - 'Little Children are Sacred' Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Assault* (2007).

³ *Ibid*, 21 – 22.

⁴ See *Northern Territory National Emergency Response Act 2007* (Cth), *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth), *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth).

⁵ See also, Human Rights Law Resource Centre, *Submission to the Northern Territory Emergency Response Review Board: Practical Implications of the Northern Territory Emergency Response* (15 August 2008)

<<http://www.hrlrc.org.au/files/YE0PPFCQTT/HRLRC%20Submission%20on%20NTER.pdf>> at 15 January 2010; Human Rights Law Resource Centre, *Indigenous Rights: Request for Urgent Action on NT Intervention from UN ICERD (March 2009)*

<http://www.hrlrc.org.au/content/topics/equality/northern-territory-intervention-request-for-urgent-action-ICERD/>> at 15 January 2010; *Freedom Respect Equality Dignity: Action – NGO Submission to the UN Committee on Economic, Social and Cultural Rights, Australia (April 2008)* < <http://www.hrlrc.org.au/our-work/law-reform/ngo-reports/#ICESCR>> at 20 December 2009; *Freedom Respect Equality Dignity: Action – NGO Submission to the UN Human Rights Committee (September 2008)* <

<http://www.hrlrc.org.au/our-work/law-reform/ngo-reports/#ICCPR>> at 20 December 2009.

⁶ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007* (2007), 259, 298 and 265 < http://www.hreoc.gov.au/social_justice/sj_report/sjreport07/download.html> at 1 December 2009. ('Social Justice Report 2007')

⁷ Northern Territory Emergency Response Review Board ('NTER Review Board'), *Report of the Northern Territory Emergency Response Review Board* (2008), 12 <<http://www.nterreview.gov.au/report.htm>> at 12 December 2009.

⁸ United Nations High Commissioner for Human Rights, *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, 2.

- the UN Committee on the Elimination of Racial Discrimination and the UN Human Rights Committee have both called for the reinstatement of the RDA and the re-design of NTER measures in direct consultation with Aboriginal people and in conformity with Australia's human rights obligations.⁹
13. The current Bills propose the reinstatement of the RDA, which fulfils an early promise of the current Government and is described in the 2009 policy statement *Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response* ('NTER Policy Statement') as part of a broader effort to 'restore dignity to [NTER proscribed] communities'.¹⁰ NACLC commends this policy decision but we believe that the Bills continue many of the original NTER measures and breach Australia's human rights obligations by continuing the wide ranging restriction on affected Aboriginal peoples' rights.
 14. The Government has justified its restriction on rights by asserting that they have been 'balanced' against the objective of protecting children from violence.¹¹ However, this justification is not supported by law.
 15. Australia's obligations in respect of the protection and promotion of children's rights derive from a number of international treaties to which it is a party, including the International Covenant on Civil and Political Rights ('ICCPR')¹² and the Convention on the Rights of the Child ('CRC').¹³ The CRC provides that while children have the right to be protected from sexual abuse,¹⁴ the measures for protection must themselves be consistent with the other human rights to which Australia is obliged to uphold and protect, and must not be implemented in a discriminatory way.¹⁵ Similarly, the ICCPR makes it clear that the Government cannot justify restricting certain rights by claiming that they're acting in the furtherance of another right.
 16. The ICCPR also provides that Australia is not permitted to justify the restriction of one right by claiming to act in furtherance of another right.¹⁶ As the AHRC noted, the Australian Government must not privilege one right over another 'as if different rights are in competition with each other or are subject to a hierarchy of 'more important and 'less important rights'.¹⁷ Rather, Australia's human rights obligations require that it construct solutions that respect and protect all rights.
 17. NACLC recognises and supports the Government taking action to fulfil its obligation to take protective measures to prevent, identify and address violations of a child's right to be free from all forms of violence and abuse.¹⁸ However, we submit that by its failure to use human rights framework to address the complex issues of child protection in Indigenous communities, the

<<http://www.unhcr.ch/hurricane/hurricane.nsf/view01/313713727C084992C125761F00443D60?opendocument>> at 27 January 2010.

⁹ UN High Commissioner for Human Rights, *Urgent Action Letter to Australia*, 13 March 2009

<<http://www.hrlrc.org.au/content/topics/equality/northern-territory-intervention-request-for-urgent-action-ICERD/>> at 5 January 2010.

¹⁰ Australian Government, *Policy Statement – Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response* ('NTER Policy Statement 2009'), 2.

¹¹ Senate Standing Committee on Legal and Constitutional Affairs, *Report on Social Security and Other Legislation Amendment (Welfare Reform Payment) Bill 2007 and four related bills concerning the Northern Territory national emergency response*, August 2007 and *Ibid* 2.

¹² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

¹³ *Convention on the Rights of the Child*, opened for signature 20 November 1989 (entered into force 2 September 1980) ('CRC').

¹⁴ *Ibid* article 34.

¹⁵ *Ibid* article 2.

¹⁶ ICCPR, above n 12, article 5.

¹⁷ Social Justice Report 2007, above n 6, 43.

¹⁸ CRC, above n 13, articles 19 and 34.

Government has failed to meet its overarching human rights obligations of ensuring that the NTER is both compatible with the right of non-discrimination and complementary to the realisation of other protected rights.

The NTER, as amended by the Bills, does not support the Australian Government's obligation to uphold and promote the human rights of Aboriginal people because its measures are themselves inconsistent with these human rights obligations

18. The Government has deemed most NTER measures (including all those in the Bill) to be 'special measures' for the purposes of the reinstated RDA.¹⁹ Special measures are designed to promote and accelerate achievement by disadvantaged groups of 'effective' or 'substantive' equality and permit differential treatment for the sole purpose of securing the advancement of some or all members of a racial or ethnic group.²⁰ The measures must be necessary for the group to achieve that purpose and must cease once the objective is met.²¹ Where special measures have a potentially negative effect, the participation, proper consultation and consent of the affected group to the measures is required.²²
19. While NACLC welcomes the proposed reinstatement of the RDA and increased consultation on bans on alcohol and pornography, we submit that the NTER measures are incapable of being properly deemed 'special measures'. The Government has failed to demonstrate that the measures satisfy the criteria for a 'special measure'; particularly because they were designed and implemented without the proper consultation and informed consent of affected communities.

General prohibition against discrimination

20. The Australian Government's obligations in respect of non-discrimination derives from a number of international human rights treaties to which it is a party, including the ICCPR, the International Covenant on Economic, Social and Cultural Rights ('ICESCR')²³ and the International Convention on the Elimination of All Forms of Racial Discrimination ('ICERD').²⁴ Collectively, they provide that:
- all people have the right to enjoy rights and freedoms without discrimination, including discrimination based on their race;²⁵
 - all public authorities and public institutions act in conformity with this obligation;²⁶ and
 - all persons are equal before the law and entitled to equal protection of the law without discrimination.²⁷
21. The Committee on the Elimination of Racial Discrimination has recommended that state parties give particular attention to the rights of Indigenous peoples by ensuring that they are 'free and equal in dignity and rights and free from any discrimination, in particular that based on

¹⁹ NTER Policy Statement 2009, above n 10, 5.

²⁰ *Racial Discrimination Act 1975* (Cth) ('RDA'), section 8.

²¹ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature on 21 December 1965 (entered into force 4 January 1969) ('ICERD'), article 1(4).

²² *Ibid.*

²³ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966 (entered into force 3 January 1976) ('ICESCR').

²⁴ ICERD, above n 21.

²⁵ ICCPR, above n 12, article 2 and *Ibid.*, article 2.

²⁶ ICERD, above n 21.

²⁷ ICCPR, above n 12, article 26.

Indigenous origin or identity'.²⁸ Further, the Declaration on the Rights of Indigenous Peoples reaffirms the right of Indigenous peoples to be free from any kind of discrimination, particularly that which is based on their indigenous origin or identity.²⁹

22. The RDA enacts Australia's obligations under ICERD and section 9(1) prohibits any measure that makes a distinction, exclusion, restriction or preference based on race and which has the purpose of limiting or extinguishing the equal recognition, enjoyment or exercise of any human right or fundamental freedom. Section 10 also recognises the right to equality before the law on the basis of race.
23. The NTER was expressly directed at Aboriginal people on the basis of race. The legislative provisions apply to communities that are predominantly populated by Aboriginal people and its effect has been to deny proscribed Aboriginal communities equality before, or equal protection by, the law.³⁰ Indeed, the Review Board commented that experiences of racial discrimination and humiliation were widespread and should be regarded by the Australian Government as a matter for serious concern.³¹
24. Section 8 of the RDA provides an exception to the prohibition on racial discrimination on the basis that they constitute 'special measures' for the purposes of the ICERD. NALC submits that the Government is wrongly relying on this provision to ensure that the NTER measures continue without contravening apparently the RDA or its international obligation to promote and respect the human rights of affected Aboriginal people.[fn to EM]. In our view, the measures as they are implemented do not satisfy the test for a special measure.

Special measures

25. To be properly deemed a special measure, an action must meet all the criteria set out above in paragraph 18. Our main concerns are set out below.

Benefit

26. To be properly deemed special measures, NTER measures must be capable of being defined as providing a benefit to Aboriginal people in the proscribed NTER communities.
27. As explained above, the broad aim of the NTER is to protect children from violence and abuse by taking action to address 'exceptional disadvantage.'³² However, the Australian Government has failed to provide clear and objective criteria against which an assessment of the measures can be made in order to establish the fact and extent of any benefit.
28. These limitations are compounded by the lack of baseline data against which measures of achievement and benefit can be made over time. The Review Board noted that:

...apart from some initial scoping data, there was little evidence of baseline data being gathered in any formal or organised format which would permit an assessment of the impact and progress of the NTER upon communities. The lack of empirical data has been proved to be a major problem for this Review and is an area that requires urgent consideration.³³

²⁸ Committee on the Elimination of Racial Discrimination, *General Recommendation No. 23: Indigenous Peoples* (1997) ('CERD Rec 23'), [4].

²⁹ *United Nations Declaration on the Rights of Indigenous Peoples*, article 2.

³⁰ NTER legislative package, above n 4.

³¹ NTER Review Board, above n 7, 34.

³² NTER Policy Statement 2009, above n 10, 5.

³³ NTER Review Board, above n 7, 16.

29. The Review Board also found that while attitudes towards the NTER and its benefits were still divided within the affected communities, the practical implications of the measures have had a detrimental impact on Aboriginal dignity and empowerment and have further damaged the already strained relationship between the affected communities and the Government. Amongst the Review Board's findings was that Aboriginal people:

- experienced racial discrimination, indignity and humiliation as a result of certain NTER measures;
- had experienced confusion and anxiety, and showed widespread hostility to the Government's actions;
- felt intense hurt and anger at being isolated on the basis of race;
- expressed the conviction that measures would never be applied to other Australians;
- demonstrated a sense of betrayal and disbelief;
- showed exasperation at the focus on Aboriginal child abuse and neglect when abuse and neglect occurs throughout Australia; and
- expressed incomprehension at the link between child welfare and some of the measures.³⁴

30. The 2009 NTER consultations undertaken by the Department of Families, Housing, Community Services and Indigenous Affairs ('FaHCSIA') similarly revealed concerns over the implications of the measures, including:

- concern about the discriminatory application of the NTER
- concern about the discriminatory nature of compulsory income management
- resentment about the intervention signs which imply that Aboriginal people use pornography; and
- observation that little has been delivered in terms of services and infrastructure since the NTER began.³⁵

Requirements for consultation and informed consent

31. Measures which have a potentially negative effect can only be special measures if they are developed and implemented on the basis of prior consultation with affected communities and the active participation of such communities. The ICERD requires that parties 'ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent...'.³⁶ The Australian courts have affirmed the need for consultation and held that the consent of intended beneficiaries is important in determining whether an action should be classified as beneficial or not.³⁷

32. On a practical level, consultation can improve the development and implementation of measures by ensuring that Indigenous perspectives, ideas and cultural differences are respected and accommodated. This, in turn, will promote Indigenous ownership and support for the implementation process and outcomes.³⁸

³⁴ Ibid.

³⁵ Jumbunna Indigenous House of Learning, *Will they be heard? A response to the NTER Consultations, June to August 2009* (November 2009) ('Jumbunna Report'), [40].

³⁶ CERD Rec 23, above n 27, [18]. See also, *Gerhardy v Brown* (1985) 159 CLR 70, per Brennan J at 159 and Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007* (2008), 261.

³⁷ *Gerhardy v Brown*, above n 35, per Brennan J at 159 and *Social Justice Report 2007*, above n 6, 261.

³⁸ CERD Rec 23, above n 27.

33. At no time during the formation and implementation of the NTER were Aboriginal people given a right to meaningfully participate in the development of the measures, or to provide informed consent to their implementation. This was particularly concerning given that the legislative process for the 480 page NTER legislative package took only 10 days, despite the former Government's in principle agreement to consult with Aboriginal people when policies and programs have an impact on them.³⁹
34. In 2009, the current Government undertook a consultation process with NTER communities for the purpose of discussing its proposed changes to the NTER and to obtain the necessary consent to its deemed special measures.⁴⁰
35. The consultation process has been criticised as being 'insufficient in quality as indicating consent by Aboriginal people in the Northern Territory to special measures for the purposes of the RDA';⁴¹ a position that NACLC supports.
36. The deficiencies have been well documented in a report by the Jumbunna Indigenous House of Learning, entitled *Will they be heard?*. The report provides concerning evidence of a consultation process that, at every stage, fell well short of achieving agreement, consent or an opportunity to influence decision making; from the design of the consultation to the subject matter that was presented and discussed.
37. First, there was a reported lack of independence from the Government on the part of people undertaking the consultancy. The process was designed and implemented by public servants, giving rise to a conflict between their duty to implement the NTER and their role in facilitating its assessment. Not surprisingly then, the consultations were 'framed within a prescriptive context of asserted benefit, providing no more than a forum for comment on the Government's proposed changes'.⁴² As a result, the consultations did not provide an opportunity for participants to influence decision-making and did not, in good faith, support the objective of achieving agreement or consent.
38. The Jumbunna Report also notes that stakeholders were not involved in the design of the consultation process itself and, accordingly, the consultations did not take into account community norms and protocols. As a consequence, organisers failed to identify and invite all appropriate participants or promote a region-specific approach to the process (such as the involvement of interpreters) that maximised accessibility and participation.⁴³ The report also notes that potential participants were excluded from participating due to insufficient notice.⁴⁴ Further, an absence of interpreters undermined the ability of participants to fully participate and engage in the consultation process which affected understanding of the measures that were presented and purportedly agreed to.⁴⁵
39. A fundamental criticism of the consultation process was that it failed to provide Aboriginal people with an opportunity to participate in the design or implementation of the revised NTER. The consultations were based on the Government's discussion paper *Future Directions for the Northern Territory Emergency Response* – a paper which outlined the Government's proposed

³⁹ Australian Government, *Common Core Document forming part of the reports of State Party Australia incorporating the Fifth Report under the International Covenant on Civil and Political Rights and the Fourth Report under the International Covenant on Economic, Social and Cultural Rights (June 2006)* ('Common Core Document'), [181].

⁴⁰ NTER Policy Statement 2009, above n 10.

⁴¹ Jumbunna Report, above n 34.

⁴² *Ibid*, [41] – [44].

⁴³ *Ibid*, [45].

⁴⁴ *Ibid*, [47].

⁴⁵ *Ibid*, [49].

changes to a limited number of NTER measures. This had the effect of limiting discussion to policy decisions which the Government had already made and excluding meaningful consultation on other measures; particularly existing NTER measures which are not amended by the Bills. Those measures either not address, or only partially discussed, included removal of the right to negotiate under the *Native Title Act 1993*, the coercive powers of the National Indigenous Violence and Child Abuse Intelligence Task Force, the broad powers to intervene in the operation of Aboriginal councils and the right to compulsorily acquire Aboriginal town camps.⁴⁶ The failure to broadly consult or inform participants on the full suite of NTER measures significantly undermines the ability of the Government to claim genuine consultation or informed consent.

40. The failure to provide adequate consultation and involvement of the affected communities, and to obtain their informed consent, means that the NTER does not satisfy the test for a special measure. Accordingly, the measures breach the Government's obligations with respect to the RDA and its international obligation to promote and protect the right of non-discrimination.

Adapted and reasonable for the purpose of advancement

41. To qualify as a special measure, an action must also have the sole purpose of securing the advancement of Aboriginal people so they can enjoy human rights and fundamental freedoms equally with others. To achieve this, measures must be 'reasonably considered to be appropriate and adapted to achieving that purpose'.⁴⁷ NACLC has two concerns with respect to this criteria.
42. First, widespread concern has been expressed by Aboriginal communities about the incomprehensible link between child welfare and some of the measures.⁴⁸ For example, the NTER facilitates the compulsory acquisition and taking control of specified Indigenous land and community living areas through renewable five-year leases. This measure raises significant concerns in relation to the right of self-determination, as well as Indigenous cultural rights, and is not necessary and adapted to achieving the aim of improving Aboriginal access to adequate housing. As explained by Vivian and Schokman (2009):

It is acknowledged that the Government has a legitimate objective of providing better housing and infrastructure in Aboriginal townships...[but] the connection between the acquisition of Aboriginal land on the one hand, and the need to provide housing on the other, has not been made. It cannot sensibly be argued that the provision of housing and related infrastructure requires the acquisition of Aboriginal township land with its attendant undermining the cultural authority and the right of self determination.⁴⁹

43. Secondly, as explained above, NTER measures have a detrimental impact on the enjoyment by Aboriginal people of a number of their rights. Given the requirement at international law that child rights measures must themselves be consistent with the right to non-discrimination, it is difficult to justify the Government's claim that all measures are both adapted and reasonable for the purpose of advancement.

⁴⁶ Ibid, [53] and [55].

⁴⁷ Gerhardy v Brown (1985), above n 36, Mason CJ, 105 and Deane J, 149.

⁴⁸ NTER Review Board, above n 7.

⁴⁹ Alison Vivian & Ben Schokman, 'The Northern Territory Intervention and the fabrication of 'special measures' (2009) *Australian Indigenous Law Review*, 78.

Temporary

44. To qualify as a special measure, a measure must also stop once its purpose has been achieved to avoid establishing separate rights permanently for different racial groups.⁵⁰
45. As mentioned above, the lack of clear and measurable goals for achieving the NTER objective of protecting children from sexual abuse and violence makes it difficult to establish what must occur for the Government's objectives to be satisfied. While temporary does not necessarily mean that the measures must be short term, it will nonetheless be difficult to establish when the NTER aims have been met and, accordingly, when its measures should be lifted.⁵¹

NACLC Recommendations

46. NACLC believes that the Government's aim and obligation to protect children from sexual abuse and violence can be achieved in a manner that is consistent with its international human rights obligations by:
- a. implementing the recommendations of the *Little Children are Sacred Report*;
 - b. passing those aspects of the Bills that support the reinstatement of the RDA;
 - c. redesigning the NTER measures to ensure that they are consistent with the RDA and Australia's international obligations to uphold and protect the rights of Aboriginal people, including by ensuring that any measures are appropriate and adapted to achieving their express purpose, but in balance and complementary with Australia's other human rights obligations; particularly non-discrimination. As part of ensuring the legality of its special measures, the Government must demonstrate the need for each measure and justify clear criteria against which the progress and outcomes of the measures can be independently and objectively assessed;
 - d. ensuring that the redesign, development and implementation of any measures is done with the full participation and informed consent of affected communities, in accordance with best practice community consultation for Australia. NACLC endorses and supports the use of the Australian Human Rights Commission's Draft Income Management Guidelines' model for community consultation for this purpose; and
 - e. amending the Bill imposing compulsory income management to ensure that income management is voluntary and part of a broader strategy to improve pathways out of poverty, social exclusion and unemployment.

⁵⁰ CERD Rec 23, above n 27.

⁵¹ For further analysis, see Vivian & Schokman (2009), above n 48, 11-14.

Social Security Reform

The new compulsory income management framework and its extension beyond NTER proscribed communities will contravene the Australian Government's international obligation to uphold and protect the rights of social security and non-discrimination

47. The Bills also propose to repeal the existing income management category and establish a new model of compulsory income management to apply to social security recipients in three categories across NTER proscribed areas, other communities in the Northern Territory and, eventually, across Australia.
48. NACLC is concerned that the new regime of compulsory income management breaches right to social security. The assumptions and policy that underpin the new framework are not supported by evidence that the measures will achieve the Government's objective of 'tackling the destructive, intergenerational cycle of passive welfare'.⁵² In NACLC's view, fulfilment of the right to social security and the needs of disadvantaged social security recipients will be better met through voluntary and targeted measures that take a holistic and long-term approach to addressing the underlying causes of poverty and social exclusion, rather than compulsory and blanket actions.
49. NACLC is also concerned that the effect of the measures will be discriminatory against Aboriginal people and others from culturally and linguistically diverse communities. We also submit that the income management regime does not meet the test for a 'special measure'.

Overview of the proposed compulsory income management scheme

50. The Bills propose to repeal the existing income management category and establish a new model of compulsory income management to apply to social security recipients in three categories:
- disengaged youth (15-25) who have received the Youth Allowance, Newstart Allowance, Special Benefit or Parenting Payment for more than 13 of the last 26 weeks;
 - long term social security recipients aged over 25 but not yet eligible for the Age Pension who have been in receipt of Youth Allowance, Newstart Allowance, Special Benefit or Parenting Payment for more than 52 of the past 104 weeks; and
 - vulnerable social security recipients assessed by a Centrelink social worker as requiring income management for reasons including vulnerability to financial crisis, domestic violence or economic abuse.⁵³
51. Individuals subject to compulsory income management who either demonstrate responsible parenting or take initiatives through participation in education or training will be offered evidence-based exemptions. Individuals currently subject to NTER income management measures will only be compulsorily affected if they meet the criteria for the new categories of income management or are subject to a child protection notification.
52. Managed portions of social security payments can only be spent on 'priority needs', which includes food, non-alcoholic beverages, basic personal and household items, rent/mortgage,

⁵² NTER Policy Statement 2009, above n 10.

⁵³ *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009*, sections 123UCA-C.

household utilities, health, childcare, education and training.⁵⁴ Management income must not be spent on alcohol, tobacco, and pornographic materials or gambling.⁵⁵

Social security

53. The right to social security is found in article 9 of ICESCR and requires state parties to recognise the right of everyone to social security, including social insurance. The right to social security has been affirmed in a number of other international instruments, including the Universal Declaration of Human Rights ('UDHR') and the ICERD. The purpose of social security is to support poverty reduction and alleviation by providing and maintaining access to benefits, without discrimination or arbitrary and unreasonable restrictions, to protect recipients from a lack of work-related income, deficient family support (particularly for child dependents).⁵⁶ Accordingly, social security is a key element in the prevention of social exclusion and the promotion of human dignity.⁵⁷

54. NALCLC submits that the proposed compulsory income management measures do not satisfy the Australian Government's obligations with respect to promoting and protecting the right to social security. Specifically, NALCLC submits that the measures fail to meet the following threshold criteria set out by the Committee on Economic, Social and Cultural Rights by:

- failing to take steps to ensure the right to social security within available resources
- failing to implement the right to social security reasonably and proportionally
- taking regressive steps in the fulfilment of the right to social security
- failing to meaningfully involve Aboriginal people in the decision making process.⁵⁸

55. Each element is considered in detail below.

Available resources

56. Under its international obligations, the Australian Government is obliged to take all necessary steps to progressively realise the right to social security within its maximum available resources. However, the compulsory income management measures increase the cost of administering the provision of social security without improving the level or breadth of the benefits.

57. NALCLC understands that the NWRN is preparing a submission about the Bills' proposed social security reform measures. NALCLC will consider NWRN's submission when it becomes available and may provide a supplementary submission with respect to NWRN's recommendations.

Reasonable and proportional

58. NALCLC submits that the model of compulsory income management proposed in the Bill will not meet the tests for reasonableness or proportionality on the basis that there is no basis in evidence that it will achieve its stated objective.⁵⁹

⁵⁴ Ibid, sections 123TH.

⁵⁵ Ibid, sections 123TH.

⁵⁶ United Nations Committee on Economic, Social and Cultural Rights, *General Comment 19: The right to social security* ('ESCR Committee General Comment 20'), UN Doc E/C, 12/GC/20/CRP.

⁵⁷ Ibid, [1] and [3].

⁵⁸ Ibid.

⁵⁹ Ibid, [49].

59. On this point, NACLCL endorses the sections of the ACOSS submission that provide a critical analysis on the reasonableness and proportionality of imposing compulsory income management. In summary, ACOSS provides that:

- 'The proposed scheme is punitive and targets individuals in an attempt to engender behavioural change; fails to address the structural reform needed to address social and economic disadvantaged and is applied without justification and without rigorous evidence of its success elsewhere;
- The Government's claims of a benefit are not backed up with evidence base;
- There is evidence that those placed on income management face discrimination through Centrelink and supermarkets that insist they stand in separate queues to collect payments or buy groceries. Income quarantining has had the effect of limiting the freedom of movement as people subject to income quarantining under the NTER have not been able to travel between communities for cultural obligations due to inadequacies in the administration of income management.'⁶⁰

Regressive

60. International law prohibits measures which restrict access to social security without consideration of alternatives, justification by reference to other protected rights and context of the full use of the maximum resources available to provide social security.⁶¹

61. The latter two points have already been addressed in this submission. In relation to the consideration of alternatives, NACLCL expresses its concern that the Government has failed to provide evidence-based justifications for implementing compulsory income management despite the Review Board recommending that income management be imposed only on a voluntary basis. This, is particularly important given with the overwhelming evidence (as set out in the ACOSS submission) that compulsory income management does not deliver the benefits asserted by the Government.

Consultation

62. The Australian Government must respect the right of individuals and groups to participate in decision making process that may affect their right to exercise social security.⁶² As discussed elsewhere in this submission, the consultations with NTER affected communities were manifestly inadequate and failed to meet the threshold for meaningful consultation with Indigenous communities about a measure that will impact on their rights. NACLCL is particularly concerned that during the consultations, the Government only presented two models of income management for discussion – both of which were compulsory measures.⁶³

63. We also submit that the Government has failed to consult broadly across the Northern Territory and the rest of Australia given the proposal that income management be rolled out to new categories of social security recipients across the country.

⁶⁰ Australian Council of Social Service, *Submission to Senate Community Affairs Committee Inquiry into Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 and related Bills (February 2009)*.

⁶¹ ESCR Committee General Comment 19, above n 55, [42].

⁶² *Ibid*, [69].

⁶³ NTER Policy Statement 2009, above n 10, 5.

Non-discrimination

64. NALCL submits that the model of compulsory income management proposed by the Bills will be discriminatory on the basis of race. As noted above, the Government has deemed compulsory income management a special measure for the purposes of the RDA. In a 2008 report, the AHRC Social Justice Commissioner concluded that income management regimes cannot be classified as a special measure.⁶⁴ In a position fully endorsed by NALCL, he noted that:

Income management is not a form of preferential treatment or affirmative action to obtain substantive equality. Rather, income management is inherently detrimental and potentially violates a number of positive obligations under the ICERD, including the right to social security, the right to equal treatment before the law, and the right to access public services. Second, the legitimacy of the Government's objectives is uncertain. The objectives are broad and imprecise, without clarification of necessary and measurable advancement and without a specification of the targets and criteria against which income management is to be assessed.⁶⁵

65. The Government's consultations with Aboriginal communities were, as outlined above, manifestly inadequate. NALCL also reiterates that while evidence suggests some Aboriginal people have benefited from income quarantining and support its continuation, the overwhelming majority are in support of a voluntary basis scheme.⁶⁶

Other communities

66. As part of the proposed Northern Territory and national roll out, NALCL is concerned that the Government has provided no detail about the basis on which it will choose one community for intervention over another.

67. While a measure may have a varied purpose (in this case, to tackle 'the destructive, intergenerational cycle of passive welfare') it will still be discriminatory if the effect of the measure disproportionately impacts a group based on their race, colour, descent or national or ethnic origin.

68. Accordingly, NALCL is concerned that the measures will continue to have a disproportionate impact on Aboriginal people across the Northern Territory as well CALD, recently arrived immigrants and refugee communities throughout Australia. We are also concerned that prior to the introduction of the Bills, there was no broad consultation process with those communities across the Northern Territory or Australia.

NALCL recommendation

69. NALCL recommends that the Bills imposing compulsory income management be amended to ensure that income management is voluntary and part of a broader strategy to improve pathways out of poverty, social exclusion and unemployment. The redesign of income management must be done in consultation with affected communities.

⁶⁴ Social Justice Report 2007 (2008), 265

⁶⁵ Ibid. See also, Vivian & Schokman (2009), above n 48, 16-18.

⁶⁶ NTER Review Board, above n 7, 21.

Appendix A

About Community Legal Centres

Community Legal Centres ('CLCs') are not-for-profit community-based organisations that provide free legal advice, information, education and referrals to their client communities, focussing on disadvantaged members of the Australian community and those with special needs. For over thirty years, CLCs have been working for a rights-based approach and equitable access to justice for all Australians and to prevent social exclusion. Many CLCs have tailored specific programs and service models for Aboriginal and Torres Strait Islander people and communities and for people from culturally and linguistically diverse backgrounds ('CALD').

CLCs are also actively involved in law reform initiatives that flow from their advice and casework activities and other contacts with their community and client base. Law reform is integral to the fundamental goals of CLCs to protect human rights and ensure equitable access to justice, to their holistic approach to problem solving, and to their strategies of early intervention and prevention. During 2008/9, CLCs finalised approximately 1000 law reform projects.⁶⁷

About the National Association of Community Legal Centres

NACLCLC is the peak national organisation representing CLCs in Australia. Our members are the state and territory associations of CLCs that, together, represent over 200 CLCs nationally. NACLCLC's purpose is to assist disadvantaged and marginalised people in the Australian community obtain access to legal services by:

- supporting and assisting CLCs to provide these services;
- providing a national forum for CLCs;
- developing and coordinating national CLC policy; and
- advancing the interests of CLCs within Australia.

As part of its national coordination role, NACLCLC makes and endorses law reform and policy submissions on behalf of the CLC sector.

Contact

Liz O'Brien
National Convenor
National Association of Community Legal Centres
PO Box A2245
Sydney South NSW 1235
W: naclc@clc.net.au
Ph: (02) 9264 9595

⁶⁷ National Association of Community Legal Centres, *2008/9 Annual Report*, at 13.

Appendix B

NACLC endorses and supports the use of the Australian Human Rights Commission's Draft Income Management Guidelines, which require:

- an atmosphere of good faith, full and equitable participation, time and an effective system of communication;
- full and meaningful debate in Indigenous languages as appropriate;
- accurate and accessible information;
- mechanisms and procedures to verify free, prior and informed consent;
- involvement of ATSI people in planning the consultation process
- inclusion of all relevant stakeholders;
- accessibility enabling grassroots consultation aiming for gender balance;
- Indigenous control over time frames;
- transparency and clear parameters;
- consideration of specific, time bound, and verifiable benchmarks and indicators to measure progress;
- agreement on how feedback will be delivered⁶⁸

⁶⁸ Australian Human Rights Commission, *Draft guidelines for ensuring income management measures are compliant with the Racial Discrimination Act (11 November 2009)*