Dr Ben Saul
Associate Professor of International Law
Co-Director, Sydney Centre for International Law

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Committee Secretary
Senate Community Affairs Committee
Parliament House, Canberra ACT 2600

Dear Senate Community Affairs Committee,

Re: Inquiry into the amending bills concerning the NT Intervention

Please accept this late submission to this inquiry. The Sydney Centre for International Law (SCIL) is a leading research and policy centre on international law. This submission considers whether the proposed legislative amendments to aspects of the Northern Territory Intervention are sufficient to bring Australia into conformity with its international human rights obligations. In general, this submission welcomes those aspects of the amendments which seek to remove racially discriminatory features of the legislative scheme.

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

Schedule 2: Income management

1. On the face of the proposed legislation, the new model of income management no longer exclusively targets prescribed indigenous areas in the Northern Territory and consequently does not overtly discriminate on a racial or ethnic basis.

2. Legislation which is facially non-discriminatory may still operate in a discriminatory manner, depending upon its manner of implementation.

3. Whether the new income management regime is racially discriminatory will accordingly depend upon both the manner in which individuals are subjected to it and the areas which are designated a 'declared income management area'.

Faculty of Law
Law Building F10
The University of Sydney
NSW 2006 Australia

T +61 2 9351 0354
F +61 2 9351 0200
E ben.saul@sydney.edu.au
www.law.usyd.edu.au

ABN 15 211 513 464
CRICOS 00026A

4. If the true purpose of the legislation is to continue to target indigenous communities under the cover of a facially neutral scheme, and that purpose manifests in the designation of predominantly indigenous communities as declared areas, then the new regime may still involve impermissible discrimination. In practice, giving effect to a *non-discriminatory application* of the new regime to all welfare-dependent Australians will require intensive and costly national administrative arrangements.

Schedule 3: Alcohol

The removal of blanket restrictions on alcohol in indigenous communities, and the tailoring of restrictions to community needs, is welcome. Whether the new regime is non-discriminatory in practice, however, will depend upon the manner in which restrictions are applied, for the same reasons given above.

Schedule 4: Prohibited material

The amendments do not terminate the existing restrictions on prohibited material which apply only in prescribed areas of the Northern Territory with the consent of affected communities. Those restrictions amount to a prima facie interference in freedom of expression under article 19 of the International Covenant on Civil and Political Rights.

The question is whether such interference is lawfully justified by human rights law. Article 19(3) of the ICCPR provides for the restriction of freedom of expression where it is 'provided by law' and is a necessary (including not arbitrary) and proportionate measure for the protection of public order, public health or morals.

Informed, robust democracies depend on the adequate protection of free expression. However, the right may be limited when such limits are *necessary* and *proportionate*. The ability of States to restrict freedom of expression by reason of public morals has been interpreted quite widely by the United Nations Human Rights Committee. In *Hertzberg et al v Finland (61/79)* it was suggested that States are given a margin of discretion, or the benefit of the doubt, when legislating to control freedom of expression for legitimate and demonstrable justifiable public policy purposes.

The voluntary banning of certain broadcasts may be a *necessary* restriction on freedom of expression where it aims to protect public health, order and morality (in the narrow sense of averting sexual violence and abuse). Internationally, there are divergent research views about the relationship between pornography and sexual violence, and whether depictions of sexual activity (whether consensual or violent) are causally related to increases in sexual violence.[1]

[1] See B Harris, 'Censorship: A Comparative Approach Offering a New Theoretical Basis for Classification in Australia' (2005) 8 *Canberra Law Review* 25 (reviewing the relevant research).

Numerous reports, most recently *Little Children are Sacred*, have highlighted the negative impact that access to pornography has on indigenous communities in Australia. The report found that pornography leads 'inexorably' to family and other violence and sexual abuse, and noted the role of pornography as a 'sex-grooming' tool and a cause of sexual offending by children.

In principle then, restrictions on pornography in indigenous communities may constitute a legitimate restriction of freedom of expression if they are designed to safeguard indigenous women and children against empirical risks of violence. The UN Human Rights Committee has even implied, in General Comment 28, an obligation on states to 'control' pornography, suggesting that pornography controls are not only a permissible limitation to freedom of expression, but may in fact be *required* under the ICCPR.

It must be noted, however, that the Report above did *not* recommend a ban on R18+ material. Under the Classification Code, the R18+ category encompasses a range of disparate material which is 'unsuitable for a minor' to see, and which extends beyond the sub-set of pornography. The restriction of access to non-pornographic material is not a necessary or proportionate means of responding to sexual abuse and violence in indigenous communities, and bears no real relation to that legitimate policy objective. Accordingly, it is recommended that the law should only restrict the broadcast of X18+ material (that is, which depicts sexual activity) and R18+ material *which has a substantial pornographic content.*

The restrictions are otherwise likely to be *proportionate* in that a ministerial prohibition occurs only on the request of the community and after consultation with the community, and must be accompanied by an assessment of whether women and children would benefit from a prohibition in the particular circumstances. The proposed amendments would further improve the proportionality of the restrictions by enabling communities to request the minister to remove them, taking into account relevant matters. Such safeguards are designed to avoid blanket interferences with expression which are not justified by reference to the circumstances and risks faced by particular communities.

A problem remains, however, that the restrictions on prohibited materials still only target declared indigenous areas, notwithstanding their voluntary nature. There is no proposal to extend the restrictions to other people across Australia who consume pornographic material and pose a risk to the safety of children. The current arrangements send a normative message to the community that only indigenous communities are affected by pornography-fuelled child abuse. The law may thus have a powerful stigmatizing effect on indigenous people and has a seriously prejudicial and discriminatory impact on all indigenous people, while implying that non-indigenous communities are free from that social problem.

Schedule 5: Acquisition of rights, titles and interests in land

The bill seeks to confirm the beneficial intent of the five-year leases which have been compulsorily acquired in certain Northern Territory communities, namely, to improve service delivery and promote economic and social development. The

intent behind the leases arguably qualifies as a 'legitimate aim' within the meaning of international human rights law, sufficient to justify interference in human rights. That regard must be had to indigenous traditions indicates some effort to ensure that the restriction imposed is proportionate.

However, the restrictive measure must also be *rationally connected* to the policy aim. It is difficult to see how compulsory acquisition of rights in indigenous land is *necessary*, within the meaning of human rights law, to improve service delivery and to promote economic and social development. To justify acquisition of property, it must first be demonstrated that existing indigenous rights in land prejudice or impede service delivery and economic or social development. It must secondly be shown that there is no other less invasive means of improving service delivery and development. Sufficient justification does not appear to have been established on either front.

Schedule 6: Licensing of community stores

Licensing of community stores remains limited to certain indigenous areas of the Northern Territory. It is arguable that there is a legitimate public policy interest in promoting food security among those who need it, so as to justify licensing.

However, a licensing scheme which is limited to indigenous communities risks solely stigmatizing indigenous people as unable to care for themselves. Australia as a whole faces an obesity epidemic: over 16% of adults were reportedly obese in 2004-05.[2] Obesity carries with it serious personal and public health implications.

If health and food security is a justification for licensing of community stores in respect of indigenous people, then there an equally compelling rationale for dealing similarly with members of the population at large who are affected by poor diets and nutrition. Otherwise the special measure risks being seen a form of paternalistic, adverse discrimination by the intended beneficiaries, even if there is a supposed beneficial intent behind it. It should be recalled that, for instance, indigenous child removals were once subjectively justified by beneficial intentions, yet objectively resulted in the humiliation of indigenous people.

Such risks are aggravated where there is an absence of meaningful, formal consultative processes for engaging indigenous communities in decision-making about their welfare, the consequence of which may be resistance to and ineffectiveness of government policy.

Yours sincerely

Dr Ben Saul
SCIL Director

Dr Thalia Anthony
SCIL Associate

Mr Samuel Thampapillai
SCIL Researcher

[2] Australian Parliamentary Library, 'Overweight and Obesity in Australia', E-Brief, 5 October 2006.