

# Contents

Abbreviations	p3
Summary of Recommendations	p4

## Submission

---

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

---

Proposed Amendments to <i>Aboriginal Land Rights (Northern Territory) Act 1976</i> (Cth)	Question (i)	
	Recommendation (i)	p5
Proposed Amendments to <i>Social Security (Administration) Act 1999</i> (Cth)	Recommendations (ii) – (iii)	p5

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

---

Introductory Comment		p6
Proposed Amendments to <i>Families, Community Services, Indigenous Affairs (Northern Territory National Emergency Response) Act 2007</i> (Cth)	Recommendations (iv) – vii	p7
Proposed Amendments to <i>Northern Territory National Emergency Response Act 2007</i> (Cth)	Recommendations (viii) – xi	p8
Proposed Amendments to <i>Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007</i> (Cth)	Recommendations (xii) – xv	p10

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

---

Proposed Amendments to <i>Northern Territory National Emergency Response Act 2007</i> (Cth)	Questions (ii) – (iii)	
	Recommendations (xvi) – (xviii)	p13
Proposed Amendments to <i>Australian Crime Commission Act 2002</i> (Cth)	Recommendations (xix)	p13

## ***Miscellaneous***

---

Recommendations for Amendments Not Proposed	Recommendations (xx) – (xxvi)	p14
---	-------------------------------	-----

# Abbreviations

## Acts

---

- *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)* ALR (NT) Act 1976
- *Australian Crime Commission Act 2002 (Cth)* ACC Act 2002
- *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 (Cth)* FaCSIA (NTNER) Act 2007
- *Northern Territory National Emergency Response Act 2007 (Cth)* NTNER Act 2007
- *Racial Discrimination Act 1975 (Cth)* RDA 1975
- *Social Security (Administration) Act 1999 (Cth)* SS (Administration) Act 1999
- *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (Cth)* SS (Welfare Payment Reform) Act 2007

## Bills

---

- *Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Bill 2009 (Cth)* FaHCSIA (2009 Measures) Bill 2009
- *Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Restoration of Racial Discrimination Act) Bill 2009 (Cth)* FaHCSIA (Restoration of RDA) Bill 2009
- *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Cth)* SS (Welfare Reform & Reinstatement of RDA) Bill 2009

## Conventions & Declarations

---

- *Convention for the Elimination of all Forms of Racial Discrimination* CERD
- *United Nations Declaration on the Rights of Indigenous Peoples* UN DRIP

## Summary of Recommendations

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

#### Recommendations for Proposed Amendments to *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)

(i) There is no recommendation providing that the Central Land Council is party to an agreement in respect of the Alice Valley Extension (East).

#### Recommendations for Proposed Amendments to *Social Security (Administration) Act 1999* (Cth)

(ii) Abolish mandatory income management and in its place allow it to only be adopted on an 'opt-in' or voluntary basis.

(iii) Remove the redundant provisions regarding applying for an exemption from compulsory income management.

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

#### Recommendations for Proposed Amendments to *Families, Community Services, Indigenous Affairs (Northern Territory National Emergency Response) Act 2007* (Cth)

(iv) Section 4 of the *FaCSIA (NTNER) Act 2007* should be repealed but not substituted with the proposed new s4 in its entirety (see **v and vi, viii, ix and x, and xii, xiii and xiv**).

(v) Proposed s4(1), s4(2), s4(4) and s4(5) of the *FaCSIA (NTNER) Act 2007* should be inserted, omitting proposed s4(3) (see **vi**).

(vi) Omit proposed s4(3) of the *FaCSIA (NTNER) Act 2007*.

(vii) Section 5 of the *FaCSIA (NTNER) Act 2007* should be repealed.

#### Recommendations for Proposed Amendments to *Northern Territory National Emergency Response Act 2007* (Cth)

(viii) Section 132 of the *NTNER Act 2007* should be repealed but not substituted with the proposed new s132 in its entirety (see **iv, v and vi, ix and x, and xii, xiii and xiv**).

(ix) Proposed s132(1), s132(2), s132(4) and s132(5) of the *NTNER Act 2007* should be inserted, omitting s132(3) (see **x**).

(x) Omit proposed s132(3) of the *NTNER Act 2007*.

(xi) Section 133 of the *NTNER Act 2007* should be repealed.

#### Recommendations for Proposed Amendments to *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth)

(xii) Section 4 of the *SS (Welfare Payment Reform) Act 2007* should be repealed but not substituted with the proposed new s4 in its entirety (see **iv, v and vi, viii, ix and x, xiii and xiv**).

(xiii) Proposed s4(1), s4(2), s4(4) and s4(5) of the *SS (Welfare Payment Reform) Act 2007* should be inserted, omitting s4(3) (see **xiv**).

(xiv) Omit proposed new s4(3) of the *SS (Welfare Payment Reform) Act 2007*.

(xv) Sections 5, 6 and 7 of the *SS (Welfare Payment Reform) Act 2007* should be repealed.

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

#### Recommendations for Proposed Amendments to *Northern Territory National Emergency Response Act 2007* (Cth)

(xvi) Leases should immediately (and not progressively) be transitioned to an 'opt-in' or voluntary basis for entering them.

(xvii) Back payment of rent should immediately be implemented, based on independent valuations from the NT Valuer-General, for any incursions or use (ie compulsory acquisition or compulsory leasing, or otherwise) of rights, titles and interests in land so far.

(xviii) Repeal the reference to special measures in relation to leases.

#### Recommendations for Proposed Amendments to *Australian Crime Commission Act 2002* (Cth)

(xix) Existing s4(1) of the *ACC Act 2002* should not be repealed by the *SS (Welfare Reform and Reinstatement of RDA) Bill 2009*.

### *Miscellaneous*

#### Recommendations for Amendments Not Proposed

(xx) All mandatory or compulsory income management provisions which were introduced for the 'emergency response' or 'intervention' in the NT should be repealed in favour of inserting provisions allowing income management to only be adopted on an 'opt-in' or voluntary basis.

(xxi) All mandatory or compulsory five year leasing provisions which were introduced for the 'emergency response' or 'intervention' in the NT should be repealed in favour of inserting provisions allowing leases and rights, titles or interests under them to only be adopted on an 'opt-in' or voluntary basis.

(xxii) All provisions proposing acquisitions of rights, titles and interests in land which were introduced for the 'emergency response' or 'intervention' in the NT should be repealed.

(xxiii) Compensation should be provided for the harm already suffered due to infringements on human rights due to measures introduced for the 'emergency response' or 'intervention' in the NT including but not limited to those under the *RDA 1975*.

(xxiv) Compensation should be provided for the harm already suffered due to measures introduced for the 'emergency response' or 'intervention' in the NT that resulted in incursions on rights, titles and interests in land (ie from compulsory acquisition or compulsory leasing of areas, or otherwise).

(xxv) All changes to the permit system which were introduced for the 'emergency response' or 'intervention' in the NT should be repealed and the permit system restored.

(xxvi) Provisions disallowing the considerations of customary law or cultural practice in bail applications and determining sentencing which were introduced for the 'emergency response' or 'intervention' in the NT should be repealed.

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

## **Recommendations for Proposed Amendments**

*Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)*

Professor Michael Dodson and Jo-Anne Weinman

### **Proposed insertions to Schedule 1, *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)***

These provisions add areas in Loves Creek, West Macdonnell National Park and the Alice Valley Extension (East) to Schedule 1, enabling those lands to be held by a land trust and for the interests in those lands to be dealt with by the Minister and a relevant land council.

**Question (i)** Which land council will administer the land trust in respect of the Alice Valley Extension (East)?

**Recommendation (i)** There is no recommendation providing that the Central Land Council is party to an agreement in respect of the Alice Valley Extension (East).

## **Recommendations for Proposed Amendments**

*Social Security (Administration) Act 1999 (Cth)*

Professor Michael Dodson and Jo-Anne Weinman

### ***Social Security (Administration) Act 1999 (Cth)***

These proposed amendment provisions enable so-called ‘blanket’ or automatic income management of half the amount of welfare payments received to be imposed on various people (eg on a 24 year old who received welfare payments for more than 3 of the last 6 months; or people aged 25 years old and above who received welfare payments such as a parenting payment for more than 1 of the last 2 years). While an exemption may be applied for, the requirements for exemptions are premised on personal or individual,<sup>1</sup> rather than collective or group, responsibility for children’s welfare and are therefore an inadequate reflection of child rearing practices and kinship structures among many Indigenous people. Indigenous people (and likely other ethnic minorities) will therefore be unfairly and disproportionately affected by these provisions, as will parents who are not guardians of their biological children.

The recommendations below relate equally to the income management regime amendments proposed to *NTNER Act 2007* relating to Schedule 2 of the *SS (Administration) Act 1999*.

**Recommendation (ii)** Abolish mandatory income management and in its place allow income management to only be adopted on an ‘opt-in’ or voluntary basis.

**Recommendation (iii)** Remove the redundant provisions regarding applying for an exemption from compulsory income management.

---

<sup>1</sup> Minister’s Second Reading Speech: “The government is committed to progressively reforming the welfare system to foster individual responsibility...”

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

## **Introductory Comment**

**Ernst Willheim**

We begin with the proposition that one of the many unfortunate consequences of the enactment of

- s4 of the *FaCSIA(NTNER) Act 2007*
- s132 of the *NTNER Act 2007*
- s4 of the *SS (Welfare Payment Reform) Act 2007*

(each being provisions that excluded the relevant legislation and acts done under the relevant legislation from the operation of the *RDA 1975*) was to cast doubt on the constitutional validity of the *RDA 1975*.

The reasons are straightforward and widely known.

The constitutional authority for the enactment of the *RDA 1975* is s51(xxix) of the *Constitution*, the external affairs power. That power, as interpreted by the High Court, enables the Commonwealth Parliament to legislate to give effect to obligations under international treaties. In *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, the High Court specifically upheld the validity of the *RDA 1975* as a law enacted pursuant to s 51(xxix) to give effect to Australia's obligations under CERD. To be valid under s51(xxix) a law implementing a treaty must be in conformity with the treaty in the sense that it 'must be capable of being reasonably considered to be appropriate and adapted' to that end (*Franklin Dam Case* (1983) 158 CLR 1, 259).

The risk to invalidity arises because provisions of the 2007 Emergency Response package of legislation excluding the operation of the *RDA 1975* are clearly inconsistent with Australia's obligations under CERD. By virtue of the exclusion of the operation of the *RDA 1975* from the 2007 emergency response legislation Australian legislation no longer implements Australia's obligations under CERD. Australian legislation is no longer 'appropriate and adapted to that end'.

It is important to note, in this respect, that unlike many conventions in which obligations and prohibitions are expressed in broad and general terms, the key obligations in CERD are expressed in absolute and unqualified terms. Thus in Article 2 the States Parties undertake to pursue a policy of elimination of racial discrimination *in all its forms* and Each State Party undertakes to engage in *no* act or practice of racial discrimination. Apart from affirmative action, or special measures, no exceptions are permitted. A State Party cannot, for example, implement the Convention except in relation to members of a particular race, such as members of the Aboriginal race, or people in a particular part of the State, such as the Northern Territory. The prohibition on racial discrimination is not a prohibition in respect of which a 'margin of appreciation' is permissible.

The one exception that is allowed is for 'special measures' (Article 1.4, often referred to as 'affirmative action' or 'positive discrimination'). The requirements for the 'special measures' exception are set out in the Convention. Although the provisions in the emergency response package are stated in the legislation to be special measures, they do not satisfy the Convention test of a special measure. Views may differ as to whether the provisions such as those excluding ordinary access to social security payments confer benefits on or secure the advancement<sup>2</sup> of Aboriginal people in the Northern Territory. What is clear beyond doubt is that the provisions were not introduced after consultation with or with the consent of the Aboriginal people.<sup>3</sup> It was well understood in 2007 that the provisions did not satisfy the special measures requirements, otherwise the specific statutory exclusion of the *RDA 1975* would not have been thought necessary.

CERD is a fundamental component of international human rights standards and has achieved universal acceptance. To treat people differently on the grounds of race is universally accepted as abhorrent.

Against this background, we welcome the proposed repeal of the provisions that excluded the operation of the *RDA 1975*.

We also welcome the proposed statutory provisions that the provisions of the *RDA 1975* are to prevail and that the substantive legislation does not authorise conduct that is inconsistent with the *RDA 1975*. Full restoration of the operation of the *RDA 1975* is a significant and important reform.

<sup>2</sup> *Gerhardy v Brown* (1985) 159 CLR 70, 126.

<sup>3</sup> *Loc cit*, 135.

## Recommendations for Proposed Amendments

*Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 (Cth)*

Professor Peter Bailey and Jo-Anne Weinman

### **Existing Section 4, *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 (Cth)***

The section has four sub-sections which provide, *inter alia*, that the operation of Part II of the *RDA 1975* is excluded from provisions of the *FaCSIA (NTNER) Act 2007* (per s4(2)) and that any provisions or actions done under the *FaCSIA (NTNER) Act 2007* are special measures for the purposes of the *RDA 1975* (per s4(1)). The proposal to repeal this s4 in order to restore operation of the *RDA 1975* to the *FaCSIA (NTNER) Act 2007* is endorsed because it ensures that the operation of the *RDA 1975* prevails over that of the *NTNER Act 2007*. However, the proposal that it be repealed in favour of substituting it with the new s4 is not entirely endorsed (see discussions regarding **Recommendations v and vi, viii, ix and x, and xii, xiii and xiv** below).

**Recommendation (iv)** Section 4 of the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 (Cth)* should be repealed but not substituted with the proposed new s4 in its entirety (see **Recommendations v and vi, viii, ix and x, and xii, xiii and xiv**).

### **Proposed new Section 4, Sub-Clauses (1), (2), (4) and (5), *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 (Cth)***

The proposed new s4(1), (2), (4) and (5) have the desirable object of restoring the operation of the *RDA 1975* in relation to the four Commonwealth Acts listed by confirming that the *RDA 1975* is to prevail over them. They also confirm the *RDA 1975* prevails over inconsistent provisions, actions or decisions exercised under the *FaCSIA (NTNER) Act 2007*, which must be consistent with the intended beneficial purpose of the *FaCSIA (NTNER) Act 2007*. These provisions clarify and strengthen the operation of the *RDA 1975*. There is no objection to these provisions, except in relation to proposed sub-clause 4(3) (see **Recommendation vi** below).

**Recommendation (v)** Proposed s4(1), s4(2), s4(4) and s4(5), *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 (Cth)* should be inserted, omitting s4(3) (see **Recommendation vi** below).

### **Proposed new Sub-clause 4(3), *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 (Cth)***

Sub-clause 4(3) provides the *FaCSIA (NTNER) Act 2007* as a whole, its provisions and any actions done pursuant to its provisions, are intended to qualify as ‘special measures’ for the purposes of the *RDA 1975*. This purports to allow, virtually without fetter, any action inserted into the *FaCSIA (NTNER) Act 2007* to qualify as an exception to unlawful discrimination. If this proposed sub-clause (3) is inserted, it would greatly weaken the strength of the *RDA 1975* as it stands. The insertion of s4(3) is opposed for the following reasons:

1. Providing that the entire *FaCSIA (NTNER) Act 2007* is indeed to qualify as a special measure demeans the *RDA 1975* and CERD which (as confirmed by Australian courts) have specific criteria for judging whether an exception can qualify as a ‘special measure’.
2. There will be a greater risk of challenges to the *FaCSIA (NTNER) Act 2007* if it is amended in this way because it will invite challenges based on its new status as a ‘special measure’. Special measures do not comprehend all the purposes of the *FaCSIA (NTNER) Act 2007*. The concept of ‘special measures’ was flagrantly abused in relation to various provisions (eg 5 year leases, withholding of benefits and management of businesses).

Challenges will almost inevitably be made on the ground that something done under the *FaCSIA (NTNER) Act 2007* is not done ‘for the sole purpose of securing advancement’ (CERD Art. 1.4) of certain groups.



Challenges could also be invited on the ground that the *FaCSIA (NTNER) Act 2007* is being continued ‘after the objectives for which [it] was taken have been achieved’ (CERD Arts. 1.4, 2.2).

3. It is incongruous with the stated intended purpose of the *FaHCSIA (Restoration of RDA) Bill 2009*, evidenced by:
- the short name of the *FaHCSIA (Restoration of RDA) Bill 2009* which contains the phrase ‘Restoration of Racial Discrimination Act’;
  - the long name of the *FaHCSIA (Restoration of RDA) Bill 2009* which states it is a ‘Bill for an Act to amend laws to restore the operation of the *Racial Discrimination Act 1975* in the Northern Territory’;
  - the Minister’s Second Reading speech which states the Bill is to “introduce legislation into the parliament in 2009 so that the *Racial Discrimination Act* applies to the NTER”;
  - the proposal to repeal s4 of the *FaCSIA (NTNER) Act 2007* (see also 4. below);
  - the other proposed provisions in s4 (namely, sub-sections (1), (2), (4) and (5)) of the *FaCSIA (NTNER) Act 2007*;
  - the proposal to repeal s132 of the *NTNER Act 2007*;
  - the proposed provisions in s132 (namely, sub-sections (1), (2), (4) and (5)) of the *NTNER Act 2007*;
  - the proposal to repeal s4 of the *SS (Welfare Payment Reform) Act 2007*;
  - the proposed provisions in s4 (namely, sub-sections (1), (2), (4) and (5)) of the *SS (Welfare Payment Reform) Act 2007*.
4. It is particularly incongruous to propose repealing s4 of the *FaCSIA (NTNER) Act 2007* which at (1) states:

...the provisions of this Act, and any acts done under or for the purposes of those provisions, **are**, for the purposes of the *Racial Discrimination Act 1975*, special measures. [Emphasis added.]

while proposing the insertion of a virtually similar new s4(3) which states:

The provisions of this Act, and any acts done under or for the purposes of those provisions, **are**, for the purposes of the *Racial Discrimination Act 1975*, **intended to qualify as** special measures. [Emphasis added.]

**Recommendation (vi)** Omit proposed s4(3) of the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth).

**Existing Section 5, Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007** (Cth)

The existing section 5 excludes the operation of some Northern Territory Acts that deal with discrimination. Action to repeal s5 is appropriate and endorsed.

**Recommendation (vii)** Section 5 of the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) should be repealed.

## Recommendations for Proposed Amendments

*Northern Territory National Emergency Response Act 2007* (Cth)

Professor Peter Bailey and Jo-Anne Weinman

**Existing Section 132, Northern Territory National Emergency Response Act 2007** (Cth)

The purpose of this existing s132 is to exclude the operation of Part II of the *RDA 1975* (at s132(2)) and to state that all provisions of the *NTNER Act 2007* (and any acts done for those purposes) are special measures under the *RDA 1975*. The proposal to repeal this section is welcomed and endorsed because it ensures that the operation of the *RDA 1975* prevails over that of the *NTNER Act 2007*. However, the proposal that it be repealed in favour of substituting it with the new s132 is not entirely endorsed (see **Recommendations iv, v and vi, ix and x, and xii, xiii and xiv**).

**Recommendation (viii)** Section 132 of the *Northern Territory National Emergency Response Act 2007* (Cth) should be repealed but not substituted with the proposed new s132 in its entirety (see **Recommendations iv, v and vi, ix and x, and xii, xiii and xiv**).

**Proposed new Section 132, Sub-Clauses (1), (2), (4) and (5), Northern Territory National Emergency Response Act 2007 (Cth)**

As these provisions are identical to the proposed s4 of the *FaCSIA (NTNER) Act 2007* (except for references to the 4 Acts mentioned in s4(1) of the proposed section) and proposed s4 of the *SS (Welfare Payment Reform) Act 2007*, please see the discussions in relation to **Recommendations iv, v and vi** above.

The proposed new s132(1), (2), (4) and (5) of the *NTNER Act 2007* have the desirable object of restoring the operation of the *RDA 1975* by confirming that it is to prevail over the *NTNER Act 2007*. They also confirm the *RDA 1975* prevails over inconsistent provisions, actions or decisions exercised under the *NTNER Act 2007*, which must be consistent with the intended beneficial purpose of the *NTNER Act 2007*. These provisions clarify and strengthen the operation of the *RDA 1975*. There is no objection to these provisions, except in relation to proposed sub-clause 4(3) (see **Recommendation x** below).

**Recommendation (ix)** Proposed s132(1), s132(2), s132(4) and s132(5), *Northern Territory National Emergency Response Act 2007* (Cth) should be inserted, omitting s132(3) (see **Recommendation x** below).

**Proposed new Sub-clause 132(3), Northern Territory National Emergency Response Act 2007 (Cth)**

As this provision is identical to the proposed s4(3) of the *FaCSIA (NTNER) Act 2007* and proposed s4(3) of the *SS (Welfare Payment Reform) Act 2007*, please see the discussions in relation to those sections above.

The proposed new s132(3) provides the *NTNER Act 2007* as a whole, its provisions and any actions done pursuant to its provisions, are intended to qualify as ‘special measures’ for the purposes of the *RDA 1975*. This purports to allow, virtually without fetter, any action inserted into the *NTNER Act 2007* to qualify as an exception to unlawful discrimination. If this proposed sub-clause (3) is inserted, it would greatly weaken the strength of the *RDA 1975* as it stands. The insertion of s132(3) is opposed for the following reasons:

1. Providing that the entire *NTNER Act 2007* is indeed to qualify as a special measure demeans the *RDA 1975* and CERD which (as confirmed by Australian courts) have specific criteria for judging whether an exception can qualify as a ‘special measure’.
2. There will be a greater risk of challenges to the *NTNER Act 2007* if it is amended in this way because it will invite challenges based on its new status as a ‘special measure’. Special measures do not comprehend all the purposes of the *NTNER Act 2007*. The concept of ‘special measures’ was flagrantly abused in relation to various provisions (eg 5 year leases, withholding of benefits and management of businesses).
  - 2.1 Challenges will almost inevitably be made on the ground that something done under the *NTNER Act 2007* is not done ‘for the sole purpose of securing advancement’ (CERD Art. 1.4) of certain groups.
  - 2.2 Challenges could also be invited on the ground that the *NTNER Act 2007* is being continued ‘after the objectives for which [it] was taken have been achieved’ (CERD Arts. 1.4, 2.2).
5. It is incongruous with the stated intended purpose of the *FaHCSIA (Restoration of RDA) Bill 2009*, evidenced by:
  - the short name of the *FaHCSIA (Restoration of RDA) Bill 2009* which contains the phrase ‘Restoration of Racial Discrimination Act’;
  - the long name of the *FaHCSIA (Restoration of RDA) Bill 2009* which states it is a ‘Bill for an Act to amend laws to restore the operation of the *Racial Discrimination Act 1975* in the Northern Territory’;
  - the Minister’s Second Reading speech which states the Bill is to “introduce legislation into the parliament in 2009 so that the *Racial Discrimination Act* applies to the NTER”;
  - the proposal to repeal s4 of the *FaCSIA (NTNER) Act 2007*;
  - the other proposed provisions in s4 (namely, sub-sections (1), (2), (4) and (5)) of the *FaCSIA (NTNER) Act 2007*;
  - the proposal to repeal s132 of the *NTNER Act 2007* (see also **4.** below);



- the proposed provisions in s132 (namely, sub-sections (1), (2), (4) and (5)) of the *NTNER Act 2007*;
- the proposal to repeal s4 of the *SS (Welfare Payment Reform) Act 2007*;
- the proposed provisions in s4 (namely, sub-sections (1), (2), (4) and (5)) of the *SS (Welfare Payment Reform) Act 2007*.

6. It is particularly incongruous to propose repealing s132 of the *NTNER Act 2007* which at (1) states:

The provisions of this Act, and any acts done under or for the purposes of those provisions, **are**, for the purposes of the *Racial Discrimination Act 1975*, special measures. [Emphasis added.]

while proposing the insertion of a virtually similar new s4(3) which states:

The provisions of this Act, and any acts done under or for the purposes of those provisions, **are**, for the purposes of the *Racial Discrimination Act 1975*, **intended to qualify as** special measures. [Emphasis added.]

**Recommendation (x)** Omit proposed s132(3) of the *Northern Territory National Emergency Response Act 2007 (Cth)*.

#### **Existing Section 133, Northern Territory National Emergency Response Act 2007 (Cth)**

The existing s133 excludes the operation of some Northern Territory Acts that deal with discrimination. Action to repeal s133 is appropriate and endorsed.

**Recommendation (xi)** Section 133 of the *Northern Territory National Emergency Response Act 2007 (Cth)* should be repealed.

## **Recommendations for Proposed Amendments**

### ***Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (Cth)***

**Professor Peter Bailey and Jo-Anne Weinman**

#### **Existing Section 4, Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (Cth)**

The purpose of this existing s4 is to, *inter alia*, exclude the operation of the *RDA 1975* (at s4(3) and (5)) and to state that certain provisions of the *SS (Welfare Payment Reform) Act 2007* (and any acts done for those purposes) are special measures under the *RDA 1975* (at s4(2) and regarding the Queensland Commission in s4(4)). The proposal to repeal this section is welcomed and endorsed because it ensures that the operation of the *RDA 1975* prevails over that of the *SS (Welfare Payment Reform) Act 2007*. However, the proposal that it be repealed in favour of substituting it with the new s4 is not entirely endorsed (see discussion regarding **Recommendations xiii and xiv** below, see also the discussions regarding **Recommendations iv, v and vi** above).

**Recommendation (xii)** Section 4 of the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (Cth)* should be repealed but not substituted with the proposed new s4 in its entirety (see **Recommendations iv, v and vi, viii, ix and x, xiii and xiv**).

#### **Proposed new Section 4, Sub-Clauses (1), (2), (4) and (5), Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (Cth)**

As these provisions are identical to the proposed s4 of the *FaCSIA (NTNER) Act 2007* (except for references to the 4 Acts mentioned in s4(1) of the proposed section) and proposed s132 of the *NTNER Act 2007*, please see the discussions in relation to **Recommendations iv, v and vi** above.

The proposed new s4(1), (2), (4) and (5) of the *SS (Welfare Payment Reform) Act 2007* have the desirable object of restoring the operation of the *RDA 1975* by confirming that it is to prevail over the *SS (Welfare Payment Reform) Act 2007*. They also confirm the *RDA 1975* prevails over inconsistent provisions, actions or decisions exercised under the *SS (Welfare Payment Reform) Act 2007*, which must be consistent with the intended beneficial purpose of the *SS (Welfare Payment Reform) Act 2007*. These provisions clarify and strengthen the operation of the *RDA 1975*. There is no objection to these provisions, except in relation to proposed sub-clause 4(3) (see **Recommendation xiv** below).

**Recommendation (xiii)** Proposed s4(1), s4(2), s4(4) and s4(5), *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) should be inserted, omitting s4(3) (see **Recommendation xiv** below).

**Proposed new Sub-clause 4(3), *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth)**

As this provision is identical to the proposed s4(3) of the *FaCSIA (NTNER) Act 2007* and proposed s132(3) of the *NTNER Act 2007*, please see the discussions in relation to those sections above.

The proposed new s4(3) provides the *SS (Welfare Payment Reform) Act 2007* as a whole, its provisions and any actions done pursuant to its provisions, are intended to qualify as ‘special measures’ for the purposes of the *RDA 1975*. This purports to allow, virtually without fetter, any action inserted into the *SS (Welfare Payment Reform) Act 2007* to qualify as an exception to unlawful discrimination. If this proposed sub-clause (3) is inserted, it would greatly weaken the strength of the *RDA 1975* as it stands. The insertion of s4(3) is opposed for the following reasons:

1. Providing that the entire *SS (Welfare Payment Reform) Act 2007* is indeed to qualify as a special measure demeans the *RDA 1975* and CERD which (as confirmed by Australian courts) have specific criteria for judging whether an exception can qualify as a ‘special measure’.
2. There will be a greater risk of challenges to the *SS (Welfare Payment Reform) Act 2007* if it is amended in this way because it will invite challenges based on its new status as a ‘special measure’. Special measures do not comprehend all the purposes of the *SS (Welfare Payment Reform) Act 2007*. The concept of ‘special measures’ was flagrantly abused in relation to various provisions (eg 5 year leases, withholding of benefits and management of businesses).

**2.3** Challenges will almost inevitably be made on the ground that something done under the *SS (Welfare Payment Reform) Act 2007* is not done ‘for the sole purpose of securing advancement’ (CERD Art. 1.4) of certain groups.

**2.4** Challenges could also be invited on the ground that the *SS (Welfare Payment Reform) Act 2007* is being continued ‘after the objectives for which [it] was taken have been achieved’ (CERD Arts. 1.4, 2.2).

3. It is incongruous with the stated intended purpose of the *FaHCSIA (Restoration of RDA) Bill 2009*, evidenced by:
  - the short name of the *FaHCSIA (Restoration of RDA) Bill 2009* which contains the phrase ‘Restoration of Racial Discrimination Act’;
  - the long name of the *FaHCSIA (Restoration of RDA) Bill 2009* which states it is a ‘Bill for an Act to amend laws to restore the operation of the *Racial Discrimination Act 1975* in the Northern Territory’;
  - the Minister’s Second Reading speech which states the Bill is to “introduce legislation into the parliament in 2009 so that the *Racial Discrimination Act* applies to the NTER”;
  - the proposal to repeal s4 of the *FaCSIA (NTNER) Act 2007*;
  - the other proposed provisions in s4 (namely, sub-sections (1), (2), (4) and (5)) of the *FaCSIA (NTNER) Act 2007*;
  - the proposal to repeal s132 of the *NTNER Act 2007* (see also **4.** below);
  - the proposed provisions in s132 (namely, sub-sections (1), (2), (4) and (5)) of the *NTNER Act 2007*;
  - the proposal to repeal s4 of the *SS (Welfare Payment Reform) Act 2007*;
  - the proposed provisions in s4 (namely, sub-sections (1), (2), (4) and (5)) of the *SS (Welfare Payment Reform) Act 2007*.

4. It is particularly incongruous to propose repealing s4 of the *SS (Welfare Payment Reform) Act 2007* which at (2) states (with a similar provision at s4(4) regarding the *SS (Administration) Act 1999*):

...the provisions referred to in paragraph (1)(a), and any acts referred to in paragraph (1)(b), **are**, for the purposes of the *Racial Discrimination Act 1975*, special measures. [Emphasis added.]

while proposing the insertion of a virtually similar new s4(3) which states:

The provisions of this Act, and any acts done under or for the purposes of those provisions, **are**, for the purposes of the *Racial Discrimination Act 1975*, **intended to qualify as** special measures. [Emphasis added.]

**Recommendation (xiv)** Omit proposed new s4(3) of the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth).

**Existing Sections 5, 6 and 7, *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth)**

These existing sections exclude the operation of some Queensland and Northern Territory Acts that deal with discrimination, and determine terms of relevant activity agreement for approved programs of work relating to income support. Action to repeal them is appropriate and endorsed.

**Recommendation (xv)** Sections 5, 6 and 7 of the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) should be repealed.

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

## **Recommendations for Proposed Amendments**

*Northern Territory National Emergency Response Act 2007 (Cth)*

Professor Michael Dodson and Jo-Anne Weinman

### **Schedule 5 – Acquisition of rights, titles and interests in land, *Northern Territory National Emergency Response Act 2007 (Cth)***

These provisions attempt to provide security of tenure via compulsory five year leases purportedly to enable better service delivery and promote economic and social development. However, both these objectives can be achieved without compulsorily acquiring land or compulsorily leasing land from Indigenous traditional owners, which constitute unnecessary incursions on Indigenous people's rights, contrary to the international human rights principle of free-prior and informed consent (as encapsulated in various instruments, among them CERD and the UN DRIP), and contrary to domestic law (RDA 1975, as interpreted by the High Court – see also the discussion in relation to **Recommendations iv – xiv** above). It is insufficient to merely legislatively deem an act, provision or Act to be a 'special measure', alone (ie without also complying with other legal requirements to validly demonstrate qualification as a 'special measure'). Provisions that purport to do so are at great risk of being challenged via litigation.

**Question (ii)** From which point in time has compensation for the leases begun to be paid?

**Question (iii)** Noting that there will be payment in compensation for leases paid to Milikapiti and Pirlangimpi in the Tiwi Islands, will all others affected receive compensation? If so, what is the timeframe for valuation and payment?

**Recommendation (xvi)** Leases should immediately (and not progressively) be transitioned to an 'opt-in' or voluntary basis for entering them.

**Recommendation (xvii)** Back payment of rent should immediately be implemented, based on independent valuations from the Northern Territory Valuer-General, for any incursions or use (ie compulsory acquisition or compulsory leasing, or otherwise) of rights, titles and interests in land so far.

**Recommendation (xviii)** Repeal the reference to special measures in relation to leases.

## **Recommendations for Proposed Amendments**

*Australian Crime Commission Act 2002 (Cth)*

Professor Michael Dodson and Jo-Anne Weinman

### **Proposed new Sub-section 4(1), *Australian Crime Commission Act 2002 (Cth)***

It is proposed that the existing sub-section 4(1) (definition of *Indigenous violence or child abuse*) be repealed and substituted with a definition that 'means serious violence or child abuse committed against an Indigenous person' which is to be applied in relation to ACC operations or investigations begun on or after the commencement of the new sub-section 4(1). The purported aim of this SS (*Welfare Reform and Reinstatement of RDA*) Bill 2009 (as expressed in the short and long titles of the Bill as well as in the Minister's Second Reading Speech) is welfare reform and compliance with the *RDA 1975*. Focus should therefore be concentrated on removing impediments on freedoms and human rights from existing legislation, rather than slipping provisions relating to penalties or crimes into this Bill. The existing NT and other legislation would cover most offences and there would, if necessary, be the possibility of recourse to the Australian Crimes Commission. Added criminal penalties are not desirable in this legislative reform.

**Recommendation (xix)** Existing s4(1) of the *Australian Crime Commission Act 2002 (Cth)* should not be repealed by the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Cth)*.

### Recommendations for Amendments Not Proposed

Professor Michael Dodson and Jo-Anne Weinman

With important exceptions (for more information, see discussions above), while many of the proposals in the

- *FaHCSIA (2009 Measures) Bill 2009*
- *FaHCSIA (Restoration of RDA) Bill 2009* and
- *SS (Welfare Reform and Reinstatement of RDA) Bill 2009*

to reinstate and strengthen the operation of the *RDA 1975* are generally welcomed and supported, these Bills do not go far enough to ensure the ‘emergency response’ or ‘intervention’ comply with the *RDA 1975*. Accordingly, the following recommendations are made in relation to those pieces of legislation and other relevant legislation concerning the Northern Territory ‘emergency response’ or ‘intervention’.

**Recommendation (xx)** All mandatory or compulsory income management provisions which were introduced for the ‘emergency response’ or ‘intervention’ in the Northern Territory should be repealed in favour of inserting provisions allowing income management to only be adopted on an ‘opt-in’ or voluntary basis.

**Recommendation (xxi)** All mandatory or compulsory five year leasing provisions which were introduced for the ‘emergency response’ or ‘intervention’ in the Northern Territory should be repealed in favour of inserting provisions allowing leases and rights, titles or interests under them to only be adopted on an ‘opt-in’ or voluntary basis.

**Recommendation (xxii)** All provisions proposing acquisitions of rights, titles and interests in land which were introduced for the ‘emergency response’ or ‘intervention’ in the Northern Territory should be repealed.

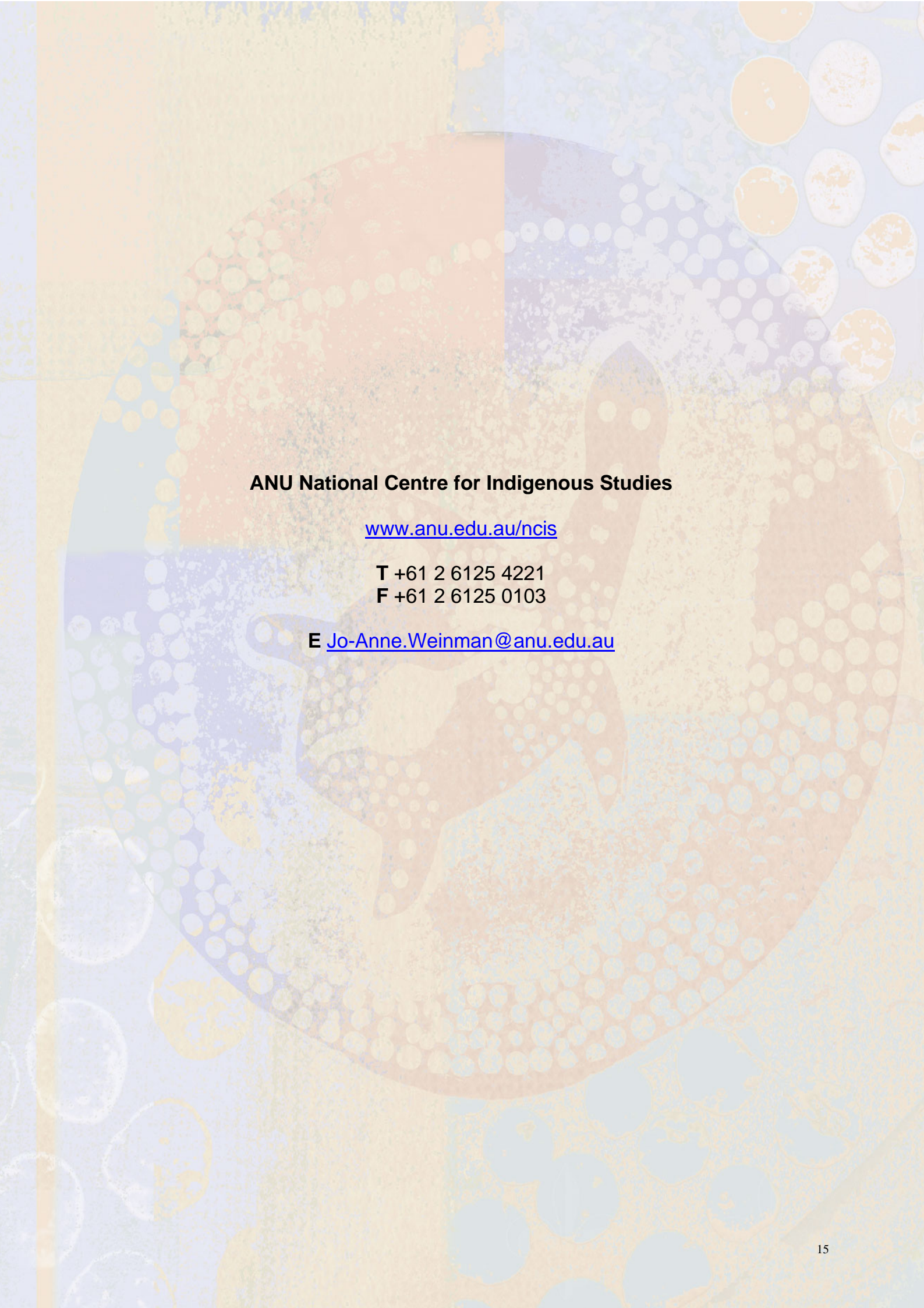
**Recommendation (xxiii)** Compensation should be provided for the harm already suffered due to infringements on human rights due to measures introduced for the ‘emergency response’ or ‘intervention’ in the Northern Territory including but not limited to those under the *RDA 1975*.

**Recommendation (xxiv)** Compensation should be provided for the harm already suffered due to measures introduced for the ‘emergency response’ or ‘intervention’ in the Northern Territory that resulted in incursions on rights, titles and interests in land (ie from compulsory acquisition or compulsory leasing of areas, or otherwise).

**Recommendation (xxv)** All changes to the permit system which were introduced for the ‘emergency response’ or ‘intervention’ in the Northern Territory should be repealed and the permit system restored.

**Recommendation (xxvi)** Provisions disallowing the considerations of customary law or cultural practice in bail applications and determining sentencing which were introduced for the ‘emergency response’ or ‘intervention’ in the Northern Territory should be repealed.





**ANU National Centre for Indigenous Studies**

[www.anu.edu.au/ncis](http://www.anu.edu.au/ncis)

**T +61 2 6125 4221**

**F +61 2 6125 0103**

**E [Jo-Anne.Weinman@anu.edu.au](mailto:Jo-Anne.Weinman@anu.edu.au)**