



UNIVERSITY OF
TECHNOLOGY SYDNEY



Submission to the Senate Community Affairs Committee

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

along with the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Restoration of Racial Discrimination Act) Bill 2009 [introduced by Senator Siewert]

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Jumbunna Indigenous House of Learning
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To Whom It May Concern:

Re: Proposed amendments to the Northern Territory National Emergency Response

1. Thank you for the opportunity to comment on the Government's proposed amendments to the Northern Territory National Emergency Response (**NTER**) commonly referred to as the Northern Territory Intervention (**Intervention**).
2. Given the short timeframe, complexity of the NTER legislation as it currently exists and complexity of the issues posed in the Senate Committee's terms of reference, this submission will not address the terms of reference in its entirety but will concentrate on three main areas:
 - The likely effectiveness of the proposed amendments (Part 2);
 - An assessment of whether the amended measures will constitute compliance with Australia's obligations under the United Nations Convention on the Elimination of All Forms of Racial Discrimination (**Race Convention**) (Part 3); and
 - The likely effectiveness of the new scheme of income quarantining of social security entitlements (Part 4).

PART 1. SUMMARY OF SUBMISSIONS

A. Background

3. Implemented in tremendous haste, without notification, let alone consultation, the comprehensive suite of measures comprising the Intervention constitutes unjustifiable racial discrimination targeted at Aboriginal people in the Northern Territory in violation of the Racial Discrimination Act (**RDA**) and Race Convention.
4. Being prevented from seeking any remedy in domestic law by the suspension of the RDA, a group of senior Aboriginal people requested that the Committee on the Elimination of Racial Discrimination (**CERD**) invoke its urgent action procedure (**CERD Request**),¹ arguing that the gravity and scale of the Intervention measures imposes serious, massive and persistent racial discrimination against the Aboriginal people of the Northern Territory on an unprecedented scale, constituting numerous violations of the Race Convention and RDA.
5. The Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People (**Special Rapporteur**), UN Human Rights Committee and UN Committee on Economic, Social and Cultural Rights (**CESCR**) have each criticised the Intervention, in the strongest possible terms, as being in breach of international law. The Special Rapporteur powerfully condemned the measures of the Intervention that 'overtly discriminate against Aboriginal peoples, infringe their right of self-determination and stigmatise already stigmatised communities.'²

¹ Barbara Shaw et al, *Request for Urgent Action under the International Convention on the Elimination of All Forms of Racial Discrimination* (2009), 10 available at <http://www.jumbunna.uts.edu.au/research/submissions.html> (accessed 29 October 2009) (**CERD Request**).

² Professor James Anaya, *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* (27 August 2009), [6] available at <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/313713727C084992C125761F00443D60?opendocument> (accessed 21 October 2009) (**Statement of Special Rapporteur**).

6. The minimalist amendment of the Northern Territory Intervention proposed by the Australian Government does little to remedy its defects and as such, continues to impair the enjoyment of the human rights and fundamental freedoms of those affected. This is a breach of international law and the RDA.

B. Effectiveness of measures

7. From the outset, the objectives of the Intervention have been criticised as vague and imprecise with little connection to the broad aim of protecting children from abuse and neglect. The result is that assessing the legitimacy of the measures and whether they are capable of achieving legitimate objectives has always been difficult, if not impossible.
8. The objectives of the amended measures continue to be imprecise and incapable of measurement, representing instead broad aspirations that may be described as motherhood statements. Baseline data continues to be absent in the public domain and there are no specific criteria, benchmarks or timelines against which the measures are to be measured. These omissions render an assessment of the effectiveness of the measures speculative.
9. Assessment of whether the proposed amended measures will deliver their stated policy objectives in an appropriate and effective manner necessarily should commence with an overview of the evidence cited as justifying the continuation of the Intervention. Notwithstanding our difficulties in assessing effectiveness against specific objectives and measurable criteria, existing evidence relating to the impact of the Intervention as it currently stands demonstrates severe and widespread harm that overwhelmingly outweighs asserted claims of benefit.
10. Further, the principles underlying the Intervention are contrary to Australian and international evidence of 'what works' in Indigenous communities. Minimalist tinkering

with the measures will not alleviate existing harm and will not achieve the broad aspirations identified.

C. Compliance with human rights obligations

11. The Intervention has been determined to be in breach of Australia's legally binding international obligations. Further, the current measures have been assessed by UN human rights bodies as discriminatory and incapable of being characterised as special measures.
12. For similar reasons, the amended measures also cannot be legitimately characterised as special measures:
 - (a) Even if it were possible to retrospectively fulfil the requirement for prior consultation with the targeted beneficiaries, the Government's NTER redesign consultations conducted from June to August 2009 (**NTER Redesign consultations**) were flawed to such an extent that reliance on the process and its 'findings' is unsafe;
 - (b) Again, the objectives of the amended measures are not specific and measurable, such that an assessment of whether they are legitimate and necessary; and tailored to the necessary advancement of a defined group of beneficiaries is not feasible; and
 - (c) Finally, the existing evidence demonstrates severe harm; distrust of Government; humiliation, hostility, suspicion, confusion, anxiety and a sense of betrayal contributing to a sense of alienation from the rest of the Australian community and perception of a return to a protectionist and paternalistic era. Such adversity, balanced against assertions of benefit based on equivocal and weak evidence, suggests that the measures cannot be characterised as proportional to a legitimate objective.

D. Income quarantining

13. In essence, the income quarantining regime has effectively been removed from the Intervention.
14. The Government has frequently asserted the beneficial nature of income quarantining, contrary to the weight of evidence. Notwithstanding some positive outcomes and support, the reports from which the Government selectively cites acknowledge significant limitations in methodology. This reduces the credibility of the Government's claims.
15. Despite the Government's expressed intention that the amended income quarantining regime will be non-discriminatory, it is of great concern that the regime will continue to disproportionately impact upon Aboriginal people in the Northern Territory. Unfortunately, analysis of whether the amended regime will comply with human rights obligations is hampered by the absence of critical information. For example, it is not clear to which 'disadvantaged locations' income quarantining is to apply and it may be that it will apply disproportionately to Aboriginal communities. Further, to whom the regime will apply is also uncertain. For example, the category of 'vulnerable welfare recipient' is not defined.
16. Elements of the amended income quarantining regime are likely to impact disproportionately on Aboriginal people in the Northern Territory, further marginalising and disempowering people experiencing extreme disadvantage. In particular:
 - (a) Persons entitled to be exempted from the regime will have to apply for such exemption. In the context of a scheme that has demonstrably caused anxiety, humiliation and increased incidents of racial discrimination, Aboriginal people in remote Northern Territory communities, where English may be a second or third

language are likely to be discouraged from interacting with bureaucracy and remain subject to the punitive regime; and

- (b) During the transition period, people who are subject to income quarantining on the basis of residence in a Prescribed Area but who are entitled to be exempted, will be prevented from such exemption until the amended regime is rolled out into their area.

PART 2. EFFECTIVENESS OF PROPOSED AMENDMENTS

A. The Intervention to date

17. Aboriginal and Torres Strait Islander people are the most disadvantaged group in Australia with significant disparity in almost all indicators of disadvantage ranging from life expectancy; educational outcomes; over representation in the criminal justice system, including imprisonment for men and women and juvenile detention; levels of disability and chronic disease; income; unemployment; and rates of suicide and self-harm.³ The very existence of such disparity, which is widening in relation to some indicators, is a matter of national concern. Increasingly, it is also a matter of international concern, as Indigenous Australians rank lower than their counterparts in Canada, NZ, and the US.⁴

18. Necessarily then, the effectiveness of Government policy and programs designed to alleviate Indigenous disadvantage is a matter of considerable importance. When added to the expenditure on the Intervention of an estimated \$1.4 billion over 5 years,⁵ the public interest in adopting effective policy is self-evident. Finally, in an environment of competing human rights, if the rationale underpinning the Intervention is that the anticipated benefits justify the removal and curbing of rights, then the Government must be able to provide evidence that the measures are benefiting Aboriginal people in the Northern Territory. Given the scope and magnitude of the measures, which by the Government's own admission are extraordinary, a formal and transparent mechanism for review is a necessary precondition for their continued existence.

³ Australian Government Productivity Commission, Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2009*, (Commonwealth of Australia, 2009) (**Key Indicators Report**).

⁴ Martin Cooke, Francis Mitrou, David Lawrence, Eric Guimond, and Dan Beavon, 'Indigenous well-being in four countries: An application of the UNDP's Human Development Index to Indigenous Peoples in Australia, Canada, New Zealand, and the United States' (2007) *BMC International Health and Human Rights*, 7.

⁵ Senate Standing Committee on Community Affairs, *Government expenditure on Indigenous affairs and social services in the Northern Territory*, (2008), [3.7] (**Government Expenditure in NT Report**).

19. Produced with extraordinary haste to avoid 'red tape' and 'talkfests' in a top down, non-discretionary manner without consultation or notice, the measures of the Intervention constitute unjustifiable discrimination against, and impair the enjoyment of human rights and fundamental freedoms of, Aboriginal people in the Northern Territory subject to those measures.⁶
20. From the outset, the objectives and effectiveness of the Intervention have been questioned and Government assertions of benefit challenged. The Government's justification for the Intervention was the reported 'endemic sexual abuse of Aboriginal children in the Northern Territory',⁷ and yet the specific means by which the measures of the Intervention were to address child welfare were not articulated. Measures, seemingly unrelated to the achievement of its central aim, were introduced without clear justification.
21. Indeed effectiveness of the Intervention remains an unknown quantity on several grounds:
 - Baseline data is lacking;
 - No specific criteria exist against which 'success' may be measured; and
 - No transparent system of ongoing monitoring exists.
22. The Northern Territory Emergency Response Review Board (**Review Board**) reported that, apart from some initial scoping data, there was little evidence of baseline data being gathered in any formal or organised format that would permit an assessment of the impact or progress of the Intervention upon communities. The absence of baseline

⁶ For an analysis of whether the Northern Territory Intervention complies with Australia's obligations under the Race Convention, see Alison Vivian & Ben Schokman, 'The Northern Territory Intervention and the Fabrication of 'Special Measures'' (2009) 13(1) *Australian Indigenous Law Review* 78.

⁷ *Report of the NTER Review Board October 2008* (Commonwealth: 20 September 2008), 33 (**Review Board Report**).

data proved to be a major problem for the Review Board and was identified as an area requiring urgent attention.⁸

23. A central failing of the Intervention in general, and of its specific measures, has been the absence of specific, measurable objectives against which any asserted benefit may be gauged. Objectives that do exist are vague and imprecise, describing broad aspirations. Benchmarks and timelines are lacking. Further, while reviews of the Intervention and of income quarantining in particular have been undertaken, no system of ongoing monitoring and evaluation of the measures exists.

B. Impact of the Intervention

24. It is undeniable that some individuals believe they have benefited from the Intervention and that it has supporters. Nonetheless, the Government's unequivocal assertions of benefit cannot be maintained and, indeed, any alleged benefit is outweighed by egregious breaches of human rights obligations.
25. The evidence demonstrates that the Intervention has profoundly undermined the relationship between the Aboriginal people of the Northern Territory and the Australian Government, having resulted in distrust, hostility and suspicion.⁹ The implementation and continuation of the Intervention without formally engaging those who are affected has further undermined the relationship, which contrary to the Australian Government's assertions, has not been remedied by the flawed NTER Redesign consultation process. As the Review Board described, the impact of the experience is not easily set aside by those who feel aggrieved by the circumstances that were imposed on them and has

⁸ Review Board Report above, note 7, 16.

⁹ Review Board Report, above, note 7, 8 and 40; Australian Indigenous Doctors' Association, *Submission to the Northern Territory Emergency Response Review Board* at http://www.aida.org.au/pdf/AIDA_SubmissionNTERRB.pdf (accessed 19 September 2008), [9]-[10] (**AIDA Submission**); and Claire Smith & Gary Jackson, *A Community Based Review of the Northern Territory Emergency Response* (University of Newcastle, August 2008) (**Community Based Review**), 5 and 126.

contributed to a sense of alienation from the rest of the Australian community.¹⁰ Further, opposition to the Intervention was exacerbated by a ‘profound lack of communication across all levels and between all key stakeholders’, with ‘little explanation of the rationale’ linking the measures of the Intervention with child abuse.¹¹

26. A community based review of the Intervention (**Community Review**) found that ‘dysfunctional communication strategies’ produced undue hardship as well as confusion, fear, and frustration in Aboriginal communities, explaining that ‘even now, most Aboriginal people still don’t know what is going on, unless it affects them personally (and even then many are confused). Information is conveyed by rumour’.¹² The lack of consultation profoundly disempowered Aboriginal people and their communities and led to a strongly articulated sense of helplessness. The Australian Indigenous Doctors Association’s (**AIDA**) interviews with communities and stakeholders reinforced a sense of regression to a protectionist era, with Government control of every aspect of Aboriginal people’s lives.¹³ Speakers at a Prescribed Area People’s Alliance meeting described a similar sentiment – that of an overwhelming sense of a return to ‘mission days’.¹⁴
27. Crucially, the lack of consultation has undermined the right of self-determination, which is one of the most important aspects of international human rights protection and is espoused in CERD’s General Recommendation 21. AIDA’s research and the Central Land Council’s survey of six communities, found that the Intervention had failed to recognise existing good governance, undermining self management and autonomy.¹⁵ On a practical level, lack of consultation and haste resulted in unnecessary duplication

¹⁰ Draft, *Report of the NTER Review Board October 2008* (undated), 37 (**Draft Review Board Report**).

¹¹ AIDA Submission, above, note 9, [9]-[10].

¹² Community Based Review, above, note 9, 128.

¹³ AIDA Submission, above, note 9, [16].

¹⁴ Public addresses, Prescribed Area People’s Alliance meeting, Alice Springs, 29 September 2008.

¹⁵ AIDA Submission, above, note 9, [14]; Central Land Council, *Northern Territory Emergency Response: Perspectives from Six Communities*, July 2008 at <http://www.clc.org.au/media/features/CLC%20REPORTweb.pdf> (accessed 20 November 2008) (**Central Land Council Survey**), 79.

of services in critical areas, such as childhood health.¹⁶ Excellent programs that were in place before the Intervention did not receive recognition and support, which was and was seen to belittle and sideline all the efforts and energy that individual communities and individual people have put into tackling their own problems.¹⁷

28. The Australian Government has a legitimate objective of providing better housing and infrastructure in Aboriginal townships. Overcrowding and poor living conditions in remote Aboriginal communities have been identified over decades as issues requiring a concerted and long term response from government.¹⁸ However, that aim must be achieved in a manner that is proportionate and culturally appropriate. It is clear that very few people living in Prescribed Areas are aware of the five-year lease regime.¹⁹ Further, when informed of their existence, people were overwhelmingly (85 percent to 95 percent) opposed to them²⁰ and, as a result, were indignant, angry and/or worried.²¹ People opposed five-year leases on the perception that the lease gave more control to the government at the expense of the community²² and gave inadequate respect to traditional owners in decision-making.²³ Further, distrust of the Australian Government's intentions was exacerbated by its failure to pay rent as a tenant or compensation for the compulsory acquisition of land subject to the leases.²⁴ The removal of the future act regime in the Native Title Act further removes the measures from any assertion of appropriateness or proportionality. Removal of traditional owners' rights to exercise their cultural obligations is patently unnecessary.

¹⁶ Community Based Review, above, note 9, 129.

¹⁷ Community Based Review, above, note 9, 129; and Draft Review Board Report, above, note 10, 9.

¹⁸ Ben Doherty & Leo Shanahan, "Review finds intervention racist" *The Age*, 29 October 2008 available at <http://www.theage.com.au/national/review-finds-intervention-racist-20081028-5al0.html?page=-1> (accessed 20 November 2008).

¹⁹ Central Land Council Survey, above, note 15, 58; Community Based Review, above, note 9, 93-94; and Review Board Report, above, note 7, 39.

²⁰ Central Land Council Survey, above, note 15, 58; and Community Based Review, above, note 9, 121.

²¹ Community Based Review, above, note 9, 11.

²² Central Land Council Survey, above, note 15, 58.

²³ Central Land Council Survey, above, note 15, 58; and Community Based Review, above, note 9.

²⁴ Review Board Report, above, note 7, 40.

29. Evidence of severe harm, particularly in relation to income quarantining, to the most vulnerable, including the elderly and those with disabilities,²⁵ is widespread. The reported hunger, inability to fulfil cultural obligations, strain on kinship and family relationships, segregation in stores, loss of dignity and disempowerment and a sense of reversion to a protectionist era vividly demonstrates the questionable benefits of the income management regime.²⁶
30. The Government's reliance on 'excellent evidence' collected from licensed stores of changing household expenditure²⁷ and anecdotes from women supporting compulsory income quarantining,²⁸ is unsafe and will be discussed below in a specific discussion of income quarantining. Such evidence is equivocal, often controversial and, in some instances, open to methodological challenge.

²⁵ Human Rights and Equal Opportunity Commission, *Submission to the Northern Territory Emergency Response Review Board*, 15 August 2008 available at http://www.hreoc.gov.au/legal/submissions/2008/20080815_nt_response.html (accessed 20 November 2008), [37] (**HREOC Review Board Submission**).

²⁶ See HREOC Review Board Submission, above, note 25, [37]; Review Board Report, above, note 7, 20-21; AIDA Submission, above, note 9, [19]-[23] and [43]-[54]; Community Based Review, above, note 9, 123; Draft Review Board Report, above, note 10, 48-55 and 123-129; Central Land Council Survey, above, note 15, 25-31; and CAALAS & NAAJA, *Joint Submission by the Central Australian Aboriginal Legal Aid Service and the North Australian Aboriginal Justice Agency to the Senate Select Committee on Regional and Remote Indigenous Communities*, July 2008 available at http://www.aph.gov.au/SENATE/committee/indig_ctte/submissions/sub24.pdf (accessed 20 November 2008), 16-20 (**CAALAS & NAAJA Submission**); and Department of Families, Housing, Community Services and Indigenous Affairs, *Northern Territory Emergency Response (NTER): Stores Post Licensing Monitoring Report – Early Indications of Income Management in Community Stores – First 20 stores* (undated) 9, available at http://www.facs.gov.au/nter/docs/reports/nter_stores_post_report.pdf (accessed 20 November 2008).

²⁷ The Minister cited evidence of increased purchases of meat, fruit and vegetables; a reduced consumption of cigarettes and alcohol; less humbugging; children putting on weight and people saving for whitegoods. See Hon Jenny Macklin, *Compulsory income management to continue as key NTER measure*, 23 October 2008 available at http://www.facsia.gov.au/internet/jennymacklin.nsf/print/nter_measure_23oct08/htm (accessed 6 November 2008) (**Compulsory Income Management Continues**); *Govt responds to Northern Territory intervention review*, ABC: 7.30 Report, 23 October 2008 available at <http://www.abc.net.au/7.30/content/2008/s2399696.htm> (accessed 20 November 2008) (**Government Responds to Intervention Review**); *Government's response to the NTER review*, ABC Radio National, 24 October 2008 at http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/interview_fran_kelley_24oct08.htm (accessed 20 November 2008) (**Government Response to Review Board**); Hon Jenny Macklin, *Response to the NTER Review*, Transcript, 23 October 2008 available at http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/nter_review_24oct08.htm (accessed 20 November 2008) (**Response to the NTER Review**).

²⁸ 7.30 Report, *Government Responds to Intervention Review*, above, note 27.

31. The Government's own evaluation of the Intervention measures from January 2009 to June 2009 contained some findings that are damning of its effectiveness:²⁹

- Just 25 children were referred from an initial health check for further services in the 1 January 2009 – 30 June 2009 reporting period, a significant reduction from the previous reporting period (1 July 2008 – 31 December 2008) in which there were 813 children referred for further services;³⁰
- The number of children aged 0-5 years hospitalised for malnutrition increased across the 2006 – 07 to 2008 – 09 reporting periods;³¹
- School attendance rates were marginally down from 63.1% in June 2007 to 63% in June 2009³² and school enrolments increased by just 610 students over the same period³³ despite the school breakfast and lunch programs and more police working as truancy officers; and
- Alcohol, drug and substance abuse incidents; domestic violence related incidents and breaches of domestic violence orders were all up across the period from 2006-07 to 2008-09 despite a far greater police presence.³⁴

C. The proposed amendments

32. The Government Bills before the Australian Parliament the subject of the current inquiry, propose to amend NTER legislation to redesign the following measures:

- Income quarantining;
- Alcohol restrictions;
- Restrictions on prohibited material;
- Five-year leases;

²⁹ Australian Government, Closing the Gap in the Northern Territory – January 2009 to June 2009 Whole of Government Monitoring Report, available at http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Pages/closing_the_gap_nter.aspx (accessed 2 February 2010) (**Closing the Gap Report**).

³⁰ Ibid, 9-11.

³¹ Ibid, 17.

³² Ibid, 19.

³³ Id.

³⁴ Ibid, 33-36.

- Community store licensing; and
 - Law enforcement powers.
33. Objectives identified in the Government's policy statement,³⁵ explanatory memoranda³⁶ and the second reading speech³⁷ include the following:

Income quarantining

- Support individuals and families reliant on welfare who are living in communities under severe social pressure;³⁸
- Lay the foundations for pathways to economic and social participation through helping to stabilise household budgeting that assists people to meet the basic needs of life;³⁹
- Foster individual responsibility and provide a platform for people to move up and out of welfare dependence;⁴⁰
- Help people order their lives and provide for their children;⁴¹
- Give people access to the basics of life by reducing the amount of welfare funds available for substance abuse and other risky behaviours providing a pathway for participation in the broader economy and society;⁴²
- Provide the foundations for pathways to economic and social participation through helping to stabilise household budgeting;⁴³ and

³⁵ Australian Government, *Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response* (2009) 5 http://www.fahcsia.gov.au/SA/INDIGENOUS/PUBS/NTER_REPORTS/POLICY_STATEMENT_NTER/Pages/default.aspx (accessed 28 January 2010) (**Landmark Reform Policy Statement**).

³⁶ Explanatory Memorandum, Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Cth) and Explanatory Memorandum, Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Bill 2009 (Cth).

³⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2009, (Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs), (**Second Reading Speech**).

³⁸ Australian Government, Landmark Reform Policy Statement, above, note 35, 5.

³⁹ Id.

⁴⁰ Hon Jenny Macklin, Second Reading Speech, above, note 37, 12783.

⁴¹ Ibid, 12787.

⁴² Hon Jenny Macklin, Second Reading Speech, above, note 37, 12787-12788; and Explanatory Memorandum, Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Cth), 11.

⁴³ Explanatory Memorandum, Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Cth), 12.

- Provide a tool to create more positive conditions in families, by helping people to use their income support payments responsibly and save for the future.⁴⁴

Five year leases

- Improve the delivery of services and to promote economic and social development in the 64 Northern Territory communities over which there are five year leases.⁴⁵

Australian Crime Commission Powers

- Ensure that the Australian Crime Commission's (**ACC**) use of its special powers in relation to Indigenous violence and child abuse is for the benefit of Indigenous victims.⁴⁶

Alcohol restrictions

- To reduce alcohol-related harm in Aboriginal communities in the Northern Territory, particularly in relation to women, children and the elderly;⁴⁷ and
- Enable communities to implement locally negotiated alcohol management plans where there is evidence the proposed changes will lead to a reduction in the level of alcohol related harm in that area.⁴⁸

Restrictions on prohibited material

- To protect children from exposure to pornographic and very violent material;⁴⁹

⁴⁴ Id.

⁴⁵ Explanatory Memorandum, Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Cth), 46; Hon. Jenny Macklin, Second Reading Speech, above, note 37, 12787; and Australian Government, Landmark Reform Policy Statement, above, note 35, 10.

⁴⁶ Explanatory Memorandum, Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Cth) 86; and Hon. Jenny Macklin, Second Reading Speech, above, note 37, 12787.

⁴⁷ Explanatory Memorandum, Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Cth) 32; and Hon. Jenny Macklin, Second Reading Speech, above, note 37, 12786.

⁴⁸ Explanatory Memorandum, Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Cth) 32; and Hon. Jenny Macklin, Second Reading Speech, above, note 37, 12786.

- To reduce rates of sexual abuse in Aboriginal communities in the Northern Territory;⁵⁰ and
- Enable people who ordinarily reside in prescribed areas to apply to have the restrictions removed.⁵¹

Community store licensing

- To improve food security for residents in remote Aboriginal communities;⁵² and
 - Building a best practice model for the operation of community stores, reflecting their contribution to the health and wellbeing of Aboriginal people.⁵³
34. The business management areas powers and controls over public computers are to continue without change.
35. We note that the overall objectives of the Intervention measures continue to be vague and imprecise, lacking identifiable benchmarks for achievement and specific criteria against which success may be measured. Thus, what is to constitute 'effectiveness' of measures is not defined. While aspirations such as 'improving service delivery', 'promoting economic development' or 'creating positive conditions' may be laudable, they are too nebulous to constitute a policy framework.
36. Furthermore, given the economic and social development focus of the objectives, the failure to identify the socioeconomic data that should form the baseline data for future evaluations (such as the 2011-2012 review of the Intervention measures to be conducted as part of the Closing the Gap in the Northern Territory Evaluation Strategy)

⁴⁹ Explanatory Memorandum, Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Cth) 41; and Hon. Jenny Macklin, Second Reading Speech, above, note 37, 12787.

⁵⁰ Id.

⁵¹ Id.

⁵² Explanatory Memorandum, Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Cth) 50.

⁵³ Hon. Jenny Macklin, Second Reading Speech, above, note 37, 12787.

further reduces meaningful analysis of the effectiveness of the proposed amended measures.

D. Evidence of what does work

37. Research findings in Australia⁵⁴ and North America⁵⁵ identify that economic, social and cultural prosperity is achieved where communities exercise genuine decision making control over their internal affairs and utilisation of resources; where they have capable institutions of self-governance that have cultural legitimacy with the community that they serve and where their actions are based on long term systemic strategies with leadership focussed on creating stable political institutions. Where communities exercise genuine decision making control, greater risk and accountability results in community leaders bearing the consequences of their actions and dealing with the consequent approval or disapproval from stakeholders, which in turn fosters better decision making as decision makers learn through experience.

⁵⁴ M Dodson & D E Smith, "Governance for sustainable development: Strategic issues and principles for Indigenous Australian communities" *Discussion paper No 250/2003*, (CAEPR, Australian National University, 2003) available at <http://www.anu.edu.au/caepr/discussion.php> (accessed 12 August 2008). See the findings of the Indigenous Community Governance Project, a collaborative action research project by the Centre for Aboriginal Economic Policy Research (CAEPR) and Reconciliation Australia (RA) available at http://www.anu.edu.au/caepr/ICGP_home.php (accessed 25 July 2008). See also the findings of the Successful Strategies in Aboriginal Organisations Project available at <http://www.australiancollaboration.com.au/research/index.html> (accessed 12 August 2008).

⁵⁵ For an overview of the research of the Harvard Project on American Indian Economic Development and the Native Nations Institute for Leadership, Management and Policy see Miriam Jorgenson (ed), *Rebuilding Native Nations: Strategies for Governance and Development* (Tucson, University of Arizona Press: 2007). For publications of the Harvard Project see <http://www.hks.harvard.edu/hpaied/> (accessed 25 July 2008) and NNI see <http://nni.arizona.edu/> (accessed 25 July 2008). There is dispute as to whether aspects of the Harvard Project's findings are replicable or indeed, desirable in Australia, which arguably relates to the ambiguity between 'community' and 'community organisation' identified by Hunt & Smith. See for example, Patrick Sullivan, "Indigenous Governance: The Harvard Project, Australian Aboriginal Organisations and Cultural Subsidiarity" *Working Paper No 4* (Desert Knowledge CRC, March 2007); Martin Mowbray "Localising Responsibility: The Application of the Harvard Project on American Indian Economic Development to Australia" (2006) 41(1) *Australian Journal of Social Issues* 87-103 and The Australian Collaboration & AIATSIS, *Volume 1: Organising for Success. Policy Report. Successful strategies in Indigenous organisations*, (AIATSIS and Australian Collaboration, 2007), 14-16, available at <http://www.australiancollaboration.com.au/research/index.html> (accessed 12 August 2008). The significance of these critiques is open to question and there may be implications for potential implementation of the research. Nonetheless, an analysis of the findings demonstrates significant correlation of the fundamental foundations of 'successful' communities and organisations.

38. The research also indicates that for Indigenous institutions to operate effectively, they need to be regarded as legitimate in the eyes of the people they purport to serve.⁵⁶ Legitimacy, for Indigenous people, concentrates on 'processes, relationships and cultural institutions'.⁵⁷ As Hunt and Smith observe, process is fundamental to legitimacy, such that that the means may be more important than the end.⁵⁸
39. The support of government at all levels is also required to build effective Indigenous institutions. Devolving jurisdiction to Indigenous communities does not end government responsibility. Instead, its role is transformed from decision maker to facilitator. Again, resonant themes emerge from the Australian and North American research as to the appropriate role for government. It is not uncommon for authority given to Indigenous leaders to be restricted to administrative implementation of government set priorities and protocols *within program guidelines*, while the big decisions about priorities and program design will be set elsewhere.⁵⁹ Instead, the research reinforces the role of government as assisting communities to identify and achieve priorities.
40. Based on Indigenous Community Governance Project research, Hunt and Smith have made a variety of recommendations to foster environments conducive to the achievement of economic and social aspirations of Indigenous communities. These include fully costed service delivery in Indigenous communities; policy frameworks and program guidelines that actively promote Indigenous capacity and authority; greater support, advice, and mentoring for both governing bodies and managers in their organisational roles and responsibilities. They identify an urgent need for a nationally coordinated approach to the provision of governance capacity development and training

⁵⁶ Janet Hunt & Diane Smith, "Building Indigenous community governance in Australia: Preliminary research findings" *Working Paper No 31/2006* (CAEPR, Australian National University: May 2006), 14, available at <http://www.anu.edu.au/caepr/Publications/WP/CAEPRWP31.pdf> (accessed 25 July 2008) (**Building Indigenous Community Governance**).

⁵⁷ Ibid, 15; Manley A Begay Jr, Stephen Cornell, Miriam Jorgenson & Joseph P Kalt, "Development, Governance, Culture. What are they and what do they have to do with rebuilding Native nations?" in Miriam Jorgenson (ed), *Rebuilding Native Nations: Strategies for Governance and Development* (Tucson, University of Arizona Press: 2007), 53 (Development, Governance, Culture).

⁵⁸ Hunt & Smith, *Building Indigenous Community Governance*, above, note 56, 16.

⁵⁹ Stephen Cornell and Joseph P Kalt, "Two Approaches to the Development of Native Nations: One Works, the Other Doesn't" in Miriam Jorgenson (ed), *Rebuilding Native Nations: Strategies for Governance and Development* (Tucson, University of Arizona Press: 2007), 14.

that is targeted, high quality and place-based.⁶⁰ State and federal government policies, funding arrangements and initiatives are not consistent or coherent and also require urgent review.⁶¹

41. In summary, the evidence indicates that federal government support would be best focussed on facilitating institutional capacity building, assisting communities to engage in long term strategic planning, supporting visionary leadership, allowing communities to develop their own priorities and assisting them to develop appropriate benchmarks that reflect Indigenous aspirations.

⁶⁰ Janet Hunt & Diane Smith, "Indigenous Community Governance Project: Year Two Research Findings" *CAEPR Working Paper No 36/2007* (CAEPR, Australian National University: April 2007), 6, 7, 13, 23, 28, 34, 42, available at <http://www.anu.edu.au/caepr/Publications/WP/CAEPRWP36.pdf> (accessed 25 July 2008) (**Indigenous Community Governance Project**).

⁶¹ Hunt & Smith, *Indigenous Community Governance Project*, above, note 60, 36ff.

PART 3. COMPLIANCE WITH HUMAN RIGHTS OBLIGATIONS

A. The Intervention as it currently stands

42. CERD has observed the degree to which acts of racial discrimination and racial insults damage the injured party's perception of his/her own worth and reputation is often underestimated.⁶² The affront to Aboriginal peoples' right to freedom and dignity from the Intervention is exemplified by a perception of regression to a protectionist and paternalistic era⁶³ with humiliation, incomprehension, confusion, anxiety and a sense of betrayal and disbelief reported by the Review Board.⁶⁴ AIDA research identified a feeling of 'collective existential despair', characterised by a widespread helplessness, hopelessness and worthlessness and with profound implications for resilience, social and emotional wellbeing and mental health of Aboriginal people in the Northern Territory, and throughout the country.⁶⁵
43. In his preliminary observations from his August 2009 visit to Australia, the Special Rapporteur powerfully condemned the measures of the Intervention that 'overtly discriminate against Aboriginal peoples, infringe their right of self-determination and stigmatise already stigmatised communities.'⁶⁶ The Special Rapporteur concluded:

*As currently configured and carried out, the Emergency Response is incompatible with Australia's obligations under the Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights, treaties to which Australia is a party, as well as incompatible with the Declaration on the Rights of Indigenous Peoples, to which Australia has affirmed its support.*⁶⁷

44. The Special Rapporteur called on Australia to amend measures of the Intervention to diminish or remove its discriminatory aspects and adequately take into account the

⁶² UN Committee on the Elimination of Racial Discrimination, *General Recommendation 26, Article 6 of the Convention*, (Fifty sixth session, 2000) (**General Recommendation 26**).

⁶³ AIDA Submission, above, note 9, [16].

⁶⁴ Review Board Report, above, note 7, 34.

⁶⁵ AIDA Submission, above, note 9, [17].

⁶⁶ Professor James Anaya, Statement of the Special Rapporteur, above, note 2, [6].

⁶⁷ *Ibid*, [8].

rights of Aboriginal peoples to self determination and cultural integrity, in order to bring this Government initiative in line with Australia's international obligations. The Special Rapporteur urged the Government to act swiftly to reinstate the protections of the RDA in regard to Aboriginal peoples of the Northern Territory.⁶⁸

45. In similar terms, the Human Rights Committee⁶⁹ and the CESCR⁷⁰ criticised the Intervention as being inconsistent with Australia's obligations under the respective treaties, for being discriminatory and having a negative impact on the rights of Aboriginal people and, in particular, for being adopted without sufficient and adequate consultation with the Aboriginal people concerned.
46. Domestically, the Review Board, charged with providing an independent review of the Intervention, and the Aboriginal and Torres Strait Islander Social Justice Commissioner, who monitors the enjoyment and exercise of human rights for Aboriginal and Torres Strait Islander Australians, called for the reinstatement of the RDA, describing its removal as undermining the Intervention. Australia's national human rights institution, the Australian Human Rights Commission (**AHRC**) has described the Intervention measures as 'punitive and racist'⁷¹ and, following a comprehensive analysis of the Intervention, found that the 'racially based legislation' contravenes a number of international human rights conventions and the RDA.⁷²
47. A range of other organisations, human rights activists, NGOs, academics and most importantly, people subject to the Intervention themselves, have repeatedly and over the duration of the Intervention, emphasised the critical necessity for reinstatement of

⁶⁸ Ibid, [9].

⁶⁹ Concluding Observations of the Human Rights Committee, 7 May 2009, available at <http://www2.ohchr.org/english/bodies/hrc/hrcs95.htm> (accessed 1 February 2010), [14].

⁷⁰ Concluding Observations of the Committee on Economic, Social and Cultural Rights, 12 June 2009, available at <http://www2.ohchr.org/english/bodies/cescr/cescrs42.htm> (accessed 1 February 2010), [15].

⁷¹ Russell Skelton, 'Rights Watchdog Proposes Overhaul of Howard's Emergency Intervention', *The Age* (Melbourne), 12 February 2008, available at <http://www.theage.com.au/news/national/pressure-to-overhaul-intervention/2008/02/11/1202578694335.html>.

⁷² Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007* (2007), 209–11 (**Social Justice Report 2007**).

the RDA as a precursor to any policy or program development in relation to Aboriginal and Torres Strait Islander people in Australia.

B. Impact of suspension of the RDA

48. The suspension of the RDA is a clear violation of Australia's obligations in international law. That the Government failed to fulfil its commitment to reinstate the RDA in October 2009 and will not reinstate the protections until December 2010 is contrary to the recommendations of international and domestic human rights monitoring bodies. The removal of enforceable protection from, or relief in respect of, racial discrimination for Aboriginal people in the Northern Territory undermines the principle of equality and dignity that underlies human rights protections.
49. Further, the RDA clearly serves a symbolic as well as legal purpose, providing a sense of security and equality. People subject to the Intervention generally do not talk about the loss of legal remedies. Instead, they describe a sense of being diminished as citizens – that they now can be treated differently. Its suspension has led Aboriginal people to perceive that it is acceptable and appropriate to discriminate against Aboriginal people from the Northern Territory⁷³ and that they are less worthy of legislative protections afforded to other Australians.⁷⁴ Worryingly, an escalation of racist incidents has been widely reported since the commencement of the Intervention.⁷⁵ The Community Review observed that:

Aboriginal people of all ages and both genders have a very clear understanding that they are at the receiving end of racially discriminating policies. This is apparent in people's views on income management, on the suspension of the RDA and on five-year leases.⁷⁶

⁷³ CAALAS & NAAJA Submission, above, note 26, 4.

⁷⁴ Review Board Report, above, note 7, 46.

⁷⁵ Community Based Review, above, note 9, 128; CAALAS & NAAJA Submission, above, note 26; and Public addresses, *Prescribed Area People's Alliance meeting*, Alice Springs, 29 September 2008.

⁷⁶ Community Based Review, above, note 9, 126.

50. The Review Board succinctly summarised the response of Aboriginal communities in the Northern Territory to the Intervention:

Experiences of racial discrimination and humiliation as a result of the NTER were told with such passion and such regularity that the Board felt compelled to advise the Minister for Indigenous Affairs during the course of the Review that such widespread Aboriginal hostility to the Australian Government's actions should be regarded as a matter for serious concern.

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.⁷⁷

C. Australia's obligations to promote non-discrimination and equality

51. Equality is the most fundamental principle underlying all human rights. Non-discrimination is one of the guiding principles of the *United Nations Charter* which mandates 'respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion' and is embodied in numerous international instruments including the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, the *International covenant on Economic, Social and Cultural Rights*, the *Convention on the Elimination of All Forms of Racial Discrimination (Race Convention)* and the *Declaration on the Rights of Indigenous Peoples (Declaration)*.
52. State parties to the Race Convention, such as Australia, have adopted specific legally binding obligations and standards directed at the elimination of racial discrimination and promotion of equality, embodied in positive obligations to provide for equality before the law in the enjoyment of a non-exhaustive range of political, economic, social and cultural rights and negative obligations to prohibit racial discrimination. With the enactment of the RDA, Australia incorporated the Race Convention into Australian domestic law.

⁷⁷ Review Board Report, above, note 7, Foreword.

53. Fundamental to the interpretation of the Race Convention is the achievement of *de facto* rather than formal equality. Thus, article 2(1)(c) of the Race Convention provides that differential treatment on the basis of race is contrary to the Race Convention if it has the *purpose or effect* of impairing particular rights and freedoms (emphasis added).
54. While particular actions may have varied purposes, an action has an effect contrary to the Race Convention if it has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.⁷⁸ The definition of racial discrimination in article 1 expressly extends beyond measures that are explicitly discriminatory, to encompass measures which are not discriminatory at face value but are discriminatory in fact and effect.⁷⁹
55. The norm of non-discrimination has specific implications as it applies to Aboriginal peoples, who continue to experience racial discrimination that is the ‘outcome of a long historical process of conquest, penetration and marginalisation, accompanied by attitudes of superiority and by a projection of what is Aboriginal as “primitive” and inferior’.⁸⁰ The discrimination against Aboriginal peoples has been characterised as having a dual nature, consisting of destruction of the material and spiritual conditions underpinning their lifeways; and exclusion and negative discrimination when participating in the dominant society.⁸¹
56. The specific challenges to Aboriginal culture and identity are recognised in CERD’s General Recommendation 23, which acknowledges Indigenous peoples’ vulnerability and recognises that Indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and, in particular,

⁷⁸ UN Committee on the Elimination of Racial Discrimination, *General Recommendation 14: Definition of discrimination (art1 par 1)*, [2] (**General Recommendation 14**).

⁷⁹ *Ms L R et al v Slovak Republic* CERD/C/66/D/31/2003 at par [10.4].

⁸⁰ “Report on the United Nations Seminar on the Effect of Racial Discrimination on the Social and Economic Relations between Indigenous Peoples and States” at 5 cited in S James Anaya, *Indigenous Peoples in International Law (2nd edition)* (Oxford University Press: 2004), 130 (**Indigenous Peoples in International Law**).

⁸¹ *Id.*

that they have lost their land and resources to colonists, commercial companies and State enterprises.⁸² CERD has frequently reminded State parties, including Australia, of the necessity of compliance with General Recommendation 23, notably in relation to the obligation that no decisions directly relating to the rights and interests of Indigenous people are taken without their informed consent.⁸³

57. Australia's obligations under the Race Convention are in turn embodied in the RDA, which prohibits direct (s 9) and indirect racial discrimination (s 9A). Section 10 of the RDA reflects article 5 of the Race Convention and provides for equality before the law, regardless of race, colour, national or ethnic origin.

D. Special measures

58. As described above, the Race Convention is based on the principles of dignity and equality of all human beings. The principle of equality 'combines formal equality before the law and equal protection before the law, with substantive or *de facto* equality in the enjoyment and exercise of human rights',⁸⁴ with the attendant recognition that formal equality before the law may not achieve this aim. Indeed, CERD clarifies that to 'treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the unequal treatment of persons whose situations are objectively the same.'⁸⁵

⁸² UN Committee on the Elimination of Racial Discrimination, *General Recommendation 23: Indigenous Peoples*, [3] (**General Recommendation 23**).

⁸³ The Australian Government has rejected the binding nature of General Recommendation 23, arguing that there is much dissent as to its effect: *Comments by the Government of Australia on the Concluding Observations of the Committee on the Elimination of Racial Discrimination*, [20], UN Doc CERD/C/AUS/CO/14/Add.1. However, the Australian approach has been criticised as underestimating the significance of general recommendations in providing guidance as to the content of the Race Convention and developing the jurisprudence. See for example, Greg Marks, 'Avoiding the International Spotlight: Australia, Indigenous Rights and the United Nations Treaty Bodies' (2002) 2(1) *Human Rights Law Review* 19, 55.

⁸⁴ UN Committee on the Elimination of Racial Discrimination, *General Recommendation 32: Special Measures*, [6] (**General Recommendation 32**).

⁸⁵ General Recommendation 32, above, note 84, [8].

59. Substantive equality does not necessarily entail uniform treatment, such that 'differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and the purposes of the Convention, are legitimate.'⁸⁶ That is, differential treatment constitutes discrimination if 'the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention are not applied pursuant to a legitimate aim, and are not proportional to the achievement of that aim.'⁸⁷ Where there are significant differences in situation between one group of persons and another, an objective and reasonable justification for differential treatment may exist.
60. 'Special measures' constitute one specific example of differentiation permissible under the Race Convention. Special or positive measures are forms of favourable or preferential treatment described by CERD as 'affirmative measures', 'affirmative action' or 'positive action'⁸⁸ intended to ensure the adequate advancement of certain racial groups who require support to be able to enjoy their human rights and fundamental freedoms in full equality. Special measures are permitted under article 1(4) of the Race Convention; they are also *required* when 'when the circumstances so warrant' under article 2(2) of the Race Convention.
61. CERD recently published General Recommendation 32 to provide practical guidance on the meaning of special measures under the Race Convention in order to assist States parties in the discharge of their obligations under the Race Convention. CERD identified a number of specific characteristics of special measures relevant to an assessment of whether the proposed amended measures can legitimately be characterised as special measures. Special measures:
- are designed and implemented on the basis of *prior* consultation with affected communities and the active participation of such communities;⁸⁹

⁸⁶ General Recommendation 14, above, note 78, [2].

⁸⁷ UN Committee on the Elimination of Racial Discrimination, *General Recommendation 30: Discrimination Against Non-Citizens*, [4] (**General Recommendation 30**).

⁸⁸ General Recommendation 32, above, note 84, [12].

⁸⁹ General Recommendation 32, above, note 84, [18].

- are appropriate to the situation to be remedied, legitimate and necessary in a democratic society;⁹⁰
 - respect the principles of fairness and proportionality;
 - are temporary;⁹¹
 - are designed and implemented on the basis of need, grounded in a realistic appraisal of the current situation of the individuals and communities concerned;⁹²
 - are goal directed programs which have the objective of alleviating and remedying disparities in the enjoyment of human rights and fundamental freedoms;⁹³
 - are carefully tailored to meet the particular needs of the groups or individuals concerned;⁹⁴ and
 - require a continuing system of monitoring their application and results using, as appropriate, quantitative and qualitative methods of appraisal.⁹⁵
62. Appraisals of the need for special measures should be based on accurate data, incorporating a gender perspective, on the socio-economic and cultural status and conditions of the various groups in the population and their participation in the social and economic development of the country.⁹⁶
63. CERD observed that special measures should not be confused with specific rights pertaining to certain categories of person or community, such as the rights of persons belonging to minorities to enjoy their own culture, profess and practise their religion and use their own language, the rights of indigenous peoples including rights to lands traditionally occupied by them, and rights of women to non-identical treatment with

⁹⁰ Ibid, [16].

⁹¹ Id.

⁹² Id.

⁹³ Ibid, [22].

⁹⁴ Ibid, [27].

⁹⁵ Ibid, [35].

⁹⁶ Ibid, [17].

men.⁹⁷ Such rights are permanent rights, recognised as such in human rights instruments.⁹⁸

64. In incorporating the Race Convention into Australian domestic law, the RDA also makes provision for 'special measures'. Reflecting article 1(4) of the Race Convention, s 8 of the RDA allows for differential treatment that would otherwise breach ss 9 and 10. Section 8(1) provides:

This Part does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies except measures in relation to which subsection 10(1) applies by virtue of subsection 10(3).

65. The High Court clarified in *Gerhardy v Brown*⁹⁹ that the answer to whether particular measures are special measures 'require[s] consideration of the meaning and operation of the *Racial Discrimination Act* and of the convention to which the text of that Act refers.¹⁰⁰ '[T]he true meaning of the Act is ascertained by reference to the meaning in international law of the corresponding Convention provisions.'¹⁰¹

66. Justice Brennan identified six indicia of a special measure as follows:¹⁰²

- A special measure confers a *benefit* on some or all members of a class;
- *Membership* of that class is based on race, colour, descent, or national or ethnic origin;
- The special measure is for the *sole purpose of securing adequate advancement* of the beneficiaries in order that they may enjoy and exercise equally with others, human rights and fundamental freedoms;
- The protection given by the special measure is *necessary* in order that they may enjoy and exercise equally with others, *human rights and fundamental freedoms*;

⁹⁷ Ibid, [15].

⁹⁸ Id.

⁹⁹ *Gerhardy v Brown* (1985) 159 CLR 70.

¹⁰⁰ Ibid per Brennan J at 123.

¹⁰¹ Ibid per Brennan J at 124.

¹⁰² Ibid per Brennan J at 133, 139.

- The measure must not lead to the maintenance of separate rights for different racial groups; and
 - It must not be continued after the objectives for which [it was] taken are achieved.
67. Crucially, his Honour cautioned that the question of what constitutes ‘advancement’ requires objective evaluation:¹⁰³

‘Advancement’ is not necessarily what the person who takes the measure regards as a benefit for the beneficiaries. 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.

E. Analysis of the Government’s proposed amendments as special measures

68. It is evident that the measures of the Intervention as they currently stand cannot be characterised as special measures.¹⁰⁴ In particular, the oppressive and wide ranging measures were imposed without consultation or notice through blanket application. There was no input from the affected group nor means of identifying the targeted beneficiaries. The objectives, if identified at all, were vague and imprecise, without measurable targets or timelines, rendering impossible any assessment of whether they were legitimate or necessary. As the Review Board commented, there was no baseline data against which to identify benchmarks and no system of ongoing monitoring. Indeed, the harm created by imposition of the measures far outweighed any alleged benefit, rendering them illegitimate.
69. Importantly, the Special Rapporteur clarified that the current measures of the Intervention are not special measures:

¹⁰³ Ibid per Brennan J at 136.

¹⁰⁴ For an analysis of the measures of the Northern Territory Intervention see Alison Vivian & Ben Schokman, above, note 6.

[A]ffirmative measures by the Government to address the extreme disadvantage faced by indigenous peoples and issues of safety for children and women are not only justified, but they are in fact required under Australia's international human rights obligations. However, any such measure must be devised and carried out with due regard of the rights of indigenous peoples to self-determination and to be free from racial discrimination and indignity.¹⁰⁵

70. The Special Rapporteur concluded:

In this connection, any special measure that infringes on the basic rights of indigenous peoples must be narrowly tailored, proportional, and necessary to achieve the legitimate objectives being pursued. It is the view of the Special Rapporteur that the Northern Territory Emergency Response does not meet these requirements.¹⁰⁶

71. On 23 October 2008, in response to the Review Board's report, the Government indicated its intention to revise the core measures of the Intervention, including compulsory income quarantining and compulsory five year leases, so that they are either more clearly 'special measures' or non-discriminatory, in conformity with the RDA.¹⁰⁷ On 21 May 2009, the Government released the *Future Directions for the Northern Territory Emergency Response (Discussion Paper)* that outlined the Government's proposals to amend a number of Intervention measures which formed the basis for the NTER Redesign consultations. The proposed amendments to the NTER legislation theoretically have their origin in the NTER Redesign consultations, whereby the Government weighed up the feedback and other evidence to decide its approach.¹⁰⁸

72. Under the Government's proposed amendments, the RDA and other anti-discrimination laws will be reinstated at the end of 31 December 2010.¹⁰⁹ It is the Government's intention that the amended income quarantining scheme will be independent of race

¹⁰⁵ Professor James Anaya, Statement of Special Rapporteur, above, note 2, [7].

¹⁰⁶ Ibid, [8].

¹⁰⁷ Hon Jenny Macklin, Compulsory Income Management Continues, above, note 27.

¹⁰⁸ Australian Government, Landmark Reform Policy Statement, above, note 35, 3.

¹⁰⁹ S 2 of the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009* (Cth).

and, as a result, non-discriminatory.¹¹⁰ The Government intends that other amended measures, namely alcohol restrictions, pornography restrictions, five year leases, community store licensing and powers of the ACC are special measures.¹¹¹

73. Object clauses have been introduced in relation to a number of measures to 'enable special measures to be taken':

- 'to reduce alcohol related harm' (**alcohol restrictions**);
- 'to protect children living in Indigenous communities in the Northern Territory from being exposed to prohibited material' (**restrictions on prohibited material**);
- 'to improve the delivery of services in Indigenous communities in the Northern Territory and to promote economic and social development in those communities' (**five year leases**); and
- 'for the purpose of promoting food security for certain Indigenous communities in the Northern Territory' (**licensing of community stores**).

74. Existing measures that will continue unamended, namely controls on the use of publicly funded computers and business management areas powers, are also intended to be special measures.¹¹²

75. Other important measures of the Intervention are not mentioned at all and it is not clear how the Government proposes that they be characterised. Such measures include:

- Removal of operation of future act provisions under the *Native Title Act 1993 (Cth)*, including the right to negotiate;
- Removal of consideration of customary law or cultural practice in bail applications or in determining sentence in relation to an offence against *any* law of the Northern Territory;
- Right to compulsorily acquire Aboriginal town camps;

¹¹⁰ Australian Government, Landmark Reform Policy Statement, above, note 35, 6

¹¹¹ Explanatory Memorandum, *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009* (Cth), 32, 40, 44, 50 and 85.

¹¹² Hon. Jenny Macklin, Second Reading Speech, above, note 37, 12785.

- Limitations on access to merits review by the Administrative Appeals Tribunal. Certain determinations and notices are not legislative instruments and thus are administrative in character,¹¹³ including notices varying or terminating compulsory leases or a notice terminating a right, title or interest in land;¹¹⁴ and
- Removal of oversight of the construction of significant public works on Aboriginal lands by the Public Works Committee, which reports on issues such as the need for and cost effectiveness of the work.

F. Criteria for classification as special measures

76. Despite the Government's intention that provisions and acts under the amended measures are special measures under the RDA, an analysis of the NTER Redesign consultation process and content of the measures reveals that they do not fulfil the criteria of special measures.
77. The amended measures suffer from a number of the same defects as the existing measures and similarly cannot be characterised as special measures. In particular:
- Even if it were possible to retrospectively fulfil the requirement for consultation with the affected beneficiaries, the consultation process, while extensive, was flawed to such a degree that it cannot be described as facilitating Aboriginal participation in design and implementation;
 - As described above, objectives continue to be vague and imprecise and do not reveal defined, measurable targets against which 'advancement' may be assessed or progress towards defined benchmarks assessed;
 - In the absence of clear, defined and measurable targets, it appears that proposed advancement is to be assumed on the basis asserted benefit of existing measures. In fact, evidence relating to the impact of existing measures reveals the negative impact and harm of existing measures. Any evidence of 'benefit' is limited and qualified; and
 - The existing measures are not proportional to any legitimate aim. The amendments do not reform existing measures sufficiently to ensure proportionality.

¹¹³ See for example ss 34(9), 35(11), 37(5), 47(7), 48(5) and 49(4) of the *Northern Territory National Emergency Response Act 2007(Cth)* (NTNER Act).

¹¹⁴ ss 35(11) and 37(5) of the NTNER Act.

Special measures are designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities

78. The Review Board, the Little Children Are Sacred Report and the AHRC each situated the complex problem of child sexual assault in the context of Aboriginal disadvantage; past, current and continuing social problems; and decades of cumulative government neglect.¹¹⁵ Each underscored the crucial need for genuine partnerships with Aboriginal communities and immediate and ongoing effective dialogue with Aboriginal people to design initiatives that address the well being of the community as a whole.¹¹⁶
79. The Government claims that feedback from the Redesign consultations weighed up with other evidence provided the basis for the amendments. Therefore, detailed analysis of the process is appropriate.

Duty to consult

80. The obligation of States to consult with Indigenous peoples is unambiguously stated in a number of international instruments including the Declaration and ILO Convention No 169 and is also fundamental to the core United Nations human rights treaties, the Race Convention and the International Covenant on Civil and Political Rights (**ICCPR**).
81. For example, CERD, which monitors compliance with the Race Convention, has identified specific obligations of State parties, including Australia, as they apply to Indigenous peoples in General Recommendation 23.¹¹⁷ Relevantly, States have an obligation to ensure that:

¹¹⁵ Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle 'Little Children Are Sacred'* (2007) (**Little Children are Sacred Report**); HREOC Review Board Submission, above, note 25, 15; and Review Board Report, above, note 7, 9.

¹¹⁶ Little Children Are Sacred Report, above, note 115, 50; HREOC Review Board Submission, above, note 25, [5]; and Review Board Report, above, note 7, 9-11 and 47.

¹¹⁷ General Recommendation 23, above, note 82. The former Australian Government argued that General Recommendation 23 is not binding, observing that there is much dissent as to its effect: *Comments by*

*[M]embers 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** (emphasis added).*¹¹⁸

82. Similarly, the obligation is stated in art 19 of the Declaration where consultations are to be carried out in 'good faith ... in order to obtain their **free, prior and informed consent**' (emphasis added).
83. The duty to consult has recently been analysed by the Special Rapporteur,¹¹⁹ arising from his observation of the need to provide orientation to governments and other stakeholders about measures necessary for compliance with this duty.¹²⁰
84. The Special Rapporteur has clarified that, as a general rule, decisions of the State will be made through democratic processes in which the public's interests are adequately represented, including Indigenous people's interests.¹²¹ However, special differentiated consultation procedures are required when State decisions affect Indigenous peoples' particular interests, even when those interests do not correspond to a recognised right to land or other legal requirement, and when State decisions may affect Indigenous peoples in ways not felt by others in society.¹²²

the Government of Australia on the Concluding Observations of the Committee on the Elimination of Racial Discrimination, 16 May 2006, CERD/C/AUS/CO/14/Add.1 [20] <<http://daccess-ods.un.org/TMP/224071.8.html>> at 17 November 2009. However, Greg Marks contends that this approach underestimates the significance of general recommendations in providing guidance as to the content of the Race Convention and developing the jurisprudence: Greg Marks, 'Avoiding the International Spotlight: Australia, Indigenous Rights and the United Nations Treaty Bodies' (2002) 2(1) *Human Rights Law Review* 19, 55.

¹¹⁸ General Recommendation 23, above, note 82, art 4(d).

¹¹⁹ Professor James Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, 15 July 2009, available at <http://www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm> (accessed 2 February 2010) (**Report of Special Rapporteur**).

¹²⁰ *Ibid.*, [36].

¹²¹ *Ibid.*, [42].

¹²² *Ibid.*, [42]-[44].

85. Importantly, compliance with the duty to consult does not merely ensure fulfilment of international obligations but has the practical benefit of avoiding a potentially detrimental outcome. As the Special Rapporteur observes:

[W]ithout the buy-in of indigenous peoples, through consultation, at the earliest stages of the development of Government initiatives, the effectiveness of Government programs, even those that are intended to specifically benefit indigenous peoples, can be crippled at the outset. Invariably, it appears that a lack of adequate consultation leads to conflict situations, with Indigenous expressions of anger and mistrust.¹²³

86. Two essential requirements for compliance with the duty to consult include:
- **Good faith with the objective of achieving agreement or consent.** The requirement does not provide a veto power to Indigenous peoples but emphasises negotiations towards mutually acceptable arrangements prior to decisions being made rather than mechanisms for imparting information that do not provide the ability to genuinely influence the decision making process;¹²⁴ and
 - **Confidence building conducive to consensus.** Good faith consultations require a climate of confidence arising from Indigenous involvement in the design and implementation of the consultation procedure and attempts to address power imbalance.¹²⁵

The NTER Redesign consultations

87. It is apparent that the NTER Redesign consultations were to represent an 'engagement process' sufficient to justify the characterisation of measures as special measures.
88. It cannot be denied that the consultation process was extensive, with 500 meetings having taken place. Had the opportunity been taken for genuine and comprehensive discussions designed to canvass people's ambitions for their communities and what has worked, the process could have been revolutionary. Instead, the process was seemingly undertaken as a formality to justify the characterisation of the proposed

¹²³ Ibid, [36].

¹²⁴ Ibid, [36].

¹²⁵ Ibid, [50].

amendments contained within the Future Directions discussion paper as special measures. The two overarching objectives of the 'engagement and communication strategy' illustrate the limited scope of the consultation process:

The first is to reset the relationship between the Government and the Indigenous people in the NT. It will do this by:

- *Reiterating the original purpose of the NTER;*
- *Reiterating the major achievements to date;*
- *Reiterating this Government's commitments including what it has delivered to date;*
- *Explaining the Government's current position on the NTER, in particular, its position on each of the specific measures;*
- *Explaining why the Government is conducting these consultations; and*
- *Explaining the longer term agenda.*

The second objective is to collect and record feedback from stakeholders on the benefits of the various NTER measures, and how they could be made to work better.¹²⁶

89. The Minister's post consultations contention that the Future Directions discussion paper was designed to provide a 'starting point for discussion'¹²⁷ is not borne out by the objectives. Indeed, the stated objectives of the consultation process illustrate the narrow and directed scope of the consultations, concentrating on the Government's own proposals. The objectives do not even include the opportunity to provide feedback on the Intervention in general terms.

Government's report on NTER Redesign consultations

¹²⁶ Cultural & Indigenous Research Centre Australia, *Report on the NTER Redesign Engagement Strategy and Implementation* (September 2009) 7, available at http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Pages/report_nter_redesign_strat_implement.aspx (accessed 27 January 2010) (**CIRCA Report**).

¹²⁷ Landmark Reform Policy Statement, above, note 35, 3.

90. The Government has described the NTER Redesign consultations as occurring in the 'spirit of genuine consultation with Indigenous people. The Government has listened to what people had to say and carefully weighed up the feedback given to it during the consultations and other evidence in reaching its position.'¹²⁸
91. The Government's report on the NTER Redesign consultations¹²⁹ cites Cultural & Indigenous Research Centre Australia (**CIRCA**), reporting on its review of the consultations, as concluding that the process was 'open and fair'; that 'facilitators encouraged open discussion and emphasised the importance of people having their say'; and that feedback reports reflected the content of consultations.¹³⁰ In refraining from acknowledging the limited scope of the review undertaken by CIRCA and failing to refer to CIRCA's criticisms of the process and concerns about openness of process and content emerging from meetings, the Government alters the tone of CIRCA's conclusions and overstates the outcomes of the consultations. Indeed, Jumbunna IHL's analysis of the NTER Redesign consultations discussed below, reveals such fundamental flaws that the process cannot safely be relied upon.

Inadequacy of the NTER Redesign consultations

92. An analysis of the NTER Redesign consultation process reported in *Will they be heard?*¹³¹, raised a number of serious flaws in the consultation process that undermine its credibility and render reliance on the process unsafe. In particular, the process was criticised for:

- Lack of independence;

¹²⁸ Id.

¹²⁹ Australian Government, *Report on the Northern Territory Emergency Response Redesign Consultations* (November 2009) http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Pages/report_nter_redesign_consultations.aspx (accessed 28 January 2010) (**Redesign Consultations Report**).

¹³⁰ Redesign Consultations Report, above, note 129, 18.

¹³¹ Alastair Nicholson, Larissa Behrendt, Alison Vivian, Nicole Watson and Michele Harris, *Will they be heard?: A Response to the NTER Consultations June to August 2009*, (November 2009) (**Will They Be Heard Report**).

- Lack of impartial facilitation;
- Absence of Aboriginal input into design and implementation;
- Insufficient notice in some communities;
- Absence of interpreters or qualified interpreters;
- Consultation on plans and proposals already made by the Government;
- Inadequate explanations and description of measures;
- Failure to explain complex legal concepts; and
- Concerns about the Government's motives in undertaking the consultation.

93. Similarly, a review of the consultation process undertaken by CIRCA reported on a range of factors that impacted upon openness of meetings and appropriateness of content, including:¹³²

- Domination at large public meetings by a few senior community members;
- The option not given in some instances to separate into smaller male and female groups;
- Limited numbers of young people in attendance;
- Practicalities of larger meetings that naturally inhibit feedback, such as having to use microphones or having to speak loudly in a group setting;
- In many cases interpreters were not available, and the bulk of the discussion was conducted in English, limiting participation of those less confident speaking English and limiting the appropriateness of the material;
- In a few cases, facilitators tended to emphasise the positive outcomes of the NTER, rather than providing a balanced view, and were, in CIRCA's opinion, defensive of the Government;
- There was very little awareness of several of the measures, such that it was not possible to adequately explain the measure and gather feedback in the timeframe

¹³² CIRCA Report, above, note 126.

allowed, including publicly funded computers, business management powers, and law enforcement measures; and

- For several other measures, it was difficult in the Tier 2 meetings to have an open discussion as the level of understanding and knowledge of the measure varied, and there was not time to fully explain the measure. This was true for five-year leases and alcohol restrictions.

94. CIRCA observed that a natural prioritisation took place in every meeting based on community interest, so that reinstatement of the RDA and income quarantining dominated discussion, being the issues that community members were most passionate about.¹³³ CIRCA noted that less time was spent discussing measures that had less relevance for participants. However, its conclusion that this was not a 'significant issue as the relevance and significance of these measures [publicly funded computers, business management powers, and law enforcement measures] was minimal'¹³⁴ is not supported by its own observations that people did not know about measures or did not understand them. It is apparent from the reports of the process that the *only* two measures that people understood well enough to comment on were income quarantining and the suspension of the RDA.
95. Even during the two day Tier 3 workshop that CIRCA observed, there was 'not the time needed to fully explain and workshop all measures, for example 'the workshop on the special powers of the ACC was difficult for many participants, as there was little awareness and understanding, so people found it difficult to discuss whether this measure should continue.'¹³⁵
96. CIRCA praised the commitment made at community meetings to 'discussing the report with community members before sending this to Canberra', describing it as an 'important protocol when conducting community meetings' that should be standard practice.¹³⁶ In fact, the reality was quite different, where community members

¹³³ Ibid, 14.

¹³⁴ Ibid, 13.

¹³⁵ Ibid, 6.

¹³⁶ Ibid, 11.

experienced great difficulty in accessing FaHCSIA's reports of local consultation meetings.¹³⁷

97. The starting point for classification of initiatives as special measures is the design and implementation on the basis of *prior* consultation with affected communities and the active participation with such communities. The requirement for consultation is further modified as it applies in relation to Indigenous peoples where the standard is of informed consent. In any event, where measures are not forms of affirmative or positive action but are negative and remove rights, such as community initiated alcohol restrictions, the Social Justice Commissioner has confirmed that consent is required.¹³⁸ It is inconceivable that consent can be inferred from the consultation process when the complexity of the legal concepts under discussion is appreciated. Further, even if consent were not the standard to be achieved, the process would fail as having provided an opportunity to engage people in design and implementation, when it is appreciated that people did not understand or even know about the measures under discussion.
98. Despite the rhetoric and despite the very large number of meetings, the above discussion illustrates that the Redesign consultation process was in fact a mechanism for providing information about decisions already made or in the making, without providing the ability to genuinely influence the decision making process and, therefore, incapable of fulfilling that criterion of special measures.

Goal directed programs that are appropriate, legitimate and necessary

99. Special measures are temporary forms of favourable or preferential treatment, necessary to advance substantive equality for particular groups or individuals facing persistent disparities. They are appropriate, legitimate and necessary; being fair and proportional

¹³⁷ Will They Be Heard Report, above, note 131, 7-8.

¹³⁸ Human Rights and Equal Opportunity Commission, *Submission to the Senate Legal and Constitutional Committee on the Northern Territory National Emergency Response Legislation* (10 August 2007) [20] – [21]; references omitted.

to the achievement of defined aims; and are carefully tailored to meet the particular needs of the target beneficiaries based on a realistic appraisal of their current situation.

100. CERD has indicated it has specific reporting requirements of governments intending to implement special measures. Governments should identify articles of the Race Convention to which the special measures are related and report on specific issues including:

- Justifications, including statistical and other data on the situation of beneficiaries, how disparities have arisen and what results are expected;
- Intended beneficiaries;
- Range of consultations undergone;
- Nature of measures and how they promote the advancement, development and protection of affected groups and individuals;
- Envisaged duration of measures;
- Mechanisms for monitoring and evaluating the measures;
- Participation by the targeted groups and individuals in implementing institutions and in monitoring and evaluation process; and
- Results, provisional or otherwise of the application of the measures.

101. As discussed above, the objectives of NTER measures continue to be vague and imprecise, more in the nature of broad aspirations or motherhood statements such that specific goals or benchmarks are not readily identifiable. In the absence of specific objectives and measurable targets, it is not possible to assess whether measures are appropriate, legitimate and necessary. While there may be agreement that these broad aspirations, such as economic development are desirable, it is not possible to assess whether the means of attaining said economic development are fair or proportional.

102. Indeed, existing evidence demonstrates a profoundly negative impact, harm, lack of understanding or knowledge of existing measures, hostility, distrust and humiliation of such magnitude any asserted benefit cannot be fair or proportional. The minor amendments to the measures will not cure the defects.

PART 4. COMPULSORY QUARANTINING OF SOCIAL SECURITY ENTITLEMENTS

A. Background

103. The Intervention introduced a mandatory and non-discretionary regime of compulsory income quarantining to the Northern Territory, applying to people based on their residence in Prescribed Areas. By contrast, outside Prescribed Areas, income quarantining is triggered by factors such as risk of neglect or abuse or inadequate school attendance, assessed on a case-by-case basis.
104. In its review of the operation of the Intervention measures, the Review Board made a number of specific recommendations, including that income quarantining continue on a voluntary basis imposed only as a precise part of child protection measures or where specified by statute and that it be subject to independent review. In both cases, the Review Board said that such measures should be supported by services to improve financial literacy.¹³⁹ The Government rejected the Review Board's recommendation, asserting that income quarantining will continue to be compulsory 'because of its demonstrated benefits for women and children'.¹⁴⁰
105. At 30 June 2009, income quarantining was operating in 73 communities and the associated outstations and in ten town camp regions. A total of 15,182 people¹⁴¹ were affected with 'direct and profound impact on their lives', 'based on their residence in Aboriginal townships' and 'unrelated to a person's capacity to meet family responsibilities'.¹⁴²
106. There is no question that income quarantining has had the most profound impact of the Intervention's myriad measures, being described by the Review Board as synonymous

¹³⁹ Review Board Report, above, note 7, 12 and 21.

¹⁴⁰ Hon Jenny Macklin, Compulsory Income Management Continues, above, note 27.

¹⁴¹ Australian Government, Closing the Gap Report, above, note 29.

¹⁴² Review Board Report, above, note 7, 20.

with the Intervention.¹⁴³ It deserves separate scrutiny because of the profound hardship that it has had on those subject to the regime. Analysis of claims of its beneficial nature balanced against potential hardship must be undertaken before initiatives to extend its scope can be considered appropriate.

B. Impact of income quarantining

(a) Government assertions of benefit

107. The Government has made repeated claims of the beneficial nature of income quarantining, said to justify its expansion. The proposed expansion of the scheme to apply on the basis of 'objective criteria independent of race or ethnicity'¹⁴⁴ is claimed to be on the basis of:

- Feedback from the NTER Redesign consultations of 'real benefits' and support from the majority of participants;
- Evidence of 'positive outcomes' from a range of reports including:
 - (a) Australian Institute of Health and Welfare (**AIHW**) review;
 - (b) Central Land Council survey of six communities; and
 - (c) Final Stores Post Licensing Monitoring Report.

108. Reported benefits have been described as 'substantial' and include increased spending on food; more savings for larger purchases such as whitegoods; less money being spent on alcohol, gambling, cigarettes and drugs, reduced levels of humbugging; improved capacity for household budgeting; increased amounts of food being eaten by children; ensuring key household bills are paid; stabilising housing; and helping people

¹⁴³ Review Board Report, above, note 7, 20.

¹⁴⁴ Explanatory Memorandum, Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Cth) 11.

save money.¹⁴⁵ In particular, the Government cited ‘advantages for mothers with small children and large families, for grandparents and for communities.’¹⁴⁶

109. The only reservation described by the Government was that ‘people had felt hurt and ashamed by the way income management was introduced, with little consultation, and they did not understand why it only applied to Aboriginal people’ but that there was growing acceptance of income quarantining.¹⁴⁷
110. We believe that, in fact, an analysis of the reports cited by the Government illustrates that evidence of ‘beneficial outcomes’ and community support is in fact equivocal and inconsistent. The Government’s assertions are overstated and contentious, without robust foundation and little empirical evidence to support its claims.

Australian Institute of Health and Welfare Report

111. The AIHW report on the evaluation of income quarantining is not an independent review. FaHCSIA developed the evaluation approach and methodology and was responsible for data collection. Other sources of data included a telephone survey conducted by FaHCSIA of 66 community store operators, a survey of Government Business Managers and an earlier qualitative report on community consultations. AIHW merely compiled the data and wrote the report.
112. Of the 15,125 people subject to income quarantining across the Northern Territory at the time, the client survey involved face to face interviews with only 76 people subject to income quarantining from four of the 73 prescribed areas. Thus, a statistic cited from the report, that ‘more than half of parents ... reported that their children were eating

¹⁴⁵ Landmark Reform Policy Statement, above, note 35, 5.

¹⁴⁶ Explanatory Memorandum, Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Cth) 12.

¹⁴⁷ Explanatory Memorandum, Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Cth) 12.

more, weighed more and were healthier'¹⁴⁸ is referring to 30 people of the 15,125 subject to the measure.

113. Focus groups constituted by community representatives from the same four locations, and community sector and government employees from a wider range of locations were also conducted. Two communities supported income quarantining while the other two communities had a negative perspective.

114. AIHW criticised FaHCSIA's methodology and described limitations of the evaluation, noting that the studies did not rank highly in research hierarchies and there were issues with their quality. The evidence available, then, was 'not strong'.¹⁴⁹ AIHW made specific observations including:

- that the four areas selected for the interviews were not necessarily representative of all prescribed areas in the Northern Territory;¹⁵⁰
- that the sample size was small (76 of 15,125);¹⁵¹
- clients participating in the survey were not randomly selected but were chosen by 'community brokers' and GBMs;¹⁵²
- the lack of baseline and quantitative data corroborating qualitative findings;¹⁵³
- difficulties in determining what changes were due to income quarantining or quantify the extent of any change;¹⁵⁴
- difficulties in separating the effects of income quarantining from other measures;¹⁵⁵

¹⁴⁸ Hon Jenny Macklin, Second Reading Speech, above, note 37, 12788.

¹⁴⁹ Australian Institute of Health and Welfare, *Report on the evaluation of income management in the Northern Territory* (20 August 2009) available at http://www.fahcsia.gov.au/SA/INDIGENOUS/PUBS/nter_reports/pages/income_management_evaluation.aspx (accessed 1 February 2010).

¹⁵⁰ *Ibid.*, 16.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Ibid.*, 15.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

- that in one community, a large number of people were away on the day of the interviews, such that participants may not have been representative.¹⁵⁶
115. The client survey consisted of 74 questions, many with multiple parts, taking 45 minutes to one hour to complete. Respondents found the interview process to be very long and many did not answer all the questions.¹⁵⁷ The nature of the questions themselves also presents challenges to reliability. Theoretically, people are subject to income quarantining because they are incapable of managing their financial affairs and require punitive controls so they will take responsibility for their families, and, in particular, their children. The survey questions relate to these very sensitive issues of responsibility and wellbeing, asked by people who would be perceived as representing the Government who has imposed the regime. The potential fear of negative judgment and further repercussions may lead people to give the answers that they anticipate the questioners would like to hear. So, for example, people reported spending less on cigarettes but cigarette sales remain largely unchanged.
116. Finally, it is interesting to note that it would appear that the answer to question 57, 'If the government said you could choose whether or not to be on Income Management, what would you choose?', was not reported in the study. This is a major omission in a report cited as providing evidence of community support for the continuation of income quarantining.

Central Land Council survey of six communities

117. A survey of six communities undertaken by the Central Land Council demonstrated that responses to individual measures of the Intervention were mixed and often specific to community context and point in time.¹⁵⁸

¹⁵⁶ Ibid, 16.

¹⁵⁷ Ibid, 12.

¹⁵⁸ Central Land Council Survey, above, note 15, 79.

118. While it is correct that the survey reported that responses across survey participants are almost equally divided between people in favour (51%) and opposed to income quarantining (46%), it was most likely to be supported by people on wages not subject to the regime.¹⁵⁹ Unsurprisingly, the survey suggested a link between the successful operation of community stores and support for the regime.¹⁶⁰ Gender was not a significant factor influencing people's support or opposition to income quarantining, which was considered important given the anecdotal discussion that Aboriginal women may be more in favour of income management.¹⁶¹
119. Finally, the survey did report advantages arising from income quarantining but also reported serious disadvantages discussed below.

Surveys of community stores and Government Business Managers

120. Evidence frequently referred to by the Minister as a source of 'excellent evidence' that income quarantining was sufficiently beneficial to justify its continuation, and the only evidence relied upon in the *Closing the Gap in the NT Whole of Government Monitoring Report*, is taken from FaHCSIA surveys of community stores. The *Final Stores Post Licensing Monitoring Report*¹⁶² concluded that the overall impact of income quarantining was positive; customer shopping habits had changed; women were telling store operators that they have more control over their money and greater capacity to manage humbug; and that initial mistrust and confusion over income management had abated over time.

¹⁵⁹ Ibid, 19.

¹⁶⁰ Id.

¹⁶¹ Ibid, 21.

¹⁶² FaHCSIA, *Final Stores Post Licensing Monitoring Report* (2009) available at http://www.facs.gov.au/sa/indigenous/pubs/nter_reports/final_monitoring_report/Pages/default.aspx (accessed 31 January 2010) (**Final Stores Report**).

121. In fact, there is no baseline data and little empirical evidence as to the impact of income quarantining.¹⁶³ Caution should be adopted in relation to surveys of community stores that did not obtain primary evidence from those subject to income quarantining and do not explore why altered sales patterns were experienced. Similarly, an online survey of Government Business Managers based on their in community experience and perceptions of effectiveness,¹⁶⁴ must be treated with caution, given the Review Board's findings of the lack of engagement and lack of professional qualifications of some managers.¹⁶⁵

(b) Overwhelming evidence of hardship and disadvantage

122. Evidence relating to the impact of income quarantining is equivocal at best and, at worst, demonstrates severe harm, undermining of confidence in the Government, and frustration, anger and humiliation. The evidence does not support continuation of income quarantining in its current or proposed amended forms.

123. Hardship included hunger, with families being unable to buy food for days at a time and people criss-crossing family groups to find food; inability to travel for ceremony and sorry business; people travelling long distances and incurring exorbitant transport costs to access community stores; difficulties in accessing Centrelink, especially for the elderly and those with disabilities; increased prices at community stores; people becoming subject to income quarantining without their knowledge; people contributing to services, such as meals on wheels, that they do not have access to; tensions within and between families; and frustration, embarrassment, humiliation and overt racism because of the difficulties associated.¹⁶⁶ The administration of income quarantining has

¹⁶³ The Review Board described the lack of baseline data as a major problem requiring urgent attention. See Review Board Report, above, note 7, 16

¹⁶⁴ Brian Walker-Catchpole, Lucy Phelan & Kate Snow, *Survey of Government Business Managers Relating to the Impact of the Northern Territory Emergency Response*, July 2008.

¹⁶⁵ Review Board Report, above, note 7, 44

¹⁶⁶ See HREOC Review Board Submission, above, note 25 at [37]; Review Board Report, above, note 7, 20-21; AIDA Submission, above, note 9, [19]-[23], [43]-[54]; Community Based Review, above, note 9, 123; Draft Review Board Report, above, note 10, 48-55, 123-129; Central Land Council Survey, above,

resulted in segregated services in Alice Springs. For example, when first implemented, Centrelink in Alice Springs had separate queues for those subject to income quarantining until complaints were heeded. Similarly, for ease of administration, at least one store in Alice Springs has designated certain cashiers for people subject to income quarantining.¹⁶⁷ Not only does this shame and humiliate those subject to income quarantining, but it also prevents them from equal access to services as the general public.

124. Reports describe loss of dignity and disempowerment; a sense of shame at being treated in the same category of negligent or abusive parents and anger at its discriminatory nature. Of particular concern is the sense of reversion to a protectionist era, the return of 'ration days' with its attendant loss of autonomy and dignity.¹⁶⁸

(c) Jumbunna IHL's research findings

125. Research undertaken by Jumbunna IHL working in Prescribed Areas in the Northern Territory from June 2008 to February 2009 replicates previous research findings of unacceptable hardship and disempowerment impacting on the most vulnerable and does not support the Government's contention that there has been increased acceptance of the regime.¹⁶⁹

Greater poverty and increased difficulties looking after children

note 15, 25-31; CAALAS & NAAJA Submission, above, note 26, 16-20; Final Stores Report, above, note 162, 9.

¹⁶⁷ For example, it has been reported that certain supermarkets in Alice Springs direct people subject to income quarantining to a specific cashier.

¹⁶⁸ See HREOC Review Board Submission, above, note 25 at [37]; Review Board Report, above, note 7, 20-21; AIDA Submission, above, note 9 at [19]-[23], [43]-[54]; Community Based Review, above, note 9, 123; Draft Review Board Report, above, note 10, 48-55, 123-129; Central Land Council Survey, above, note 15, 25-31; CAALAS & NAAJA Submission, above, note 26, 16-20; Final Stores Report, above, note 162, 9.

¹⁶⁹ More than 100 interviews and statements were taken from Aboriginal people living in Prescribed Areas through this period. We will provide transcripts or fieldnotes if requested, subject to confidentiality considerations. Comments by community members quoted in this section are taken from a report of the research that is currently being finalised for publication.

126. The central justification for the continuation of a compulsory income quarantining system provided by Indigenous Affairs Minister Jenny Macklin is that it has increased well being in Indigenous communities – particularly that of women and children.
127. Contrary to these claims, Jumbunna IHL's research has found that income quarantining is resented by most Aboriginal people surveyed, precisely because the severe restriction of cash has made meeting day to day needs far harder.

The restrictive nature of income quarantining

128. Despite the introduction of the BasicsCard, and the proliferation of shops which can utilise the system, many needs can not be met without cash. For example, a female teacher from the community of Santa Teresa in November 2008 complained that the nearest place where the BasicsCard could be used was in Alice Springs, more than 90 kms away:

Some people can't go into town to do shopping because they've got no car. Or the price of fuel is too high. So sometimes they miss out on food. Lots of families hungry, poor things. And no cash to buy power card.

129. The distance between stores and communities is a common complaint. A man from the Murray Downs community told a similar story. He noted that many children in the community go away for high school or travel long distances for sporting trips and that not being able to give them cash means they are unable to buy uniforms, or feed themselves while travelling. When asked whether he agreed that the Government was making it easier to look after children he replied:

Some of us, we can't even buy clothes for the kids to go out training, to high school. We haven't got no money to buy their clothes, bag and stuff...Intervention got us down. The Income (Management). If we're lucky we'll get through...Everyone is getting sick of that card! People should get paid cash!

130. The problem with cash flow is not restricted to remote areas. Maxine Carlton works for Aboriginal legal aid in Alice Springs. She lives in the Kunoth town camp and many of her family, including her husband, are on the income quarantining system. A participant in our earlier research project, she was interviewed on January 20 2010 for this submission:

It's far harder because there's no cash around. My husband Donald just got a \$500 cash advance all into the Basics Card. But we can't get what is needed. For the car, for lots of things because the Basics Card isn't used by lots of shops."

Income Management has taken away the cash flow from mothers and Nannas and that hits the kids, particularly the teenage group from 10-17. There is no cash for them now. This has actually led to more of them doing crime.

I know there are more break and enters now than there's even been, say where the BasicsCard isn't in a store that might have whatever it is that they want.

Income quarantining is an administrative nightmare

131. Income quarantining has placed an incredible administrative burden on people living in Prescribed Areas. This has been particularly acute for people living in remote areas, who have routinely been required to travel into Alice Springs to negotiate their payments. An interview with Freida Jarrah from Yuendumu in October 2008 outlines some of these issues. Here she talks about her mother's experience on income quarantining:

She's really old. She's about 100. And she wants to stay here in Yuendumu, but this Income Management...I always have to travel from Little Sisters camp [in Alice Springs] to pick it up. Have to go to Tangentyere Council and Centrelink just to pick it up. And she doesn't walk. That's why I was talking to the Centrelink people – "this old lady. Can you put her back to money? And same for carer, so they can get their money?"

When I get ready to go to Alice Springs from here, it takes all day. Really old lady. She must be hungry now...Her two legs are swelled up. She can't stand up - she always just crawls now, can't stand up and walk. You know, the old people, when they are really old, they can't stand up and walk. That's why I'm upset about

Centrelink.

132. With the full implementation of the BasicsCard system, some of this face-to-face administration has lessened for people with consistent access to phones (a limited section of the population). But as Valerie Martin from Yuendumu described in December 2008, the constant need to call up Centrelink has created its own problems. On the morning we interviewed Valerie, her daughter had spent over an hour and a half on a public phone trying to get credit transferred, before the line unexpectedly cut out:

We almost used all of the credit on the phone card. More than an hour, just listening to that music, and for nothing.

133. A very common complaint from those living in Prescribed Areas has been that people have lost money because of income quarantining through administration failures by Centrelink. For example, in October 2008, Joanne Nakamarra from the Tara community explained:

[S]ometimes we go to Centrelink over there [Tennant Creek] and they don't know where our money went. Like last time I went in there, there was about \$400 and then the next thing when I rang up they said only \$174 was there.

134. In January 2009, Barbara Shaw from Mt Nancy Town Camp in Alice Springs explained the increased hardship that has come with Centrelink mismanagement:

Well with Income Management right, Centrelink didn't put across enough pay enough to pay my bills. And now, I've fallen way back. So they're going to repossess my fridge. So when I go shopping with my BasicsCard, where am I supposed to put my food?

When I was on Centrepay [a voluntary system that existed before the NTER] I was always in credit because I nominated a certain amount myself – and then come Income Management I fall behind and don't keep up with the payments.

And OK – I've been going to Tangentyere [shop] looking for my food vouchers that go there out of Income Management and there's nothing there. They're missing

money. Misplacing my Income Management food vouchers that are supposed to go to Tangentyere. Three weeks of it. I get it every week out of both payments – out of my family allowance and out of my parenting payments.

That's happening to a lot of people where money is going missing...If they're losing our money in Income Management then why can't they give us cash?

135. One major cause of increased poverty and in some cases extreme hunger resulting from the administrative nightmare of income quarantining has been the operation of the 'bush orders' system in many remote areas.
136. Under this system, boxes of food are sent out to Prescribed Areas, with the cost deducted from the income quarantined account. While in theory people are supposed to be given a choice about whether to use their income quarantined funds in this way, in practice, our research has found it is often presented by Centrelink staff as the only available option.
137. For example, on a research trip to Tara in October 2008, our team arrived at the same time as the 'bush orders' vehicle, which left as soon as locals had unloaded the boxes. A number of full boxes didn't arrive for people and items were missing from other boxes. Nathaniel Long explained that this was common:

Sometimes people just miss out, maybe they have to wait like a month or even two months for any to come in. Today they've had to leave for town, a couple of families. They can't wait any more for food. They'll spend the day travelling. Then when they get there, maybe Centrelink says come tomorrow. Then they rely on family in town to stay, to get a feed off.

138. An interview with a community member from Ti-Tree, conducted outside Alice Springs Centrelink in August 2008, outlined a similar experience:

They're sending food that people don't want. They're sending the wrong food, they're sending the wrong brands. We've had problems down there with the meat going off. With detergents getting packed with edible foods. The wrong orders going to the wrong people. All sorts of problems you know.

The first few times they started they actually mucked it up that bad they had to give emergency rations out. Just boxes of rations because they never got the bush orders right, they weren't rocking up at the right time, they weren't finding the people who actually had the orders.

You've got to go through a checklist on every box that's dropped off. The old people don't even understand what they're getting. They don't understand what's being ordered for them - they can't do their own ordering, they don't know how to read.

And the people that are doing the ordering for them are talking them into buying things that they don't even need, that they don't know what they are buying.

Plus it's a 100% mark up on their items, whereas out on the farm its only a 60% mark up. Where they are used to doing their shopping. So they are probably losing 20% straight up just doing their bush order.

They don't want it. People like to do their own shopping and they like to shop when they need the food. They don't buy a pound of flour, they buy a drum of flour. And a few people out there getting the bush orders, their flour just ain't turning up. And that's their main diet - flour for damper - and they just aren't getting it.

It's a high mark up and a lot of embarrassment. Its downgrading people, because they want to do their own shopping. Those old women, its reminding them of when they were kids and they used to get passed out rations out on the stations. This government is trying to do virtually the same things. There's no ifs and buts about it that's exactly what's happening.

People are actually going hungry out there now. They get a two week bush order, in one go, they've got big families. That family comes in and eats to. So the food's gone in two days. Then they've got nothing. They've got to wait for the next person to get their bush order before they can go and eat again.

It's costing the taxpayers millions and millions and dollars that they didn't need to spend. Centrelink mob out there, some of them are doing 14 hour days with this bush order. Delivering it and then there was no need for that. Let people do their own shopping. It's taking people's rights away. Everyone who I've talked to doesn't want this.

Alcohol abuse and violence

139. Another key justification for compulsory income quarantining is the proposition that the system helps alleviate problems of alcohol and family violence more prevalent in disadvantaged communities in general and Aboriginal communities in particular.
140. In fact, there is no evidence that these problems are decreasing in the Prescribed Areas currently subjected to income quarantining. On the contrary, in a number of interviews and statements recorded through our research suggest that the problems are getting worse. For example, at a public seminar organised by the NT Council of Social Services in November 2008, which featured numerous Centrelink and government staff explaining the new BasicsCard system, a young Aboriginal woman from the Charles Creek town camp spoke strongly about the growing problems in her community:

There's a lot more people drinking in my camp now and a lot more domestic violence...More domestic violence because people can't access money through their Basics Card and this causes fights. More drinking, everyone is always coming in from the bush.

I can't sleep until four in the morning. Before this I used to go to bed at nine at night. Now its 100 times worse. People supporting this – have they ever lived in a town camp!

Is the government taking into account what they are doing to our elders? This is killing them. Back in the old days they fought really hard for black people to get their rights. Now they have to see their grandkids going through this.

141. Donald Kunoth, from the Kunoth town camp, also spoke about the greater stress and fighting that existed as a result of reduced cash flow in an interview conducted on January 25, 2010:

I haven't seen a reduction in grog. Its just made people more desperate to hang around the shop and hassle the other ones – the people that don't drink. It starts fights and everything. It makes them steal from the bottle departments.

Disempowerment and racism

142. There are ample statements on the public record by Aboriginal people talking about the extreme disempowerment and experience of racism that has come with the imposition of compulsory income quarantining. The Government, responding to the NTER Redesign Consultation Report, has itself acknowledged that many people have felt discriminated against through the process.¹⁷⁰
143. The interview transcribed below, conducted in September 2008 with three women who have children in their care at the community of Nyrippi, is provided as just one example of many statements collected through Jumbunna IHL's research that speak to the trauma and disempowerment that has come with income quarantining. The women spoke mostly in Warlpiri and translation was provided by Valarie Martin (VM):

How did you feel when they told you would be going on the system?

VM: She cried. She cried when they told her that. Instead of getting money like before, she got surprised and just cried when they told her all the money was in that card. Quick changeover.

Molly: Even pensioner too. So quick it changed from just money to purchase order.

VM: They were confused and are still very confused about it. Here today. They are saying they don't understand why.

What about looking after family?

VM: It's hard. Not like before.

Molly: My daughter. Him cry. Him worry about money. Kids money, for kids money. True.

Alice: We never get him money - I've got grandchildren, and I look after my sister's daughter. Might be \$4,000 but no cash, Lowa [nothing].

VM: (translating) Like my grand-daughter, the other day, everything on that card. She didn't see the money. She has seen it in the computer, she went to Centrelink, They showed her. In her mind, she's been thinking a

¹⁷⁰ Explanatory Memorandum, Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Cth), 12.

lot. How come?

Leena: I bin get angry then. I don't like you know.

Alice: I'm not drinking woman!

VM: (translating) we don't drink. We know how to look after the kids. That's what she's saying.

Leena: Is it for one year?

At the moment the government is talking about pushing it out longer.

(Very angry response.)

VM: It's not working. We don't want it!

Breaking the cycle of passive welfare? The opportunity cost of income quarantining

144. This has been touted as an investment which will help 'break the cycle of passive welfare' and encourage people into employment or education. However, the inter-relation between the imposition of Income Management and severe reforms to the Community Development Employment Projects (**CDEP**) in the Northern Territory has had a disastrous impact on Aboriginal employment.
145. Thousands of CDEP positions have been lost through the reforms. This workforce provided the backbone for many essential services in Aboriginal communities – positions that in many cases have not been replaced. Payment for CDEP is now paid through Centrelink, rather than a local employment provider, and is Income Managed, making it indistinguishable to many people from 'work for the dole' programs.
146. An interview with some women in Santa Teresa, conducted in November 2008 told a familiar story of the impact of these reforms. Elaine Gori said:

Lots of young people are just walking around since they scrapped CDEP. They

used to do everything, pick up the rubbish. Gardens everywhere. Go and check on the old people and make sure they had things.

Imelda Palmer added:

Now people told to do that work for the dole. They don't get paid much. And half of it goes into that card, BasicsCard, or some to the shop. But it's not much.

In response Elaine commented:

You know we've had that problem before...Just a hand out – ration – given out, without any money. Now it's just like going back.

147. The abolition of local community councils in favour of mega Shires, a Northern Territory government reform that has come alongside the NTER, has also contributed to a lack of co-ordination of the local workforces, resulting in even greater levels on unemployment and neglect.
148. A research trip to Ampilatwatja in January 2010 found that only one rubbish collection had been done by the Shire in the previous two months. Rubbish was strewn around the community as a result, as rubbish bags deposited outside by residents for collection had been ripped open by dogs and donkeys.
149. Local elders said that despite a willingness to work, people were not enlisting with the Shire services manager because all that was on offer in payment was income quarantining.
150. Based on the above research, we believe that income is increasing the reliance of Aboriginal people in Prescribed Areas on 'passive welfare' and does nothing to encourage or build on local initiative.
151. Furthermore, there is a desperate need for very basic services across the Prescribed

Areas and no plans on the table to deliver these.

152. Under the new Northern Territory government 'hub towns' policy and the provisions of the federal Strategic Indigenous Housing and Infrastructure Program (**SIHIP**), only three of the scores of communities suffering from overcrowding across the Northern Territory will receive any new housing and even then, this will only come if they disempower themselves further through signing 40-year leases over township land.
153. An alternative and perhaps better targeted use of the resources allocated to income quarantining would be to put these funds into community development programs across all Aboriginal communities to create real employment opportunities and increase expenditure on community-based education to alleviate the scourge of illiteracy that keeps so many Aboriginal people in the Northern Territory out of employment.

C. The proposed amendments

154. The Welfare Reform Bill 'introduces landmark reforms to the welfare system which, over time, will see the national rollout of a new scheme of income management of welfare payments in *disadvantaged regions* across Australia' (emphasis added).¹⁷¹ From 1 July 2010, the new regime will begin to be implemented applying to:
 - disengaged youth;
 - long term income support recipients; and
 - people assessed by Centrelink social workers as vulnerable income support recipients, on the basis of financial crisis, domestic violence or economic abuse.
155. The existing measure enabling child protection authorities to refer people to Centrelink for income quarantining in certain locations within Western Australia will be extended to cover the Northern Territory.

¹⁷¹ Hon Jenny Macklin, Second Reading Speech, above, note 37, 12783.

156. The Government has stated that the 'categories of welfare payment recipients were chosen based on evidence that indicates a range of negative outcomes for people with early or long term dependence on income support payments, including poor social and health outcomes and financial vulnerability, as well as the risks of long-term exclusion and the intergenerational transmission of welfare dependency. Children growing up in these circumstances are also at high risk of poor outcomes.'¹⁷² The Government has chosen these groups based on their need for support due to their high risk of social isolation and disengagement, poor financial literacy, and participation in risky behaviours'.¹⁷³
157. The amended scheme of income quarantining will operate from 1 July 2010 and will begin to be implemented in the Northern Territory which has the highest proportion of severely disadvantaged locations in Australia, represented by 24 of the 50 most disadvantaged locations measured by the Socio-Economic Indexes for Areas (**SEIFA**).¹⁷⁴
158. The amended scheme contains exemptions for the first two categories, which places the onus on the applicant for exemption to provide evidence that they are undertaking responsible parenting, or, for those without children, engaging in study, or participating in employment.¹⁷⁵

D. Discriminatory nature of the proposed amendments

159. The right to equality before the law in the enjoyment, without distinction as to race, colour, or national or ethnic origin notably in the enjoyment of the right to social security is enshrined in article 5(e)(iv) of the Race Convention. Importantly, in relation to a right

¹⁷² Explanatory Memorandum, Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Cth) 13.

¹⁷³ Hon Jenny Macklin, Second Reading Speech, above, note 37, 12788.

¹⁷⁴ Ibid, 12788; Landmark Policy Reform Statement, above, note 35, 5.

¹⁷⁵ Hon Jenny Macklin, Second Reading Speech, above, note 37, 12788.

listed in article 5, whenever a State party imposes a restriction that applies ostensibly to all within its jurisdiction, it must ensure that the restriction is, neither in purpose nor effect, incompatible with article 1 of the Race Convention as an integral part of human rights standards.¹⁷⁶ To ascertain whether this is the case, CERD is obliged to inquire further to make sure that any such restriction does not entail racial discrimination.¹⁷⁷

160. CERD has also previously indicated that where State parties have taken policy and practical steps towards realisation of an article 5 right, its revocation and replacement with a weaker measure amounted to the impairment of the recognition or exercise on an equal basis of the right.¹⁷⁸

161. CESCR in its General Comment No 19 articulates the content of the right to social security. In particular, the right to social security must be enjoyed without discrimination, whether in law or in fact, whether direct or indirect. State parties are cautioned to take particular care that Aboriginal peoples are not excluded from social security systems through direct or indirect discrimination.¹⁷⁹ CESCR has identified the strong presumption that retrogressive measures taken in relation to the right to social security are prohibited. The State party has the burden of proving that retrogressive measures have been introduced after the most careful consideration of all alternatives and that they are duly justified.¹⁸⁰

162. The RDA will apply to the amended income quarantining regime from its implementation on 1 July 2010.¹⁸¹ People currently subject to income quarantining in the Northern Territory will either transition to the new scheme or move off income quarantining altogether, within 12 months of the commencement of the new scheme. It

¹⁷⁶ Committee on the Elimination of Racial Discrimination, *General Recommendation 20. Non-discriminatory implementation of rights and freedoms (Art 5)* (Forty eighth session 1996) at [2] (**General Recommendation 20**).

¹⁷⁷ *Ibid*, [2].

¹⁷⁸ *Ms L R et al v Slovak Republic* CERD/C/66/D/31/2003.

¹⁷⁹ UN Committee on Economic, Social and Cultural Rights, *General Comment No 19: The right to social security (article 9)*, [35].

¹⁸⁰ *Ibid*, [42]

¹⁸¹ Hon Jenny Macklin, Second Reading Speech, above, note 37, 12789.

will be a staged transition process and people will transition to the new scheme or seek to exit from the existing scheme, once the new scheme is operational in their area.¹⁸² It is the Government's intention that the amended income quarantining scheme will be independent of race, and as a result, non-discriminatory.¹⁸³

163. The repeal of the suspension of the RDA and provisions deeming the legislation and acts done under the legislation to be special measures – the provisions that apply to the current income quarantining regime applying to Prescribed Areas within the Northern Territory – will commence at the end of 31 December 2010.
164. The new scheme will begin to be implemented in the Northern Territory which has the highest proportion of severely disadvantaged locations in Australia, represented by 24 of the 50 most disadvantaged locations measured by SEIFA.¹⁸⁴
165. Any analysis of whether the amended income quarantining regime will be racially discriminatory, in breach of the Race Convention and RDA is hampered by the absence of the following critical information:
 - The expanded scheme will apply to 'disadvantaged locations', initially across the Northern Territory and later across Australia. How disadvantaged locations are to be defined is not clear. However, key socioeconomic indicators identify Aboriginal and Torres Strait Islanders as the most disadvantaged in Australia. Therefore we confidently predict that in the Northern Territory, disadvantaged locations will predominantly be Aboriginal communities; and
 - The criteria for 'vulnerable' persons who will become subject to income quarantining is also not defined.

¹⁸² Explanatory Memorandum, Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Cth) 14.

¹⁸³ Landmark Policy Reform Statement, above, note 35, 6.

¹⁸⁴ Hon Jenny Macklin, Second Reading Speech, above, note 37, 12788; Landmark Policy Reform Statement, above, note 35, 5.

166. We have several concerns that the amended income quarantining regime will continue to discriminate against Aboriginal people in the Northern Territory:

- **People must apply to be exempted.** Persons entitled to be exempted from the regime will have to apply for such exemption. In the context of a scheme that has demonstrably caused anxiety, humiliation and increased incidents of racial discrimination, Aboriginal people in Northern Territory communities, where English may be a second or third language are likely to be discouraged from interacting with bureaucracy and remain subject to the punitive regime.
- **Transition period arrangements.** During the transition period, people who are subject to income quarantining on the basis of residence in a Prescribed Area, but who are entitled to be exempted, will be prevented from such exemption until the amended regime is rolled out into their area.
- **Blanket application.** The same criticisms levelled at the previous regime in relation to its blanket application continue to apply to the amended regime. The right to social security of individuals within the first two categories of welfare payment recipients captured by the amended regime (disengaged youth and long term welfare payment recipients) is diminished on the basis of residence in a Declared Income Management Area alone and not on the basis of a case-by-case assessment.
- **Vulnerability not defined.** In relation to the one category that is said to be on the basis of individual assessment ('vulnerable' persons), we are unable to assess the potential discriminatory effect of the measure as the Government has not set out the criteria for declaring vulnerability.

167. The extreme disadvantage suffered by Aboriginal people in the Northern Territory can

be attributed to discriminatory government practices, including decades of under spending and failure to provide basic services available to other Australian citizens. Under spending in key social welfare areas is estimated by the Northern Territory Council of Social Service (**NTCOSS**) at \$542 million in 2006/2007 alone.¹⁸⁵ This has contributed to the circumstances of severe disadvantage in the Northern Territory and weakening of communities, identified by the Little Children are Sacred report to a 'combination of the historical and ongoing impact of colonisation and the failure of governments to actively involve Aboriginal people, especially Elders and those with traditional authority, in decision making.' It has been a source of deep frustration that, historically, there has not been concerted, long term action taken by governments in partnership with communities to address these issues.¹⁸⁶

168. Under this proposed regime, Aboriginal people living in the Northern Territory will be subject to punitive income quarantining controls because they live in disadvantaged circumstances; disadvantaged circumstances which are not of their own making.

¹⁸⁵ Northern Territory Council of Social Service, 'Submission to the Inquiry into Government Expenditure on Indigenous Affairs and Social Services in the Northern Territory' (October 2008), available at http://www.aph.gov.au/senate/committee/clac_ctte/gov_exp_indig_affairs/submissions/sublist.htm (accessed 30 October 2009).

¹⁸⁶ HREOC Review Board Submission, above, note 25, [16]

PART 5. RECOMMENDATIONS

169. That the Federal Government immediately reinstate the Racial Discrimination Act and other anti-discrimination legislation without qualification.
170. That the Federal Government and the Northern Territory Government commit to meeting their obligations to provide:
- (a) Adequate levels of basic services for health and education, including adequate numbers of doctors, nurses, teachers and teacher's aides.
 - (b) Adequate infrastructure for communities, including housing, schools, electricity and sewerage.
 - (c) Programs that promote capacity building within Aboriginal communities.
171. That the Federal and Northern Territory Governments commit to an evidence-based approach to policy and program development and implementation that:
- (a) Engages Aboriginal and Torres Strait Islanders in design and implementation of policy and programs;
 - (b) Promotes community-led initiatives to identified problems;
 - (c) Develops the capacity of Aboriginal and Torres Strait Islander governance institutions and service delivery organisations; and
 - (d) Places cultural legitimacy and appropriateness as central to all initiatives.