



Australian
Human Rights
Commission

everyone, everywhere, everyday

Inquiry into the Welfare Reform and Reinstatement of Racial Discrimination Act Bill 2009 and other Bills

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Australian Human Rights Commission Submission
to the Senate Community Affairs Committee

10 February 2010

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1 Introduction

1. The Australian Human Rights Commission (the Commission) makes this submission to the Senate Community Affairs Committee Inquiry into the Welfare Reform and Reinstatement of Racial Discrimination Act Bill 2009 and other Bills.

2 Summary

2. The Commission welcomes the intention of the Government to reinstate the *Racial Discrimination Act 1975* (Cth) (RDA) in relation to the Northern Territory Emergency Response (NTER)¹ and to redesign identified NTER measures so that they are non-discriminatory and respect human rights.
3. This submission assesses whether the Bills in fact bring the NTER into compliance with Australia's human rights obligations, including the right to non-discrimination reflected in the RDA. In doing so, it refers to:
 - The RDA and the *Draft guidelines for income management measures under the Racial Discrimination Act* (issued by the Commission in November 2009) (the Draft Guidelines) (see Appendix A)
 - The Aboriginal and Torres Strait Islander Social Justice Commissioner's *Social Justice Report 2007* recommendations for the Northern Territory Emergency Response (see Appendix B)
4. The Commission maintains the view that measures that breach human rights will not enjoy the support of affected communities and will not be capable of meeting their intended purpose in the long-term.
5. This submission identifies those proposed measures that make the NTER non-discriminatory and human rights compliant as well as outlining concerns where the proposed measures fail to remove the discriminatory impact of the legislation and where human rights concerns remain. The submission identifies further amendments necessary to ensure that the NTER measures put in place will be non-discriminatory and fully respect human rights.

¹ The five acts that constitute the NTER are:

- *Northern Territory National Emergency Response Act 2007* (Cth) (NTNER Act);
- *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) (FCSIA Act);
- *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) (SSWP Act)
- *Appropriation (Northern Territory National Emergency Response) Act (No. 1) 2007-2008* (2007) (Cth) (Appropriation Act No 1) and
- *Appropriation (Northern Territory National Emergency Response) Act (No. 2) 2007-2008* (2007) (Cth) (Appropriation Act No 2).

Collectively these acts are referred to as the 'NTER legislation' in this submission.

6. The Commission notes that, overall, while the proposed changes to the NTER do not address all the concerns of the Commission, they will improve the measures that currently apply to individuals in prescribed communities in the Northern Territory.
7. In particular the Commission welcomes the following proposed measures included in the Bills:
 - Lifting of the suspension of the RDA for the NTER legislation
 - Redesigning the income management measures so that they are not applied on a racially discriminatory basis.
 - Redesigning the income management measures so that disability support pensions or age pensions are no longer being automatically income-managed, unless the recipient is determined to be a vulnerable welfare payment recipient.
 - Including provisions to enable affected individuals to apply for an exemption from income management where their circumstances so warrant as well as options for individuals to voluntarily participate in income management where they desire.
 - Enabling a shift from the blanket imposition of alcohol bans to restrictions that are tailored to the needs of communities.
 - Clarifying the objectives of five-year leases; and committing to move to voluntary leases through negotiations in good faith where requested.
 - Providing greater transparency in the community store licensing scheme.
8. The Commission notes, however, that the proposed changes to the NTER legislation do not fully address all existing breaches of human rights and will not ensure full consistency with the RDA. Of particular concern are the following:
 - Practical limitations on the reinstatement of the RDA that emerge due to the absence of a notwithstanding clause in the Bills.
 - Delays in the reinstatement of the RDA and state/ territory anti-discrimination legislation until 31 December 2010.
 - The failure to require consent for measures that are intended to be 'special measures' for the purposes of the RDA and Australia's human rights obligations.
 - The broad reach of some categories of the new income management measure that could result in a disproportionate number of Aboriginal people being unnecessarily income-managed.

- Insufficient clarity in the definition for ‘vulnerable welfare payment recipient’ under the income management measures.
 - The continuation of the compulsory five-year lease arrangements and their exclusion from the protections against discrimination under the RDA.
 - The characterisation of five-year leases as a special measure is inconsistent with the RDA.
 - The continuation of the business management areas powers, which are unnecessary and unreasonable.
 - The limited monitoring and evaluation measures in place to ensure that reliable evidence is available as to the effectiveness of existing and redesigned NTER measures.
9. The Commission has made a number of recommendations to address these concerns.

3 Recommendations

10. The Australian Human Rights Commission recommends that:

- The Government Bills be amended to:
 - Include notwithstanding clauses in order to specify that the provisions of the *RDA* are intended to prevail over the NTER legislation and that the NTER legislation does not authorise conduct that is inconsistent with the provisions of the *RDA*;
 - Remove Item 4 of Schedule 1 of the Government Welfare Reform Bill (relating to retrospectivity and section 8 of the *Acts Interpretation Act 1901*) [**Recommendation 1**].
- The government lift the suspension of the *RDA* for all NTER measures no later than 1 July 2010 [**Recommendation 2**].
- The government reinstate state/ territory anti-discrimination legislation for all NTER measures no later than 1 July 2010 [**Recommendation 3**].
- The categories of ‘disadvantaged youth’ and ‘long-term welfare payment recipients’ be reformulated to apply on a case-by-case basis as follows:
 - Welfare recipients be offered in the first instance the option to be voluntary income-managed;
 - Welfare recipients that do not choose to be voluntarily income-managed, and who fit a defined category, are assessed for inclusion based on their individual circumstances;

- The decision to income manage the welfare recipient be made reviewable;
 - The welfare recipient have the option to apply for an exemption from income management at any stage of the process; and
 - Provide for a defined period of income management and make continuation of income management subject to regular review **[Recommendation 4]**.
- The government develop proactive strategies to provide sufficient and appropriate information about the new exemption provisions **[Recommendation 5]**.
 - The Government Welfare Reform Bill be amended to include a full definition of 'vulnerable welfare payment recipient' **[Recommendation 6]**.
 - The government supplement any income management scheme with additional support programs that address the rights to food, education, housing, and provide support in the form of financial, literacy/budgeting skills development for welfare recipients, safe houses for women and men, and alcohol and substance abuse programs **[Recommendation 7]**.
 - The government establish rigorous and comprehensive monitoring and evaluation mechanisms to progressively assess the effectiveness of income management measures, in advance of the 2012 evaluation **[Recommendation 8]**.
 - The government:
 - Ensure the participation of Indigenous peoples in developing, implementing and monitoring alcohol management plans and ensure all alcohol management processes are consistent with the RDA
 - Ensure alcohol restrictions are supplemented by investment in infrastructure in the health and mental health sectors (including culturally appropriate detoxification facilities) and investment in culturally appropriate community education programs delivered by Indigenous staff **[Recommendation 9]**.
 - The Government Welfare Reform Bill be amended to remove clauses Schedule 3, item 10 (s 18), item 11 (s 19), item 12 (s 19A) in order that community consultation is a critical determinant of whether to support a community driven alcohol ban or not **[Recommendation 10]**.
 - The Government Welfare Reform Bill be amended to remove clauses Schedule 4, Item 5 (s100A (5) and 100B (5)) **[Recommendation 11]**.

- The government Bills be amended to remove the capacity to compulsorily acquire any further five-year leases under Part 4 of the NTNER Act and commit to obtaining the free, prior and informed consent of traditional owners to enter into voluntary lease arrangements for existing compulsory lease arrangements [**Recommendation 12**].
- The Government Bills be amended to remove the statutory rights provisions, set out in Part IIB of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) [**Recommendation 13**].
- The Government Welfare Reform Bill be amended to remove the business management areas powers [**Recommendation 14**].

4 Compliance of the redesigned NTER measures with human rights standards

11. In assessing the proposed redesign measures against human rights standards, the Commission considers the following human rights treaties and declarations:

- *The International Covenant on Civil and Political Rights* (ICCPR)
- *The International Covenant on Economic, Social and Cultural Rights* (ICESCR)
- *The International Convention on the Elimination of all forms of Racial Discrimination* (ICERD)
- *The Declaration on the Rights of Indigenous Peoples* (the Declaration)
- *The Convention on the Elimination of all forms of Discrimination Against Women* (CEDAW)
- *The Convention on the Rights of the Child* (CRC)
- *The Convention on the Rights of Persons with Disabilities* (CRPD)

12. Of particular importance is the *UN Declaration on the Rights of Indigenous Peoples* (the Declaration). The Declaration sets out the human rights standards for laws, policies and programs that apply to Indigenous peoples. The Declaration while not legally-binding is constituted of human rights standards recognised in existing covenants and conventions that Australia has ratified. Further, the treaty body committees have looked to the Declaration to guide their interpretation of human rights standards, in their

application to indigenous peoples.² Compliance with the Declaration is therefore an important means of ensuring that the NTER measures are consistent with human rights standards.

13. A critical component of the Declaration is the principle of free, prior and informed consent. This requires appropriate community consultation and engagement in the design, development, implementation and review of laws, policies and programs that affect indigenous peoples.³ The Commission notes that the government's redesign consultations would need to be consistent with these components of the principle of free, prior and informed consent to be consistent with the Declaration. This submission notes the Commission's concerns about the limitations of the government's redesign consultations below.

5 Draft guidelines for ensuring income management measures are compliant with the *Racial Discrimination Act*

14. In November 2009, the Commission issued *Draft guidelines for ensuring income management measures are compliant with the Racial Discrimination Act* (Draft Guidelines).

15. The Draft Guidelines are intended to provide practical assistance to Parliament and the government in designing and implementing income management measures that protect human rights and that are consistent with the RDA. They are also intended to increase awareness among affected communities about the application of the RDA to income management regimes.

16. Section 20(d) of the *Racial Discrimination Act 1975* (Cth) (RDA) provides the Australian Human Rights Commission with a function to 'prepare, and to publish in such manner as the Commission considers appropriate, guidelines for the avoidance of infringements of Part II or Part IIA' of the RDA.⁴ While not legally binding, they provide important guidance as to the operation of the RDA and will be relevant in assisting the resolution of complaints.⁵

17. The Draft Guidelines contain two sections which should be read concurrently:

² Committee on the Elimination of Racial Discrimination, *Concluding Observations on the United States of America*, UN Doc CERD/C/USA/CO/6 (2008), par 29. At <http://www1.umn.edu/humanrts/CERDConcludingComments2008.pdf> (viewed 20 January 2010).

³ The UN Permanent Forum on Indigenous Issues has issued a common understanding on the principle that outlines the requirements of free, prior and informed consent (Common Understanding). Permanent Forum on Indigenous Issues, *Key elements of the principle of free, prior and informed consent* (2005). At http://www.humanrights.gov.au/social_justice/nt_report/ntreport05/pdf/ntr-nx03.pdf (viewed 20 January 2010).

⁴ Part II relates to the prohibition of racial discrimination and Part IIA to the prohibition of offensive behaviour based on racial hatred.

⁵ Note that these guidelines do not alter the operation of the RDA and compliance with them does not constitute a defence to an allegation of discrimination under the RDA.

- Section one poses three key questions to consider when developing and implementing an income management measure so it is compliant with the RDA and outlines the steps to achieve this.
 - Section two provides background information on the legal basis for the different elements discussed in the first section. It also provides the background on existing income management regimes nationally and considers the extent to which they are consistent with the RDA.
18. The Draft Guidelines are also a practical tool that governments can look to when designing other NTER measures, in addition to the income management measures.
19. The Draft Guidelines set out a practical, step-by-step approach for governments and policy-makers to adopt when considering the development of a special measure. These guidelines could be used to consider formulating special measures for the NTER that are compliant with the RDA.
20. In the Commission's view, taking the approach set out in these Draft Guidelines will not only ensure that all measures are compliant with fundamental human rights and discrimination laws, they will also help to ensure that they are effective.
21. The Draft Guidelines provide a framework to ensure that competing human rights concerns can be balanced in a manner that is appropriate and consistent with Australia's human rights obligations.
22. These Draft Guidelines have been released in draft format on the Commission's website to encourage feedback and comments by 12 February 2010.
23. The Commission has taken the approach set out in the Draft Guidelines to assess the consistency of the Bills under consideration with the RDA and human rights standards.

6 Continuation of the NTER measures

24. The Commission has consistently welcomed the Australian Government's announcements to act to protect the rights of Indigenous women and children in the Northern Territory. In doing so, the Commission has urged the government and Parliament to adopt an approach that is consistent with Australia's international human rights obligations and particularly with the RDA.
25. While doing so, the Commission has noted the discriminatory aspects and human rights concerns of the NTER legislation and measures, including their lack of compliance with the RDA and international human rights standards. These concerns have been raised in:

- *Submission of the Human Rights and Equal Opportunity Commission (HREOC) to the Senate Legal and Constitutional Committee on the Northern Territory National Emergency Response Legislation (10 August 2007)*
- *Social Justice Report 2007 (2008)*
- *Submission of the Human Rights and Equal Opportunity Commission (HREOC) to the Northern Territory Emergency Response Review Board, on the Review of the Northern Territory Emergency Response (15 August 2008).*

26. Actions to address family violence and child sexual abuse in Indigenous communities must be undertaken in a way that is consistent with Indigenous people's human rights. To this end the Commission has previously called for the government to:

- Reinstatement of the application of the RDA and state/ territory anti-discrimination legislation to the suite of NTER legislation.
- Adopt a human rights based approach to: address family violence, child abuse and the underlying problems of poverty, disadvantage and discrimination; ensure the participation of those affected in policy development and service delivery; ensure rigorous benchmarking, monitoring and evaluation; and ensure access to forms of redress.

27. The Aboriginal and Torres Strait Islander Social Justice Commissioner (the Social Justice Commissioner) has also developed a ten-point plan in the *Social Justice Report 2007* that articulates how the NTER legislation could be made consistent with the RDA and human rights standards. (see Appendix C).

28. The NTER Review Board similarly noted in its final report that while it was important for the NTER measures to continue, they needed to be amended to be compliant with the RDA and human rights standards:

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.

The crisis that prompted the NTER in June 2007 is real. It should remain a national priority for sustained attention and investment by the Australian Government. But the way forward must be based on a fresh relationship.

If the various NTER measures are to operate as a genuine suite of measures there needs to be adjustments in the machinery of government enabling better

coordination of services, greater responsiveness to the unique characteristics of each community and higher levels of community participation in the design and delivery of services.⁶

29. The NTER Review Board's overarching recommendations called for:

- The Australian and Northern Territory Governments to recognise the continuing need to address the unacceptably high level of disadvantage and social dislocation being experienced by Aboriginal Australians living in remote communities throughout the Northern Territory.
- Both governments to reset their relationship with Aboriginal people based on genuine consultation, engagement and partnership.
- Government actions affecting Aboriginal communities to respect Australia's human rights obligations and conform with the *Racial Discrimination Act 1975*.⁷

30. UN treaty bodies and special mechanisms have also noted their concerns with the NTER legislation and measures not complying with Australia's human rights obligations, and recommended they be redesigned:

- Human Rights Committee:

The Committee notes with concern that certain of the Northern Territory Emergency Response (NTER) measures... are inconsistent with the State party's obligations under the Covenant. It is particularly concerned at the negative impact of the NTER measures on the enjoyment of the rights of indigenous peoples and at the fact that they suspend the operation of the Racial Discrimination Act 1975 and were adopted without adequate consultation with the indigenous peoples. (arts. 2, 24, 26 and 27)⁸

- Committee on Economic Social and Cultural Rights:

The Committee recommends that the State party: a) address the human rights violations identified in the 2007 *Little Children are sacred* report bearing in mind the recommendations of the 2008 report of the Northern Territory Intervention Response Review board in this regard; b) conduct formal

⁶ Northern Territory Emergency Response Review Board, *Report of the NTER Review Board* (2008), pp 9-10. At http://www.nterreview.gov.au/docs/report_nter_review.PDF (viewed 20 January 2010).

⁷ Northern Territory Emergency Response Review Board, *Report of the NTER Review Board* (2008), p 12. At http://www.nterreview.gov.au/docs/report_nter_review.PDF (viewed 20 January 2010).

⁸ Human Rights Committee, Concluding Observations of the Human Rights Committee: Australia, UN Doc CCPR/C/AUS/CO/5 (2009), par 14. At <http://www2.ohchr.org/english/bodies/hrc/docs/co/CCPR-C-AUS-CO-5.doc> (viewed 20 January 2010).

consultations with the indigenous peoples concerned regarding the operation and impact of the Northern Territory Intervention....⁹

- UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people:

Of particular concern is the Northern Territory Emergency Response, which by the Government's own account is an extraordinary measure, especially in its income management regime, imposition of compulsory leases, and community-wide bans on alcohol consumption and pornography. These measures overtly discriminate against aboriginal peoples, infringe their right of self-determination and stigmatize already stigmatized communities...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 as well as ... the Declaration on the Rights of Indigenous Peoples ... the Special Rapporteur urges the Government to act swiftly to reinstate the protections of the Racial Discrimination Act in regard to the indigenous peoples of the Northern Territory.¹⁰

- Committee on the Elimination of Racial Discrimination:

The Committee appreciates the information provided on progress in drafting of redesigned Northern Territory Emergency Response measures and the lifting of the suspension of the Racial Discrimination Act 1975 ... At the same time the Committee takes note of the assessment by the Special Rapporteur of the human rights of indigenous peoples following his recent visit to Australia that the Emergency Response, as currently configured and carried out is still incompatible with Australia's obligations under the International Convention on the Elimination of Racial Discrimination. The Committee encourages the State party to give due consideration to the findings of the Special Rapporteur and continue its efforts to bring measures undertaken within the framework of the Emergency Response in full compliance with the provisions of the Convention.¹¹

⁹ Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/AUS/CO/4 (2009), par 15. At <http://www2.ohchr.org/english/bodies/cescr/docs/AdvanceVersions/E-C12-AUS-CO-4.doc> (viewed 20 January 2010).

¹⁰ UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Preliminary Note on the Situation of the Indigenous Peoples in Australia, UN Doc A/HRC/12/34/Add.10 (2009), pars 6-9. At <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A.HRC.12.34.Add10.pdf> (viewed 20 January 2010).

¹¹ Committee on the Elimination of Racial Discrimination, 'Correspondence to the Australian Government following up on the Early Warning and Urgent Action Procedure on the issues raised before the Committee in relation to the Northern Territory Emergency Response', 28 September 2009. At http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Australia28092009.pdf (viewed 20 January 2010).

7 Reinstatement of the RDA and state/ territory anti-discrimination legislation

7.1 Reinstatement of the RDA under the government's Bills

31. The Government Bills' reinstatement of the RDA is consistent with recommendation 4 of the *Social Justice Report 2007* and is welcomed by the Commission.
32. The Commission is concerned, however, that the Government Welfare Reform Bill appears to leave unchanged potentially discriminatory elements of the NTER regime, such as the compulsory five-year leases.
33. The Government Welfare Reform Bill lifts the suspension of the RDA over the NTER legislation and actions under it. It also removes those provisions that effectively deemed the legislation and actions done under it to be 'special measures'. It does this by repealing those sections in the original legislation that dealt with the RDA and special measures (see Schedule 1 of the Bill). The Bill does not, however, include a notwithstanding clause. The significance of this is discussed below.

(a) *What will the RDA do if the Bill passes?*

34. Once the RDA is reinstated, sections 9(1) and 9(1A) will apply to decisions and actions done under or for the purposes of the legislation. The decisions and actions of Government Business Managers and Centrelink Officers, for example, will be able to be challenged as being either 'directly' or 'indirectly' discriminatory.
35. Section 10 of the RDA will also operate in relation to the NTER legislation itself. It will require the NTER legislation to be read so as to avoid operating in a discriminatory way (by denying or impairing the equal enjoyment of rights by people of a particular racial group). Mason J noted in *Gerhardy v Brown* that s 10 'is not aimed at striking down a law which is discriminatory or is inconsistent with the Convention. Instead it seeks to ensure a right to equality before the law by providing that persons of the race discriminated against by a discriminatory law shall enjoy the same rights under that law as other persons'.¹²
36. However, if the NTER legislation cannot be read so as to be consistent with the RDA, the NTER legislation, being the later legislation, will prevail. In other words, if NTER measures remain discriminatory, they will not be altered by the 'reinstatement' of the RDA.

¹² *Gerhardy v Brown* (1985) 159 CLR 70, 94.

(b) *The need for a notwithstanding clause*

37. The Government Welfare Reform Bill does not include a 'notwithstanding clause'. This is a clause that would expressly state that the provisions of the RDA prevail notwithstanding anything to the contrary in the NTER legislation. The Social Justice Commissioner called for the inclusion of such a clause in recommendation 5 of the *Social Justice Report 2007* (described there as a 'non-obstante' clause).
38. Such a clause would require all acts authorised under the legislation to be undertaken consistently with the RDA. To be effective a notwithstanding clause should be unequivocal that the provisions of the NTER legislation are subject to the provisions of the RDA.
39. The consequences of not including a notwithstanding clause are significant. Without such a clause, any provision of the amended emergency response legislation that is inconsistent with the RDA will still override the RDA.
40. An example of this is in relation to the issue of five-year leases.
41. The provision in the NTER legislation (s 31(1)(a) of the NTNER Act) that enables the Commonwealth to obtain a five-year lease from an owner of the land without their consent will remain in place despite the proposed amendments. The lifting of the suspension of the RDA does not alter the validity of this provision or the validity of leases that have been obtained by the Commonwealth. This is for three reasons.
42. First, the repeal of the provisions that suspend the operation of the RDA do not have retrospective effect (Schedule 1, Item 4(a)).
43. Second, it is a principle of statutory construction that where a provision of a later Act (the NTER legislation) is inconsistent with a provision of an earlier Act (the RDA), then the provisions of the later Act prevail. The purpose and effect of a notwithstanding clause is to counter the operation of this principle.
44. Third, the Government Welfare Reform Bill expressly states that section 8 of the *Acts Interpretation Act 1901* applies to the repeal and is unaffected by any contrary intention (Schedule 1, Item 4(b)). The effect of this provision is that any rights acquired by the Commonwealth under the leases continue. More generally, anything done under the current legislation will not be affected by the repeal of the provision that suspends the operation of the RDA.
45. It appears, therefore, that the existence of all existing five-year leases will not be able to be successfully challenged under the RDA even if the suspension of the RDA is lifted by the Government Welfare Reform Bill. Likewise, nothing already done by the Commonwealth pursuant to the grant of the leases will be able to be successfully challenged.

46. There may be other examples of discriminatory or potentially discriminatory elements of the NTER legislation that will also be protected from challenge in a similar way.
47. Including a notwithstanding clause in the NTER legislation would serve to give full effect to the government's intention to reinstate the RDA.
48. There is precedent for this level of protection. The *Social Security Legislation Amendment (Newly Arrived Residents' Waiting Periods and Other Measures) Act 1997* (Cth) contained an equivalent section defining the interaction of the RDA with Social Security legislation. It reads:

Section 4 - Effect of the Racial Discrimination Act 1975

(1) Without limiting the general operation of the *Racial Discrimination Act 1975* in relation to the provisions of the *Social Security Act 1991*, the provisions of the *Racial Discrimination Act 1975* are intended to prevail over the provisions of this Act.

(2) The provisions of this Act do not authorise conduct that is inconsistent with the provisions of the *Racial Discrimination Act 1975*.

49. The Commission therefore recommends that the Government Bills be amended to:

- Include notwithstanding clauses in order to specify that the provisions of the *RDA* are intended to prevail over the NTER legislation and that the NTER legislation does not authorise conduct that is inconsistent with the provisions of the *RDA*
- Remove Item 4 of Schedule 1 of the Government Welfare Reform Bill (relating to retrospectivity and section 8 of the *Acts Interpretation Act 1901*) [**Recommendation 1**].

(c) *Delays in the reinstatement of the RDA*

50. The Commission is also concerned by the delay proposed by the Government Bills for reinstating the RDA. Currently, the Bills propose that the RDA will be reinstated as of 31 December 2010, although it will apply to the redesigned income management measures from 1 July 2010.
51. The Commission believes that a 'staggered' reinstatement of the RDA will lead to further confusion among communities as to whether their rights are protected or not and the remedies that are available to them. For instance, people who will continue to be income-managed under the existing income management scheme will not be able to access the protections of the RDA until the suspension is lifted on 31 December 2010. Whereas people who will be income-managed under the redesigned income management provisions, will be able to access the protections of the RDA as of 1 July 2010.

52. This will operate to further undermine trust and confidence in the government within affected communities and will damage the overall intent of the Bills. The longer the reinstatement of the RDA is delayed, the greater the risk is for racially discriminatory measures to continue to operate without redress.
53. Accordingly, the Commission recommends that the government lift the suspension of the RDA for all NTER measures no later than 1 July 2010 [**Recommendation 2**].

7.2 Reinstatement of the RDA under the Greens' Bill

54. The Greens' Bill provides for the reinstatement of the RDA and includes a notwithstanding clause in line with recommendations 4 and 5 of the *Social Justice Report 2007*. The Bill allows for the reinstatement of the RDA to commence on the day of assent. The Commission supports an approach that confirms the operation of the RDA and reinstates it as soon as possible.
55. However, the Commission notes that the Greens' Bill provides that the legislation as an entirety, and all the acts done under the legislation, are intended to constitute special measures.
56. The Social Justice Commissioner noted his view in the *Social Justice Report 2007* that it is not possible for the entire legislation to be a special measure.¹³ This is because a number of the measures in the legislation are not a proportionate response to the problems they seek to address and were introduced without community consent. While the Commission supports the change in legislative language away from special measures being 'deemed', the Commission does not accept the characterisation of the legislation as a whole as a special measure.
57. Further, the Greens' Bill does not include a redesign of the individual NTER measures to be compliant with the RDA. While it leaves individual measures open to legal challenge under the RDA, the Commission suggests that Parliament should seek to make the NTER compliant with the RDA, rather than leave it to individuals to challenge aspects that may be discriminatory.

7.3 Reinstatement of state/ territory anti-discrimination legislation

58. The Government Bills reinstate the Queensland and Northern Territory anti-discrimination laws that are also currently suspended by the NTER legislation. This is consistent with Recommendation 8 of the *Social Justice Report 2007*. It recommends that the Minister declare that the *Anti-Discrimination Act 1992* (NT) continues to have effect in all prescribed communities under the NTER legislation and that the *Anti-Discrimination Act*

¹³ Aboriginal and Torres Strait Islander Commissioner, *Social Justice Report 2007* (2008), p 265. At http://humanrights.gov.au/social_justice/sj_report/sjreport07/chap3.html (viewed 20 January 2010).

1991 (Qld) continues to be of effect in relation to welfare reforms in Cape York.

59. The Commission again notes its concerns about the long commencement timeframe proposed by the Government Bills. The reinstatement of the state/territory anti-discrimination legislation is currently scheduled to commence on 31 December 2010.
60. The *Social Justice Report 2007* noted that the Minister had the authority under the NTER legislation to declare the anti-discrimination legislation to have effect, as a short term measure, until legislative amendments to this end were in place.
61. The Commission recommends that the government reinstate state/territory anti-discrimination legislation for all NTER measures no later than 1 July 2010 [**Recommendation 3**].

7.4 Special measures under the RDA

62. The Government Bills remove existing provisions that deem the measures under the NTER legislation to be special measures and provisions that deem the whole of the legislation to be a special measure under the RDA. This is in accordance with recommendation 6 of the *Social Justice Report 2007* and is supported by the Commission.
63. The Government Welfare Reform Bill inserts references to special measures in the object clauses of the various Parts of the NTER legislation. Each Part states that its object is 'to enable special measures to be taken...' This intention is confirmed by the government's policy statement which indicates that it considers the following measures to be special measures for the purposes of the RDA:
- Alcohol restrictions
 - Prohibited material restrictions
 - Five-year leases
 - Community store licensing.
64. Similar object clauses are not provided for the other three measures - controls on use of publicly funded computers, law enforcement powers and business management areas powers. These three measures are intended to continue without amendment. The government has indicated that it considers these three measures to also be special measures for the purposes of the RDA.¹⁴

¹⁴ Department of Families, Housing, Community Services and Indigenous Affairs, *Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response*, (2009), pp 12-14. At

65. The Commission's Draft Guidelines outline the requirements of a special measure under Article 1(4) of the *International Convention on the Elimination of all forms of Racial Discrimination* (ICERD):

- the special measure must confer a benefit on some or all members of a class;
- membership of this class must be based on race, colour, descent, or national or ethnic origin;
- the special measure must be 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 to the beneficiaries by the special measure must be necessary in order that they may enjoy and exercise equally with others human rights and fundamental freedoms; and
- the special measure must not already have achieved its objectives.¹⁵

66. The redesigned measures will not meet these requirements where:

- The government's redesign consultations do not meet the standard of consultation and consent of the affected group
- There is insufficient current and credible evidence which shows that the measure will be effective
- There are alternative means of achieving the objective that are not as restrictive of affected persons' human rights

http://www.facsia.gov.au/sa/indigenous/pubs/nter_reports/policy_statement_nter/Documents/landmark_reform_welfare_system.pdf (viewed 20 January 2010).

¹⁵. *Gerhardy* (1985) 159 CLR 70, Brennan J (133). The CERD Committee in General Comment 32 has outlined similar requirements of a special measure under ICERD as follows:

16. Special measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary. The measures should be designed and implemented on the basis of need, grounded in a realistic appraisal of the current situation of the individuals and communities concerned.

17. Appraisals of the need for special measures should be carried out on the basis of accurate data, disaggregated by race, colour, descent and ethnic or national origin and incorporating a gender perspective, on the socio-economic and cultural³⁵ status and conditions of the various groups in the population and their participation in the social and economic development of the country'.

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

(Committee on the Elimination of Racial Discrimination, *General Comment 32 - The meaning and scope of special measures in the International Convention on the Elimination of all forms of Racial Discrimination* (2009), pars 16-18. At <http://www2.ohchr.org/english/bodies/cerd/docs/GC32.doc> (viewed 1 October 2009)).

- There are inadequate mechanisms for monitoring and evaluating the measure to ensure if it is working effectively and if its objective has been met.

67. The Commission notes that there are limitations to the redesign consultation processes which undermine the claim that measures under the Bills are special measures for the purposes of CERD and the RDA.¹⁶ Some of these limitations include:

- The limited scope of the consultations – the consultations did not cover all measures under the NTER. They are therefore not capable of evidencing community support for continuation of all measures. Some of the measures that were not identified in the government’s *Future Directions for the Northern Territory Emergency Response - Discussion Paper* (Discussion Paper) included:
 - Modifications to the permit system
 - Compulsorily acquisition of Aboriginal town camps
 - Provision for statutory rights powers to be obtained over Aboriginal land.
 - Removal of consideration of customary law or cultural practice in bail applications and sentencing
 - Provision of services related to health, child protection and police enforcement.
- The scope of the consultations was also limited by the parameters set around the options for the measures in the government’s Discussion Paper. For example, the Discussion Paper proposes certain changes to five-year leases but it does not encourage consideration of their removal.¹⁷ In the *Native Title Report 2009* the Social Justice Commissioner expressed concern that community residents were only being asked for comment on the proposed amendments and that the Australian Government had already formed the view that five-year leases had operated for the benefit of Aboriginal residents.¹⁸

¹⁶ Article 19 of the Declaration states: States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

¹⁷ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009* (2009), p 154. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/pdf/ntr2009.pdf (viewed 28 January 2010).

¹⁸ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009* (2009), p 155. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/pdf/ntr2009.pdf (viewed 28 January 2010).

- The government's Discussion Paper noted the purpose of the consultations was to 'hear community views about continuing the NTER measures and how they could be changed to deliver greater benefits'.¹⁹ The consultations did not seek consent for the purposes of developing special measures under the RDA, or obtain participants' free, prior and informed consent for the redesigned measures.
- The limited availability of interpreters and the lack of clear understanding among some participants of some of the measures being discussed, undermined the informed participation of participants.²⁰ For instance the government's *Report on the Northern Territory Emergency Response Redesign Consultations* (the Redesign Report) states:

[t]here were frequent comments that people did not understand the leasing arrangements and there was some confusion between five-year leases, township leasing and voluntary leasing.²¹

This was confirmed in the independent review of the consultations undertaken by the Cultural and Indigenous Research Centre Australia (CIRCA), which noted:

There was very little awareness of several of the measures, and it was therefore not possible to adequately explain the measure and gather feedback in the timeframe allowed for the Tier 2 meetings. This was true for publicly funded computers, business management powers, and law enforcement measures.²²

¹⁹ Department of Families, Housing, Community Services and Indigenous Affairs, *Future Directions for the NTER - Discussion Paper* (2009), Section 5: Next Steps. At http://www.fahcsia.gov.au/SA/INDIGENOUS/PUBS/NTER_REPORTS/FUTURE_DIRECTIONS_DISCUSSION_PAPER/Pages/next_steps.aspx (viewed 20 January 2010).

²⁰ Cultural and Indigenous Research Centre Australia (CIRCA), *Report on the NTER Redesign Engagement Strategy and Implementation* (2009), p 13. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/redesign_engagement_strategy/final_report_09_engage_strat.PDF (viewed 20 January 2010).

²¹ Department of Families, Housing, Community Services and Indigenous Affairs, *Report on the Northern Territory Emergency Response Redesign Consultations* (2009), Executive Summary. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/redesign_consultations/exec.htm (viewed 28 January 2010). The executive summary also reported 'In some consultations, this topic was not discussed, or was discussed only briefly, because the community was not subject to five-year leasing or the people present deferred to the Traditional Owners or the Land Councils on this matter'. See also Cultural and Indigenous Research Centre Australia (CIRCA), *Report on the NTER Redesign Engagement Strategy and Implementation* (2009), p 13. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/redesign_engagement_strategy/final_report_09_engage_strat.PDF (viewed 20 January 2010). See also some limitations of the consultation process identified in A Nicholson, L Behrendt, A Vivian, N Watson, M Harris, 'Will They Be Heard – a response to the NTER Consultations June to August 2009' (2009). At http://indigenouspeoplesissues.com/attachments/3094_WillTheyBeHeard_NT_2009.pdf (viewed 28 January 2010).

²² Cultural and Indigenous Research Centre Australia (CIRCA), *Report on the NTER Redesign Engagement Strategy and Implementation* (2009), p 13. At

- The measures for pornography restrictions and the controls on use of publicly funded computers were not discussed in many communities due to a high level of discomfort to talk about these issues in large, mixed public forums.²³ As a result it is not possible to draw informed conclusions about communities' views on these measures.

68. The Commission discusses in further detail below whether individual measures meet the requirements of a special measure under the RDA.

69. The Special Rapporteur on indigenous peoples, during his recent visit to Australia, noted that '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'.²⁴ Further he stated that in his view the existing NTER measures did not meet the requirements of special measures.²⁵

70. The Commission also notes that the following recommendations related to special measures from the *Social Justice Report 2007* have not been addressed under these Bills:

Recommendation 6: ... insert new provisions that require that in the performance of any actions undertaken to implement the measures contained in the legislation, the intended beneficial purpose of the legislation must be a primary consideration.

Recommendation 7: Subject the intervention measures to regular monitoring and review to establish whether they meet the purposes of a 'special measure'

That the Government ensure strict monitoring and evaluation provisions to ensure that only those measures that are appropriate and adapted to the purpose of child protection are maintained. Such monitoring should particularly focus on measures relating to income management, alcohol bans, changes to the permit system and compulsory acquisition of Aboriginal land.

http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/redesign_engagement_strategy/final_report_09_engage_strat.PDF (viewed 20 January 2010).

²³ Department of Families, Housing, Community Services and Indigenous Affairs, *Report on the Northern Territory Emergency Response Redesign Consultations* (2009), pp 39 and 51. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/redesign_consultations/sec2.htm#t2 (viewed 20 January 2010).

²⁴ UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *Preliminary Note on the Situation of the Indigenous Peoples in Australia*, UN Doc A/HRC/12/34/Add.10 (2009), par 8. At <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A.HRC.12.34.Add10.pdf> (viewed 20 January 2010).

²⁵ UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *Preliminary Note on the Situation of the Indigenous Peoples in Australia*, UN Doc A/HRC/12/34/Add.10 (2009), par 8. At <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A.HRC.12.34.Add10.pdf> (viewed 20 January 2010).

8 Income management measure

71. Under the existing NTER measures income management applies to most welfare payment recipients in prescribed areas in the Northern Territory (including communities, town camps and outstations).²⁶ There are 73 prescribed areas.²⁷ The current income management measures are set out in Part 3B of the *Social Security (Administration) Act 1999* (SSA Act).²⁸ Sections 123TE and 123UB of the SSA Act outline the conditions for a declared relevant Northern Territory area and outline the persons subject to income management in those areas. Income management involves directing a portion of a person's welfare payments for the purchase of priority items as outlined in the SSA Act including food, clothing and rent.
72. It was clear that the income management measures as enacted under the 2007 NTER legislation were racially discriminatory as well as denying procedural fairness to those to whom they applied.²⁹
73. The *NTER Review Board Report* noted that the blanket imposition of the measure 'resulted in widespread disillusionment, resentment and anger in a significant segment of the Indigenous community'.³⁰ However, the Board also noted that many Aboriginal people, especially women, felt that families and children have benefited from income management in the form of greater quantities and better quality of food being bought at community stores, reduction in tobacco sales, better management of family incomes and savings, and reduced vulnerability of pensioners and women to 'humbugging'.³¹
74. The NTER Review Board recommended that income management be available on a voluntary basis to community members who choose to have

²⁶ FaHCSIA, *Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response* (2009), p 6. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/policy_statement_nter/Documents/landmark_reform_welfare_system.pdf (viewed 4 February 2010).

²⁷ Department of Families, Housing, Community Services and Indigenous Affairs, *Future Directions for the Northern Territory Emergency Response – Discussion Paper* (2009). At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/future_directions_discussion_paper/Pages/default.aspx (viewed 4 February 2010)

²⁸ Welfare payment recipients may also be subject to income management where required by a child protection officer or the Queensland Commission, or where school enrolment or attendance requirements are not met, see Division 2, SSA Act.

²⁹ Aboriginal and Torres Strait Islander Commissioner, *Social Justice Report 2007* (2008). At http://humanrights.gov.au/social_justice/sj_report/sjreport07/chap3.html (viewed 20 January 2010); Northern Territory Emergency Response Review Board, *Report of the NTER Review Board* (2008), ch 2. At www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/nt_eval_rpt/NT_eval_rpt.pdf (viewed 20 January 2010).

³⁰ Northern Territory Emergency Response Review Board, *Report of the NTER Review Board* (2008), ch 2 (2.1 Measure 1: Welfare reform and employment). At http://www.nterreview.gov.au/docs/report_nter_review/ch2.htm#2_1 (viewed 20 January 2010).

³¹ Northern Territory Emergency Response Review Board, *Report of the NTER Review Board* (2008), ch 2 (2.1 Measure 1: Welfare reform and employment). At http://www.nterreview.gov.au/docs/report_nter_review/ch2.htm#2_1 (viewed 20 January 2010).

some of their income quarantined for specific purposes, as determined by them; and that compulsory income management should only apply on the basis of child protection, school enrolment and attendance and other relevant behavioural triggers.³²

75. The objective of the redesigned income management measure has shifted from a focus on Aboriginal and Torres Strait Islander peoples to individuals and families reliant on welfare who are living under severe social pressure.
76. The redesigned income management measures change the income management measures from a blanket approach based on race, to measures that are more generally applicable. They are intended to 'target assistance to the most disengaged and disadvantaged individuals in the welfare system'.³³
77. Due to their general application, the income management measure has not been developed as a special measure under the RDA and does not raise issues of direct discrimination. In order to comply with the RDA then, it only remains to identify whether it raises concerns of indirect discrimination.
78. People living in the 73 prescribed areas currently subject to the income management measure under the NTER legislation will continue to be subject to income management.
79. The current income management measures relating to child protection, school enrolment, school attendance and the Queensland Family Responsibilities Commission will also continue to apply.
80. The new income management scheme will be gradually rolled out across the Northern Territory. The transitional arrangements provide for people subject to the current scheme of income management in the Northern Territory to either transition to the new scheme or move off income management altogether within 12 months of the commencement on 1 July 2010.³⁴
81. The Government Welfare Reform Bill introduces a new defined term 'declared income management area'³⁵ which defines an area as either a specified State, specified Territory or a specified area, that the Minister determines by legislative instrument.

³² Northern Territory Emergency Response Review Board, *Report of the NTER Review Board* (2008), p 12. At http://www.nterreview.gov.au/docs/report_nter_review.PDF (viewed 20 January 2010).

³³ Department of Families, Housing, Community Services and Indigenous Affairs, *Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response* (2009), p 6. At http://www.facsia.gov.au/sa/indigenous/pubs/nter_reports/policy_statement_nter/Documents/landmark_reform_welfare_system.pdf (viewed 20 January 2010).

³⁴ Explanatory Memorandum, Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Cth), 14.

³⁵ Welfare Reform Bill, Schedule 2, item 29 (s 123TC).

82. The Commission recognises that with the introduction of the redesigned income management measure the number of people currently subject to income management in Indigenous communities may reduce.

83. The redesigned income management measure identifies three new categories of people that will be subject to income management:

- disengaged youth
- long-term welfare payment recipients
- people assessed as vulnerable.³⁶

84. The redesigned income management measure also provides for eligible welfare recipients to seek exemptions from income management.³⁷ Exemptions will be available in the categories of disengaged youth and long-term welfare payment recipients as follows:

- parents with dependent children who can demonstrate their children attend school regularly and consistently or
- people without dependent children who can show they are participating in regular paid employment, or engaged in full-time formal study or an apprenticeship.

85. In addition to the three new categories, the Government Welfare Reform Bill allows for a person to voluntarily agree to be subject to the income management regime.³⁸ The provision for welfare recipients to be voluntarily income-managed is accompanied by a financial incentive for entering voluntary income management.³⁹

³⁶ The Government Welfare Reform Bill identifies seven categories of welfare recipients in total who can be subjected to income management:

- (a) a child protection officer of a State or Territory requires the person to be subject to the income management regime; or
- (b) the Secretary has determined that the person is a vulnerable welfare payment recipient; or
- (c) the person meets the criteria relating to disengaged youth; or
- (d) the person meets the criteria relating to long-term welfare payment recipients; or
- (e) the person, or the person's partner, has a child who does not meet school enrolment requirements; or
- (f) the person, or the person's partner, has a child who has unsatisfactory school attendance; or
- (g) the Queensland Commission requires the person to be subject to the income management regime.

Welfare Reform Bill, Schedule 2, item 25 (s 123TA).

³⁷ Government Welfare Reform Bill, Schedule 2, item 37, (ss 123UGB, 123UGC, 123UGD)

³⁸ Government Welfare Reform Bill, Schedule 2, item 25 (s 123TA), items 46-53 and 61.

³⁹ Government Welfare Reform Bill, Schedule 2, item 61 (ss 1061W, 1061WA, 1061WB).

86. The Government Welfare Reform Bill also provides for a matched savings incentive to build recipients' financial management skills and capabilities.⁴⁰

87. The redesigned income management measure will be subject to the RDA by 1 July 2010, while the existing income management measures in prescribed communities will only be subject to the RDA and state/ territory anti-discrimination legislation as of 31 December 2010.

88. The redesigned measure is also subject to external merits review and appeal.

(a) *Compliance with non-discrimination and human rights standards*

89. There has been a significant debate on whether income management is an effective policy tool for supporting the welfare of disadvantaged individuals and families, and in particular, Indigenous individuals and families. The redesigned measure extends income management beyond the prescribed Indigenous communities in the Northern Territory, to Indigenous and non-Indigenous people in disadvantaged locations across the Northern Territory. However, this submission will focus its assessment of the redesigned income management measure on the specific impacts on Indigenous peoples.

90. The Commission has previously noted that the preferred features for an income management measure include:

- voluntary/ opt-in approaches - rather than automatic quarantining or an exemption approach
- a last-resort approach for targeted risk areas such as child protection (that is supported by case management and support services), akin to the Family Responsibilities Commission model in Queensland - rather than automatic quarantining and
- a defined period of income management, where the timeframe for compulsory quarantining is proportionate to the context.

91. An income management measure with such features would be consistent with international human rights standards, and in particular the standards for self-development of Indigenous peoples recognised in Article 23 of the *UN Declaration on the Rights of Indigenous peoples*, which states:

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and as far as possible, to administer such programmes through their own institutions.

⁴⁰ Welfare Reform Bill, Schedule 2, item 61 (ss 1061WG, 1061WH).

92. The Commission welcomes the provisions in the redesigned income management measure that are in line with the above preferred features of an income management measure. That is, the provisions for voluntary income management and the provisions for the last-resort approach for targeted risk areas that are continued in relation to child protection, school enrolment, school attendance and the Queensland Family Responsibilities Commission.

(i) 'Disengaged youth' and 'long-term welfare payment recipients' categories

93. In contrast, the 'disengaged youth' and 'long-term welfare payment recipients' categories are the only categories for which quarantining will still be automatically applied under the new income management measure. That is, within the relevant declared area, all welfare recipients who satisfy the criteria applicable to these two categories are subject to being income-managed. These two categories of income management are not consistent with the preferred features for income management identified above.

94. The Commission is concerned that Indigenous peoples will be more vulnerable to being subjected to income management under these categories than non-Indigenous peoples. This risk stems from the limited access to education, training and employment for Aboriginal people, particularly in remote communities in the Northern Territory, and the consequent high proportion of Aboriginal people accessing welfare payments for extended periods. There is also a large Aboriginal youth population in the Northern Territory, many of whom also have difficulties accessing education, training and employment.

95. The Commission recommends that the categories of 'disadvantaged youth' and 'long-term welfare payment recipients' be reformulated to apply on a case-by-case basis as follows:

- Welfare recipients be offered in the first instance the option to be voluntarily income-managed;
- Welfare recipients that do not choose to be voluntarily income-managed, and who fit one of the two defined categories, are assessed for inclusion in the scheme, based on their individual circumstances;
- The decision to income manage the welfare recipient be made reviewable;
- The welfare recipient have the option to apply for an exemption from income management at any stage of the process (for example, after a period of time where their circumstances may have changed or the concerns that led to them being income managed having changed); and
- Provide for a defined period of income management and make continuation of income management subject to regular review **[Recommendation 4]**.

(ii) Exemptions

96. As noted above, the redesigned income management measure makes provision for people within the categories of disadvantaged youth and long-term welfare payment recipients to apply for exemptions from the scheme and for merits review of the outcomes of their applications.
97. The Commission notes that due to the lower education levels, the difficulties of living in rural and remote areas and living in disadvantaged situations, Aboriginal welfare recipients subject to these categories of income management may face difficulties in accessing the exemption processes.
98. The information about exemptions needs to be readily accessible and in appropriate forms and be supplemented by the increased presence of government departments and services in Indigenous communities in rural and remote areas.
99. The Commission recommends the government develop proactive strategies to provide sufficient and appropriate information about the new exemption provisions [**Recommendation 5**].

(iii) 'Vulnerable welfare payment recipient' category

100. A further category for inclusion within the income management scheme is for people who are determined to be a 'vulnerable welfare payment recipient'. There is no indication in the Government Welfare Reform Bill as to who will fit within this category, and what the criteria for making the determination will be.
101. The Bill foreshadows that decision-making principles may be set out in a legislative instrument by the Minister for the purposes of this measure, but it is not clear how or if this will be done. As decisions by administrative decision-makers will have a significant impact upon the rights and liberties of affected persons it is imperative that clear definitions are contained in the legislation.
102. The explanatory memorandum suggests what maybe included in a possible definition of the term includes situations of vulnerability such as domestic violence, economic abuse and financial crisis.
103. The Commission is concerned that there maybe negative, unintended consequences of including domestic violence as a trigger for being income-managed as a vulnerable welfare payment recipient.
104. Centrelink Social Workers currently provide women who have experienced domestic violence with information on entitlements and services available. The concern is that including domestic violence as a trigger for income management could discourage women experiencing domestic or family violence from seeking assistance from Centrelink and consequently place women at greater risk, and result in under-reporting of domestic violence.

105. 60% of income-managed clients are female.⁴¹ Given the majority of domestic violence victims are women there is a risk that the inclusion of domestic violence in this category will have a particular effect on women.⁴²

106. This is a further reason why the Bill should include a clear definition of the term 'vulnerable welfare payment recipient' and clear criteria and processes for determining a person to be subject to income management as a result of being determined to be a vulnerable welfare payment recipient.

107. The Commission recommends the Government Welfare Reform Bill be amended to include a full definition of 'vulnerable welfare payment recipient' **[Recommendation 6]**.

(iv) Veterans' benefits

108. The Commission notes people in receipt of Veterans' benefits⁴³ could be automatically subject to income management. This is in the circumstances where persons fall within the category of 'disadvantaged youth', 'long-term welfare payment recipients', or if they are determined to be 'vulnerable'.⁴⁴

(v) Community support

109. In transitioning from the existing blanket approach to quarantining into the redesigned income management measure, the Commission notes the importance of ensuring the participation of affected people in all aspects of the design, delivery and monitoring of the measure.

110. This process would allow for a transition that does not compromise the safety of vulnerable community members. It would enable the government to respond to the specific circumstances of individual people and communities and it would allow for individuals and communities to decide on the most appropriate measures to meet their particular needs.

111. A community-based approach is likely to result in some communities electing to have a community wide income management scheme, such as

⁴¹ Australian Institute for Health and Welfare, *The evaluation of income management in the Northern Territory* (2010), Executive Summary. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/nt_eval_rpt/0_summary.htm (viewed 20 January 2010).

⁴² Australian Bureau of Statistics, *2005 Personal Safety Survey (Reissue)* (2006). At: [http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/056A404DAA576AE6CA2571D00080E985/\\$File/49060_2005%20\(reissue\).pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/056A404DAA576AE6CA2571D00080E985/$File/49060_2005%20(reissue).pdf) (viewed 5 February 2010)

⁴³ Veterans' benefits are distinct from welfare benefits, as the former are provided to support those who serve or have served in defence of the nation and commemorate their service and sacrifice. Eligible veterans, serving and former defence force members, their war widows and widowers and dependants are provided appropriate compensation, income support, health care and other services in recognition of the effects of war and defence service (Department of Veterans Affairs website, <http://www.dva.gov.au/Pages/home.aspx> (viewed 20 January 2010)).

⁴⁴ Government Welfare Reform Bill, Schedule 2, item 42 (ss 123XJA, 123XJB, 123XJC, 123XJD).

the Families Responsibilities Commission process, while others would elect to continue to participate in income management on a voluntary basis.

112. The Commission commends COAG for its Closing the Gap commitments in the Northern Territory in the areas of governance and leadership, early childhood, schooling, health, economic participation, healthy homes and safe communities.
113. The Commission notes that commitments to Closing the Gap in the Northern Territory need to be continued and expanded to supplement the extended income management measures.
114. The Commission recommends the government supplement any income management scheme with additional support programs that address the rights to food, education, housing, and provide support in the form of financial literacy/budgeting skills development for welfare recipients, safe houses for women and men, and alcohol and substance abuse programs
[Recommendation 7].

(b) *Monitoring and evaluation*

115. The Commission also notes that the Government Welfare Reform Bill allows for a national roll-out of the income management measure subject to the outcomes of an evaluation in 2012.
116. However, to date there have been concerns regarding the availability of sufficient and reliable monitoring data to assess the effectiveness of income management. Some of the reasons for this, which the government has itself acknowledged, include the absence of baseline data available from before or at the time the NTER was introduced; and the lack of uniformity in available data.⁴⁵
117. The government has relied on selected statistical and anecdotal reports for evidence of the effectiveness of income management.⁴⁶ However, these sources fail to provide conclusive evidence of the effectiveness of these measures. The AIHW Report for instance notes that:

⁴⁵ Rita Markwell, Adviser to Minister Macklin, Department of Families, Housing, Community Services and Indigenous Affairs, *Email sent to stakeholders*, 18 December 2009.

⁴⁶ The sources relied upon by the Government include: the Australian Institute for Health and Welfare, *The evaluation of income management in the Northern Territory* (2010); Department of Families, Housing, Community Services and Indigenous Affairs, *Report on the Northern Territory Emergency Response Redesign Consultations* (2009); Cultural and Indigenous Research Centre Australia (CIRCA), *Report on the NTER Redesign Engagement Strategy and Implementation*, (2009); Department of Families, Housing, Community Services and Indigenous Affairs, *Final Stores Post Licensing Monitoring Report* (2009); Central Land Council, *NTER: Perspectives from Six Communities* (2008); and analysis of Centrelink data (Rita Markwell, Adviser to Minister Macklin, Department of Families, Housing, Community Services and Indigenous Affairs *Email sent to stakeholders*, 18 December 2009).

The research studies used in the income management evaluation (point in time descriptive surveys and qualitative research) would all sit towards the bottom of an evidence hierarchy. A major problem for the evaluation was the lack of a comparison group, or baseline data, to measure what would have happened in the absence of income management... the overall evidence about the effectiveness of income management in isolation from other NTER measures was difficult to assess....The evaluation findings would have greater strength if these views were supplemented by empirical indicators that showed evidence of the changes reported by the various stakeholders.⁴⁷

118. Further the anecdotal evidence gathered both by the Central Land Council and the government's Redesign Consultations, also shows that some people have benefitted from and support income management, equally they show that significant numbers of people have not benefitted from and do not support income management.⁴⁸
119. With the redesign of the income management measure, new monitoring processes will need to be established to properly assess the effectiveness of the measure against the new objectives.
120. The Commission recommends the government establish, in advance of the 2012 evaluation, rigorous and comprehensive monitoring and evaluation mechanisms to progressively assess the effectiveness of income management measures [**Recommendation 8**].

9 Other measures

121. With the exception of the income management measure, all other redesigned measures under the Government Welfare Reform Bill apply only to the 73 prescribed Indigenous communities in the Northern Territory. This submission assesses whether the government has met its stated intent to redesign these measures to comply with the RDA and human rights standards.

9.1 Alcohol restrictions measure

122. The original NTER measures issued a ban on drinking, possessing, supplying or transporting liquor in prescribed areas, but allowed for the continued operation of licensed premises and individual permits issued under the Northern Territory *Liquor Act* and for some recreational, tourism and commercial fishing activities.⁴⁹ It also monitored takeaway sales across the

⁴⁷ Australian Institute for Health and Welfare, *The evaluation of income management in the Northern Territory* (2010), Executive Summary. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/nt_eval_rpt/0_summary.htm (viewed 20 January 2010).

⁴⁸ Central Land Council, *NTER: Perspectives from Six Communities* (2008).

⁴⁹ Department of Families, Housing, Community Services and Indigenous Affairs, *Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and*

whole of the Northern Territory.⁵⁰ Under the NTER measures, road signs were erected notifying the restrictions on alcohol and prohibited materials in prescribed communities. Police were also provided with powers to enter private residences in prescribed areas as if they were public places.

123. The Commission welcomes aspects of the redesigned alcohol restriction measure that provide for greater discretion in placing appropriate signage and publishing notices, and for a more consultative scheme regarding entry by police into private residences.

124. The Commission also welcomes the introduction of provisions that will enable communities to introduce voluntary alcohol management arrangements, and to apply to be exempted from the existing alcohol bans where those community mechanisms are deemed appropriate. The Commission notes the comparative success of community-based alcohol management plans over blanket alcohol bans.⁵¹

125. The Government Welfare Reform Bill states that the object of the alcohol restriction measure is to enable special measures to be taken to reduce alcohol-related harm in Indigenous communities in the Northern Territory.

(a) *Alcohol restrictions as a special measure*

126. The Commission has supported the introduction of alcohol restrictions as a 'special measure' to address the impact of alcoholism within the community where such restrictions have community support. Such community-led initiatives have occurred in Halls Creek and Fitzroy Crossing in the Kimberley region.

127. The Commission is concerned that the alcohol restrictions measure in the NTER have not been developed with adequate community consultation and do not meet the requirements of consent for a special measure.

128. The CIRCA Report notes that in the consultations conducted by the government '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

Strengthening of the Northern Territory Emergency Response (2009), p 6. At http://www.facsia.gov.au/sa/indigenous/pubs/nter_reports/policy_statement_nter/Documents/landmark_reform_welfare_system.pdf (viewed 4 February 2010).

⁵⁰ Department of Families, Housing, Community Services and Indigenous Affairs, *Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response* (2009), p 6. At http://www.facsia.gov.au/sa/indigenous/pubs/nter_reports/policy_statement_nter/Documents/landmark_reform_welfare_system.pdf (viewed 4 February 2010).

⁵¹ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007* (2008), Ch 2. At http://humanrights.gov.au/social_justice/sj_report/sjreport07/chap3.html (viewed 20 January 2010).

was not time to fully explain the measure. This was true for five-year leases and alcohol restrictions'.⁵²

129. Where a special measure operates by limiting certain rights of some, or all the affected group, the issue of consent to the measure becomes of paramount concern. In the Commission's view such measures will not be special measures where they are implemented without the consent of the group to whom they apply.

130. The Commission notes the level of consultation or consent required will vary depending on whether the measure to be introduced involves a limitation on certain rights or is entirely beneficial in nature. Measures that seek to provide a benefit to a racial group or members of it, but operate by limiting certain rights of some, or all of that group, should be approached with particular care. At a minimum, consultation with the 'beneficiary' group is essential and consent should be obtained unless there are legitimate reasons for not doing so (for example, because a measure is a short-term one to be introduced at short notice).

131. The Commission reiterates its recommendations from the *Social Justice Report 2007* for the government to:

- Ensure the participation of Indigenous peoples in developing, implementing and monitoring alcohol management plans and ensure all alcohol management processes are consistent with the RDA
- Ensure alcohol restrictions are supplemented by investment in infrastructure in the health and mental health sectors (including culturally appropriate detoxification facilities) and investment in culturally appropriate community education programs delivered by Indigenous staff **[Recommendation 9]**.

(b) *Community consultation*

132. The Commission notes that the Government Welfare Reform Bill enables the Minister to support community initiated alcohol restrictions in lieu of the alcohol bans in the NTER legislation. The Bill provides for community consultation to be undertaken before making a declaration or legislative instrument pertaining to the redesigned alcohol restrictions measure but does not require it for the declaration or legislative instrument to be valid.⁵³

⁵² Cultural and Indigenous Research Centre Australia (CIRCA), *Report on the NTER Redesign Engagement Strategy and Implementation* (2009), p 13. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/redesign_engagement_strategy/final_report_09_engage_strat.PDF (viewed 20 January 2010).

⁵³ Government Welfare reform Bill, Schedule 3, item 10 (s 18 94)), item 11 (s 19 (6)), item 12 (s 19A(5))

133. This undermines the objective of community consultations, and contravenes the government's intent to engage in more community driven processes.
134. The Commission recommends the Government Welfare Reform Bill be amended to remove clauses Schedule 3, item 10 (s 18(4)), item 11 (s 19(6)), item 12 (s 19A(5)) in order that community consultation is a critical determinant of whether to support a community driven alcohol ban or not **[Recommendation 10]**.
135. The Commission notes similar clauses are included in relation to the prohibited materials measure.⁵⁴ These should also be removed to ensure a consistent approach that promotes community engagement.
136. The Commission recommends the Government Welfare Reform Bill be amended to remove clauses Schedule 4, Item 5 (s100A (5) and 100B (5)) **[Recommendation 11]**.

9.2 Five-year leases measure

(a) The continuation of five-years leases under the NTNER Act

137. Five-year leases are created under s 31 of the NTNER Act. Section 31 deems a lease to be granted to the Australian Government over certain types of land for a period of 5 years. The government currently holds five-year leases over 64 communities.⁵⁵
138. The proposed Bill inserts a new object clause⁵⁶, and outlines that the Commonwealth is entitled to use, and to permit the use of, land covered by a section 31 lease for any use that the Commonwealth considers is consistent with the fulfillment of the object of the Part.⁵⁷
139. The proposed Bill also provides for the development of guidelines for the Commonwealth to consider when subleasing or otherwise dealing with its interest in the lease,⁵⁸ and specifies that regard must be had to the body of traditions, observances, customs and beliefs of Indigenous persons when administering leases.⁵⁹ In addition, the proposed amendments would require the Commonwealth to enter into negotiations with the relevant owner on the

⁵⁴ Government Welfare reform Bill, Schedule 4, Item 5 (s100A (5) and 100B (5)).

⁵⁵ Department of Families, Housing, Community Services and Indigenous Affairs, *Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response* (2009), p 6. At http://www.facsia.gov.au/sa/indigenous/pubs/nter_reports/policy_statement_nter/Documents/landmark_reform_welfare_system.pdf (viewed 4 February 2010).

⁵⁶ Government Welfare Reform Bill, Schedule 5, item 1

⁵⁷ Government Welfare Reform Bill, Schedule 5, item 2

⁵⁸ Government Welfare Reform Bill, Schedule 5, item 3

⁵⁹ Government Welfare Reform Bill, Schedule 5, item 5

terms and conditions of another lease covering the land in good faith, if requested to do so by the owner.⁶⁰

140. The Commission is concerned that the compulsory grant of five-year leases under the NTNER Act was discriminatory and the current drafting of the Government Welfare Reform Bill protects these leases from challenge under the RDA. Retaining and protecting potentially discriminatory aspects of the NTER from challenge appears contrary to the intention of 'reinstating' the RDA.
141. The Commission further notes that recommendation 9 of the *Social Justice Report 2007* called for the Minister for Indigenous Affairs to place a moratorium on five-year compulsory leases over Aboriginal land. The Social Justice Commissioner also called for the Minister to direct public servants and Government Business Managers to conduct negotiations with Aboriginal communities to obtain access to Aboriginal land for infrastructure and related purposes.
142. The Commission recognises that the government has made efforts to put in place processes to make compensation payments for the five-year leases. In 2008, the *Indigenous Affairs Legislation Amendment Act 2008* (Cth) included a process for land owners and the government to agree on an amount to be paid by the Australian Government for the five-year leases.
143. The Australian Government also commenced a process in 2008 for making payments by asking the Northern Territory Valuer-General to determine a reasonable rent for the five-year leases.⁶¹ In 2009, the Australian government finalised a review of the boundaries of five-year leases and reduced the size of the land to which the leasehold arrangements apply to those lands that are necessary. This was due to concerns that the boundaries of leases were excessive and took in land that was not necessary to deliver essential services to communities.

(b) *Five-year leases are not a special measure*

144. The Bill proposes a new section 30A which expresses that the object of Part 4 of the NTNER Act is to enable special measures to be taken to improve the delivery of services in Indigenous communities in the Northern Territory, and to promote economic and social development in those communities.⁶²

⁶⁰ Government Welfare Reform Bill, Schedule 5, item 6

⁶¹ J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), 'High Court decision on NT five-year leases' (Media Release, 2 February 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/high_court_decision_02feb09.htm (viewed 5 December 2009).

⁶² Government Welfare Reform Bill Schedule 5, Item 1.

145. The Commission notes, however, that the RDA explicitly excludes from the 'special measures' exemption laws that authorise management of property without the consent of Aboriginal and Torres Strait Islander people or prevent them from terminating management by another of land owned by them (see ss 8(1), 10(3), RDA).
146. To be consistent with the RDA, measures relating to the management of land must be taken with the consent of the landowners. The redesigned five-year leases therefore remain inconsistent with the RDA in this respect.
147. Further, in the *Native Title Report 2009*, the Social Justice Commissioner has commented that it is wrong to suggest that the provision of safe houses and Government Business Manager (GBM) accommodation, or the refurbishment of housing, required the acquisition of the five-year leases.⁶³ These could easily have been achieved in other ways as this infrastructure has been installed and refurbished for years without the compulsory acquisition of five-year leases.⁶⁴

(c) *Intended transition to voluntary leases*

148. The government has indicated that it is committed to the progressive transition of five-year leases to voluntary leases and that the Bill obliges the Commonwealth, at the request of a land owner, to negotiate voluntary leases in good faith.⁶⁵ The Commission supports the intention of the government to enter into voluntary lease arrangements with traditional owners.
149. So long as compulsory five-year leases remain in place and are only applied to Indigenous communities these provisions will remain inconsistent with the RDA.
150. The Commission recommends the Government Bills be amended to remove the capacity to compulsorily acquire any further five-year leases under Part 4 of the NTNER Act and commit to obtaining the free, prior and informed consent of traditional owners to enter into voluntary lease arrangements for existing compulsory lease arrangements
[Recommendation 12].

⁶³ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009* (2009), p 155. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/pdf/ntr2009.pdf (viewed 28 January 2010).

⁶⁴ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009* (2009), p 155. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/pdf/ntr2009.pdf (viewed 28 January 2010).

⁶⁵ J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 Second Reading Speech* (25 November 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/ss_legislation_amend_25nov2009.htm (viewed 28 January 2010).

(d) *Continuation of Statutory Rights*

151. 'Statutory rights' were introduced by the *Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth). This created a new Part IIB into the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

152. This is a procedure under which the Australian or Northern Territory Governments can obtain a set of rights over certain Aboriginal land. It applies when infrastructure is installed or repaired and funded wholly or partly by the government.⁶⁶

153. The *Native Title Report 2009* analysed these provisions, expressing concern about its effects:

While aspects of this process are similar to applying for the grant of a lease, statutory rights are very different from a lease. They provide no benefits to the land owner, only rights in favour of the government occupier. Those rights include the exclusive and perpetual right to occupy the land without having to pay rent.

Statutory rights are like a one-sided lease, under which the interests of the traditional owners are ignored. Traditional owners are unlikely to agree to such an arrangement by choice when they can instead negotiate a lease.⁶⁷

154. The Commission notes that the proposed Bills do not remove the statutory rights provisions, set out in Part IIB of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

155. The Commission recommends the Government Bills be amended to remove the statutory rights provisions, set out in Part IIB of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) [**Recommendation 13**].

9.3 ***Community stores licensing measure***

156. Under the existing NTER measures, community stores can be assessed to determine whether they are to be granted a community store license.⁶⁸ The basis of assessment is whether:

⁶⁶ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009* (2009), p 155. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/pdf/ntr2009.pdf (viewed 28 January 2010).

⁶⁷ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009* (2009), p 156. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/pdf/ntr2009.pdf (viewed 28 January 2010).

⁶⁸ Department of Families, Housing, Community Services and Indigenous Affairs, *Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response* (2009), p 6. At

They have a reasonable quality, quantity and range of groceries and consumer items available and promoted at the store, including healthy food and drinks; demonstrate the capacity to participate in the requirements of the income management arrangements under the social security law; and have sound financial structures, retail and governance practices.⁶⁹

157. The Commission welcomes redesigned the community stores licensing scheme for introducing greater transparency in the licensing procedures for stores.
158. The object clause for this measure enables special measures to be taken for the purpose of promoting food security for certain Indigenous communities in the Northern Territory. It is the Commission's view that the terms and conditions of the measure are reasonable, able to be complied with and do not have a negative impact upon the equal enjoyment of rights in public life by people of a particular race - and therefore are not racially discriminatory.
159. The Commission notes that the Government Welfare Reform Bill will insert a new Division 4 into the NTNER Act that provides for the Secretary to give written notice to the owner and manager of a community store to become registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act) by the day specified in the notice.⁷⁰
160. The Explanatory Memoranda states:
- New Division 4 assists in improving the governance and capacity of Northern Territory Indigenous corporate associations that own community stores....Poor governance practices and resourcing issues have been a recurring problem in relation to community stores and corporate governance has been identified as a key area for improvement in Indigenous communities.⁷¹
161. The Social Justice Commissioner has raised concerns about the application of the CATSI Act since its commencement in 2007 and noted

http://www.facsia.gov.au/sa/indigenous/pubs/nter_reports/policy_statement_nter/Documents/landmark_reform_welfare_system.pdf (viewed 4 February 2010).

⁶⁹ Department of Families, Housing, Community Services and Indigenous Affairs, *Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response* (2009), p 6. At

http://www.facsia.gov.au/sa/indigenous/pubs/nter_reports/policy_statement_nter/Documents/landmark_reform_welfare_system.pdf (viewed 4 February 2010).

⁷⁰ Government Welfare Reform Bill, Schedule 6, item 49.

⁷¹ Explanatory Memorandum, Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Cth), p 75. At:

http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4265_ems_e258b1c4-a0cb-427d-b501-84f885b5ca90/upload_pdf/336802.pdf;fileType=application%2Fpdf (viewed 1 February 2009)

some of the difficulties experienced by organisations in meeting the requirements of the CATSI Act.⁷²

162. The Commission notes the need for additional support and resources to be provided to stores registering under the CATSI Act for the first time, to ensure that community store owners can comply with the CATSI Act and build capacity to govern themselves.

163. The Commission further notes, that in an effort to avoid over-regulation of community stores, where stores are given notice to register under the CATSI Act, that this be in place of, rather than in addition to, registration under other federal or territory registration schemes (i.e. through the Australian Securities and Investments Commission (ASIC)).

9.4 Business management areas powers measure

164. The NTER created powers that provide the Australian Government with the ability to vary and terminate funding agreements⁷³ and for the Commonwealth Minister to make directions relating to the provision of services and assets required for the delivery of community services.⁷⁴

165. The NTER laws also allowed the government to cease funding to a community organisation if it felt the organisation was not properly doing its job of delivering services.⁷⁵

166. The business management areas powers are proposed to be continued without amendment and the government considers the measure to be special measure for the purposes of the RDA.⁷⁶

⁷² Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009* (2009), Ch 1. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/pdf/ntr2009.pdf (viewed 28 January 2010), Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2008* (2009), Ch 2. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport08/pdf/chap2.pdf (viewed 1 February 2010), Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007* (2008) Ch 6. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/chapter6.html (viewed 1 February 2010).

⁷³ *Northern Territory National Emergency Response Act 2007* (Cth), s 65.

⁷⁴ Department of Families, Housing, Community Services and Indigenous Affairs, *Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response* (2009), p 6. At http://www.facsia.gov.au/sa/indigenous/pubs/nter_reports/policy_statement_nter/Documents/landmark_reform_welfare_system.pdf (viewed 4 February 2010).

⁷⁵ Department of Families, Housing, Community Services and Indigenous Affairs, *Future Directions for the NTER - Discussion Paper* (2009), Section 5: Next Steps. At http://www.fahcsia.gov.au/SA/INDIGENOUS/PUBS/NTER_REPORTS/FUTURE DIRECTIONS DISCUSSION PAPER/Pages/next_steps.aspx (viewed 4 February 2010). See *Northern Territory National Emergency Response Act 2007* (Cth), s 78, outlining the suspension of council members.

⁷⁶ Department of Families, Housing, Community Services and Indigenous Affairs, *Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response*, (2009), pp 12-14. At

167. These powers are disproportionate and unnecessary. As the government notes in its Policy Statement, there are other avenues already in existence for addressing service delivery and governance issues (i.e. the CATSI Act and ASIC). Further, the fact that the powers have not been used since they were enacted over two years ago is evidence that they are not necessary.
168. The Commission recommends the Government Welfare Reform Bill be amended to remove the business management areas powers **[Recommendation 14]**.

10 Monitoring and Evaluation

169. Since the inception of the NTER the Social Justice Commissioner has called for proper monitoring and review processes to assess the efficacy of the NTER measures:

Given the complexity of the NT intervention measures and their potential to negatively impact on the human rights of Indigenous peoples, it is essential for transparent monitoring and evaluation processes to be set in place and for regular review to take place.⁷⁷

170. The Commission also noted the importance for proper monitoring in its submission to the Northern Territory Review Board:

A human rights based approach...emphasises a holistic, integrated approach, which promotes transparency, accountability and the development of rigorous benchmarking, monitoring and reporting systems and access to forms of redress.⁷⁸

171. The NTER Review Board's Report noted that as at the time of the review in 2008, there were insufficient monitoring processes in place for the NTER:

...little or no baseline data existed to specifically evaluate the impacts of the NTER....Apart from some initial scoping data, there was little evidence of baseline data being gathered in any formal or organised format which would permit an assessment of the impact and progress of the NTER upon communities. The lack of empirical data has proved to be a major problem for this Review and is an area that requires urgent attention.⁷⁹

http://www.facsia.gov.au/sa/indigenous/pubs/nter_reports/policy_statement_nter/Documents/landmark_reform_welfare_system.pdf (viewed 20 January 2010).

⁷⁷ Aboriginal and Torres Strait Islander Commissioner, *Social Justice Report 2007* (2008), p 32. At http://humanrights.gov.au/social_justice/sj_report/sjreport07/chap3.html (viewed 20 January 2010).

⁷⁸ Human Rights and Equal Opportunity Commission, *Submission to the Northern Territory Emergency Response Review Board* (2008), Summary. At http://humanrights.gov.au/legal/submissions/2008/20080815_nt_response.html (viewed 20 January 2010).

⁷⁹ Northern Territory Emergency Response Review Board, *Report of the NTER Review Board* (2008), p 16. At http://www.nterreview.gov.au/docs/report_nter_review.PDF (viewed 20 January 2010).

172. The AIHW also noted similar difficulties in its recent review of income management under the NTER:

The research studies used in the income management evaluation (point-in-time descriptive surveys and qualitative research) would all sit towards the bottom of an evidence hierarchy. A major problem for the evaluation was the lack of a comparison group, or baseline data, to measure what would have happened in the absence of income management.⁸⁰

173. While, the Commission welcomes the proposed evaluation of the NTER in 2012, the concerns about data raised by both the NTER Review Board and the AIHW highlight that the government has still not collected adequate data to be able to conclusively demonstrate a positive impact of the NTER measures. The Commission encourages stronger data collection structures be established to develop a proper evidence based approach for determining if the NTER measures are effective and should be continued or expanded in the future.

11 Inadequate consultation timeframes for the Senate Inquiry

174. The lack of adequate consultation processes and timeframes has beleaguered the NTER since its introduction in 2007.

Our visits to communities left us with a clear impression that there has been a progressive disengagement by government agencies from Aboriginal communities. By this we mean that not only are there few government personnel located in communities but that decisions affecting the communities in a very direct way were seen by the communities to be made by unknown people 'in Canberra'.⁸¹

175. When the initial NTER Bills were submitted to the Senate Committee for review in 2007, the Commission commented on the lack of consultation time provided during the Senate Inquiry for meaningful consideration and review:

Almost every witness before the Senate Inquiry, as well as those that made written submissions to Parliament on the legislation, noted with regret the inability of the primary stakeholders to meaningfully interact with the process that was being set up to govern them.⁸²

176. Proper and adequate consultation with affected communities and organisations is a central and necessary component of the NTER. This was

⁸⁰ Australian Institute for Health and Welfare, *The evaluation of income management in the Northern Territory* (2010), p iv. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/nt_eval_rpt/.htm (viewed 20 January 2010).

⁸¹ Northern Territory Emergency Response Review Board, *Report of the NTER Review Board* (2008), p 48. At http://www.nterreview.gov.au/docs/report_nter_review.PDF (viewed 20 January 2010).

⁸² Aboriginal and Torres Strait Islander Commissioner, *Social Justice Report 2007* (2008), p 211. At http://humanrights.gov.au/social_justice/sj_report/sjreport07/chap3.html (viewed 20 January 2010).

highlighted in the NTER Review Board's Report in 2008, which recommended that:

In addressing these needs both governments acknowledge the requirement to reset their relationship with Aboriginal people based on genuine consultation, engagement and partnership.⁸³

177. The importance of proper consultation with affected Indigenous communities is also recognised in the Declaration. It is also central to the principle of free, prior and informed consent, contained in the Declaration, which should frame the Governments model of consultation.
178. The timeframe for this Senate Inquiry has been too short to allow for proper and extensive consultations or for it to receive submissions from a wide range of affected persons. This is primarily because both the Christmas holiday period and the Northern Territory's wet season fall within the reporting period. The impact of this is that very few organisations and communities will be operating at their full capacity during this period. Consequently, the capacity of individuals and organisations to provide submissions and engage in public hearings with the Committee will be noticeably limited.
179. The Common Understanding on free, prior and informed consent indicates that the time frame should respect the requirements of Indigenous peoples in the consultation process.
180. The Commission notes that the inadequate timeframes provided for this Senate Inquiry, once again, has inhibited the process for adequate consultation and engagement with affected communities and primary stakeholders.

⁸³ Northern Territory Emergency Response Review Board, *Report of the NTER Review Board* (2008), p 48. At http://www.nterreview.gov.au/docs/report_nter_review.PDF (viewed 20 January 2010).

Appendix A: Draft guidelines for ensuring income management measures are compliant with the *Racial Discrimination Act*⁸⁴

(See attached)

⁸⁴ Australian Human Rights Commission, *Draft guidelines for ensuring income management measures are compliant with the Racial Discrimination Act* (2009). At http://humanrights.gov.au/racial_discrimination/publications/RDA_income_management2009_draft.html (viewed 20 January 2010).

Appendix B: Social Justice Report 2007: Recommendations 3-14⁸⁵

The Northern Territory 'Emergency Response' intervention – A human rights analysis

Recommendation 3: Provision of external merits review of administrative decision-making

That the Parliament should immediately repeal all provisions which deny external merits review. These provisions should be replaced with provisions which make explicit that merits review processes do apply. This includes, but is not limited to, the following provisions:

- sections 34(9), 35(11), 37(5), 47(7), 48(5) and 49(4) of the *Northern Territory National Emergency Response Act 2007* (Cth) relating to determinations about Indigenous land;
- section 78 and sections 97 and 106 of the *Northern Territory National Emergency Response Act 2007* (Cth) in relation to decisions by the Minister to suspend all the members of a community government council, and decisions of the Secretary of the Department of FACSIA in relation to community store licences respectively; and
- new section 144(ka) of the *Social Security (Administration) Act 1999* (enacted by the *Social Security and other legislation amendment (Welfare Payment Reform) Act 2007* (Cth)) in relation to the right to seek a review by the Social Security Review Tribunal of decisions that relate to income management.

Note on implementation: This action can only be achieved through amendments to the legislation.

Recommendation 4: Reinstatement of the *Racial Discrimination Act 1975* (Cth)

That the Parliament immediately repeal the following provisions that exempt the NT measures from the protections of the *Racial Discrimination Act 1975* (Cth):

- section 132(2), *Northern Territory National Emergency Response Act 2007* (Cth);
- section 4(2), *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth); and
- section 4(3),(5) and section 6(3), *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth).

Note on implementation: This action can only be achieved through amendments to the legislation.

⁸⁵ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007* (2008), pp 303-308. At http://humanrights.gov.au/social_justice/sj_report/sjreport07/chap3.html (viewed 20 January 2010).

Recommendation 5: Subject the NT intervention measures to the safeguards of the *Racial Discrimination Act 1975* (Cth)

That the Parliament amend each of the following Acts by inserting a *non-obstante* clause in order to ensure that the NT provisions are subject to the protections of the RDA in the exercise of all discretions under the legislation:

- section 132, *Northern Territory National Emergency Response Act 2007* (Cth);
- section 4, *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth); and
- section 4 and section 6, *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth).

Section 4 of the *Social Security Legislation Amendment (Newly Arrived Residents' Waiting Periods and Other Measures) Act 1997* (Cth) provides a model for such a clause.

Such a clause might read as follows:

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

Note on implementation: This action can only be achieved through amendments to the legislation.

Recommendation 6: Amend the ‘special measures’ provisions of the NT legislation

That the Parliament amend the following provisions of the NT intervention legislation to clarify the status of the measures as ‘special measures’ under the RDA:

- section 132(1), *Northern Territory National Emergency Response Act 2007* (Cth);
- section 4(1), *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth); and
- section 4(1), (2) and (4), and section 6, *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth).

In particular, Parliament should:

- remove those provisions which *deem* the measures to constitute a special measure;
- replace these provisions with language which clarifies that the measures are *intended* to constitute special measures; and
- insert new provisions that require that in the performance of any actions undertaken to implement the measures contained in the legislation, the intended beneficial purpose of the legislation must be a primary consideration.

Note on implementation: This action can only be achieved through amendments to the legislation.

Recommendation 7: Subject the intervention measures to regular monitoring and review to establish whether they meet the purposes of a ‘special measure’

That the government ensure strict monitoring and evaluation provisions to ensure that only those measures that are appropriate and adapted to the purpose of child protection are maintained. Such monitoring should particularly focus on measures relating to income management, alcohol bans, changes to the permit system and compulsory acquisition of Aboriginal land.

Note on implementation: This action can be achieved through the exercise of powers vested in the Minister for Indigenous Affairs. It may require amendments to the legislation by Parliament at a future time.

Recommendation 8: Application of the *Anti-Discrimination Act 1992 (NT)*

a) That the Minister for Indigenous Affairs declare that the *Anti-Discrimination Act 1992 (NT)* continues to have effect in all prescribed communities under the NT intervention legislation and that the *Anti-Discrimination Act 1991 (Qld)* continues to be of effect in relation to welfare reforms in Cape York.

b) That Parliament repeal the following provisions of the legislation to remove this restriction on Indigenous peoples right to obtain remedy:

- section 133, *Northern Territory National Emergency Response Act 2007 (Cth)*;
- section 5, *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 (Cth)*; and
- section 5, *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (Cth)*.

Note on implementation: This action can be achieved in the short term through the exercise of powers vested in the Minister for Indigenous Affairs. This should be backed up by amendments to the legislation by Parliament to confirm that discriminatory provisions have no place in Australian law and to ensure full compliance with Australia’s human rights obligations.

Recommendation 9: Negotiate with Aboriginal owners in relation to access to Aboriginal land

That the Minister for Indigenous Affairs place a moratorium on 5 year compulsory leases over Aboriginal land. Further, that the Minister direct public servants and Government Business Managers to conduct negotiations with Aboriginal communities to obtain access to Aboriginal land for infrastructure and related purposes.

Note on implementation: This action can be achieved through the exercise of Ministerial discretion (such as by choosing to **not** exercise her discretion to

compulsorily acquire property and instead instructing government officials to negotiate with Aboriginal communities).

Recommendation 10: Amend the legislation to ensure the entitlement to ‘just terms’ compensation

That the Parliament amend sections 60 and 134 of the *Northern Territory National Emergency Response Act 2007* (Cth) to remove the exemption from section 50(2) the *Northern Territory (Self Government) Act 1978*.

Note on implementation: This action can only be achieved through amendments to the legislation.

Recommendation 11: Reinstate CDEP and develop community based options for income management

a) That the CDEP scheme be reinstated in the Northern Territory, with community economic development plans developed into the future to ensure the transition from CDEP into ‘real jobs’ where possible.

b) That voluntary income management measures be introduced for CDEP participants.

c) That the income management regime under the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) be reviewed and amended to ensure compliance with human rights standards as outlined in this report.

d) That the government support the development and introduction of voluntary income management and financial literacy programs for welfare recipients. When such programs are operational in prescribed Aboriginal communities, individuals and potential communities should be exempted by the Minister from the mandatory income management regime as set out in the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth).

Note on implementation: Aspects of this action require amendments to the legislation, while others can be achieved through the exercise of Ministerial discretion or at the operational level in delivering services to communities.

Recommendation 12: Supporting community based initiatives for alcohol management

That the alcohol management scheme established in the *Northern Territory National Emergency Response Act 2007* (Cth) be reviewed to establish its workability as well as whether it adds value beyond the measures relating to dry community restrictions and permits adopted by the Northern Territory Liquor Commission.

That all alcohol management processes should occur consistent with the RDA. Central to this is ensuring the participation of Indigenous peoples in developing, implementing and monitoring alcohol management plans.

Note on implementation: Aspects of this action may ultimately require amendments to the legislation, while others can be achieved through the exercise of Ministerial discretion or at the operational level in delivering services to communities.

Recommendation 13: Ensuring Indigenous participation and developing community partnerships

That the Minister for Indigenous Affairs direct the NT Emergency Response Taskforce and all public servants to ensure the participation of Indigenous peoples in all aspects of the design, delivery and monitoring of the intervention measures.

That the Minister task Government Business Managers operating at the local level to develop **Community Partnership Agreements** as the basis for shared action by the community and governments. Such agreements should be developed with the express purpose of setting a comprehensive community development plan for communities as an alternative that can ultimately supersede the application of various intervention measures (such as mandatory income management).

Note on implementation: This action can primarily be achieved through the exercise of Ministerial discretion or at the operational level in delivering services to communities. A process of Community Partnership Agreements may ultimately require amendments to the legislation in the future.

Recommendation 14: Monitoring and evaluation of the NT intervention

That the intervention measures be independently monitored 12 months following their commencement to establish whether the legislation is achieving its intended purposes; is resulting in unintended negative consequences; and to assess appropriate alternative approaches or mechanisms that would enhance the ability of the legislation to achieve its purpose.

Such a review should ensure the full participation of Indigenous peoples in affected communities in the NT and should also address the specific concerns raised in this report relating to human rights compliance

Note on implementation: This action can primarily be achieved through the exercise of Ministerial discretion or at the operational level in delivering services to communities.

Appendix C: Social Justice Report 2007: Modifying the NT intervention measures so that they comply with human rights – a ten point action plan for the future of Aboriginal children in the Northern Territory⁸⁶

In this final section of this report I outline a **Ten Point Action Plan** for modifying the NT intervention so that it respects the human rights of Aboriginal people and treats us with dignity. This ten point plan is as follows:

Action 1: Restore all rights to procedural fairness and external merits review under the NT intervention legislation;

Action 2: Reinstate protections against racial discrimination in the operation of the NT intervention legislation;

Action 3: Amend or remove the provisions that declare that the legislation constitutes a 'special measure'

Action 4: Reinstate protections against discrimination in the Northern Territory and Queensland

Action 5: Require consent to be obtained in the management of Indigenous property and amend the legislation to confirm the guarantee of just terms compensation

Action 6: Reinstate the CDEP Program and review the operation of the income management scheme so that it is consistent with human rights

Action 7: Review the operation and effectiveness of the alcohol management schemes under the intervention legislation

Action 8: Ensure the effective participation of Indigenous peoples in all aspects of the intervention – Developing Community Partnership Agreements

Action 9: Set a timetable for the transition from an 'emergency' intervention to a community development plan

Action 10: Ensure stringent monitoring and review processes.

In putting forth this plan, I note that the newly elected federal government has emphasised the importance of ensuring that the NT intervention proceeds in a manner that is consistent with Australia's human rights obligations. For example, they have stated that 'Observing the integrity of the Racial Discrimination Act is a basic principle for this country and a basic principle for the Indigenous community of this country'.

Accordingly, this action plan provides a platform for the newly elected government to meet their stated commitments in relation to the NT intervention. The overall objective of this

⁸⁶ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007* (2008), p 294. At http://humanrights.gov.au/social_justice/sj_report/sjreport07/chap3.html (viewed 20 January 2010).

action plan is to remove the discrimination from the legislation and in its operation. There are three main ways that the NT intervention can be modified:

- amending the NT intervention legislation;
- utilising the powers provided under the legislation (predominately through powers to make non-reviewable legislative instruments, vested in the Minister for Indigenous Affairs); or
- in the operation of the measures in communities.

So long as the NT intervention legislation permits the conduct of racially discriminatory actions, it will lack legitimacy among Aboriginal people and communities as well as the broader Australian society. It will also leave Australia in breach of its international human rights obligations.



Australian
Human Rights
Commission

everyone, everywhere, everyday

Draft guidelines for ensuring income management measures are compliant with the *Racial Discrimination Act*

.....

Australian Human Rights Commission

11 November 2009

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1. Introduction

1. Section 20(d) of the *Racial Discrimination Act 1975* (Cth) (RDA) provides the Australian Human Rights Commission with a function to 'prepare, and to publish in such manner as the Commission considers appropriate, guidelines for the avoidance of infringements of Part II or Part IIA' of the Racial Discrimination Act.¹
2. The Commission has issued these draft guidelines to provide practical assistance to Parliament and the Government in designing and implementing income management measures that protect human rights and are consistent with the RDA. They are also intended to increase awareness among affected communities about the application of the RDA to income management regimes.
3. While not legally binding, they provide important guidance as to the operation of the RDA and will be relevant in assisting the resolution of complaints.²
4. The draft guidelines contain two sections which should be read concurrently:
 - Section one: poses three key questions to consider when developing and implementing an income management measure so it is compliant with the RDA and outlines the steps to achieve this.
 - Section two: provides background information on the legal basis for the different elements discussed in the first section. It also provides the background on existing income management regimes nationally and considers the extent to which they are consistent with the RDA.
5. In the Commission's view, taking the approach set out in these draft guidelines will not only ensure that such measures are compliant with fundamental human rights and discrimination laws, they will also help to ensure that they are effective.
6. The guidelines provide a framework to ensure that competing human rights concerns can be balanced in a manner that is appropriate and consistent with Australia's human rights obligations.
7. These guidelines have been released in draft format on the Commission's website to encourage feedback and comments. The Commission particularly wants to hear how the guidelines could be modified and improved to be a more useful and practical tool.
8. Comments should be provided to the Australian Human Rights Commission by close of business, **Friday 12 February 2010**.

¹ Part II relates to the prohibition of racial discrimination and Part IIA to the prohibition of offensive behaviour based on racial hatred.

² Note that these guidelines do not alter the operation of the RDA and compliance with them does not constitute a defence to an allegation of discrimination under the RDA.

9. The Commission aims to finalise the guidelines in early 2010.

2. Key questions

10. This section poses three key questions to consider when developing and implementing an income management measure so it is compliant with the RDA and outlines the steps to achieve this. The key questions are:

- Where the measure is established by legislation, does it ensure equality before the law?
- Is the measure implemented in a way that avoids both 'direct' and 'indirect' discrimination?
- Is the measure a 'special measure'?

2.1 Does the income management measure ensure equality before the law?

11. Where income management measures are established by law, the measure should ensure human rights are enjoyed equally by all racial groups (s10 of the RDA).³

12. Income management measures may impact upon the enjoyment of a number of human rights including, most prominently, the right to social security. This is a right relevant to both adults who may be entitled to social security and their children under Article 26 of the *Convention on the Rights of the Child*.

13. In determining whether an income management measure ensures equal human rights for all, you should ask:

- (a) Does the measure have a disparate impact upon the ability of people of a particular race to enjoy a right? If it does, the measure may be discriminatory.

It is not necessary that the measure *target* a particular racial group, *apply* only to that racial group or *intend* to have a disparate impact upon members of that group. What matters is the practical effect of a measure. If, in practice, it has a greater impact upon people of a particular race, then it may be discriminatory.

- (b) Is any limitation on the right a legitimate one, intended to achieve a non-discriminatory purpose? If it is not, the measure will be discriminatory.

To be legitimate, any limitation on a right should meet the following criteria:

³ For the purposes of these guidelines, the term 'race' is used as shorthand for 'race, colour or national or ethnic origin'.

- The purpose of the limitation should be directly linked to the promotion of another human right, such as those protected by the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR'), the *International Covenant on Civil and Political Rights* ('ICCPR'), the *Convention on the Elimination of Discrimination Against Women* ('CEDAW') and the *Convention on the Rights of the Child* ('CRC'). Administrative convenience or efficiency will not be a legitimate purpose to justify racial distinction.
- The limitation must be *proportionate* to the benefit being sought by the measure. This in turn requires that:
 - the benefit be clearly identified, and
 - the measure be the least restrictive/interfering option available to achieve that benefit.

In practice, other ways of achieving the relevant benefit that do not have a disparate impact upon the rights of people of a particular race should be considered first. Only if the purpose of the measure cannot reasonably be achieved by those other methods can a limitation be described as 'proportionate', and therefore legitimate.

- Where an income management measure targets or impacts upon particular groups, working with those groups in the design and implementation of the measure will be important in establishing its legitimacy.

For Aboriginal and Torres Strait Islander communities, the right to self-determination means that their effective participation in any decision is fundamental to the legitimacy of a measure. A standard of free, prior and informed consent should always be applied (see key elements of free, prior and informed consent in Appendix 1).

2.2 Does implementation of the measure involve discrimination?

14. Discretionary actions and decisions taken in the implementation of an income management measure must also avoid 'direct' and 'indirect' racial discrimination (sections 9(1) and 9(1A) of the RDA).

'Direct discrimination': s 9(1)

15. There are two central questions in assessing whether an income management measure may involve 'direct' discrimination. These include:

- (a) Are there any discretionary acts done in the implementation of the income management measure that involve a distinction, exclusion,

restriction or preference based on race? If so, the acts may be discriminatory.

An act will be 'based on race' where there is a sufficient connection between the act and the race of a person or group. It is not necessary to show a causal connection or that a person had an intention to discriminate - discrimination can be unintentional and unconscious.

- (b) Does the act have a negative impact on the equal enjoyment of rights in public life by people of that race?

The practical effect of an act 'based on race' must be considered. If its practical effect is to limit the enjoyment of a human right, it is discriminatory.

'Indirect discrimination': s 9(1A)

16. 'Indirect discrimination' occurs when a term, condition or requirement is imposed *generally* that is unreasonable and has a disparate impact on people of a particular race.
17. In assessing whether actions taken in the implementation of an income management measure may indirectly discriminate against people of a particular race, it is necessary to ask:
- (a) Are there any terms, conditions or requirements being imposed that are unreasonable (both in terms of what they require or how they are applied)?
- (b) Are there people of a particular race who are unable to comply with the relevant term, condition or requirement?
- (c) Does the requirement to comply have a negative impact upon the equal enjoyment of rights in public life by people of that race?
18. If the answer to all of these questions is 'yes', the implementation of the income management measure is indirectly discriminatory.

2.3 Is the measure a 'special measure' that meets the requirements of the RDA?

19. If a measure is non-discriminatory, then it is not necessary to consider whether it is a 'special measure'.
20. For an income management measure to meet the requirements of a special measure it must comply with all of the following criteria:
- the measure must confer a *benefit* on some or all members of a class of people
 - membership of this class must be based on race, colour, descent, or national or ethnic origin

- The *sole purpose* of the measure must be to secure adequate advancement of the beneficiaries so they may equally enjoy and exercise their human rights and fundamental freedoms;
 - The protection given to the beneficiaries by the measure must be necessary for them to enjoy and exercise their human rights equally with others; and
 - The measure must not have already achieved its objectives.
21. To meet the requirement outlined above that the sole purpose of the measure is to secure adequate advancement of the beneficiaries, the following should be considered:
- When assessing the 'adequate advancement' of a group, it is necessary to consider their views. Because income management measures operate by limiting certain rights, both consultation with and consent of the group to whom it applies is essential.
 - In dealing with Indigenous communities, the standard of free, prior and informed consent should be applied. See Appendix 1 for an overview of the key elements of the standard of free, prior and informed consent.
 - The consultation process must be a real opportunity for engagement. It should aim for full and equitable participation across and between affected communities. (For a brief guide to good practice for community consultations see Appendix 2).
22. In relation to the requirement that the protection given to the beneficiaries by the measure must be necessary for them to enjoy and exercise their human rights equally with others, you should be aware that:
- If the benefits of the measure can be achieved without making a racial distinction, the measure will not be necessary.
 - Demonstrating necessity requires evidence - current and credible evidence which shows that the measure will be effective. The data must be reliable, credible and where possible, supported by both qualitative and quantitative sources.
 - All parts of the measure must be appropriate and adapted to meet the intended purpose.
 - The measure must also be monitored and evaluated to ensure that it is working effectively. Without this it is not possible to establish whether the measure is necessary or not. (For a brief guide to good practice for monitoring and evaluation see Appendix 3).
23. To meet the requirement that the measure must not have already achieved its objectives - regular monitoring and evaluation is also required to assess if the objectives of the measure have been met. This includes:

- whether the measures are appropriate and suitably adapted to their stated purpose
- whether the measures are having the intended (immediate/short-term and/or long-term) effect
- whether there are any emerging, unintended consequences of the measures
- whether there are any negative flow on effects from the measures?
- whether there is a continuing need for the measures, that is, have they already achieved their stated purpose?

3. Commentary

24. This section provides background information on the legal basis for the different elements discussed in the first section. It also provides background on the recent income management measures and considers the extent to which current income management measures are consistent with the RDA.

3.1 Background

25. On 21 June 2007, the Australian Government announced the Northern Territory Emergency Response (NTER) to protect Aboriginal children in the Northern Territory from sexual abuse and family violence.

26. The *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) was part of the package to enable the NT intervention. Schedule 1 of the Act authorises a variety of income management measures.

27. The purpose of the income management measures is to promote socially responsible behaviour, particularly in relation to the care and education of children, by quarantining the suspended payments to ensure that they are only spent on food and other essential items. The quarantined income can not be used to purchase alcohol, tobacco products or pornographic material.⁴

28. The Act provides for five different types of income management measures for people receiving welfare, including:

- **Declared relevant Northern Territory area**

A person can be subject to an income management measure if the person lives in a declared relevant Northern Territory area (s 123UB).

- **Child protection notices**

Child protection officer of a State or Territory can require a person to be subject to the income management regime (s 123UC).

- **School enrolment in declared primary school area and declared secondary school area**

⁴ The objects of the legislation under section 123TB are as follows:

- (a) to promote socially responsible behaviour, particularly in relation to the care and education of children
- (b) to set aside the whole or a part of certain welfare payments
- (c) to ensure that the amount set aside is directed to meeting the priority needs of:
 - I. the recipient of the welfare payment
 - II. the recipient's partner
 - III. the recipients children
 - IV. any other dependants of the recipient.

A person can be subject to an income management measure if the person, or the person's partner, has a child who does not meet school enrolment requirements (s 123UD).

- **School attendance in declared primary school area and declared secondary school area**

A person can be subject to an income management measure if the person, or the person's partner, has a child who has unsatisfactory school attendance (s 123UE).

- **Queensland Commission**

A person can be subject to an income management measure if required by the Queensland Commission (s 123UF).

29. While the first measure is specific to the Northern Territory and the last measure only operates in specific areas of Queensland, the remaining measures have a national application and can be introduced in any State or Territory of Australia.

30. At the time the NTER measures were introduced, the *Social Security (Administration) Act* stated that: 'a decision under Part 3B of this Act that relates to a person who is subject to the income management regime under section 123UB cannot be reviewed by the Social Security Appeals Tribunal' (and subsequently the Administrative Appeals Tribunal).

31. However, an individual can ask the original decision maker or an authorised review officer to review the decision; can seek review under the *Administrative Decisions (Judicial Review) Act 1977*; or lodge a complaint with the Commonwealth Ombudsman. Also, payment suspensions due to a failure to respond to the income management letter, or attend an income management interview, are not made under Part 3B of the *Social Security (Administration) Act* and are subject to the usual review and appeals process.

32. In June 2009, the *Family Assistance and Other Legislation Amendment (2008 Budget and Other Measures) Act 2009* amendments were passed enabling the Social Security Appeals Tribunal and the Administrative Appeals Tribunal to review a decision made under Part 3B of the *Social Security (Administration) Act* about a person who is subject to the Northern Territory income management regime.

3.2 Current status of income management measures

33. To date, the following income management measures have been introduced:

- 73 prescribed communities in the Northern Territory have been determined to be declared areas in the NT for the purposes of income management;
- The Families Responsibilities Commission was established in Queensland (*Family Responsibility Commission Act 2008* (Qld)) for the

Cape York Welfare Reform Trial and operates in the Aurukun, Coen, Hope Vale and Mossman Gorge communities and associated outstations.

- A trial in the Logan area (across Woodridge, Kingston, Logan Central and Eagleby), Queensland. This is the first welfare reform trial in Australia that targets a densely populated, urban mainstream community.
- In conjunction with the Western Australian Government, an income management measure for child protection was introduced in selected areas of WA (Cannington and Kimberley region). Under this measure a case manager from the WA Department for Child Protection can refer a person to Centrelink for income management.

34. In addition, the *Social Security and Veterans' Entitlements Legislation Amendment (Schooling Requirements) 2008 Act*, established an income management measure for school enrolment and attendance in two metropolitan locations in Western Australia and six Northern Territory communities (Hermannsburg, Katherine, Katherine town camps, Wallace Rockhole, Wadeye and Tiwi Islands).
35. There are also examples of voluntary income management measures. Such measures have been introduced under the Cape York Welfare Reform Trial and under the child protection income management measure in WA.⁵
36. There also continues to be provision under social security legislation to make regular payments to a registered service provider directly from Centrelink payments.⁶
37. This provision has been the basis for voluntary income management measures, such as the Tangentyere Council's food voucher system, which has been in operation for 25 years, pre-dating the income management measures under the NTER. Under the food voucher system, people receiving Centrelink payments can choose to have a nominated amount of money deducted from their Centrelink payments every fortnight. This money is then provided to them in the form of a food voucher, which is issued through the Tangentyere community banking service. The Council supports over 800 Aboriginal people under this voluntary measure.⁷
38. Of the four income management measures outlined above (not including the voluntary income management measures) the 'School enrolment and attendance measure (WA/ NT)' is the only one that is not exempted from the RDA and state/territory anti-discrimination legislation.

⁵ Section 123TGA of the *Social Security (Administration) Act 1999* also provides for the Minister to declare a specified State, Territory or area as a declared voluntary income management area for the purposes of this Part.

⁶ Centrelink, *Voluntary Income Management* (2008). At [http://www.centrelink.gov.au/internet/internet.nsf/filestores/co508_0808/\\$file/co508_0808en.pdf](http://www.centrelink.gov.au/internet/internet.nsf/filestores/co508_0808/$file/co508_0808en.pdf) (viewed 1 October 2009).

⁷ Tangentyere Council, 'Tangentyere's Voluntary Food Voucher System'. At http://www.tangentyere.org.au/services/finance/food_voucher/ (viewed 1 October 2009).

39. All four of the income management measures now allow for Commonwealth and state review processes and appeal rights, but, with the exception of the 'School enrolment and attendance measure (WA/ NT)', only for decisions made after 1 July 2009.
40. The '73 prescribed communities measure (NT)' applies mandatory quarantining within a declared area. In contrast, the 'Cape York Welfare Reform Trial measure (QLD)', the 'Child protection measure (WA)' and the 'School enrolment and attendance measure (WA/ NT)' are based on an opt-in or last-resort suspension model⁸

3.3 Racial discrimination and income management measures

41. To date, income management measures have been introduced primarily under the NTER legislation, which declares that the whole legislation is a special measure, as well as exempting the legislation and acts done under it from the RDA.⁹
42. The Commission and Indigenous communities have expressed concerns that the measures involve breaches of human rights.¹⁰ In particular, concerns have focused on the potentially racially discriminatory impact of the measures, the characterisation of the measures as 'special measures' accompanied by the exclusion from the protection of racial discrimination laws, and the lack of participation and consultation with Indigenous peoples in the formulation and implementation of the measures. Measures that violate the human rights of the intended beneficiaries are more likely to work in ways that undermine the

⁸ An example of the last-resort suspension model can be seen in the Cape York Welfare Reform Trial which operates as follows: A person is referred by an agency to the Families Responsibilities Commission if:
a person's child is absent from school three times in a school term, without reasonable excuse
a person has a child of school age who is not enrolled in school without lawful excuse
a person is the subject of a child safety report
a person is convicted of an offence in the Magistrates Court, or
a person breaches his or her tenancy agreement - for example, by using the premises for an illegal purpose, causing a nuisance or failing to remedy rent arrears.

Once the Commission receives an agency notice, a process is followed where it is determined if the person is within the jurisdiction of the Commission. Upon determination of jurisdiction, the matter is then referred to the Local Commissioners for a decision about whether to order the person to attend a conference. A conference proceeds where the client may be encouraged to enter in an agreement, or an order is made to refer the person to community support services. The matter is then case managed by the Commission for the period of the order/agreement. Where a person does not comply, show cause proceedings are initiated and the client is ordered to appear before the Commission to explain reasons for non-compliance and if necessary an order for Conditional Income Management (CIM) may be made. (Families Responsibilities Commission, *Quarterly Report No. 3 January – March 2009, Report to the Family Responsibilities Board and the Premier of Queensland* (2009). At <http://www.atsip.qld.gov.au/government/families-responsibilities-commission/documents/frc-quarterly-report-3.doc> (viewed 1 October 2009).)

⁹ *Northern Territory National Emergency Response Act 2007* (Cth), s 132(2); *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth), ss 4(3), (5); *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth), s 4 (2).

¹⁰ Aboriginal and Torres Strait Island Social Justice Commissioner, *Social Justice Report 2007* (2008), ch 3. At http://humanrights.gov.au/social_justice/sj_report/sjreport07/index.html. (viewed 1 October 2009). See also: 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*, Canberra, 27 August 2009. At <http://www.un.org.au/files/files/Press%20Release%20-%20Australia%20JA%20final.pdf>

overall well-being of these communities in both the short and longer term than measures that respect their human rights.

43. In its response to the NTER Review, the Government has committed to introducing legislation into the Parliament in the Spring sittings of 2009 to remove the provisions in the current NTER Acts that exclude the operation of the RDA and state/territory anti-discrimination legislation.
44. On 21 May 2009, the Government released a discussion paper setting out proposals for the measures affected by the RDA, including the income management measures. Community consultations are underway to assess how these measures might be improved and amended to conform with the RDA.
45. These guidelines are aimed at ensuring that income management measures are designed and implemented so as to be consistent with the RDA and accordingly Australia's international legal obligations under the International Convention on the Elimination of All Forms of Racial Discrimination¹¹ (ICERD), upon which the RDA is based.

3.4 Making income management consistent with the RDA

46. There are two ways to ensure income management measures are consistent with the RDA:
 - ensure that the structure and implementation of an income management measure avoids racial discrimination, or
 - develop and implement the measure as a 'special measure' under the RDA.

Option 1: Avoiding discrimination in the structure and implementation of the income management measure

47. The RDA seeks to ensure that laws do not breach the rights of people of a particular race (the right to equality before the law, s 10) and prohibits actions that discriminate against people based on their race, colour or national or ethnic origin (the prohibition on discrimination ss 9, 11-5).
48. In the context of income management regimes, it is necessary to consider both
 - the laws that establish the regime to ensure that such laws do not impair the right to equality before the law, and
 - the manner in which such laws are implemented to ensure that such acts do not discriminate based on race.

¹¹ Opened for signature 21 December 1965 (entered into force 4 January 1969 except for art 14 which came into force 4 December 1982). ICERD entered into force for Australia on 30 October 1975 and art 14 with effect from 28 January 1993.

Right to equality before the law

49. Section 10 of the RDA creates a general right to equality before the law. The section is concerned with ensuring the equal enjoyment of rights of all persons under law.¹²

50. It provides:

10. Rights to equality before the law

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

(2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.

51. It is not necessary for a law to single out people of a particular race for it to engage s 10(1). The section is directed at 'the practical operation and effect' of laws and is 'concerned not merely with matters of form but with matters of substance'.¹³

52. Determining whether s 10(1) has been breached requires asking:

- whether there is a relevant 'right' or 'rights' that are affected by the impugned law, and
- whether persons of a particular race do not enjoy that right or enjoy it to a more limited extent than persons of another race by reason of the impugned law. This requires asking:
 - does the law limit the enjoyment of a right by people of a particular race relative to others, and
 - is the limitation a legitimate one, intended to achieve a non-discriminatory purpose?¹⁴

What are the relevant 'right' or 'rights' that are affected?

53. Article 5 of ICERD sets out an extensive list of rights, covering civil, political, economic, social and cultural rights. However, s 10(2) makes clear that the rights covered by s 10(1) are not limited to those referred to in ICERD.

¹² *Gerhardy v Brown* (1985) 159 CLR 70 ('Gerhardy'), 99 (Mason J); *Western Australia v Ward* (2002) 213 CLR 1 ('Ward'), [105] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

¹³ *Jango v Northern Territory* (2007) 159 FCR 531 [115]; *Gerhardy* (1985) 159 CLR 70, 99 (Mason J); *Ward* (2002) 213 CLR 1, 107 at [126] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

¹⁴ *Bropho v State of Western Australia* [2008] FCAFC 100 ('Bropho'), [81]-[83].

54. The rights protected by s 10 should be understood very broadly. It is not necessary that a right be one that is recognised in Australian law.¹⁵
55. A 'right' under s 10 should be understood to exist where there is 'a moral entitlement to be treated in accordance with standards dictated by the fundamental notions of human dignity and essential equality which underlie the international recognition of human rights'.¹⁶ A law will engage a right if it impacts upon a persons ability to 'live in full dignity', 'engage freely in any public activity' or 'enjoy the public benefits of... society'.¹⁷
56. This approach is consistent with the broad purpose of s 10. As its title makes clear, s 10 is intended to guarantee equality before the law. That purpose is also clear from the second reading speech of the Racial Discrimination Bill 1975: 'The Bill will guarantee equality before the law without distinction as to race'.¹⁸
57. In the context of income management measures, the right to social security is clearly one right that is engaged. Such measures may also impact upon the right to privacy where they allow for, or require, the disclosure of information in determining which people can be made the subject of a measure.¹⁹

Do persons of a particular race not enjoy a right or enjoy it to a more limited extent than persons of another race by reason of the law?

58. As noted above, there are two aspects to this question.
59. *First, does the law limit the enjoyment of a right by people of a particular race relative to others?*
60. Section 10 (1) of the RDA is engaged where there is unequal enjoyment of rights between racial groups by reason of the law that is being considered. It is not necessary to show that this effect is the intention or purpose of the law. The focus is on its practical operation and effect.²⁰
61. The central issue here is whether a law has a disparate impact upon people of a particular racial group.²¹

¹⁵ *Mabo v Queensland* (1988) 166 CLR 186 ('*Mabo No. 1*'), 217 (Brennan, Toohey and Gaudron JJ). See also *Gerhardy* (1985) 159 CLR 70, 126 (Brennan J).

¹⁶ *Mabo No. 1* (1988) 166 CLR 186, 229 (Deane J).

¹⁷ *Gerhardy* (1985) 159 CLR 70, 126 (Brennan J).

¹⁸ Commonwealth, *Parliamentary Debates*, Senate, 15 April 1975, 999 (James McClelland, Minister for Manufacturing Industry).

¹⁹ Aboriginal and Torres Strait Island Social Justice Commissioner, *Social Justice Report 2007* (2008), 278. At http://humanrights.gov.au/social_justice/sj_report/sjreport07/index.html. (viewed 1 October 2009).

²⁰ *Bropho* [2008] FCAFC 100, [73]; *Ward* (2002) 213 CLR 1, 103.

²¹ The CERD Committee has noted in General Recommendation 32: 'The term 'non-discrimination' does not signify the necessity of uniform treatment when there are significant differences in situation between one person or group and another, or, in other words, if there is an objective and reasonable justification for differential treatment. 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. The Committee has also observed that the application of the principle of non-discrimination requires that the characteristics of groups be taken into consideration'. (Committee on the Elimination of Racial Discrimination,

62. In the case of income management, where a measure operates in a particular location that is predominantly populated by people of a particular race, the measure is likely to have a disparate impact upon people of that racial group.
63. *Second, is the limitation a legitimate one, intended to achieve a non-discriminatory purpose?*
64. As most rights are not absolute, it may be permissible to limit them in pursuit of a legitimate, non-discriminatory goal. In determining whether a limitation is 'legitimate', the following principles should be applied:
- When determining the legitimacy of a limitation of a right, the assessment is an objective one – it is not sufficient, for example, that the law-maker lacks a discriminatory motive or intention.
 - Proportionality will be a vital factor in making assessments of what is legitimate – a measure will not be legitimate if its impact upon rights is disproportionate to the claimed purpose or benefit of the measure. In considering proportionality the following should be considered:
 - Is the measure applied only for a specific purpose and directly related to a specific need?
 - Is the regime the least restrictive one available to achieve the lawful objectives pursued? The measure must involve the least possible interference with the right to be free from race discrimination.
 - The legitimacy of any limitation upon a right must be assessed in the context of the right in question: not all rights can necessarily be limited in the same ways. Where a right is one that is expressly protected by a convention it is necessary to consider what limitations are permitted under that convention and/or what, if any, limitations are recognised for that specific right.²²
 - Because the 'balancing' of rights is taking place in the context of the right to racial equality before the law and non-discrimination, legitimacy should be judged against the objectives and purposes of ICERD and other relevant human rights instruments such as the ICCPR, ICESCR, CEDAW and the CRC.²³

General Recommendation 32 - The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination (2009), par 8. At

<http://www2.ohchr.org/english/bodies/cerd/docs/GC32.doc> (viewed 1 October 2009)).

²² United Nations Economic and Social Council Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN4/1985/4, Annex (1985) ('Siracusa Principles'). This is also consistent with the approach adopted by the CERD Committee for ICERD in General Recommendations 14, 30 and 32 (Committee on the Elimination of Racial Discrimination, *General Recommendation 32 - The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination* (2009), par 8. At <http://www2.ohchr.org/english/bodies/cerd/docs/GC32.doc> (viewed 1 October 2009)).

²³ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976, except Article 41 which came into force 28 March 1979). See the Committee on the Elimination of Racial Discrimination, *General Recommendation 14: Definition of Racial Discrimination* (Forty-second session), UN Doc A/48/18 at 114 (1994),

The purpose of the measure should be directly linked to the promotion of another human right. Administrative convenience or efficiency will not be a legitimate purpose upon which a racial distinction can be justified.

- Where an income management measure targets or impacts upon particular groups, working with those groups in the design and implementation of the measure will be important in establishing its legitimacy.

For Aboriginal and Torres Strait Islander communities, the right to self-determination means that their effective participation and consent is fundamental to the legitimacy of a measure. A standard of free, prior and informed consent should be applied (see Appendix 1). These issues are discussed further above in the context of special measures in 2.3 of the first section.

65. The Commission notes that income management measures that are properly targeted to parents or families in need of assistance to prevent neglect or abuse of children and reduce family violence may limit rights in a manner that is legitimate and accordingly be non-discriminatory.
66. As currently formulated, however, the limitation upon the rights of Aboriginal people under the income management measure applied in declared NT areas under the NTER is not legitimate. This is because the measure has a disproportionate impact upon the rights of the people subject to it:
- The income management measures apply to all people receiving welfare payments in the relevant communities. This means that the measures apply to individuals that are not responsible for the care of children, are not problem gamblers, do not engage in family violence and do not abuse alcohol or other substances. They also apply equally to responsible and irresponsible parents. There is accordingly no connection for such people between the operation of the measure and the object of addressing family violence and abuse.
 - It is difficult for individuals to be exempted from the income management provisions. Exemption requires a decision by the Minister. It would be more appropriate for the decision making about the applicability of the measure to be inverted; that is, for the measure to operate in relation to a particular individual only if a decision is made, based on clearly defined criteria, that the measure should be applied to that individual.²⁴
67. A model that complies with the RDA should include the following features:

[2]; Human Rights Committee *General Comment 18: Non-discrimination*, (Thirty –seventh session), UN Doc A/45/40 (1989), [13]. For a list of some of the relevant human rights standards to consider see: Aboriginal and Torres Strait Island Social Justice Commissioner, *Social Justice Report 2007* (2008), ch 3. At http://humanrights.gov.au/social_justice/sj_report/sjreport07/index.html. (viewed 1 October 2009).

²⁴ See further Aboriginal and Torres Strait Island Social Justice Commissioner, *Social Justice Report 2007* (2008) pp 19, 276-7. At http://humanrights.gov.au/social_justice/sj_report/sjreport07/index.html. (viewed 1 October 2009).

- it should be subject to the application of the RDA and state/territory anti-discrimination legislation
- it should not apply automatic quarantining – different options that should be considered may include allow for a voluntary/opt in approach or a last-resort suspension approach for income management
- it should provide for a defined period of income management, where the time-frame for compulsory quarantining would be proportionate to the context and/or subject to periodic review
- it must allow for review and appeal processes, and
- it should include additional support programs that address the rights to food, education, housing, and provide support in the form of financial literacy/budgeting skills development for welfare recipients, safe houses for women and men, alcohol and substance abuse programs.²⁵

Discriminatory acts

68. Section 9 of the RDA contains broad prohibitions on acts of racial discrimination.²⁶ This section does not apply to laws that may be alleged to discriminate against people of a particular race,²⁷ but it does apply to discretionary acts done under those laws – for example, by administrators implementing the laws.

'Direct' discrimination

69. Section 9(1) prohibits what is generally known as 'direct' race discrimination. It provides:

(1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

70. To ensure that the implementation of an income management measure does not directly discriminate on the basis of race, those implementing the measure must take care not to include do acts that:

- involve a distinction, exclusion, restriction or preference

²⁵ For effective human rights based approaches for addressing family violence and child abuse in Indigenous communities in Australia see: Aboriginal and Torres Strait Island Social Justice Commissioner, *Social Justice Report 2007* (2008) ch 2. At http://humanrights.gov.au/social_justice/sj_report/sjreport07/chap2.html (viewed 1 October 2009).

²⁶ Sections 11 to 15 of the RDA also prohibit acts of race discrimination in specific areas of public life, including in the provision of goods and services (s 13).

²⁷ *Gerhardy* (1985) 159 CLR, 81 (Gibbs CJ), 92-93 (Mason J), 120 (Brennan J); *Mabo No.1* (1988) 166 CLR 186, 197 (Mason CJ), 203 (Wilson J) and 216 (Brennan, Toohey and Gaudron JJ); *Ward* (2002) 213 CLR 1, 97-98 [102] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Bropho* [2008] FCAFC 100, [70].

- are based on race, and
- have a negative impact upon the equal enjoyment by people of a particular racial group of their rights and freedoms in public life.

71. An act will be 'based on' race where there is a 'sufficient connection' between the act and the race of a person or group. It is not necessary to show a *causal* connection.²⁸

72. It is not necessary for race to be the sole or dominant reason for the act: it only needs to be a reason.²⁹

73. It is also not necessary for a person to have a discriminatory intention or motive: an act can still be 'based on race' unintentionally or unconsciously.³⁰

'Indirect' discrimination

74. Section 9(1A) of the RDA describes what is generally known as 'indirect' race discrimination. It provides:

(1A) Where:

- (a) a person requires another person to comply with a term, condition or requirement which is not reasonable having regard to the circumstances of the case; and
- (b) the other person does not or cannot comply with the term, condition or requirement; and
- (c) the requirement to comply has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, by persons of the same race, colour, descent or national or ethnic origin as the other person, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life;

The act of requiring such compliance is to be treated, for the purposes of this Part, as an act involving a distinction based on, or an act done by reason of, the other person's race, colour, descent or national or ethnic origin.

75. People implementing an income management measure may therefore indirectly discriminate on the grounds of race if:

- they impose an unreasonable term, condition or requirement

²⁸ *Macedonian Teachers' Association of Victoria Inc v Human Rights & Equal Opportunity Commission* (1998) 91 FCR 8 ('*Macedonian Teachers*'), 29-30 cited in *Bropho* [2008] FCAFC 100, [68].

²⁹ Section 18, RDA.

³⁰ *Australian Medical Council v Wilson* (1996) 68 FCR 46, 74 (Sackville J); *Macedonian Teachers* (1998) 91 FCR 8, 39.

- a person of a particular race does not or cannot comply with that term, condition or requirement; and
- imposing the requirement has a negative impact upon the equal enjoyment of rights in public life by other people of the same race.

76. Section 123TE of the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 - Schedule 1* provides an example of how a discretion may be structured and exercised so as to limit the potential for discrimination.³¹ See Text Box 1 below.

Text Box 1: Information to consider for discretionary decisions
(excerpt from Section 123TE of the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 - Schedule 1*)

(5) In deciding whether to make a determination under subsection (1), the Minister must have regard to the following matters:

(a) the availability in the relevant Northern Territory area of information setting out:

(i) the proposal to make the determination; and

(ii) an explanation, in summary form, of the consequences of the making of the determination for people who may become subject to the income management regime under section 123UB;

(b) the opportunities that have been made available to people in the area to discuss:

(i) the proposal to make the determination; and

(ii) the consequences of the making of the determination for people who may become subject to the income management regime under section 123UB; with employees or officers of the Commonwealth;

(c) the opportunities that have been made available to potentially affected people in the area to:

(i) discuss their circumstances with officers of Centrelink; and

(ii) give Centrelink information about their expenditure;

(d) the extent to which it will be feasible for the Secretary to take action under Division 6 in relation to people who may become subject to the income management regime under section 123UB;

(e) such other matters (if any) as the Minister considers relevant.

³¹ Note, however, that section 123TE (6) allows for the Minister to make a discretionary decision that contravenes section 123TE (5). This undermines the effectiveness of such a clause.

Option 2: Income management measure as a special measure

77. The prohibitions in sections 9 and 10 of the RDA do not apply to ‘special measures’ that fall within Article 1(4) of ICERD.³²

78. Article 1(4) of ICERD provides:

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

79. Special measures are typically ‘affirmative action’ measures that give members of a disadvantaged racial group access to a benefit that is intended to promote substantive equality. For example, Abstudy – a government allowance for Indigenous students – has been held to be a special measure.³³

80. In the Commission’s view, it is preferable that measures that may limit the rights of people of a particular racial group, such as income management measures, are designed so as to be non-discriminatory, rather than justified as special measures.

Features of special measures

81. From the definition in Art 1(4) of ICERD, the following features of special measures can be identified:

- the special measure must confer a benefit on some or all members of a class;
- membership of this class must be based on race, colour, descent, or national or ethnic origin;

³² Note, however, that the special measures ‘exemption’ does *not* apply to laws that authorise management of property owned by Aboriginal or Torres Strait Islander people without their consent or restricts the ability of Aboriginal or Torres Strait Islander people to terminate the management of their property by another: ss 8(1), 10(3).

³³ *Bruch v Commonwealth* [2002] FMCA 29. The CERD Committee has also noted that special measures should not be confused with specific rights pertaining to certain categories of person or community, such as...the rights of indigenous peoples, including rights to lands traditionally occupied by them, and rights of women to non-identical treatment with men, such as the provision of maternity leave, on account of biological differences from men. Such rights are permanent rights, recognised...in human rights instruments...The distinction between special measures and permanent rights implies that those entitled to permanent rights may also enjoy the benefits of special measures. (Committee on the Elimination of Racial Discrimination, *General Recommendation 32 - The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination* (2009), par 15. At <http://www2.ohchr.org/english/bodies/cerd/docs/GC32.doc> (viewed 1 October 2009))

- the special measure must be 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 to the beneficiaries by the special measure must be necessary in order that they may enjoy and exercise equally with others human rights and fundamental freedoms; and
- the special measure must not already have achieved its objectives.³⁴

82. All parts of a 'special measure' must be 'appropriate and adapted' to the relevant purpose.³⁵ In other words, the exemption for a special measure does not mean that if some aspects of a measure are a special measure, all aspects of that measure are immune from challenge.³⁶

83. To be satisfied that a measure is necessary to ensure that the people it benefits can enjoy their human rights equally with others, you should ask:

- Could the benefits of the measure be achieved in a way that does not make a racial distinction?
- Is there current and credible evidence that supports the need for the measure and shows that it will be effective?
- Are the elements of the measure appropriate and adapted to meet the intended purpose?
- How will the measure be monitored and evaluated to ensure that it is working effectively?

³⁴ *Gerhardy* (1985) 159 CLR 70, Brennan J (133). The CERD Committee in General Recommendation 32 has outlined similar requirements of a special measure under ICERD as follows:

16. Special measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary. The measures should be designed and implemented on the basis of need, grounded in a realistic appraisal of the current situation of the individuals and communities concerned.

17. Appraisals of the need for special measures should be carried out on the basis of accurate data, disaggregated by race, colour, descent and ethnic or national origin and incorporating a gender perspective, on the socio-economic and cultural³⁴ status and conditions of the various groups in the population and their participation in the social and economic development of the country'.

18. States parties should ensure that special measures are designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities. (Committee on the Elimination of Racial Discrimination, *General Recommendation 32 - The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination* (2009), pars 16-18. At <http://www2.ohchr.org/english/bodies/cerd/docs/GC32.doc> (viewed 1 October 2009))

³⁵ *Gerhardy* (1985) 159 CLR 70, 105 (Mason J), 149 (Deane J).

³⁶ *Vanstone v Clark* (2005) 147 FCR 299, 354 [209] (Weinberg J), Black CJ agreeing.

Consultation and consent

84. Consulting with the group that is intended to benefit from a special measure and obtaining their consent to the measure should be given special attention. The Commission is of the view that the level of consultation or consent required will vary depending on whether the measure to be introduced involves a limitation on certain rights or is entirely beneficial in nature.

Consent to 'affirmative action' measures

85. In the context of 'affirmative action' measures (i.e. measures that give members of a racial group access to a benefit that is not available to people of other racial groups), the appropriate approach is to consider the wishes of the beneficiaries to be 'of great importance (perhaps essential)' in establishing whether the measure is a special measure. This means that, at a minimum, consultation with the 'beneficiary' group is essential and consent should be obtained unless there are legitimate reasons for not doing so (for example, because a measure is a short-term one to be introduced at short notice).
86. In the context of a law that granted land rights to a group of Aboriginal people, Brennan J in *Gerhardy v Brown* stated:

'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. The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them.³⁷

87. It has similarly been observed that:

Legislators and social welfare administrators should resist their natural inclination to believe that they know better than the recipients what is good for them. Preferential programs should always, where remotely feasible, be developed in consultation with those being helped, and individuals should always be given the opportunity of receiving normal, non-preferential treatment should they so prefer. Where these conditions are not met, doubts about the benignity of a measure may be well founded.³⁸

Consent to measures that limit certain rights of a racial group

88. Measures that seek to provide a benefit to a racial group or members of it, but operate by limiting certain rights of some, or all of that group, should be approached with particular care. This includes income management measures.

³⁷ *Gerhardy* (1985) 159 CLR 70, 135.

³⁸ Gareth Evans, *Benign Discrimination and the Right to Equality* (1974) 6 FLR 26, 30.

89. In the Commission's view, such measures will *not* be special measures where they are implemented without the consent of the group to whom they apply (Please refer to Appendix One)

90. An example of such a measure is a restriction on the sale of alcohol to Aboriginal people living in remote communities.³⁹ Such restrictions will only be special measures where they are introduced with the consent of the relevant community.⁴⁰

91. In the context of measures that apply to Aboriginal and Torres Strait Islander peoples, the concept of 'special measures' must be understood consistently with the right of peoples to self-determination. It is inconsistent with the right to self-determination for a measure that limits the rights of a group to be imposed upon it without the consent of the group.

92. Article 1 of the ICCPR and the ICESCR provides:

All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.⁴¹

93. The Committee on the Elimination of Racial Discrimination has, in its General Recommendation 23, called upon parties to ICERD to:

ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent...⁴²

94. The *Declaration on the Rights of Indigenous People*⁴³ has affirmed the right of Indigenous peoples to self-determination and has endorsed the standard of 'free, prior and informed consent' (FPIC) in dealings with Indigenous peoples. Article 19 states:

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

95. An important part of the principle of FPIC is ensuring that accurate and clear information is provided to affected communities. Prescribed communities, as defined by the NTER legislation, cover over 500 Aboriginal communities and multiple language groups. Information regarding any significant developments with income management programs should be:

³⁹ See Race Discrimination Commissioner, *Alcohol Report* (1995), pp 137-49.

⁴⁰ It is important to note, however, that alcohol restrictions that apply generally to a community and not just members of a particular racial group may not be discriminatory and may therefore be permissible under the RDA. As discussed above, the first question is whether the measures are discriminatory. Only then is it necessary to consider the question of special measures.

⁴¹ See also art 1 of the International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

⁴² Committee on the Elimination of Racial Discrimination, *General Recommendation No. 23: Indigenous Peoples* (1997) par 4. At <http://www.unhcr.ch/tbs/doc.nsf/0/73984290dfea022b802565160056fe1c?Opendocument> (viewed 1 October 2009).

⁴³ GA Res 61/295, UNGAOR, 62nd sess, 107th plen mtg, Annex, UN Doc A/Res/61/295 (2006).

- translated where necessary and also provided in a plain-English format
- comprehensible for members of affected communities
- provided in summary form so that community members are able to become familiar with content quickly.

96. Government officers should make appropriate use of interpreter services during any consultation process. This will require adequate advance notice to ensure that an interpreter from the required language group is available.

97. Where proposed special measures may have a vastly different impact on the male and female members of a racial group it is crucial to consider ways to maximise broad participation in a consultation process. For example, there may be compelling evidence of family violence across a community, as a result of which women are not necessarily in a position to participate in a general consultation process or consent to a proposed measure.⁴⁴

98. The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, in commenting on States' duty to consult with indigenous peoples, has noted that where Indigenous peoples' particular interests are affected by a proposed measure, obtaining their consent should, in some degree, be an objective of the consultations.

The strength or importance of the objective of achieving consent varies according to the circumstances and the indigenous interests involved. A significant, direct impact on indigenous peoples' lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples' consent. In certain contexts, that presumption may harden into a prohibition of the measure or project in the absence of indigenous consent.⁴⁵

99. The Special Rapporteur further notes, that in order to achieve a climate of confidence and mutual respect for the consultations, the consultation procedure itself should be the product of consensus. Having observed that, in many instances, consultation procedures are not effective because the affected indigenous peoples were not adequately included in the design and implementation of the consultation procedures.⁴⁶

⁴⁴ M Davis, *International Human Rights Law, Women's Rights and the Intervention*, 10, *Indigenous Law Bulletin* (2009), pp 11-14.

⁴⁵ J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, UN Doc A/HRC/12/34 (2009), par 47. At <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-34.pdf> (viewed 22 October 2009)

⁴⁶ J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, UN Doc A/HRC/12/34 (2009), par 51. At <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-34.pdf> (viewed 22 October 2009)

Appendices

Appendix 1: Key elements of free, prior and informed consent⁴⁷

WHAT?

Free – should imply no coercion, intimidation or manipulation.

Prior – should imply consent has been sought sufficiently in advance of any authorisation or commencement of activities and respect time requirements of Indigenous consultation/consensus processes.

Informed – should imply that information is provided that covers (at least) the following aspects:

- a. the nature, size, pace, reversibility and scope of any proposed project or activity
- b. the reason(s) or purpose of the project and/or activity
- c. the duration of the above
- d. the locality of areas that will be affected.
- e. a preliminary assessment of the likely economic, social, cultural and environmental impacts, including potential risks and fair and equitable benefit sharing in a context that respects the precautionary principle
- f. personnel likely to be involved in the execution of the proposed project (including Indigenous peoples, private sector staff, research institutions, government employees and others)
- g. procedures that the project may entail.

Consent - Consultation and participation are crucial components of a consent process. Consultation should be undertaken in good faith. The parties should establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect in good faith, and full and equitable participation. Consultation requires time and an effective system for communicating among interest holders. Indigenous peoples should be able to participate through their own freely chosen representatives and customary or other institutions.

The inclusion of a gender perspective and the participation of Indigenous women are essential, as is the participation of children and youth as

⁴⁷ Australian Human Rights Commission (formerly HREOC), the United Nations and the Queensland Government, *International Conference on Engaging Communities* (2005). At http://www.humanrights.gov.au/social_justice/conference/engaging_communities/fpic_brochure.html (viewed 1 October 2009). See also Principle of Free Prior and Informed Consent. At <http://www2.ohchr.org/english/issues/indigenous/docs/wgip23/WP1.doc> (viewed 1 October 2009).

appropriate. This process may include the option of withholding consent. Consent to any agreement should be interpreted as Indigenous peoples have reasonably understood it.

2. WHEN?

Free, prior and informed consent (FPIC) should be sought sufficiently in advance of commencement or authorisation of activities, taking into account Indigenous peoples' own decision-making processes, in phases of assessment, planning, implementation, monitoring, evaluation and closure of a project.

3. WHO?

Indigenous peoples should specify which representative institutions are entitled to express consent on behalf of the affected peoples or communities. In FPIC processes, Indigenous peoples, UN Agencies and governments should ensure a gender balance and take into account the views of children and youth as relevant.

4. HOW?

Information should be accurate and in a form that is accessible and understandable, including in a language that the Indigenous peoples will fully understand. The format in which information is distributed should take into account the oral traditions of Indigenous peoples and their languages.

5. PROCEDURE AND MECHANISMS

Mechanisms and procedures should be established to verify FPIC as described above, including mechanisms of oversight and redress, such as the creation of national mechanisms. As a core principle of FPIC, all sides of an FPIC process must have equal opportunity to debate any proposed agreement/development project.

'Equal opportunity' should be understood to mean equal access to financial, human and material resources in order for communities to fully and meaningfully debate in Indigenous language(s) as appropriate, or through any other agreed means, on any agreement or project that will have or may have an impact, whether positive or negative, on their development as distinct peoples, or an impact on their rights to their territories and/or natural resources.

FPIC could be strengthened by establishing procedures to challenge and independently review these processes. Determination that the elements of FPIC have not been respected may lead to the revocation of consent given. Mechanisms and procedures should be established to verify FPIC, including mechanisms of oversight and redress, such as the creation of national mechanisms.

Appendix 2: A brief guide to good practice for community consultations⁴⁸

Following are good practice requirements for community consultations in relation to income management measures.

(i) Pre-consultation phase:

- **Involving Aboriginal and Torres Strait Islander people at the outset.** Community leaders (e.g. traditional owners and traditional elders) may be willing to provide input into planning the consultation process. They will also be able to provide you with information regarding community norms and protocols.
- **Ensuring that all engagement is structured to include all relevant Aboriginal and Torres Strait Islander stakeholders, interests and organisations.** Where proposals will affect Indigenous land, contacting traditional land owners, the Prescribed Body Corporate (PEC) local branches of Aboriginal Land Councils and the regional Native Title Representative Body (NTRB) is vital. Peak bodies such as the National Aboriginal Community Controlled Health Organisation (NACCHO) and Indigenous Coordination Centers may also be good sources of knowledge.
- **Recognising the diversity of Aboriginal and Torres Strait Islander communities.** Be sure not to generalise from understandings gained from one community by applying assumptions about these findings to another community.
- **Ensuring that the consultation process is accessible for broad cross sections of affected communities.** The consultation process should provide sufficient opportunity for grassroots communities to provide input, and not simply focus around individuals/community organisations that are high profile or easy to access. In other words, don't just dialogue with 'experts' or the usual suspects. Where consultations cannot be held across each affected community, free transport should be provided to the nearest local hub where a consultation has been scheduled.
- The consultation process should aim for a **gender balance** in relation to overall participant representation. Government officers should acknowledge the special role of women in discussions about income management. Aboriginal women are the heads of households in many cases and have caring responsibilities for their families and extended families. Consultation sessions should specifically seek information regarding the impacts and effectiveness of any measures on Aboriginal women who are caring

⁴⁸ Australian Government, *Best Practice Regulation Handbook* (2007). At <http://www.finance.gov.au/obpr/docs/handbook.pdf> (viewed 22 June 2009).

for their grandchildren.

- Ensuring that the conduct of consultations allow affected communities to have control over timeframes. Notice of proposed measure/s must be given sufficiently in advance of its authorisation to allow time for the community to reach informed consent or to arrive at considered points of difference.

(ii) Consultation phase:

- Using various **participatory methods** throughout the consultation process (oral, written, electronic and aided by translators) to maximise participation. It is important that government officers check for participant understanding periodically during the course of any consultation session.
- **Ensuring that the consultations provide for a mechanism to obtain agreement with communities over the process and desired outcome of any proposed measure.** Communities are acutely aware of the issues and possible solutions relating to their particular circumstances and will be pivotal to the success of any proposal.
- Acknowledging that it may not be possible to reach a community consensus or agreement about the merit or likely impact/s of a measure in all cases. Where consensus is not attainable, it is important to consult with the broadest cross section of the affected community, to be able to demonstrate that there has been appropriate and adequate consultation and weigh up the diverse views against current evidence.
- **Consultations should be transparent and have clear parameters.** To avoid creating unrealistic community expectations, any aspects of a particular proposal that has already been decided or finalised should be clearly identified and declared. For example, if a decision has been made to continue with an income management regime, the government should clearly explain that they are seeking input on the design and implementation of the policy, rather than the merits of the policy itself.
- Being clear about what **outcomes(s)** the proposal seeks to achieve and what **issue(s)** the proposal seeks to address.
- Being clear about the potential and real **risks, costs** and **benefits** of the proposed measure. Be clear about what aspects of the proposed measure Aboriginal and Torres Strait Islander peoples will be involved in and if there are specific areas of concern. Consultation sessions should seek information regarding **unintended positive and negative consequences** of the income management measure.

- Identifying how you will **accurately collect** and **record data** during consultations. Provide people with a clear idea of **how their input** will be included in decision making processes.
- Special measures are temporary and therefore do not set out permanent rights or arrangements. Consultation sessions should ask for input regarding whether the measures build long-term capacity in affected communities, develop improved budgeting skills and healthier spending patterns.
- Considering what **specific, time bound and verifiable benchmarks and indicators** you will use to measure progress. Affected communities should have input into developing success measures. Consider what measures will be used to evaluate the **quality** and **effectiveness** of the consultation process.
- Reaching agreement with communities about **how feedback will be provided** after the consultation phase is concluded.

(iii) Post-consultation phase:

- Identifying the best ways to **keep communities informed** about developments regarding the issue/proposal. Explain to community members the likely timeframes for the first phase of implementation. Explain what, if any options community members have to call for a **review of decision making**.
- Government agencies should **publish their consultation protocols**. This information should be made available in plain English formats and in summary form. Where consultation was limited in its scope, explanation should be provided as to why a full process was inappropriate/not feasible. Government agencies should evaluate and continuously improve their consultation processes.
- Remember that consent is *not* valid if it obtained through **coercion** or **manipulation**. Consent cannot be considered valid unless affected communities have been presented with *all* of the information relevant to a proposed measure.⁴⁹

⁴⁹ United Nations, *An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices* (2005). At http://www.un.org/esa/socdev/unpfii/documents/workshop_FPIC_tamang.doc (viewed 22 June 2009).

Appendix 3: A brief guide to good practice for monitoring and evaluation⁵⁰

The following questions need to be considered when developing good practice for monitoring and evaluating income management measures.

(i) Developing indicators and measures

- What are your indicators and how are they measured? Are they sufficiently specific (focused around impacts of the measure) and holistic (the combined impact of the measure and other developments in a community)?
- Has the income management measure worked as a specific initiative or have other factors facilitated or been a barrier to impact/community benefit?
- How will you ensure that you evaluate both the quality of your consultation and overall process and the *impact* of the measure? How will you evaluate immediate, medium and long-term impacts?
- Has the measure caused any unintended positive or negative consequences?
- Have your results suggested that alternative, less intrusive strategies could have achieved similar, positive outcomes?
- What additional support services are required to increase the likely success of the measure?
- How will you know when the measure has achieved its stated purpose?

(ii) Developing monitoring and data collection methods:

- How will you monitor developments in the affected communities? Who will be responsible for the monitoring role in your agency? How will emerging data be captured?
- Do you have a system to collect, organise and analyse anecdotal evidence?
- Is your evaluation plan flexible enough to track and investigate emerging issues?

⁵⁰ Australian Government, *Best Practice Regulation Handbook* (2007). At <http://www.finance.gov.au/obpr/docs/handbook.pdf> (viewed 22 June 2009).

- How will you reduce bias in your data collection and interpretation?
Have you considered appointing an independent reviewer or observer?

(iii) Designing an evaluation:

- Will the evaluation be designed and conducted by an independent, external provider?
- Have you developed criteria as part of your procurement process to ensure that your supplier has adequate expertise and cross cultural competence?
- Is your contract with the supplier flexible enough to allow for process changes?
- Has your agency dedicated sufficient resources to plan and conduct a comprehensive evaluation? Has adequate consideration been given to the quantum and type of resources required?
- What is your methodology/evaluation plan? How will you make information regarding your plan available to members of affected communities?
- Has your evaluation been designed to adequately measure the stated objective of your special measure (for example, reducing the incidence of child abuse and family violence)?
- What are your key evaluation questions/themes? Have affected communities had input into the development of these questions/themes?
- Have you developed an evaluation schedule? Have you consulted community leaders in developing this schedule?

(iv) Engaging community participation in the evaluation:

- Have you developed strategies to ensure that you will capture a full or representative range of community views to be included in your evaluation process?
- Have you considered strategies to inform affected communities about your evaluation process and how they can participate?
- Have you considered the likely barriers to community participation in your evaluation process and how you will address them?
- Have you considered if and how you will share the outcomes or your evaluation process?