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**Request for Urgent Action**  
under the  
**International Convention on the Elimination of All Forms Racial Discrimination**

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**Submission in relation to the Commonwealth Government of Australia**

**28 January 2009**

**Prepared by the Authors' legal representatives**

This Request for Urgent Action is submitted by a number of Aboriginal people who reside in Prescribed Areas in the Northern Territory and are subject to the measures of the Northern Territory Intervention (“**Authors**”) and is structured as follows:

- (a) **Section 1** is an Executive Summary that provides a brief overview of the factual background and a summary of the submissions made in this Request for Urgent Action;
- (b) **Section 2** provides details relating to the Authors, the Legal Advisors and the State party;
- (c) **Section 3** is a detailed summary of the measures involved in the Northern Territory Intervention and the impact that they have had on Aboriginal Australians in the Northern Territory;
- (d) **Section 4** outlines why the Authors request the Committee to take Urgent Action;
- (e) **Section 5** address the principal concerns with the relevant articles of the Race Convention;
- (f) **Section 6** indicates the measures that the Authors request be taken by the Committee; and
- (g) **Section 7** provides a Glossary of the terms used throughout this Request.

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## 1. Executive Summary

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### 1.1 Factual Background

1. In June 2007, the Northern Territory Government released a report arising from an inquiry into the protection of children from sexual abuse in Aboriginal communities in the Northern Territory, entitled *Ampe Akelyernemane Meke Mekarle 'Little Children Are Sacred'* ("**Little Children Are Sacred Report**").<sup>1</sup> The report detailed the 'extent, nature and factors contributing to sexual abuse of Aboriginal children' and the obstacles and challenges associated with effective child protection mechanisms.<sup>2</sup> The report made 97 recommendations to the Northern Territory Government on how best to support and empower communities to prevent child sexual abuse. The recommendations spanned a wide range of areas, including school education, awareness campaigns, improving family support services and the empowerment of Aboriginal communities.
2. The report stated that there needed to be a radical change in the way government and non-government organisations consult, engage with and support Aboriginal people with an emphasis on immediate and ongoing effective dialogue with Aboriginal people with genuine consultation in designing initiatives that address child sexual abuse.<sup>3</sup>
3. Six days after the release of the Little Children Are Sacred Report, the Australian Government announced a 'national emergency intervention' into Aboriginal communities in the Northern Territory<sup>4</sup> and within seven weeks passed a legislative package<sup>5</sup> ("**Northern Territory Intervention**") with the very broad aim of improving the well-being of certain communities in the Northern Territory.<sup>6</sup> The Commonwealth had ultimate legislative power to enact such legislation to apply to the Northern Territory by reason of sections 51(xxvi), 109 and 122 of the Australian Constitution.
4. The Authors contend that the Northern Territory Intervention contravenes many of Australia's international obligations with respect to the human rights of Aboriginal people and, in particular, the *International Convention on the Elimination of All Forms of Racial Discrimination* ("**Race Convention**").

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<sup>1</sup> Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle 'Little Children are Sacred' Little Children Are Sacred* (2007). ("**Little Children Are Sacred Report**")

<sup>2</sup> *Ibid*, 4.

<sup>3</sup> *Ibid*, 50

<sup>4</sup> Media release by the former Minister for Families, Community Services and Indigenous Affairs, the Hon Mal Brough MP, *National emergency response to protect children in the NT*, 21 June 2007 available at [http://www.facsia.gov.au/internet/minister3.nsf/content/emergency\\_21june07.htm](http://www.facsia.gov.au/internet/minister3.nsf/content/emergency_21june07.htm) (accessed 18 September 2008)

<sup>5</sup> *Northern Territory National Emergency Response Act 2007* (Cth) ("**NTNER Act**"); *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) ("**Welfare Payment Reform Act**"); *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) ("**FaCSIA Amendment Act**").

<sup>6</sup> s 5 of the NTNER Act

5. The provisions of the Northern Territory Intervention legislation were targeted directly at Aboriginal people. As a result, they required the exclusion of the operation of the *Racial Discrimination Act 1975* (Cth) ("**Racial Discrimination Act**") in respect of all acts or omissions done under or for the purposes of the Northern Territory Intervention. The Racial Discrimination Act is the instrument that enacts the State party's obligations under the Race Convention.
6. The Authors note that the Northern Territory Intervention legislation did not give effect to the recommendations contained in the Little Children Are Sacred Report.<sup>7</sup> Indeed, the terms 'children' or 'sexual abuse' do not appear in any of the 480 pages of legislative instruments. Rather, the Australian Government's response consisted of a range of extraordinary measures which were targeted directly at Aboriginal people residing in the Northern Territory. These measures included:
  - (a) an income management regime, which includes measures such as quarantining 50 percent of welfare payments for food and other essentials, and linking welfare payments directly to children's school attendance;
  - (b) the compulsory acquisition and control of specified Aboriginal land and community living areas in the Northern Territory through five-year leases to the Commonwealth with no guarantee of compensation;
  - (c) the deployment of military and police in traditional Aboriginal lands;
  - (d) the appointment of Australian Government employees (Government Business Managers) to coordinate services in Aboriginal communities, implement the Northern Territory Intervention and become the key liaison and consultation contact ;
  - (e) powers given to the Australian Government to take over representative Aboriginal community councils and organisations in order to, for example, direct them to deliver services in a specific way, to transfer council-owned assets to the Commonwealth, to appoint observers or to suspend community councils or to appoint managers to run them;
  - (f) the abolition of the Community Development Employment Projects program ("**CDEP Program**"), which employed Aboriginal people in a wide variety of jobs directed towards meeting local community needs;
  - (g) the removal of consideration of Aboriginal customary law and cultural practice in bail applications and sentencing;
  - (h) the granting of coercive 'star chamber' powers to the National Indigenous Violence and Child Abuse Intelligence Task Force ("**Task Force**"); and
  - (i) a failure to use a children's rights framework to address the complex issue of the protection of children from sexual abuse in Aboriginal communities. Notwithstanding its descriptor as a 'national emergency intervention', the Australian Government made no effort to use children's rights or human rights principles to frame its response.

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<sup>7</sup> See, eg, Parliament of Australia Parliamentary Library, *Briefing Book for the 42<sup>nd</sup> Parliament: National Emergency Intervention in the Northern Territory* (2008), available at [http://www.aph.gov.au/library/Pubs/BriefingBook42p/18SocialPolicy-IndigenousAffairs/emergency\\_intervention.htm](http://www.aph.gov.au/library/Pubs/BriefingBook42p/18SocialPolicy-IndigenousAffairs/emergency_intervention.htm).

7. The measures that constitute the Northern Territory Intervention apply only to 'prescribed areas' as defined in section 4(2) of the *Northern Territory Emergency Response Act 2007* (Cth) ("**Prescribed Areas**").<sup>8</sup> Prescribed Areas encompass more than 500 Aboriginal communities, with over 70 percent of Aboriginal people who live in the Northern Territory living on Aboriginal titled land within Prescribed Areas.<sup>9</sup> As a result, the Northern Territory Intervention measures, which directly affect approximately 45,500 men, women and children,<sup>10</sup> predominantly apply to Aboriginal people.
8. Furthermore, the Australian Government's response was formulated with no consultation at all with either Aboriginal people or with Aboriginal representative bodies.
9. After one year of operation of the Northern Territory Intervention, the Australian Government established the Northern Territory Emergency Response Review Board ("**Review Board**") to conduct 'an independent and transparent review of the Northern Territory Intervention'.<sup>11</sup> The Review Board released its report on 13 October 2008, concluding that the situation in remote Northern Territory communities and town camps remained 'sufficiently acute to be described as a national emergency and that the Northern Territory Intervention should continue'.<sup>12</sup> In making this conclusion, the Review Board made three overarching recommendations:<sup>13</sup>
  - (a) there is a continuing need to address the unacceptably high level of disadvantage and social dislocation experienced by Aboriginal Australians living in remote communities in the Northern Territory;
  - (b) there is a requirement for a relationship with Aboriginal people based on genuine consultation, engagement and partnership; and
  - (c) there is a need for government actions affecting Aboriginal communities to respect Australia's human rights obligations and to conform to the Racial Discrimination Act.
10. The Review Board commented that experiences of racial discrimination and humiliation were told with such passion and such regularity that it felt compelled to advise the Commonwealth Minister for Families, Housing, Community Services and Indigenous Affairs ("**Minister**") during the course of the review that such widespread Aboriginal hostility to the Australian Government's actions should be regarded as a matter for serious concern.<sup>14</sup> Nonetheless, it

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<sup>8</sup> 'Prescribed areas' are defined in section 4(2) of the *Northern Territory Emergency Response Act 2007* (Cth).

<sup>9</sup> *Report of the NTER Review Board October 2008* (Commonwealth: 20 September 2008), 9 and 19 ('**Review Board Report**')

<sup>10</sup> *Ibid*, 9

<sup>11</sup> Hon Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, *NT Emergency Response Review Board*, 6 June 2008 at [http://www.facsia.gov.au/internet/jennymacklin.nsf/print/nter\\_measure\\_23oct08.htm](http://www.facsia.gov.au/internet/jennymacklin.nsf/print/nter_measure_23oct08.htm) (accessed 6 November 2008)

<sup>12</sup> Review Board Report, above, note 9, 10; Hon Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, *Compulsory income management to continue as key NTER measure*, 23 October 2008 at [http://www.facsia.gov.au/internet/jennymacklin.nsf/print/nter\\_measure\\_23oct08.htm](http://www.facsia.gov.au/internet/jennymacklin.nsf/print/nter_measure_23oct08.htm) (accessed 6 November 2008) ('**Compulsory income management continues**')

<sup>13</sup> Review Board Report, above, note 9, 12

<sup>14</sup> Review Board Report, above, note 9, 8

observed definite gains and heard widespread, if qualified, community support for many Northern Territory Intervention measures.<sup>15</sup>

11. In response to the Review Board's report, the Australian Government acknowledged that the Northern Territory Intervention will not achieve robust long term outcomes if measures do not conform to the Racial Discrimination Act.<sup>16</sup> The Australian Government indicated its intention to revise the core measures of the Northern Territory Intervention, such as compulsory income quarantining and compulsory five year leases, so that they are either more clearly 'special measures' or non discriminatory, in conformity with the Racial Discrimination Act.<sup>17</sup>
12. However, to date, the exclusion of the operation of the Racial Discrimination Act remains. Legislative amendments to bring the Northern Territory Intervention within the scope of the Racial Discrimination Act are said to be introduced in the Spring Parliamentary session in 2009. However, the nature and detail of these amendments, and whether they will be passed by the Senate (in which the Government party does not have a majority), remains uncertain.<sup>18</sup> Given the ongoing nature of many aspects of the Northern Territory Intervention, the Authors therefore remain extremely concerned about the continuing serious and pervasive effects that the measures are having on Aboriginal communities and, in particular, their traditional culture and way and life.
13. A further, more detailed description, of the Northern Territory Intervention measures and their impact is provided in Section 3 of the Request for Urgent Action.

## **1.2 Request for Urgent Action**

14. This Request for Urgent Action arises from the flagrant breach by Australia of its obligations under the Race Convention. While it is expected that the Australian Government may attempt to modify some measures of the Northern Territory Intervention, the Authors consider that it should remain a matter of serious concern to the international community that legislation overriding the Race Convention can be implemented by the State party with impunity. That is particularly the case when it concerns the fundamental human rights of Aboriginal people.
15. The Authors' detailed submissions on the indicators demonstrating the need for Urgent Action by the Committee are provided in Section 4 of the Request for Urgent Action.

## **1.3 Summary of Submissions**

16. The broad legislative measures involved in the Northern Territory Intervention are targeted directly at people of the Aboriginal race. This Request for Urgent Action concerns the discriminatory aspects of the Northern Territory Intervention that necessitated the exclusion of the Racial Discrimination Act by the State party. The Northern Territory Intervention legislation adopted the device of declaring that the legislative provisions are 'special measures' for the purposes of the Racial Discrimination Act (and therefore the Race Convention). This legislative declaration is non-justiciable and, the Authors note, is internally

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<sup>15</sup> Review Board Report, above, note 9, 34

<sup>16</sup> Hon Jenny Macklin, Compulsory income management to continue, above, note 12

<sup>17</sup> Hon Jenny Macklin, Compulsory income management to continue, above, note 12

<sup>18</sup> Hon Jenny Macklin, Compulsory income management to continue, above, note 12

- inconsistent because, if the provisions were special measures, there would be no need to exclude the operation of the Racial Discrimination Act.<sup>19</sup>
17. Australia's national human rights institution, the Australian Human Rights Commission ("AHRC") has described the Northern Territory Intervention measures as 'punitive and racist'<sup>20</sup> and, following a comprehensive analysis of the Intervention, found that the 'racially based legislation' contravenes a number of international human rights conventions and the Racial Discrimination Act.<sup>21</sup>
  18. In addition to its discriminatory nature, the Northern Territory Intervention legislation was passed without any consultation with Aboriginal representatives or affected communities. This is particularly worrying as the Northern Territory Intervention measures were introduced and continue at a time when there is no representative body for Aboriginal people in Australia.<sup>22</sup> In this regard, the Authors note the Committee's criticism of the State party for abolishing the former national Aboriginal representative body and replacing it with a board of appointed nominees, which the Committee considered could reduce Aboriginal peoples' participation in decision-making and alter Australia's capacity to address the full range of issues relating to Aboriginal peoples.<sup>23</sup>
  19. Of particular concern is the haste with which the Northern Territory Intervention legislation was prepared and enacted. The legislative process took just 10 days, despite the fact that it introduced 480 pages of new legislation.<sup>24</sup> In fact, the former Minister responsible for enacting the Northern Territory Intervention revealed in June 2008 that it took just 48 hours to formulate the policy that was the foundation for the measures.<sup>25</sup>
  20. The Authors respectfully submit that:
    - (a) the Northern Territory Intervention legislation enacted by the State party; and
    - (b) actions by the State party done under or for the purposes of the provisions of the Northern Territory Intervention legislationhave constituted and continue to constitute serious, massive and persistent racial discrimination against Aboriginal people in the Northern Territory and have constituted and continue to constitute multiple violations of the Race Convention.

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<sup>19</sup> This was the position of the Government in Opposition which claimed that the measures of the Northern Territory Intervention were special measures and opposed the suspension of Part II the Racial Discrimination Act. See Hon Kevin Rudd, House of Representatives Hansard (7 August 2007) at <http://www.aph.gov.au/hansard/reps/dailys/dr070807.pdf> (accessed 22 November 2008), 108-109

<sup>20</sup> Russell Skelton, 'Rights Watchdog Proposes Overhaul of Howard's Emergency Intervention', *The Age* (Melbourne), 12 February 2008, available at <http://www.theage.com.au/news/national/pressure-to-overhaul-intervention/2008/02/11/1202578694335.html>.

<sup>21</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007* (2007), 209–11 ('**Social Justice Report 2007**')

<sup>22</sup> The Aboriginal and Torres Strait Islander Commission was abolished in April 2004 and no representative Indigenous body current exists.

<sup>23</sup> CERD, Concluding Observations to Australia's thirteenth and fourteenth periodic reports (2005)

<sup>24</sup> Social Justice Report, above, note 21, 215-19.

<sup>25</sup> ABC News, "Intervention created in just 48 hours: Brough" at <http://www.abc.net.au/news/stories/2008/06/16/2275863.htm> (accessed 12 August 2008)

21. These submissions are summarised below and addressed in greater detail in Section 5 of the Request for Urgent Action.
- (a) *Serious, massive and persistent racial discrimination***
22. The Authors respectfully submit that the gravity and scale of the Northern Territory Intervention requires immediate action due to the potential for irreparable harm caused to the Aboriginal persons subjected to the discrimination.
23. The Authors submit that each of the measures identified in paragraph 6 is racially discriminatory, which together constitute numerous violations of the Race Convention. When viewed in its totality, the Northern Territory Intervention imposes unjustifiable harm on the Aboriginal people of the Northern Territory on an unprecedented scale.
24. In particular, the Authors respectfully submit that the Northern Territory Intervention:
- (a) threatens Aboriginal cultural and social norms and traditional collective ownership of land;
  - (b) undermines traditional authority and prevents traditional owners from fulfilling cultural obligations;
  - (c) undermines Aboriginal governance and decision making in relation to Aboriginal communities, assets and property and places control of Aboriginal communities in the hands of Government employees;
  - (d) transfers ownership of community housing to the Australian government;
  - (e) removes consideration of Aboriginal customary law and cultural practice in bail and sentencing in the Northern Territory;
  - (f) restricts the right to social security on the basis of race;
  - (g) removes rights of review available to other citizens; and
  - (h) imposes severe hardship on the most vulnerable in the Australian community.
25. The suspension of the Racial Discrimination Act has precluded challenge to the measures of the Northern Territory Intervention on the basis of racial discrimination and has led Aboriginal people to perceive that it is acceptable and appropriate to discriminate against Aboriginal people from the Northern Territory<sup>26</sup> and that they are less worthy of legislative protections afforded to other Australians.<sup>27</sup> Worryingly, an escalation of racist incidents has been widely reported since the commencement of the Northern Territory Intervention.<sup>28</sup>
26. The evidence further demonstrates that the Northern Territory Intervention has profoundly undermined the relationship between the Aboriginal people of the Northern Territory and the

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<sup>26</sup> CAALAS & NAAJA, *Joint Submission by the Central Australian Aboriginal Legal Aid Service and the North Australian Aboriginal Justice Agency to the Senate Select Committee on Regional and Remote Indigenous Communities*, July 2008 at [http://www.aph.gov.au/SENATE/committee/indig\\_ctte/submissions/sub24.pdf](http://www.aph.gov.au/SENATE/committee/indig_ctte/submissions/sub24.pdf) (accessed 20 November 2008), 4 ('**CAALAS & NAAJA Submission**')

<sup>27</sup> Review Board Report, above, note 9, 46

<sup>28</sup> Claire Smith & Gary Jackson, *A Community-Based Review of the Northern Territory Emergency Response* (Institute of Advanced Study for Humanity, University of Newcastle, August 2008), 128 ('**Community Based Review**'); CAALAS & NAAJA Submission, above, note 26; Public addresses, *Prescribed Area People's Alliance meeting*, Alice Springs, 29 September 2008

- Australian Government, having resulted in distrust, hostility and suspicion.<sup>29</sup> The implementation and continuation of the Northern Territory Intervention without formally engaging those who are affected in formulating the revised measures further undermines the relationship. As the Review Board described, the impact of the experience is not easily set aside by those who feel aggrieved by the circumstances that were imposed on them and has contributed to a sense of alienation from the rest of the Australian community.<sup>30</sup>
27. The Review Board, the Little Children Are Sacred Report and the AHRC have each situated the complex problem of child sexual assault in the context of Aboriginal disadvantage; past, current and continuing social problems; and decades of cumulative government neglect.<sup>31</sup> Each underscored the crucial need for genuine partnerships with Aboriginal communities and immediate and ongoing effective dialogue with Aboriginal people to design initiatives that address the well-being of the community as a whole.<sup>32</sup>
28. Importantly, the Authors note the Committee's observation that the degree to which acts of racial discrimination and racial insults damage the injured party's perception of his/her own worth and reputation is often underestimated.<sup>33</sup> The Authors submit that the affront to Aboriginal peoples' right to freedom and dignity is exemplified by a perception of a regression to a protectionist and paternalistic era<sup>34</sup> with humiliation, incomprehension, confusion, anxiety and a sense of betrayal and disbelief reported by the independent review of the Northern Territory Intervention.<sup>35</sup> The Australian Indigenous Doctors' Association's ("**AIDA**") research identified a feeling of 'collective existential despair', characterised by a widespread helplessness, hopelessness and worthlessness and with profound implications for resilience, social and emotional wellbeing and mental health of Aboriginal people in the Northern Territory, and throughout the country.<sup>36</sup>

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<sup>29</sup> Review Board Report, above, note 9, 8, 40; Australian Indigenous Doctors' Association, *Submission to the Northern Territory Emergency Response Review Board* at [http://www.aida.org.au/pdf/AIDA\\_SubmissionNTERRB.pdf](http://www.aida.org.au/pdf/AIDA_SubmissionNTERRB.pdf) (accessed 19 September 2008) at [9]-[10] ('**AIDA Submission**'); Community Based Review, above, note 28, 5, 126

<sup>30</sup> Draft, *Report of the NTER Review Board October 2008* (undated), 37 ('**Draft Review Board Report**')

<sup>31</sup> Little Children Are Sacred Report, above, note 1; Human Rights and Equal Opportunity Commission, *Submission to the Northern Territory Emergency Response Review Board*, 15 August 2008 at [http://www.hreoc.gov.au/legal/submissions/2008/20080815\\_nt\\_response.html](http://www.hreoc.gov.au/legal/submissions/2008/20080815_nt_response.html) (accessed 20 November 2008), [5]-[6] ('**HREOC Review Board Submission**'); Review Board Report, above, note 9, 9

<sup>32</sup> Little Children Are Sacred Report, above, note 1, 50; HREOC Review Board Submission, above, note 31 at [5]; Review Board Report, above, note 9, 9-11, 47

<sup>33</sup> UN Committee on the Elimination of Racial Discrimination, *General Recommendation 26. Article 6 of the Convention*. (Fifty sixth session, 2000) ('**General Recommendation 26**')

<sup>34</sup> AIDA Submission, above, note 29 at [16]

<sup>35</sup> Review Board Report, above, note 9, 34

<sup>36</sup> AIDA Submission, above, note 29 at [17]

29. On these bases, the Authors respectfully submit that the Northern Territory Intervention raises serious, massive and persistent concerns under the Race Convention. A more detailed description of the specific indicators that the Authors submit warrants Urgent Action by the Committee is provided in Section 4 of the Request for Urgent Action.

**(b) Concerns under the Race Convention**

30. A more detailed description of the specific concerns under the Race Convention is provided in Section 5 of the Request for Urgent Action. In summary, the Authors respectfully submit that the Northern Territory Intervention measures raise serious concerns in relation to the following articles of the Race Convention:

**(a) Article 2: Obligation to implement the Race Convention**

- (i) The effect of the exclusion of the Racial Discrimination Act and state and territory anti-discrimination legislation is that the measures of the Northern Territory Intervention are not subject to scrutiny by Australian domestic law;
- (ii) Rather than ensuring state and territory compliance with the Race Convention, the Australian Government removed the protections of state and territory anti-discrimination legislation;
- (iii) Public authorities and public institutions administering the Northern Territory measures are excluded from complying with the principles and standards contained in the legislation.

**(b) Article 5(a): Equal treatment before the law**

- (i) Affected individuals are prevented from obtaining merits review of decisions relating to income management from the Social Security Appeals Tribunal (“SSAT”);
- (ii) Certain administrative determinations and notices are not subject to merits review by the Administrative Appeals Tribunal (“AAT”);
- (iii) The construction of significant public works on Aboriginal lands is not subject to scrutiny by the Public Works Committee;
- (iv) The effect of the prohibition on consideration of customary law and cultural practice in bail and sentencing is that, unlike non-Aboriginal offenders, the full context of an Aboriginal offender’s situation cannot be taken into account;
- (v) The grant of coercive ‘star chamber’ powers to the Task Force in relation to Aboriginal violence and abuse is to give extraordinary powers in relation to one subset of broadly applicable offences, based on race.

**(c) Article 5(c): Right to participate in public affairs**

- (i) The continuing failure to consult with Aboriginal peoples subject to the Northern Territory Intervention is a breach of article 5(c) and the standards and obligations enunciated in the Committee’s General Recommendation 23;
- (ii) The Minister’s very broad powers to intervene in the operation of Aboriginal councils and organisations has the potential to remove the ability of Aboriginal people to control their own communities and essential services, such that interaction with government is placed under the control of third parties.

- (d) **Article 5(d)(i): Freedom of movement**
- (i) Income quarantining has had the effect of unjustifiably limiting the freedom of movement of Aboriginal people. People subject to income quarantining have not been able to travel between communities for cultural obligations due to inadequacies in the administration of the income management regime.
- (e) **Article 5(d)(v): Right to own property**
- (i) The compulsory acquisition and control of specified Aboriginal land restricts the incidents of ownership to such a degree that the right to ownership is undermined;
- (ii) The removal of the right to negotiate provided by the *Native Title Act* 1993 (Cth) ("**Native Title Act**") removes traditional owners' rights to exercise cultural obligations;
- (iii) The Minister's broad powers to intervene in the operation of Aboriginal councils and organisations, including the right to direct the use and management of assets and to transfer the possession of assets violates Aboriginal organisations' property rights;
- (f) **Article 5(e)(iv): Right to social security**
- (i) The effect of compulsory income quarantining that applies to Aboriginal people on the basis of their residence in Prescribed Areas is mandatory and non-discretionary and restricts the right to social security of Aboriginal people on the basis of race.
- (g) **Article 5(e)(vi): Right to equal participation in cultural activities**
- (i) The failure to consult with Aboriginal people and the unnecessary haste with which the Northern Territory Intervention measures were introduced precluded a culturally appropriate framework to address Aboriginal disadvantage;
- (ii) The measures in relation to Aboriginal land deliberately seek to undermine traditional communal ownership;
- (iii) The removal of the future act regime explicitly prevents traditional owners from exercising their cultural obligations to speak for country;
- (iv) The stated aim of income quarantining is to alter Aboriginal social norms, including the cultural norm of sharing resources;
- (v) The effect of income quarantining has been to affect participation in ceremony and 'sorry business';
- (vi) The removal of considerations of customary law and cultural practice in bail and sentencing prevents consideration of the full circumstances of Aboriginal offenders;
- (vii) The unjustified conflation of sexual predation and violence with cultural practices and traditional law has undermined respect for Aboriginal culture;
- (viii) The potential effect of the Minister's powers to intervene in Aboriginal councils and organisations is to undermine Aboriginal peoples' right to sustainable

economic and social development compatible with their cultural characteristics.

(h) **Article 5(f): Right of access to any public place or service**

(i) The administration of income quarantining has, in some circumstances, resulted in segregated services. Some stores in Alice Springs have designated certain cashiers for income quarantined customers with the reality of a separate queue for Aboriginal people.

(i) **Article 6: Effective protection and remedies**

(i) The exclusion of the operation of the Racial Discrimination Act and state and territory anti-discrimination legislation prevents people who are subject to the Northern Territory Intervention from challenging any measures or seeking remedy for harm.

(j) **Article 7: Immediate and effective measures to combat prejudices**

(i) The rhetoric justifying the implementation of the Northern Territory Intervention was sensationalist and has perpetrated prejudicial views of Aboriginal communities and culture;

(ii) The means adopted to implement the Northern Territory Intervention, including mobilisation of the police and armed forces, have the potential to add to prejudice leading to racial discrimination;

(iii) Actions taken to implement the Northern Territory Intervention, such as signage designating areas Prescribed Areas subject to alcohol and pornography bans, have had the effect of shaming Aboriginal people as alcoholics and paedophiles.

31. The Authors submit that the above concerns in relation to the Northern Territory Intervention's compliance with the Race Convention should be considered with particular regard to the principles and standards outlined by the Committee in its General Recommendation 21 in relation to the right of self-determination for Aboriginal peoples.

32. Each of these concerns with the above articles of the Race Convention are discussed in further detail in [Section 5](#).

**(c) Request for Measures to be taken by the Committee**

33. The Authors respectfully request that the Committee adopt a decision including the expression of specific concerns and recommending that the State party:

(a) immediately take all necessary steps to bring to an end the exclusion of the Racial Discrimination Act in respect of the Northern Territory Intervention; and

(b) undertake that there will be no further implementation of the Northern Territory Intervention until the Committee is satisfied that each of the measures is properly a 'special measure' for the purposes of the Race Convention.

34. To that end, the Committee is respectfully requested to direct that the State party enter into discussions with the Aboriginal peoples of the Northern Territory to develop solutions that comply with the State party's obligations under the Race Convention and its other international obligations.

## 2. Details relating to the Authors, Legal Advisers and State Party

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### 2.1 Information on the Authors

35. The Authors are a number of Aboriginal people residing in Prescribed Areas in the Northern Territory who are subject to the measures of the Northern Territory Intervention. Their details are as follows:

| <b>Name</b>                 | <b>Aboriginal community</b>           |
|-----------------------------|---------------------------------------|
| Barbara Shaw                | Mount Nancy Town Camp, Alice Springs  |
| Marlene Hodder              | Mount Nancy Town Camp, Alice Springs  |
| Geoff Shaw                  | Mount Nancy Town Camp, Alice Springs  |
| Harry Nelson Jakamarra      | Yuendumu                              |
| Valerie Martin Napaltjarra  | Yuendumu                              |
| Peggy Brown Nampitjimpa OAM | Yuendumu                              |
| Johnny Miller Japangardi    | Yuendumu                              |
| Ronnie Agnew                | Knuckey's Lagoon town camp, Darwin    |
| Philip Goodman              | Palmerston Indigenous Village, Darwin |
| Neparrnga Gumbula           | Galiwinku                             |
| Elaine Peckham              | Outstation, Alice Springs             |
| Irene Fisher                | Katherine                             |
| Rosalie Kunoth-Monks OAM    | Utopia                                |
| Yingiya Guyula,             | Millingimbi/Gapuwiyak                 |
| Matthew Dhulumburrk         | Millingimbi                           |
| Keith Lapalung              | Millingimbi                           |
| Jane Miyatatawuy            | Millingimbi                           |
| Munyarirr Gurralpa          | Ramangining                           |
| Peter Ganbung               | Ramangining                           |
| Ronnie Barramala            | Ramangining                           |

36. The Authors reside in a number of the 73 Prescribed Areas targeted for intensive application of the Northern Territory Intervention measures.
37. The Authors submit that the Committee is competent to receive complaints from groups of individuals<sup>37</sup> and that anyone may approach the Committee or individual members to invoke the urgent action procedure.

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<sup>37</sup> *Jewish Community of Oslo & Ors v Norway* CERD/C/67/D/30/2003.

## 2.2 Information on Counsel

38. The Authors have engaged the following qualified legal practitioners to assist in the preparation of this Communication:

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Melbourne Victoria 3000  
AUSTRALIA

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Surry Hills NSW 2010  
AUSTRALIA

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Melbourne Victoria 3000  
AUSTRALIA

## 2.3 Address for Correspondence

39. Please address all correspondence in relation to this Request for Urgent Action to:

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Surry Hills NSW 2010  
AUSTRALIA  
  
T: + 61 2 9318 6400  
F: + 61 2 9318 6499  
E: [george.newhouse@surrypartners.com.au](mailto:george.newhouse@surrypartners.com.au)

## 2.4 State party against which the Communication is directed

40. The Request for Urgent Action is made against the Commonwealth of Australia ("**State party**").
41. The State party ratified the Race Convention on 30 September 1975 with one reservation to article 4(a).
42. The Race Convention came into effect in Australia on 30 October 1975 with the commencement of the operation of the Racial Discrimination Act.

### 3. Measures of the Northern Territory Intervention and their Impact

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43. This section provides a detailed overview of the specific measures that were adopted by the State party through the Northern Territory Intervention, and the impact that the measures have had on Aboriginal people in the Northern Territory.

#### 3.1 Measures apply to Prescribed Areas

44. The measures that constitute the Northern Territory Intervention (described in detail below) apply only to Prescribed Areas. Prescribed Areas include 'Aboriginal land' under the *Aboriginal Land Rights (Northern Territory) Act 1976* ('**Land Rights Act**') held by Aboriginal Land Trusts or Land Councils; 'Aboriginal community living areas' under the Northern Territory *Lands Acquisition Act* ('**Lands Acquisition Act**') held by Aboriginal associations and any declared areas.<sup>38</sup>

45. Prescribed Areas cover an area of over 600,000 square kilometres and encompass more than 500 Aboriginal communities. The focus of the Northern Territory Intervention measures is on 73 of the larger Aboriginal township settlements and associated outstations, as well as a number of Aboriginal town camps.<sup>39</sup>

46. Over 70 percent of the Aboriginal people who live in the Northern Territory live on Aboriginal titled land within Prescribed Areas.<sup>40</sup> Within those Prescribed Areas, it is estimated that approximately 87 percent of the people living in those areas are Aboriginal Australians.<sup>41</sup> Furthermore, of those people who live in very remote areas in the Northern Territory and who are unemployed or not in the labour force (and hence are likely to be in receipt of social security entitlements), 92.3 percent of working aged individuals (15-64 years) are Aboriginal.

47. The Northern Territory Intervention measures directly affect approximately 45,500 men, women and children.<sup>42</sup> As a result, it is apparent that the Northern Territory Intervention was targeted directly at, and has specifically impacted on, Aboriginal people.

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<sup>38</sup> 'Prescribed areas' are defined in section 4(2) of the *Northern Territory Emergency Response Act 2007* (Cth).

<sup>39</sup> Review Board Report, above, note 9, 9; Department of Families, Housing, Community Services and Indigenous Affairs, "Section 1 Overview", *Submission of Background Material to The Northern Territory Emergency Response Review Board*, at [http://www.facs.gov.au/nter/docs/reports/nter\\_review\\_submission/sec1.htm](http://www.facs.gov.au/nter/docs/reports/nter_review_submission/sec1.htm) (accessed 7 November 2008) ('**FaHCSIA Background Material**')

<sup>40</sup> Review Board Report, above, note 9, 9 and 19

<sup>41</sup> FaHCSIA Background Material, above, note 39, p11

<sup>42</sup> Review Board Report, above, note 9, 9

### 3.2 Exclusion of the Racial Discrimination Act

48. As explained above, the Race Convention is incorporated into Australian domestic law by the Racial Discrimination Act. However, despite the Committee's recommendations to the State party in relation to article 2 of the Race Convention,<sup>43</sup> there remains no entrenched guarantee against racial discrimination in Australia that would override a law of the Commonwealth. Therefore, as a law of the Federal Parliament, the Racial Discrimination Act can be, and in this instance has been, overridden by the Federal Parliament.
49. In addition to the legislative device of declaring that the measures of the Northern Territory Intervention are 'special measures', each of the three statutes enacting the Northern Territory Intervention goes further to explicitly exclude the operation of Part II of the Racial Discrimination Act.<sup>44</sup> Part II prohibits direct and indirect discrimination and provides for rights to equality before the law in the enjoyment of rights, regardless of race, colour, national or ethnic origin.
50. Further, the Northern Territory Intervention legislation excludes Northern Territory and, where relevant, Queensland anti-discrimination laws from having effect.<sup>45</sup>
51. The suspension of the Racial Discrimination Act and other anti-discrimination laws is exceptionally broad, applying not only to the provisions of the Northern Territory Intervention but also to any acts (including omissions to act) done under or for the purposes of the provisions.
52. Significantly, the exclusion of the Racial Discrimination Act and state and territory anti-discrimination legislation precludes parties from seeking any effective legal protection from, or relief in respect of, the discriminatory measures implemented by the Northern Territory Intervention or any reparation or remedies for damage suffered.

### 3.3 Compulsory income management regime

53. The Northern Territory Intervention introduces a regime of compulsory income quarantining by requiring 50 percent of income support and 100 percent of advances and lump sum payments<sup>46</sup> to be diverted to an 'income management account'.<sup>47</sup> Money in an income management account can only be spent on 'priority needs', such food, clothing, household items, household utilities, childcare and development, education and training<sup>48</sup> and is prohibited from being spent on items such as alcohol, tobacco, gambling and pornography.<sup>49</sup>
54. Quarantined income may only be spent in specified licensed stores in the Northern Territory.

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<sup>43</sup> CERD, Concluding Observations to Australia's thirteenth and fourteenth periodic reports (2005) and Australia's tenth, eleventh, twelfth periodic reports (2000)

<sup>44</sup> Section 132(2) of the NTNER Act; s 4(2) of the FaCSIA Amendment Act; ss4(3) and 6(3) of the Welfare Payment Reform Act

<sup>45</sup> Sections 133(1) & 133(2) of the NTNER Act; ss 5(1) & 5(2) of the FaCSIA Amendment Act; ss5(2) & 5(3) of the Welfare Payment Reform Act

<sup>46</sup> Division 5, Subdivision A (ss 123XA to 123XH) of the *Social Security (Administration) Act 1999* (Cth)

<sup>47</sup> Division 4 and Division 5, Subdivision A of the *Social Security (Administration) Act 1999* (Cth)

<sup>48</sup> Section 123TH of the *Social Security (Administration) Act 1999* (Cth)

<sup>49</sup> Section 123TI of the *Social Security (Administration) Act 1999* (Cth)

55. Income quarantining in the Northern Territory applies to people receiving social security entitlements on the basis of their residence in a Prescribed Area,<sup>50</sup> regardless of whether the person has responsibility for children.
56. Income quarantining is mandatory and non-discretionary in respect of the persons subjected to it. By contrast, outside Prescribed Areas, income quarantining can only be triggered by factors such as risk of neglect or abuse or inadequate school attendance, which is assessed on a case by case basis.<sup>51</sup> The absence of any criteria apart from race (which in practical terms coincides with a person receiving social security in a Prescribed Area) for the application of income quarantining makes that measure discriminatory and necessarily results in it failing to satisfy any of the requirements for a special measure.
57. In its review of the operation of the Northern Territory Intervention measures, the Review Board made a number of specific recommendations, including that income quarantining continue on a voluntary basis imposed only as a precise part of child protection measures or where specified by statute and that it be subject to independent review. In both cases, the Review Board said that such measures should be supported by services to improve financial literacy.<sup>52</sup>
58. The Australian Government rejected the Review Board's recommendation and income quarantining will continue to be compulsory 'because of its demonstrated benefits for women and children'.<sup>53</sup>
59. At 10 December 2008, income quarantining was operating in 73 communities and their associated outstations and in ten town camp regions.<sup>54</sup> A total of 15,781 people were subject to income quarantining<sup>55</sup> with 'direct and profound impact on their lives', 'based on their residence in Aboriginal townships' and 'unrelated to a person's capacity to meet family responsibilities'.<sup>56</sup> This extensive mandatory and non-discretionary measure applies overwhelmingly to Aboriginal people and has no counterpart in Australian legislation.

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<sup>50</sup> Section 123UB of the *Social Security (Administration) Act 1999* (Cth). A 'relevant Northern Territory area' includes prescribed areas under the NTNER Act and certain specified places: See s 123TD of the *Social Security (Administration) Act 1999* (Cth)

<sup>51</sup> The income management scheme also applies nationally where state or territory child protection officers refer a person to Centrelink because their child is considered to be at risk of neglect or abuse; a person's child does not meet school enrolment and attendance requirements; or a person, subject to the jurisdiction of the Queensland Commission is recommended for income management; or the person is subject to the voluntary income management agreement is in force. See ss 123UC to UFA of the *Social Security (Administration) Act 1999* (Cth). This case by case approach stands in stark contrast to the scheme as it applies to people living in prescribed areas.

<sup>52</sup> Review Board Report, above, note 9, 12 and 21

<sup>53</sup> Hon Jenny Macklin, Compulsory income management to continue, above, note 12

<sup>54</sup> Department of Families, Housing, Community Services and Indigenous Affairs, *Northern Territory Emergency Response: Operation Update*, 10 December 2008 at [http://www.fahcsia.gov.au/nter/operation\\_update.htm](http://www.fahcsia.gov.au/nter/operation_update.htm) (accessed 29 December 2008) ('**FaHCSIA Operation Update**')

<sup>55</sup> FaHCSIA Operation Update, above, note 54

<sup>56</sup> Review Board Report, above, note 9, 20

### 3.4 Compulsory acquisition of Aboriginal land

60. The three main measures by which the Australian Government has weakened Aboriginal property rights are:
- (a) the acquisition of Aboriginal land and Aboriginal community living areas through the statutory imposition of five year leases of that land to the Commonwealth;
  - (b) broad discretionary statutory powers in relation to town camps; and
  - (c) the suspension of the future act provisions of the Native Title Act thereby effectively suspending the operation of any native title rights inconsistent with the Commonwealth's five year Lease.
- (a) Five year leases on Aboriginal freehold land**
61. The Northern Territory Intervention provides for the compulsory acquisition of leases by the Australian Government over townships on Aboriginal land held by Aboriginal Land Trusts or Land Councils and 'Aboriginal community living areas' held by Aboriginal associations and other specified areas.<sup>57</sup> These five year leases come into effect by operation of the legislation without any requirement for consent by the relevant Aboriginal Land Trust, Aboriginal Land Council or Aboriginal Association.<sup>58</sup>
62. Prior to the Northern Territory Intervention, Aboriginal land and Aboriginal community living areas in the Northern Territory were held or owned solely for the benefit of the traditional Aboriginal owners or residents of the relevant areas. After the Northern Territory Intervention, the rights of the traditional owners and residents were subject to the Commonwealth's overarching rights as tenant in possession of the land under compulsory five year leases, the terms of which were able to be dictated and controlled by the Commonwealth as if it were also the landlord under the five year leases. Pre-existing rights, titles and interests in land covered by a five year lease are preserved, other than native title rights and interests.<sup>59</sup> However, rights, titles or interests can be terminated at will by the Commonwealth.<sup>60</sup>
63. Although the relationship in the five year lease regime is that of lessee and lessor, Aboriginal land owners do not possess the rights ordinarily enjoyed by lessors. The terms and conditions of the compulsory five year leases are able to be determined by the Australian Government. The present terms include:
- (a) no clearly expressed liability to pay rent on the improved value of the land<sup>61</sup> (although the Government now has signalled its intention to pay rent on the unimproved value<sup>62</sup>);

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<sup>57</sup> Section 31(1) of the NTNER Act. 'Aboriginal land' is land granted to Aboriginal Land Trusts in fee simple under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). Aboriginal community living areas are created by grant to associations in fee simple under the *Lands Acquisition Act (NT)*.

<sup>58</sup> FaHCSIA Background Material, above, note 39, Appendix 1: Measures and sub-measures

<sup>59</sup> Sections 34(2) & 34(3) of the NTNER Act

<sup>60</sup> s 37(1) of the NTER Act

<sup>61</sup> Section 35(2) of the NTNER Act

<sup>62</sup> *Government's response to the NTER review*, ABC Radio National, 24 October 2008 at [http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/interview\\_fran\\_kelley\\_24oct08.htm](http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/interview_fran_kelley_24oct08.htm)

- (b) the ability to vary or terminate the lease without reference to the Aboriginal landholders,<sup>63</sup> while the Aboriginal land owners are explicitly precluded from doing so;<sup>64</sup> and
- (c) the ability to terminate the underlying right, title or interest,<sup>65</sup> by giving notice in writing.<sup>66</sup>
64. On 17 August 2007, the former Minister approved additional terms and conditions,<sup>67</sup> providing for wide ranging control of the land, including the right to use, and permit the use of the land for any purpose the Australian Government considers to be consistent with the objective of the NTNER Act,<sup>68</sup> and the right to carry out any activity on or in relation the land consistent with permitted use.<sup>69</sup>
65. The ownership of all community houses and infrastructure has been transferred to the Australian Government while the lease regime is in place, to be managed by the Northern Territory Government.<sup>70</sup>
66. The extensive and all embracing power of the Commonwealth over Aboriginal land conferred by the compulsory five year lease regime has no counterpart or precedent in Australian legislation. It is plainly discriminatory and is not capable of being a special measure for the purpose of the Race Convention. As with income quarantining, the all embracing nature of the regime and the absence of criteria requiring that statutory powers or discretions *must* be exercised for the benefit of traditional owners or other Aboriginal persons preclude the measure from being a special measure.
- (b) Powers over Aboriginal town camps**
67. Division 2 of Part 4 of the NTNER Act provides for the acquisition of Aboriginal town camps. Titles to the lands that make up the town camps are held by Aboriginal associations under the *Special Purposes Leases Act* (NT) and *Crown Lands Act* (NT).
68. The *Special Purposes Leases Act* (NT) and *Crown Lands Act* (NT) are amended so that the Commonwealth Minister has the same powers as the Northern Territory Minister to administer, forfeit or resume town camp leases.<sup>71</sup> Further, the Minister can modify the effect of both Acts by regulation.<sup>72</sup> When the Commonwealth intends to resume such land, the

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(accessed 20 November 2008) ('**Government response to Review Board**'); Hon Jenny Macklin, Compulsory income management to continue, above, note 12

<sup>63</sup> s 35(5),(6),(7) & (8) of the NTNER Act

<sup>64</sup> s 35(4) of the NTNER Act

<sup>65</sup> s 37(1) of the NTNER Act

<sup>66</sup> s 37(3) of the NTNER Act

<sup>67</sup> *Additional Terms and Conditions for Leases Determination* available at <http://www.comlaw.gov.au/comlaw/Legislation/LegislativeInstrument1.nsf/0/797B910B7958F11CCA25733F001DADED?OpenDocument> (accessed 13 November 2008)

<sup>68</sup> cl 2.1, *Ibid*

<sup>69</sup> cl 4, *Ibid*

<sup>70</sup> Australian Government & Northern Territory Government, "A New Remote Housing System. Better Houses, Healthy Homes" *Information Sheet #137* at [www.nt.gov.au/territoryhousing/remotehousing](http://www.nt.gov.au/territoryhousing/remotehousing)

<sup>71</sup> ss 44 & 46 of the NTNER Act

<sup>72</sup> s 44(3) & 46(3) of the NTNER Act

Minister is required to give a mere 60 days notice, in contrast to the six months generally required.<sup>73</sup>

69. The Commonwealth has the further option of vesting all rights, titles and interests in town camps in itself by merely giving notice.<sup>74</sup>
70. These provisions have the same discriminatory consequences as the compulsory five year lease regime.

**(c) Suspension of the Native Title Act**

71. Given that native title applications may take many years to resolve, the future act regime under the Native Title Act was devised to facilitate negotiations between native title claimants and project proponents, so that native title rights and interests can be protected.
72. The Northern Territory Intervention provides that the future acts regime provided for in the Native Title Act does not apply in an expansive range of circumstances, including over:
- (a) the compulsory five year leases;<sup>75</sup>
  - (b) rights, titles and interests over Aboriginal town camps vested in the Commonwealth;<sup>76</sup>
  - (c) any acts done by, under or in accordance with any other provision dealing with the acquisition of rights, titles and interests in land;<sup>77</sup>
  - (d) acts done by the Commonwealth, the Northern Territory or an Authority on land that has been resumed or leases that have been forfeited over town camps;<sup>78</sup>
  - (e) land on which a Commonwealth interest exists;<sup>79</sup> or
  - (f) any acts related to any of the above acts.<sup>80</sup>

The practical and legal consequence of these measures is the suspension of native title rights in so far as they may be inconsistent with the Commonwealth's rights and powers under the Northern Territory Intervention.

**3.5 Powers over Aboriginal community councils**

73. Part 5 of the NTNER Act vests broad powers in the Minister to intervene in the operation of representative community councils and organisations. The Minister's powers apply to 'community services entities' in 'business management areas', which include areas covered by a lease under s 31; 'Aboriginal land'; 'Aboriginal community living areas'; places specified to be business management areas under the NTNER Act and areas declared by the Minister to be business management areas.<sup>81</sup>

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<sup>73</sup> ss 44(1)(b)(i) & 46(1)(b)(i) of the NTNER Act

<sup>74</sup> s 47 of the NTNER Act

<sup>75</sup> s 51(1)(a) of the NTNER Act

<sup>76</sup> s 51(1)(a) of the NTNER Act

<sup>77</sup> s 51(1)(b) of the NTNER Act

<sup>78</sup> s 51(1)(c) of the NTNER Act

<sup>79</sup> s 51(1)(d) of the NTNER Act

<sup>80</sup> s 51(1)(e) of the NTNER Act

<sup>81</sup> s 3 of the NTNER Act

74. A community service entity can be a community government council, an incorporated association under the Associations Act, an Aboriginal corporation under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*; or any person or entity that performs functions or provides services in a business management area and is specified by the Minister to be a community service entity.<sup>82</sup>
75. The Minister's powers over community organisations are enormously broad, ranging from the power to unilaterally vary or terminate funding agreements between the Commonwealth and a 'community services entity' which is funded to provide services in a 'business management area',<sup>83</sup> direct how funds may be spent,<sup>84</sup> appoint a person to control funds,<sup>85</sup> and direct reporting requirements,<sup>86</sup> direct how and what kind of services are to be provided,<sup>87</sup> direct the use and management of assets<sup>88</sup> and even transfer possession and ownership of assets,<sup>89</sup> appoint observers to attend any or all meetings of the community services entity,<sup>90</sup> and take over management of community government council and incorporated associations<sup>91</sup>.
76. The powers in Part 5 of the NTNER Act were introduced to support the role of the Government Business Manager.<sup>92</sup> The powers are not vested in the Government Business Manager personally but are vested in the Commonwealth or the Minister.<sup>93</sup>
77. The powers were introduced to apply where 'normal processes of discussion and negotiation had failed, or where community organisations are unable, or unwilling, to make the changes that are necessary to benefit their community and their children.'<sup>94</sup>
78. Apart from the extraordinary breadth of the Minister's powers, a number of unusual features are evident. First, it appears that the Minister can give direction as to how an asset is used regardless of the funding source used to obtain the asset. Thus, the Commonwealth could seek to control donated assets, assets purchased through specific fund raising or other means. A failure to comply with a direction results in a civil penalty.<sup>95</sup>
79. Second, as a 'community services entity' is not defined in terms of its funding sources, it seems that the Minister may appoint an observer to a wholly independent organisation that

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<sup>82</sup> s 3 of the NTNER Act

<sup>83</sup> s 65 of the NTNER Act

<sup>84</sup> s 65(2)(b) of the NTNER Act

<sup>85</sup> s 65(2)(d) of the NTNER Act

<sup>86</sup> s 65(2)(c) of the NTNER Act

<sup>87</sup> s 67 of the NTNER Act

<sup>88</sup> s 68(2)(a) & (b) of the NTNER Act

<sup>89</sup> s 68(2)(c) & (d) of the NTNER Act

<sup>90</sup> s 72(3) of the NTNER Act

<sup>91</sup> Division 4 of Part 5 of the NTNER Act

<sup>92</sup> Review Board Report, above, note 9, Appendix 11, 114

<sup>93</sup> Review Board Report, above, note 9, Appendix 11, 114

<sup>94</sup> Review Board Report, above, note 9, Appendix 11, 114; The Hon Mal Brough MP, Second Reading Speech, *Northern Territory National Emergency Response Bill 2007*, House of Representatives Hansard (7 August 2007) at <http://www.aph.gov.au/hansard/reps/dailys/dr070807.pdf> (accessed 22 November 2008), 15 ('**Second Reading Speech**')

<sup>95</sup> s 69 of the NTNER Act

does not receive government funding, as long as it provides functions or services in a business management area. There are no preconditions for the appointment of an observer, other than that the community services entity performs functions or provides services in a business management area.<sup>96</sup>

80. Third, the Northern Territory *Associations Act 2003* (NT) is amended so that a statutory manager can be appointed to administer the affairs of the association, where the association has wilfully contravened a direction given by the Minister in relation to service delivery, use of funding or use of assets etc under Division 2 of Part 5 of the NTNER Act.<sup>97</sup>
81. Finally, the *Associations Act 2003* (NT) is amended so that a statutory manager can be appointed to administer the affairs of the association without an investigation into the affairs of the association that is normally required by that Act.<sup>98</sup>
82. These statutory powers also find no counterpart or precedent elsewhere in Australia. Together with the compulsory five year lease and town camp regimes, they enable the Australian Government to dictate, direct and control all community service delivery to persons of the Aboriginal race within the Prescribed Areas irrespective of the wishes or rights of those persons or of the representative bodies they established to deliver those services.

### **3.6 Removal of consideration of Aboriginal customary law**

83. Part 6 of the NTNER Act precludes considerations of customary law or cultural practice in bail applications<sup>99</sup> or in determining sentence<sup>100</sup> in relation to offences against a law of the Northern Territory.<sup>101</sup>
84. A court may not take into account any form of cultural law or cultural practice as a reason for 'excusing, justifying, authorising, requiring or lessening the seriousness' of the criminal behaviour or alleged criminal behaviour to which the offence or alleged offence relates.<sup>102</sup> Further, a court must not take into account any form or customary law or cultural practice as mitigating the seriousness of the criminal behaviour to which the offence or alleged offence relates.<sup>103</sup>
85. Of most importance is the departure from fundamental legal principle by excluding all relevant factors (which include cultural factors) from being considered in respect of moral culpability in sentencing. The practical and intended effect of this exclusion is for longer and harsher sentences to be imposed on persons of the Aboriginal race in disregard of moral culpability factors that are unique to those persons. Thus, there is serious discrimination against Aboriginal persons by the exclusion of such considerations in bail and sentencing.

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<sup>96</sup> s 72(1) of the NTNER Act

<sup>97</sup> Item 2 of Table 2 in Schedule 4 of the NTNER Act

<sup>98</sup> Item 3 of Table 2 in Schedule 4 of the NTNER Act

<sup>99</sup> s 90 of NTNER Act

<sup>100</sup> s 91 of NTNER Act

<sup>101</sup> s 90(1) of NTNER Act

<sup>102</sup> s 90(1)(b)(i) and s 91(a) of NTNER Act

<sup>103</sup> s 90(1)(b)(ii) and s 91(b) of NTNER Act

### 3.7 Coercive powers of the Task Force

86. While not a specific measure of the Northern Territory Intervention, the establishment of the Task Force in July 2006 arose from the same events that led to the Little Children Are Sacred Report and ultimately the Northern Territory Intervention. The Task Force was established by the Australian Crime Commission (“ACC”) to ‘provide a collaborative and measured response to violence and child abuse in Australia’s Aboriginal communities’.<sup>104</sup>
87. The ACC Board declared the operation of the Task Force to be a special intelligence operation<sup>105</sup> on 5 February 2008,<sup>106</sup> allowing for the exercise of coercive powers, whereby a person may be summoned to appear before an examiner at an examination to give evidence or produce such documents or other things as are referred to in the summons.<sup>107</sup>
88. A person who is served with a summons must attend the examination;<sup>108</sup> must take an oath or affirmation if required; must answer questions as required by the examiner and must produce documents required by the summons.<sup>109</sup> A person who does not comply with these requirements is guilty of an offence and is liable for a fine or imprisonment for up to five years.<sup>110</sup>
89. The examiner has the power to prohibit the disclosure of information about the summons or notice, or any official matter connected with it.<sup>111</sup> Where a person has received a summons with notice of the disclosure prohibition, it is an offence to disclose the existence of the summons, the notice or any information about it; or the existence of any information about any official matter connected with the summons or notice, except to obtain legal advice or in other limited circumstances.<sup>112</sup>
90. It is unprecedented that coercive powers in relation to an investigation of criminal offences defined by race.

### 3.8 Abolition of Community Development Employment Projects

91. The Northern Territory Intervention also involved the abolition of the CDEP Program, a program that was implemented in 1997 to assist Aboriginal people in securing work. This program is essentially a national work for the dole program for Aboriginal people which employed 8,000 Aboriginal people in about 50 separate community controlled

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<sup>104</sup> Australia Crime Commission, Media Release, *National Indigenous Violence and Child Abuse Intelligence Task Force*, (17 July 2006) at [http://www.aic.gov.au/topics/indigenous/task\\_force/](http://www.aic.gov.au/topics/indigenous/task_force/) (accessed 9 October 2008)

<sup>105</sup> Alistair Milroy, Chief Executive Australian Crime Commission, Abstract of an address to the 2008 Bennelong Society Conference (20 June 2008) at [www.bennelong.com.au/conferences/pdf/Milroy2008.pdf](http://www.bennelong.com.au/conferences/pdf/Milroy2008.pdf) (accessed 17 November 2008)

<sup>106</sup> *NTD8 v Australian Crime Commission (No 2)* [2008] FCA 1551 (17 October 2008) at [7]

<sup>107</sup> s 28 of the *Australian Crime Commission Act 2002* (Cth)

<sup>108</sup> s 30(1) of the *Australian Crime Commission Act 2002* (Cth)

<sup>109</sup> s 30(2) of the *Australian Crime Commission Act 2002* (Cth)

<sup>110</sup> s 30(6) of the *Australian Crime Commission Act 2002* (Cth)

<sup>111</sup> s 29A of the *Australian Crime Commission Act 2002* (Cth)

<sup>112</sup> s 29B of the *Australian Crime Commission Act 2002* (Cth)

organisations.<sup>113</sup> Under the CDEP Program, Aboriginal workers were employed in a wide variety of jobs directed towards meeting local community needs. Government funding was provided to employer organisations in lieu of unemployment support to the individual employees.

92. Many organisations relied on this workforce funding to provide services, and for some community councils CDEP Program funds made up half of their budget. In 2001, 69 percent of CDEP Program participants were from remote areas.<sup>114</sup>
93. The CDEP Program was being abolished as part of the Northern Territory Intervention in order to 'reduce the flow of cash' into Aboriginal communities.<sup>115</sup> CDEP Program workers were instead moved to unemployment payments and therefore subject to the 'income management regime'.
94. The CDEP Program had been important to Aboriginal communities, particularly those in very remote areas where there may be little choice or opportunity to gain employment. However, the abolition of the CDEP Program removed the ability of workers and their families to make economic decisions, and will undoubtedly increase poverty levels. Community organisations relying on CDEP Program have lost the ability to provide services to their communities.
95. There was no consultation with affected communities and CDEP Program employers about this decision, which has been retreated from in part by the present government.

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<sup>113</sup> Department of Families, Community Services and Indigenous Affairs, *Factsheet: Jobs and Training for Indigenous People in the Northern Territory — Changes to CDEP* (2007) available at [http://www.facsia.gov.au/nter/docs/legis\\_factsheet\\_05.htm](http://www.facsia.gov.au/nter/docs/legis_factsheet_05.htm).

<sup>114</sup> Australian Bureau of Statistics, *Population Characteristics, Aboriginal and Torres Strait Islander Australians* (2001) available at <http://www.abs.gov.au/ausstats/abs@.nsf/ProductsbyTopic/2B3D3A062FF56BC1CA256DCE007FBFFA?OpenDocument>.

<sup>115</sup> FaHCSIA CDEP Factsheet, above, note 113

#### 4. Impetus for Urgent Action

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96. As outlined in Section 3, the Northern Territory Intervention has imposed a comprehensive suite of oppressive measures that disproportionately affect Aboriginal people in the Northern Territory. The measures have impacted on almost every aspect of the lives of Aboriginal people, ranging from: control of personal income without redress; prescriptions as to where income can be spent and what can be bought; control of Aboriginal organisations, assets and land by Government employees; and the removal of the consideration of culture in bail and sentencing.
97. The independent review of the Northern Territory Intervention by the Review Board was highly critical of some elements, referring to:
- (a) experiences of racial discrimination and humiliation;<sup>116</sup>
  - (b) hardship and indignity, especially for vulnerable people such as the elderly, disabled and mentally ill;<sup>117</sup>
  - (c) confusion and anxiety arising from inadequate, unclear advice being conveyed to communities and/or inadequate resourcing for the implementation;<sup>118</sup>
  - (d) widespread Aboriginal hostility to the Australian Government's actions;<sup>119</sup>
  - (e) intense hurt and anger at being isolated on the basis of race;<sup>120</sup>
  - (f) conviction that the measures would never be applied to other Australians;<sup>121</sup>
  - (g) a sense of betrayal and disbelief;<sup>122</sup>
  - (h) exasperation at the focus on Aboriginal child abuse and neglect, when abuse and neglect occurred throughout Australia;<sup>123</sup> and
  - (i) incomprehension at the linkage between child welfare and some of the measures of the Northern Territory Intervention.<sup>124</sup>
98. The Authors respectfully submit the need for urgent action, notwithstanding that the Northern Territory Intervention has been in operation since June 2007. A request for urgent action has not to date been forthcoming, as it was necessary to ascertain the current Australian Government's response to the independent review of measures implemented by the previous Australian Government.

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<sup>116</sup> Review Board Report, above, note 9, 8

<sup>117</sup> Draft Review Board Report, above, note 30, 36

<sup>118</sup> Draft Review Board Report, above, note 30, 36

<sup>119</sup> Review Board Report, above, note 9, 8

<sup>120</sup> Review Board Report, above, note 9, 8

<sup>121</sup> Review Board Report, above, note 9, 8

<sup>122</sup> Review Board Report, above, note 9, 8

<sup>123</sup> Review Board Report, above, note 9, 34

<sup>124</sup> Review Board Report, above, note 9, 34

99. As discussed in Section 1, the Authors submit that the Northern Territory Intervention has the potential to cause irreparable harm to Aboriginal people in the Northern Territory. The Authors are especially fearful of the impact of the Northern Territory Intervention measures on Aboriginal cultural and social norms, including the undermining of communal ownership of land and principles of self-determination.
100. In addition, the Authors submit that the manner of the Northern Territory Intervention's implementation, and its continued operation, has severely undermined the relationship between Aboriginal people and the Australian Government.
101. The Authors contend that the current Australian Government's decision to maintain the oppressive and discriminatory measures of the Northern Territory Intervention results in a continuation of the serious harm. In any event, there remains considerable doubt as to the Government's power and will to re-impose the Racial Discrimination Act in respect of the Intervention.
102. Further, in the absence of a formal mechanism to actively engage Aboriginal people, the Authors submit that there is considerable doubt as to the Government's intention to form genuine partnerships in the formulation of initiatives to deal with Aboriginal disadvantage required to address child sexual abuse and neglect.
103. The Authors respectfully submit that the gravity and scale of the Northern Territory Intervention requires immediate attention due to the potential for irreparable harm caused to Aboriginal persons subjected to the discrimination.
104. Specifically, the Authors submit that the Northern Territory Intervention demonstrates the following indicators of the need for immediate attention:
- (a) Adoption of new discriminatory legislation that was enacted with haste and without sufficient consideration to alternatives;<sup>125</sup>
  - (b) Failing to provide a guaranteed right of redress<sup>126</sup> through suspension of the existing state, territory and federal legislative framework prohibiting racial discrimination and removing all mechanisms for remedy;
  - (c) Breaching cultural rights;<sup>127</sup>
  - (d) Evidence of a pattern of escalating incidents of racism and racial tension arising from the measures themselves and from State party rhetoric justifying the implementation of the Northern Territory Intervention;
  - (e) Enacting legislation that was incompatible with the Race Convention;<sup>128</sup>
  - (f) Evidence that implementation of the Northern Territory Intervention has led to de facto racial segregation in service delivery;

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<sup>125</sup> Decision 1(66) New Zealand, CERD/C/DEC/NZL/1, 27 April 2005 ('**Decision 1(66) New Zealand**')

<sup>126</sup> Ibid

<sup>127</sup> Decision 1(68) United States of America, CERD/C/USA/DEC/1, 11 April 2006 ('**Decision 1(68) USA**')

<sup>128</sup> Decision 1(66) New Zealand, above, note 125; Decision 2(54) on Australia, 18 March 1999, A/54/18 ('**Decision 2(54) Australia**')

- (g) Embarking upon actions that may lead to irreparable harm to Northern Territory Aboriginal communities, impacting on the most vulnerable, without formal notification and without seeking prior agreement or informed consent;<sup>129</sup>
  - (h) Failing to provide for effective participation by Aboriginal communities in decision making and policy making in compliance with its obligations under article 5(c) of the Race Convention and General Recommendation 23.<sup>130</sup>
  - (i) Breaching Aboriginal peoples' rights to own, develop, control and use communal lands, territories and resources detailed in General Recommendation 23;<sup>131</sup>;
  - (j) Removing the protection of Aboriginal title and adopting processes that do not accord with contemporary international human rights norms, principles and standards that govern Aboriginal property rights, including the right to self-determination;<sup>132</sup>
  - (k) Denying traditional rights over land;<sup>133</sup> and
  - (l) Creating legal certainty for governments and non- Aboriginal people at the expense of Aboriginal property rights.<sup>134</sup>
105. In light of the indicators specified above, the Authors respectfully request that the Committee invoke its Urgent Action procedure. The specific measures that the Authors request be taken by the Committee are outlined in Section 6 of this Request for Urgent Action.

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<sup>129</sup> Decision 1(67) Suriname, CERD/C/DEC/SUR/2, 18 August 2005

<sup>130</sup> Decision 2(54) on Australia, above, note 128

<sup>131</sup> Decision 1(68) USA, above note 127; Decision 2(54) on Australia, 18 March 1999, A/54/18

<sup>132</sup> Decision 1(68) USA, above note 127

<sup>133</sup> Decision 1(68) USA, above note 127

<sup>134</sup> Decision 2(54) on Australia, above, note 128

## 5. Concerns under the Race Convention

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106. This section outlines the Authors' major concerns in relation to the Northern Territory Intervention by reference to the relevant provisions of the Race Convention.

### 5.1 Article 1: Definition of 'Discrimination'

107. The Authors submit that the measures involved in the Northern Territory Intervention constitute 'discrimination' for the purposes of article 1 of the Race Convention.

108. The Authors observe that the norm of 'non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitutes a basic principle in the protection of human rights.'<sup>135</sup> Non-discrimination is a foundational principle of international human rights law and, in addition to the Race Convention, is entrenched in numerous international instruments including the *United Nations Charter*, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights* and the *Declaration on the Rights of Indigenous Peoples*.

109. The norm of non-discrimination is embodied in the objectives and principles of the Race Convention. In particular, Article 2(1)(c) provides that a distinction is contrary to the Race Convention if it has either the purpose or the effect of impairing particular rights and freedoms.<sup>136</sup>

110. While particular actions may have varied purposes, an action has an effect contrary to the Race Convention if it has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.<sup>137</sup> The definition of racial discrimination in article 1 expressly extends beyond measures that are explicitly discriminatory, to encompass measures which are not discriminatory at face value but are discriminatory in fact and effect.<sup>138</sup>

111. The norm of non-discrimination has specific implications as it applies to Aboriginal peoples, who continue to experience racial discrimination that is the 'outcome of a long historical process of conquest, penetration and marginalisation, accompanied by attitudes of superiority and by a projection of what is Aboriginal as "primitive" and inferior'.<sup>139</sup> The discrimination against Aboriginal peoples has been characterised as having a dual nature consisting of

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<sup>135</sup> UN Committee on the Elimination on Racial Discrimination, *General Recommendation 14: Definition of discrimination (art1 par 1)* at [1] ('**General Recommendation 14**'); Human Rights Committee, *General Comment 18: Non-Discrimination* at [1]

<sup>136</sup> CERD, *General Recommendation 14*, *ibid* at [1].

<sup>137</sup> CERD, *General Recommendation 14*, *ibid* at [2].

<sup>138</sup> *Ms L R et al v Slovak Republic* CERD/C/66/D/31/2003 at par [10.4]

<sup>139</sup> "Report on the United Nations Seminar on the Effect of Racial Discrimination on the Social and Economic Relations between Indigenous Peoples and States" at 5 cited in S James Anaya, *Indigenous Peoples in International Law (2<sup>nd</sup> edition)* (Oxford University Press: 2004), at p130 ('**Indigenous Peoples in International Law**')

destruction of the material and spiritual conditions underpinning their lifeways; and exclusion and negative discrimination when participating in the dominant society.<sup>140</sup>

112. The specific challenges to Aboriginal culture and identity are recognised in the Committee's General Recommendation 23, which acknowledges Aboriginal peoples' vulnerability and recognises that Aboriginal peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises.<sup>141</sup>
113. Thus, the Authors submit that the Race Convention must be read together with General Recommendation 23 to discern the content of State party obligations as they apply to Aboriginal peoples. Relevantly, State parties have the obligation to:
- (a) Recognise and respect Aboriginal distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;<sup>142</sup>
  - (b) Ensure that members of Aboriginal peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on Aboriginal origin or identity;<sup>143</sup>
  - (c) Provide Aboriginal peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;<sup>144</sup>
  - (d) Ensure that members of Aboriginal 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;<sup>145</sup>
  - (e) Ensure that Aboriginal communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.<sup>146</sup>
114. State parties have a specific obligation to recognise and protect the rights of Aboriginal peoples to own, develop, control and use their communal lands, territories and resources. Where Aboriginal peoples have been deprived of their land and territories without their free and informed consent, State parties are obligated to return their land and territories and where this is not possible, provide just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.<sup>147</sup>
115. It is without question that the Northern Territory Intervention was directed at Aboriginal persons and communities.<sup>148</sup> The legislative provisions apply to townships on Aboriginal land

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<sup>140</sup> Ibid

<sup>141</sup> UN Committee on the Elimination of Racial Discrimination, *General Recommendation 23: Indigenous Peoples* at [3] ('**General Recommendation 23**')

<sup>142</sup> Ibid at [4(a)]

<sup>143</sup> Ibid at [4(b)]

<sup>144</sup> Ibid at [4(c)]

<sup>145</sup> Ibid at [4(d)]

<sup>146</sup> Ibid at [4(e)]

<sup>147</sup> Ibid at [5]

<sup>148</sup> The Intervention was argued to be implemented in response to the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse. In turn, the Inquiry was instigated in response to

that are predominantly populated by Aboriginal people<sup>149</sup> and it is beyond dispute that they disproportionately affect Aboriginal people in the Northern Territory.

116. The Authors acknowledge that non-discrimination does not entail identical treatment and that differential treatment does not necessarily constitute discrimination.<sup>150</sup> However, the Authors submit that measures of the Northern Territory Intervention apply a distinction to, and limit certain rights and freedoms of, a specific group of people identified by race. The effect of the measures has had an unjustifiable disparate impact upon Aboriginal people.<sup>151</sup>
117. The Authors submit that the discriminatory nature of the Northern Territory Intervention is implicitly acknowledged by the exclusion of the Racial Discrimination Act and state and territory anti-discrimination legislation that prevents those who are subject to the Northern Territory Intervention from seeking protection from discrimination or a remedy from harm by reason of discrimination. As a result of the exclusion of the operation of the Racial Discrimination Act, there are no domestic remedies available to dispute or seek relief from that discrimination.<sup>152</sup>
118. The exclusion of the Racial Discrimination Act is a profound violation of the norm of non-discrimination embodied in the principles and objectives of the Race Convention.
119. Rather than entrenching a guarantee against racial discrimination, as directed by the Committee,<sup>153</sup> the State party has on three occasions suspended or excluded the operation of the Racial Discrimination Act. On each occasion, the suspension related to the enactment of Commonwealth legislation to the detriment of the rights and interests of Aboriginal Australians.<sup>154</sup>

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media accounts of shocking allegations of child sexual abuse, organised paedophile rings and sexual slavery. In the Coalition Government's own words, action was taken to "ensure the protection of Aboriginal children from harm". See Media release by the former Minister for Families, Community Services and Indigenous Affairs, the Hon Mal Brough MP, *National emergency response to protect children in the NT*, 21 June 2007 available at [http://www.facsia.gov.au/internet/minister3.nsf/content/emergency\\_21june07.htm](http://www.facsia.gov.au/internet/minister3.nsf/content/emergency_21june07.htm) (accessed 18 September 2008)

<sup>149</sup> FaHCSIA Background Material, above, note 39, "Section 1 Overview"

<sup>150</sup> CERD, General Recommendation 14 at [2]

<sup>151</sup> CERD, General Recommendation 14 at [2].

<sup>152</sup> There is currently pending a decision of the High Court (which is expected to be handed down by 1 February 2009) on whether the 5 Year lease regime imposed by the Northern Territory Intervention contravenes s 51(xxxi) of the Australian Constitution. That section prohibits the Commonwealth from acquiring property other than on just terms. The judgment will determine whether s 51 (xxxi) applies to an acquisition of property in the Northern Territory and, if so, whether the limited financial and other compensation provided for comprises 'just terms'. The constitutional case is not able to be based upon any constitutional protection from discrimination on grounds of race etc because the Australian Constitution provides no such protection.

<sup>153</sup> CERD, Concluding Observations to Australia's thirteenth and fourteenth periodic reports (2005), and to Australia's tenth, eleventh, twelfth periodic reports (2000)

<sup>154</sup> The three occasions when the Racial Discrimination Act has been suspended were: (1) the 1998 amendments to the *Native Title Act 1993* (Cth) (which were held by the Committee to be incompatible with the Race Convention. The Committee recommended that Australia refrain from adopting measures that withdraw existing guarantees of Indigenous rights, that informed consent be sought and that discussions be reopened with Indigenous peoples. See CERD, Concluding Observations to Australia's thirteenth and fourteenth periodic reports (2005) and Australia's tenth, eleventh, twelfth periodic reports (2000)); (2) the enactment of the *Hindmarsh Island Bridge Act 1997* (Cth); and (3) the Northern Territory Intervention.

## 5.2 'Special Measures'

120. 'Special measures' are initiatives intended to ensure the adequate advancement of certain racial groups who require support to be able to enjoy their human rights and fundamental freedoms in full equality. Special measures are permitted under article 1(4) of the Race Convention; they are also *required* when 'when the circumstances so warrant' under article 2(2) of the Race Convention.
121. Article 1(4) of the Race Convention provides that:
- 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 have been achieved.
122. Article 2(2) of the Race Convention provides that:
- States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.
123. A differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Race Convention:<sup>155</sup>
- (a) are legitimate; or
  - (b) fall within the scope of article 1(4) of the Race Convention.
124. The Author submits that special measures have some essential characteristics, including that they:
- (a) are taken for the sole purpose of securing the **advancement** of some or all members of a racial or ethnic group so they can enjoy human rights and fundamental freedoms equally with others;
  - (b) must be **necessary** for the group to achieve that purpose; and
  - (c) are **temporary**, ceasing on the achievement of the objectives for which they were taken.
125. Importantly, special measures require the participation of the affected group in their formulation.<sup>156</sup> In this respect, the AHRC's Aboriginal and Torres Strait Islander Social Justice

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<sup>155</sup> CERD, General Recommendation 14 at [2]

<sup>156</sup> UN Committee on the Elimination of Racial Discrimination, "Committee on Elimination of Racial Discrimination Discusses States' Obligation to Undertake Special Measures (5 August 2008) at

Commissioner (“**Social Justice Commissioner**”) argues that where measures have a potentially negative effect, they can only be special measures when enacted with the **consent** of the affected people.<sup>157</sup>

126. There is a distinction to be made between the permanent and positive obligations on State parties under the Race Convention, especially under article 5, and ‘special measures’, such that special measures do not replace existing measures or norms, such as Aboriginal peoples’ right to speak their own language.<sup>158</sup>
127. Special measures require clear objectives and specific criteria for adequate advancement against which the measure is assessed, requiring periodic assessment and management.<sup>159</sup> Such examination of the difference, objective and purpose of measures must be undertaken in the political context of the each State party.<sup>160</sup>
128. Special measures are temporary measures, existing only while the inequality persists with the aim of ‘overcoming structural situations based on a discriminatory basis’.<sup>161</sup> However, the Authors acknowledge that ‘temporary’ does not necessarily mean ‘short term’ as the process of addressing inequality could take decades.<sup>162</sup>
129. Specifically in relation to Aboriginal people, the Authors submit that the justification for preferential treatment necessarily must recognise Aboriginal distinctiveness including on collective ownership and possession of Aboriginal lands, language rights and customary ways of solving internal disputes.<sup>163</sup>
130. The Authors submit that the Northern Territory Intervention measures do not fulfil the criteria for special measures for the following reasons:
  - (a) the measures are not demonstrably for the advancement of Aboriginal people;
  - (b) the Australian Government has not explicitly demonstrated the necessity for the Northern Territory Intervention measures;
  - (c) many of the measures are not temporary;
  - (d) the measures are largely arbitrary and provide for discrimination at the discretion of the State party without reasonable or appropriate criteria for or limitations on the exercise of the discretion;
  - (e) there was no input by Aboriginal communities into the formulation - or implementation - of the policies and measures of the Northern Territory Intervention;

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[http://www.unog.ch/unog/website/news\\_media.nsf/\(httpNewsByYear\\_en\)/696149E128473FAFC125749C004A5160?OpenDocument](http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/696149E128473FAFC125749C004A5160?OpenDocument) (accessed 12 August 2008) (**‘CERD Discusses Special Measures’**)

<sup>157</sup> Human Rights and Equal Opportunity Commission, *Submission to the Senate Legal and Constitutional Committee on the Northern Territory National Emergency Response Legislation* (10 August 2007) [20] – [21]; references omitted.

<sup>158</sup> Linos-Alexander Sicilianos, Committee expert cited in CERD Discusses Special Measures, above, note 156

<sup>159</sup> Media Release, CERD Discusses Special Measures, above, note 156

<sup>160</sup> Media Release, CERD Discusses Special Measures, above, note 156

<sup>161</sup> Jose Lindgren Alves, Media Release, CERD Discusses Special Measures, above, note 156

<sup>162</sup> Dilip Lahiri, Committee Expert cited in Media Release, CERD Discusses Special Measures, above, note 156

<sup>163</sup> Alexandra Xanthaki, *Indigenous Rights and United Nations Standards*, (Cambridge University Press: 2007), at p75

- (f) there are no specific criteria necessarily or clearly linking the measures to the aim of child protection, Aboriginal welfare, the provision of housing or any other legitimate objective to overcome Aboriginal disadvantage;
  - (g) the measures breach positive obligations under the Race Convention; and
  - (h) the measures do not respect Aboriginal distinctiveness including on communal ownership, obligations of traditional owners to speak for country and Aboriginal cultural and social norms.
131. These concerns are explored in further detail below.
- (a) Advancement**
132. The right to non-discrimination requires not only protection from discrimination, but in some circumstances may also require affirmative action designed to ensure the positive enjoyment of rights of a particular group. Such 'special measures' must improve the circumstances of that group; laws which do not secure advancement and which are contrary to the wishes of the affected group cannot be regarded as being special measures.
133. When first implemented in 2007, the Australian Government declared that all measures constituting the Northern Territory Intervention were 'special measures' for the purposes of the Racial Discrimination Act. Each of the three substantive legislative instruments that constitute the Northern Territory Intervention include a provision to that effect.<sup>164</sup>
134. The Australian Government has itself acknowledged the discriminatory nature of the Northern Territory Intervention measures. It has recognised that the core elements of the Northern Territory Intervention — including the income management regime and the compulsory five year leases — require strengthening 'to ensure that they are either more clearly special measures or non-discriminatory'.<sup>165</sup> However, the Author notes that this 'strengthening' is yet to be formulated.
135. The Minister has stated her confidence that the Northern Territory Intervention measures are, or will be, legitimately categorised as special measures on the basis that they are of a beneficial nature<sup>166</sup> and that there is engagement and consultation with the affected individuals or group.<sup>167</sup>
136. The Minister's approach seems to use the term 'benefit' as suggesting a positive outcome or improvement in circumstances, where the focus is on the outcome itself and not on the mechanism by which it is achieved; an ends justifies the means approach. This is most

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<sup>164</sup> s 132(1) of the NTNER Act; s 4(1) of the FaCSIA Amendment Act; ss4(2) and s 6(2) of the Welfare Payment Reform Act provide that, for the purposes of the *Racial Discrimination Act 1975* (Cth) ('Racial Discrimination Act'), the provisions of the Acts and any acts done under or for the purposes of those provisions, are special measures.

<sup>165</sup> Hon Jenny Macklin, Compulsory income management to continue, above, note 12

<sup>166</sup> Hon Jenny Macklin, Compulsory income management to continue, above, note 12; *Govt responds to Northern Territory intervention review*, ABC: 7.30 Report, 23 October 2008 at <http://www.abc.net.au/7.30/content/2008/s2399696.htm> (accessed 20 November 2008) ('**Government Responds to Intervention Review**'); ABC Radio National, Government Response to Review Board, above, note 62

<sup>167</sup> ABC Radio National, Government Response to Review Board, above, note 62

clearly demonstrated in the Minister's repeated assertion of the beneficial nature of income quarantining, where the increased sales of fresh food is cited as evidence.<sup>168</sup>

137. The Authors submit that while 'special measures' are designed to achieve 'effective equality' or equality of outcome, the requirement for a proportional and therefore, culturally appropriate, response to the achievement of a specific objective properly requires an analysis of the mechanism by which it is attained. In any event, the Authors refute that, notwithstanding support of the Northern Territory Intervention by some Aboriginal people, the Northern Territory Intervention has not conferred the unqualified benefit described by the Australian Government.
138. The Northern Territory Intervention has implemented a range of extraordinary measures that, rather than ensuring the positive enjoyment of other human rights, have actually had the effect of severely limiting the enjoyment of those rights, including:
- (a) the right of self-determination;
  - (b) the rights of the child;<sup>169</sup>
  - (c) rights of political participation;
  - (d) the right to work;
  - (e) the right to social security; and
  - (f) cultural rights.
139. Special measures are clearly designed to support the principle of equality.<sup>170</sup> However, the Northern Territory Intervention measures do not enable Aboriginal Australians to enjoy each of these rights to the same degree as non-Aboriginal Australians.
140. The impact of the Northern Territory Intervention measures on these rights is discussed further below in relation to each of the articles of the Race Convention.
- (b) Necessity**
141. Special measures are designed to achieve substantive equality. Substantive equality allows different groups to be treated differently so that they can, in the end, enjoy their human rights equally. Indeed, article 2(2) of the Race Convention imposes an obligation on governments to introduce special measures when necessary. However, the onus is on the State party to prove that the discriminatory action can be justified as a special measure.

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<sup>168</sup> Hon Jenny Macklin, Compulsory income management to continue, above, note 12; 7.30 Report, Government Responds to Intervention Review, above, note 166; ABC Radio National, Government Response to Review Board, above, note 62; Hon Jenny Macklin, *Response to the NTER Review*, Transcript, 23 October 2008 at [http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/nter\\_review\\_24oct08.htm](http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/nter_review_24oct08.htm) (accessed 20 November 2008) ('**Response to the NTER Review**')

<sup>169</sup> The Australian Government has failed to use a children's rights framework to address the complex issue of the protection of children from sexual abuse in Indigenous communities. Notwithstanding its descriptor as a 'national emergency intervention', the Australian Government has made no effort to use children's rights or human rights principles to frame its response.

<sup>170</sup> CEDAW, General Recommendation 23 at [15]

142. As described above, the Northern Territory Intervention was justified as introducing 'immediate, broad ranging measures to stabilise and protect communities' in response to the 'national emergency confronting the welfare of Aboriginal children in the Northern Territory'.<sup>171</sup> The Northern Territory Intervention was said by the former Australian Government to be triggered by the release of the Little Children Are Sacred Report, stressing the need for urgency<sup>172</sup> and need to avoid 'talkfests' and 'red tape'.<sup>173</sup>
143. In fact, in announcing the legislative package in August 2007, the former Minister responsible for the implementation of the Northern Territory Intervention, criticised the authors of the report for not providing recommendations designed to immediately secure communities and protect children from abuse.<sup>174</sup> The Northern Territory Intervention has been described as at odds with the recommendations of the Little Children Are Sacred Report, in particular the need for consultation.<sup>175</sup>
144. Clear objectives and specific criteria for the measures are required to articulate the necessary 'advancement', justify the measure in achieving that advancement and identify an end point for cessation. There must be mechanisms by which the advancement can be assessed and managed.
145. The 'essential justification for the Northern Territory Intervention was the reported endemic sexual abuse of Aboriginal children in the Northern Territory'<sup>176</sup> yet the specific means by which the measures of the Northern Territory Intervention were to address child welfare have not been articulated.
146. Apart from some initial scoping data, there was little evidence of baseline data being gathered in any formal or organised format that would permit an assessment of the impact or progress of the Northern Territory Intervention upon communities.<sup>177</sup> Assertions of benefit arising from income quarantining for example have been based on limited empirical data and hearsay and anecdotal observations from third parties and has not arisen from primary evidence obtained from those subject to the measure.
147. These aspects are analysed in further detail in the discussion below each relevant article of the Race Convention.

**(c) Northern Territory Intervention Measures are disproportionate and arbitrary**

148. Special measures can only be taken when they are needed so that members of a disadvantaged racial group can enjoy their human rights equally with others. The Authors do not dispute that family violence and abuse have been prevalent problems in some Aboriginal

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<sup>171</sup> Hon Mal Brough, Media release, above note 4

<sup>172</sup> Ibid

<sup>173</sup> Hon Mal Brough MP, Second Reading Speech, above, note 94, 18

<sup>174</sup> Media release by the former Minister for Families, Community Services and Indigenous Affairs, the Hon Mal Brough MP, *Howard Government getting on with the job of protecting children in the Northern Territory*, 6 August 2007 available at [http://www.facsia.gov.au/internet/minister3.nsf/content/nter\\_6aug07.htm](http://www.facsia.gov.au/internet/minister3.nsf/content/nter_6aug07.htm) (accessed 18 September 2008)

<sup>175</sup> Draft Review Board Report, above, note 30, 10

<sup>176</sup> Review Board Report, above, note 9, 33

<sup>177</sup> Review Board Report, above, note 9, 43

communities for many years<sup>178</sup> and notes that it has been a source of deep frustration that, historically, there has not been concerted, long term action taken by governments in partnership with communities to address these issues.<sup>179</sup> However, the Authors submit that the Northern Territory Intervention measures are arbitrary and disproportionate and therefore not reasonably adapted to fulfilling the stated aim of the Northern Territory Intervention.

149. As referred to previously, the Little Children Are Sacred Report, the AHRC and the Review Board have each emphasised the complexity of child sexual abuse in Northern Territory Aboriginal communities and recognised the importance of an approach targeting Aboriginal disadvantage to address decades of cumulative neglect by governments, where formulation of that approach with the affected communities is paramount. Importantly, the Little Children Are Sacred Report attributed the weakening of Aboriginal communities in the Northern Territory to a 'combination of the historical and ongoing impact of colonisation and the failure of governments to actively involve Aboriginal people, especially Elders and those with traditional authority, in decision making.'
150. Article 1(4) of the Race Convention requires that any criteria for differentiation on the ground of race must be applied pursuant to the achievement of a legitimate aim, and must be proportional to the achievement of that aim. Such criteria must be judged in the light of the objectives and purposes of the Race Convention.
151. The Authors respectfully submit that the Northern Territory Intervention, and each of the measures associated with the Intervention:
- (a) are not proportionate to the achievement of the State party's stated aim of the Northern Territory Intervention;
  - (b) are not based on objective and reasonable grounds;
  - (c) have not taken into consideration whether any alternative, less restrictive mean exist and therefore can not constitute 'special measures' for the purposes of the Race Convention.
152. These aspects are analysed in further detail in the discussion below each relevant article of the Race Convention.
- (d) Lack of Consultation**
153. As stated above, laws which are contrary to the wishes of the affected group cannot be special measures. Yet two of the defining features of the Northern Territory Intervention are policy formation without consultation with affected Aboriginal communities and the unprecedented haste with which the Northern Territory Intervention was enacted, which precluded the crafting of an appropriate community based response.
154. The lack of consultation has resulted in hostility to government on the party of Aboriginal people and a lack of support and cooperation that otherwise might be forthcoming.<sup>180</sup> This

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<sup>178</sup> HREOC Review Board Submission, above, note 31 at [16]

<sup>179</sup> HREOC Review Board Submission, above, note 31 at [16]

<sup>180</sup> See Review Board Report, above, note 9, 10; Central Land Council, *Northern Territory Emergency Response: Perspectives from Six Communities*, July 2008 at [http://www.clc.org.au/media/features/CLC%20 REPORTweb.pdf](http://www.clc.org.au/media/features/CLC%20REPORTweb.pdf) (accessed 20 November 2008) ('**Central Land Council Survey**'); AIDA Submission, above, note 29 at [9]-[10]; Community Based Review, above, note 28, 5

- opposition has been exacerbated by a 'profound lack of communication across all levels and between all key stakeholders', with 'little explanation of the rationale' linking the measures of the Northern Territory Intervention with child abuse.<sup>181</sup>
155. A report entitled *A Community Based Review of the Northern Territory Emergency Response* ("**Community Review**") found that 'dysfunctional communication strategies' produced undue hardship as well as confusion, fear, and frustration in Aboriginal communities, explaining that 'even now, most Aboriginal people still don't know what is going on, unless it affects them personally (and even then many are confused). Information is conveyed by rumour'.<sup>182</sup>
156. The lack of consultation has profoundly disempowered Aboriginal people and their communities and led to a strongly articulated sense of helplessness. The AIDA's interviews with communities and stakeholders reinforced a sense of regression to a protectionist era, with Government control of every aspect of Aboriginal people's lives.<sup>183</sup> Speakers at a Prescribed Area People's Alliance meeting described a similar sentiment; that of an overwhelming sense of a return to 'mission days'.<sup>184</sup>
157. The Australian Government has adopted the Review Board's recommendation that there be greater emphasis on community development and engagement<sup>185</sup> but as yet has not explained how this is to be achieved.
158. Crucially, the lack of consultation has undermined the right of self-determination, which is one of the most important aspects of international human rights protection and is espoused in the Committee's General Recommendation 21.
159. AIDA's research and the Central Land Council's survey of six communities found that the Northern Territory Intervention had failed to recognise existing good governance, undermining self management and autonomy.<sup>186</sup> On a practical level, lack of consultation and haste resulted in unnecessary duplication of services in critical areas, such as childhood health.<sup>187</sup> Excellent programs that were in place before the Intervention did not receive recognition and support, which was and was seen to belittle and sideline all the efforts and energy that individual communities and individual people have put into tackling their own problems.<sup>188</sup>
160. The lack of consultation and undermining of self-determination is not only exemplified through the means by which the Northern Territory Intervention was implemented, but is also reflected in the measures themselves where governance and decision making control are removed or proposed to be removed at will from Aboriginal organisations, particularly through the appointment of Government Business Managers.

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<sup>181</sup> AIDA Submission, above, note 29 at [9]-[10]

<sup>182</sup> Community Based Review, above, note 28, 128

<sup>183</sup> AIDA Submission, above, note 29 at [16]

<sup>184</sup> Public addresses, Prescribed Area People's Alliance meeting, Alice Springs, 29 September 2008

<sup>185</sup> Hon Jenny Macklin, Compulsory income management to continue, above, note 12

<sup>186</sup> AIDA Submission, above, note 29 at [14]; Central Land Council Survey, above, note 180, 79

<sup>187</sup> Community Based Review, above, note 28, 129

<sup>188</sup> Community Based Review, above, note 28, 129; Draft Review Board Report, above, note 30, 9

**(e) Unjustifiable disparate impact on Aboriginal people**

161. In seeking to determine whether an action has an effect contrary to the Race Convention, the Committee will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.<sup>189</sup>
162. In order to do this, the Committee must evaluate the actual effect of the action in question. The remainder of this section examines each of the relevant articles of the Race Convention by reference to the measures of the Northern Territory Intervention.

**5.3 Article 2: Obligation to Implement the Race Convention**

163. Article 2 of the Race Convention imposes an obligation on State parties to pursue, by all appropriate means, a policy of eliminating racial discrimination in all its forms. The Authors submit that the Northern Territory Intervention measures and, in particular, the exclusion of the Racial Discrimination Act and state and territory non-discrimination laws, raise serious concerns in relation to the State party's obligations under article 2 of the Race Convention.
164. The Racial Discrimination Act constitutes the incorporation of the Race Convention into the State party's domestic law. In this respect, the operation of the Racial Discrimination Act serves an important function of ensuring that the State party's domestic laws and policies give effect to the objectives and principles contained in the Race Convention. The effect of the exclusion of the Racial Discrimination Act is that the Northern Territory Intervention measures are not subject to scrutiny against the obligations and standards contained in the Race Convention.
165. In addition, the exclusion of the Racial Discrimination Act and state and territory anti-discrimination laws applies very broadly, such that public authorities and public institutions administering the Northern Territory measures are excluded from complying with the principles and standards contained in the legislation.
166. In previous comments in relation to the State party, the Committee has consistently expressed that the Convention should be applied by the State party 'at all levels of government and that, where necessary, it should override territory laws and use its external powers in relation to state laws'.<sup>190</sup> In this respect, the Authors consider that the exclusion of the Racial Discrimination Act and state and territory non-discrimination laws, rather than the application of its principles and standards, has the effect of contributing to racial discrimination, rather than eliminating it, and raises serious concerns in relation article 2 of the Race Convention.

**5.4 Article 5: Equal Enjoyment of Rights**

167. Article 5 of the Race Convention contains the obligation of States parties to guarantee the equal enjoyment of civil, political, economic, social and cultural rights and freedoms without racial discrimination. Importantly, whenever a State party imposes a restriction upon one of the rights listed in article 5 of the Race Convention which applies ostensibly to all within its

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<sup>189</sup> General Recommendation XIV, [2].

<sup>190</sup> CERD, Concluding Observations to Australia's tenth, eleventh, twelfth periodic reports (2000) and Australia's ninth periodic report (1994)

jurisdiction, it must ensure that the restriction is, neither in purpose nor effect, incompatible with article 1 of the Race Convention.<sup>191</sup>

168. The Authors note that the Committee has previously indicated that where State parties have taken policy and practical steps towards realisation of an article 5 right, its revocation and replacement with a weaker measure amounted to the impairment of the recognition or exercise on an equal basis of the right.<sup>192</sup> In this context, the Authors make the following submissions on the Northern Territory Intervention measures with regard to relevant human rights enumerated in article 5 of the Race Convention.

**(a) Article 5(a): Equal Treatment before the Law**

169. The Authors submit that measures of the Northern Territory Intervention raise serious concerns in relation to article 5(a) of the Race Convention.

**(i) Lack of appeal rights, procedural fairness and due process**

170. Aspects of the Northern Territory Intervention remove a number of basic democratic and legal protections and safeguards, which raises concerns with article 5(a) of the Race Convention.
171. For example, individuals who are subjected to income quarantining as a result of the Northern Territory Intervention are prevented from obtaining a merits review of the imposition of such measures from the SSAT.<sup>193</sup> In any event, the lack of criteria (other than the practical criterion of race) for the income quarantining would render any merits review inutile. Although the Australian Government has indicated its intention to restore a right of appeal, to date the preclusion continues. In light of the racially discriminatory effect of the Northern Territory Intervention measures, removal of the right to appeal to the SSAT results in unequal access to tribunals on the basis of race.
172. Another example is the various subclauses under the NTNER Act which provide that certain determinations and notices are not legislative instruments and thus are administrative in character.<sup>194</sup> Such decisions include a notice varying or terminating compulsory leases or a notice terminating a right, title or interest in land.<sup>195</sup> The effect of the operation of these subclause of the NTNER Act is that such determinations and notices are not subject to merits review by the AAT.<sup>196</sup> The former Minister stated that removal of such rights was necessary because the 'potential for review by the AAT would cause unacceptable delays for what are short-term emergency measures'.<sup>197</sup>

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<sup>191</sup> Committee on the Elimination of Racial Discrimination, *General Recommendation 20. Non-discriminatory implementation of rights and freedoms (Art 5)* (Forty eighth session 1996) at [2] ('**General Recommendation 20**')

<sup>192</sup> *Ms L R et al v Slovak Republic* CERD/C/66/D/31/2003.

<sup>193</sup> The SSAT is an independent statutory body established to conduct merits review of administrative decisions made under the social security law, the family assistance law, child support law and various other pieces of legislation.

<sup>194</sup> See for example 34(9), 35(11), 37(5), 47(7), 48(5) and 49(4) of the NTNER Act

<sup>195</sup> s 35(11) and 37(5) of the NTNER Act

<sup>196</sup> The AAT is an independent body that reviews a wide range of administrative decisions made by Australian Government ministers, departments, agencies, authorities and other tribunals.

<sup>197</sup> Senate Standing Committee for the Scrutiny of Bills, *Ninth Report of 2007* (12 September 2007) at <http://www.aph.gov.au/Senate/Committee/scrutiny/bills/2007/index.htm> (accessed 9 October 2008)

173. Further, there is no Parliamentary oversight of the construction of significant public works on Aboriginal lands. All Commonwealth public works that are likely to exceed \$15 million must be referred to the Public Works Committee, which reports on issues such as the need for and cost effectiveness of the work. Section 53 of the NTNER Act effectively prevents public scrutiny of the construction of public works on lands subject to the Northern Territory Intervention.
174. The Authors submit that the removal of external review mechanisms does not constitute a 'special measure' for the purposes of article 1(4) of the Race Convention. Denying access to appeal or review mechanisms for Aboriginal people affected by the Northern Territory Intervention measures cannot logically be said to be designed to ensure the positive enjoyment of rights of a particular group. Particularly in the context of the exclusion of the Racial Discrimination Act and the lack of consultation with affected Aboriginal communities, the denial of any basis on which to challenge the imposition of harsh and draconian measures is arbitrary, disproportionate and unnecessary. The need to avoid 'unacceptable delays' cannot be a legitimate aim to justify such measures.
175. For these reasons, the Authors submit that the denial to Aboriginal people of basic legal protections and safeguards results in unequal treatment before the law on the basis of race and constitutes a violation of article 5(a) of the Race Convention.

**(ii) Prohibition on consideration of customary law and cultural practice in bail and sentencing**

176. The Authors submit that the prohibition on the consideration of Aboriginal customary law and cultural practice in bail and sentencing introduced by the Northern Territory Intervention constitutes a violation of article 5(a) of the Race Convention and General Recommendation 31, which requires that State parties ensure respect for and recognition of traditional systems of justice of Aboriginal peoples. The prohibition on consideration of Aboriginal customary law or cultural practice applies to all laws of the Northern Territory. The removal of consideration of the entirety of an individual's circumstances and the full context of the offence is contrary to established sentencing principles.
177. The Authors submit that the prohibition of consideration of Aboriginal customary law and cultural practices does not constitute a 'special measure' for the purposes of article 1(4) of the Race Convention. The impact of the prohibition is that, unlike non-Aboriginal offenders in the Northern Territory, the full context of an Aboriginal offender's situation cannot be taken into account by a court. Such a prohibition does not provide favourable or preferential treatment to Aboriginal people. To the contrary, the prohibition is inherently negative in quality and undermines respect for Aboriginal culture. Indeed, at the time of similar amendments made by the Australian Government to the *Crimes Act 1914* (Cth) in 2006, a Parliamentary Committee identified that such measures will not 'provide substantive equality to Aboriginal offenders'<sup>198</sup> and 'will lead to increased racial discrimination against Indigenous Australians'.<sup>199</sup>

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<sup>198</sup> Senate Standing Committee on Legal and Constitutional Affairs, "Report of the Inquiry into the Crimes Amendment (Bail and Sentencing) Bill 2006, October 2006, p 32 cited in Law Council of Australia, *Review of the Northern Territory 'Emergency Intervention' in Regional and Remote Aboriginal Communities*, 15 August 2008 at [http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uuid=6A21A8E5-1C23-](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=6A21A8E5-1C23-)

178. The 2006 *Crimes Act* amendments were declared to be necessary to ensure the protection of Aboriginal women and children from men who claimed that their violent or offensive behaviour was justified under Aboriginal customary law.<sup>200</sup> Those amendments were ostensibly in response to isolated cases of violent sexual assaults, in which apparently lenient sentences were imposed at trial level.<sup>201</sup>
179. However, the perception of leniency in sentencing at trial level is contrary to the evidence that Australian courts have been generally consistent in sentencing decisions for violent and sexual offences.<sup>202</sup> This mirrors sentencing in the Northern Territory where customary law has never played a major role in arguments relating to mitigation.<sup>203</sup> The Chief Justice of the Northern Territory Supreme Court has stated that:<sup>204</sup>
- Only on rare occasions has customary law been presented as lessening the moral culpability of the Aboriginal offender. Even less frequently has the sentencing court accepted the significance of the submission.*
- Thus, if the aim of protecting women was to arise from specific or general deterrence, then the measure does not fulfil this purpose.
180. The prohibition of consideration of Aboriginal customs and practices is mandatory and non-discretionary and applies to all offences in the Northern Territory, regardless of the gravity of those offences. The prohibition is not temporary and requires legislative change for removal. Even if it were appropriate to prescribe that a court shall not consider cultural considerations relied upon to justify serious indictable offences of a sexual nature, the Australian Government has constructed a law of blanket application with no room for discretion.
181. A pointed indicator of the complete lack of proportionality in enacting the prohibition is the increasing recognition across the rest of Australia of the importance of cultural context in the criminal justice system. This recognition has manifested in, for example, the development of Aboriginal community courts such as the 'Koori Court',<sup>205</sup> which, the Authors note, were advocated in the Little Children Are Sacred Report.<sup>206</sup> Similarly, the Australian Law Reform

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[CACD-2213-AA87E5303B4E&siteName=lca](#) (accessed 25 November 2008), 18 ('**Law Council of Australia Submission**')

<sup>199</sup> Senate Standing Committee on Legal and Constitutional Affairs, "Report of the Inquiry into the Crimes Amendment (Bail and Sentencing) Bill 2006, October 2006, p 31 cited in Law Council of Australia Submission, *ibid*, 18

<sup>200</sup> Law Council of Australia Submission, *ibid*, 17-18

<sup>201</sup> Law Council of Australia Submission, *ibid*, 18

<sup>202</sup> Law Council of Australia Submission, *ibid*, 18

<sup>203</sup> CAALAS & NAAJA Submission, *above*, note 26, 13

<sup>204</sup> Chief Justice Martin, "Customary Law – Northern Territory", JCA Colloquium, 5 October 2007 cited in CAALAS & NAAJA Submission, *above*, note 26, 13

<sup>205</sup> The Koori Court sentencing model provides the opportunity to an Indigenous defendant pleading guilty to have their matter heard by the Koori Court with as little formality and technicality as possible. Indigenous elders and respected persons with authority within the community sit with the magistrate and have input into the 'sentencing conversation', which necessarily acknowledges the importance of Aboriginal culture and tradition.

<sup>206</sup> Little Children Are Sacred Report, *above*, note 1, 130

Commission has on many occasions determined that the customary law of Aboriginal offenders is a necessary factor to be taken into account throughout the process.<sup>207</sup>

182. For these reasons, the Authors submit that the prohibition on consideration of customary law and cultural practice in bail and sentencing introduced by the Northern Territory Intervention constitutes a violation of article 5(a) of the Race Convention.

**(iii) Coercive powers of the Task Force**

183. The Authors submit that the application of coercive powers relating only to Aboriginal violence and abuse fails to provide equal treatment before organs administering justice and represents a breach of article 5(a) of the Race Convention.

184. The Authors note the Committee's recognition of the importance of law enforcement officials in a State party's fulfilment of their obligation to undertake that all public authorities and public institutions, national and local, will not engage in any practice of racial discrimination.<sup>208</sup> The Authors submit that the use of law enforcement agencies to investigate criminal activity identified by race is inherently antithetic to the obligation contained in article 5 of the Race Convention. The Authors acknowledge that the freedom to prosecute criminal offences – the expediency principle – is governed by considerations of public policy and the Convention cannot be interpreted as challenging the *raison d'être* of that principle. Nonetheless, it should be applied in each case of alleged racial discrimination in light of the guarantees laid down in the Convention.<sup>209</sup>

185. The Task Force's coercive powers in relation to 'violence and child abuse' apply only to '*Indigenous* violence and child abuse'. The Authors acknowledge the difficulty in assessing the discriminatory nature of criminal investigations is that such investigations necessarily target particular groups based on criminal activity. However, the Authors note that the incidence of child sexual abuse — the purported reason for the grant of the coercive powers to the Task Force — occurs in every sector of society across Australia.<sup>210</sup>

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<sup>207</sup> The Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders'* (Report 103, 2006) recommended the retention cultural background in the factors listed in section 16(1)(2)(m) of the *Crimes Act 1914* (Cth) [6.94]; The New South Wales Law Reform Commission, *Sentencing: Aboriginal Offenders* (Report 96, 2000) recommended that evidence concerning customary laws of both the offender and the victim be taken into account in sentencing [3.89]; The Australian Law Reform Commission, *Multiculturalism and the Law* (Report 57, 1992) recommended an offender's cultural background should be expressly included as a factor to be taken into account in sentencing under s 16 A(2)(m) of the *Crimes Act 1914* (Cth) [8.14]; The Australian Law Reform Commission, *Sentencing* (Report 44, 1988) recommended that an offender's cultural background be listed in the relevant legislation as a factor to be taken account in sentencing [94]; The Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Report 31, 1986) concluded that Aboriginal customary laws are a relevant factor in mitigation of sentence [507-509].

<sup>208</sup> Committee on the Elimination of Racial Discrimination, *General Recommendation 13. Training of law enforcement officials in the protection of human rights* (Forty second session, 1993) at [2]

<sup>209</sup> *A Yilmaz-Dogan v The Netherlands* CERD/C/36/D/1/1984 (29 September 1988); *L K v The Netherlands* CERD/C/42/D/4/1991(16 March 1993)

<sup>210</sup> CAALAS and NAAJA identify that child abuse if an Australia wide issue, citing evidence that "12 percent of all Australian women report being sexually abused before the age of 15", a second study found that "20 percent of women, selected randomly from the federal electoral roll, reported that they had experienced child sexual abuse." See CAALAS & NAAJA Submission, above, note 26, 11

186. Therefore, the Authors submit that the grant of coercive powers in relation to one subset of broadly applicable offences has an arbitrary character. To be justified, the designation of a special operation must be based on the seriousness of the crime and not on a subset of the offence identified by race.
187. The Authors submit that the regime of income quarantining does not constitute a 'special measure' for the purposes of article 1(4) of the Race Convention.
188. It has not been demonstrated that the Task Force's coercive powers are necessary, appropriate or proportionate. It is self-evident that allegations of child sexual abuse must be thoroughly investigated and abusers prosecuted. However, coercive powers deny citizens the right to remain silent and must apply in the most serious of circumstances. Their scope must be limited and monitored.
189. Given the gravity of coercive powers, it is imperative that clear justification be presented for their existence, yet the Australian Government provided no indication as to specific requirements or justification for their adoption. Due to the secrecy provisions surrounding the powers it is not possible to ascertain whether exercise of the powers has resulted in referrals for prosecution.<sup>211</sup> Nor are there definitive outcomes as to what the coercive powers are to achieve.
190. Two reported justifications in the media for the classification of the Task Force operation as a special intelligence operation were the under reporting of child sexual abuse by service providers and that people in Aboriginal communities were intimidated into not disclosing crime.<sup>212</sup> The Authors submit that these reported justifications do not warrant such powers.
191. First, any allegation of 'high levels of underreporting of child sexual abuse by service providers' is the serious allegation that service providers would breach their duty to report child abuse under s 14(1) of the *Community Welfare Act* (NT) such that the means exist to prosecute offending service providers.
192. Second, health services and authorities acknowledge that a large number of Aboriginal teenagers in the Northern Territory are sexually active. Thus, reporting guidelines do not require clinics to provide information about contraception for adolescents but they must report any suspicion of abuse.<sup>213</sup> While sexual activity between teenagers under 16 is a criminal offence, even if consensual, it is unlikely to constitute abuse in the circumstances of many of such offences.

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<sup>211</sup> The Review Board Draft Report noted that the Task Force's intelligence role was in its formative stages and that while some useful information had been disseminated to the NT Police, much of that material emanated from NT Police intelligence. The Review Board also observed that there appeared to be no data linkage between specific intelligence passed from the Task Force and the ACC for jurisdictional investigation, so it was not possible to determine the final justice outcome from such referrals. See Draft Review Board Report, above, note 30, 56

<sup>212</sup> *Child Abuse Taskforce Powers Working*, ABC News, 13 May 2008 cited in CAALAS & NAAJA Submission, above, note 26, 11; Simon Kearney, "Outback taskforce gets star chamber" *The Australian* (21 February 2008) at <http://www.theaustralian.news.com.au/story/0,25197,23249316-5013172,00.html> (accessed 17 November 2008); *NT cops use coercive powers*, NT News, Saturday 17 May 2008 p 3 cited in CAALAS & NAAJA Submission, above, note 26, 12

<sup>213</sup> Paul Toohey, *Pursuit of sex abuse cases stymied by secrecy*, *The Australian*, 24 October 2008 at <http://www.theaustralian.news.com.au/story/0,25197,24542969-17044,00.html> (accessed 20 November 2008)

193. Similarly, the Authors submit that the powers cannot be categorised as securing advancement for Aboriginal people in the Northern Territory and that, in all likelihood, negative outcomes may outweigh any alleged benefit.
194. First, Aboriginal people are strikingly over represented at every stage of the criminal justice system in Australia and a high degree of suspicion is evident,<sup>214</sup> which is in itself an indicator or racial discrimination.<sup>215</sup> Coercive powers may serve to increase such suspicion and may adversely impact on cooperation. Given the gravity of the powers and the context of overrepresentation of Aboriginal people in the criminal justice system, the failure to consult with those who would be affected by the powers is a severe failing.
195. Second, health service providers have expressed concern that, once it has become apparent that patient confidentiality may be compromised, the existence of coercive powers could lead to patients losing trust and ceasing to utilise their services,<sup>216</sup> which appears to be occurring.<sup>217</sup>
196. Third, the existence of coercive powers that put Aboriginal people on par with outlawed motorcycle gangs, terrorists and organised crime may exacerbate the image of Aboriginal people as violent and as paedophiles. Aboriginal and non-Aboriginal people alike report increased racism since the implementation of the Northern Territory Intervention with associated loss of self-esteem and despair.<sup>218</sup> The exclusion of the Racial Discrimination Act exacerbates the problem.
197. Two Aboriginal community controlled health organisations have successfully challenged ACC notices requiring them to produce medical records and other documents related to patients who may have presented for treatment associated with family and domestic violence and/or other forms of assault including sexual assault.<sup>219</sup> In both cases, Justice Reeves held that the examiner who issued the notice was required to take into account the 'best interests of the child' as a primary consideration.<sup>220</sup> Instead, the examiner had considered issues such as the under reporting of sexual abuse at some medical clinics, the objectives of the Task Force's Special Intelligence Operation, the objects of the *Australian Crime Commission Act 2002* (Cth) and the objects of the determination by the ACC Board but did not weigh those considerations against the best interests of the Aboriginal children concerned.<sup>221</sup>

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<sup>214</sup> See CERD, Concluding Observations to Australia's thirteenth and fourteenth periodic reports (2005)

<sup>215</sup> General Recommendation 31, *Prevention on racial discrimination in the administration and functioning of the criminal justice system* at [1(d)] and [19(e)]

<sup>216</sup> Paul Toohey, *Pursuit of sex abuse cases stymied by secrecy*, *The Australian*, 24 October 2008 at <http://www.theaustralian.news.com.au/story/0,25197,24542969-17044,00.html> (accessed 20 November 2008)

<sup>217</sup> Sunrise Health Service in Katherine has observed that pregnant teenage girls are attending the clinic at a later stage of their pregnancies.

<sup>218</sup> HREOC Review Board Submission, above, note 31 at [37]; Community Based Review, above, note 28, 128; AIDA Submission, above, note 29; CAALAS & NAAJA Submission, above, note 26, 17

<sup>219</sup> *NTD8 v Australian Crime Commission (No 2)*[2008] FCA 1551 (17 October 2008) ('**NTD8 v ACC**'); *C Incorporated v Australian Crime Commission* [2008] FCA 1806 (28 November 2008) ('**C Inc v ACC**'). In *NTD8*, the notice indirectly referred to eight patients, whereas in *C Incorporated*, the notice generally applied to patients under the age of 18.

<sup>220</sup> *NTD8 v ACC*, *ibid* at [52]; *C Inc v ACC* *ibid* at [61]

<sup>221</sup> *NTD8 v ACC*, *ibid* at [50]-[51]; *C Inc v ACC* *ibid* at [92]

198. For these reasons, the Authors submit that the application of coercive powers relating only to Aboriginal violence and abuse represents a breach of article 5(a) of the Race Convention.

**(b) Article 5(c): right to participate in public affairs**

199. The Authors submit that:

- (a) the lack of consultation with Aboriginal communities regarding the Northern Territory Intervention measures; and
- (b) the powers granted to the Minister over Aboriginal community councils and organisations

contravenes article 5(c) of the Race Convention.

**(i) Lack of consultation**

200. The lack of consultation is one of the aspects of the Intervention that has most profoundly disempowered Aboriginal people and their communities and led to a strongly articulated sense of helplessness. In particular, it has led to a perception of a reversion to a protectionist and paternalist era.

201. The Authors contend that the State party's obligations under article 5(c) to Aboriginal peoples must be read together with General Recommendation 23 to discern its content; namely, that decisions directly relating to the rights and interests of Aboriginal people should be made with their informed consent. Yet the Northern Territory Intervention was implemented without consultation with profound effects and described by the Review Board as a deep insult.<sup>222</sup>

202. The Authors note that in each of the three Concluding Observations in relation to the State party's periodic reports since 1994, the Committee has reminded the State party of its obligation to ensure effective participation of Aboriginal people in the conduct of public affairs and in decision making and policy making relating to their rights and interests.<sup>223</sup> In particular, the Committee has recommended that Aboriginal communities should participate in decisions affecting their land rights.<sup>224</sup> However, diminution of rights of Aboriginal landowners and removal of the future act regime provided by the Native Title Act were undertaken without any consultation.

203. The Review Board stressed the importance of consultation occurring at the grass roots level.<sup>225</sup> Yet, despite this recommendation, the Authors are not aware of any systematic or formal mechanisms by which the Australian Government is consulting or engaging with people who are subject to the Northern Territory Intervention to formulate policy and measures to address Aboriginal disadvantage.<sup>226</sup>

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<sup>222</sup> Draft Review Board Report, above, note 30, 10

<sup>223</sup> See CERD, Concluding Observations to Australia's thirteenth and fourteenth periodic reports (2005), Australia's tenth, eleventh, twelfth periodic reports (2000) and Australia's ninth periodic report (1994).

<sup>224</sup> CERD, Concluding Observations to Australia's tenth, eleventh, twelfth periodic reports (2000)

<sup>225</sup> Review Board Report, above, note 9, 47

<sup>226</sup> The Northern Territory Emergency Response Taskforce visited prescribed communities in the course of its advising on the implementation of the Northern Territory Intervention. Further, the Authors note that the Minister and her representatives have visited prescribed communities, on one occasion at the invitation of one of the Authors. However, these visits do not constitute a formal process of participation in policy formation.

204. In December 2007, the Australian Government established an advisory group of 25 Aboriginal leaders from the Northern Territory to discuss the implementation of the Northern Territory Intervention measures and to provide feedback to the Minister.<sup>227</sup> However, this group's role has not been disclosed, nor was this group referred to in the Review Board report. The Authors adopt the Committee's caution that consultation with boards of appointed nominees could reduce Aboriginal peoples' participation in decision-making and alter the State party's capacity to address the full range of issues relating to Aboriginal peoples.<sup>228</sup>
205. The Authors respectfully submit that the lack of consultation with Aboriginal communities regarding the Northern Territory Intervention measures is a contravention of article 5(c) of the Race Convention.

**(ii) Minister's powers over Aboriginal community councils and organisations**

206. The Minister has very broad powers to intervene in Aboriginal councils and organisations where normal processes of discussion and negotiation have failed; or where community organisations are unable, or unwilling, to make the changes that are 'necessary' to benefit their community and their children'. The Authors note that the Minister's exercise of the powers of intervention are unrelated to any allegations of illegality, incompetence, mismanagement, corruption or fraud.
207. The Authors submit that the Minister's powers have the potential to restrict the authority of councils and associations to exercise their responsibilities under their governing legislation and constitutions in a manner not applied to other councils and associations. The Minister's powers of intervention apply solely to Aboriginal communities. The powers have the potential to shift the balance in negotiations to pressure Aboriginal service providers to act in a manner that may be contrary to that community's interest.
208. The effect of the Minister's powers is that the right of Aboriginal people to participate in public affairs, and in particular in relation to matters that directly affect Aboriginal people, is taken away from Aboriginal councils and communities and placed in the hands of the Australian Government. This runs counter to the principle, and indeed the right, of self-determination. One stark example is that of the participation by Government Business Managers, rather the Aboriginal peoples themselves, in the consultative process in relation to the proposed structure of a national Aboriginal representative body.
209. In many cases, this may result in the management of Aboriginal councils and communities in a way that is not appropriate or sensitive to the particular needs Aboriginal people and communities. The Review Board observed that many Government Business Managers who had been appointed by the Minister to intervene in Aboriginal communities did not have any professional community development training. To date, 53 Government Business Managers have been appointed to service 73 communities and town camps.<sup>229</sup> The Review Board reported that some Government Business Managers were 'distant and apart from the community and in some cases, from the key local service providers'.<sup>230</sup> In one case, the

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<sup>227</sup> FaHCSIA Background Material, above, note 39 "Section 1 Overview"

<sup>228</sup> CERD, Concluding Observations to Australia's thirteenth and fourteenth periodic reports (2005)

<sup>229</sup> FaHCSIA Operation Update, above, note 54

<sup>230</sup> Review Board Report, above, note 9, 44

Review Board found it necessary to introduce the Government Business Manager to senior staff at the local health clinic.<sup>231</sup>

210. In addition to concerns about lack of cultural sensitivity associated with the Minister's powers, the Authors also note that, despite the breadth and magnitude of the Minister's powers, there is no set of criteria for assessing when such powers should or will be exercised. The powers were introduced as a measure of 'last resort', yet are exercised on the breakdown of discussions or negotiations, seemingly regardless of whether they are being conducted in good faith or whether negotiations are undertaken by properly authorised officers of the council or organisation.
211. The Authors submit that the Minister's powers to intervene cannot be characterised as necessary, proportionate or culturally appropriate, especially where the undermining of effective governance structures through the Northern Territory Intervention has been reported. In many instances, the implementation of the Northern Territory Intervention measures have not taken into account the individuality of each Aboriginal community. A survey by the Central Land Council indicated that where 'good governance structures and systems were in place, they were ignored and undermined'.<sup>232</sup> Similarly, the Community Review observed that excellent programs that were in place before the Northern Territory Intervention have not received recognition and support.<sup>233</sup>
212. For these reasons, the Authors submit that the Minister's powers over Aboriginal communities do not constitute 'special measures' for the purposes of article 1(4) of the Race Convention and represent a breach of article 5(c) of the Race Convention.

**(c) Article 5(d)(i): freedom of movement**

213. The Authors submit that the regime of income quarantining raises serious concerns in relation to article 5(d)(i) of the Race Convention. While income quarantining does not explicitly restrict movement, its effect is to limit ease of travel within the Northern Territory and severely impact on travel to other states and territories.
214. The evidence indicates that income quarantining has affected the mobility of Aboriginal people in two distinct ways. First, there is evidence of changed mobility patterns as people are forced to travel to access Centrelink (the Federal Government agency which administers social security payment and therefore quarantined income) and licensed stores in urban centres. For many Aboriginal people, travel to access licensed stores and services is not a simple proposition. Some individuals travel vast distances at great expense.<sup>234</sup> In addition, no longer being able to pool resources – due to the operation of income quarantining - means that everyone must travel, including the elderly and infirm. The widely held perception is that Aboriginal people, especially elderly people, are being forced to move away from traditional lands and into urban centres.<sup>235</sup>

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<sup>231</sup> Report Review Board Report, above, note 9, 44

<sup>232</sup> Central Land Council Survey, above, note 180, 79

<sup>233</sup> Community Based Review, above, note 28, 129

<sup>234</sup> For example People in Eva Valley pay up to \$220 each way for a taxi to Katherine to shop for food, with funds being diverted from family needs to transportation See Community Based Review, above, note 28, 63

<sup>235</sup> Review Board Report, above, note 9, 18; Personal conversations, Mount Nancy, Alice Springs, 28 September 2008 and Prescribed Area People's Alliance meeting, Alice Springs, 29 September 2008. Note

215. Second, Aboriginal people in central Australia are highly mobile and move between communities for ceremony, sorry business and to access services.<sup>236</sup> People subject to income quarantining have been prevented from travelling between communities for ceremony and sorry business due to the inadequacy of the administration of income quarantining to deal with such a highly mobile population, such that people are not able to access income as they move between communities.<sup>237</sup> This is compounded by the fact that people can no longer pool money to save on transport costs and share resources.<sup>238</sup>
216. In response to difficulties in accessing quarantined income, the Australian Government has introduced the 'BasicsCard', which enables people subject to income quarantining to purchase priority goods and services from a range of approved retailers.<sup>239</sup> However, the BasicsCard does not operate outside the Northern Territory, which severely restricts travel to other states and territories.
217. In addition, reports of inadequate administration of social security payments has resulted in difficulty in accessing quarantined income when travelling to other states and territories. In particular, proof of identity requirements have impeded access to quarantined income to people unaccustomed to carrying the requisite identity documents.
218. The Authors submit that the regime of income quarantining does not constitute a 'special measure' for the purposes of article 1(4) of the Convention and therefore constitutes a violation of article 5(d)(i) of the Race Convention.
- (d) Article 5(d)(v): right to own property**
219. The Authors submit that the:
- (a) imposition of compulsory leases over Aboriginal land; and
  - (b) removal of the future act regime provided by the Native Title Act
- raise serious concerns under article 5(d)(v) of the Race Convention.
220. Aboriginal culture and way of life is intrinsically connected to land.<sup>240</sup> Thus, any assessment of impact on Aboriginal land rights must acknowledge the undermining of culture and way of life that is necessarily incurred. This lack of consideration of the potential impact is highlighted by the lack of consultation with Aboriginal people that occurred.

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that while demographic research undertaken on behalf of the Review Board did not support the perception of large numbers of Aboriginal people forced to urban centres on a permanent basis, anecdotal evidence suggests that there have been increased mobility patterns on a temporary basis between usual places of residence and regional centres. See Review Board Report, above, note 9, 18

<sup>236</sup> Central Land Council Survey, above, note 180, 27

<sup>237</sup> Central Land Council Survey, above, note 180, 27

<sup>238</sup> HREOC Review Board Submission, above, note 31 at [37]

<sup>239</sup> Review Board Report, above, note 9, 23; FaHCSIA Background Material, above, note 39, "Appendix 1: Measures and sub-measures"

<sup>240</sup> Turner and Watson have identified that, for Indigenous people, land is the source of their "identity, economy and spirituality;" in essence, their "life force." See Pat Turner and Nicole Watson, "The Trojan Horse" in Jon Altman & Melinda Hinkson (eds), *Coercive Reconciliation. Stabilise, Normalise, Exit Aboriginal Australia* (Australia, Arena Publications Association: 2007), 206

**(i) Compulsory acquisition of Aboriginal land**

221. The Authors submit that the compulsory acquisition of Aboriginal land that has occurred under the Northern Territory Intervention must be assessed in its historical context of redress for dispossession. The NT Land Rights Act was enacted in 1976 to restore Aboriginal possession, control and ownership of land. Aboriginal land is granted in fee simple to recognise complete ownership by Aboriginal communities in the Northern Territory.<sup>241</sup>
222. The compulsory five year leases under the Northern Territory Intervention regime apply to forms of Aboriginal freehold, namely 'Aboriginal land', 'Aboriginal community living areas' and other specified areas.<sup>242</sup> The Authors submit that, although the imposition of compulsory leases over Aboriginal forms of freehold does not explicitly remove the interest, it restricts the incidents of ownership to such an extent that it violates article 5(d)(v) of the Race Convention.
223. First, it is inconceivable that freehold land would be acquired in Australia by reference to any other racial group that owns the land. Second, the terms of the lease are dictated by the Commonwealth Government without consultation or negotiation with the Aboriginal owners. Such terms are therefore atypical and favour the Commonwealth Government. Thus, Aboriginal Land Trusts or Land Councils enjoy substantially fewer legal rights in relation to freehold land than other freehold title holders.

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<sup>241</sup> Ironically, former minister Brough described the Land Rights Act as one of the two things that "did more to harm Indigenous culture and destroy it than any two other legislative instruments ever put into the Parliament. ... You can be land rich but be absolutely poor in every other way. See The Hon Mal Brough, former Federal Minister for Families, Community Services and Indigenous Affairs, "Northern Territory Intervention" 2007 Alfred Deakin Lecture, (Melbourne University, 2 October 2007) at [http://www.facsia.gov.au/Internet/Minister3.nsf/content/alfred\\_deakin\\_02oct07.htm](http://www.facsia.gov.au/Internet/Minister3.nsf/content/alfred_deakin_02oct07.htm) (accessed 21 September 2008)

<sup>242</sup> All 64 five year leases are currently in force and all will expire on 18 August 2012. Forty eight of the leases are on 'Aboriginal land' as defined by the *Aboriginal Land Rights Act 1976* (Cth) and the remaining 16 leases are over Community Living Areas, granted in fee simple under the *Lands Acquisition Act (NT)*.

224. Crucially, the acquisition of Aboriginal land violates the State party's specific obligation to protect Aboriginal peoples' rights to own, develop, control and use communal lands, territories and resources. Indeed, on the introduction of the Northern Territory Intervention, the Australian Government described the undermining of communal ownership as an explicit aim of the lease regime.<sup>243</sup> At the time of the announcement of the Northern Territory Intervention, the Minister claimed that historic land rights decisions like *Mabo* and *Wik*<sup>244</sup> had impoverished Aboriginal people and had not freed or empowered them.<sup>245</sup> He stated the land rights decisions have locked people into collective tenure and that we 'need to actually recognise that communism didn't work, collectivism didn't work'. The Minister claimed that, 'It doesn't work to say a collective owns it and you don't have anything.'<sup>246</sup>
225. As the Committee is aware, communal ownership is fundamental to traditional Aboriginal title and to providing the foundation for social and cultural norms. For these reasons, the Authors submit that the aspects of the Northern Territory Intervention that relate to Aboriginal land treat communal ownership as a lesser right than individual ownership and constitutes a serious breach of article 5(d)(v) of the Race Convention.

**(ii) Removal of the future act regime provided by the Native Title Act**

226. The Authors note the Committee's support for the Native Title Act as providing a framework for continued recognition of Aboriginal land rights following the precedent established in the *Mabo* case.<sup>247</sup> The removal of the future act regime, which was specifically designed to protect native title rights and interests during the long process of resolution of a native title application, undermines that recognition in violation of the Convention.
227. The Authors submit that the removal of the future act regime creates certainty for governments and third parties at the expense of Aboriginal title. The effect of removing the right to negotiate in relation to proposed future acts is that proponents of development on relevant land the subject of a native title claim no longer need give consideration to the preservation of Aboriginal rights and interests.
228. The Authors also contend that the removal of the traditional Aboriginal owners' ability to fulfil cultural obligations through the removal of the right to negotiate removes a fundamental incident of Aboriginal ownership of land.

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<sup>243</sup> Indigenous land tenure was described as working against "developing a real economy" and was to be transformed so that people can "own and control" their own houses and obtain loans to establish small businesses. The Northern Territory Intervention was also supposed to provide the same services and infrastructure to town camps as "normal suburbs". See The Hon Mal Brough MP, Hon Mal Brough MP, Second Reading Speech, above, note 94,

<sup>244</sup> The *Mabo* and *Wik* decisions were seminal cases in Australia, providing recognition and protection of Aboriginal title. As the Committee has identified, the *Mabo* decision provided a significant development in the recognition of Indigenous rights under the Convention.

<sup>245</sup> Hon Mal Brough, National Press Club, 15 August 2007, cited in *The Age*, "Brough questions worth of land rights", 15 August 2007 at [http://www.theage.com.au/news/national/brough-slams-land-rights/2007/08/15/1186857579661.html?s\\_cid=rss\\_news](http://www.theage.com.au/news/national/brough-slams-land-rights/2007/08/15/1186857579661.html?s_cid=rss_news) (accessed 10 October 2008)

<sup>246</sup> *Ibid*

<sup>247</sup> Decision 2(54) on Australia, 18 March 1999, A/54/18

**(iii) The property regime is not a special measure**

229. The Authors submit that the property regime described above is not capable of constituting a 'special measure' for the purposes of article 1(4) of the Convention. The right of Aboriginal peoples to their land, and the connection that land has with their livelihood, is not a subject for special measures as it is of a permanent nature.<sup>248</sup>
230. Further, in domestic law, the measures are legislatively precluded from being special measures. Sections 8(1) and 10(3) of the Racial Discrimination Act provide that, where a provision authorises management of Aboriginal owned property or prevents termination of management of Aboriginal owned property, and is not a law of general application, it cannot be classified as a 'special measure'.
231. The compulsory acquisition of Aboriginal freehold land and removal of the future act regime are not forms of preferential treatment, designed to facilitate substantive equality. Nor are the measures necessary, appropriate or proportionate to any legitimate objective of the State party.
232. The Australian Government has a legitimate objective of providing better housing and infrastructure in Aboriginal townships. The Authors acknowledge that overcrowding and poor living conditions in remote Aboriginal communities have been identified over decades as issues requiring a concerted and long term response from government.<sup>249</sup> However, that aim must be achieved in a manner that is proportionate and culturally appropriate, subject to State party obligations enunciated in General Recommendations 21 and 23. The transfer of ownership of community housing and infrastructure from local community housing associations and community councils to the Australian Government weakens Aboriginal capacity to respond to community requirements.
233. The connection between the acquisition of extensive areas of Aboriginal land and housing on some parts of that land has not been made. It cannot sensibly be argued that the provision of housing and related infrastructure requires the acquisition of *all* Aboriginal township land with its attendant undermining of cultural authority and right of self-determination. Significantly, the Australian Government's legitimate objective is negated by its objective to undermine communal ownership, as referred to in paragraphs 223 and 224 above.
234. It is clear that very few people living in Prescribed Areas are aware of the five year lease regime.<sup>250</sup> Further, when informed of their existence, people were overwhelmingly (85 percent to 95 percent) opposed to them<sup>251</sup> and, as a result, were indignant, angry and/or worried.<sup>252</sup> Such opposition to the Northern Territory Intervention measures was based on the perception that the lease gave more control to the government at the expense of the

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<sup>248</sup> Media Release, CERD Discusses Special Measures, above, note 156

<sup>249</sup> Ben Doherty & Leo Shanahan, "Review finds intervention racist" *The Age*, 29 October 2008 at <http://www.theage.com.au/national/review-finds-intervention-racist-20081028-5a10.html?page=-1> (20 November 2008)

<sup>250</sup> Central Land Council Survey, above, note 180, 58; Community Based Review, above, note 28, 93-94; Review Board Report, above, note 9, 39

<sup>251</sup> Central Land Council Survey, above, note 180, 58; Community Based Review, above, note 28, 121

<sup>252</sup> Community Based Review, above, note 28, 11

community<sup>253</sup> and gave inadequate respect to traditional owners in decision making.<sup>254</sup> Further, distrust of the Australian Government's intentions was exacerbated by its failure to pay rent as a tenant or compensation for the compulsory acquisition of land subject to the leases.<sup>255</sup>

235. The removal of the future act regime is further removed from any assertion of appropriateness or proportionality. Removal of traditional owners' rights to exercise their cultural obligations is patently unnecessary.
236. Finally, the acquisition of Aboriginal freehold through five year leases and the suspension of the future act regime are not temporary measures and do not necessarily cease to have effect at the end of the five years of the Northern Territory Intervention.<sup>256</sup> The Australian Government's intention is to replace the five year lease regime with head leases of 40 to 99 years under s 19A of the *Lands Acquisition Act* (NT).<sup>257</sup> Sixteen communities have been targeted for housing and infrastructure and only communities that sign land leases will receive government funding.<sup>258</sup> The Australian Government's stated intention is to promote private ownership.<sup>259</sup> However, the Authors submit that promotion of private ownership must only occur with the explicit consent of the Aboriginal peoples concerned and must be carefully monitored. Further, the future act regime has been removed on a permanent basis in respect of developments during the five year period.
237. For these reasons, the Authors submit that the Northern Territory Intervention measures that relate to property do not constitute 'special measures' and are therefore a violation of article 5(d)(v) of the Race Convention.

**(e) Article 5(e)(iv): right to social security**

238. The Authors submit that the regime of income quarantining raises serious concerns in relation to article 5(e)(iv) of the Race Convention.
239. While the Authors acknowledge that there is no prescription as to the form of the right to social security, the discrimination experienced by those subject to income quarantining lies in the differing access to existing social security entitlements, effectively based on race. The Committee on Economic, Social and Cultural Rights ("CESCR") in its General Comment No 19 articulates the content of the right to social security. In particular, the right to social security must be enjoyed without discrimination, whether in law or in fact, whether direct or

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<sup>253</sup> Central Land Council Survey, above, note 180, 58

<sup>254</sup> Central Land Council Survey, above, note 180, 58; Community Based Review, above, note 28

<sup>255</sup> Review Board Report, above, note 9, 40

<sup>256</sup> Section 6 of the NTNER Act provides that the Act would cease to have effect at the end of five years, with the exception of Parts 1, 4, 6 and 8 and Schedule 1.

<sup>257</sup> Hon Jenny Macklin, Compulsory income management to continue, above, note 12

<sup>258</sup> Australian Government & Northern Territory Government, "A New Remote Housing System. Better Houses, Healthy Homes" *Information Sheet #137* at [www.nt.gov.au/territoryhousing/remotehousing](http://www.nt.gov.au/territoryhousing/remotehousing)

<sup>259</sup> Patricia Karvelas and Nicola Berkovic, *Aborigines told to buy homes by the Rudd Government*, *The Australian*, 2 January 2009 at <http://www.theaustralian.news.com.au/story/0,,24863938-2702,00.html> (accessed 6 January 2009)

- indirect. State parties are cautioned to take particular care that Aboriginal peoples are not excluded from social security systems through direct or indirect discrimination.<sup>260</sup>
240. CESCR has identified the strong presumption that retrogressive measures taken in relation to the right to social security are prohibited. The State party has the burden of proving that retrogressive measures have been introduced after the most careful consideration of all alternatives and that they are duly justified.<sup>261</sup>
241. The Authors reject any assertion by the State party that mandatory, non-discretionary income quarantining can be characterised as a ‘special measure’ under article 1(4) of the Race Convention. Indeed, the Social Justice Commissioner has concluded that the Northern Territory Intervention income quarantining regime cannot be classified as a special measure.<sup>262</sup>
242. Income quarantining is not a form of preferential treatment or affirmative action to obtain effective equality. By contrast, income quarantining is inherently negative in quality and violates a number of positive obligations under the Race Convention.
243. The Authors acknowledge that there are some individuals who claim to have benefited from income quarantining and are content with its operation. However, the Authors refute that income quarantining provides the necessary and measurable advancement of Aboriginal people to justify its characterisation as a special measure and challenges the Australian Government’s repeated assertion of unqualified benefit.<sup>263</sup>
244. Indeed, the Review Board recommended that income quarantining be made voluntary. However, the Australian Government ignored this recommendation, citing ‘excellent evidence’ collected from licensed stores of changing household expenditure<sup>264</sup> and anecdotes from women supporting compulsory income quarantining.<sup>265</sup> The Authors note, however, the vital qualifications in the Review Board’s draft report that sharing of resources could be mistaken by those on the ‘outside’ as an unwelcome practice<sup>266</sup> and that there were families managing their budgets responsibly before the Northern Territory Intervention began.<sup>267</sup>

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<sup>260</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment No 19: The right to social security (article 9)* at [35]

<sup>261</sup> *Ibid* at [42]

<sup>262</sup> Social Justice Report, above, note 21, 251, 259-265

<sup>263</sup> Hon Jenny Macklin, Compulsory income management to continue, above, note 12; 7.30 Report, Government Responds to Intervention Review, above, note 166; ABC Radio National, Government Response to Review Board, above, note 62; Hon Jenny Macklin, Response to the NTER Review, Transcript, above, note 168

<sup>264</sup> The Minister cited evidence of increased purchases of meat, fruit and vegetables; a reduced consumption of cigarettes and alcohol; less humbugging; children putting on weight and people saving for whitegoods. See Hon Jenny Macklin, Compulsory income management to continue, above, note 12; 7.30 Report, Government Responds to Intervention Review, above, note 166; ABC Radio National, Government Response to Review Board, above, note 62; Hon Jenny Macklin, Response to the NTER Review, Transcript, above, note 168

<sup>265</sup> 7.30 Report, Government Responds to Intervention Review, above, note 166

<sup>266</sup> The Draft Review Board Report also observed that “[d]istinguishing between meeting reciprocal obligations and unacceptable humbugging was not a simple proposition.” Draft Review Board Report, above, note 30, 38

<sup>267</sup> Draft Review Board Report, above, note 30, 38

245. The Authors also note that there is no baseline data and little empirical evidence as to the impact of income quarantining.<sup>268</sup> Caution should be adopted in relation to surveys of community stores that did not obtain primary evidence from those subject to income quarantining and do not explore why altered sales patterns were experienced.<sup>269</sup> Similarly, an online survey of Government Business Managers based on their in community experience and perceptions of effectiveness,<sup>270</sup> must be treated with caution, given the Review Board's findings in regard to the lack of engagement and lack of professional qualifications of some managers.<sup>271</sup>
246. In addition, even if evidence as to altered household expenditure and reduction of humbugging is accepted, it must be balanced against evidence of severe harm, impacting on the most vulnerable, including the elderly and those with disabilities.<sup>272</sup> The Authors submit that reported hunger, inability to fulfil cultural obligations, strain on kinship and family relationships, segregation in stores, loss of dignity and disempowerment and a sense of reversion to a protectionist era vividly demonstrates the questionable benefits of the income management regime.<sup>273</sup>

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<sup>268</sup> The Review Board described the lack of baseline data as a major problem requiring urgent attention. See Review Board Report, above, note 9, 16

<sup>269</sup> The two surveys conducted by FaHCSIA are based on interviews with store operators where income quarantining had been in place for at least 12 weeks. See Department of Families, Housing, Community Services and Indigenous Affairs, *Northern Territory Emergency Response (NTER): Stores Post Licensing Monitoring Report – Early Indications of Income Management in Community Stores – First 20 stores* (undated) [http://www.facs.gov.au/nter/docs/reports/nter\\_stores\\_post\\_report.pdf](http://www.facs.gov.au/nter/docs/reports/nter_stores_post_report.pdf) (accessed 20 November 2008); Department of Families, Housing, Community Services and Indigenous Affairs, *Second Stores Post Licensing Monitoring Report – 41 Stores* (undated) [http://www.fahcsia.gov.au/nter/docs/reports/nter\\_second\\_stores\\_post\\_report.pdf](http://www.fahcsia.gov.au/nter/docs/reports/nter_second_stores_post_report.pdf) (accessed 1 December 2008)

<sup>270</sup> Brian Walker-Catchpole, Lucy Phelan & Kate Snow, *Survey of Government Business Managers Relating to the Impact of the Northern Territory Emergency Response*, July 2008 at [http://www.facs.gov.au/nter/docs/reports/gbm\\_survey\\_report/downloads/GBM\\_Survey\\_Report.pdf](http://www.facs.gov.au/nter/docs/reports/gbm_survey_report/downloads/GBM_Survey_Report.pdf) (accessed 20 November 2008)

<sup>271</sup> Review Board Report, above, note 9, 44

<sup>272</sup> HREOC Review Board Submission, above, note 31 at [37]

<sup>273</sup> Hardship included hunger, with families being unable to buy food for days at a time with people going hungry and criss-crossing family groups to find food; dedicated cashiers in stores; inability to travel for ceremony and sorry business; increased prices at community stores; people becoming subject to income quarantining without their knowledge; people contributing to services, such as meals on wheels, that they do not have access to; tensions within and between families; and frustration, embarrassment, humiliation and overt racism because of the difficulties associated with acquiring and using store cards. Reports and submissions describe loss of dignity and disempowerment; a sense of shame at being treated in the same category of negligent or abusive parents<sup>273</sup> and anger at its discriminatory nature. Of particular concern was the sense of reversion to a protectionist era, the return of 'ration days' with its attendant loss of autonomy and dignity. See HREOC Review Board Submission, above, note 31 at [37]; Review Board Report, above, note 9, 20-21; AIDA Submission, above, note 29 at [19]-[23], [43]-[54]; Community Based Review, above, note 28, 123; Draft Review Board Report, above, note 30, 48-55, 123-129; Central Land Council Survey, above, note 180, 25-31; CAALAS & NAAJA Submission, above, note 26, 16-20; Department of Families, Housing, Community Services and Indigenous Affairs, *Northern Territory Emergency Response (NTER): Stores Post Licensing Monitoring Report – Early Indications of Income Management in Community Stores – First 20 stores* (undated) [http://www.facs.gov.au/nter/docs/reports/nter\\_stores\\_post\\_report.pdf](http://www.facs.gov.au/nter/docs/reports/nter_stores_post_report.pdf) (accessed 20 November 2008), 9

247. The Authors therefore submit that an argument that income quarantining is appropriate or proportionate is unsustainable. It is mandatory and non-discretionary, applying on the basis of residence in Prescribed Areas. It is punitive and targets individuals in an attempt to engender behavioural change, failing to address structural reform, without justification based on rigorous evidence of its success elsewhere. It represents untested theory and is being applied to the most vulnerable people in the Australian community.
248. The objectives of income quarantining identified by the Australian Government are broad and imprecise<sup>274</sup> and do not provide criteria against which income quarantining can be assessed. In particular, the Authors are deeply troubled by the Minister's assertion that compulsory income quarantining is designed to develop 'strong, social norms'.<sup>275</sup> Against a background of a racist and discriminatory colonial history, the dominant society deliberately aiming without consultation to alter the social norms of Aboriginal peoples suffering from poverty, disadvantage and discrimination is of deep concern, especially when viewed through the lens of humiliation, despair, shame and lack of trust of government reported.
249. Nor is compulsory income quarantining a temporary measure but will continue indefinitely.<sup>276</sup> The Authors accept that 'temporary' does not necessarily connote 'short term', as the process of addressing inequality could take decades.<sup>277</sup> However, there are no clear objectives or specific criteria for securing 'adequate advancement', against which the measure can be assessed to determine an end point.
250. For these reasons, the Authors submit that the income management regime constitutes a violation of article 5(e)(iv) of the Race Convention.

**(f) Article 5(e)(vi): right to equal participation in cultural activities**

251. The Authors submit that the effect of many of the Northern Territory Intervention measures is that Aboriginal people are unable to access and participate in cultural activities. There was no consideration of cultural paradigms in the framework development, such that the Northern Territory Intervention in its entirety, in its implementation and through specific measures constitutes a serious breach of the right to cultural practice.
252. The justification for the Northern Territory Intervention has undermined respect for Aboriginal culture by unjustifiably conflating sexual predation, violence and deviant behaviour with cultural practices and traditional law and resulted in imposed undermining of Aboriginal culture.<sup>278</sup> The Northern Territory Intervention seeks to undermine communal ownership of

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<sup>274</sup> They include reducing alcohol-related violence, protecting children, guarding against humbugging and promoting personal responsibility, directing money to the needs of children and reducing the amount of cash in communities where substance abuse, gambling and other anti-social behaviours are problems that can lead to child abuse and community dysfunction. See Hon Jenny Macklin, Compulsory income management to continue, above, note 12; FaHCSIA Background Material, above, note 39 "Appendix 1: Measures and sub-measures"

<sup>275</sup> 7.30 Report, Government Responds to Intervention Review, above, note 166

<sup>276</sup> Hon Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, *Response to the NTER Review*, 23 October 2008 at [http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/nter\\_review\\_24oct08.htm](http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/nter_review_24oct08.htm) (accessed 6 November 2008)

<sup>277</sup> Dilip Lahiri, Committee Expert cited in Media Release, CERD Discusses Special Measures, above, note 156

<sup>278</sup> Draft Review Board Report, above, note 30, 11; Community Based Review, above, note 28, 124-125

land and promote individual ownership described above. Worryingly, an explicit aim of the Northern Territory Intervention is to rebuild Aboriginal 'social norms'.<sup>279</sup> It explicitly prevents traditional owners from exercising their rights to speak for country through the right to negotiate in the native title application process and prevents Aboriginal offenders from having customary law and cultural practice considered before the courts.

253. The failure to consult with Aboriginal peoples and unnecessary haste prevented measured consideration of the implications of the Northern Territory Intervention, resulting in unintended breaches of Aboriginal cultural and social norms by public authorities, for example by the Australian Federal Police.<sup>280</sup>
254. In particular, Australia in enacting the Northern Territory Intervention breaches a number of its specific obligations to Aboriginal peoples under General Recommendation 23, generally violating Aboriginal peoples' rights to practise and revitalise cultural traditions and customs. Australia has violated its obligation to recognise and respect Aboriginal distinct culture as an enrichment of Australian culture. In undermining Aboriginal land tenure and providing for Ministerial control of Aboriginal organisations, it has violated its obligation to provide for sustainable economic and social development compatible with Aboriginal peoples' cultural characteristics.

**(g) Article 5(f): right of access to any public place or service**

255. The Authors submit that the regime of income quarantining raises serious concerns in relation to article 5(e)(iv) of the Race Convention.
256. The administration of income quarantining has resulted in segregated services in Alice Springs. For example, when first implemented, Centrelink in Alice Springs had separate queues for those subject to income quarantining until complaints were heeded. Similarly, for ease of administration, at least one store in Alice Springs has designated certain cashiers for people subject to income quarantining.<sup>281</sup> Not only does this shame and humiliate those subject to income quarantining, but it also prevents them from equal access to services as the general public.
257. While the restricted access to public places is an indirect consequence of income quarantining, it nonetheless a discriminatory effect of income quarantining. Although the restricted access is not on its face based on race, those subject to income quarantining overwhelmingly are Aboriginal people. The alarming reality is therefore one of segregation between Aboriginal and non-Aboriginal people.

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<sup>279</sup> Hon Mal Brough MP, Hon Mal Brough MP, Second Reading Speech, above, note 94., 9; *Govt responds to Northern Territory intervention review*, ABC: 7.30 Report, 23 October 2008 at <http://www.abc.net.au/7.30/content/2008/s2399696.htm> (accessed 20 November 2008)

<sup>280</sup> For example, Professor Smith describes the tragic suicide of a young man who had been charged with carnal knowledge in relation to his relationship with a girl approved by the families and the community, as illustrating the failure of the Federal Police, exemplified by grossly inadequate training in Aboriginal community policing; no training in protocols and cultural customs of the community; no introductions to community elders or mechanism created for seeking advice; and no guidance from an Aboriginal Community Police Officer. See Professor Claire Smith, *NT Intervention: victims of avoidable tragedies*, 20 October 2008 at <http://www.crikey.com.au/Politics/20081020-The-NT-where-both-police-and-aboriginal-people-are-the-victims-of-avoidable-tragedies.html> (accessed 20 November 2008); See also the example of

<sup>281</sup> For example, the Eastside IGA in Alice Springs directs people subject to income quarantining to a specific cashier

258. The Authors submit that the regime of income quarantining does not constitute a 'special measure' for the purposes of article 1(4) of the Convention and therefore constitutes a violation of article 5(f) of the Race Convention.

### 5.5 Article 6: Effective Protection and Remedies

259. Article 6 of the Race Convention imposes on State parties the obligation to provide redress for damage, whether material or moral, suffered as a result of racial discrimination.<sup>282</sup> The Authors submit that the exclusion of the operation of the Racial Discrimination Act and state and territory anti-discrimination laws, which has had the effect of removing any rights of appeal in relation to the Northern Territory Intervention measures, raises serious concerns with article 6 of the Race Convention and General Recommendation 31.

260. While the Review Board conducted an investigation of the Northern Territory Intervention, its mandate was limited only to the practical impact of the Northern Territory Intervention measures and not the racially discriminatory impact. The Social Justice Commissioner, who monitors the enjoyment and exercise of human rights for Aboriginal Australians,<sup>283</sup> conducted an assessment of the Northern Territory Intervention in terms of its fulfilment of the State party's human rights obligations. The Social Justice Commissioner's report found that Australia had obligations to address family violence and child abuse in Indigenous communities, but that restricting rights of Indigenous peoples and overriding the principles of non-discrimination, just compensation and procedural fairness safeguards were not justified.<sup>284</sup> Income quarantining, in particular, raised particular human rights concerns.<sup>285</sup>

261. However, the concerns that have been expressed by the Review Board and the Social Justice Commissioner do not provide any protection or remedy to any affected individuals. The Australian Government is not even required to respond to, let alone implement, any of these recommendations.

262. The Committee's jurisprudence on article 6 of the Race Convention has emphasised the positive obligation of State parties to afford a remedy in cases where an act of racial discrimination within the meaning of the Race Convention has been made out,<sup>286</sup> including where no bodily harm has been inflicted but where the victim has suffered humiliation, defamation, or other attack against his/her reputation and self esteem.<sup>287</sup> An investigation of an allegation of racial discrimination must be more than mere formality for the purposes of article 6.<sup>288</sup>

263. The terms of article 6 do not impose upon States parties the duty to institute a mechanism of sequential remedies, up to and including the Supreme Court level, in cases of alleged racial

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<sup>282</sup> CERD, General Recommendation 26, above, note 33 at [2]

<sup>283</sup> s 46C(1) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth)

<sup>284</sup> HREOC Review Board Submission, above, note 31 at [19]

<sup>285</sup> HREOC Review Board Submission, above, note 31 at [19]

<sup>286</sup> *Ms L R et al v Slovak Republic* CERD/C/66/D/31/2003

<sup>287</sup> *BJ v Denmark* CERD/C/56/D/17/1999

<sup>288</sup> *Kashif Ahmad v Denmark* CERD/C/56/D/16/1999 (8 May 2000); *Habassi v Denmark* CERD/C/54/D/10/1997 (6 April 1999)

discrimination.<sup>289</sup> As a general rule, it is for the domestic courts of State parties to the Race Convention to review and evaluate the facts and evidence in a particular case.<sup>290</sup>

264. However, the Authors note that the Northern Territory Intervention measures cannot be examined in accordance with the law and procedures set up by the State party to deal with cases of racial discrimination. Indeed, the Racial Discrimination Act and state and territory anti-discrimination legislation are specifically excluded.
265. Persons subject to the Northern Territory Intervention are prevented from challenging, on the basis of racial discrimination, its measures through existing domestic law and are prevented from seeking any remedy.
266. Given the range of the measures of the Northern Territory Intervention and their significant physical, cultural, social and moral impact, the inability of Aboriginal people to seek a remedy represents a serious and clear violation of article 6 of the Race Convention.

### **5.6 Article 7: Immediate and Effective Measures to Combat Prejudices**

267. The Authors submit that the rhetoric surrounding the introduction of the Northern Territory Intervention, the means chosen to implement it and some specific measures raise serious concerns in relation to article 7 of the Race Convention. The significance of article 7 is exemplified by the Committee's reminder to State parties of its binding obligations.<sup>291</sup> Combating prejudice is an effective means of eliminating racial discrimination.<sup>292</sup>
268. Media reports in mid-2006 of extreme levels of sexual abuse in Aboriginal communities were followed by allegations of sexual slavery and sophisticated paedophile rings operating in Aboriginal communities protected by community elders and cultural norms. The reporting of these allegations led to the establishment by the Northern Territory Government Board of the Inquiry into the Protection of Aboriginal Children from Sexual Abuse, which led to the production of the Little Children Are Sacred Report.<sup>293</sup> The former Australian Government argued that this report led to the implementation of the Northern Territory Intervention.
269. The allegations of paedophile rings in Aboriginal communities were ultimately rejected by the ACC,<sup>294</sup> a joint NT Police and Family and Community Services Taskforce<sup>295</sup> and the Little Children Are Sacred Report, although the report did conclude that individual non-Aboriginal 'paedophiles' occupying positions of trust had been infiltrating Aboriginal communities and offending against children.<sup>296</sup> Much of the complexity of the Little Children Are Sacred Report

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<sup>289</sup> *Yilmaz-Dogan v. the Netherlands* at [9.4]

<sup>290</sup> *Z.U.B.S. v. Australia* at [9.3].

<sup>291</sup> UN Committee on the Elimination of Racial Discrimination, *General Recommendation V. Reporting by State Parties (Art 7)* (Fifteenth session, 1977)

<sup>292</sup> UN Committee on the Elimination of Racial Discrimination, *General Recommendation V. Reporting by State Parties (Art 7)* (Fifteenth session, 1977)

<sup>293</sup> Little Children Are Sacred Report, above, note 1

<sup>294</sup> Senator Rachel Siewert, Media release, *No evidence of organised paedophile rings: ACC* at <http://rachel-siewert.greensmps.org.au/content/media-release/no-evidence-organised-paedophile-rings-acc> (accessed 6 January 2009);

<sup>295</sup> "Mutitjulu ups the Aunty", *National Indigenous Times*, 7 September 2006 at <http://www.nit.com.au/News/story.aspx?id=7734> (accessed 9 January 2009)

<sup>296</sup> Little Children Are Sacred Report, above, note 1, 59

was lost in the media reporting. Indeed, the Australian Government's response focussed on the disturbing allegations of violence and neglect but did not address the lack of coordination of services, the continuing social problems and weakening of Aboriginal communities that have developed over decades due to the continued lack of government support for Aboriginal people.

270. The rhetoric employed by the former Australian Government in support of the Northern Territory Intervention was sensationalist and evoked an environment of unceasing brutality, dysfunction and despair. Those who questioned the Northern Territory Intervention were described by the former Minister as 'ignorant'.<sup>297</sup> Those who opposed the Northern Territory Intervention were berated for not caring about violence and child abuse.<sup>298</sup> The apprehension of women who were to be subject to the Northern Territory Intervention was minimised.<sup>299</sup>
271. As the Review Board observed, Aboriginal customary law has been associated with the sexual abuse of children and violence towards women, and media coverage has conflated sexual predation, violence and deviant behaviour with cultural practices and traditional law, distorting and demeaning the integrity of Aboriginal culture.<sup>300</sup>
272. The means adopted to implement the Northern Territory Intervention, including the mobilisation of police and armed forces, also have the potential to add to prejudice and lead to racial discrimination. On a practical level, signs are erected designating areas as Prescribed Areas with associated bans on alcohol and pornography. The signs are in English that cannot be read by many of the residents and had the effect of shaming and labelling Aboriginal people as alcoholics and paedophiles.<sup>301</sup>
273. The Authors do not contend that freedom of press should be impaired or that shocking allegations of abuse and neglect should be minimised. Rather, the Authors contend that the gravity of the allegations, and the potential for a shocked or frenzied response, necessitated a measured and considered response based on evidence and statistical analysis, which was not adopted.
274. The Authors note the Committee's previous concern at reports of biased treatment of asylum seekers by the media in Australia and its recommendation that Australia take resolute action to counter any tendency to target, stigmatise, stereotype, or profile, in this case, non-citizens... on the basis of race, colour, descent, or national or ethnic origin.<sup>302</sup>
275. The Authors argue that the rhetoric surrounding the Northern Territory Intervention and the means of its implementation have undermined broad community confidence in Aboriginal

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<sup>297</sup> The Hon Mal Brough, former Federal Minister for Families, Community Services and Indigenous Affairs, "Northern Territory Intervention" *2007 Alfred Deakin Lecture*, (Melbourne University, 2 October 2007) at [http://www.facsia.gov.au/Internet/Minister3.nsf/content/alfred\\_deakin\\_02oct07.htm](http://www.facsia.gov.au/Internet/Minister3.nsf/content/alfred_deakin_02oct07.htm) (accessed 21 September 2008)

<sup>298</sup> Ibid

<sup>299</sup> Ibid

<sup>300</sup> Draft Review Board Report, above, note 30, 11

<sup>301</sup> Review Board Report, above, note 9, 25; Community Based Review, above, note 28, 124

<sup>302</sup> CERD, Concluding Observations to Australia's thirteenth and fourteenth periodic reports (2005)

communities and perpetrated prejudicial views of Aboriginal communities and culture as described by the Review Board.<sup>303</sup>

276. Although the present Australian Government has not engaged in the same sensationalist rhetoric adopted by the former Government, the Authors submit that it nonetheless has obligations to deal with its consequences and to use and disseminate information to combat the prejudice and misinformation that leads to racial discrimination.

#### **5.7 General Recommendation 21: Right of Self-Determination**

277. The principle of self-determination obliges Governments to be sensitive towards the rights of persons belonging to ethnic groups, particularly their rights to lead lives of dignity, to preserve their culture, to share equitably in the fruits of national growth and play their part in the government of the country of which they are citizens.<sup>304</sup>
278. The Authors submit that the principles and objectives of the Northern Territory Intervention in its entirety and a number of the measures of the Northern Territory Intervention violate the State party's obligation to provide for the right to self-determination for Aboriginal peoples, specifically provided for in General Recommendation 21 and enshrined in numerous international instruments.
279. Significantly, the continuing failure to engage the Aboriginal peoples affected by such wide ranging measures of profound effect is to crudely subject them to the authority of the State, continuing failed previous approaches, criticised by the Little Children Are Sacred Report as leaving Aboriginal people 'disempowered, confused, overwhelmed, and disillusioned'.<sup>305</sup>
280. Further, the effect of Northern Territory Intervention measures is to remove authority and decision making from the Aboriginal communities affected.
281. The legislative scheme providing for the Minister's unprecedented powers over every aspect of the operation of Aboriginal representative councils and organisations undermines Aboriginal decision making and authority. In particular, the scope of the powers must be viewed through the lens of findings that the Northern Territory Intervention to date had failed to assess communities on an individual basis and had not recognised good governance and excellence in programs. Interaction with government bodies is placed in the hands of third parties.
282. The right to negotiate under the Native Title Act provides a limited but crucial avenue for Aboriginal participation in decisions that affect them on Aboriginal land and specifically recognises the authority and cultural obligations of traditional owners. Its removal profoundly undermines Aboriginal self-determination.
283. The undermining of Aboriginal ownership of land is to fail to respect the specific incidents of Aboriginal ownership and in fact treat Aboriginal property rights as lesser forms of right.

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<sup>303</sup> Draft Review Board Report, above, note 30, 11

<sup>304</sup> UN Committee on the Elimination of Racial Discrimination, *General Recommendation 21: Right to self-determination* at [5]

<sup>305</sup> Little Children Are Sacred Report, above, note 1, 50.

**5.8 General Recommendation 23: Rights of Indigenous Peoples**

284. The continuing lack of engagement in formulating the measures is in breach of Australia's obligation to ensure that no decisions directly relating to their rights and interests are taken without Aboriginal peoples' informed consent. The failure to consult is of particular impact given the absence of a national representative body for Aboriginal peoples in Australia and the increased likelihood of adoption of measures that would undermine Aboriginal culture.
285. Australia's obligation to ensure that Aboriginal peoples' of the Northern Territory are free and equal in dignity and rights is exemplified by a perception of a regression to a protectionist and paternalistic era with humiliation, incomprehension, confusion, anxiety and a sense of betrayal and disbelief reported. A widespread feeling of 'collective existential despair', characterised by a widespread helplessness, hopelessness and worthlessness has profound implications for resilience, social and emotional wellbeing and mental health of Aboriginal people in the Northern Territory with ongoing effects.
286. Measures of the Northern Territory Intervention specifically undermine the traditional authority of elders and prevent threaten Aboriginal cultural and social norms; undermine traditional collective ownership of land; undermine traditional authority and prevent traditional owners from fulfilling cultural obligations; and remove consideration of Aboriginal customary law and cultural practice in bail and sentencing, which violates Australia's obligations to recognise and respect Aboriginal distinct culture; to ensure that Aboriginal people can exercise their rights to practice and revitalise their traditional culture and customs; and to protect Aboriginal people's rights to own, develop and control their communal lands, territories and resources.
287. Finally, removal of control over Aboriginal communities, land and assets, including community housing violates Australia's obligation to provide conditions allowing for sustainable economic and social development, compatible with their cultural characteristics.

## **6. Request for Measures**

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288. Based on the submissions outlined throughout this Request for Urgent Action, the Authors respectfully request that the Committee adopt a decision including the expression of specific concerns and recommending that the State party:
- (a) immediately take all necessary steps to bring to an end the exclusion of the Racial Discrimination Act in respect of the Northern Territory Intervention; and
  - (b) undertake that there will be no further implementation of the Northern Territory Intervention until the Committee is satisfied that each of the measures is properly a 'special measure' for the purposes of the Race Convention.
289. To that end, the Committee is respectfully requested to direct that the State party enter into discussions with the Aboriginal peoples of the Northern Territory to develop solutions that comply with the State party's obligations under the Race Convention and its other international obligations.

## 7. Glossary

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**Aboriginal community living areas** means areas granted to Aboriginal associations under the Northern Territory *Lands Acquisition Act*.

**Aboriginal land** means land held by Aboriginal Land Trusts or Aboriginal Land Councils as defined in the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)*.

**ACC** means the Australian Crime Commission.

**AAT** means the Administrative Appeals Tribunal.

**Australian Government** or **Australia** means the State party.

**AHRC** means the State party's national human rights institution, the Australian Human Rights Commission.

**AIDA** means the Australian Indigenous Doctors' Association.

**Authors** means the individuals listed in section 2 who are subject to the measures of the Northern Territory Intervention.

**Committee** means the Committee on the Elimination of Racial Discrimination established under Part II of the Race Convention.

**Commonwealth Government** means the Federal Government of the Commonwealth of Australia.

**Community Review** means the *Community-Based Review of the Northern Territory Emergency Response* conducted by the Institute of Advanced Study for Humanity, University of Newcastle

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

**Former Minister** means the former Minister for Families, Community Services and Indigenous Affairs

**High Court** means the High Court of Australia.

**Land Rights Act** means the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)*.

**Lands Acquisition Act** means the Northern Territory *Lands Acquisitions Act*.

**Little Children Are Sacred Report** means Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle 'Little Children are Sacred' Little Children Are Sacred (2007)*, commissioned by the Northern Territory Government and released in June 2007.

**Minister** means the Commonwealth Minister for Families, Housing, Community Services and Indigenous Affairs.

**Native Title Act** means the *Native Title Act 1993 (Cth)*.

**Northern Territory Intervention** means the legislative package passed by the former Australian Government following the announcement of a 'Northern Territory emergency response' into Indigenous communities in the Northern Territory.

**NTNER Act** means the *Northern Territory National Emergency Response Act 2007 (Cth)*.

**Prescribed Areas** means 'Aboriginal land' under the *Aboriginal Land Rights (Northern Territory) Act 1976* held by Aboriginal Land Trusts or Land Councils; Aboriginal community living areas held by Aboriginal associations under the Northern Territory *Lands Acquisition Act* held by Aboriginal associations and any declared areas.

**Race Convention** means the *International Convention on the Elimination of All Forms of Racial Discrimination*, adopted and opened for signature and ratification by GA Res 2106 (XX) of 21 December 1965 (entered into force 4 January 1969, in accordance with Article 19).

**Racial Discrimination Act** means the Federal *Racial Discrimination Act 1975 (Cth)*.

**Request** means this Request for Urgent Action to the Committee on the Elimination of Racial Discrimination.

**Review Board** means the Northern Territory Emergency Response Review Board established by the Australian Government to conduct 'an independent and transparent review of the Northern Territory Intervention' after one year of operation.

**Rules of Procedure** means revision 3 of the *Rules of Procedure of the Committee on the Elimination of Racial Discrimination*, UN Doc CERD/C/35/Rev.3 (1 January 1989).

**Social Justice Commissioner** means the Australian Human Rights Commission's Aboriginal and Torres Strait Islander Social Justice Commissioner.

**SSAT** means the Social Security Appeals Tribunal.

**State party** means the Commonwealth of Australia.

**Task Force** means the National Indigenous Violence and Child Abuse Intelligence Task Force that was established by the Australian Crime Commission in July 2006.

**Welfare Payment Reform Act** means the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (Cth)*.