Chapter 3

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

On 21 June 2007, the Australian Government announced a 'national emergency response to protect Aboriginal children in the Northern Territory' from sexual abuse and family violence.[1] This has become known as the 'NT intervention' or the 'Emergency Response'. The catalyst for the measures was the release of Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, titled *Ampe Akelyernemane Meke Mekarle: 'Little Children are Sacred'.*

In the following months the emergency announcements were developed and formalised into a package of Commonwealth legislation which was passed by the federal Parliament and received Royal Assent on the 17 August 2007.

The Human Rights and Equal Opportunity Commission welcomed the Australian Government's announcements to act to protect the rights of Indigenous women and children in the Northern Territory. In doing so, the Commission urged the government and Parliament to adopt an approach that is consistent with Australia's international human rights obligations and particularly with the *Racial Discrimination Act 1975* (Cth).[2]

This chapter provides an overview of the NT emergency intervention legislation and approach more generally. It considers the human rights implications of the approach adopted by the government. Many details of how the intervention will work remain to be seen, and so the analysis here is preliminary. It seeks to foreshadow significant human rights concerns that are raised by the particular approach adopted by the government, and proposes ways forward to ensure that the intervention is consistent with Australia's human rights obligations as embodied in legislation such as the *Racial Discrimination Act 1975* (Cth).

1 Brough, M., (Minister for Families, Community Services and Indigenous Affairs), *National emergency response to protect children in the NT*, Media Release, 21 June 2007, available online at: http://www.fahcsia.gov.au/internet/minister3.nsf/content/emergency_21june07.htm, accessed 18 October 2007.

2 Human Rights and Equal Opportunity Commission, 'A human rights based approach is vital to address the challenges in Indigenous communities', *Press Release*, 26 June 2007, available online at: www.humanrights.gov.au/about/media/media_releases/2007/45_07.html, accessed 9 November 2007.

Part 1 provides background on the announcement of the intervention and the findings of the *Little Children are Sacred* report. Part 2 then provides an overview of the legislative package to implement the intervention, the scrutiny process at the time of its introduction and related issues. Part 3 then considers the human rights impact of the intervention. Part 4 considers how to ensure that any actions to protect Indigenous children and women are done in a manner consistent with the human rights of Indigenous peoples.

Part 1: Background – The *Little Children are Sacred* Report and the announcement of the 'emergency measures'

On 21 June 2007 the Australian Government announced a series of broad ranging measures to be introduced in Aboriginal communities across the Northern Territory to address what it described as the 'national emergency confronting the welfare of Aboriginal children' in relation to child abuse and family violence.[3] The Minister described the measures to be introduced as measures aimed at 'stabilis(ing) and protect(ing) communities in the crisis area' with all action 'designed to ensure the protection of Aboriginal children from harm'.[4] He described the measures as 'a first step that will provide immediate mitigation and stabilising impacts in communities'.

The extent to which the proposed measures would shift the social, cultural and legal landscapes of Aboriginal communities in the Northern Territory was immediately obvious. The Government described the measures to be introduced as follows:

- Introducing widespread alcohol restrictions on Northern Territory Aboriginal land;
- Introducing welfare reforms to stem the flow of cash going toward substance abuse and to ensure funds meant to be for children's welfare are used for that purpose;
- Enforcing school attendance by linking income support and family assistance payments to school attendance for all people living on Aboriginal land and providing meals for children at school at parents' cost;
- Introducing compulsory health checks for all Aboriginal children to identify and treat health problems and any effects of abuse;
- Acquiring townships prescribed by the Australian Government through five year leases including payment of just terms compensation;
- As part of the immediate emergency response, increasing policing levels in prescribed communities, including requesting secondments from other jurisdictions to supplement NT resources, funded by the Australian Government;
- Requiring intensified on ground clean up and repair of communities to make them safer and healthier by marshalling local workforces through work-for-the-dole;
- Improving housing and reforming community living arrangements in prescribed communities including the introduction of market based rents and normal tenancy arrangements;
- Banning the possession of X-rated pornography and introducing audits of all publicly funded computers to identify illegal material;

3 Brough, M., (Minister for Families, Community Services and Indigenous Affairs), *National emergency response to protect children in the NT*, Media Release, 21 June 2007.

4 Brough, M., (Minister for Families, Community Services and Indigenous Affairs), *National emergency response to protect children in the NT*, Media Release, 21 June 2007.

- Scrapping the permit system for common areas, road corridors and airstrips for prescribed communities on Aboriginal land; and
- Improving governance by appointing managers of all government business in prescribed communities.[5]

The Government also noted that it expected the Northern Territory Government to undertake the following, complementary actions:

- Increase its efforts and resources to ensure the servicing and protection of its citizens in the range of areas of State and Territory responsibility and support, within the scope of its resources, the national emergency response;
- Develop a comprehensive strategy to tackle the 'rivers of grog' across the Territory;
- Resume all special leases over town camps in the major urban areas where lease conditions have been breached, with the Australian Government acting in this area if the NT Government fails to do so; and
- Remove customary law as a mitigating factor for sentencing and bail conditions.

The initial phase of the intervention is due to last for up to five years. It will apply in most Aboriginal townships and town camps in the Northern Territory (as 'prescribed' by the NT intervention legislation or subsequently by legislative instrument by the Minister for Indigenous Affairs). Initially, 73 communities were identified for application of the measures.[6]

The Government announced that the intervention would be overseen by a Taskforce of 'eminent Australians, including logistics and other specialists as well as child protection experts' to be chaired by Dr Sue Gordon AM.

In announcing the intervention, the Minister stated that:

> The immediate nature of the Australian Government's response reflects the very first recommendation of the Little Children are Sacred report into the protection of Aboriginal children from child abuse in the Northern Territory which said: "That Aboriginal child sexual abuse in the Northern territory be designated as an issue of urgent national significance by both the Australian and Northern Territory Governments…."[7]

He also stated that the immediacy of the broad scale change being undertaken was justifiable from the perspective of the urgent need to 'stabilise' the situation in Northern Territory communities, and that:

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5 Brough, M., (Minister for Families, Community Services and Indigenous Affairs), *National emergency response to protect children in the NT*, Media Release, 21 June 2007.

6 Department of Families, Community Services and Indigenous Affairs, Transcripts: *Mal Brough discusses the Northern Territory National Emergency Response Legislative Program*, 6 August 2007, available online at: http://www.facsia.gov.au/internet/minister3.nsf/content/nter_6aug07.htm, accessed 15 January 2008.

7 Brough, M., (Minister for Families, Community Services and Indigenous Affairs), *National emergency response to protect children in the NT*, Media Release, 21 June 2007. Note that this and other statements by the Minister do not cite the full recommendation from the *Little Children are Sacred* report, which is significantly different in process.

> I could not live with myself and I know that not one member of this House would want to live with themselves knowing that we sat on a report like this for eight weeks and then said for another six or eight weeks that we would wait and try and come up with some answers and then start to implement them.[8]

The Minister has consistently stated that: 'All action at the national level is designed to ensure the protection of Aboriginal children from harm'.[9]

The *Little Children are Sacred* report

> Our appointment and terms of reference arose out of allegations of sexual abuse of Aboriginal children. Everything we have learned since convinces us that these are just symptoms of a breakdown of Aboriginal culture and society. There is, in our view, little point in an exercise of band-aiding individual and specific problems as each one achieves an appropriate degree of media and political hype. It has not worked in the past and will not work in the future...
>
> What is required is a determined, coordinated effort to break the cycle and provide the necessary strength, power and appropriate support and services to local communities, so they can lead themselves out of the malaise: in a word, ***empowerment!***[10]
>
> ***Pat Anderson and Rex Wild QC, Little Children are Sacred report***

The catalyst for the NT intervention was the findings of the report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, titled *Ampe Akelyernemane Meke Mekarle: 'Little Children are Sacred'* (herein the *Little Children are Sacred* report). This had been presented to the Chief Minister of the Northern Territory on 30 April 2007 and publicly released on 15 June 2007.

The *Little Children are Sacred* report was commissioned by the Chief Minister of the Northern Territory on 8 August 2006. It involved extensive research and community consultation by members of the Board of Inquiry into instances of sexual abuse in Aboriginal communities in the Northern Territory. The report took over eight months to complete.

The *Little Children are Sacred* report found that child sexual abuse is serious, widespread and often unreported in Aboriginal communities. It also found that:

- Most Aboriginal people are willing and committed to solving problems and helping their children. They are also eager to better educate themselves.
- Aboriginal people are not the only victims and not the only perpetrators of sexual abuse.
- Much of the violence and sexual abuse occurring in Territory communities is a reflection of past, current and continuing social problems which have developed over many decades.

8 Brough, M., (Minister for Families, Community Services and Indigenous Affairs), *Hansard*, House of Representatives, 21 June 2007, p76.

9 Brough, M., (Minister for Families, Community Services and Indigenous Affairs), *National emergency response to protect children in the NT*, Media Release, 21 June 2007.

10 Anderson, P. and Wild, R., *Ampe Akelyernemane Meke Mekarle 'Little Children are Sacred' Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse*, Darwin 2007, p12.

- The combined effects of poor health, alcohol and drug abuse, unemployment, gambling, pornography, poor education and housing, and a general loss of identity and control have contributed to violence and to sexual abuse in many forms.
- Existing government programs to help Aboriginal people break the cycle of poverty and violence need to work better. There is not enough coordination and communication between government departments and agencies, and this is causing a breakdown in services and poor crisis intervention. Improvements in health and social services are desperately needed.
- Programs need to have enough funds and resources and be a long-term commitment.[11]

Throughout the report, the Board of Inquiry emphasised the importance of entering into genuine partnerships with Aboriginal communities if there is to be progress in addressing child abuse and family violence issues in those communities. In introducing the recommendations, the report states:

> In the first recommendation, we have specifically referred to the critical importance of governments committing to genuine consultation with Aboriginal people in designing initiatives for Aboriginal communities, whether these be in remote, regional or urban settings. We have been conscious throughout our enquiries of the need for that consultation and for Aboriginal people to be involved…
>
> The thrust of our recommendations, which are designed to advise the Northern Territory Government on how it can help support communities to effectively prevent and tackle child sexual abuse, is for there to be consultation with, and ownership by the communities, of those solutions. The underlying dysfunctionality where child sexual abuse flourishes needs to be attacked and the strength returned to Aboriginal people.[12]

The Report called for there to be 'a radical change in the way government and non-government organisations consult, engage with and support Aboriginal people'.[13] The Report states that it 'was a common theme of discussions that many Aboriginal people felt disempowered, confused, overwhelmed, and disillusioned' with this situation leading to:

> communities being weakened to the point that the likelihood of children being sexually abused is increased and the community ability to deal with it is decreased.[14]

Recommendation 1 of the report reflects the need for immediate action as well as ongoing effective dialogue with Aboriginal people in designing initiatives that address child sexual abuse:

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11 Anderson, P. and Wild, R., *Ampe Akelyernemane Meke Mekarle 'Little Children are Sacred' Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse*, 2007.

12 Anderson, P. and Wild, R., *Ampe Akelyernemane Meke Mekarle 'Little Children are Sacred' Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse*, 2007, p21.

13 Anderson, P. and Wild, R., *Ampe Akelyernemane Meke Mekarle 'Little Children are Sacred' Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse*, 2007, p50.

14 Anderson, P. and Wild, R., *Ampe Akelyernemane Meke Mekarle 'Little Children are Sacred' Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse*, 2007, p50.

Recommendation 1: That Aboriginal child sexual abuse in the Northern Territory be designated as an issue of urgent national significance by both the Australian and Northern Territory Governments, and both governments immediately establish a collaborative partnership with a Memorandum of Understanding to specifically address the protection of Aboriginal children from sexual abuse. It is critical that both governments commit to genuine consultation with Aboriginal people in designing initiatives for Aboriginal communities.

The report also identified a series of principles to guide engagement with Aboriginal communities in addressing the scourge of child abuse and family violence. It stated that these 'rules of engagement' must be central to any policy formation and implementation in Indigenous communities:

- ***Principle One- Improve government service provision to Aboriginal people***. Including genuine whole-of-government commitment to improving service provision to Aboriginal communities, and a significant fiscal outlay, much better infrastructure and improved provision of resources.
- ***Principle Two: Take language and cultural 'world view' seriously***. Much of the failure to successfully address the dysfunction in Aboriginal communities has its roots in the "language barrier" and the "cultural gap" and this is widening among the younger generations. A common theme in consultations was that many Aboriginal people did not understand the mainstream law and many mainstream concepts, including sexual abuse.
- ***Principle Three: Engage in effective and ongoing consultation and engagement with Aboriginal Communities***. Many government policies are formulated without the active involvement of the very Aboriginal people whose lives and livelihoods are going to be affected by them, and whose support is needed for their success. The result is that these policies have not had the "on the ground" impact that it was hoped they would. The Inquiry believes that effective and ongoing consultation and engagement is an essential principle in reform.
- ***Principle Four: Maintain a local focus and recognise diversity*** There cannot be a one-size fits all approach to reform in Aboriginal communities. The Northern Territory Aboriginal population is made up of many culturally diverse groups. Recognition of this diversity demands that government initiatives have a local focus and that generic programs have sufficient flexibility to adapt to the cultural dynamics of individual Aboriginal communities.
- ***Principle Five: Support community-based and community-owned initiatives.*** There is now sufficient evidence to show that well resourced programs that are owned and run by the community are more successful than generic, short term, and sometimes inflexible programs imposed on communities. The Inquiry recognises the significant challenge for bureaucrats and politicians to avoid reverting to the familiar habits of seeking to control, incorporate and assimilate. The Inquiry takes the view that the government must offer realistic and useful support for local initiatives rather than: 'only seeking to re-orient communities toward better acceptance of existing mainstream legal processes and institutions'.

- ***Principle Six: Recognise and respect Aboriginal law, and empower and respect Aboriginal people***. An overwhelming request from both men and women during community consultations was for Aboriginal law to be respected, recognised, and incorporated within the wider Australian law where possible.
- ***Principle Seven: Maintain balance in gender, family and group representation***. For policies and programs to truly reflect the needs of the whole of community, consultations must include representatives from all different groups. In developing new structures and in engaging with community, care must be taken that all family groups have an equal role, that men and women are equally represented, and that the old and the young are equally represented.
- ***Principle Eight: Provide adequate and ongoing support and resources***. There is a need to overcome the lack of ongoing support for many programs. While initial support to commence a program could often be obtained, continuing support was much more difficult to obtain.
- ***Principle Nine: Commit to ongoing monitoring and evaluation of programs***. An increased understanding and accommodation of an Aboriginal cultural perspective is required in order to effectively evaluate service provision in Aboriginal communities, Further, there is a need to acknowledge Aboriginal people's history of being "researched on", and to develop culturally appropriate collaborative partnerships, where Indigenous communities share ownership of the research (and service provision) process.[15]

The *Little Children are Sacred* report includes 97 recommendations in relation to government leadership; family and children's services; health crisis intervention; police; prosecutions and victim support; bail; offender rehabilitation; prevention services; health care as prevention of abuse; family support services; education; alcohol; substance abuse; community justice; employment; housing; pornography; gambling, and cross cultural practices.

In particular, the recommendations emphasise that education is the key to helping children and communities foster safe, well adjusted families. It emphasised that school is the way to keep future generations of Aboriginal children safe, and getting children to school every day is essential. Education campaigns are also needed about sexual abuse, the impact of alcohol and pornography, and on the importance of schooling for a child's future.

The report also emphasises the need for urgent action to be taken to reduce alcohol consumption in Aboriginal communities.

15 Anderson, P. and Wild, R., *Ampe Akelyernemane Meke Mekarle 'Little Children are Sacred' Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse*, 2007, pp50-56. These principles were drawn from the Western Australian Law Reform Commission's final report into Aboriginal Customary Law: Western Australian Law Reform Commission, *The Interaction of Western Australian Law with Aboriginal Law and Culture*, WALRC Perth, 2006, pp34-40.

Part 2: The Northern Territory 'emergency response' legislation

The Australian Government's emergency intervention was announced hastily. There was six days between the public release of the *Little Children are Sacred* report and the government's announcement of the intervention measures.[16] The Northern Territory government were informed of the intervention measures at the same time that they were announced at a press conference by the Minister for Indigenous Affairs and the Prime Minister.

The majority of measures announced by the government require legislation to proceed. The substantive provisions of the government's 'Emergency Response' are contained in the following legislation:

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

Overview of content of the legislation underpinning the intervention

Text Box 1 below provides an overview of the content of the *Northern Territory National Emergency Response Act 2007* (Cth).

Text Box 1: Contents of the *Northern Territory National Emergency Response Act 2007* (Cth)

Part I

Part I identifies the areas of the Northern Territory to which the legislation is to apply as:

- Aboriginal land, within the meaning of Aboriginal Land in the *Aboriginal Land Rights Act 1976* (Cth) including roads and rivers on Aboriginal land;
- Aboriginal community living areas;
- town camps as declared by the Minister; and
- other areas declared by the Minister.

Part I identifies that the operation of the Act is for **5 years.**

16 The Minister for Indigenous Affairs stated publicly that neither he nor the federal government had seen the report prior to its public release.

Part II

Part II prohibits the sale, consumption or purchase of alcohol in prescribed areas, and enacts new penalty provisions for those activities. It also makes new laws in relation to liquor sales in the Northern Territory, making the collection of information compulsory for purchases over $100 or 5 litres of alcohol.

Part III

Part III mandates that any computer in a prescribed area owned by an individual or agency that receives government funding to be installed with a filter that has been accredited by the Telecommunications Minister. It also mandates that records be kept for three years of each person that uses the computer and the time and purpose for which they use it. Penalties apply for not complying with this requirement.

Part IV

Part IV outlines the Commonwealth's compulsorily acquisition of leases over 65 Aboriginal communities, and mandates the Minister to further acquire leases by use of legislative instrument.

Part V

Part V empowers the Minister for Indigenous Affairs to control the activities of 'community service entities', which are defined as a local government council, incorporated association or Aboriginal corporation. The Minister also has the power to declare any person or organisation operating within the boundaries of the Northern Territory as a 'community services entity'. The scope of the Minister's control over the entity's activities extends to the complete direction of its funding, assets, and business structures.

Part VI

Part VI provides that a court or bail authority must not consider any customary law or cultural practice as a mitigating factor in determining either sentencing or bail applications.

Part VII

Part VII sets up a licensing scheme for stores operating in prescribed areas whose main purpose is the provision of food or groceries. The licensing scheme requires the stores to participate in the income management scheme introduced by the *Social Security (Welfare Reform)* Act. The owner of such a store may apply for a license, or the Commonwealth can declare that such a store will be required to apply for a license. Where a license is not granted, the Commonwealth has the power to acquire the assets of the community store.

Part VIII

Part VIII excludes the operation of a range of Commonwealth and Territory laws in relation to the matters covered in the legislation. This includes excluding the operation of section 49 of the *Northern Territory (Self Government) Act 1978* (Cth), any law of the Northern Territory that deals with discrimination and Part II of the *Racial Discrimination Act 1975* (Cth). It also excludes provisions relating to the acquisition of property contained in section 50(2) of the *Northern Territory (Self Government) Act 1978* (Cth) and section 128A of the *Liquor Act* 1978 (NT).

Text Box 2 below provides an overview of the content of the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth).

Text Box 2: Content of the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth)

Schedule I

Schedule I bans pornographic material, such as videos and materials that have been refused classification or identified as restricted material by the Classification Board, in 'prescribed areas' (as identified by the Northern Territory National Emergency Response Act (Cth) 2007). It makes the possession, control, or supply of such materials a federal offence.

Schedule II

Schedule II extends the mandate of the Australian Crime Commission to allow it to deal with child sexual abuse and Indigenous violence.

Schedule II also deploys Australian Federal Police as 'special constables' to the Northern Territory Police Force.

Schedule III

Schedule III grants the Commonwealth an ongoing legal interest in infrastructure on Aboriginal land if it funds their construction or maintenance to the value of $50,000 or more.

Schedule IV

Schedule IV modifies the existing permit system for Aboriginal land in the Northern Territory set out by the *Aboriginal Land Rights Act 1976* (Cth) (ALRA) by giving the Northern Territory Legislative Assembly the power to make laws authorising entry onto Aboriginal land.

Schedule IV also gives the administrator of the Northern Territory the power to declare an area of Aboriginal land to be an area not requiring a permit for entry.

Text Box 3 below provides an overview of the content of the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth).

Text Box 3: Contents of the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth)

Schedule I

Schedule I establishes an income management regime that suspends between 50 and 100% of welfare payments that would otherwise be paid to:

- Individuals responsible for the care and protection of children
- Individuals subject to the jurisdiction of the 'Queensland Commission in Cape York'

- Individuals in 'prescribed areas' (as identified by the Northern Territory National Emergency Response Act (Cth) 2007).

The purpose of the measures is to quarantine the suspended payments to only be spent on food and other essential items.

Schedule II

Schedule II Provides that an individual who is subject to income management and who is eligible for the baby bonus will receive the payment in 13 fortnightly instalments, instead of in a lump sum. The instalments may also be subject to quarantining measures.

Schedule III

Schedule III ends all funding for CDEP arrangements in the Northern Territory, and moves all CDEP workers into the mainstream employment market. Provision is made for a one year transition payment to individuals transferring from CDEP to unemployment benefits, to make up the shortfall in the amount received.

The *Appropriation (Northern Territory National Emergency Response) Bill (No.1) 2007-2008 and Appropriation (Northern Territory National Emergency Response) Bill (No.2) 2007-2008* provided an additional $587million to implement the first stage of the emergency measures[17]

This funding is for a mixture of services for Indigenous communities in the Northern Territory, as well as administrative and bureaucratic costs of implementing the measures.

For example, it includes the following costs which are predominately administrative:

- $91.25 million to the Department of Employment and Workplace Relations to assist with implementing welfare reforms which aim to provide all Indigenous people in the Northern Territory with the capacity to work;
- $10.1 million to Centrelink to implement the welfare payment reform through both staff deployment and activities;
- $15.5 million to the Department of Defence for the initial rollout of the measures, including logistical support; and
- $34.3 million to the Department of Families and Community Services and Indigenous Affairs for the purpose of addressing short-term accommodation needs of department staff in implementing the intervention. [18]

17 Brough, M., (Minister for Families, Community Services and Indigenous Affairs), 'Second reading speech: Appropriation (Northern Territory National Emergency Response) Bill (No.1) 2007-2008', *Hansard*, House of Representatives, 7August 2007, p22.

18 Brough, M., (Minister for families, Community Services and Indigenous Affairs), 'Second reading speech: Appropriation (Northern Territory National Emergency Response) Bill (No.1) 2007-2008', *Hansard,* House of Representatives, 7 August 2007, p23.

It also includes the following funds intended to provide services in communities:

- $24.21 million to Indigenous Business Australia for investment and community initiatives in the Northern Territory, inclusive of $18.9 million set aside for supporting existing community stores in the outback;
- $212.3 million to the Department of Family and Community Services and Indigenous Affairs to assist with welfare payment reforms housing and land as well as additional support for children and families including the establishment of a diversionary scheme for Indigenous youth from the ages 12-18 to provide an alternative to alcohol and substance misuse;
- $14.5 million to the Department of Families and Community Services and Indigenous Affairs to provide grants for the employment of child protection workers and the establishment of additional safe places for Indigenous families escaping violence; and
- $10.5 million funding to the Attorney General's department to fund additional Night Patrol services in 50 Indigenous communities as well as financing extra legal services for Indigenous people.[19]

On 18 September 2007, the Minister for Indigenous Affairs announced a further $100 million in funding over 2 years to be provided to support Indigenous health care services in the Northern Territory. This includes for additional doctors, nurses and to follow up on issues identified by the child health checks that were conducted in the initial phase of the intervention.[20]

Timeline for introduction of the legislation and scrutiny by the Parliament

Table 1 below sets out the timeline for the introduction and consideration of this legislation.

Table 1: Timeline for introduction of the Northern Territory Intervention

Date	Action
15 June	The *Little Children are Sacred* report is publicly released by the Northern Territory government.
21 June	The Australian Government announces the introduction of the 'emergency measures'. The NT government is informed of the decision at the same time that the press conference by the Prime Minister and Minister for Indigenous Affairs.

19 Brough, M., (Minister for Families, Community Services and Indigenous Affairs), 'Second reading speech: Appropriation (Northern Territory National Emergency Response) Bill (No.1) 2007-2008', *Hansard*, House of Representatives, 7 August 2007, p24.

20 Australian Government, *Government delivers long-term commitment to housing, jobs, health and police as part of long term commitment to NT*, Media Release, 18 September 2007, available online at: http://www.facsia.gov.au/internet/minister3.nsf/content/funding_18sep07.htm, accessed 23 January 2008.

7 August	The following legislation is introduced to federal Parliament to give legal authority for the intervention measures announced: • Northern Territory National Emergency Response Bill 2007; • Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007; • Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill 2007; • Appropriation (Northern Territory National Emergency Response) Bill (No. 1) 2007-2008; and • the Appropriation (Northern Territory National Emergency Response) Bill (No. 2) 2007-2008. The bills are 480 pages long. All five Bills pass through the House of Representatives on the same day they are introduced.
8 August	The Senate authorises the Legal and Constitutional Committee to conduct an inquiry into the legislation, with five days for the conduct of the inquiry.
10 August	The Senate Legal and Constitutional Committee conducts its sole public hearing for its inquiry into the intervention legislation. The authors of the *Little Children are Sacred* report provide a lunchtime briefing to members of the Committee after they are not invited to give evidence to the inquiry. Only non-government members of the committee attend the briefing.
13 August	The Senate Scrutiny of Bills Committee releases its *Alert Digest* raising a number of concerns about the NT intervention legislation and how it trespasses unduly on personal rights and liberties; make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers as well as non-reviewable decisions; inappropriately delegate legislative powers; and insufficiently subjects the exercise of legislative power to parliamentary scrutiny. Government ministers respond to the concerns raised in the *Alert Digest* on 15 August 2007.
13 August	The Senate Committee on Legal and Constitutional Affairs tables its report on the NT Emergency Response legislation.[21]
17 August	All five Bills pass through the Senate. They receive Royal Assent and are enacted as legislation on 17 August 2007.

21 Senate Standing Committee on Legal and Constitutional Affairs, *Report on Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 and four related bills concerning the Northern Territory National Emergency Response*, August 2007, available online at: http://www.aph.gov.au/Senate/committee/legcon_ctte/nt_emergency/index.htm, accessed 2 November 2007.

12 September	In its *Ninth report* the Senate Scrutiny of Bills Committee notes that a number of concerns raised in its *Alert Digest* of 13 August remain to be addressed in the legislation. The legislation has already been passed by Parliament by this time and so these concerns are not considered.
14 September	The *Northern Territory National Emergency Response Act 2007* (Cth) is amended by the *Northern Territory National Emergency Response Amendment (Alcohol) Act 2007* (Cth) to introduce exemptions for tourists to alcohol restrictions. The amendments came into force on 14 September 2007.

Table 1 shows that there was limited consideration of the legislation by the Parliament, with extremely circumscribed timeframes for analysis despite the complexity and potential implications of the legislation.

The legislative process had entirely concluded within 10 days of the bills being introduced to Parliament. The Parliamentary Bills Digest noted that '[t]he quick passage of these Bills has been unusual, if not unprecedented'.[22]

The haste with which the measures were introduced is also demonstrated in Table 1 in the timeline for the conduct of an inquiry into the package of bills by the Senate Legal and Constitutional Committee.

The bills were referred to the committee on 8 August 2007, with a public hearing to be conducted on 10 August 2007 and the committee to table its report by 13 August 2007. In other words, it took a total of 6 days from commencement to finalisation of the inquiry's deliberations on perhaps the most complex legislative package to be placed before the Parliament in that term of office.

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

Of the first 70 submissions to the Senate Committee inquiry, 67 voiced concerns with the Bills and requested that they either be subject to further amendment and consultation, or be rejected.[23] Organisations such as Reconciliation Australia, the Secretariat of National Aboriginal and Islander Child Care, the Combined Aboriginal Organisations of the Northern Territory and the Central Land Council called for a

22 Parliamentary Library, 'Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency response and Other Measures) Bill 2007', 13 August 2007, no.21, 2007-2008, p4.

23 Parliamentary Library, 'Northern Territory National Emergency Response Bill', 13 August 2007, Bills Digest, no.28, 2007-2008, p20.

delay to the passage of the legislation to allow for meaningful consideration and review.[24]

The Senate Committee's inquiry revealed overwhelming support from all sides of politics that something needed to be done to tackle child sexual abuse in Indigenous communities. However, this was accompanied by significant concerns about the methods to be adopted for the intervention.

The then Opposition, the Australian Labor Party, acknowledged the importance of addressing child abuse as a matter of urgent national significance.[25] They emphasised that the goals of the intervention would not be realised unless they were part of a long term strategy with the following aims:

- the protection of children;
- the nurturing of children and ensuring they have access to appropriate health and education;
- strengthening Indigenous communities to take control of their own affairs; and
- assisting those communities to achieve economic independence.

They stated that these aims 'cannot be achieved unless the Commonwealth, after dialogue and genuine consultation with affected Aboriginal communities, sets out a comprehensive long term plan'.[26]

They also noted that the 'intervention is silent on many of the recommendations set out in the *Little Children are Sacred* report' and argued that:

> Any longer term plan should establish a framework for the achievement, in partnership with the Northern Territory Government and Indigenous communities, of the recommendations set out in the *Little Children are Sacred* report.[27]

24 On requests for delay to the passing of the legislation to allow greater time for consultation, see: Central Land Council, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs*, 10 August 2007, p2, available online at: http://www.aph.gov.au/Senate/committee/legcon_ctte/nt_emergency/submissions/sub84.pdf, accessed 2 November 2007; Combined Aboriginal Organisations of the Northern Territory, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs*, 10 August 2007, p7, available online at: http://www.aph.gov.au/Senate/committee/legcon_ctte/nt_emergency/submissions/sub125.pdf, accessed 2 November 2007; Reconciliation Australia, *Reconciliation Australia calls for non-urgent aspects of legislation to be deferred*, Media Release, 7 August 2007; Secretariat of National Aboriginal and Islander Child Care, *Delay the Northern Territory Intervention Legislation: Our children deserve better*, Media Release, 7 August 2007.

25 'Additional comments by the Australian Labor Party', contained in Senate Standing Committee on Legal and Constitutional Affairs, *Report on Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 and four related bills concerning the Northern Territory National Emergency Response*, August 2007, p37.

26 'Additional comments by the Australian Labor Party', contained in Senate Standing Committee on Legal and Constitutional Affairs, *Report on Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 and four related bills concerning the Northern Territory National Emergency Response*, August 2007, p38.

27 'Additional comments by the Australian Labor Party', contained in Senate Standing Committee on Legal and Constitutional Affairs, *Report on Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 and four related bills concerning the Northern Territory National Emergency Response*, August 2007, p38.

The ALP made a series of proposals relating to the legislation, including:

- **Permits on Aboriginal land:** That the blanket removal of the permit system on roads, community common areas and other places be opposed. That access without a permit for agents of the Commonwealth or Northern Territory Government to facilitate service delivery (such as doctors or other health workers) be supported, and greater public scrutiny of Aboriginal communities in the Northern Territory be facilitated by allowing access to roads and common town areas, without a permit, by journalists acting in their professional capacity, subject to restrictions relating to the protection of the privacy of cultural events (such as sorry business).
- **Compulsory acquisition:** That the Government should negotiate with affected communities prior to the acquisition of property. A twelve month review of the intervention measures should particularly focus on the compulsory acquisition of 5 year leases over communities due to their potential impact.
- **Compensation for acquisition of property:** That it is an absolutely fundamental principle that the Commonwealth Government should pay just terms compensation for the acquisition of property from anyone, anywhere in Australia. Any suggestion that services or infrastructure, which all Australians have the right to expect their governments to provide, should be considered as contributing to compensation for the acquisition of the property rights of Indigenous people should be absolutely rejected.
- **Welfare reform**: The effectiveness of the income management measures in stabilising communities, and stemming the flow of money to alcohol should be identifiable after 12 months. A review should focus on this issue, particularly given significant concerns about the practicality of welfare quarantining on the ability of Indigenous peoples to travel between outstations and homelands, and to go back to remote areas for cultural and ceremonial reasons (such as funerals).
- **Compliance with the Racial Discrimination Act:** Observing the integrity of the Racial Discrimination Act is a basic principle for this country and a basic principle for the Indigenous community of this country. Accordingly, the provisions in the bills suspending the operation of the Racial Discrimination Act should be opposed.[28]

They subsequently announced that they would also reinstate the CDEP Program in the Northern Territory in a revised format.

The Australian Greens and Australian Democrats also noted that the failure of the government to consult with Indigenous communities about the proposed measures amounted to a failure to comply with the very first recommendation of

28 'Additional comments by the Australian Labor Party', contained in Senate Standing Committee on Legal and Constitutional Affairs, *Report on Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 and four related bills concerning the Northern Territory National Emergency Response*, August 2007, pp37-47.

the *Little Children are Sacred* report.[29] This was despite the government's claim, as cited above, that the basis of the intervention was this very recommendation.

The Senate Committee's report was tabled in Parliament on 13 August 2007. It contained the following recommendations:

1. That the operation of the measures implemented by the bills be continuously monitored and publicly reported on annually through the Overcoming Indigenous Disadvantage framework (para 3.17).
2. That the Northern Territory Emergency Taskforce make publicly available its strategic communications plan as well as other operational plans, within six months, and the long term plans being developed in relation to the intervention, within 12 months; and that information regarding significant revisions to these plans should be provided in the Overcoming Indigenous Disadvantage report (para 3.18).
3. That the operation of the measures implemented by the bills be the subject of a review two years after their commencement, particularly to ascertain the impact of the measures on the welfare of Indigenous children in the Northern Territory. A report on this review should be tabled in Parliament (para 3.19).
4. That a culturally appropriate public information campaign be conducted, as soon as possible, to allay any fears Indigenous communities in the Northern Territory may hold, and to ensure that Indigenous people understand how the measures in the bills will impact on them and what their new responsibilities are (para 3.20).
5. That the Australian Government develop, as a matter of high priority, explanatory material to assist people to understand what is meant in practical terms by the phrases 'a quantity of alcohol greater than 1350 millilitres' and 'unsatisfactory school attendance' (para 3.21).
6. That the Australian Government should closely examine the need for additional drug and alcohol rehabilitation services in the Northern Territory and, if necessary, provide additional funding to support those services (para 3.22).
7. That the committee recommends the Senate pass the bills (para 3.23).[30]

The Government accepted recommendations 3-7 in full, and recommendations 1-2 in part. For recommendations 1-2, the government stated that they 'fully supported transparency and accountability and that the bills be continuously monitored' but that they had concerns 'over the appropriateness of the Overcoming Indigenous Disadvantage as a reporting framework'.[31]

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29 'Dissenting Report by the Australian Greens', contained in Senate Standing Committee on Legal and Constitutional Affairs, *Report on Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 and four related bills concerning the Northern Territory National Emergency Response*, August 2007, pp37-80.

30 Senate Standing Committee on Legal and Constitutional Affairs, *Report on Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 and four related bills concerning the Northern Territory National Emergency Response*, August 2007, available online at: http://www.aph.gov.au/Senate/committee/legcon_ctte/nt_emergency/index.htm, accessed 2 November 2007.

31 Brough, M., (Minister for Families, Community Service and Indigenous Affairs), *Letter to Standing Committee on Legal and Constitutional Affairs*, 16 August 2007.

The Government also indicated that they did not consider that any amendments to the legislation were necessary to address the recommendations of the Senate Committee.

The bills were then passed by the Senate without substantial amendment on 17 August 2007. They received Royal Assent the same day.

Interaction of the legislation with the *Racial Discrimination Act 1975* (Cth) and other protections against discrimination

One of the most significant aspects of the legislative package is the way in which it interacts with the *Racial Discrimination Act 1975* (Cth) (RDA) and other protections against discrimination at the territory level.

Text Box 4 below outlines the provisions in the legislation relating to the *Racial Discrimination Act 1975* (Cth), as well as Northern Territory and Queensland anti-discrimination laws.

Text Box 4: Legislative provisions in the Northern Territory intervention legislation relating to racial discrimination

Northern Territory National Emergency Response Act 2007

Section 132 – Racial Discrimination Act

(1) The provisions of this Act, and any acts done under or for the purposes of those provisions, are, for the purposes of the Racial Discrimination Act 1975, special measures.

(2) The provisions of this Act, and any acts done under or for the purposes of those provisions, are excluded from the operation of Part II of the Racial Discrimination Act 1975.

(3) In this section, a reference to any acts done includes a reference to any failure to do an act.

Section 133 – Some Northern Territory laws excluded

(1) The provisions of this Act are intended to apply to the exclusion of a law of the Northern Territory that deals with discrimination so far as it would otherwise apply.

(2) Any acts done under or for the purposes of the provisions of this Act have effect despite any law of the Northern Territory that deals with discrimination.

(3) However, subsections (1) and (2) do not apply to a law of the Northern Territory so far as the Minister determines, by legislative instrument, that the law is a law to which subsections (1) and (2) do not apply.

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

Section 4 – Racial Discrimination Act

(1) Subject to subsection (3), the provisions of this Act, and any acts done under or for the purposes of those provisions, are, for the purposes of the Racial Discrimination Act 1975, special measures.

(2) Subject to subsection (3), the provisions of this Act, and any acts done under or for the purposes of those provisions, are excluded from the operation of Part II of the Racial Discrimination Act 1975…

Section 5 – Some Northern Territory laws excluded

(1) Subject to subsections (3) and (4), the provisions of this Act are intended to apply to the exclusion of a law of the Northern Territory that deals with discrimination so far as it would otherwise apply.

(2) Subject to subsections (3) and (4), any acts done under or for the purposes of the provisions of this Act have effect despite any law of the Northern Territory that deals with discrimination.

(3) Subsections (1) and (2) do not apply to a law of the Northern Territory so far as the Minister determines, by legislative instrument, that the law is a law to which subsections (1) and (2) do not apply.

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

Section 4 Racial Discrimination Act—Part 3B of the Social Security (Administration) Act
(NB: This is an extract from this section)

(2) To the extent that this subsection applies, the provisions referred to in paragraph (1)(a), and any acts referred to in paragraph (1)(b), are, for the purposes of the Racial Discrimination Act 1975, special measures.

(3) To the extent that this subsection applies, the provisions referred to in paragraph (1)(a), and any acts referred to in paragraph (1)(b), are excluded from the operation of Part II of the Racial Discrimination Act 1975.

(4) The following are, for the purposes of the Racial Discrimination Act 1975, special measures:

(a) any acts done by the Queensland Commission in relation to the giving of:

(i) a notice referred to in paragraph 123UF(1)(b) or (2)(c) of the Social Security (Administration) Act 1999; or

(ii) a notice referred to in paragraph 123YM(2)(c) or 123YN(2)(c) of that Act; or

(iii) a direction referred to in section 123ZK of that Act;

(b) any provisions of any laws made by, or any acts done by, Queensland in relation to the establishment or operation of the Queensland Commission.

(5) The following are excluded from the operation of Part II of the Racial Discrimination Act 1975:

(a) any acts done by the Queensland Commission in relation to the giving of:

(i) a notice referred to in paragraph 123UF(1)(b) or (2)(c) of the Social Security (Administration) Act 1999; or

(ii) a notice referred to in paragraph 123YM(2)(c) or 123YN(2)(c) of that Act; or

(iii) a direction referred to in section 123ZK of that Act;

(b) any provisions of any laws made by, or any acts done by, Queensland in relation to the establishment or operation of the Queensland Commission.

Section 5 – Some Queensland and Northern Territory laws excluded—Part 3B of the Social Security (Administration) Act

(2) To the extent that this subsection applies, the provisions referred to in paragraph (1)(a) are intended to apply to the exclusion of a law of Queensland or the Northern Territory that deals with discrimination so far as it would otherwise apply.

(3) To the extent that this subsection applies, any acts referred to in paragraph (1)(b) have effect despite any law of Queensland or the Northern Territory that deals with discrimination.

(4) However, subsections (2) and (3) do not apply to a law of Queensland or the Northern Territory so far as the Minister determines, by legislative instrument, that the law is a law to which subsections (2) and (3) do not apply.

Section 6 – Racial Discrimination Act—determining terms of relevant activity agreement for approved programs of work for income support

(1) Subsections (2) and (3) apply in relation to the implementation of guidelines, or the doing of any other acts, for the purpose of determining the terms of a relevant activity agreement in relation to an approved program of work for income support payment, if the implementation or acts are done in the period:

(a) beginning on 9 July 2007; and

(b) ending 5 years after the commencement of section 1 of the Northern Territory National Emergency Response Act 2007.

(2) Any such implementation, or other acts, are, for the purposes of the Racial Discrimination Act 1975, special measures.

(3) Any such implementation, or other acts, are excluded from the operation of Part II of the Racial Discrimination Act 1975.

Each of these three Acts does two things in relation to the operation of the RDA.

First, they state that the measures contained in each Act are deemed to be 'special measures' in accordance with section 8 of the RDA.

Special measures are a form of positive discrimination whereby a group defined by race receives beneficial treatment. This is not considered discriminatory under the RDA. As discussed in part 3 of this chapter below, certain criteria must be met in order to establish that the measures in fact qualify as 'special measures'.

So in essence, the legislation states that ***all*** of the measures introduced through the legislation are to be characterised as 'beneficial' and therefore exempt from the prohibition of racial discrimination in Part II of the RDA.

Second, the Acts also suspend the operation of Part II of the RDA in relation to the provisions of these Acts, 'and any acts done under or for the purposes of those provisions'. Part II of the RDA makes it unlawful to discriminate against a person on the basis of their race.

In essence, this is a statement that if the intervention measures do not qualify as special measures and are in fact racially discriminatory, then the protections of the RDA do not apply. This has the consequence that individuals affected by the intervention measures have no right to bring a complaint under the RDA. They can also not challenge the validity of any laws introduced by the Northern Territory government under the auspices of this legislation (such as in relation to alcohol restrictions or changes to permits for entry into Aboriginal land) under section 10 of the RDA.

This exemption from the RDA is extremely broad as it relates not only to the provisions of the legislation but also to 'any acts done under or for the purposes of those provisions'. This means that there can be no challenge to any exercise of discretion by officials purporting to act in accordance with the legislation (for example, decisions of government business managers, variations of contract conditions, seizure of assets and so on).

At the Senate Legal and Constitutional Committee Inquiry into the legislation, the government indicated that the reason for excluding the intervention measures from the operation of Part II of the RDA was first, to provide 'legal certainty' for the intervention to progress without any delay caused by legal challenge, and second, to deal particularly with the provisions in section 10(3) of the RDA.[32]

Section 10(3) of the RDA operates to deem that a law or provision which:

- authorises property owned by an Aboriginal or Torres Strait Islander to be managed by another person without the consent of the Aboriginal or Torres Strait Islander; or
- prevents or restricts an Aboriginal or a Torres Strait Islander from terminating the management by another person of property owned by the Aboriginal or Torres Strait Islander; and
- is not a provision that applies to persons generally without regard to their race

32 Senate Standing Committee on Legal and Constitutional Affairs, *Report on Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 and four related bills concerning the Northern Territory national emergency response*, August 2007, pp10-11.

contravenes s 10(1) of the RDA.[33] A law or provision that falls within s10(3) of the RDA can also **not** be a special measure under section 8 of the RDA.

Each of the NT intervention Acts also exempts the operation of anti-discrimination laws in the Northern Territory. This means there is also no right to review or a remedy through the Northern Territory Anti-Discrimination Act.

The social security amendments also remove the operation of both the RDA and anti-discrimination laws in Queensland in relation to the establishment of a Families Commission in Cape York.

Importantly, the provisions of the legislation provide that the federal Minister for Indigenous Affairs can determine that any law of the Northern Territory Parliament (or Queensland in relation to the social security amendments) is not exempt from these provisions. In other words, the Minister can reinstate the protections against racial discrimination at the state and territory level. However, no such power exists in the legislation in order to restore the application of the RDA.

HREOC had argued to the Parliament that the clauses of the legislation suspending the RDA should be removed, because upholding the values of the RDA is vital to ensuring community respect for government action and to maintaining Australia's reputation as a nation committed to equality.[34]

The impact of these provisions and proposals for addressing the problems that they create are discussed in detail in part 3 of this chapter below.

Constitutional basis for the legislative package

The constitutional source of Commonwealth power relies on the legislative package is section 122 of the Constitution (the 'Territories Power'), which provides:

> 122. The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

The High Court has traditionally interpreted section 122 of the Constitution as providing the Commonwealth Government with unqualified scope to legislate as it pleases in the Northern Territory, identifying the power as 'plenary in quality and unlimited and unqualified in point of subject matter'.[35]

However, more recent cases heard by the Court seem to have adopted a far more 'integrationist' view of the Territories Power,[36] leaving the issue of whether it does operate independently of any other constitutional guarantee as an open question.

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33 Pearce, D. and Geddes R., *Statutory Interpretation in Australia*, 6th edn., Butterworths, Sydney, 2006, para 4.36; *Mabo v State of Queensland (No 1)* (1988) 166 CLR 186, per Deane J, p232.

34 Human Rights and Equal Opportunity Commission, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs*, 10 August 2007, p18 available online at: http://www.aph.gov.au/senate/committee/legcon_ctte/nt_emergency/submissions/sub67.pdf, accessed 23 November 2007.

35 *Teori Tau v Commonwealth* (1969) 119 CLR 564, p570. This statement was approved by the full court of the High Court in *Northern Land Council v Commonwealth* (1986) 161 CLR 1, p6.

36 See for example: *Northern Territory v GPAO* (1998) 196 CLR 553; *Spinks v Prentice* (1999) 198 CLR 511; *Re Governor, Goulburn Correctional Centre, Goulburn; Ex parte Eastman* (1999) 200 CLR 322; and *Newcrest Mining v Commonwealth* (1997) 190 CLR 513.

If the legislative package is controlled by Constitutional guarantees external to section 122, certain aspects of the legislation, such as the acquisition of Aboriginal property, may be open to challenge in the High Court.[37]

Even if the Commonwealth government's use of the Territories Power to enact the legislative 'Emergency Measures' package is entirely constitutionally competent, its compatibility with respect for the doctrine of representative government in the Northern Territory is, at best, highly questionable.

As the Bills Digest prepared on the Northern Territory National Emergency Response Bill noted:

> [W]hile the Commonwealth [has] constitutional power to effect changes to any area of NT law, the approach raises questions about the wisdom of such a policy. It involves the Commonwealth intervening in the affairs of a self-governing territory to modify or disapply its laws. There are principles that suggest interfering with, and adding layers of complexity to the laws of, a self-governing polity, is inappropriate. Furthermore it can be argued that the legislature (which is answerable to Northern Territorians) should have the freedom to legislate in a particular way. These arguments have been rehearsed with respect to other decisions to over-ride Territory laws, but there is an unusually complex set of issues that the Commonwealth is intervening in through these Bills.[38]

While the Commonwealth has stated it is relying upon section 122 of the Constitution as the basis of validly enacting the legislation, it is notable that there are provisions contained in the legislation relating to other states. Most notably, this includes provisions which enable the quarantining of income for carers of children identified as 'at risk' to come into force across Australia by 2009.[39]

These measures cannot depend upon the territories power in section 122 of the Constitution for their validity.

In relation to the Queensland welfare reforms in Cape York, the Commonwealth uses the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* to set up a financial framework for the scheme, and has then encouraged the Queensland Parliament to legislate to enact the introduction of the 'Queensland Commission'.

However, by exempting this process from the operation of the RDA and Queensland discrimination law, the Commonwealth has stepped beyond a mere financial framework arrangement for this scheme. Accordingly, it would still need to justify how it has validly enacted these provisions.

This may pose some difficulty for the Commonwealth, since the federal government's power with respect to States is far more narrowly defined under the Constitution than it is with regard to Territories. Indeed, constitutional law expert George Williams has commented that the intervention measures stand as 'a clear example of the Commonwealth seeking to assert a national interest in a way that

37 At the time of writing, one such challenge had already been lodged by the Bawinanga Aboriginal Corporation on 25 October 2007.

38 Parliamentary Library, 'Northern Territory National Emergency Response Bill', 13 August 2007, Bills Digest no.28, 2007-2008, p19.

39 Brough, M., (Minister for Families, Community Services and Indigenous Affairs), 'Second reading speech: Social Security and other Legislation Amendment (Welfare Payment Reform) Bill 2007', *Hansard*, House of Representatives, 7 August 2007, p6.

could not be done in the same way in the states, and in a way that undercuts self-government in the Territory'.[40]

In order to enact parallel legislative measures for the States, the Commonwealth would need to find authority in some of the narrower heads of power granted to it by section 51 of the Constitution.

Initial responses to the announcement of the 'Emergency Response' measures and legislation

Upon the announcement of the NT intervention measures, a consensus was quickly revealed among political parties, Indigenous peoples and the general community about the need for child abuse and family violence in Indigenous communities to be treated as a national priority.[41]

For many sectors of the community, there was hope that after a plethora of inquires and reports into the occurrence and causes of violence in Aboriginal communities, something might finally be done to address it.

Unfortunately, while there was consensus about the government's **intentions**, concerns about the actual **methods** being adopted by the federal government to address these issues also quickly emerged.

Aboriginal leaders and organisations expressed significant concerns at the potentially adverse consequences of implementing a quick response to such a complex social problem without wide-spread consultation with the communities involved, and due to the lack of connection between the response announced by the government and the recommendations of the *Little Children Are Sacred* report that had initiated the process.[42]

The Chief Executive Officer of the Co-operative Research Centre for Aboriginal Health, Mick Gooda, said, 'Anything we do to protect our kids I will support', but urged Canberra to 'engage with incentives rather than punishment'.[43]

Former ATSIC chairwoman Dr Lowitja O'Donoghue commented that stripping people of control was not an appropriate measure to address child sex abuse, declaring 'You can't just come over the top of people, you've got to talk to them'.[44]

Concerns were also aired about the practicality of many of the intervention measures. Dr Mark Wenitong, the President of the Australian Indigenous Doctors Association, commented that:

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40 'Indigenous abuse crackdown earns mixed response', *ABC Online* 22 June 2007, available online at: http://abc.net.au/news/stories/2007/06/21/1958547.htm, accessed 22 November 2007.

41 See for example: Macklin, J., (Shadow Minister for Indigenous Affairs and Reconciliation), *Labor offers bipartisan in-principle support on Indigenous child abuse measures*, Media Release, 21 June 2007.

42 'Aboriginal leaders want more services', *The Sydney Morning Herald* (Sydney) 21 June 2007, available online at: http://www.smh.com.au/news/National/Aboriginal-leaders-want-more-services/2007/06/21/1182019288480.html, accessed 2 November 2007.

43 'National emergency: PM acts', *The Age* (Melbourne) 22 June 2007, available online at: http://www.theage.com.au/news/national/howard-acts-on-nt-emergency/2007/06/21/1182019284327.html?page=3, accessed 2 August 2007.

44 'National emergency: PM acts', *The Age* (Melbourne) 22 June 2007, available online at: http://www.theage.com.au/news/national/howard-acts-on-nt-emergency/2007/06/21/1182019284327.html?page=3, accessed 2 August 2007.

> As medical professionals, we question the notion that you can treat poverty, dispossession, marginalisation and despair (the root causes of substance misuse and sexual, physical and emotional abuse) with interventions that further contribute to poverty, dispossession, marginalisation and despair.[45]

Ian Anderson, the director of the Centre for Health & Society and Onemda VicHealth Koori Health Unit at the University of Melbourne, commented:

> The Australian government response is framed as a top–down crisis intervention … It is characterised as a short-term response to be followed by medium- and long-term strategies – none of which are clear at this stage. So, for example, whilst the Anderson/Wild report recommended strategies to increase policing in remote communities in the long term the Howard plan only extends for six months…
>
> Many of the government's proposals – for instance, scrapping the permit system, assuming control of Aboriginal land and instituting welfare reform – are simply not raised in the Anderson/Wild report. No reason is given as to how measures such as scrapping the permit system will address the problem of child sexual abuse. Conversely, a number of the issues that are raised in the report – in relation to community justice process, education/awareness campaigns in relation to sexual abuse, employment, reform of the legal processes, offender rehabilitation, family support services or the role of communities, for example – have not, as yet, been addressed by the Australian government response.[46]

Despite the airing of significant concerns, there was a broad willingness from across all areas of society to work with the government to make lasting change in Indigenous communities. For example, an open letter was delivered to the Minister for Indigenous Affairs on 26 June 2007 signed by over 150 organisations from the Indigenous and community sector. It reads:

> The safety and well-being of Indigenous children is paramount. We welcome your commitment to tackling violence and abuse in certain Indigenous communities. We are deeply concerned at the severity and widespread nature of the problems of child sexual abuse and community breakdown in Indigenous communities in the NT, catalogued in the *Little Children are Sacred* Report.
>
> We wish to work collaboratively with Governments and the communities affected to ensure that children are protected. We would like to see greater investment in the services that support Indigenous families and communities, the active involvement of these communities in finding solutions to these problems and greater Federal Government engagement in delivering basic health, housing and education services to remote communities…
>
> We note that the services which most Australians take for granted are often not delivered to remote Indigenous communities, including adequately resourced schools, health services, child protection and family support services, as well as police who are trained to deal with domestic violence in the communities affected. We endorse the call in the *Little Children are Sacred* Report for the Australian and Territory Governments to work together urgently to fill these gaps in services.

45 The Australian Indigenous Doctor's Association, *Indigenous doctors demand real and long term results in Aboriginal and Torres Strait Islander kids' health*, Media Release, 22 June 2007.

46 Anderson, I., 'Remote Communities: Unexplained Differences' *Australian Policy Online*, 26 June 2007, available online at: http://www.apo.org.au/webboard/comment_results.chtml?filename_num=161613, accessed 17 November.

There is also a need for a longer term plan to address the underlying causes of the problem, including community breakdown, joblessness, overcrowding and low levels of education.

Successfully tackling these problems requires sustainable solutions, which must be worked out with the communities, not prescribed from Canberra.

We are committed to working with the Government to ensure that in developing and introducing the proposed measures, support is provided to Indigenous communities' efforts to resolve these problems. The proposals go well beyond an 'emergency response', and will have profound effects on people's incomes, land ownership, and their ability to decide the kind of medical treatment they receive. Some of the measures will weaken communities and families by taking from them the ability to make basic decisions about their lives, thus removing responsibility instead of empowering them…

We offer our support to Indigenous communities and the Government in:

- developing programs that will strengthen families and communities to empower them to confront the problems they face;
- consulting adequately with the communities and NT Government, and community service, health and education providers;
- developing a long term plan to address and resolve the causes of child abuse including joblessness, poor housing, education and commit the necessary resources to this.[47]

The Human Rights and Equal Opportunity Commission (HREOC) welcomed the Prime Minister's commitment to tackling violence and child and alcohol abuse in Indigenous communities in the Northern Territory, but also urged the government to adopt an approach in the NT intervention that was consistent with Australia's human rights obligations:

> The complex issues being tackled and the proposed measures to be taken to overcome them raise a host of fundamental human rights principles. It is of the utmost importance to Australia's international reputation, and for community respect for our system of government, that solutions to all aspects of these matters respect the human rights and freedoms of everyone involved.
>
> Every Australian woman, man and child has the right to live free from violence in a safe and supportive home and community. These rights are clearly spelt out in the Convention on the Rights of the Child (CRC) and the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), to which Australia is a party. While these Conventions require government action to protect women and children against immediate harm, they also require government to address the broader social factors (such as health, education and housing) and disadvantage experienced within Indigenous communities.
>
> The design and implementation of measures to address violence and child abuse should also respect the human rights principles embodied in the Racial Discrimination Act 1975 (Cth) (the RDA), which gives effect to Australia's international obligations under the Convention on the Elimination of All Forms of Racial Discrimination (CERD). The RDA protects all Australians against discrimination on the grounds of race, colour, descent, or national or ethnic origin. Successive Australian governments for more than 30 years have proudly endorsed the objects

47 Open letter to the Hon Mal Brough MP, 26 June 2007, available online at: http://www.acoss.org.au/News.aspx?displayID=99&articleID=2683, accessed 5 December 2007.

> of the RDA, and Australia has been a strong advocate for its principles on the international stage.
>
> HREOC considers that the situation the government is confronting can and should be addressed consistently with the RDA. The RDA provides that its provisions are not contravened by special measures taken to ensure the enjoyment or exercise of the human rights of particular racial groups or individuals belonging to them. Special measures must be reasonable and proportionate to the risk of harm being addressed. These provisions give an avenue for laws to protect Indigenous women and children who are at risk.
>
> For more than a decade HREOC has supported the introduction of alcohol restrictions in some Indigenous communities as a 'special measure' on the basis that social benefits are likely to result in reduced violence and abuse and improved public safety. However in giving this support, HREOC has indicated that the restrictions should be part of a broad range of measures to address the causes of alcoholism, rehabilitation and underlying social disadvantage.
>
> Many Indigenous communities are crying out for support services to assist them in addressing the social conditions in their communities. HREOC has been advocating for some time that a proactive approach needs to be taken by governments to address Indigenous disadvantage. Successive Social Justice Reports to Parliament have recommended a human rights based approach to development in Indigenous communities and stressed the necessity of ensuring the effective participation of Indigenous peoples in decision making processes. This approach is important to ensure that measures have more than a temporary impact on Indigenous people and their communities.
>
> It is crucial that the government thoroughly analyses barriers that exist within Indigenous communities to the full enjoyment of basic human rights, such as the right to an adequate standard of living, and to the highest attainable standard of health, education and housing and identifies the steps necessary to address these.
>
> HREOC will continue to work constructively with governments, Indigenous communities and the broader Australian community by putting forward suggestions to ensure that proposals in this area are consistent with Australia's human rights obligations.[48]

As Social Justice Commissioner, I also expressed some concerns about the capacity of the Government to implement the announced measures given the significant difficulties and failings that had occurred in its whole of government machinery for Indigenous affairs in the past three years. Upon the announcement of the NT intervention measures I stated:

> Overall, the announcements and the commitments made by the federal Government for the NT raise a number of important and complex issues. Each of these issues in some way comes back to the **capacity** of the government to deliver on its commitments. And it is, of course, the capacity of the government through the new arrangements that has been the focus of successive *Social Justice Reports*.
>
> Structural questions about *how* the government will achieve its objectives include, but are by no means limited to the following:

48 Human Rights and Equal Opportunity Commission, *A human rights based approach is vital to address the challenges in Indigenous communities*, Press Release, 26 June 2007, available online at: http://www.humanrights.gov.au/about/media/media_releases/2007/45_07.html, accessed 3 December 2007.

- **First, on what basis will the government intervene in one community as opposed to another?** As Rex Wild and Pat Anderson's report reveals, there is a lack of statistics that reveal the true extent of the problem. So, in the absence of any situational and needs analysis, how does the government decide?
- **Second, and related to this question, is how will the government decide the appropriate approach for the specific needs of individual communities?** I am concerned about a mismatch that has already revealed itself between the public debate on these issues and the findings of the *Little Children are Sacred* report.
- **Third, and of critical importance, is what role does the community have in this process?** I think it is intentional that the government has described its announcements as an 'intervention' as opposed to a 'partnership' with Indigenous communities. We are now coming on three years since the introduction of the new arrangements – so why has the government not built relationships with communities sufficiently that they can approach the announcements as a partnership?
- **Fourth, if the government intends to make lasting change – how will it know when such change has occurred?** In the absence of regional and local level planning how will the specific issues facing communities, and the connections between communities on a regional basis, be addressed? This is something that incidentally was intended to be a key feature of the new arrangements but which has by and large failed to materialise as yet.
- **And fifth, how does the NT announcement fit with the processes that are continuing to be introduced as part of the 'new arrangements' to date?** Will it require another re-engineering of processes that are yet to be bedded down? For example, the government has released an evaluation plan for whole-of-government activities to address the critical problem of lack of baseline data.[49] The evaluation plan identifies that in the coming year there will be reviews of some of the communities who have previously been designated as communities in crisis, and baseline data will be established for some new priority communities. What is the impact of the NT announcement on this plan? Does it re-direct these evaluation activities for new communities to the NT rather than to communities in other states, or will there be an expansion of the scope of the evaluative framework? This would appear necessary to be able to effectively understand the success or otherwise of the measures to be taken.
- Similarly, will the government seek to utilise and expand its program of Shared Responsibility Agreements and Regional Partnership Agreements as tools to implement its NT announcements? It has previously foreshadowed the importance of these as primary mechanisms for engagement. As the *Social Justice Report* notes, these processes offer the potential to embed a community development approach into the new arrangements, but there is no evidence of this occurring to date.

  The *Social Justice Report* identifies the warning signs where the current federal system for Indigenous affairs is not capable of addressing these core issues due to significant policy errors.

49 See: www.oipc.gov.au/documents/OIPC_EvaluationPlan_23May.pdf. For commentary on the plan see: *Social Justice Report 2006*, pp64-68.

- The most significant problem with the new arrangements identified by the Report **is the lack of capacity for engagement and participation of Indigenous peoples**. This manifests as a lack of connection between the local and regional level, up to the state and national level; and as a disconnect between the making of policy and its implementation…

  Indigenous peoples are treated as problems to be solved, not as partners and active participants in creating a positive life vision for the generations of Indigenous peoples still to come.

  The greatest irony of this is that it fosters a passive system of policy development and service delivery while at the same time criticising Indigenous peoples for being passive recipients of government services![50]

Another important question I raised was:

> Will the Government conduct child protection checks on volunteers and ther personnel who enter Indigenous communities to assist in this process? As the Wild/ Anderson report notes it is unfortunate that many offenders in communities are non-Indigenous support workers so this has to be addressed so as to not entrench longer term offending behaviours.[51]

Reconciliation Australia also cautioned that long term strategies would need to be implemented in order for the emergency measures to be successful:

> It comes as somewhat of a relief that the Federal Government seems to be saying today that "enough is enough". But what remains to be seen is firstly whether having made this wide ranging announcement, the Government has the measures and properly trained people in place to make it work. Then we must hope that the Prime Minister, and all our leaders, will work to move Australia beyond serial crisis intervention to take the systemic, long term action consistently called for by fellow Australians living the horror. This will be the test of the sincerity behind today's announcement.[52]

Aboriginal organisations in the Northern Territory, in conjunction with other community sector organisations across the nation (Aboriginal and non-Aboriginal), developed a formal response to the federal government's proposed intervention measures on 10 July 2007.

The proposals were developed by the Combined Aboriginal Organisations of the Northern Territory (or CAO) representing Aboriginal organisations in Darwin, Alice Springs, Tennant Creek and Katherine, as well as community sector organisations from across the country.

Their document was titled: *A proposed Emergency Response and Development Plan to protect Aboriginal children in the Northern Territory – A preliminary response to the*

50 Calma, T., *Continuity and change through the new arrangements – Lessons for addressing the crisis of child sexual abuse in the Northern Territory*, Speech – Launch, *Social Justice Report and Native Title Report 2006,* 3 July 2007, p7.

51 Calma, T, Continuity and change through the new arrangements – Lessons for addressing the crisis of child sexual abuse in the Northern Territory, Speech – Launch, Social Justice Report and Native Title Report 2006, 3 July 2007, p12.

52 Reconciliation Australia, *Statement by Reconciliation Australia in Response to National Emergency Measures to Protect Aboriginal Children*, Media Release, 22 June 2007.

Australian Government's proposals[53] realeased on 10 July 2007 and outlines steps to protect children in Northern Territory Aboriginal communities in both the short and long term.

The proposal outlined the willingness of a vast number of Indigenous organisations across the territory to work in partnership with the government to address family violence and child abuse issues. The report stated that:

> The serious nature of Aboriginal child abuse and family violence in the Northern Territory demands an emergency response. However, in developing this response governments must show confidence and faith in Aboriginal communities to take ownership of these problems and support them to protect and nurture their children over the long term. This has been the expressed desire of Aboriginal communities…[54]
>
> A comprehensive approach to child protection in an emergency context gives priority to protection from immediate physical or emotional harm, but must go further. It should also address community safety and access to essential services including housing, health care and education. A failure to also commit to addressing these underlying issues will ensure the current risk factors contributing to existing child abuse and neglect will remain.[55]

Accordingly, the CAO proposed a two stage response to the problems of child abuse in remote Aboriginal communities:

1) An emergency response over the first 3-6 months, on which agreement can be reached quickly between Governments and community leaders; and
2) A more comprehensive plan and costed financial commitment that addresses the underlying issues within specific timeframes and has bi partisan political support.

They noted that:

> This plan would include specific objectives, timeframes and mechanisms that ensure transparency and ongoing independent rigorous evaluation. The performance of both governments and Aboriginal organisations would be included. This would also involve thorough planning and negotiation to ensure that the correct strategies are adopted, the substantial resources required are efficiently used, and funding is stable and predictable over the longer term. This plan should be developed and negotiated under a partnership approach with the targeted communities during the current emergency response phase and be implemented as soon as is practicable.

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53 Combined Aboriginal Organisations of the Northern Territory, *A proposed Emergency Response and Development Plan to protect Aboriginal children in the Northern Territory – A preliminary response to the Australian Government's proposals*, CAO Darwin 2007, available online at: http://www.snaicc.asn.au/news/documents/CAOreport8july.pdf, accessed 12 December 2007.

54 Combined Aboriginal Organisations of the Northern Territory, *A proposed Emergency Response and Development Plan to protect Aboriginal children in the Northern Territory – A preliminary response to the Australian Government's proposals*, CAO Darwin 2007, p1, available online at: http://www.snaicc.asn.au/news/documents/CAOreport8july.pdf, accessed 12 December 2007.

55 Combined Aboriginal Organisations of the Northern Territory, *A proposed Emergency Response and Development Plan to protect Aboriginal children in the Northern Territory – A preliminary response to the Australian Government's proposals*, CAO Darwin 2007, p3, available online at: http://www.snaicc.asn.au/news/documents/CAOreport8july.pdf, accessed 12 December 2007.

> These stages are not mutually exclusive. During the emergency response phase, the emphasis must shift from immediate child endangerment goals to the underlying and wider child protection goals of health, housing, education and ongoing community safety.
>
> Funding must be organised so that short term needs are met and long term development funding is also available. In these ways the emergency measures provide a foundation for stable long term investment that results in longer term solutions…
>
> The response should build on the knowledge base already available to Government, starting with the recommendations of the *Little Children are Sacred* Report.[56]

Text Box 5 below provides a summary of the recommended approach as set out by the Combined Aboriginal Organisations of the Northern Territory.

Text Box 5: Summary of the proposed emergency response and long term development plan to protect Aboriginal children in the NT by the Combined Aboriginal Organisations of the Northern Territory

1. Guiding principles

- Relationships with Aboriginal communities must be built on trust and mutual respect. All initiatives must be negotiated with the relevant communities.
- Cultural awareness and appropriateness.
- Actions should draw from and strengthen governance and community capacity.
- Build on the knowledge base already there in communities and in Government.
- Flexibility and responsiveness to local needs rather than a 'one size fits all' approach.
- Aboriginal communities are entitled to receive the same benefits and services, and their children to the same protections, that are available to other Australians.

2. Emergency Response

Objectives

- Act in conjunction with local community representatives and services to reduce the immediate risks to children and to plan and commence investment in the services and governance systems required to address the underlying causes.
- Establish systems of planning, service delivery, and monitoring and evaluation at the Territory-wide and community level that are based on partnerships between the two Governments and Aboriginal community representatives and services.

56 Combined Aboriginal Organisations of the Northern Territory, *A proposed Emergency Response and Development Plan to protect Aboriginal children in the Northern Territory – A preliminary response to the Australian Government's proposals*, CAO Darwin 2007, p3, available online at: http://www.snaicc.asn.au/news/documents/CAOreport8july.pdf, accessed 12 December 2007.

- Together with community representatives, assess the nature and scope of the problems and capabilities (strengths) within each community, both in terms of the direct risks to children (e.g. violence, overcrowded housing, and alcohol or substance abuse), and contributing factors (such as joblessness). Most of this information is available from previous reports, administrative data, and from local communities and there is no need to collect it yet again.

Priority actions – July to September 2007

Priority Actions in this period include:

- Consultations with all local communities to establish the scope and nature of risks to children, community needs including key service gaps, the resources available locally, and to establish bodies to coordinate the Emergency Response at the local level (see below);
- Recruitment and training of suitably skilled, culturally aware child protection staff and police, in consultation with local community representatives on the understanding that these positions will be filled permanently as soon as practicable;
- Where the capacity exists within communities or external agencies approved by them, funding to be provided for community controlled child safety services such as safe houses, night patrols and Aboriginal Community Police;
- Introduction of tougher restrictions on sale of alcohol outside the communities (including take away trade);
- Establishment of emergency treatment and rehabilitation services, where possible controlled by local communities, for people affected by the alcohol restrictions;
- Recruitment and training of voluntary and paid medical staff to assist Aboriginal Medical Services and clinics to assess the health and health service needs of Aboriginal children where their parents seek such assistance, using the auspices of the Aboriginal Medical Service Alliance of the Northern Territory to assist with selection and training, including cultural awareness training;
- Funding and recruitment to commence for community based family support and foster care services;
- Recruitment and training of appropriately qualified teachers and Aboriginal Education Workers to schools to fill gaps in schools on a priority basis;
- Construction on a priority basis of multipurpose family centres;
- Where local communities agree, establish community justice groups to assist authorities with education and administration on the law (e.g. night patrols, court support for victims);
- Commence extension of financial services (especially savings accounts) and financial education to Aboriginal communities and fund local community organisations to assist residents to use these facilities as well as the Centrepay system;
- Finance and establish school meals programs in communities, paid for in part by parents;

- Commit funds to a major upgrade and repairs and maintenance program along with construction of new housing on communities on a priority basis, and commence training of local Aboriginal people in home construction and maintenance.

3. Long Term Development plan – community capacity and governance

Objectives

- The Development Plan is a fully costed plan of action by the Australian and Northern Territory Governments with set goals and measurable targets to be achieved within fixed time frames.

Actions

The Plan should be developed in full negotiation with the relevant Aboriginal community organisations during the Emergency Response stage. It should include such actions as:

- the progressive roll-out of new housing built mainly by workers drawn from the communities;
- more effective employment development and assistance programs;
- expansion of school infrastructure and better training and career development for teachers and Aboriginal Education Workers;

Action in these areas should commence now, but will take more time to roll out than the Emergency Response. The Plan would also continue and build on the initiatives commenced during the Emergency Response phase.

Coordination and funding

- The Australian and NT Governments should jointly develop the Plan in consultation with Aboriginal community organisations. This work should be led by the Department of Prime Minister and Cabinet.
- It should provide adequate and stable funding for the services and infrastructure required to protect Aboriginal children in the communities, including special funding arrangements and components of mainstream funding programs.
- A permanent monitoring and evaluation body should be established after the Emergency Response phase.
- Aboriginal communities and services should continue to be fully resourced to engage with Government in the development and implementation of the Plan.

4. Planning and coordination for services in communities

A national lead agency is needed to oversight, co-ordinate and monitor co-ordination plan for the necessary for services and supports for communities in the Northern Territory to ensure that children are protected. The lead agency needs to take overall responsibility for the development and resourcing of the Emergency Response and Development Phases.

The lead agency should be accountable to Parliament to:

- ensure negotiations with Aboriginal communities are conducted in a fair, open and transparent manner;
- to improve standard setting, monitoring and advocacy ;
- establish and strengthen capacity and financial resources needed;

- establish training and vetting processes;
- to establish or improving access to services;
- develop and monitor a plan to address gaps in child protection including the provision of essential services in Aboriginal communities.

Governments should establish sector leads in each of the following sectors: child safety, community safety and services, health, education, housing and infrastructure. These should generally be drawn from relevant Australian and Territory Government Departments.

They should work closely with Aboriginal community organisations and prioritize the use of Aboriginal owned and controlled service providers. Their tasks would include developing clear targets and timelines for access to basic services, mapping community needs, service gaps, and the resources and capabilities of local regional and national actors, strengthening response capabilities (especially human resources), establishing links with other sectors to enhance the resources available, applying benchmarks to measure performance (in conjunction with the monitoring and evaluation body described below), and acting as a provider of last resort.

Sector leads should negotiate with representatives of Aboriginal communities, and consult with the providers of relevant services (child safety, police, community, health and education services), over the provision of services in each community as part of the Emergency Response. Regular community meetings should be organised and resourced to inform the community of proposed actions, progress, and to assist in local planning.

Communities must be properly resourced (including appropriate fulltime paid staff) to engage with the Emergency Response.

Monitoring and Evaluation

An independent monitoring and evaluation body should be established to report on the scope and nature of the problems identified, actions taken at local and Territory wide level, and their effectiveness and contribution to long term planning and solutions. This body should include the Aboriginal community as well as Australian and NT Government representatives, and independent experts.

Critical to the CAO's proposal is a transition from an emergency 'intervention style' approach to a community development process. As the CAO state in their proposal:

> Strategies to resolve these problems are more likely to succeed if local Aboriginal governance and the capacity of communities to pursue their own solutions are strengthened. This does not preclude or excuse Governments from providing and administering services such as schools and health care, but it means that any 'takeover' of Aboriginal controlled services would be counterproductive…
>
> there is broad agreement over many of the changes that are necessary (including safe places and better support for victims). To consult properly over these measures need not take long and it would improve the effectiveness of implementation…

> In addition to an Emergency Response, a longer term community capacity and service development plan is needed to establish the basic services and facilities that are lacking in the communities, to build job opportunities and proper housing, and to strengthen community governance so that the communities themselves can take the lead in addressing their problems. It is vital that the governments and the communities work together to get these medium to long term strategies right from the outset, to avoid the demoralising cycle of 'stop-start' policy making and frequent changes of direction that have characterised Aboriginal affairs for many years.[57]

Community engagement, and strengthening community cohesion, is critical to such an approach:

> Consultation and engagement with community leaders is crucial to ensure that policy is informed by knowledge of local conditions, priorities are properly set and mistakes are avoided in implementation…
>
> if the 'emergency measures' are implemented without community consent and ownership, there is a risk that the problems (e.g. alcohol addiction) will be driven underground and that initiatives to help prevent child sexual abuse and family violence will be resisted.
>
> More fundamentally, a Government 'takeover' of community administration risks undermining local community leadership and initiative that is essential to resolve the problems of child abuse and neglect, alcohol misuse, joblessness and inadequate services.[58]

As the timeline for the introduction of the legislation vividly demonstrates, the government was unwilling to enter into any dialogue, let alone negotiations, with Indigenous communities or the broader community about the methods to be adopted. The circumscribed process for debate and scrutiny also meant there was limited scrutiny prior to the introduction of the legislation.

The result was acrimonious public debate in which those who expressed concerns about the methods being adopted by the government were criticised (often in the most personal of terms) as if they were opposed to addressing violence and abuse.

From a distance, it appears inconceivable that a program to address issues as fundamental as family violence and child abuse should be the cause of community division. Such a process should have built partnerships across society and solidified a joint determination to address the scourge of family violence and child abuse in Indigenous communities.

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57 Combined Aboriginal Organisations of the Northern Territory, *A proposed Emergency Response and Development Plan to protect Aboriginal children in the Northern Territory – A preliminary response to the Australian Government's proposals*, CAO Darwin 2007, pp6-7, available online at: http://www.snaicc.asn.au/news/documents/CAOreport8july.pdf, accessed 12 December 2007.

58 Combined Aboriginal Organisations of the Northern Territory, *A proposed Emergency Response and Development Plan to protect Aboriginal children in the Northern Territory – A preliminary response to the Australian Government's proposals*, CAO Darwin 2007, p6, available online at: http://www.snaicc.asn.au/news/documents/CAOreport8july.pdf, accessed 12 December 2007.

Instead, the approach adopted has created or exacerbated division and mistrust between the federal government, the Northern Territory government, Indigenous communities and numerous community organisations.

The introduction of the NT intervention has, as a result, been highly controversial.

The responsibility for creating such division lies with those who led the process. The inability to develop a national consensus and partnership for addressing violence and abuse should be seen as one of the main legacies, and a significant failure, of the now former Minister for Indigenous Affairs.

The main victims of such conflict and division are, of course, Indigenous peoples themselves – with a noticeable increase in intolerance towards our communities and an increased stereotyping of all Aboriginal men (as violent, drunks or abusers).

Rebuilding trust and partnerships is a major challenge for the incoming Minister and government.

Part 3: The measures enacted in the NT emergency response and human rights standards

The NT intervention legislation and associated measures raise complex human rights challenges.

In introducing the NT intervention legislation, the Government clearly stated that the measures were intended to protect the rights of Indigenous children as set out in the *Convention on the Rights of the Child*, and were undertaken in furtherance of Australia's human rights obligations.

The Explanatory Memorandum for the *Northern Territory Emergency National Response Bill 2007* also states:

> The impact of sexual abuse on indigenous children, families and communities is a most serious issue requiring decisive and prompt action. The Northern Territory national emergency response will protect children and implement Australia's obligations under human rights treaties.[59]

As noted in the previous section, the legislation underpinning the intervention also deems the measures introduced to be 'special measures' and therefore non-discriminatory and consistent with Australia's human rights obligations. In apparent contradiction of this, however, the legislation also provides that in any event the measures are not subject to racial discrimination protections at either the territory or national level.

Many people and Indigenous communities have expressed concerns that the measures involve breaches of human rights. In particular, concerns have focused on the potentially racially discriminatory impact of the measures, the characterisation of the measures as 'special measures' accompanied by the exclusion from the protection of racial discrimination laws, and the lack of participation and consultation with Indigenous peoples in the formulation and implementation of the measures.

In response, Government officials stated before the Senate Inquiry into the legislation that:

> Australia's international obligations go to the protection of children as well as its obligations in relation to the elimination of all forms of racial discrimination. In balancing those two measures, in the context of the emergency response, we have considered those matters and we consider that the legislation achieves that balance.[60]

This section of the report provides an overview of the main human rights standards and legal obligations that are relevant to the Government's emergency intervention response to protect Aboriginal children in the Northern Territory. It considers established criteria (as set through processes of international law) for determining

59 Northern Territory Emergency National Response Bill 2007, Explanatory Memorandum, p76, available online at: www.austlii.edu.au/au/legis/cth/bill_em/ntnerb2007541/memo_0.html, accessed 20 November 2007.

60 Senate Standing Committee on Legal and Constitutional Affairs, *Report on Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 and four related bills concerning the Northern Territory national emergency response*, August 2007, available online at: http://www.aph.gov.au/Senate/committee/legcon_ctte/nt_emergency/index.htm, accessed 2 November 2007.

whether the 'balance' struck by the government is in fact consistent with Australia's human rights obligations or whether the intervention places Australia in breach of those obligations.

Australia's human rights obligations in relation to family violence and child abuse in Indigenous communities

Text Box 6 below provides a summary of the main human rights obligations undertaken by Australia that relate, directly or indirectly, to family violence and child abuse issues.[61]

Text Box 6: Human rights standards relevant to addressing family violence and child abuse in Indigenous communities

Convention on the Rights of the Child (CRoC)

- Governments shall respect and ensure the rights set out in the Convention are provided to each child within their jurisdiction without discrimination of any kind, including discrimination on the basis of race (Article 2).
- In all actions concerning children, the best interests of the child is a primary consideration, and the government has a duty of care to ensure that necessary protection is provided taking into account the rights of parents (Article 3).
- The family unit is recognised as fundamental for the growth and well-being of the child, and the government shall provide assistance to parents in meeting their child-rearing responsibilities and in the provision of services for the care of children (Articles 5 and 18).
- Children have a right to protection from all forms of violence, and governments must take protective measures to prevent, identify, and address violations. These measures include social programmes which provide necessary support for a child and his or her parents (Article 19).
- Children have a right to be protected from all forms of sexual abuse (Article 34).
- Governments must take measures to promote recovery and rehabilitation of children who are victims of neglect and abuse. This should be done in an environment that fosters the health, self-respect and dignity of the child (Article 39).
- Children have the right to the highest attainable standard of health and equal access to health care services. The government has a responsibility to diminish infant mortality, ensure the provision of necessary health care and combat disease and nutrition (Article 24).
- Indigenous children have the right to enjoy and practice their culture, in community with other members of their group (Article 30).
- Children must not be subjected to arbitrary interference with their privacy (Article 16).

61 This is not intended to be an exhaustive list. Note that many human rights are inter-related and inter-dependant, and so other rights not listed here may impact on the enjoyment of rights to be free from violence and abuse.

- Children have a right to benefit from social security (Article 26) and have a right to an adequate standard of living, with governments taking measures to assist parents, including through providing support programmes for nutrition, clothing and housing (Article 27).

International Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)

- Women have the right to be protected from discrimination on the basis of gender (Article 2).
- Gender-based violence and abuse is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men. Violence against women includes acts that inflict mental or sexual harm. (Article 1; General Comment 19).
- Governments must ensure legal protection of the rights of women against acts of discrimination (Article 2).
- Governments shall take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women (Article 5(a)).

International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

- All people have the right to be protected against discrimination on the basis of their race (Article 2).
- Governments undertake not to engage in any act or practice of racial discrimination and must ensure that all public authorities and public institutions act in conformity with this obligation (Article 2).
- Governments must guarantee equality before the law without distinction as to race. This includes equality in relation to the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution (Article 5(b)) and in relation to rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to housing, to public health, medical care, social security and social services and to education and training (Article 5(e)).
- 'Special measures' shall not be deemed to constitute racial discrimination (Articles 1(4) and 2(2).

'Special measures':

- provide a *benefit* to some or all members of a group based on race; and
- have *the sole purpose* of securing the advancement of the group so they can enjoy human rights and fundamental freedoms equally with others;
- and are *necessary* for the group to achieve that purpose; and
- *stop* once their purpose has been achieved and do not set up separate rights permanently for different racial groups (Article 1(4)).

Special measures shall also be taken by governments in the social, economic, cultural and other fields to ensure the adequate development and protection of groups defined by race in order to guarantee them the full and equal enjoyment of human rights and fundamental freedoms (Article 2(2)).

International Covenant on Civil and Political Rights (ICCPR)

- All people have the right to enjoy rights and freedoms without discrimination, including discrimination based on their race or sex (Articles 2 and 26).
- All people have the right to be protected against arbitrary interference with privacy, family and the home and the protection of the family as the fundamental group unit of society (Articles 17 and 23).
- All children have the right to special protection as children, without discrimination of any kind (Article 24).
- All members of minority groups have the right to enjoy and practice their culture, in community with other members of their group (Article 27).
- In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the government may take measures derogating from their obligations under the treaty to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and does not involve discrimination on the basis of race (Article 4).

International Covenant on Economic, Social and Cultural Rights (ICESCR)

- All people have the right to enjoy rights and freedoms without discrimination, including on the basis of race (Article 2).
- Each government must take steps to achieve progressively the full realisation of the rights recognised in the ICESCR, to the maximum of its available resources (Article 2).
- All people have the right to social security (Article 9).
- All people have the right to protection of the family as the fundamental group unit of society. Special measures of protection should be taken on behalf of children and young persons (Article 10).
- All people have the right to an adequate standard of living, including adequate food, clothing and housing, and to the continuous improvement of living conditions (Article 11).
- All people have the right to the highest attainable standard of physical and mental health (Article 12), the right to education (Article 13), and the right to take part in cultural life (Article 15).

This text box reveals a complex range of human rights issues that the NT intervention measures raise.

It is important to acknowledge at the outset the overlapping and inter-connected nature of these different human rights. This reflects that human rights are **universal** and **indivisible**. I explained these concepts in last year's *Social Justice Report* as follows:

> In simple terms **universality** means that (rights) apply to everyone, everywhere, equally and regardless of circumstance – they are intended to reflect the essence of humanity. They are the standards of treatment that all individuals and groups, irrespective of their racial or ethnic origins, should receive for the simple reason that we are all members of the human family. They are not contingent upon any factor or characteristic being met – you do not have to 'earn' rights or have to be 'deserving' for them to be protected.
>
> And the **indivisibility** of human rights means that all rights – economic, social, cultural, civil and political rights – are of equal importance. There is no hierarchy or priority for the protection or enjoyment of rights. Similarly, this means that all rights are to be applied consistently – *you cannot claim to be performing an action in exercise of your rights if it causes harm or breaches the rights of another person*.[62]

Ultimately, this means that governments (and individuals) should not privilege the enjoyment of one right over that of another, as if different rights are in competition with each other or subject to a hierarchy of 'more important' and 'less important' rights.[63]

Article 5 of the *International Covenant of Civil and Political Rights* enshrines this principle. It states:

> 1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

While this language is somewhat opaque, it reflects the principle that it is not legitimate to suggest that the reason for breaching a human right is in order to further the recognition of a different right.

Governments must apply human rights in a consistent manner and ensure that their efforts to promote the enjoyment of certain human rights do not (by design or impact) result in breaches of other rights.

In relation to the NT intervention, the implication of this should be clear: it is **not** appropriate to seek to justify discriminatory measures on the basis that they are undertaken in furtherance of another right (such as addressing violence). Human rights law requires that solutions be found that respect and protect *both* rights.

The relevant human rights issues raised by the NT intervention can be categorised into the following broad thematic areas:

- Equality before the law, non-discrimination and special measures;
- Rights to be free from violence and abuse;

62 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2006,* Human Rights and Equal Opportunity Commission, Sydney, pp3-5. Emphasis added.

63 There are some limited exceptions to this including protection of the right to life and limits on free speech.

- Rights to effective participation in decision-making and self-determination;
- Accountability and transparency measures in the implementation of rights; and
- Justifiable limits on the protection of rights (such as in times of public emergency).

There are also a range of specific economic, social and cultural rights that are related to preventing violence, such as the right to health, education, an adequate standard of living and to social security. These are discussed further below in relation to specific measures contained in the NT intervention.

A brief summary of the key human rights obligations in relation to each of these thematic areas is provided below.[64]

i) Equality before the law, non-discrimination and special measures

- Non-discrimination, together with equality before the law, constitutes a basic and general principle relating to the protection of all human rights.[65]
- These principles create a legal obligation on the government to ensure that every person is able to exercise and enjoy all of their human rights without discrimination of any kind, such as on the basis of their race or gender.
- For example, the *CRoC* makes clear that every right recognised by the convention must be applied to all children in a non-discriminatory manner.
- The right to non-discrimination has attained the status of *jus cogens* and is non-derogable. This means that under no circumstances can a government justify the introduction of discriminatory measures (including during a state of emergency). As a consequence, it is never permissible to attempt to 'balance' or justify a discriminatory measure against the enjoyment of a specific human right.
- 'Special measures' constitute an exception to the prohibition of racial discrimination. 'Special measures' are a form of preferential or 'beneficial' treatment that is aimed at enabling a group, defined by race, to fully enjoy their human rights.
- The *ICERD* sets out criteria for when an action qualifies as a 'special measure'. The action must:
  - provide a *benefit* to some or all members of a group based on race; and
  - have *the sole purpose* of securing the advancement of the group so they can enjoy human rights and fundamental freedoms equally with others; and

64 This list is not intended to provide an exhaustive or definitive list of human rights obligations – it merely reflects the main principles that are of relevance and application to the NT situation.

65 UN Human Rights Committee, *General Comment 18: Non-discrimination,* 1989, HRI/GEN/1/Rev.8, para 1, p185.

  - be *necessary* for the group to achieve that purpose, and
  - *stop* once their purpose has been achieved and not set up separate rights permanently for different racial groups.
- As discussed further below, Australian courts have elaborated on the necessary aspects of a special measure and suggested that, in addition:
  - the consent of the intended beneficiary is important in determining whether an action should be classified as beneficial or not; and
  - that each proposed action or measure must be tested individually to establish whether it meets the criteria for a 'special measure'.

ii) Rights to be free from violence and abuse

- The *CRoC* and *CEDAW* clearly provide that women and children have a right to be free from violence and sexual abuse.
- The *CRoC* requires government to ensure 'to the maximum extent possible the survival and development of the child'. It includes an explicit requirement that governments 'undertake to protect the child from all forms of sexual exploitation and sexual abuse'. Where children fall victim to any form of violence, neglect, exploitation or abuse, governments have a responsibility to 'take all measures to promote physical and psychological recovery and social reintegration' of those children.
- The *CRoC, CEDAW* and *ICERD* require that government's take a range of proactive steps to ensure that children, women and groups of people defined by race can live free from violence of any kind:
  - *CRoC* requires governments to provide protection from 'all forms of physical or mental violence' while in the care of their parents or others. Where such violence occurs, governments have a responsibility to provide protective measures including the provision of appropriate support and follow-up services to children and their families.
  - *CEDAW* requires governments to take all appropriate measures to modify cultural and customary practices that are based on the idea of the inferiority or the superiority of either of the sexes.
  - *ICERD* requires governments to guarantee equality before the law without distinction as to race in relation to the right to security of person and protection by the State against violence or bodily harm. This right applies whether the violence is inflicted by government officials or by any individual group or institution. Accordingly, a failure of the government to act in relation to a known situation of violence and abuse that affects a particular racial group (such as was identified in relation to Indigenous children and women in the *Little Children are Sacred* report) would place them in breach of *ICERD*.

iii) Rights to effective participation in decision-making and self-determination

- Indigenous peoples have the right to full and effective participation in decisions which directly or indirectly affect their lives, including participation and partnership in program planning, development, implementation and evaluation.
- *ICERD* has been interpreted as requiring that governments ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent.[66]
- Effective participation has also been found to be a central component of a non-discriminatory approach to implementing a range of economic, social and cultural rights (such as the right to health and education), as well as integral to the enjoyment of the right of minority groups to the enjoyment of their culture and the right of self-determination.
- The importance of ensuring effective participation has been reinforced through the recognition of the right to development. This recognises that the 'human person is the central subject of development and should be the active participant and beneficiary of the right'.
- The right to development encompasses the following issues for Indigenous peoples:
  - requires free and meaningful participation by affected indigenous people in defining the objectives of development and the methods used to achieve these objectives;
  - is directed towards the goal of realizing the economic, social, and cultural rights of indigenous people;
  - facilitates the enjoyment of indigenous peoples' cultural identity, including through respects the economic, social and political systems through which indigenous decision-making occurs; and
  - is self-determined development, so that peoples are entitled to participate in the design and implementation of development policies to ensure that the form of development proposed on their land meets their own objectives and is appropriate to their cultural values.
- Rights to participate have also begun to find expression in the policies of the UN agencies and the decision making of UN treaty bodies as the principle of free, prior and informed consent. Procedurally, this requires processes that allow and support meaningful and authoritative choices by indigenous peoples about their development paths, doing so on the basis of accurate and accessible information, and following consultation undertaken in good faith, and on the basis of full and equitable participation.

66 Committee on the Elimination of All Forms of Discrimination, *General Comment XXIII on the rights of indigenous peoples,* 1997, in HRI/GEN/1/Rev.8, para 4(d), p256.

iv) Accountability and transparency measures in the implementation of rights

- The realisation of economic, social and cultural rights (such as the right to health, housing and education) is subject to the 'progressive realisation' principle. This requires that governments justify that they are addressing the lack of full enjoyment of human rights within the shortest possible timeframe and to the maximum of available resources. This acknowledges that it takes time to address deeply entrenched situations of poverty and marginalisation.
- This requires that:
  - there exist specific, time-bound and verifiable benchmarks and indicators to ensure that progress can be tracked and measured over time;
  - these be set with the participation of the people whose rights are affected, to agree on what is an adequate rate of progress and set realistic targets; and
  - these are reassessed independently on their target date, with accountability for performance.[67]

v) Justifiable limits on the protection of rights (such as in times of public emergency)

- Article 4 of the *ICCPR* sets out strict criteria for circumstances where a government may derogate from its human rights obligations. This is when:
  1. the situation involves a public emergency which threatens the life of the nation;
  2. the emergency is officially proclaimed;
  3. the restrictions on rights imposed are strictly required by the situation;
  4. the restrictions are not inconsistent with other provisions in international law;
  5. they may not involve discrimination solely on the basis of race;
  6. they must not breach certain provisions of the Covenant (as specified in Article 4); and
  7. the intention to enact emergency measures must be communicated to all other members of the treaty, via the UN Secretary-General.
- The United Nations Human Rights Committee has also noted that:
  - the government's actions during the state of emergency must be proportionate to the situation;

67 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2006,* Human Rights and Equal Opportunity Commission, Sydney, p7.

- to 'officially proclaim' a public emergency, the government must immediately inform the United Nations Secretary-General of the announcement of a public emergency, any derogations that have been made, why they have been made, and how long they will apply; and
- the declaration of a public emergency is 'of an exceptional and temporary nature and may only last as long as the life of the nation concerned is threatened'.[68]

The Government's stated position – how the NT Intervention measures are consistent with Australia's human rights obligations

The federal government has consistently stated that the NT intervention measures are consistent with Australia's human rights obligations.

The Government has emphasised that the measures 'are all about the safety and wellbeing of children'[69], address a need that is 'urgent and immediate'[70] and is backed up by the funding 'necessary to achieve this goal'.[71]

Accordingly, they have characterised the intervention as an 'emergency' situation and argue that all of the measures introduced are necessary in order to adequately protect Indigenous children.

The Explanatory Memorandum for the *Northern Territory National Emergency Response Bill 2007* (Cth) sets out the government's position on how the measures announced are consistent with Australia's human rights obligations. An extract is contained in the Text Box below.

Text Box 7: The NT intervention legislation and human rights compliance – Extract from Explanatory Memorandum

The Northern Territory national emergency response announced by the government recognises the importance of prompt and comprehensive action as well as Australia's obligations under international law:

- The Convention on the Rights of the Child requires Australia to protect children from abuse and exploitation and ensure their survival and development and that they benefit from social security. The International Convention for the Elimination of All Forms of Racial Discrimination requires Australia to ensure that people of all races are protected from discrimination and equally enjoy their human rights and fundamental freedoms.

68 Human Rights Committee, *General Comment No.5,* 1989, HRI/GEN/1/Re.8, para 3, p166.

69 Brough, M., (Minister for Families, Community Services and Indigenous Affairs), 'Second reading speech: Appropriation (Northern Territory National Emergency Response) Bill (No.1) 2007-2008', *Hansard*, House of Representatives, 7 August 2007, p10.

70 Brough, M., (Minister for Families, Community Services and Indigenous Affairs), 'Second reading speech: Appropriation (Northern Territory National Emergency Response) Bill (No.1) 2007-2008', *Hansard*, House of Representatives, 7 August 2007, p16.

71 Brough, M., (Minister for Families, Community Services and Indigenous Affairs), 'Second reading speech: Appropriation (Northern Territory National Emergency Response) Bill (No.1) 2007-2008', *Hansard*, House of Representatives, 7 August 2007, p16.

- Preventing discrimination and ensuring equal treatment does not mean treating all people the same. Different treatment based on reasonable and objective criteria and directed towards achieving a purpose legitimate under international human rights law is not race discrimination In fact, the right not to be discriminated against is violated when Governments, without objective and reasonable justification, fail to treat differently people whose situations are significantly different.

The impact of sexual abuse on indigenous children, families and communities is a most serious issue requiring decisive and prompt action. The Northern Territory national emergency response will protect children and implement Australia's obligations under human rights treaties. In doing so, it will take important steps to advance the human rights of the indigenous peoples in communities suffering the crisis of community dysfunction.

In the case of Indigenous people in the Northern Territory, there are significant social and economic barriers to the enjoyment of their rights to health, development, education, property, social security and culture.

The emergency measures in the bill are the basis of action to improve the ability of indigenous peoples to enjoy these rights and freedoms. This cannot be achieved without implementing measures that do no apply in other parts of Australia. In a crisis such as this, the measures in the bill are necessary to ensure that there is real improvement before it is too late for many of the children. The bill will provide the foundation for rebuilding social and economic structures and give meaningful content to indigenous rights and freedoms.

For example, in relation to limiting the availability of alcohol, some measures apply across the entire Northern Territory (sales over 1,350ml of alcohol and record keeping) while others apply in communities which are predominantly indigenous, referred to as 'prescribed areas'.

The bill strengthens and extends a number of prohibitions and offences under the Northern Territory Liquor Act in each of the prescribed areas. This will enable alcohol to be controlled in indigenous communities to address the related issues of alcohol misuse and child abuse. Although the alcohol measures apply generally to prescribed areas, individuals can apply for permits and the measures are subject to a five year sunset period.

The bill also grants five year leases to the Government over certain land in the Northern Territory as part of the measures to achieve the object of the Act of improving the well-being of communities in the Northern Territory.

Preventing child abuse depends upon families living in stable and secure environments. Indigenous communities cannot enjoy their social and economic rights equally with non-indigenous people, including their rights over their land, if living conditions in communities are dangerous and their children are subject to abuse. Sustainable housing is a key element to making lasting improvements to community living arrangements.

The leasing provisions are required to allow the Government to address the national emergency in the Northern Territory. The Government cannot build and repair buildings and infrastructure without access to the townships and security over the land and assets.

The leases will not prevent the indigenous communities from living on and using the land, or lead to limitations not connected with the Government's emergency intervention. The existing rights, title and interest of indigenous owners over the leased land are not removed but are preserved and compensation, on just terms, will be given whenever it is payable.

The leases are a short-term measure with the longer-term focus on putting residents of these communities in a position where they can buy their own homes.[72]

In relation to the claim that the measures qualify as a 'special measure' and are consistent with the *Racial Discrimination Act 1975,* there is no material in any of the Explanatory Memorandum for the bills or in the 2nd Reading Speeches to explain how this is the case.

Dr Sue Gordon, the Chairperson of the NT Intervention Taskforce, has expanded on the government's position as to why the measures are consistent with Australia's human rights obligations. Her remarks to the Senate Legal and Constitutional Committee are extracted in the text box below.

Text Box 8: Dr Sue Gordon: Comments on the NT intervention and human rights

I would now like to bring to the attention of senators the fact that Australia ratified the United Nations Convention on the Rights of the Child, which came into force on 16 January 1991, but we are still not treating children as a priority for protection across Australia. Part 1, Article 1, deals with the notion of what a child is. Article 2.1 says:

> States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

Article 3.1 states:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Both the Prime Minister and the minister, in relation to these interventions, said that all action at the national level is designed to ensure the protection of Aboriginal children from harm.

72 Northern Territory Emergency National Response Bill 2007, Explanatory Memorandum, pp76-77, available online at: www.austlii.edu.au/au/legis/cth/bill_em/ntnerb2007541/memo_0.html, accessed 20 November 2007.

Article 3.2 states:

> States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

The legislation currently before the parliament addresses this. Article 6.1 states:

> States Parties recognize that every child has the inherent right to life.

Article 6.2 states:

> States Parties shall ensure to the maximum extent possible the survival and development of the child.

The legislation currently before the parliament addresses this—in particular, for improving child and family health. Article 19.1 states:

> States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

The permit system as it stands has not had this effect. Most abusers are known to the victims. The permit system as it stands has protected the offenders. The legislation before parliament addresses this. Article 19.2 goes on to state:

> Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

The National Indigenous Violence and Child Abuse Intelligence Task Force, set up in October 2006 and based in Alice Springs, is addressing this, and the legislation currently before the parliament also addresses this. The measures related to pornographic DVDs, videos and government funded computers, which I raised with you this morning and which was brought to the attention of the government by the National Indigenous Council, also address this.

Article 24 refers to recognising the right of the child to the enjoyment of the highest attainable standards of health and to facilities for the treatment of illnesses et cetera. It also states that states parties shall pursue full implementation of this right and, in particular, shall take appropriate measures to: diminish infant and child mortality; provide necessary medical assistance; combat disease; ensure appropriate pre-natal and post-natal health and care; and— more importantly—ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health, including hygiene, environmental sanitation and the prevention of accidents.

The legislation currently before the parliament addresses this. Article 24 goes on to state:

> States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

Abuse by a minority—and, I repeat, a minority—of men in relation to customary law as it relates to promised marriages is being addressed as well, as part of promoting law and order, which includes protective bail conditions. Article 27.1 states:

States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

The employment and welfare reform addresses this point. The minister also links the five-year township leases to this. Article 28 states:

> States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity.

— and goes on to address various things. Enhancing education as part of the legislative measures is aimed at addressing this article. I was appalled when I went to a school in the Territory and I found out that, while it looks good on paper that Aboriginal students are attaining year 12 level, when I asked the principal what that meant in reality, she said, 'Year 8 or year 9.' That is not fair to Aboriginal people.

Article 33 states:

> States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking substances.

This is currently being addressed by the drug desk in Alice Springs and the National Indigenous Violence and Child Abuse Intelligence Task Force. The permit system as it stands has not had this effect. Rather, it has protected the offenders.

I will not go through articles 34 and 36, but these are only some of the articles of the United Nations Convention on the Rights of the Child that relate to the Northern Territory emergency response.

I appreciate very much Aboriginal people's concerns regarding permits and the acquisition of townships for five years but believe that the protection of children, men and women in the communities who suffer violence and abuse on a daily basis has been completely lost in this debate.

I plan, as a chairperson of the task force and as a mother and a grandmother, to remain totally focused on the best interests of children in our Aboriginal communities, and I will continue to work with the communities in the Northern Territory and with the Commonwealth government to protect children.[73]

73 Gordon, S., Chairperson, Northern Territory Emergency Taskforce, Senate Standing Committee on Legal and Constitutional Affairs, *Report on Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 and four related bills concerning the Northern Territory National Emergency Response*, August 2007, pp77-78, available online at: http://www.aph.gov.au/Senate/Committee/legcon_ctte/nt_emergency/report/report.pdf, accessed 12 November 2007.

In its report on the NT intervention legislation, the Senate Legal and Constitutional Committee noted concerns that the legislation may be discriminatory. Ultimately however they did not address this point in detail. Instead, they state:

> 3.1... The committee is of the view that immediate and absolute priority must be given to addressing the issues that affect the welfare of Indigenous children in the Northern Territory. Indeed, the protection of these children from violence and abuse, and the establishment of conditions that will allow them to lead healthy and productive lives, in which they achieve their full potential, is of the utmost importance. More broadly, there is clearly a need for immediate action to address the disadvantage all Indigenous people confront.
>
> 3.2 The committee welcomes the policy changes contained in this suite of bills as a genuine and enduring commitment from the Australian Government to tackle critical issues in Indigenous communities in the Northern Territory. These issues include high unemployment, alcohol and drug dependency, poor health and education outcomes, inadequate housing and child abuse. In saying this, the committee acknowledges that many of the issues that the bills seek to address are complex and entrenched; however, this is no excuse for failure or neglect.
>
> 3.3 The committee commends the holistic approach taken by the Australian Government in its policy formulation in this challenging area. The legislation contains 'on the ground' practical solutions which the committee believes will go a long way to addressing some of the inherent problems in Indigenous communities. In this context, the committee notes the close cooperation that has taken place throughout the policy formulation process between all relevant Commonwealth agencies.[74]

Do the measures enacted in the NT emergency response legislation comply with human rights standards?

While the government has expressed clearly its determination to tackle the problem of family violence and child abuse in Indigenous communities, it remains to be seen whether the specific measures adopted by the government to achieve this purpose are in fact consistent with Australia's human rights obligations.

In making this assessment, it is necessary to draw a distinction between the stated *intention* of the government and its chosen *method* for implementation.

Measures that violate the human rights of the intended beneficiaries are more likely to work in ways that undermine the overall well-being of these communities in both the short and longer term.

For example, the Government has clearly stated that the NT intervention seeks to address a breakdown in law and order in Aboriginal communities. And yet it potentially involves introducing measures that undermine the rule of law and that do not guarantee Aboriginal citizens equal treatment to other Australians.

If this is the case, then it places a fundamental contradiction at the heart of the NT intervention measures. This will inhibit the building of relationships, partnerships and trust between the Government and Indigenous communities. It would

74 Senate Standing Committee on Legal and Constitutional Affairs, *Report on Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 and four related bills concerning the Northern Territory National Emergency Response*, August 2007, pp31-32, available online at: http://www.aph.gov.au/Senate/Committee/legcon_ctte/nt_emergency/report/report.pdf, accessed 4 December 2007.

also undermine the credibility of the measures, and ultimately, threaten the sustainability and long term impact of the measures.

Similarly, if policy interventions are misconceived or poorly designed, then the possibility of constructing a truly effective long-term response to family violence and child abuse in Indigenous communities will be compromised.

a) Measures to tackle family violence and child abuse in Indigenous communities are necessary

The starting point for determining the human rights implications of the NT intervention measures is to recognise that they are intended to address family violence and child abuse in Indigenous communities.

When the NT intervention was announced in June 2007, the Human Rights and Equal Opportunity Commission welcomed the federal government's intention to treat family violence and sexual abuse in Indigenous communities as an issue of national importance that requires immediate action.[75]

It is essential that governments undertake action to address violence and abuse, particularly when there is compelling evidence that it is widespread. As noted above, Governments that fail to act in these circumstances would be in breach of their human rights obligations under *CRoC*, *CEDAW* and *ICERD*.

Australian governments have, from time to time, acknowledged the existence of a pervasive and serious pattern of sexual abuse and family violence in Indigenous communities. And yet, action had rarely been backed by resources or sustained action.

For example, as Appendix 2 of this report shows, the Prime Minister had convened a national roundtable on this issue in 2003 with limited follow up actions and the Council of Australian Governments had agreed on the urgency of addressing this issue several times in the past decade.

Accordingly, the NT intervention presents a historic opportunity to deal with a tragedy that has existed for too long, and that has destroyed too many families and too many young Aboriginal lives.

The Government's approach also blows out of the water – once and for all – one of the most significant problems that has beset Indigenous affairs over the past generation.

That is, the belief that an incremental approach to funding services for Indigenous communities is all that is needed to address the gross disparities in social and economic conditions faced by Indigenous people.

The scale of the NT intervention reveals that the absence of adequate service provision in Indigenous communities is something that is costly to rectify, difficult to address, that impacts on such basic issues as ensuring community safety and that ultimately, will require long term resourcing, effort and solutions.

75 See for example: Calma, T., (Aboriginal and Torres Strait Islander Social Justice and Race Discrimination Commissioner) *Race Discrimination Act is a Vital safeguard*, Media Release, 8 August 2007.

b) The NT intervention is not a situation that would justify introducing restrictions on the rights of Indigenous peoples

The focus of the government on the need for immediate action in communities is also to be welcomed. But I do have concerns about the rhetoric that the government has used in describing the intervention as an 'emergency' situation.

The government has described the measures introduced in the NT as an 'emergency response' and as an 'intervention'. This language has been used to justify why the measures have been introduced without consultation and engagement with Indigenous communities.

This description of the measures as an 'emergency' has also been used to justify why protections against racial discrimination should be sidestepped for added 'certainty' of the process – so that it can proceed without delay. As noted previously, the Government has also argued that the emergency nature of the measures is a justification for the 'balance' that has been struck between undertaking measures aimed at protecting children against violence and adopting a non-discriminatory approach.

The previous section outlined in summary form the relevant human rights obligations that apply to this situation. It tells us that:

- It is clearly established in international law that the principle of non-discrimination on the basis of race cannot be overridden by other considerations. The *CRoC* also makes clear that rights – such as for children to be protected from violence – are to be implemented in a non-discriminatory manner.
- As a consequence, it is not appropriate to claim that discriminatory measures are justified as they have been 'balanced' against the objective of protecting children from violence. Simply put, measures to address violence must also be non-discriminatory. It would lack credibility to suggest that it is not possible to meet this requirement while also providing effective protection against violence.
- Similarly, the *ICCPR* makes it clear that you cannot justify restrictions on certain rights by claiming that you are acting in furtherance of another right. So if the measures legitimately go towards the aim of protecting children against violence, this does not provide a justification for any other rights abuses that might result from the intervention measures.
- The *ICCPR* also establishes clear and strictly limited criteria for when some rights can be overridden because of the existence of an emergency situation. It is clear that the NT intervention – while still relating to a situation of great importance – does not reach the threshold to qualify as an emergency situation as that term is understood in international law. This means that any such restrictions on human rights that are contained in the intervention legislation cannot be justified.

The description of the NT measures as an 'emergency' situation does not exempt the government from its human rights obligations.

c) The NT intervention legislation does not provide Indigenous peoples with procedural fairness

The description of the NT intervention as an 'emergency' measure has also been relied upon by the government to justify the absence of many of the ordinary democratic protections and safeguards, such as rights to external review of decision making processes that we have come to expect in our Westminster system of government. In fact, the legislation also explicitly *disentitles* Indigenous peoples to many of these protections.

The government has repeatedly asserted that this is necessary to ensure the 'certainty' and smooth and rapid implementation of the measures, and that providing processes such as administrative review 'could jeopardise the Government's attempts in its emergency response' by slowing the ability to introduce the measures.

If we consider the scope of the measures and how they can intrude into the daily lives of Indigenous people in the NT, this is an entirely unacceptable situation. This is particularly so given that the measures are intended to apply for a period of up to five years.

The Senate Standing Committee for the Scrutiny of Bills has reported a number of concerns about the legislation to the Parliament. The Committee's role is to assess legislative proposals against a set of accountability standards that focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary propriety.[76]

In its *Alert Digest* of 13 August 2007, the Committee noted a number of concerns relating to the NT intervention legislation including:

- The potential exercise of significant executive power without parliamentary scrutiny;
- The exclusion of merits review;
- Legislative non-compliance with the acquisition of property on 'just terms', guaranteed by section 51 of the Constitution;
- The unacceptable trespass of personal rights and liberties, particularly in relation to the *Racial Discrimination Act;* and
- The retrospective operation of parts of the legislation relating to social security status.[77]

For example, sections 34(9), 35(11), 37(5), 47(7), 48(5) and 49(4) of the N*orthern Territory National Emergency Response Act 2007* (Cth) declare that various determinations and notices by the Minister for Indigenous Affairs that relate to interests in land are not to be legislative instruments and therefore not subject to parliamentary scrutiny.

In essence, this treats such discretion by the Minister as administrative decision making. But the legislation does not provide that decision making under these sections is subject to merits review under the *Administrative Appeals Tribunal Act 1975* (Cth). The Government justifies this on the basis that:

76 See further details online at: http://www.aph.gov.au/senate/committee/scrutiny/cominfo.htm.

77 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest* No 9 of 2007, 13 August 2007.

> It is not appropriate for these determinations and notices to be subject to merits review under the AAT Act. The potential for review by the Administrative Appeals Tribunal would create unacceptable delays for what are short term emergency measures.[78]

The Senate Standing Committee for the Scrutiny of Bills has responded to this in the following terms:

> In light of the possible duration of the emergency response, i.e. up to five years initially, the Committee remains concerned at the absence of merits review of these decisions. The Committee is of the view that these provisions may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions… and trusts that careful consideration will be given to the possibility of providing for merits review of these decisions when the Act is reviewed in two years time.[79]

The Committee also expresses concern at the lack of merits review of decisions by the Minister to suspend all the members of a community government council,[80] and decisions of the Secretary of the Department of FACSIA to grant or refuse a community store licence, and revoke an existing community store licence.[81]

In addition to the concerns expressed by the Scrutiny Committee, there are a range of other matters that are of concern in the legislation.

- *Determination of Important Matters by Legislative Instrument*

In order for Parliament to function effectively, it is common practice that much of the legislation passed by the government of the day only provides a skeleton for policy operation, with the detail of operative practices often being worked out by the relevant executive sector of government.

When such detail determines the law and impacts upon the rights and obligations of individuals, it gives rise to 'legislative instruments'. Such instruments are subject to the *Legislative Instruments Act 2003* (Cth). The objects of this Act include encouraging appropriate consultation by rule makers before making rules, and establishing improved mechanisms for Parliamentary scrutiny of legislative instruments (see further section 3 of the Act).

Significantly, the *Legislative Instruments Act 2003* (Cth) contains provisions for disallowance by Parliament of legislative instruments (see further: part 5, and particularly section 42 of the Act).

However, the NT measures that amend the *Social Security Act* contain a number of actions that are relegated to the status of delegated legislation but which are not subject to review and disallowance by Parliament.

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78 Senate Standing Committee for the Scrutiny of Bills, *Ninth report of 2007*, 12 September 2007, Parliament of Australia, Canberra 2007, p369, available online at: www.aph.gov.au/senate/committee/scrutiny/bills/2007/b09.doc, accessed 29 January 2008.

79 Senate Standing Committee for the Scrutiny of Bills, *Ninth report of 2007*, 12 September 2007, Parliament of Australia, Canberra 2007, p369.

80 Senate Standing Committee for the Scrutiny of Bills, *Ninth report of 2007*, 12 September 2007, Parliament of Australia, Canberra 2007, p373.

81 Senate Standing Committee for the Scrutiny of Bills, *Ninth report of 2007*, 12 September 2007, Parliament of Australia, Canberra 2007, p373.

The *Social Security and other legislation amendment (Welfare Payment Reform) Act 2007* (Cth) inserts a new section 123(TE) into the *Social Security (Administration) Act 1999*. This allows the Minister to declare an area a 'relevant Northern Territory area' for the purposes of the legislation. Similarly, the proposed new paragraph 123UK (1) of the *Social Security (Administration) Act 1999* allows the question of whether an unsatisfactory school attendance situation exists to be ascertained in accordance with a legislative instrument made by the Minister.

Under section 19(1) of the *NTNER Act*, the relevant Commonwealth Minister also has the power to declare that alcohol restrictions in all or part of a prescribed area shall no longer have effect if he or she is satisfied that there is no need to keep the measures in place. Such a declaration is also a legislative instrument, but not subject to disallowance or sunset provisions of the *Legislative Instruments Act 2003* – which would ordinarily place time limitations on the operation of the instrument, subject to legislative review.

None of these determinations are disallowable when they are tabled in Parliament. The immunity of these sections from disallowance is justified by the fact that they are measures which are 'of national significance' and disallowance would 'create uncertainty' with respect to the administration of income management systems.[82]

There are a number of objectionable characteristics of delegated legislation operating in this way. The first is that, as outlined above, our system of representative government demands that the substance of laws are made by the Parliament, and not by the unelected executive. The fact that delegated legislation itself may be seen as legitimate specifically hinges on Parliament retaining the power to unmake legislative instruments within a particular time frame. Once that power is removed, the legitimacy of the law making procedures surrounding legislative instruments is lost.

The second issue of concern is that in the case of the NTNER measures the Minister is given the unchecked administrative power to switch the entire operation of the legislation on and off for certain categories of people as he or she sees fit, and these decisions are not to be made the subject of legislative scrutiny by the parliament.

Third, the fact that the matters to be contained are of 'national significance' does not, on its own terms, provide a justification for the disallowance provisions, common to legislative scrutiny, being suspended.

On the contrary, the fact that the situation at hand is purportedly an emergency, does not mean that ordinary principles of legislative scrutiny cannot still be applied: indeed, the risk of misuse of power in an emergency situation potentially enhances the need for democratic checks and balances to be in place.

82 Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 (Cth), Explanatory Memorandum, available online at: http://www.austlii.edu.au/au/legis/cth/bill_em/ssaolaprb2007684/memo_0.html, accessed 24 November 2007.

- *Exclusion of Merits Review for income management of social security recipients*

A number of the Social Security aspects of the legislation are not subject to merits review of administrative decision making.

In cases where Centrelink has discretion to place (or not to place) individuals on income management, only a limited form of general merits review under the administrative arm of government will be allowed. The *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) inserts a new paragraph 144(ka) into the *Social Security (Administration) Act 1999*. This denies a person in a relevant Northern Territory area the right to seek a review by the Social Security Review Tribunal of decisions that relate to income management.

Ordinarily, the process of appealing a Centrelink decision would run as follows:

> First Decision → Centrelink Agent → Centrelink Authorised Review Officer (ARO) → Social Security Appeals Tribunal (SSAT) → Administrative Appeals Tribunal (AAT) → Federal Court → High Court.

The NT legislation stops the merit review process at the internal Centrelink ARO level.

Effectively, the legislation therefore cuts out two levels of merits review, forcing anyone wishing to appeal the relevant administrative decision made about them to proceed straight to judicial review in the Federal Court.

Significantly, judicial review in the Federal Court does not allow for full review of the merits of a decision.

The Federal Court is also less accessible than merit review processes. The cost and formality of the Federal Court make the bringing of proceedings prohibitive for many applicants. This will particularly impact on Aboriginal people from remote communities affected under this legislation.[83]

The effect of these changes could be substantial- of all Centrelink decisions that are appealed to AROs, over 25% go on to be appealed to the SSAT.[84] Of the decisions that are appealed to the SSAT, over 30% are reversed in favour of the applicant.[85]

In other parts of the legislation, the applicability of administrative review to people other than the relevant minister who are vested with administrative decision making power under the Acts is also far from clear.

For example, the proposed new paragraph 123CU(b) of the *Social Security (Administration) Act 1999* allows a Child Protection Officer to give the Secretary of the Department a written notice requiring that a person be subject to the income management regime set up by Part 3B of the Act. It is unclear whether a Child Protection Officer is a specified person for the purposes of review of decisions made at the Social Security Appeals Tribunal. In other words, it is unclear as to

83 Ronalds, C. and Pepper, R., *Discrimination Law and Practice*, The Federation Press, 2004, Chapter 13: Conducting a Hearing; Margaret Thornton, 'Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia' (1989) 52 *Modern Law Review,* p752.

84 Australian Government, *Centrelink Annual Report 2005-2006,* Department of Human Services, Canberra, 31 August 2006, p86.

85 Australian Government, *Centrelink Annual Report 2005-2006,* Department of Human Services, Canberra, 31 August 2006, p86.

whether the person that is the subject to such a notice has any right to appeal the merits of the decision made about them by the Child Protection Officer.

Similar concerns apply with regard to a notice given by the 'Queensland Commission' under s 123UF (1) (b) of the Act that a person will be subject to income management. Indeed, in the case of the 'Queensland Commission' the rights of appeal seem to be entirely unknown, since the Act itself only provides the machinery for a commission to be set up, without prescribing its functions. Presumably, the 'Queensland Commission' will take the form of the 'Family Responsibilities Commission' outlined in the *From hand out to hand up* report, and if this is the case then the Commission would fall within the purview of the Administrative Appeals Tribunal and its decisions would be subject to merits review if applicants so desired.

However, future delegated legislation should be scrutinised for clarity on this matter, as the original mechanism prescribed by the NTNER package leaves this question unanswered.

In my view, the justification for removing merits review in relation to various measures in the NT intervention has not properly been made out.

The absence of such review creates barriers to access for justice for Indigenous peoples. In particular, it is inappropriate to disentitle Indigenous peoples to merits review processes and instead require them to take legal action in the Federal Court if they are to obtain a remedy.

Once again, the government's statement that the situation is an 'emergency' provides no justification for denying access to stages of the merits review process that are ordinarily available to all other Australians.

Such exclusion is discriminatory. It breaches Australia's obligations under Article 5(a) of *ICERD* that requires the government to guarantee the right of everyone, without distinction as to race, 'the right to equal treatment before the tribunals and all other organs administering justice'.

Rights to full merits review should be restored for all decisions made with regards to income management.

New paragraph 144(ka) of the *Social Security (Administration) Act 1999* (enacted by the *Social Security and other legislation amendment (Welfare Payment Reform) Act 2007* (Cth) should be repealed. This section denies a person in a relevant Northern Territory area the right to seek administrative review.

Upholding the values of the Westminster System of democratic government is fundamental to protecting the community at large from abuse by concentration of power, and to ensure that government action is carried out legitimately. When legislation is passed which circumvents ordinary democratic procedures and protocols, it undermines the very structure of the democracy on which any rights framework in Australia might be based. It is crucial that the sections that enact such shifts in ordinary practice are therefore immediately repealed.

d) The NT intervention legislation removes and creates confusion about protections against discrimination at the Territory level

In addition to removing merits review processes, the NT intervention legislation also disentitles Indigenous peoples to utilise other schemes for the protection of their rights.

Most notably, each the three primary acts exempt any acts done for the purposes of the legislation from the application of Northern Territory laws that deal with discrimination.[86]

The scope of this exemption is extremely broad as it relates to 'any acts done under or for the purposes of the provisions of this' legislation. The exemption is also very general – the legislation does not specifying the particular legislation that does not apply, simply that any legislation 'that deals with discrimination'. This would include the *Anti-Discrimination Act 1992 (NT),* but it may also include other provisions in legislation that is also not specified.

The absence of protection against discrimination at the territory level creates three main difficulties for Indigenous people in the Northern Territory, and specifically for those people in prescribed communities.

First, and most obviously, it removes any right to be protected from discrimination in relation to significant issues of decision making that affect individual's livelihoods. Such removal of rights is clearly applied on the basis of race.

Second, it creates ambiguities about the circumstances where protections of discrimination will still apply. An individual who feels they have their rights aggrieved will have to determine whether the action that has taken place constitutes an act 'done under or for the purposes of the provisions' of the NT intervention legislation in order to establish whether they have a right to pursue a complaint and ultimately to obtain a remedy.

It can be foreseen that there will be some situations where the connection of the action in question to the NT legislation is tenuous or at least very difficult to ascertain, and so making this judgement may ultimately require determination through formal processes such as the courts further delaying access to justice.

Third, it will not be easily comprehended by Indigenous peoples that they have rights to be protected from discrimination but only if the discrimination occurs in a certain location – and conversely that they *do not* have a right when they are in another location (such as within a prescribed community for example) or if it relates to certain activities (but not if those activities are authorised under the NT intervention legislation). The level of uncertainty that this creates will undermine confidence in utilising discrimination provisions, even where there is widespread discrimination.

The impact of the intervention legislation can be described as a 'swiss-cheese' effect on the protection of Indigenous communities from discrimination.

These provisions are clearly arbitrary in their operation, and they undermine access to justice for Indigenous peoples.

86 See for example: section 133, *Northern Territory National Emergency Response Act 2007* (Cth).

There is no justification for such a denial of justice – stripping the most vulnerable people in our society of basic rights cannot be seen as a reasonable or proportionate response to dealing with family violence.

As discussed further below in relation to exemptions from the *Racial Discrimination Act 1975* (Cth) they also undermine confidence in the system of justice as a whole. This is contrary to one of the purposes of the intervention, namely, building awareness and support for the operation of the rule of law in remote Aboriginal communities.

These provisions – such as those set out section 133 of the *Northern Territory National Emergency Response Act 2007* (Cth) should be repealed immediately.

It is notable that the NT intervention legislation also provides that the Minister for Indigenous Affairs can, by non-reviewable legislative instrument, declare that any Territory law related to discrimination continues to have effect in the communities.[87]

It is my view that, as an interim measure prior to repealing these provisions, the Minister ought to exercise his/her discretion to declare that the *Anti-Discrimination Act 1992 (NT)* does apply across all communities in the Northern Territory and reinstate protections against discrimination in all locations of the NT.

e) The NT intervention legislation removes protections of just terms compensation for Indigenous peoples

The NT legislation also disentitles Indigenous peoples from benefiting from the ordinary protections that guarantee the payment of just terms compensation under NT law upon the compulsory acquisition of their property.

Sections 60 and 134 of the *Northern Territory National Emergency Response Act 2007* (Cth) specify that section 50(2) of the *Northern Territory (Self-Government) Act 1978* (Cth) does not apply in relation to any acquisition of property. That section provides that the acquisition of any property in the Territory must be on just terms.

The Explanatory Memorandum for the Bill explains the provisions as follows:

> Except for an acquisition of property under Part 4 of the bill (which deals with the acquisition of rights, titles and interests in land), subsection 50(2) of the Northern Territory (Self Government) Act 1978 does not apply to an acquisition of property that occurs as a result of the operation of the terms of this bill.
>
> The effect … is that where subsection 50(2) of the Northern Territory (Self Government) Act 1978 would apply so as to require the payment of compensation on just terms for an acquisition of property that occurs as a result of the operation of the terms of this bill, that requirement does not apply unless the acquisition occurs under Part 4.
>
> Subclause 134(2) provides that the Commonwealth is liable to pay a reasonable amount of compensation for acquisitions of property that occur other than under Part 4. Therefore, where an acquisition of property that occurs as a result of the operation of the terms of this bill is excluded from the requirement under subsection 50(2) of the Northern Territory (Self Government) Act 1978 to pay just terms compensation, subclause 134(2) nevertheless requires the payment of a reasonable amount of compensation.

87 See for example: section 133, *Northern Territory National Emergency Response Act 2007* (Cth).

> Subclause 134(3) provides that where an amount is unable to be agreed, proceedings may be commenced in a court of competent jurisdiction for a determination of a reasonable amount of compensation.[88]

There are two possible consequences of these provisions. First, in the situation where Indigenous people believe they have not been provided 'reasonable compensation' for the acquisition of property, they would have to pursue any claim for compensation through the original jurisdiction of the High Court as a constitutional matter.

This is a highly costly process and one with substantial barriers that may simply prove to be too difficult for Indigenous peoples to be able to meet – from a practical perspective.

Second, the Law Council of Australia has expressed concern that this provision may in fact have a very different impact and actually result in the Commonwealth not being required to pay compensation for any acquisition of property at all. They note:

> The application of s51(xxxi) of the Constitution to provide compensation for an acquisition of property in the Northern Territory is not a foregone conclusion. Under current High Court Authority there is no requirement to pay compensation for an acquisition of property referable only to the s122 Territories power under the Constitution. The Bill makes it apparent (through reference to the non-application of s 50(2) of the *Northern Territory (Self Government) Act 1978*) that the power relied upon for the acquisitions is pursuant to the Commonwealth's s122 Territories power.
>
> The Law Council notes that the legislation appears to shield the Commonwealth from its obligation to compensate the relevant Land Trust or pay rent, in circumstances where a lease is issued under section 31.[89]

Both the government and non-government members of the Senate Legal and Constitutional Committee, and the members of the Senate Scrutiny of Bills Committee expressed concern about these provisions as lacking clarity as to the rights that they provide Indigenous peoples.

In their additional comments in the Senate Legal and Constitutional Committee's report the Australian Labor Party states that:

> Labor Senators consider it to be an absolutely fundamental principle that the Commonwealth Government should pay just terms compensation for the acquisition of property from anyone, anywhere in Australia. Further, Labor rejects absolutely any suggestion that services or infrastructure, which all Australians have the right to expect their governments to provide, should be considered as contributing to compensation for the acquisition of the property rights of Indigenous people.[90]

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88 *Northern Territory National Emergency Response Bill 2007* (Cth), p78, Explanatory Memorandum.

89 Senate Standing Committee on Legal and Constitutional Affairs, *Report on Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 and four related bills concerning the Northern Territory National Emergency Response*, August 2007, p21, available online at: http://www.aph.gov.au/Senate/committee/legcon_ctte/nt_emergency/report/report.pdf, accessed 31 January 2008.

90 'Additional comments by the Australian Labor Party', contained in Senate Standing Committee on Legal and Constitutional Affairs, *Report on Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 and four related bills concerning the Northern Territory National Emergency Response*, August 2007, para 1.27, p42.

It is entirely unclear from the former Government's explanations of this provision why it exists. For example, to both the Senate Legal and Constitutional Committee and the Senate Scrutiny of Bills Committee the government has reassured Senators that a guarantee of 'just terms' compensation is preserved.[91] While this is disputed by some, there is a more fundamental question that this raises: if the intention is to preserve a guarantee of 'just terms' compensation then why disentitle Indigenous peoples from that exact protection that exists in the *Northern Territory (Self Government) Act 1978* in the first place?

The inclusion of this provision in the NT intervention legislation is punitive and unnecessarily creates barriers to the exercise of basic rights for Indigenous peoples – and *only* for Indigenous peoples – in the Northern Territory. It is a measure that is blatantly discriminatory and has no place in the laws of a modern democratic nation.

The Government should amend the NT intervention to reinstate this protection to firstly guarantee that the protection of just terms compensation does in fact apply, and secondly, to provide the simplest and most accessible route to such protection (namely the application of the *Northern Territory (Self Government) Act 1978*).

f) The Racial Discrimination Act 1975 (Cth) and special measures

A major issue of concern in relation to the NT intervention relates to the manner in which the legislation underpinning it interacts with the *Racial Discrimination Act 1975* (Cth) (RDA). There are two aspects to this:

- The 'deeming' of the legislation as a whole to constitute a 'special measure' and therefore to be considered consistent with the RDA; and
- Despite this, the exempting of all the measures contained in the legislation from the protections of the RDA.

These two issues are inter-related. Section 10(3) of the RDA does not allow measures that involve the management of Aboriginal property by others without consent to qualify as 'special measures' under the RDA under any circumstances. Because of this, the legislation provides that these (and all other measures that it has deemed to be special measures) are exempt from the RDA entirely. This is justified by the government as providing certainty of process.

I begin by considering the appropriateness of 'deeming' the legislation as a whole to constitute a 'special measure'.

Text Box 4 earlier in this chapter reproduced the provisions in the legislation underpinning the NT intervention that relate to the *Racial Discrimination Act 1975* (Cth).

Section 132 of the *Northern Territory National Emergency Response Act 2007,* for example, deems the provisions of this Act, and any acts done under or for the

91 Senate Standing Committee on Legal and Constitutional Affairs, *Report on Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 and four related bills concerning the Northern Territory National Emergency Response*, August 2007, available online at: http://www.aph.gov.au/Senate/committee/legcon_ctte/nt_emergency/report/report.pdf, accessed 31 January 2008; Senate Standing Committee for the Scrutiny of Bills, *Ninth report of 2007*, 12 September 2007, Parliament of Australia, Canberra 2007, p375.

purposes of those provisions, to be 'special measures' under the RDA and therefore not considered discriminatory.

- *Why is it necessary for the measures to qualify as a special measure?*

Section 9(1) of the RDA prohibits 'direct' discrimination on the basis of race. It provides:

> It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.[92]

Section 10 of the RDA also requires equality before the law on the basis of race. It states:

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

Section 8 of the RDA provides an exception to the prohibition of racial discrimination. It reads:

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

In basic terms, what this means is that the RDA allows for differential treatment on the basis of race for measures that provide a *benefit* to a group defined by race, so long as those measures are designed to lift that group into a situation where they can equally enjoy their human rights. Such treatment is called 'special measures'.

The NT intervention legislative measures clearly have a number of significant actual and potential negative impacts upon the rights of Indigenous people which are discriminatory. This includes through the introduction of alcohol bans, the quarantining of welfare payments, and compulsory acquisition of property through 5 year leases that only apply to Indigenous peoples.

In order for the laws generally to be consistent with the RDA, they must therefore be justifiable as a 'special measure' taken for the advancement of Indigenous people.

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92 The RDA also includes specific prohibitions on direct discrimination in certain areas of public life: access to places and facilities (s.11); land, housing and other accommodation (s.12); provision of goods and services (s.13); right to join trade unions (s.14); and employment (s.15). Section 9(1A) of the RDA provides for what is generally known as 'indirect' discrimination. This section focuses on direct discrimination and does not consider the necessary elements for establishing indirect discrimination under the RDA. For information about the necessary elements for establishing indirect discrimination see: Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Implications of the Racial Discrimination Act 1975 with reference to state and territory liquor licensing legislation', *Speech – 34th Australasian Liquor Licensing Authorities' Conference,* 26-29 October 2004, Hobart, Tasmania, available online at: http://www.humanrights.gov.au/speeches/race/LiquorLicensingAuthoritiesConference.html, accessed 29 January 2008.

- *What is a special measure?*

Article 1(4) of *ICERD* states:

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

Article 2(2) of *ICERD* also obliges governments to take 'special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purposes of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms'.

There are four elements of a special measure, as follows. A special measure:

- provides a *benefit* to some or all members of a group based on race; and
- has *the sole purpose* of securing the advancement of the group so they can enjoy human rights and fundamental freedoms equally with others; and
- is *necessary* for the group to achieve that purpose, and
- *stops* once their purpose has been achieved and do not set up separate rights permanently for different racial groups.[93]

To qualify as a special measure, an action must meet all of these criteria.

These criteria raises a number of matters of concern that must be addressed in relation to the measures contained in the NT intervention legislation if they are appropriately to be characterised as 'special measures'.

- *Do the measures provide a 'benefit'?*

First, the measures must be capable of being defined as providing a **benefit** to Indigenous peoples.

It is an unusual situation to seek to justify measures that negatively impact on Indigenous peoples as 'special measures'. For over a decade, however, HREOC has argued that negative restrictions on rights are capable of being characterised in such a way in limited circumstances.[94] These limited circumstances are where first, the restriction being introduced can be seen to impact beneficially on the community that it is designed to affect; and second, the measure is introduced with the consent of the affected community.

In the case of alcohol restrictions, for example, the Commission has argued that there are counterveiling benefits in terms of community safety, freedom from violence, health status and the creation of an environment that positively impacts of education outcomes and so forth, that can justify characterising the introduction of restrictions on alcohol as a benefit. This is particularly where such restrictions are

93 See further: *Gerhardy v Brown* (1985) 159 CLR 70, per Brennan J., p133.

94 Race Discrimination Commissioner, *Alcohol report*, HREOC Sydney 1995.

accompanied by a range of support mechanisms/services that assist in mitigating any harm that may result from the restrictions.

For measures that may impact negatively on rights to be considered 'special measures' they must also be done after consultation with, and generally the consent of, the 'subject' group. Measures taken with neither consultation nor consent cannot meaningfully be said to be for the 'advancement' of a group of people, as is required by the definition of special measures.[95]

To take any other approach contemplates a paternalism that considers the views of a group as to their wellbeing irrelevant. Such an approach in the context of Indigenous people is contrary to their right to self-determination as well as undermining their dignity. Such an approach could allow for measures to be taken that would be 'a step towards apartheid'.[96]

The need for consultation is particularly important in the context of the rights of Indigenous people. The Committee on the Elimination of Racial Discrimination has, in its General Recommendation XXIII, called upon parties to *ICERD* to:

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

At a practical level, such consultation can significantly improve the quality of the policy development and its implementation. As the *Social Justice Report 2006* states:

> Indigenous peoples [like any other stakeholder group] need to be involved at the earliest possible stage in the policy design process, so that they can contribute their perspectives and ideas on the objectives and content of the policy as well as *how* the policy should be implemented. This is particularly important to ensure that:
>
> - Indigenous cultural differences are respected and accommodated;
> - the appropriate Indigenous peoples are involved;
> - sufficient time is allocated to developing community support for the implementation process; and
> - ultimately, Indigenous peoples feel a sense of *ownership* of both the process and the outcome.[97]

Meaningful consultation with Aboriginal people upon the introduction of legislation affecting their community is hardly an untrialled concept in the Australian context. For example, when the Federal government sought to enact the *Native Title Act 1993* (Cth), leaders from the Aboriginal and Torres Strait Islander communities were actively involved in negotiations surrounding its development and introduction, and provided their consent to a number of tradeoffs in the legislative package.

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95 *Gerhardy v Brown* (1985) 159 CLR 70, per Brennan J., p135. I note that a contrary view was taken by Nicholson J. in the Federal Court of Australia in *Bropho v Western Australia* [2007] FCA 519. That decision is currently on appeal to the full Federal Court and HREOC has submitted, as intervenor, that his Honour was in error on this point. See further: www.humanrights.gov.au/legal/submissions_court/intervention/bella_bropho.html.

96 *Gerhardy v Brown* (1985) 159 CLR 70, per Brennan J., p135.

97 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2006,* Human Rights and Equal Opportunity Commission, Sydney, chapter 1, pp6-7.

The need for consent is clearest in the context of the laws that make provision for the management of property owned by Aboriginal people. The RDA excludes from the 'special measures' exemption any provisions that authorise management of property without the consent of Aboriginal and Torres Strait Islander people or prevent them from terminating management by another of land owned by them.[98] To be consistent with the RDA, the measures relating to the management of land must be undertaken with the consent of the landowners.

It is clear that the measures introduced through the NT intervention have no basis in consultation or consent of affected Aboriginal communities and people. Aboriginal people have also not had an active role during the initial 6 month emergency phase of the intervention. It is also unclear at this stage the extent to which Aboriginal peoples or their representative organisations will be able to participate effectively in the development of the longer-term phase of the Government's response.

- *Do the measures have a 'sole purpose'?*

Second, the measures must have the sole purpose of securing the advancement of the group so they can enjoy human rights and fundamental freedoms equally with others. The Courts have interpreted this requirement to mean that while it is appropriate to consider the effect of the package as a whole when determining whether it is a 'special measure', it is still necessary for its parts to be 'appropriate and adapted' to this purpose.[99]

Justice Deane explain this as follows:

> What is necessary for characterization of legislative provisions as having been "taken" for a "sole purpose" is that they can be seen, in the factual context, to be really and not colourably or fancifully referable to and explicable by the sole purpose which is said to provide their character. They will not be properly so characterized unless their provisions are capable of being reasonably considered to be appropriate and adapted to achieving that purpose. Beyond that, the Court is not concerned to determine whether the provisions are the appropriate ones to achieve, or whether they will in fact achieve, the particular purpose.[100]

The consequence of this is that if one provision of a law which purports to be a special measure can not be properly characterised as being appropriate and adapted to achieving the sole purpose of securing the 'adequate advancement' of the intended beneficiaries of the special measure, then the provision may be read down or rendered inoperative by virtue of the operation of s10 of the RDA.

This approach is necessary to ensure that the special measures provision, as an exemption to the general prohibition against racial discrimination, is applied narrowly.

This approach is supported by comments of the full Federal Court in *Vanstone v Clark*.[101] In that case, Justice Weinberg, with whom Chief Justice Black agreed, rejected the submission that once it is accepted that a particular provision of an act

98 See ss10(3), 8(1) *Racial Discrimination Act 1975* (Cth).

99 *Gerhardy v Brown* (1985) 159 CLR 70, Mason C.J., p105, and Deane J., p149.

100 *Gerhardy v Brown* (1985) 159 CLR 70, per Deane J., p149.

101 *Vanstone v Clark [2005] FCAFC 189,* per Weinberg J., pp208-209.

is a special measure, the different elements of the provision can not be separately attacked as discriminatory. Justice Weinberg stated, that such a proposition:

> involves a strained, if not perverse, reading of s8 of the RDA, and would thwart rather than promote the intention of the legislature. If the submission were correct, any provision of an ancillary nature that inflicted disadvantage upon the group protected under a 'special measure' would itself be immune from the operation of the RDA simply by reason of it being attached to that special measure.[102]

In relation to the NT intervention, widespread concern has been expressed by Aboriginal communities that certain measures are not appropriate and adapted to the end of child protection. These include the compulsory acquisition of property in circumstances where negotiations for a lease have not been sought from the landowners, as well as the changes made to the permit system. This limits the ability of these measures to be legitimately characterised as special measures under the RDA.

- *Other concerns about the NT intervention and the characterisation of the legislation as a 'special measure'*

As noted earlier, there is no justification or detail provided in the Explanatory Memorandum as to how the various measures qualify as special measures by addressing the criteria as set out in *ICERD* and section 8 of the RDA.

The Explanatory Memorandum to the Northern Territory National Emergency Response Bill instead makes the very generalised assertion that:

> The Convention on the Rights of the Child requires Australia to protect children from abuse and exploitation and ensure their survival and development and that they benefit from social security.[103]

As noted earlier, the obligations in *CRoC* must be read in light o the foundational principle outlined in Article 2 of the Convention. This requires that all measures designed to meet State Party obligations must not, in themselves, discriminate on the grounds of race.

This over-arching principle is not acknowledged by the Explanatory Memorandum or in any statements by the Government.

The pressing need to put in place a range of programs and policy initiatives to better protect the rights of children does not, on its own, justify the derogation from other human rights standards.

The legislation also provides no guidance to decision-makers as to the requirements of special measures, nor does it require that decision-makers who are authorised to conduct a range of activities under the Acts exercise their discretion consistent with the purported beneficial purpose.

102 *Vanstone v Clark [2005] FCAFC 189*, per Weinberg J., pp208-209.

103 Northern Territory National Emergency Response Bill, Explanatory Memorandum, p76, available online at: http://www.austlii.edu.au/au/legis/cth/bill_em/nterb2007541/memo_0.html, accessed 22 November 2007.

The NT intervention measures are, on their face, discriminatory in their impact. For this to be legitimate under the RDA they must be capable of being saved as 'special measures'.

If we look at individual measures contained within the legislative package, it is possible to conceive how some of them may meet the first component of the requirement that they be capable of being defined as beneficial.

For example, the welfare quarantining provisions introduced into the *Social Security Act* have the purpose of:

- stemming the flow of cash expended upon substance abuse and gambling;
- ensuring funds that are provided for the welfare of adults and children are spent on their priority needs; and
- promoting socially responsible behaviour, particularly in relation to the care and education of children.

As the Explanatory Memorandum for the Bill states, these measures address the obligation under *CRoC* for children to benefit from social security and provide the foundation for rebuilding social and economic structures in the community.

However, even if such a purpose can be characterised as beneficial, it is still necessary to demonstrate that consultation has occurred and community consent has been sought to the introduction of restrictive measures.

This is entirely absent from the NT intervention measures.

It is also not possible to see that several measures have the 'sole purpose' required to qualify as a special measure, as they are not appropriate or adapted to the purpose of the measure – namely, the protection of children and women from violence and abuse.

As a consequence, it is not possible to support the government's contention that all of the measures contained in the NT intervention legislation can be justified as special measures. It is therefore also not possible to say that in its current form the legislation is consistent with the RDA.

These concerns emphasise the need for extensive consultation with Indigenous communities to explain these measures and the objects of the legislation. Thereafter, it is of crucial importance that, in the administration of the proposed legislation, measures are delivered in ways that respect the wishes and aspirations of the relevant communities.

It also emphasises the need for effective monitoring and review of the implementation of the measures to ensure that only those that are appropriate and adapted to the purpose of child protection are maintained.

Proposals for how to adapt the NT intervention measures so that they are consistent with the RDA and can be legitimately accepted as 'special measures' is discussed in the final part of this chapter and in the accompanying recommendations.

g) The NT intervention legislation removes entirely the protection of the Racial Discrimination Act 1975 (Cth)

Despite having deemed the legislation to be a special measure, there are further provisions in each of the NT intervention acts that entirely exclude the operation of the RDA.

For example, section 132(2) of the *Northern Territory National Emergency Response Act 2007*states that:

> The provisions of this Act, and any acts done under or for the purposes of those provisions, are excluded from the operation of Part II of the Racial Discrimination Act 1975.

Similarly, the amendments to the *Social Security Act* state that a number of measures within the broad scheme of the legislation are excluded from its operation, including: any act done with respect to income management under Part 3(B) of the *Social Security (Administration) Act 1999* (Section 4(3)); any order made by the Queensland Commission (s 4(4)), and any prescribed program of guidelines implemented for candidacy in terms of work support programs such as work for the dole (s 6(3)).

As noted above, the government has acknowledged that one of the reasons that this blanket exemption was inserted into the legislation is to address the consequences of section 10(3) of the RDA.[104] Section 10(3) of the RDA makes it unlawful to manage the property of Aboriginal and Torres Strait Islander people without their consent or prevent them from terminating management by another of land owned by them. Such a measure cannot also be classified as a special measure, according to section 8(1) of the RDA.

This affects the ability of the government to legitimately enact provisions relating to some of the powers of government business managers to be placed into Aboriginal communities, as well as provisions relating to compulsory acquisition of Aboriginal land and potentially also removing aspects of the permit system.

The inclusion of this exemption to the RDA demonstrates a deliberate intent on the behalf of government to overcome the specific prohibition on measures for the management of Aboriginal land without consent being considered 'special measures' for the purposes of the RDA.

It is also evidence that the government was aware that at least some of the measures in its proposed package would not meet the standard of special measures, making the exemption clauses necessary to legitimise the legislation.

There are a number of concerns about this action of exempting the RDA.

First, as the then Opposition stated in the Senate Legal and Constitutional Committee's report on the legislation:

> Observing the integrity of the Racial Discrimination Act is a basic principle for this country and a basic principle for the Indigenous community of this country.

104 Department of Families, Community Services and Indigenous Affairs, Senate Standing Committee on Legal and Constitutional Affairs, *Report on Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 and four related bills concerning the Northern Territory national emergency response*, August 2007, pp12-15, available online at: http://www.aph.gov.au/Senate/committee/legcon_ctte/nt_emergency/report/report.pdf, accessed 30 January 2008.

> Accordingly, the provisions in the bills suspending the operation of the Racial Discrimination Act should be opposed.[105]

Second, the exemption provided to the RDA is exceptionally broad in scope. It relates to 'the provisions of this Act, and any acts done under or for the purposes of those provisions'. This covers any exercise of discretion on any aspect of the legislation.

As noted in previous sections of this chapter, the scope of this exemption is of increased concern when coupled with other provisions which limit or disentitle Aboriginal people from accessing merits review of decision making or provide other limitations on obtaining access to justice.

Similarly, as noted in the previous section, it would be more appropriate that in the exercise of all discretion under the legislation, the authorised decision makers be required to act consistent with the purported beneficial purpose of the legislation (and special measure).

To restore an appropriate balance to the legislation, the clauses exempting the RDA (as set out in section 132(2) of the *Northern Territory National Emergency Response Act 2007* and the related provisions set out in Text Box 4 in this chapter) should be immediately repealed.

These provisions should also be replaced by a new clause requiring all acts authorised under the legislation to be undertaken consistently with the RDA. To be effective such a clause – known as a *non-obstante* clause – should be unequivocal that the provisions of the NT legislation is subject to the provisions of the RDA.

There is precedent for this level of protection. The *Social Security Legislation Amendment (Newly Arrived Residents' Waiting Periods and Other Measures) Act 1997* (Cth) contained an equivalent section defining the interaction of the RDA with Social Security legislation. It reads:

> **Section 4 – Effect of the Racial Discrimination Act 1975**
>
> (1) Without limiting the general operation of the *Racial Discrimination Act* 1975 in relation to the provisions of the *Social Security Act* 1991, the provisions of the *Racial Discrimination Act* 1975 are intended to prevail over the provisions of this Act.
>
> (2) The provisions of this Act do not authorise conduct that is inconsistent with the provisions of the *Racial Discrimination Act* 1975.

The ease with which the obligations under the RDA can be set aside by the NT intervention legislation reveals the weak status of protections of racial discrimination in our legal system.

It vividly demonstrates how the Commonwealth Parliament has the power to legislate to override any provision of the RDA with very little accountability. As the High Court noted in relation to the *Native Title Act 1993* (Cth) in 1995:

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105 'Additional comments by the Australian Labor Party', contained in Senate Standing Committee on Legal and Constitutional Affairs, *Report on Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 and four related bills concerning the Northern Territory National Emergency Response*, August 2007, p39.

> If the *Native Title Act* contains provisions inconsistent with the *Racial Discrimination Act*, both acts emanate from the same legislature and must be construed so as to avoid absurdity and to give each of the provisions a scope for operation.[106]

The failure of the Australian government to encode an entrenched protection for the principle of non-discrimination beyond the level of a Commonwealth statute has lead to extensive criticism from the Committee on the Elimination of All Forms of Racial Discrimination, which monitors and administers *ICERD* at the international level. They stated in their Concluding Observations of Australia's most recent reporting session to the Committee that:

> The Committee, while noting the explanations provided by the delegation, reiterates its concern about the absence of any entrenched guarantee against racial discrimination that would override the law of the Commonwealth. (Article 2). The Committee recommends to the State party that it work towards the inclusion of an entrenched guarantee against racial discrimination in its domestic law.[107]

These criticisms are particularly pertinent given the *jus cogens* status that the prevention of race discrimination has in international law.

The Australian Government has, however, consistently rejected calls to entrench any form of constitutional rights protection, taking the position that sufficient rights protection in Australia derives from:

- a system of representative and accountable government;
- an independent judiciary, a fair and accessible justice system and the common law;
- specific human rights legislation and a national human rights institution;
- State and Territory anti-discrimination and equal opportunity commissions; and
- an array of programs and initiatives at national, State and Territory levels directed at enhancing the enjoyment of human rights.[108]

h) Specific human rights concerns relating to income management

There are a range of individual measures contained in the NT intervention legislation that raise other human rights concerns. One such measure is the income management regime. As with other provisions of the legislation, many of the concerns relate to the actual process chosen for achieving the aim of the legislation rather than the actual measure itself.

The *Social Security and other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) provides for the quarantining and control of welfare income available to Indigenous peoples in prescribed Northern Territory Communities for a period of 12 months, with the possible extension of this for up to five years. It also puts

106 *Western Australia v Commonwealth* (1995) 183 CLR 373, Mason C.J., Brennan, Deane, Toohey, Gaudron and McHugh J.J., pp483-484.

107 Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Concluding observations of the Committee on Australia CERD/C/AUS/CO/14, March 2005; Committee on the Elimination of Racial Discrimination, Sixty-sixth session, 21 February – 11 March 2005.

108 Australian Government, *Australia's National Framework for Human Rights*, Attorney General's Department, Canberra, December 2004, p69.

in place the legislative framework for delegated legislation to be enacted to set up an administrative body called the Queensland Commission to regulate income management in Cape York.

The government states that the measures in the legislation relating to child protection and school attendance could take effect for both Indigenous and non-Indigenous people Australia-wide by 2009.[109]

According to the new provisions in the *Social Security Act,* the purpose of the legislation is to:

(1) stem the flow of cash expended upon substance abuse and gambling;

(2) ensure funds that are provided for the welfare of adults and children are spent on their priority needs; and

(3) promote socially responsible behaviour, particularly in relation to the care and education of children.

As has been noted previously, the *CRoC* provides that children are entitled to *benefit* from welfare, so measures that are designed to achieve this can be seen to address a legitimate human rights concern.

- *How is the income management regime applied in the legislation?*

The legislation introduces an income management regime into the *Social Security Administration Act* (Part 3B Division 1, Item 17).

The income management regime applies to almost every form of welfare payment. It amends existing legislation including:

- *A New Tax System (Family Assistance) (Administration) Act 1999;*
- *Social Security Act 1991;*
- *Social Security (Administration) Act 1999;*
- *Veteran's Entitlements Act 1986;*
- *A New Tax System (Family Assistance) Act 1999;* and
- *Income Tax Assessment Act 1936.*

Under the legislation, a person may become subject to the income management regime because:

- A person lives in a declared relevant area (prescribed community) in the NT (s123UB). Income management involves quarantining 50% of all income support and family assistance payments.
- A state/territory child protection officer recommends to Centrelink that a person should be subject the income management because their child is considered to be at risk of neglect or abuse (s123UC). These measures are intended to apply nationally. In most cases, the principal carer will have 100% of their welfare payments income managed until such time as the risk to the child ceases (s 123XI and 123 XJ).

109 Brough, M., (Minister for Families, Community Services and Indigenous Affairs), 'Second reading speech: Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007', *Hansard*, House of Representatives, 7 August 2007, p6.

- A person, or the person's partner, has a child who does not meet school enrolment and attendance requirements (s123UD and s123UE). The trigger can be identified by either Centrelink or the State Education Authority. These measures will apply nationally starting in 2009. Income management will result in the principal carer having 50% of their income support and 100% of their family assistance payment quarantined for an initial period of 12 months. The principal carer will also have mandatory deductions from their welfare payments to cover the cost of their children's breakfast and lunch at school (Division 6).
- A person who is subject to the jurisdiction of the Queensland Commission, is recommended by the Commission for income management (s123UF).[110] It is expected that a person would be recommended for income management because the Commission found their child to be at risk of abuse or neglect, or because their child was not enrolled or not meeting school attendance requirements.

A person who is subject to the income management provisions will have an income management account created for them. Amounts will be deducted from the person's welfare payments and credited to the person's income management account. A person subject to the income management regime can then be given a store value card capable of storing monetary value in a form other than cash, to purchase essential items at particular designated shops (s123YC).

Amounts quarantined from a person's income can be spent on 'priority needs' including food, beverages, clothing, basic household items, housing, household utilities, heath, childcare and development, education and training and other specified items by legislative instrument (Section 123TH).

The measures will apply for a period of 12 months, upon which time they are able to be renewed by a legislative instrument at the discretion of the Minister.

The Minister has discretion to exempt people from income management in any circumstances that the Minister sees fit.

Income management can also apply to people who enter a prescribed area in the NT for any period of time, or if their partner enters for any prescribed period of time.

The category of people in the NT subject to income management can be expanded because the Minister may declare that a relevant Northern Territory area is a 'prescribed area' and will be subject to the Act (Section 123TE). This declaration can last for up to one year.

In couples where both parents receive income support, both parents' income support and family payments will be subject to income management. In couples where one parent receives a family income payment, the entire family income support could be subject to management (Section 123).

Other adults with at least a 14% or larger share of responsibility for care of a child may be subject to income management. However, Centrelink has the discretion to

110 It is expected that the jurisdiction of the QLD Commission will only cover the four Aboriginal communities in Cape York which have agreed to participate in the Cape York Welfare Reform Trials: Hope Vale, Aurukun, Mossman Gorge and Coen.

exclude parents on a case-by-case basis from income management where parents are only responsible for 14-34% care of children (Section 123UH).

Income management with respect to the carers of children who are identified by child protection authorities as 'at risk' will apply for as long as State Child Protection Authorities deem it necessary.

- *Is the income management regime consistent with the right to social security?*

The income management regime introduced by the NT intervention legislation raises many complex human rights issues. Chief among these is the right to social security as set out in Article 9 of *ICESCR*, as well as Article 5 of *ICERD*, Article 26 of *CRoC* and Articles 11(1)(e) and 14(2)(c) of *CEDAW*.

Text Box 9 outlines the content of this right, as set out by the Committee on Economic, Social and Cultural Rights.[111]

Text Box 9: Content of the right to social security

The right to social security covers the right to access benefits, through a system of social security, in order to secure adequate (i) income security in times of economic or social distress; (ii) access to health care and (iii) family support, particularly for children and adult dependents. It should be broadly – rather than narrowly – defined.

The right to social security contains both freedoms and entitlements. The freedoms include the right to be free from arbitrary and unreasonable interference with existing social security coverage, whether obtained publicly or privately. Furthermore, it includes the right to a system of social security that provides equality of opportunity for people to enjoy adequate protection from risks, by providing at least income security and access to health care and family benefits.

Key elements of the right to social security

Availability

(i) The right to social security implies that a system, whether composed of a single or variety of schemes, is available and in place to ensure that benefits can be accessed for the relevant categories of social security.

(ii) Benefits, whether in cash or in kind, must be adequate in amount and duration in order that everyone can realize their rights to family protection, an adequate standard of living and access to health care as contained in Articles 10, 11 and 12 of the Covenant. In addition, State parties should be guided by the principle of human dignity, contained in the preamble, and the right to non-discrimination, which may influence the levels of benefits and the form in which they are provided.

Accessibility

(i) *Physical Accessibility – Coverage*. All persons should be covered by the social security system, including the most disadvantaged or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds.

111 This is based on information contained in General Comment 20 on implementation of ICESCR by the United Nations Committee on Economic, Social and Cultural Rights: UN Doc: E/C. 12/GC/20/CRP. 1, available online at: http://www2.ohchr.org/english/bodies/cescr/comments.htm, accessed 7 January 2008.

(ii) *Economic Accessibility – Affordability*. If a social security scheme requires contributions by employees or other beneficiaries, then contributions should be defined in advance. The direct and indirect costs and charges associated with making contributions must be affordable, and must not compromise or threaten the realization of other Covenant rights.

(iii) *Information Accessibility and Participation*. Beneficiaries of social security schemes must be able to participate in the administration of the system and it must provide for a right of appeal. The system should be established under national law and permit the individuals and organizations the right to seek, receive and impart information concerning social security issues.

General issues

The obligation of States parties to guarantee that the right to social security is enjoyed without discrimination (art. 2, para. 2), and equally between men and women (art. 3), pervades all of the Covenant obligations. The Covenant thus prohibits any discrimination on the grounds of race or other grounds which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to social security.

Whereas the right to social security applies to everyone, States parties should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right.

Eligibility conditions for unemployment benefits must be reasonable and proportionate and the benefit must not be provided in a form that is onerous or undignified. The withdrawal, reduction or suspension of benefits should be circumscribed, must be based on grounds that are reasonable and proportionate, and be provided for in national law.

Benefits for families are crucial for realizing the rights of children and adult dependents to protection under Article 10 of the Covenant. The Convention on the Rights of the Child provides that" The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child." Family benefits should be provided to families, without discrimination on prohibited grounds, and would ordinarily cover food, clothing, housing, where appropriate.

States parties should take particular care that indigenous peoples and racial, ethnic and linguistic minorities are not excluded from social security systems through direct or indirect discrimination, particularly through the imposition of unreasonable eligibility conditions.

Legal Obligations relating to the right to social security

General legal obligations

States parties have immediate obligations in relation to the right to social security, such as the guarantee that the right will be exercised without discrimination of any kind (art. 2, para. 2) and the obligation to take steps (art. 2, para.1) towards the full realization of articles 11, paragraph 1, and 12.

There is a strong presumption that retrogressive measures taken in relation to the right to social security are prohibited under the Covenant. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State party's maximum available resources. The Committee will look carefully at whether (1) alternatives were comprehensively examined; (2) there was genuine participation of affected groups in examining proposed measures and alternatives that threaten their existing human right to social security protections; (3) the measures were directly or indirectly discriminatory; (4) the measures will have a sustained impact on the realization of the right to social security; (5) the individual is deprived of access to the minimum essential level of social security unless all maximum available resources have been used, including domestic and international; (6) review procedures at the national level have examined the reforms.

Specific legal obligations

The right to social security, like any human right, imposes three types of obligations on States parties: obligations to respect, obligations to protect and obligations to fulfil.

*(a) Obligations to **respect***

The obligation to ***respect*** requires that States parties refrain from interfering directly or indirectly with the enjoyment of the right to social security, including refraining from engaging in any practice or activity that denies or limits equal access to adequate social security; arbitrarily interfering with self-help or customary or traditional arrangements for social security; or interfering with institutions that have been established by individuals or corporate bodies to provide social security.

*(b) Obligations to **protect***

The obligation to ***protect*** requires State parties to prevent third parties from interfering in any way with the enjoyment of the right to social security. The obligation includes, inter alia, adopting the necessary and effective legislative and other measures to restrain, for example, third parties from denying equal access to social security schemes operated by third parties or others, imposing conditions or providing benefits that are not consistent with the national social security system; or arbitrarily interfering with self-help or customary or traditional arrangements for social security.

*(c) Obligations to **fulfil***

The obligation to ***fulfil*** requires States parties to adopt the necessary measures, including the implementation of a social security scheme, directed towards the full realization of the right to social security. The obligation to fulfil can be disaggregated into the obligations to facilitate, promote and provide.

The obligation to facilitate requires the State to take positive measures to assist individuals and communities to enjoy the right. The obligation includes, inter alia, according sufficient recognition of this right within the national political and legal systems, preferably by way of legislative implementation; adopting a national social security strategy and plan of action to realize this right; ensuring that the social security system will be adequate, accessible for everyone and covers risks and contingencies, namely income security, access to health care and family support.

States parties are also *obliged to fulfil (provide)* the right when individuals or a group are unable, for reasons beyond their control, to realize that right themselves within the existing social security system with the means at their disposal. The obligation to promote obliges the State party to take steps to ensure that there is appropriate education and awareness concerning access to social security schemes, particularly in rural and deprived urban areas, or amongst linguistic and other minorities.

Core obligations

States parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant. In the Committee's view, at least a number of core obligations in relation to the right to social security can be identified, which are of immediate effect:

(a) To ensure access to the minimum essential level of social security that is essential for acquiring water and sanitation, foodstuffs, essential primary health care and basic shelter and housing, and the most basic forms of education.

(b) To ensure the right of access to social security systems on a non-discriminatory basis, especially for disadvantaged or marginalized groups;

(c) To adopt and implement a national social security strategy and plan of action addressing the whole population; the strategy and plan of action should be devised, and periodically reviewed, on the basis of a participatory and transparent process; it should include information on the right to social security indicators and benchmarks, by which progress can be closely monitored.

(d) To monitor the extent of the realization, or the non-realization, of the right to social security;

(e) To adopt social assistance or other programmes that protect disadvantaged and marginalized individuals and groups;

Implementing the right to social security

States parties are required to utilize "all appropriate means, including particularly the adoption of legislative measures". Every State party has a margin of discretion in assessing which measures are most suitable to meet its specific circumstances. The Covenant, however, clearly imposes a duty on each State party to take whatever steps are necessary to ensure that everyone enjoys the right to social security, as soon as possible. Furthermore, any national measures designed to realize the right to social security should not interfere with the enjoyment of other human rights.

Existing legislation, strategies and policies should be reviewed to ensure that they are compatible with obligations arising from the right to social security, and should be repealed, amended or changed if inconsistent with Covenant requirements.

The duty to take steps clearly imposes on States parties an obligation to adopt a national strategy or plan of action to realize the right to social security. The strategy should: (a) be based upon human rights law and principles; (b) cover all aspects of the right to social security and the corresponding obligations of States parties; (c) define clear objectives; (d) set targets or goals to be achieved and the time frame for their achievement; (e) formulate adequate policies and corresponding benchmarks and indicators.

The formulation and implementation of national social security strategies and plans of action should respect, inter alia, the principles of non-discrimination, gender equality and people's participation. The right of individuals and groups to participate in decision-making processes that may affect their exercise of the right to social security must be an integral part of any policy, programme or strategy concerning social security.

The national social security strategy and plan of action should also be based on the principles of accountability, transparency and independence of the judiciary, since good governance is essential to the effective implementation of all human rights, including the realization of the right to social security.

Any persons or groups who have experienced violations of their right to social security should have access to effective judicial or other appropriate remedies at both national and international levels. All victims of violations of the right to social security should be entitled to adequate reparation, including restitution, compensation, satisfaction or guarantees of non-repetition. National ombudspersons, human rights commissions, and similar institutions should be permitted to address violations of the right.

These key features can be summarised as follows:

- the right is to be enjoyed without discrimination, including on the basis of race;
- access must be assured on a non-discriminatory basis to the minimum essential level of social security that is required for acquiring water and sanitation, foodstuffs, essential primary health care and basic shelter and housing, and the most basic forms of education;
- benefits should be provided in cash or in kind – determining the form that benefits take should be guided by the principle of human dignity and the right to non-discrimination;
- any national measures designed to realize the right to social security should not interfere with the enjoyment of other human rights;
- beneficiaries of social security schemes must be able to participate in the administration of the system and it must provide for a right of appeal;
- eligibility conditions for unemployment benefits must be reasonable and proportionate and the benefit must not be provided in a form that is onerous or undignified;
- the right to social security should ordinarily include provision for benefits for families and cover food, clothing and housing, where appropriate;
- governments are obliged to take steps to ensure that there is appropriate education and awareness concerning access to social security schemes, particularly among minorities and disadvantaged groups;

- all legislation and processes should be reviewed to ensure that they are compatible with obligations arising from the right to social security, and should be repealed, amended or changed if inconsistent with Covenant requirements;
- each government has a margin of discretion in assessing which measures are most suitable to meet its specific circumstances, but has a duty to take whatever steps are necessary to ensure that everyone enjoys the right to social security, as soon as possible;
- the formulation and implementation of national social security strategies and plans of action should respect, inter alia, the principles of non-discrimination, gender equality and people's participation;
- the right of individuals and groups to participate in decision-making processes that may affect their exercise of the right to social security must be an integral part of any policy, programme or strategy concerning social security; and
- access to effective judicial or other appropriate remedies at both national and international levels should be guaranteed, including with national ombudspersons, human rights commissions, and similar institutions being permitted to address violations of the right.

What these provisions reveal is a set of criteria for determining the appropriateness of adopting any particular approach to the delivery of social security entitlements.

The Explanatory Memorandum and related explanatory materials on the NT intervention measures, however, contain limited information on how such criteria are met.

The income management measures raise the following concerns relating to compatibility with the right to social security:

- The blanket application of the income management regime in the 73 prescribed communities in the NT means that the measures are applied to individuals that are not responsible for the care of children, do not gamble, and do not abuse alcohol or other substances. The criteria for being subject to the income management provisions is therefore solely on the basis of the race of the welfare recipient instead of being on the basis of need.
- The scheme is also established so that it is difficult for individuals to be exempted from the income management provisions. For this to occur requires a decision by the Minister. It would be more appropriate for the decision making about the applicability of the scheme to be inverted, so that for the scheme to operate in relation to a particular individual it would require a decision that the scheme should be applied based on clearly defined criteria.
- This also means that the method for delivery of welfare provisions is extremely costly, with significantly increased bureaucratic involvement and costs. It is questionable that this is the most appropriate approach for delivering welfare. The government would, in my view, obtain better outcomes at a more reasonable cost by focusing its efforts on meeting

its duty to take steps to ensure that there is appropriate education and awareness about social security issues in Indigenous communities.

- As the income management measures are so broadly applied, there is a tenuous connection between the operation of the scheme and the object of addressing family violence and abuse. When coupled with the lack of participation and consultation with Indigenous communities, this renders it very difficult to support the view that these measures are appropriately characterised as a special measure.
- If the measures were targeted solely to parents or families in need of assistance to prevent neglect or abuse of children, as they are in s123UC of the legislation, then some form of income management may be capable of being seen as an appropriate exercise of the governments 'margin of discretion' to ensure that families benefit from welfare and receive the minimum essentials for survival.
- It is difficult, however, to see how the quarantining of 100% of welfare entitlements can be characterised as an adapted and appropriate response, given the impact that benefits are being provided in a form that is onerous and potentially undignified.
- As discussed earlier, the limitations on reviewing decision making in relation to the income management regime, and especially the denial of external merits review processes, significantly undermines the ability to characterise the income management regime as an adapted and appropriate response. This is a clear denial of justice, is discriminatory in its impact and does not meet the requirement for the provision of effective judicial or other appropriate remedies that is integral to the right to social security. The absence of access to complaints processes such as under the RDA also breaches the right to social security.

It is arguable that some forms of income management could be undertaken consistent with the right to social security. For example, it is likely that the model proposed by the Cape York Institute in its report *From a hand out to a hand up* contains the appropriate procedural guarantees and participatory requirements to enable those proposed measures to potentially be characterised as a special measure and as consistent with the right to social security.

Notably, however, some of those procedural guarantees – such as access to merits review and to access Queensland discrimination laws – are removed in the provisions that are contained in the social security amendments in the NT intervention legislation and so it is not clear that the Queensland Commission that has been authorised actually complies.

Consistent with the right to social security, the provisions on income management in the NT intervention legislation should be reviewed and amended to ensure that these provisions are compatible with obligations arising from the right to social security.

Such a review should ensure that the right of individuals and groups to participate in decision-making processes that may affect their exercise of the right to social security are made an integral part of the NT intervention process into the future.

Ultimately, the objective of income management is to ensure that money is being spent in a responsible way on family needs, with the overarching goal of ensuring children's needs are met. However, the irony of the system being implemented by the government's legislation is that it fosters a passive system of policy development and service delivery while at the same time criticising Indigenous peoples for being passive recipients of government services.

Controlling how a person spends their money is a drastic interference into the way a person manages his or her life and family, and human rights require a proportionate response to a problem. In the context of the NT legislation, this means that governments are obliged to consider less intrusive or voluntary option as a first response before moving to options as broad-reaching as compulsory income management.

There is evidence in a number of cases that alternative programs have been trialled in Aboriginal communities to assist in the management of income, often with substantial success. For example, Tangentyere Council (near Alice Springs) supports over 800 Aboriginal people to use Centrepay to pay bills and rent. Under this *voluntary* scheme, Centrepay provides part of people's welfare payment in the form of food vouchers.[112] This has become a successful scheme and allows participants to exercise choice and control over their money.

In contrast, implementation of a system that divests Aboriginal people of any power to make choices to govern their own financial affairs is severely out of step with principles of both self-determination, and self-responsibility.

- *Protecting the right to privacy*

International law provides that every person's right to privacy should be protected by law to ensure there is no arbitrary interference or unlawful interference.[113]

However, section 123 of the *Social Security Act* provides that in order to determine which individuals will be subject to income management, there will be a significant collection, use and disclosure of personal information occurring across Australia between: schools (both public and private); state and territory education authorities; child welfare agencies; and businesses that will act as 'triggers' or agents for income management in various circumstances.[114] This may include sensitive information, such as child protection matters.

It is concerning that the ways in which personal information will be shared between government agencies such as State Child Protection Authorities, Centrelink, State Education Authorities FaCSIA and private sector agents has not been made explicit in the legislation.

Further, it is important to note that the Privacy Regulation Principles embodied in section 14 of the *Privacy Act 1988* (Cth) do not regulate the Northern Territory, State Government agencies, and most small businesses or individuals. This means that some of the handling of personal information that would occur under the

112 Combined Aboriginal Organisations of the Northern Territory, *A proposed emergency response and development plan to protect Aboriginal children in the Northern Territory: A preliminary response to the Australian Government's proposals,* 10 July 2007, p16, available online at: http://www.rachelsiewert.org.au/files/campaigns/extras/CAO-report-10%20july.pdf, accessed 2 November 2007.

113 *International Covenant on Civil and Political Rights,* Article 17.

114 For example, community stores where food vouchers will be required to be used.

provisions in the various Acts would not be subject to the safeguards against misuse of information embodied in the *Privacy Act,* but only to State privacy regulations, which are not uniform.[115]

The NT intervention legislation must be amended to ensure that adequate protections are provided to protect the privacy of individuals in the handling of personal information.

- *The right to education*

A further objective of income management is to provide an incentive for Aboriginal families to ensure that their children attend school. However, the income management scheme as set forth in the NT intervention legislation presupposes that children in the Northern Territory could access ordinary educational opportunities if they so wished.

Research into the socio-economic conditions of many Aboriginal communities strongly indicates that this is not the case.

It is difficult to assess the exact numbers of students without access to primary and secondary education in the Northern Territory. There is no reliable public data about Indigenous school participation rates mapped against ABS population data. However, the Northern Territory's Minister for Education, Mr Paul Henderson, has conceded that the number of school-aged children without access to primary and secondary education is 'significant'.[116]

The Combined Aboriginal Organisations of the NT report a severe shortage of educational services, for example:

- In Wadeye there are not enough class rooms or teachers if all the students do attend school;
- 94% of Indigenous communities in NT have no preschool;
- 56% have no secondary school; and
- 27% have a local primary school that is more that 50kms away.[117]

In spite of these shortcomings, a number of innovative educational programs in the Northern Territory were in place prior to the intervention to encouraging student attendance and participation. For example, the Clontarf program in Alice Springs has increased attendance rates to 92% by using sport and motivational techniques to motivate students to stay at school. Other success stories include Cherbourg in Queensland, as well as Yirkala, Yipirinya and Barunga in the NT.[118]

115 The Australian Law Reform Commission has recently published a discussion paper recommending an overhaul of privacy legislation in Australia that would remove this non-uniformity: Australian Law Reform Commission, *Review of Australian Privacy Law*, Discussion Paper 72, 2007.

116 Minister Paul Henderson, *Claims many NT Indigenous kids get no mainstream schooling,* ABC The World Today, 21 March 2007, available online at: http://www.abc.net.au/worldtoday/content/2007/s1877912.htm, accessed 2 November 2007.

117 Combined Aboriginal Organisations of the Northern Territory, *A proposed emergency response and development plan to protect Aboriginal children in the Northern Territory: A preliminary response to the Australian Government's proposals,* 10 July 2007, p18, available online at: http://www.rachelsiewert.org.au/files/campaigns/extras/CAO-report-10%20july.pdf, accessed 2 November 2007.

118 Combined Aboriginal Organisations of the Northern Territory, *A proposed emergency response and development plan to protect Aboriginal children in the Northern Territory: A preliminary response to the Australian Government's proposals,* 10 July 2007, p18, available online at: http://www.rachelsiewert.org.au/files/campaigns/extras/CAO-report-10%20july.pdf, accessed 2 November 2007.

An emphasis on providing children with incentives to learn and developing methods of teaching that resonate with Indigenous students is preferable to measures that penalise parents. Along with extensive Federal and Northern Territory government financial commitments to improve the quality and availability of education, such measures should be extensively trialled before options as punitive as income management of 100% of welfare entitlement recipients are utilised.

i) Specific human rights concerns relating to the abolition of the CDEP scheme

As well as introducing income quarantining, the *Social Security and other Legislation Amendment (Welfare Payment Reform) Act 2007*(Cth) abolishes the Federal government's Community Development Employment Projects (CDEP) scheme in the Northern Territory.

According to official figures, this component of the Government's legislative package is likely to affect around 7,500 people across the Northern Territory.[119]

Because CDEP participants receive a wage (rather than a welfare payment) they are treated as employees. Abolishing CDEP and requiring people to register for Newstart, undertake training, or carry out work for the dole will mean that they will be treated as 'unemployed' and can therefore be subject to income management.

It should therefore be clearly recognised from the outset that irrespective of the benefits or disadvantages of dismantling the CDEP scheme, the purpose of doing so was to enable the Government to introduce a comprehensive process for the quarantining of welfare and income management.

CDEP was created under the Fraser government in 1977 as a form of community engagement in the job creation market. Essentially, the CDEP scheme is predicated upon the use of block grants (that total the equivalent of the unemployment benefits that would otherwise be available to Aboriginal people within certain communities) being made available to community controlled organisations. These organisations then have the capacity to manage their own projects and finances in line with the aspirations and skills of the community in which they operate.

The number of participants in CDEP schemes is capped with the number of available places consistently less than demand. This means that not all unemployed people in any given community were on CDEP.

Some of the many benefits attributed to the variety of programs that exist under the rubric of CDEP include community development, employment creation, income support, and the promotion of enterprise assistance. However, as was noted in the *Social Justice Report 2006,* CDEP has had variable results.[120]

The legislative package abolishing CDEP also removes 'remote area exemptions' from Newstart Allowance activity requirements so that recipients must engage with a Job Network and other mainstream services, and either train or seek employment.

119 Altman, J., 'Neo-Paternalism and the Destruction of CDEP', *Arena Magazine*, 90, August – September 2007, p33.

120 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2006*, HREOC, Sydney 2006, p39.

According to Schedule 3 of the Social Security Act:

- The CDEP will gradually be abolished in the Northern Territory from September 2007. CDEP participants will become unemployed, and therefore subject to the income management regime. They will have to apply to Centrelink for income support payments (Newstart) and fulfil the normal participation requirements, such as looking for work, training or participating in Work for the Dole (Schedule 3).
- CDEP will progressively be replaced, community by community, by other services, including 'training', 'real jobs' or 'work for the dole' (Schedule 3).
- The measures in the legislation set up a CDEP transition payment, to ensure that CDEP participants' welfare payments are not less than they were earning as CDEP participants. This transition payment will end on 1 July 2008 (Section 1061ZAAR).

The Government has also stated that dismantling the CDEP scheme will promote interaction with the ordinary labour market, in a move to shift Indigenous people into the 'real economy'.

However, current research and statements by government ministers themselves reveal that the policy of dismantling CDEP is actually likely to result in increased unemployment. Currently, there are approximately 7,500 people in the NT on CDEP. The ideal situation would be that those 7,500 people would be transitioned through Newstart to jobs in the open workplace. However, the government expects that only about 2,000 CDEP participants will obtain 'real work'.[121]

It follows that the remaining 5,500 people are not expected to find sustainable employment and will remain on Work for the Dole.[122] Further, it is estimated that the Indigenous unemployment rate in the NT will rise from its current level of 15.7% to over 50%.[123]

The reason that relatively few CDEP participants are expected to find 'real jobs' is due to the fact that the overwhelming majority (90%) live in prescribed communities in remote areas of the NT.[124] These are small communities, in remote or very remote areas with a limited economic base. Most struggle to maintain a viable commercial economy.

According to the National Aboriginal and Torres Strait Islander Social Survey of 2002, 28.9% of people in remote Aboriginal communities in the Northern Territory are on CDEP, with over 50% on government pensions and allowances.[125]

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121 Brough, M., (Minister for Families, Community Services and Indigenous Affairs) and Hockey, J., (Minister for Employment and Workplace Relations), *Jobs and Training for Indigenous People in the NT,* Joint Media Release, 23 July 2007.

122 Altman, J., 'Neo-Paternalism and the Destruction of CDEP', *Arena Magazine*, No.90, August – September 2007, p33.

123 Altman, J., 'Neo-Paternalism and the Destruction of CDEP', *Arena Magazine*, No.90, August – September 2007, p34.

124 Australian Government, *CDEP in the Northern Territory Emergency Response: Question and Answers,* in Brough, M., (Minister for Families, Community Services and Indigenous Affairs) and Hockey, J., (Minister for Employment and Workplace Relations), *Jobs and Training for Indigenous People in the NT,* Joint Media Release, 23 July 2007.

125 Australian Bureau of Statistics, National Aboriginal and Torres Strait Islander Social Survey, Table 18.

An audit of employment opportunities for Indigenous people in 52 remote communities in the Northern Territory was undertaken by the Local Government Association of the Northern Territory (LGANT) in 2006.[126] Overall findings from the audit identified that there were only 2,955 'real jobs' across the 52 communities. According to the Audit Report, these positions were allocated across a reported population of 37,070 persons of which 2,722 were non-Indigenous.

Following the Minister's announcement that CDEP would be abolished in the NT, the Local Government Association of the Northern Territory (LGANT) commented that:

> Remote Councils are already contacting LGANT with comments like 'CDEP is the backbone of our community and the ramifications to Indigenous business enterprises could be disastrous'. Some of our members are saying that this decision could well mean the beginning of the end for many remote communities. Most people currently employed by CDEP will not get a permanent job and will have their income reduced by 18 percent. On top of this, community stores without the benefit of CDEP labour will need to increase prices.[127]

There is also concern that following the abolition of CDEP, people's income will be significantly reduced. This could occur for a number of reasons.

First, the vast majority (85-90%) of CDEP participants work more than the minimum 15 hours per week and earn on average about 60% more than the income of an unemployed person.[128] Secondly, once they become unemployed, if they do not fulfil the normal participation requirements, such as looking for work, training or participating in work for the dole programs, they will be 'breached' and have their social security payments frozen. In both cases this decline in income could have serious consequences for the ability of parents or carers to provide for their families.

It is worthwhile to note that the Social Security legislation does attempt to provide for the move from the CDEP scheme into the 'mainstream' employment market by its provision of a 'CDEP transition payment'. According to the legislation, the purpose of the payment is to ensure that general standards of living do not drop by meeting any shortfall in welfare payments that Indigenous people would otherwise receive had they been participating in the CDEP scheme.

This payment is only designed to be provided until 30 June 2008. After that time, former CDEP participants will be expected to have found employment, or else they will remain on regular levels of income support. It seems unlikely that this is a sufficient time period to expect local economies to have adapted to cope with the additional numbers of individuals seeking employment.

The abolition of CDEP raises a range of human rights concerns.

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126 Local Government Association of the Northern Territory, *Audit of Employment Opportunities in Indigenous Communities in the NT*, 2006, available online at: http://www.workplace.gov.au/NR/rdonlyres/8ECC6349-A689-4685-A954-663A3E29D977/0/nt_FINALREPORT.pdf, accessed 2 November 2007.

127 Local Government Association of the NT, 'Local Government Association calls for re-think on CDEP changes', Media Release, 24 July 2007, available online at: http://www.lgant.nt.gov.au/home/about_lgant/news_events/media_releases/local_government_association_calls_for_re_think_on_cdep_changes?PHPSESSID=48a46a425dfc9f25a944e0a02e044084, accessed 2 November, 2007.

128 Altman, J., 'Neo-Paternalism and the Destruction of CDEP', *Arena Magazine*, No.90, August – September 2007, p34.

It affects the right of Indigenous people to an adequate standard of living. This can primarily be tied to an acceptable level of income as well as unemployment. It is well known that unemployment can create additional family pressures and general social unrest in a community, especially when the effects of long-term unemployment such as depression and a sense of hopelessness are evident. It is therefore possible that increased unemployment in communities will increase, rather than decrease, the risk of family violence.

As well as CDEP programs providing employment, many communities rely on CDEP organisations to provide essential services. Some services currently provided by CDEP organisations are critical to improving law and order or the health of the community, such as night patrols, nutritional programs, garbage collection and sanitation programs. To the best of the available information, no new funds have been diverted to infrastructure and capacity building in the communities which will eventually find their primary service providers phased out as a result of the loss of CDEP.

The removal of CDEP and lack of alternative employment options in Indigenous communities could lead to some people deciding to move into urban areas such as Darwin, Katherine and Alice Springs. This would exacerbate the current pressures in those areas in relation to available and appropriate housing and other essential services, all of which would also suffer unless significant funds are diverted into improving the basic infrastructure and utilities of those locations.

The flexibility of the CDEP scheme has allowed Indigenous people considerable choice in deciding when and for how long they work each week. This in turn has allowed people to undertake a range of cultural activities such as participation in ceremonies, fishing and hunting, as well as art. It is credited with facilitating the sustainability of a flourishing Indigenous art industry in the NT. It is estimated that most of the 5,000 Indigenous artists in the NT, as well as 400 community-based rangers in the Top End, are all CDEP participants.[129]

This flexibility and opportunity to structure employment around cultural pursuits is not characteristic of mainstream employment opportunities. There is concern that these cultural responsibilities and the associated economic independence they have brought will be significantly curtailed by the abolition of the CDEP program.

The government has said that the abolition of the CDEP program is part of its 'normalisation' policy.[130] This policy encourages Indigenous people to leave remote communities and settle in 'emerging towns' where services such as housing, schools and healthcare can be provided more cheaply. However, the 'urban drift' which is likely to occur as Indigenous people find that they are unable to access employment on their traditional country will adversely impact on their ability to fully enjoy their cultural rights and fulfil the associated responsibilities.

129 Altman, J., 'Neo-Paternalism and the Destruction of CDEP', *Arena Magazine*, No.90, August – September 2007, p35.

130 Brough, M., (Minister for Families, Community Services and Indigenous Affairs) and Hockey, J., (Minister for Employment and Workplace Relations), *Jobs and Training for Indigenous People in the NT,* Joint Media Release, 23 July 2007.

The CDEP or a similar scheme should be available in communities to provide purposeful work on useful community projects for people who otherwise lack it.

While problems may exist within certain individual CDEP organisations, given the enormous success of others in stimulating both employment and cultural opportunities within communities, it is clear that the dismantling of the entire CDEP program is throwing the baby out with the bathwater.

It is highly questionable that every community will be able to generate the 'long-term prospects for economic independence' that the government intends. Therefore, any reform of CDEP programs must be done on a case-by-case basis, after consultation with the specific communities that it will affect, and in line with their aspirations.

I note the importance and desirability of supporting people to progress towards mainstream employment where such employment is available, and believe that substantial training and mainstream work experience components should be built into CDEP programs where such projects would be appropriate. Those who already have the skills to operate local community service programs should be employed through mainstream funding arrangements rather than CDEP. Further, any new funding arrangements for employment services operating in the communities should acknowledge the benefits of local community control and involvement, the 'distance from employment' of many of their clients, and their need for ongoing support (including mentoring) to sustain jobs once they obtain them.

Nevertheless, any reform of the CDEP scheme should be done with recognition of the fact that CDEP programs provide more than simply an alternative model of employment for Aboriginal people. In particular, the development of a stable paid workforce within the communities should be supported through:

- adequate and sustained funding of services including both traditional infrastructure and services and management of traditional lands;
- employment of local Aboriginal people to improve housing in the communities;
- support for local business and employment development initiatives;
- obligations and support for mainstream employers such as mining companies to employ local Aboriginal people rather than 'fly in-fly out' arrangements; and
- by assisting community members to live in areas where jobs exist but return regularly to their communities.

Fundamentally, any policy changes being made to CDEP must come with a concomitant commitment to government accountability to monitor how any proposed shifts will proceed and who they will affect.

It is highly undesirable for Aboriginal people in regional and remote communities to be placed in a position where they are unable to access the labour market, and also do not have the support of a program such as CDEP. This concern becomes manifest when it is considered that there seems to be little evidence that the mainstream job and unemployment markets are adequately equipped to cope with the specific needs and numbers of Indigenous people that will be moving into their systems.

If the government is to continue their program to move people into the 'mainstream' economy, it is desirable that they put in place monitoring and review processes that demonstrate whether over time such arrangements are having a negative or a positive impact on Indigenous people's employability and job retention rates.

Such consistent monitoring should also be applied to the provision of the sorts of services which in the past have been provided by CDEP programs. In past statements, the government has said that critical services in communities will continue to be provided by CDEP until other arrangements are in place.

However, in light of the Northern Territory and Federal governments' poor record of providing and maintaining services such as schools, roads and health services, it is desirable that there be an immediate plan detailing how such infrastructure and services will be rolled out in communities over time. Any such plan should include both immediate and long term commitments to funding, and should include inbuilt monitoring and review processes assessing the viability of any new programs over time.

j) The introduction of alcohol bans in prescribed communities

The *Northern Territory National Emergency Response Act 2007* (Cth) makes it illegal to bring; possess; or consume alcohol in a 'prescribed area' (s 12(2)). It also makes it illegal to supply; transport with intent to supply; or possess with intent to supply alcohol to another person in a 'prescribed area' (s 12(4)).

When the legislation refers to 'prescribed areas', it identifies the 73 Aboriginal communities identified as the subject of the NTNER measures generally. Of these communities, the legislation acknowledges that they are primarily townships on Aboriginal land, Aboriginal 'Community Living Areas' excised from pastoral leases and Aboriginal 'town camps' (s 4).

In spite of the broad applicability of these measures, the legislation also contains a number of exemptions in certain situations:

- There is an exemption for recreational boaters and commercial fishers while in a boat on waters in a 'prescribed area' (ss 12(3), 12(5)).
- There is an exemption for 'recreational activities' organised by tour operators in prescribed areas, as long as alcohol is consumed in a responsible manner (ss 12(3A) – (3C), 12(5A)-(5C)), and as long as the area is subject to a Ministerial declaration that such an exemption can apply (s12(8A)).
- Alcohol may still be available in 'prescribed areas' where there is an existing license or permit (ss 13, 14). The effect of this provision may be that the bans might not be applied to licensed roadhouses or venues, but only be enforced against outlets providing takeaway alcohol for consumption on traditional lands. The existing licenses or permits may, however, be overturned by the Commonwealth Minister or limited (ss 13(4), 13(5), 14(3)).
- The Commonwealth Minister has the power to declare that alcohol restrictions in all or part of a prescribed area shall no longer have effect, if he or she is satisfied that there is no need to keep the measures in place (s19(1)).

In order that the sale and consumption of alcohol can be monitored, Part 2 of the Act declares that people selling take-away alcohol in the Northern Territory must require the purchaser to produce proof of identity; record the name and address of the purchaser; and record the place where the purchaser proposes to consume the alcohol (s 20). This applies if the transaction involves a purchase price of $100 or more; or more than 5 litres of wine in a single container; or 2 or more containers of wine of at least 2 litres (see Division 3A of Part 2).

In addition to the alcohol bans, in mid-2007 the Minister for Health also removed the existing licensing approvals for the importation of kava (which has used by many Indigenous communities in the East Arnhem land region predominately as an alternative to alcohol). This negates the strict usage regime that exists under the *Kava Management Act 1998* (NT) and will have a flow on impact to alcohol usage in this region.

The introduction of bans on alcohol in Indigenous communities through the NT intervention has received a lot of public notice. It has been criticised for a range of practical reasons, including the ineffectiveness and burden of the system for registering all alcohol purchases, as well as the clearly racially based nature of the scheme (exemplified by the introduction of exemptions for tourists and by boaters on waters).[131]

The reality of the approach adopted by the federal government is, however, that it is misconceived and has threatened undoing more than two decades of achievements in Territory communities in dealing with alcohol.

As Maggie Brady, an internationally renowned researcher on the impacts of alcohol in Indigenous communities, explains:

> A fair amount of grandstanding accompanied Minister Mal Brough's announcement of the bans on alcohol on Aboriginal land, as if to suggest that all were thoroughly soaked in grog, or that they allowed easy access to alcohol.
>
> This is a little strange considering that most Aboriginal land in the Territory was already dry. There were already 107 general restricted areas, all on Aboriginal land, and all in non urban areas (except for one town camp in Alice Springs). Only 15 of these 107 allow for liquor in any shape or form. Some of the 15 have permits allowing consumption at home, or for sale away from the premises; some have clubs or canteens with on-premises sales only, while others have both on and off-premises sales. Of the 'new' bans imposed by the Minister, the only genuinely new regulation is that which imposes an alcohol free status on the 'town camps' (living areas within town boundaries such as Alice Springs and Tennant Creek); there has been resistance to this from the relevant representative bodies.[132]

131 Maggie Brady notes the extraordinary nature of the exemptions in the NT intervention measures for recreational and commercial fishers and those on boats on waters near prescribed communities. She argues that these exemptions contradict the National Alcohol guidelines prepared by the National Health and Medical Research Council which explicitly state that alcohol should not be consumed 'before or during activities involving a degree of skill or risk, such as…water sports': Brady, M., 'Alcohol regulation and the emergency intervention: Not exactly best practice', *Dialogue*, Vol.26, No.3, Academy of the Social Sciences Canberra 2007, p61.

132 Brady, M., 'Alcohol regulation and the emergency intervention: Not exactly best practice', *Dialogue*, Vol.26, No.3, Academy of the Social Sciences Canberra 2007, p60.

Prior to the intervention, alcohol has been managed through a system of permits. This is discussed in the case study of the Umbakumba community alcohol management plan in Chapter 2 of this report.

Communities with permits have controlled individual access to alcohol through Permit Committees involving representatives from across the community such as the police, the local school and council. As Brady explains:

> Their decisions are grounded in the principle that access to alcohol is a privilege and not a right, so that access to alcohol comes with conditions attached. Committees have the power (which is frequently enacted), to recommend to the NT Licensing Commission that a person's permit be cancelled immediately if he/she causes drinking trouble.
>
> Arrangements such as these have come about after years of trial and error, consultation and experiment, and are an attempt to balance the rights of drinkers and non-drinkers alike. In a sense, they constitute a work-in-progress around the dilemma of trying to 'live with alcohol' in circumstances where people's consumption is often heavy and explosive.[133]

The NT intervention placed these processes at risk of continuing:

> Brough's original plan for prohibition across Aboriginal lands would have swept all these permits and licences away. After representations from his own department and the NT Government, he has had to refine the plan to allow for the eight existing licensed clubs and the permits to continue. The NT Licensing Commission has since reviewed all existing licences and permits on Aboriginal-owned land and recommended that they stay in place. The Minister apparently has still not formally decided whether to accept these recommendations, and the NT has had to go ahead anyway and renew all existing permits, as time was running out for their renewal. The Minister has the power to override all these renewals – but so far has chosen not to do so.[134]

In the 2006 publication *Ending violence and abuse in Aboriginal and Torres Strait Islander Communities*, HREOC noted that efforts to redress problems concerning alcohol from the side of reducing 'supply' could only be regarded as a situational crime prevention technique, rather than an underlying crime prevention technique.[135]

What this means is that without a regime of programs to address the underlying factors that contribute to alcohol abuse, restrictions on the supply of alcohol to communities can only be of limited effect in reducing the associated criminal behaviour that is sought to be regulated.

Simply restricting the supply of alcohol has also been shown to exacerbate existing social problems, such as displacement of violent offenders to areas where alcohol is more readily available, increased incarceration rates if measures to limit alcohol are strictly policed, increased use of substitute drugs that are potentially more harmful

133 Brady, M., 'Alcohol regulation and the emergency intervention: Not exactly best practice', *Dialogue, Vol.*26, No.3, Academy of the Social Sciences Canberra 2007, p61.

134 Brady, M., 'Alcohol regulation and the emergency intervention: Not exactly best practice', *Dialogue*, Vol.26, No.3, Academy of the Social Sciences Canberra 2007, p61.

135 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending family violence in Aboriginal and Torres Strait Islander communities,* Human Rights and Equal Opportunity Commission, Sydney, p113-144.

such as petrol sniffing and methamphetamine ('ice'). Such an approach needs to be one of a suite of measures to tackle the effects of alcohol in NT communities.

Maggie Brady notes that this approach adopted by the NT intervention legislation goes against international best practice and evidence about what works. She notes that the World Health Organisation has identified six policies to guide reducing alcohol related harm in measurable terms as follows:

- Regulating the physical availability of alcohol – such as having a minimum age, restrictions on hours and days of sale, outlet density restrictions;
- Dealing with taxation and pricing – price is the single most important determinant of per capita consumption;
- Drinking and driving counter measures;
- Treatment and early intervention – brief interventions for hazardous drinkers;
- Education and persuasion – community mobilisation around abuse; and
- Altering the drinking context – serving practices, training, enforcement.[136]

She notes, 'the Emergency Intervention (in the NT) has not addressed any of these'.[137]

In order for alcohol bans to be effective in a long-term sense, they must be accompanied by significant investment in programs and infrastructure in the health sector. The necessity of these measures is underscored by the very real medical dangers that exist for Aboriginal people if bans are introduced without necessary services and expertise to help people safely withdraw from alcohol addiction.

Accordingly, I remain concerned that the current measures dismiss much of the good work achieved by communities to restrict alcohol and ignore the root causes of alcohol abuse.

HREOC has taken the position for over a decade that alcohol restrictions implemented with the full support of communities can qualify as a special measure under the RDA. Any initiative to overcome alcohol abuse must be taken as a part of a long term strategy, and with the support of the communities involved in its design and implementation.

In responding to the NT intervention measures when announced, the Combined Aboriginal Organisations of the Northern Territory have also recommended that a community-based approach be taken to restrict alcohol consumption in the NT.

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136 Edwards, G., Anderson, T., Babor, T., Casswell, S., Ferrence, R., Giesbrecht, N., Godfrey, C., Helder, H., Lemmens, P., Makela, K., Midanik, L., Nortstrom, T., Osterber, E., Romelsjo, A., Simpura, J., and Skog, O., *Alcohol policy and the public good,* World Health Organisation, Oxford, Oxford University Press, 1994; Babor, T., Caetano, R., Casswell, S., Edwards, G., Giesbrecht, N., Graham, K., Grube, J., Gruenewald, P., Hill, L., Holder, H., Homel, R., Osterberg, E., Rohm, J., Room, R., Rossow, I., *Alcohol: no ordinary commodity. Research and public policy,* World Health Organisation, Oxford, Oxford University Press 2003 as cited in Brady, M., 'Alcohol regulation and the emergency intervention: Not exactly best practice', *Dialogue*, Vol.26, No.3, Academy of the Social Sciences Canberra 2007, p60.

137 Brady, M., 'Alcohol regulation and the emergency intervention: Not exactly best practice', *Dialogue*, No.26, Vol.3, Academy of the Social Sciences Canberra 2007, p60.

They propose a long-term, preventative approach that is grounded in Indigenous participation and consent, and draws on successful community models.

The CAO also emphasises the importance of culturally appropriate community education that is delivered by Indigenous staff, who are trained in how to offer young people active and healthy alternatives to drug and alcohol abuse.[138]

Accordingly, given the extent of problems that can be caused by alcohol misuse, the objective of creating 'dry' communities is a worthwhile one for the Government to commit to. However, the approach adopted in the NT intervention legislation of blanket alcohol bans is a clumsy tool to effect this change and its effectiveness is in question.

This aspect of the legislation should be subject to extensive review to consider whether the Commonwealth should instead take a stronger role in funding support measures to accompany dry community restrictions and the permit systems that have been introduced by the NT Liquor Commission over recent years.

Consideration should be given as to whether the imposition of blanket bans on alcohol through the NT intervention legislation operates counter to its purpose and distorts existing efforts in communities. This could occur, for example, by encouraging migration into larger centres such as Alice Springs and exacerbating alcohol related issues in those centres, and alternatively by undermining existing community initiatives and disempowering communities in their efforts.

138 Combined Aboriginal Organisations of the Northern Territory, *A proposed emergency response and development plan to protect Aboriginal children in the Northern Territory: A preliminary response to the Australian Government's proposals,* 10 July 2007, p15, available online at: http://www.rachelsiewert.org.au/files/campaigns/extras/CAO-report-10%20july.pdf, accessed 2 November 2007.

Part 4: Ways forward – modifying the NT intervention measures so that they comply fully with Australia's human rights obligations

No one wants to see children abused, families destroyed, and the aspirations for a bright future dulled because hope has been overwhelmed by despair.

Aboriginal children – wherever they live in Australia – deserve a future in which they have the same opportunity as other children to thrive, develop and enjoy life. They are entitled to such a future for no other reason than that they are human, born with dignity and in full equality to all other Australians.

Such equality involves being able to live and grow in safety, without fear of violence or intimidation, within a thriving, caring and loving family unit, and according to your culture.

It also involves living in an environment where individuals are able to exercise control over their own lives. Where they are able to make decisions and are responsible for those decisions and their impact on their family and the community in which they live. And where their choices are meaningfully backed up by the means to achieve them, such as access to basic services and the provision of education to both build dreams and hope, and create the personal capacity to achieve these.

For many Indigenous children across Australia, such equality is a pipedream. For some, overwhelmed by environments of dysfunction, it is not even dreamed of.

It is a tragic fact that an Aboriginal or Torres Strait Islander child born today does not have the same life chances as other Australian children.

This is something that should not exist in 21st century Australia. And it is the defining challenge for our nation.

All Australian governments should be committed to ensuring an equal start in life for Indigenous children. Without this, the most vulnerable members of our society are required to overcome adversity merely to access what others take for granted.

It is with this challenge in mind that this report has analysed the intervention into Aboriginal communities in the Northern Territory.

The NT intervention measures and human rights

The particular focus of this report has been whether the NT intervention measures meet Australia's human rights obligations and by doing so ensure that Aboriginal children and their families are treated with dignity and equality.

The NT intervention measures raise many more complex issues than have been dealt with in this report. Some of those issues, particularly as they relate to building

on the lessons of recent years for whole of government service delivery, have been addressed in other forums.[139]

The starting point for determining the human rights implications of the NT intervention measures is to recognise that they are intended to address family violence and child abuse in Indigenous communities.

The NT intervention has revealed a determined commitment across society to address the horrors of family violence and child abuse in Aboriginal communities in the Northern Territory and to create a better future.

It is essential that governments undertake action to address violence and abuse, particularly when there is compelling evidence that it is widespread. Governments that fail to act in these circumstances would be in breach of their human rights obligations.

The NT intervention presents an historic opportunity to deal with a tragedy that has existed for too long, and that has destroyed too many families and too many young Aboriginal lives.

Accordingly, the intention of the NT intervention does not come into challenge in this report.

What does come into question is whether the approach adopted to achieve this aim is suitable.

Human rights obligations are not merely technical matters that sit distant from the day to day realities of life for Indigenous children and their families. The ability of children, their families and their communities to enjoy their human rights has a profound impact on the environment in which they live, grow and develop.

It fundamentally impacts upon their hopes and aspirations, in empowering or disempowering them, and in supporting or restricting different life paths and ultimately the choices that people make about their futures.

The haste with which the legislation underpinning the NT intervention measures was introduced has meant that there has been limited opportunity to consider the human rights implications of the approach adopted.

The objective of this report, therefore, has been very narrowly focussed to scrutinise the legislative framework underpinning the NT intervention measures to establish their compliance or otherwise with human rights standards.

The report has raised significant concerns about the consistency of the legislation underpinning the NT intervention with Australia's human rights obligations.

Throughout this report I have stressed that it is entirely inappropriate to seek to justify measures that breach human rights on the basis that they are taken in furtherance of other human rights considerations.

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139 See for example: Calma, T., *Continuity and change through the new arrangements – Lessons for addressing the crisis of child sexual abuse in the Northern Territory*, Speech – Launch, *Social Justice Report and Native Title Report 2006,* 3 July 2007, p7; Calma, T., *The role of local government in achieving social justice for Aboriginal peoples in the Northern Territory*, Speech, Northern Territory Local Government Association Annual Conference: "Planning for the future", Darwin, 22 November 2007; and Calma, T., *Can the end ever justify the means? Achieving equality for Aboriginal & Torres Strait Islander peoples & the Northern Territory intervention*, Speech, The 2007 Don Dunstan Oration, Adelaide, 18 September 2007. All speeches are available online at: http://www.humanrights.gov.au/about/media/speeches/social_justice/.

Such a claim is not supported by human rights law, whether the measures are classified as an 'emergency response', as 'special measures' or more broadly as measures to protect the rights of children or rights to be free from violence.

In particular, human rights law is clear that any measures must be non-discriminatory in their application and impact. This obligation is non-negotiable and unable to be deviated from.

Put simply, all measures to address family violence and child abuse should themselves respect human rights. It would be outrageous to suggest that it is not possible to achieve this.

The Human Rights and Equal Opportunity Commission maintains that the rationale behind the legislation – to protect children and to build capacity in Aboriginal communities – is one which can be undertaken without the need to resort to discrimination.

The main concerns identified about the NT intervention legislation from a human rights perspective are as follows:

- *The NT legislation is inappropriately classified as a special measure.* It is not possible to support the government's contention that all of the measures contained in the NT intervention legislation can be justified as special measures. It is therefore also not possible to say that in its current form the legislation is consistent with the RDA.

  The measures contained in the legislation are 'deemed' to be special measures despite there being no justification provided as to how the measures, individually and collectively, meet the specific criteria for a special measure.

  While it is possible to conceive how some of the individual measures contained within the legislative package may meet the first component of a special measure (namely, that they are capable of being defined as beneficial, even though they impose restrictions) it is still necessary to demonstrate that consultation has occurred and community consent has been sought to the introduction of restrictive measures. This has not been provided for any of the measures, such as restrictions on alcohol and income management measures.

  Certain measures also do not meet the second criteria for a special measure as they are not appropriate and adapted to the end of child protection. These include the compulsory acquisition of property in circumstances where negotiations for a lease have not been sought from the landowners, as well as the changes made to the permit system. The scope of income management provisions – such as quarantining of 100% of welfare in some circumstances – may also not be an appropriate and adapted response. This limits the ability of these measures to be legitimately characterised as special measures under the RDA.

- *The NT intervention legislation contains a number of provisions that are racially discriminatory.* There are also a number of provisions in the legislation that deny Aboriginal people in the Northern Territory democratic safeguards and human rights protections that exist for all other Territorians and Australians.

  Examples include the lack of merits review of decision making (often accompanied by the removal of Parliament's scrutiny role over delegated legislation); removal of access to schemes for just terms compensation; exemptions from the application of all laws that deal with discrimination at the federal and territory level; and the removal of requirements to obtain consent for the management or control of Indigenous property.

  These provisions deny Aboriginal people in the NT procedural fairness and access to justice. They fundamentally undermine the integrity of the NT intervention and contradict the stated purpose of building respect for the rule of law.

- *The NT intervention removes protections against discrimination that occurs in the implementation of the intervention measures.* Immunity is provided for any act of discrimination that occurs under the provisions of the legislation, as well as any act done 'under or for the purposes of those provisions'. This impact is provided by explicitly preventing the application of the RDA, the Northern Territory Anti-Discrimination Act and in relation to the operation of welfare reform in Cape York, the Queensland Anti-Discrimination Act. It provides an extraordinarily broad exemption from protections of discrimination. It also does not require that acts that implement the legislation do so in a manner consistent with the stated purpose of the purported 'special measure'.

The report additionally identifies a range of specific concerns about the consistency of the income management regime with the rights to social security, privacy and non-discrimination; and the alcohol management regime with the right of non-discrimination.

It also expresses concerns about the absence of effective participation of Indigenous peoples in decision making that affects them. While this concern applies to all the measures contained in the NT intervention legislation, it is of greatest concern in relation to dealings with Indigenous property (where the legislation exempt these measures from the requirement in section 10(3) of the RDA that no such measures be introduced that involve the management or control of Indigenous property without consent).

The report also identifies a range of options to modify the intervention to ensure that it proceeds in a manner that is consistent with Australia's human rights obligations.

Modifying the NT intervention measures so that they comply with human rights – a ten point action plan for the future of Aboriginal children in the Northern Territory

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

This ten point plan is as follows:

Action 1:	Restore all rights to procedural fairness and external merits review under the NT intervention legislation;
Action 2:	Reinstate protections against racial discrimination in the operation of the NT intervention legislation;
Action 3:	Amend or remove the provisions that declare that the legislation constitutes a 'special measure'
Action 4:	Reinstate protections against discrimination in the Northern Territory and Queensland
Action 5:	Require consent to be obtained in the management of Indigenous property and amend the legislation to confirm the guarantee of just terms compensation
Action 6:	Reinstate the CDEP Program and review the operation of the income management scheme so that it is consistent with human rights
Action 7:	Review the operation and effectiveness of the alcohol management schemes under the intervention legislation
Action 8:	Ensure the effective participation of Indigenous peoples in all aspects of the intervention – Developing Community Partnership Agreements
Action 9:	Set a timetable for the transition from an 'emergency' intervention to a community development plan
Action 10:	Ensure stringent monitoring and review processes.

In putting forth this plan, I note that the newly elected federal government has emphasised the importance of ensuring that the NT intervention proceeds in a manner that is consistent with Australia's human rights obligations. For example, they have stated that 'Observing the integrity of the Racial Discrimination Act is a basic principle for this country and a basic principle for the Indigenous community of this country'.[140]

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

The overall objective of this action plan is to remove the discrimination from the legislation and in its operation.

140 'Additional comments by the Australian Labor Party', contained in Senate Standing Committee on Legal and Constitutional Affairs, *Report on Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 and four related bills concerning the Northern Territory National Emergency Response*, August 2007, p39.

There are three main ways that the NT intervention can be modified:

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

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

In addition to identifying the necessary actions to be undertaken, I have also formally provided recommendations to the Attorney-General at the end of the chapter to implement these.

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

It is entirely unacceptable for the legislation to remove, or fail to provide, rights to external merits review of administrative decision making. This is particularly so given the significant impact that such decision making has on the lives of individuals who are affected. For example, a decision to quarantine 100% of your welfare entitlement, based on very loose criteria, would not be eligible for external administrative review.

The Parliament should immediately repeal all provisions which deny external merits review. These provisions should be replaced with provisions which make explicit that merit review processes do apply.

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

The removal of the protection of the RDA undermines the credibility of the NT intervention measures and contradicts their intended beneficial purpose.

It is entirely unacceptable to remove the protection of the RDA for any acts performed under or for the purposes of the NT intervention legislation. This is particularly given the broad discretion that the legislation vests in decision makers at various levels.

For the RDA to apply to the exercise of discretion under the NT intervention legislation it would additionally require the insertion of a new clause requiring all acts authorised under the legislation to be undertaken consistently with the RDA. To be effective such a clause – known as a *non-obstante* clause – should be unequivocal that the provisions of the NT intervention legislation are subject to the provisions of the RDA.

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

As they presently stand, numerous measures introduced under the NT intervention legislation do not meet the criteria for a special measure. Accordingly, it is inappropriate for the following provisions to be retained in the legislation in their current form:

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

The importance of these provisions is that they 'deem' the measures to qualify as special measures.[141]

If these provisions are to be retained, then they should:

a) be amended to clarify that the measures in the legislation are *intended* to qualify as special measures, rather than deeming that they are in fact special measures; and

b) be amended to require that in implementing the provisions of the legislation (including in the performance of 'any act done under or for the purposes of those provisions'), all actions must be undertaken consistently with the intended beneficial purpose of the legislation – or in other words, consistent with the intended special measure.

There is a need to ensure effective monitoring and review of the implementation of the measures to ensure that only those that are appropriate and adapted to the purpose of child protection are maintained.

Accordingly, it is necessary that provisions relating to income management, alcohol bans, changes to the permit system and compulsory acquisition are reviewed to establish whether they are appropriate and adapted responses to the objectives of the legislation. On the basis of this review, these provisions should be modified or repealed so that they comply with this requirement.

As noted earlier in this chapter, I am of the view that the blanket removal of the permit system on roads, community common areas and other places is not an appropriate measure and does not have sufficient relationship to the purpose of the legislation to qualify as a special measure. In the absence of contrary evidence, these provisions should be repealed.

There is also a pressing need for extensive consultation with Indigenous communities to explain these measures and the objects of the legislation. Thereafter, it is of crucial importance that, in the administration of the proposed legislation,

141 It is uncertain whether 'deeming' provisions in this way would be of effect or whether the courts would simply apply the criteria for a special measure and note this deeming provisions as indicative of the intention of the Government.

measures are delivered in ways that respect the wishes and aspirations of the relevant communities.

Accordingly, the Minister for Indigenous Affairs should also direct that provisions relating to income management and alcohol bans be implemented with the full participation of Indigenous peoples. In particular, the Minister should direct all government officials that in implementing these provisions, processes for seeking consent of Aboriginal communities should be sought.

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

The following provisions should be repealed to ensure the operation of Northern Territory laws that protect against discrimination in Aboriginal communities affected by the intervention measures:

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

The NT intervention legislation also provides that the Minister for Indigenous Affairs can, by non-reviewable legislative instrument, declare that any Northern Territory or Queensland law related to discrimination continues to have effect in the communities.[142]

As an immediate interim measure prior to repealing these provisions, the Minister should exercise her discretion to declare that the *Anti-Discrimination Act 1992 (NT)* does apply across all communities in the Northern Territory and reinstate protections against discrimination in all locations of the NT. The *Anti-Discrimination Act 1991* (Qld) should similarly be reinstated in relation to welfare reforms in Cape York.

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

The Minister for Indigenous Affairs should direct public servants and Government Business Managers to conduct negotiations with Aboriginal communities to obtain access to Aboriginal land for infrastructure and related purposes rather than utilise the extensive powers to compulsorily acquire Aboriginal land through 5 year compulsory leases.

The Minister should also exercise her discretion under Part 5 of the *Northern Territory National Emergency Response Act 2007* (Cth) in a manner that does not affect the management or control of Aboriginal property without having obtained their consent. The Minister should also direct Government Business Managers to

142 See for example: section 133, *Northern Territory National Emergency Response Act 2007* (Cth).

perform their duties in a manner that does not affect the management or control of Aboriginal property without having obtained their consent.

The obtaining of consent in relation to Aboriginal property is necessary to ensure compliance with section 10(3) of the RDA. Measures which involve the management or control of Aboriginal property cannot be classified as a 'special measure' and so such consent is required to ensure consistency with the RDA.

Similarly, sections 60 and 134 of the *Northern Territory National Emergency Response Act 2007* (Cth) should be amended in order to:

- clarify that in the event of the compulsory acquisition of property, Aboriginal people have an entitlement to just terms compensation; and
- provide the simplest and most accessible route for claiming just terms compensation (by removing the exemption from the *Northern Territory (Self Government) Act 1978*).

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

The government should continue to support the conversion of CDEP placements into paid employment or 'real jobs'. Such a measure will only be possible for a small percentage of CDEP placements in remote communities and will also need to be supported by economic development strategies into the longer term.

Accordingly, the CDEP scheme should also be reinstated in communities on a case by case basis.

The Government should also explore introducing voluntary income management measures for CDEP participants. The *Centrepay* program in the Alice Springs Town Camps; the Cape York Family Income Management (FIM) project, and financial literacy programs operated by the Fred Hollows Foundation and Ian Thorpe's Fountain for Youth provide some models for consideration.

The provisions on income management in the NT intervention legislation should also be reviewed and amended to ensure that:

a) these provisions are compatible with human rights obligations, such as those outlined in this report arising from the right to social security and to ensure that adequate protections are provided to protect the privacy of individuals in the handling of personal information;

b) the participation of individuals in decision-making processes that affect their exercise of the right to social security is made an integral part of the NT intervention process into the future; and

c) provisions relating to quarantining of welfare in circumstances of neglect or abuse, or poor school attendance, are appropriately targeted to achieve their stated purpose.

I am confident that many Aboriginal communities would voluntarily participate in income management and financial literacy support programs that are appropriate and not punitive in character.

Given the substantial administrative costs involved in administering the current income management process, and its widespread application without sufficient targeting of those in need, it may prove more beneficial into the long term to explore voluntary income management approaches. The significant administrative costs associated with the current process could then be re-directed to better targeted strategies to invest in communities and support their capacity.

The Minister for Indigenous Affairs has powers under the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) to exempt individuals from the mandatory income management regime. The Minister also has powers under the *Northern Territory National Emergency Response Act 2007* (Cth) to remove communities from the list of 'prescribed communities' to which such arrangements apply.

The Minister should exercise these powers and remove the application of the mandatory income management regime where individuals or communities as a whole have entered into voluntary income management arrangements which are targeted to need. This will provide communities with the incentive to negotiate voluntary arrangements so as to avoid the capricious application of the mandatory regime enacted through the NT intervention legislation.

In particular, an emphasis on providing children with incentives to learn and developing methods of teaching that resonate with Indigenous students is preferable to measures that penalise parents. Such measures should be extensively trialled before options as punitive as income management of 100% of welfare entitlements are utilised.

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

The process for banning alcohol in prescribed communities is complex and potentially works counter to measures that have been developed over time by the Northern Territory Liquor Commission in conjunction with Aboriginal communities. It is notable that the Liquor Commission process was in operation in nearly all of the communities subject to the NT intervention and that it is non-discriminatory in its application – whereas those provisions of the NT intervention legislation relating to alcohol bans are not.

The provisions in the NT intervention legislation should be subject to extensive review to consider their workability and to provide an evidence base for determining whether the Commonwealth should instead take a stronger role in funding support measures to accompany dry community restrictions and the permit systems that have been introduced by the NT Liquor Commission over recent years.

Consideration should be given as to whether the imposition of blanket bans on alcohol through the NT intervention legislation operates counter to its purpose and distorts existing efforts in communities. Consideration should also be given to the range of support measures, such as detox programs and counselling, needed in communities to complement alcohol management processes.

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

Many of the criticisms raised in this report share in common a concern about the lack of participation and involvement of Indigenous peoples in the design and implementation of the intervention measures.

It is essential that the government modify the current approach to the intervention and ensure the participation of Indigenous peoples in its design, implementation and monitoring.

Given the absence of this participation to date – especially in the formulation of the legislation – it is essential that Indigenous peoples in the NT can fully participate in the formal and informal evaluation of the intervention. Such participation will no doubt reveal practical issues about the implementation of the measures and will also enable better evidence to understand what works and why.

There can be little doubt that Aboriginal people and their representative organisations across the Northern Territory would willingly be involved in a genuinely consultative process. Communities have consistently expressed their desire to be active participants in the longer-term measures that the Australian Government plans to take to prevent child abuse in their communities. On various occasions, Aboriginal leaders have pointed out the importance of acknowledging, learning from and building on the success stories that exist in many communities, whether they are in relation to night patrols, running dry communities, or mother and babies programs. They have also called on the Government to consult with them to develop:

> (a) more comprehensive plan and costed financial commitment that addresses the underlying issues within specific timeframes and has bi-partisan support….(with) (t)he performance of both governments and Aboriginal organisations… included. This would also involve thorough planning and negotiation to ensure that the correct strategies are adopted, the substantial resources required are efficiently used, and funding is stable and predictable over the longer term. This plan would be developed and negotiated under a partnership approach with the targeted communities during the current emergency response phase and be implemented as soon as is practicable.[143]

Aboriginal organisations in the Northern Territory have also emphasised that ultimate success in addressing child abuse and other manifestations of dysfunction in their communities will only be possible if Indigenous people in those communities have a real sense of ownership of and involvement in the measures that are taken. Ensuring that services and programs are designed and delivered in a manner that respects and incorporates Indigenous cultures and authority structures will be an important first step in this regard.

143 Combined Aboriginal Organisations of the Northern Territory, *A proposed emergency response and development plan to protect Aboriginal children in the Northern Territory: A preliminary response to the Australian Government's proposals,* 10 July 2007, p3, available online at: http://www.rachelsiewert.org.au/files/campaigns/extras/CAO-report-10%20july.pdf, accessed 2 November 2007.

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

Complementary to Action 8 above, the Government should set a timetable for transitioning the emergency intervention from its stabilisation phase to a community development phase.

The community development phase should, as recommended by the Combined Aboriginal Organisations of the NT, involve the development of a more comprehensive plan and costed financial commitment that addresses the underlying issues within specific timeframes and has bi-partisan political support.

A key feature identified in previous action items is also transitioning the intervention from a mandatory to a voluntary process. This is a transition from intervention to partnership.

Such a partnership could be formalised through local level ***Community Partnership Agreements*.**

The utilisation of such agreement making processes would enable a more holistic approach to the issues being faced by individual communities. It would also assist in ensuring transparency, identifying lines of accountability and aid formal evaluation within communities.

The entering into *Community Partnership Agreements* could also provide the trigger for the Minister for Indigenous Affairs to exercise the ministerial discretions available under the intervention legislation to variously:

- Remove the relevant community from the list of 'prescribed communities';
- Remove the application of the alcohol management regime;
- Remove the application of the income management regime;
- And so forth.

This could be done on the basis that the Minister is satisfied that alternative, community based and supported mechanisms are in place to deal with the issues of child protection, family violence and related community development needs.

This would provide an **incentive based model** to reacting to violence and abuse, grounded in community development principles and the taking of ownership and responsibility by communities in partnership with the federal and territory governments.

It is notable that the new government has stated that the aims of the intervention 'cannot be achieved unless the Commonwealth, after dialogue and genuine consultation with affected Aboriginal communities, sets out a comprehensive long term plan'. They have also acknowledged that:

> Any longer term plan should establish a framework for the achievement, in partnership with the Northern Territory Government and Indigenous communities, of the recommendations set out in the *Little Children are Sacred* report.[144]

144 'Additional comments by the Australian Labor Party', contained in Senate Standing Committee on Legal and Constitutional Affairs, *Report on Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 and four related bills concerning the Northern Territory National Emergency Response*, August 2007, p38.

Community Partnership Agreements could provide a vehicle to meet these objectives.

Action 10: Ensure stringent monitoring and review processes

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

In order for the intervention measures to meet the 'special measures' criteria they must also be monitored over time to ensure that the specific measures which are enacted are appropriate and adapted to enhancing the rights of children, and that they protect against family violence in the prescribed communities to which they apply.

12 months after the enactment of the legislation, an independent review should take place to ensure that the goals of the legislation are being achieved in a manner that is consistent with human rights, and allow for any negative consequences to be identified and addressed as soon as possible. Such a review should cover the efficacy of the substance of all legislative provisions which comprise the intervention legislation and their operation.

Such monitoring is essential given the intent that some aspects of the legislation relating to income management might be adopted nationally from 2009.

The terms of reference of such a review should be broad in scope so that it can consider:

- Whether the legislation is achieving its intended purposes;
- Whether there have been unintended negative consequences;
- Assess appropriate alternative approaches or mechanisms that would enhance the ability of the legislation to achieve its purpose; and
- Require consultation with Indigenous peoples in the review process.

Fundamental to the success of such a review will be the involvement and input of Aboriginal people from the communities involved. Ongoing participation from individuals on the ground will not only ensure the legitimacy of the measures undertaken, it will also help to contribute to their ongoing success as the needs and aspirations of communities change over time.

Conclusion and recommendations

As it stands, there is a need for substantial change for the NT intervention measures to be considered consistent with Australia's international human rights obligations. This report has outlined ten steps to modifying the intervention so that it is consistent with these obligations and ensures Indigenous individuals in Aboriginal communities in the NT equal treatment and full human dignity.

I make the following recommendations for implementing this ten point action plan, and to ensure consistency with Australia's human rights obligations.

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

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

- sections 34(9), 35(11), 37(5), 47(7), 48(5) and 49(4) of the N*orthern Territory National Emergency Response Act 2007* (Cth) relating to determinations about Indigenous land;
- section 78 and sections 97 and 106 of the N*orthern Territory National Emergency Response Act 2007* (Cth) in relation to decisions by the Minister to suspend all the members of a community government council, and decisions of the Secretary of the Department of FACSIA in relation to community store licences respectively; and
- new section144(ka) of the *Social Security (Administration) Act 1999* (enacted by the *Social Security and other legislation amendment (Welfare Payment Reform) Act 2007* (Cth)) in relation to the right to seek a review by the Social Security Review Tribunal of decisions that relate to income management.

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

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

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

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

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

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

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

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

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

Such a clause might read as follows:

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

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

Recommendation 6: Amend the 'special measures' provisions of the NT legislation

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

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

In particular, Parliament should:

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

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

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

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

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

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

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

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

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

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

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

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

Note on implementation: This action can be achieved through the exercise of Ministerial discretion (such as by choosing to **not** exercise her discretion to compulsorily acquire property and instead instructing government officials to negotiate with Aboriginal communities).

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

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

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

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

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

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

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

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

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

Recommendation 12: Supporting community based initiatives for alcohol management

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

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

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

Recommendation 13: Ensuring Indigenous participation and developing community partnerships

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

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

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

Recommendation 14: Monitoring and evaluation of the NT intervention

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

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

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

In addition to the 14 recommendations contained in this report, I also include one follow up action. This indicates what action governments can expect from the Social Justice Commissioner to follow up the issues raised in this report.

Follow Up Action by the Social Justice Commissioner

The Social Justice Commissioner will, in the next *Social Justice Report*, report on the actions taken by the government to address the concerns identified in this report relating to non-compliance with Australia's human rights obligations and the *Racial Discrimination Act 1975 (*Cth). In particular, the Social Justice Commissioner will identify the response of the Australian Government to the 14 recommendations contained in this report.

Appendix 1

Chronology of events relating to the administration of Indigenous affairs: 1 July 2006 – 30 June 2007

Date	Event/summary of issue
July 2006 *Bilateral Agreement on Service Delivery to Aboriginal and Torres Strait Islanders in Western Australia signed.*	A Bilateral Agreement on Indigenous Affairs was signed by the State of Western Australia and the Australian Government. The Agreement establishes an agreed framework and priorities for intergovernmental cooperation and enhanced effort in Indigenous affairs.[1]
1 July 2006 *Community Development Employment Projects (CDEP) programme for 2006-07*	The Australian Minister for Employment and Workplace Relations, today officially launched a guide for Community Development Employment Projects (CDEP) organisations to improve their capacity to lead, govern and manage their business to deliver outcomes for Indigenous people. The Minister also announced that there would be two hundred and twelve organisations providing the Community Development Employment Projects (CDEP) for 2006-07.[2]
2 July 2006 *NAIDOC week 2006 commences*	NAIDOC week commenced today with the theme of *Respect the past – Believe in the future.*

1 The full text of the Bilateral Agreement is available online at: http://www.dia.wa.gov.au/Publications/Files/Bilateral_Agreement.pdf, accessed 24 January 2008.

2 Andrews, K., (Minister for Employment and Workplace Relations), *CDEP 2006-07 To Build On Success,* Media Release, 1 July 2006.

7 July 2006 *Early childhood focus for Indigenous education*	The Australian Minister for Education, Science and Training has been joined by her state and territory counterparts in agreeing to make early childhood education a priority for young Indigenous Australians.[3] At the meeting of the Ministerial Council on Education, Employment, Training and Youth Affairs (MCEETYA) today, education ministers from across the country endorsed a draft paper titled *Australian Directions in Indigenous Education 2005-2008*.[4] This paper will be provided to inform the Council of Australian Governments (COAG) of the critical importance of early childhood education in improving the 'school readiness' and successful participation in primary school education.
12 July 2006 *Funding to protect the Indigenous past for future generations*	The Australian Minister for the Environment and Heritage today announced that the 2006-2007 Indigenous Heritage Programme will provide $2.96 million for 50 projects throughout the nation.[5]
14 July 2006 *The Council of Australian Governments' (COAG) meet in Canberra*	COAG have agreed to adopt a collaborative approach to addressing the issues of policing, justice, support and governance in Indigenous communities. The bilateral agreements between the Commonwealth and the States and Territories will be the key to ensuring that this proceeds. The Commonwealth has agreed to make available funds of $103 million over four years to support the bilateral actions.[6] A communiqué from COAG states that the law's response to family and community violence and sexual abuse must reflect the seriousness of such crimes. COAG agreed that 'no customary law or cultural practice excuses, justifies, authorises, requires, or lessens the seriousness of violence or sexual abuse. All jurisdictions agree that their laws will reflect this, if necessary by future amendment'.[7]

3 Bishop, J., (Minister for Education, Science and Training), *Early childhood focus for Indigenous education,* Media Release, 7 July 2006, available online at: http://www.dest.gov.au/Ministers/Media/Bishop/2006/07/B001070706.asp, accessed 24 January 2008.

4 The full text of the report *Australian Directions in Indigenous Education 2005-2008* can be found online at: http://www.mceetya.edu.au/verve/_resources/Australian_Directions_in_Indigenous_Education_2005-2008.pdf, accessed 24 January 2008.

5 Australian Minister for the Environment and Heritage, *Funding protects Indigenous past for future generations*, Media Release C158/06, 12 July 2006.

6 Council of Australian Governments (COAG), *Council of Australian Governments Meeting*, 14 July 2006, available online at: http://www.coag.gov.au/meetings/140706/index.htm, accessed 24 January 2008.

7 Council of Australian Governments (COAG), *Council of Australian Governments Meeting*, 14 July 2006, available online at: http://www.coag.gov.au/meetings/140706/index.htm, accessed 24 January 2008.

	COAG also asked the Standing Committee of Attorneys-General (SCAG) to report to the next COAG meeting on the extent to which bail provisions and enforcement take particular account of potential impacts on victims and witnesses in remote communities and to recommend any changes required. The COAG meeting followed the recommendations of the *Intergovernmental Summit on Violence and Child Abuse in Indigenous Communities* held on 26 June 2006.[8]
14 July 2006 *National Indigenous Violence and Child Abuse Intelligence Task Force established*	The Australian Crime Commission (ACC) will lead a joint agency intelligence task force to address violence and child abuse in Indigenous communities. The National Indigenous Violence and Child Abuse Intelligence Task Force will be resourced by the Commonwealth, States and Territories Governments and will comprise personnel from the ACC, the Australian Federal Police (AFP), every State and Territory Police Force, and the Australian Institute of Criminology. The objectives of the National Indigenous Violence and Child Abuse Intelligence Task Force include: • Enhancing the national understanding of the nature and extent of violence and child abuse in remote and urban Indigenous communities. • Providing intelligence and other advice to relevant Commonwealth, state and territory organisations on violence and child abuse in remote and urban Indigenous communities, including organised criminal involvement in drugs, alcohol, pornography and fraud. • Conducting research into the impact of improved intelligence and information coordination and into the identification of good practice in the prevention, detection and responses to violence and child abuse in Indigenous communities.[9]
18 July 2006 *The Australian Government responds to the Indigenous Higher Education Advisory Council Policy Paper*	The Australian Government's response to a report by the Indigenous Higher Education Advisory Council (IHEAC) includes the implementation of initiatives aimed at building partnerships between education sectors to work for the advancement of Indigenous students in higher education.

8 *Crimes Amendment (Bail and Sentencing) Bill 2006 (Cth)*. Explanatory Memorandum, p1.

9 Brough, M., (Minister for Indigenous Affairs) and Ellison, C., (Minister for Justice and Customs), Joint Media Release, *National Indigenous Violence and Child Abuse Intelligence Task Force*, 14 July 2006, available online at: http://www.facsia.gov.au/internet/Minister3.nsf/content/indigenous_violence_and_child_abuse_intelligence_14jul06.htm, accessed 24 January 2008.

	The Minister for Education, Science and Training launched the Council's policy paper *Improving Indigenous Outcomes and Enhancing Indigenous Culture and Knowledge in Australian Higher Education*,[10] and announced an immediate $1.73 million investment to support several key priorities in the Council's paper.[11]
18 July 2006 *The Registrar of Aboriginal Corporations appoints an Administrator to Mutitjulu*	The Australian Minister for Families, Community Services and Indigenous Affairs has confirmed that the Registrar of Aboriginal Corporations has appointed an administrator to run the Mutitjulu community at Uluru.[12]
19 July 2006 *ACT Health Minster releases the Aboriginal and Torres Strait Islander Health and Family Wellbeing Plan 2006-2011*[13]	The ACT Minister for Health today released the *Aboriginal and Torres Strait Islander Health and Family Wellbeing Plan 2006-2011*.[14] The ACT *Aboriginal and Torres Strait Islander Health and Family Wellbeing Plan 2006-2011* is the ACT's response to the Australian Government's *National Strategic Framework for Aboriginal and Torres Strait Islander Health (NSFATSIH)* (July 2003) requirement that each state and territory jurisdiction develop a local implementation plan.[15]
20 July 2006 *The Native Title Amendment (Technical Amendments) Act 2007 receives Royal Assent*	The *Native Title Amendment (Technical Amendments) Act 2007* received Royal Assent today. The *Technical Amendments Act* includes measures to: • improve the workability of the Native Title Act by making a series of minor and technical amendments • make minor amendments to provisions applying to Native Title Representative Bodies (NTRBs) to complement measures in the *Native Title Amendment Act 2007*, and • partially implement two of the recommendations from the Report on the Structures and Processes of Prescribed Bodies Corporate (PCBs).

10 The full text of the policy paper *Improving Indigenous Outcomes and Enhancing Indigenous Culture and Knowledge in Australian Higher Education* is available online at: http://www.dest.gov.au/sectors/indigenous_education/publications_resources/profiles/improving_indig_outcomes.htm, accessed 24 January 2008.

11 Bishop, J., (Minister for Education, Science and Training), *Supporting Indigenous Higher Education*, Media Release, 18 July 2006, available online at: http://www.dest.gov.au/Ministers/Media/Bishop/2006/07/b002180706.asp, accessed 24 January 2008.

12 ABC News Online, *Administrator appointed to 'dysfunctional' Mutijulu*, 18 July 2006, available online at: http://www.abc.net.au/news/newsitems/200607/s1689735.htm, accessed 24 January 2008.

13 Gallagher, K., (Minister for Health), *Plan for Aboriginal and Torres Strait Island Health and Wellbeing,* Media Release, 21 July 2006, available online at: http://www.chiefminister.act.gov.au/media.asp?section=53&media=1481&id=1481&title=, accessed 24 January 2008.

14 The full text of the report is available online at: http://www.health.act.gov.au/c/health?a=da&did=10107160, accessed 24 January 2008.

15 The full text of the report is available online at: http://www.health.gov.au/internet/wcms/publishing.nsf/Content/health-oatsih-pubs-healthstrategy.htm, accessed 24 January 2008.

	Some of the amendments, including those relating to PBC's and NTRBs, came into force the day after Royal Assent. Most of the technical amendments to the *Native Title Act* will come into effect on 1 September 2007. The delayed commencement of these provisions will ensure all parties are aware of, and take into account, the relevant changes.[16]
23 July 2006 *The New South Wales Government releases its Indigenous child sex abuse report "Breaking The Silence: Creating The Future"*	The New South Wales Government report into child sexual abuse in Indigenous communities: *Breaking the Silence: Creating the Future. Addressing child sexual assault in Aboriginal communities in New South Wales* is released.[17] The report reaffirms that the problem of child sexual abuse is not limited to remote communities in the Northern Territory and is a problem that exists in urban and rural locations in New South Wales.
25 July 2006 *Indigenous Youth Mobility Programme (IYMP) launched in Perth*	The Minister for Education, Science and Training launches the Indigenous Youth Mobility Programme (IYMP)[18] for Western Australia. The programme is one element of the Australian Government's Indigenous Australians Opportunity and Responsibility commitment, and will provide $23.1 million over 4 years to enable 600 young people from remote Australia to accept training and employment opportunities that are available in major centres around the country.[19]
25 July 2006 *Australian Prime Minister urges local action on reconciliation*	The Prime Minister has launched a national program of Reconciliation Action Plans at a function in Melbourne today. Reconciliation Action Plans (RAPs) are an initiative of Reconciliation Australia that are intended to assist organizations (both governmental, non-government and from the corporate sector) to turn good intentions into actions.[20] The overarching objective of all Reconciliation Action Plans is to close the 17-year life expectancy gap between Indigenous and non-Indigenous children. Individual RAPs are a tool for organisations to demonstrate actions they will take to pursue this goal and reconciliation generally.

16 Australian Government, Attorney-Generals Department Website, *Native Title Reform*, available online at: http://www.ag.gov.au/nativetitlesystemreform, accessed 24 January 2008.

17 The full text of the report is available online at: http://www.lawlink.nsw.gov.au/acsat, accessed 24 January 2008.

18 The full text of the Indigenous Youth Mobility Programme can be found online at: http://www.dest.gov.au/sectors/indigenous_education/programmes_funding/programme_categories/iymp/default.htm, accessed 24 January 2008.

19 Bishop, J., (Minister for Education, Science and Training), *Indigenous Youth Mobility Programme (IYMP) launched in Perth*, Media release, 24 July 2006, available online at: http://www.dest.gov.au/ministers/media/bishop/2006/07/b012240706.asp, accessed 24 January 2008.

20 More information on Reconciliation Actions Plans is available online at: http://www.reconciliation.org.au/i-cms.isp?page=256, accessed 24 January 2008.

25 July 2006 *ABSTUDY report released by the Australian Minister for Education, Science and Training*	The Australian Minister for Education Science and Training last week released the final report of the *Review into the impact of ABSTUDY policy changes that came into effect in 2000*.[21] The report finds that almost the entire decline in Indigenous higher education enrolments in 2000 is accounted for by the decline in numbers commencing study, and that three quarters of this is due to reductions in numbers in enabling (pre degree courses) and diploma courses.[22]
27 July 2006 *The Australian Government announces three new initiatives to improve the health of Indigenous people in the Torres Strait and far North Queensland*	The Australian Government today announces three new initiatives to improve the health of Indigenous peoples in the Torres Strait and far North Queensland. The initiatives are: The Torres Strait Health Partnership Framework Agreement,[23] signed today by Australian and State health ministers and representatives of the Torres Strait community; a new chronic disease centre on Thursday Island; and an asthma spacer program to improve treatment for Indigenous children.[24] The Australian Government has also contributed $1.25 million to help build the new Chronic Disease Prevention and Management Centre on Thursday Island, which Queensland Health will operate.
4 August 2006 *Australian Government directs additional funding to early childhood education for Aboriginal and Torres Strait Islander people*	Today the Minister for Education, Science and Training, announced that the Australian Government has directed an additional $5 million in early childhood education to expand initiatives for Aboriginal and Torres Strait Islander people.[25] The extra $5million funding is available over three years through the Parent School Partnerships Initiative programme.[26]

21 The full text of the report, *Review into the impact of ABSTUDY policy changes that came into effect in 2000,* can be found online at: http://www.dest.gov.au/sectors/research_sector/publications_resources/profiles/abstudy_changes.htm, accessed 24 January 2008.

22 Department of Education, Science and Training, *Review into the impact of ABSTUDY policy changes that came into effect in 2000*, Abstract, available online at: http://www.dest.gov.au/sectors/research_sector/publications_resources/profiles/abstudy_changes.htm, accessed 24 January 2008.

23 Agreements, Treaties and Negotiated Settlements Project, *Torres Strait Health Partnership Framework Agreement*, 25 July 2006, available online at: http://www.atns.net.au/agreement.asp?EntityID=39, accessed 24 January 2008.

24 Abbot, T., (Minister for Health and Ageing), *New steps to improve Indigenous health in far north Queensland*, Media Release, 26 July 2006, available online at: http://www.health.gov.au/internet/ministers/publishing.nsf/content/health-mediarel-yr2006-ta-abb111.htm?OpenDocument&yr=2006&mth=7, accessed 24 January 2008.

25 Bishop, J., (Minister for Education, Science and Training), *Strengthen early childhood education for Indigenous students,* Media release, 4 August 2006, available online at: http://www.dest.gov.au/Ministers/Media/Bishop/2006/08/B001040806.asp, accessed 24 January 2008.

26 For more information on the Parent School Partnerships Initiative programme see: http://www.det.wa.edu.au/education/Abled/parent_school_partnerships.html, accessed 24 January 2008.

5 August 2006 *Indigenous education and training theme for Garma Festival*	More than 2,000 people have gathered at Gulkula in East Arnhem Land for the eighth annual Garma Festival organised by the Yothu Yindi Foundation. This year's theme is Indigenous education and training.[27]
8 August 2006 *International Day of the World's Indigenous Peoples*	The Aboriginal and Torres Strait Islander Social Justice Commissioner said that today's International Day of the World's Indigenous Peoples, the second International Decade of the World's Indigenous People and the impending vote for adoption of the Declaration on the Rights of Indigenous Peoples shows there is growing international recognition of indigenous peoples' human rights.[28]
9 August 2006 *Outback Stores formed*	A new entity – Outback Stores is created. It is a wholly owned subsidiary of Indigenous Business Australia (IBA). Outback Stores has been formed to accommodate the Australian Government's recent Budget commitment to spend $48 million over four years to address ongoing concerns regarding the running of outback stores. The Chairman of IBA will head a Board that includes some of the country's leading former CEOs from the retail and wholesale sectors in a bid to improve and expand the number of remote community stores in Indigenous areas. Community stores have the ability to improve health standards of remote area Indigenous communities by providing good food at affordable prices.[29]
11 August 2006 *The Aboriginal and Torres Strait Islander Social Justice Commissioner voices concerns about amendments to the Aboriginal Land Rights Act (Northern Territory) 1976*	The Aboriginal and Torres Strait Islander Social Justice Commissioner has expressed concerns about the amendments to the *Aboriginal Land Rights Act (Northern Territory) 1976*, which are currently being debated in the Senate. The Commissioner has urged the government to postpone the passage of the Bill until there is more detail available on the impact of the implementation of the legislation and to allow more time for consultation with landowners in the Northern Territory.[30]

27 ABC News Online, *Indigenous education and training theme for Garma Festival*, 5 August 2006, available online at: http://www.abc.net.au/news/newsitems/200608/s1707059.htm, accessed 24 January 2008.

28 Calma, T., (Aboriginal and Torres Strait Islander Social Justice Commissioner), *International Day of the World's Indigenous Peoples*, Media release, 8 August 2006, available online at: http://www.hreoc.gov.au/about/media/media_releases/2006/60_06.htm, accessed 24 January 2008.

29 Australian Government, Indigenous Business Australia, *Outback Stores to unveil high-level board*, Media release, 9 August 2006.

30 Calma, T., (Aboriginal and Torres Strait Islander Social Justice Commissioner), *Postpone the passage of the Aboriginal Land Rights Act Bill*, Media release, 11 August 2006, available online at: http://www.hreoc.gov.au/about/media/media_releases/2006/62_06.htm, accessed 24 January 2008.

	Some of the major amendments being proposed involve: the provision for 99 year leases over land owned by traditional owners; • amendments which break up Land Councils, remove their financial independence (through removal of a statutory funding guarantee), and require them to publicly disclose confidential minutes; • the termination of non-contiguous land claims to the intertidal zone; and • enabling the NT Government to meet its rental and administration costs for community leasing from the Aboriginal Benefits Account.[31]
15 August 2006 *Australian Parliamentary Inquiry into the Indigenous visual arts and craft sector*	The Minister for the Arts and Sport today announced an Australian Parliamentary inquiry into the Indigenous visual arts and craft sector. The Senate Environment, Communications, Information Technology and the Arts Legislation Committee will run the inquiry. The committee will report to Parliament in June 2007.[32]
17 August 2006 *The Australian Government passes the Aboriginal Land Rights (Northern Territory) Amendment Bill 2006*	The *Aboriginal Land Rights (Northern Territory) Amendment Bill 2006* was passed today. The Bill will introduce new streamlined procedure for exploration and mining on Aboriginal land contained in the Amendments. The Bill includes a provision that Land Councils will be funded only on their performance and outcomes.
21 August 2006 *Native Title Claims Resolution Review Report Released*	The Australian Attorney-General today announced details of the Government's reforms to the process of the resolution of native title claims. The move arises from the Government's response to the Native Title Claims Resolution Review, an independent review into the process of resolving native title claims. The independent review was established as part of the Australian Government's package of six inter-related reforms to the native title system announced in September 2005. The Attorney-General today released the report of the review along with the Government's response. The reforms include giving the National Native Title Tribunal (NNTT) additional powers to more effectively mediate native title matters.

31 Northern Land Council, *NLC calls for ALRA postponement*, Media Release, 4 August 2006, available online at: http://www.nlc.org.au/html/wht_media.html, accessed 29 January 2008.

32 Kemp, R., (Minister for the Arts and Sport), *Inquiry into the Indigenous visual arts sector*, Media Release, 15 August 2006, available online at: http://www.minister.dcita.gov.au/kemp/media/media_releases/inquiry_into_the_indigenous_visual_arts_sector, accessed 24 January 2008. Full terms of reference for the inquiry are available online at: http://www.aph.gov.au/senate/committee/ecita_ctte/indigenous_arts/tor.htm, accessed 24 January 2008.

	Amendments to the *Native Title Act 1993* arising from the Review are likely to be introduced later this year, along with legislation which will give effect to other elements of the reforms.[33]
30 August 2006 *Australian Government ratifies two Optional Protocols to the United Nations Convention on the Rights of the Child*	The Human Rights and Equal Opportunity Commission (HREOC) has welcomed the announcement that the Australian Government has ratified the two Optional Protocols to the United Nations Convention on the Rights of the Child. Australia's ratification of the Protocols sends a clear signal to the international community about the importance of these principles and the role of international law in protecting children around the world.[34] In 2004, the Human Rights and Equal Opportunity Commission (HREOC) made a submission on the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict, to the Joint Standing Committee on Treaties.[35]
19 October 2006 *Passage of the Australian Corporations (Aboriginal and Torres Strait Islander) Act 2006*	The *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act) was passed today. When it commences on 1 July 2007, it will replace the *Aboriginal Councils and Associations Act 1976 (ACA Act)*. Corporations will have up to two years – the 'transitional period' – to make the necessary changes to comply with the new law.[36]
27 October 2006 *The Western Australian Law Reform Commission Report on Aboriginal Customary Laws is launched*	From December 2000 to October 2006 the Western Australian Law Reform Commission undertook a detailed inquiry into the recognition of Aboriginal law and culture in Western Australia.

33 Ruddock, P., (Attorney-General), Media Release 158/2006, *Improving resolution of native title claims*, 21 August 2006, available online at: http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2006_Third_Quarter_1582006_-_21_August_2006_-_Improving_Resolution_of_Native_Title_Claims, accessed 24 January 2008. Information about other elements of the reforms is available at: http://www.ag.gov.au/nativetitlesystemreform. The report and the Government's response are available at: http://www.ag.gov.au/claimsresolutionreview, acccessed 24 January 2008.

34 Human Rights and Equal Opportunity Commission, *HREOC congratulates government for ratifying children's rights protocols,* Media Release, 30 August 2006, available online at: http://www.humanrights.gov.au/about/media/media_releases/2007/5_07.html, accessed 24 January 2008.

35 A copy of the Commission's submission can be found at: http://www.humanrights.gov.au/legal/submissions/jscot_submission_croc_optional_protocol.html, accessed 24 January 2008.

36 Australian Government, Office of the Registrar of Aboriginal and Torres Strait Islander Corporations website, *The Corporations (Aboriginal and Torres Strait Islander) Act 2006*, available online at: http://www.orac.gov.au/about_orac/legislation/reform_act.aspx, accessed 15 October 2007.

	Over this period the Commission consulted with Aboriginal people, communities and organisations in all regions of the state. The Commission's inquiry culminated in a comprehensive Final Report setting out 131 recommendations for reform of laws and policies and the practices of government agencies, police and courts.[37]
8 November 2006 *Passage of the Australian Crimes Amendment (Bail and Sentencing) Bill 2006*	The *Australian Crimes Amendment (Bail and Sentencing) Bill 2006* amends the sentencing and bail provisions in the *Crimes Act 1914* in accordance with the decisions made by the Council of Australian Governments (COAG) on 14 July 2006.[38] COAG asked the Standing Committee of Attorneys-General (SCAG) to report to the next COAG meeting on the extent to which bail provisions and enforcement take particular account of potential impacts on victims and witnesses in remote communities and to recommend any changes required.The COAG meeting followed the recommendations of the Intergovernmental Summit on Violence and Child Abuse in Indigenous Communities on 26 June 2006. This bill passed through the Senate with two Government amendments.[39]
14 November 2006 *National Indigenous Youth Leadership Group merged with the National Youth Roundtable*	The National Indigenous Youth Leadership Group, which was formed in July 2005, has been merged with the National Youth Roundtable (Roundtable). The original focus of the National Indigenous Youth Leadership Group was the promotion of issues of relevance to young Indigenous Australians.[40] The Roundtable replaced the Australian Youth Policy and Action Coalition, which started with 50 people and decreased to 30 in 2005 when the National Indigenous Youth Leadership Group was formed. The Roundtable is the Australian Government's youth consultation mechanism. It brings together young people aged 15 to 24 years from all areas around Australia and various cultural backgrounds. The Roundtable provides young Australians with the opportunity to meet with the Australian Government to discuss and explore issues that impact on young people.[41]

37 Law Reform Commission of Western Australia website, *Aboriginal Customary Laws*, available online at: http://www.lrc.justice.wa.gov.au/094g.html accessed 16 October 2007.

38 Council of Australian Governments, *Council of Australian Governments – Communiqué -14 July 2006*, 14 July 2006, p13.

39 Parliament of Australia, Parliamentary Library website, *Bills Digest no. 56 2006–07, Crimes Amendment (Bail and Sentencing) Bill 2006*, available online at: http://www.aph.gov.au/library/pubs/bd/2006-07/07bd056.htm#Passage accessed 16 October 2007.

40 Cob, J., (Minister for Community Services), *Labor out of touch on youth leadership*, Media Release, 14 November 2006, available online at: http://www.facs.gov.au/internet/minister4.nsf/content/youth_leadership_14nov06.htm, accessed 24 January 2008.

41 The Australian National Youth Roundtable website, *National Youth Roundtable*, available online at: http://www.thesource.gov.au/involve/NYR/default.asp accessed 16 October 2007.

28 November 2006 *Tasmanian Parliament passes the Stolen Generations of Aboriginal Children Act 2006*	All members of both Houses of Parliament in Tasmania pass the *Stolen Generations of Aboriginal Children Act 2006*. The legislation creates a $5 million fund to provide payments to eligible members of the Stolen Generations of Aborigines and their children. The Act will become operational on January 15, 2007. An Office of the Stolen Generations Assessor has been established and claims for compensation will be determined by January 2008.[42]
10 January 2007 *New Family Violence Prevention Legal Services Unit announced*	Port Lincoln Aboriginal Health Service has been appointed as the newest service provider in the Indigenous Family Violence Prevention Legal Services Program. It is anticipated that the new service will be in its early operational stages in the coming months.[43] The family violence units are established to focus on adults, children and young people who live in regional and remote areas and who are survivor-victims of family violence and sexual abuse or who are at immediate risk of such violence.[44] The appointment is part of the Australian Government's commitment to add five units to the Indigenous Family Violence Prevention Legal Services Program, which will take the total number of units to 31.
23 January 2007 *Minister signs funding agreement for Australian Training College – Pilbara*	The Australian Minister for Vocational and Technical Education today signed a $23.5 million funding agreement to establish the Australian Technical College - Pilbara in Western Australia. This agreement is the 21st Funding Agreement to be signed, providing opportunities for young people to attend Australian Technical Colleges across the nation. It is hoped that 2000 students will study and train in Australian Technical Colleges through 2007. This Australian Technical College is strategically placed in Western Australia's mining heartland and economic engine room to ensure that future skill needs for iconic mining giants such as BHP Billiton Iron Ore Pty Ltd, Chevron Australia Pty Ltd, Pilbara Iron (Rio Tinto Group) and Woodside Energy Pty Ltd can be met.

42 Tasmanian Government, Office of the Stolen Generations Assessor website, *Tasmania says sorry - Stolen Generations of Aboriginal Children,* available online at: http://www.dpac.tas.gov.au/stolengeneration/index.html accessed 15 October 2007.

43 Ruddock, P., (Australian Attorney-General), *New Family Violence Prevention Legal Services Unit announced*, Media Release 004/2007, 10 January 2007, available online at: http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2007_First_Quarter_0042007_-_10_January_2007_-_New_family_violence_prevention_legal_services_unit, accessed 24 January 2008.

44 Calma, T. (Aboriginal and Torres Strait Islander Social Justice Commissioner), *Social Justice Commissioner welcomes new Family Violence Prevention Legal Services Program announced for Port Lincoln*, Media Release, 12 January 2007, available online at: http://www.humanrights.gov.au/about/media/media_releases/2007/3_07.html, accessed 24 January 2008.

	These corporations have been instrumental in working with the Australian Government and the local community in establishing the Australian Technical College - Pilbara, which is also uniquely placed to expand the opportunities of many young Indigenous students in this geographically isolated region. Five Australian Technical Colleges opened in 2006, and a further 16, including the Australian Technical College – Pilbara, are expected to open this year.[45]
25 January 2007 *Australian of the Year Awards*	A record number of Indigenous Australians have been recognised for their contributions to the nation in this year's *Australian of the Year* Awards. High achieving Aboriginal Australians were represented for the first time as finalists in each of the three main categories: *Australian of the Year* (Raymattja Marika), *Senior Australian of the Year* (Patricia Anderson), *Young Australian of the Year* (Tania Major and John Van den Dungen). Queensland's Indigenous youth advocate, Tania Major, was named Young Australian of the Year 2007 for her efforts in addressing the issues involved in the welfare of young Indigenous people.[46]
25 January 2007 *New Family Violence Prevention Legal Service for Broken Hill*	The Australian Government has selected the Far West Community Legal Centre to provide extra legal and support services to Indigenous Australians in the Broken Hill area who are victims of family violence and sexual assault. The new service is expected to start operating in the coming months, after its detailed funding arrangements are finalised.[47]
13 February 2007 *New South Wales Police recruits have largest number of Indigenous graduates*	The largest ever class of NSW Police recruits including 12 of Aboriginal or Torres Strait Islander descent will graduate in Goulburn today, boosting the organisation's strength to approximately 15,300 officers.

45 Hardgrave, G., (Australian Minister for Vocational and Technical Education, Minister Assisting the Prime Minister), *Minister signs funding agreement for Australian Training College – Pilbara*, Media Release, 18 January 2007, available online at: http://www.dest.gov.au/Ministers/Media/Hardgrave/2007/01/H001180107.asp, accessed 24 January 2008.

46 Australian of the Year Awards, *Climate Change Crusader named Australian of the Year*, Media Release, 25 January 2007, available online at: http://www.australianoftheyear.gov.au/pages/page307.asp, accessed 24 January 2008.

47 Vaile, M., (Deputy Prime Minister, Minister for Transport and Regional Services, Leader of Nationals) and Cobb, J., (Minister for Community Services), *Australian Government Takes on Family Violence in Broken Hill*, Joint Media Statement, 24 January 2007, available online at: http://www.ministers.dotars.gov.au/mv/releases/2007/January/008MV_2007.htm, accessed 24 January 2008.

21 February 2007 *Petrol sniffing campaign expanded*	The Minister for Health and Ageing and the Minister Family and Community Services and Indigenous Affairs have announced that the Australian Government have expanded efforts to help Indigenous communities address petrol sniffing and other substance abuse problems. The Government's Central Australian anti-petrol sniffing strategy will be expanded to north of Alice Springs above Ti Tree as well as into Indigenous communities in the East Kimberley region of Western Australia.[48]
22 February 2007 *Council of Australian Governments (COAG) Indigenous Trials*	The Council of Australian Governments (COAG) trials operating in eight Indigenous communities across Australia will be further developed as part of the Governments Blueprint for Action in Indigenous Affairs, the Minister for Families, Community Services and Indigenous Affairs, announced today.[49] 'The trials, administered jointly by the Commonwealth, state and territory governments, began in 2002 and explored new ways of working to reduce Indigenous disadvantage', the Minister said. The Minister stressed that commitments made during the trials would be honoured. In the APY Lands, the Department of Health and Ageing will continue to take a lead role in seeing through its commitments and the Department of Education, Science and Training will remain a key player in the Murdi Paaki region. Agreements were made with state and territory governments in 2006 for more place-based approaches in Galiwinku (NT), Alice Springs, Mornington Island (QLD) and Kalumburu (WA). Other sites are being negotiated with state and territory Governments.[50]
23 February 2007 *$36.6 million to improve Indigenous telecommunications*	The Australian Minister for Communications, Information Technology and the Arts today invited remote Indigenous communities to apply for funding under the new $36.6 million Backing Indigenous Ability telecommunications program.

48 Brough, M., (Minister for Families, Community Services and Indigenous Affairs, Minister Assisting the Prime Minister for Indigenous Affairs) and Abbot, T., (Minister for Health and Ageing), *Petrol-sniffing Campaign Expanded*, Joint Media Release, 20 February 2007, available online at: http://facs.gov.au/internet/minister3.nsf/content/20feb_petrolsniffing.htm, accessed 24 January 2008.

49 The COAG synopsis report is available online at: http://www.atsia.gov.au/media/media07/220207_coag_trials.aspx and the individual evaluation of the COAG trials are available online at: http://www.oipc.gov.au/publications/default.asp accessed 17 October 2007.

50 More information on the COAG trials is available online at: http://www.indigenous.gov.au/coag/default.html, accessed 24 January 2008.

	The Backing Indigenous Ability (BIA) telecommunications program aims to improve access to telecommunications services in regional and remote Aboriginal and Torres Strait Islander communities. The program builds on the Telecommunications Action Plan for Remote Indigenous Communities (TAPRIC) that saw the installation of 216 robust phones throughout 124 Indigenous communities. Remote Indigenous communities are eligible to apply for funding or services, although some funding will be reserved for allocation on a needs basis, for example as part of a Shared Responsibility Agreement. Applications from remote Indigenous communities of any size are invited now.[51]
7 March 2007 *Leadership in Indigenous Education recognised*	The Minister for Education, Science and Training recognises 18 schools for outstanding leadership in Indigenous Education. The Excellence in Leadership in Indigenous Education Awards were established in 2003 as part of the Australian Government's *Dare to Lead Project*. More than 1,100 Indigenous students across Australia will have benefited from the actions of the 18 award winning schools. An 18-member selection panel consisting of school leaders and Aboriginal educators from different states and territories plus representatives of the four peak principals associations evaluated the applications received from schools nationally.[52]
13 March 2007 *New Family Violence Prevention Units in Western Australia*	Kullarri Indigenous Women's Aboriginal Corporation in Broome and Southern Aboriginal Corporation in Albany were named as the newest service providers for the Indigenous Family Violence Prevention Legal Services program. The new units will service communities in the Broome Local Government Area and in the lower great southern region of Western Australia, including Albany, Mt Barker, Katanning, Kojonup, Gnowangerup, Tambellup and Jerramungup.[53]

51 Abbot, T., (Minister for Health and Ageing), *$36.6 million to improve Indigenous telecommunications*, Media Release, 23 February 2007, http://www.tonyabbott.com.au/news/article.aspx?ID=1509, accessed 24 January 2008.

52 Bishop, J., (Minister for Education, Science and Training, Minister Assisting the Prime Minister for Women's Issues), *Making a difference for Indigenous students*, Media Release, 8 March 2007, available online at: http://www.dest.gov.au/ministers/media/bishop/2007/03/b0002080307.asp, accessed 24 January 2008.

53 Ruddock, P., (Attorney-General), *New Family Violence Prevention Units in WA*, Media Release, 13 March 2007.

13 March 2007 *New Sports Academies for Indigenous Students*	The Minister for Education, Science and Training today announced that new school-based sports academies for Indigenous students will aim to engage, motivate and lead them into lifelong learning. Thirteen academies drawing students from secondary schools, including remote areas will begin operating in five States and Territories over the next few months. The Programme will deliver 20 academies to 2009.[54]
13 March 2007 *Financial commitment from Australian Government to upgrade Alice Springs Town Camps*	The Minister for Families, Community Services and Indigenous Affairs and Minister Assisting the Prime Minister for Indigenous Affairs said the original Australian Government commitment of $20 million announced last year would be increased by up to a further $50 million to provide for an upgrade of town camps. The funding announced last year included $10 million to be used to establish two short-term visitor accommodation centres, following approval by the Northern Territory Government of two sites. The bulk of the funding would be used to upgrade existing town camps.[55]
20 March 2007 *Memorandum of Understanding (MOU) to advance Indigenous employment in the forestry industry*	A Memorandum of Understanding (MOU) has been signed today to focus on Indigenous employment and skills shortages in the forest industry, and on opportunities to encourage Indigenous business in regional Australia.[56] The MOU aims to advance the implementation of the National Indigenous Forest Strategy.[57]
21 March 2007 *Australian Football League (AFL) joins Australian Government to help Indigenous kids participate in sports*	The Minister for Families, Community Services and Indigenous Affairs and the AFL Chief Executive Officer announced details of a three-year partnership between the Australian Government and the Australian Football League. Through the *AFL Club Fostership Program*, the AFL will partner with Indigenous communities and, in conjunction with local schools and community organisations, encourage young people into sporting activities.

54 Bishop, J., (Minister for Education, Science and Training, Minister Assisting the Prime Minister on Women's Issues), *New Sports Academies for Indigenous Students*, Media Release, 13 March 2007, available online at: http://www.dest.gov.au/ministers/media/bishop/2007/03/b001130307.asp, available 24 January 2008.

55 Brough, M., (Minister for Families, Community Services and Indigenous Affairs and Minister Assisting the Prime Minister for Indigenous Affairs), *Major Howard Government investment in Alice Springs Indigenous Accommodation*, Media Release, 13 March 2007, available online at: http://www.facs.gov.au/internet/minister3.nsf/content/alice_springs_13mar07.htm, accessed 24 January 2008.

56 Abetz, E,. (Senator for Fisheries, Forestry and Conservation) Bishop, J., (Minister for Education, Science and Training), Scullion, N., (Minister for Community Services) and Hockey, J., (Minister for Employment and Workplace Relations), *MOU to advance Indigenous employment in the forest industry*, Joint Media Release, 20 March 2007.

57 More information on the National Indigenous Forestry Strategy can be found online at: http://www.daff.gov.au/forestry/policies/nifs, accessed 17 October 2007.

	The AFL All Stars Ambassador Program aims to encourage adolescents to complete secondary school or secure a job.[58]
13 April 2007 *Indigenous Family Income Management (FIM) program opens in Cooktown*[59]	The Minister for Families, Community Services and Indigenous Affairs and Minister Assisting the Prime Minister for Indigenous Affairs today opened a new Family Income Management site in Cooktown, which he said would help Indigenous families better manage their income and create more opportunities for their kids. The Australian Government had committed $16.6million over four years to support the continuation of the first five sites on Cape York and to fund two new sites, the first of which is Cooktown and to support other family and financial management programmes in the Northern Territory and Western Australia.[60]
4 April 2007 *Launch of 'Close The Gap' campaign for Indigenous health equality within 25 years*	Forty of Australia's leading Indigenous and non-Indigenous health peak bodies and human rights organisations joined forces to launch the 'Close the Gap' campaign on Indigenous health inequality. The campaign comes in response to a call from the Social Justice Commissioner to achieve health equality for Aboriginal and Torres Strait Islander people within 25 years.
	'Close the Gap' calls on all levels of Australian government to put in place firm targets, funding and timeframes to address health inequalities, including providing equal access to primary health care for Indigenous Australians within 10 years.[61]

58 Brough, M., (Minister for Families, Community Services and Indigenous Affairs and Minister Assisting the Prime Minister for Indigenous Affairs) and Demetriou, A., (Australian Football League Chief Executive Officer), *AFL stars join Australian Government to help Indigenous kids*, Joint Media Release, 21 March 2007, available online at: http://www.facsia.gov.au/internet/Minister3.nsf/content/afl_partnership_21mar07.htm, accessed 24 January 2008.

59 More information on the Indigenous Family Income Management (FIM) Program can be found online at: http://www.facs.gov.au/internet/facsinternet.nsf/indigenous/programs-money_management.htm, accessed 19 October 2007.

60 Brough, M., (Minister for Families, Community Services and Indigenous Affairs and Minister Assisting the Prime Minister for Indigenous Affairs), *Indigenous Family Income Management (FIM) program opens in Cooktown*, Media Release, 13 April 2007, available online at: http://facs.gov.au/internet/minister3.nsf/content/cooktown_13apr07.htm, accessed 24 January 2008.

61 Human Rights and Equal Opportunity Commission Website, Aboriginal and Torres Strait Islander Social Justice, *Indigenous Health Campaign*, further information available online at: http://www.hreoc.gov.au/social_justice/health/index.html, accessed 29 January 2008.

30 April 2007 *Report of the Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse is presented to the Northern Territory Government*	The Report of the Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (*Ampe Akelyernemane Meke Mekarle "Little Children are Sacred"*) is presented to the Northern Territory Government. The report found that child sexual abuse is serious, widespread and often unreported in Aboriginal communities across the Northern Territory. It makes 97 recommendations across a variety of areas to address this situation. The first recommendation calls for Aboriginal child sexual abuse in the Northern Territory to: be designated as an issue of urgent national significance by both the Australian and Northern Territory Governments, and both governments immediately establish a collaborative partnership with a Memorandum of Understanding to specifically address the protection of Aboriginal children from sexual abuse. It is critical that both governments commit to genuine consultation with Aboriginal people in designing initiatives for Aboriginal communities.
2 May 2007 *Australian Government grants $83,000 for Indigenous youth leadership in Victoria*	Indigenous young people from rural and regional Victoria will benefit from an $83,000 Australian Government initiative, which will see 10 youth leaders hold various activities in their own communities to assist access to mainstream services.[62]
8 May 2007 *Australian Government Budget 2007-2008*	Funding to Indigenous affairs in the 2007-08 Australian Government Budget will total $3.5 billion. This includes $815.7 million in new and extended funding over five years.[63] Key measures include: • Abolishing the Community Housing and Infrastructure Program (CHIP) and replacing it with the Australian Remote Indigenous Accommodation Programme (ARIA). An additional $293.6 million will focus on land tenure reform, mainstream public housing and private home ownership.

62 Australian Government, *$83,000 in funding for Indigenous youth leadership*, Media Release, 2 May 2007, available online at: http://www.facsia.gov.au/internet/minister5.nsf/content/nyc_2may07.htm, accessed 29 January 2008.

63 Brough, M. (Minister for Families, Community Services and Indigenous Affairs), *Budget backs a better future for Indigenous Australians,* Media Release, 8 May 2007, available online at http://www.facsia.gov.au/internet/facsinternet.nsf/VIA/budget2007-08/$File/07_indigenous_complete.pdf, accessed 23 January 2008.

	• Expansion of the Indigenous Youth Mobility Programme that offers boarding school places and scholarships to Indigenous young people from remote communities. An additional $218 million in new funds has been committed over four years. • Additional funding for early childhood development, including home health visits for children aged 0-8 years and better access to child care and playgroups. • Welfare reform measures including more than 800 CDEP positions will be converted into paid employment at a cost of $97.2 million over four years.
9 May 2007 *First ninety-nine year lease agreed to on Aboriginal land in the Northern Territory*	The first ninety-nine year lease over a township on Aboriginal land was signed today. A historic agreement has been reached with the Mantiyupwi people for the lease of the town of Nguiu on the Tiwi Islands in the Northern Territory. A package of benefit for Tiwi people includes the construction of 25 additional houses at Nguiu together with a programme of homes repairs and maintenance, and an additional $1 million to be invested in health initiatives. The formal grant of the ninety-nine year lease will proceed once the Tiwi Land Council completes the steps set out in the *Land Rights Act* to confirm the agreement of traditional owners, consult with other community residents and ensure the lease is appropriate. The ninety-nine year lease will be held by a new Commonwealth statutory officer – the Executive Director of Township Leasing which will issue sub leases, collect rent and administer the head lease.[64]
11 May 2007 *Tri-party Agreement signed in Hope Vale*	A tri-party agreement was signed by the Minister for Families, Community Services, and Indigenous Affairs, Hope Vale Aboriginal Shire Council and the Cape York Institute for Policy and Leadership. The agreement is based on welfare reform and family income management, housing reform and economic development. A business precinct would be established in Hope Vale and the Australian Government would support local people to establish businesses. Home ownership would now be possible, as Hope Vale Aboriginal Shire Council have decided to purchase freehold land adjacent to the town.[65]

64 Brough, M., (Minister for Families, Community Services and Indigenous Affairs Minister Assisting the Prime Minister for Indigenous Affairs), *Breakthrough agreement on Aboriginal Land in the NT*, Media Release, 9 May 2007, available online at: http://www.facs.gov.au/internet/Minister3.nsf/content/emergency_21june07.htm, accessed 24 January 2008.

65 Brough, M., (Minister for Families, Community Services and Indigenous Affairs Minister Assisting the Prime Minister for Indigenous Affairs), *Brighter Future for Hope Vale*, Media Release, 11 May 2007, available online at: http://www.facs.gov.au/internet/minister3.nsf/content/hopevale_11may07.htm, accessed 24 January 2008.

15 May 2007 *Reform package announced for Indigenous communities in Western Australia.*	The West Australian and Australian Governments have announced funding of more than $112 million for a range of service initiatives for Indigenous people living in Western Australia. The State and Federal funding would address new land tenure options to facilitate individual home ownership; upgrades to community infrastructure and housing to address overcrowding in priority communities; and help provide essential services to remote communities. In the East Kimberley, the initiative package will focus on Kalumburu and add to the State Government's already announced reforms at Halls Creek including additional services for drug and alcohol rehabilitation.[66]
16 May 2007 *Australian Government Increase funding to Indigenous Northern Territory Housing*	The Australian and Northern Territory Governments have agreed on a package of housing and infrastructure initiatives to increase spending on housing for Indigenous people in remote communities in the Northern Territory. The package represents an investment by the Australian Government of $163.5 million, and includes the $70 million previously announced by the Minister for Families, Community Services and Indigenous Affairs for the Alice Springs town camp redevelopment.[67]
25 May 2007 *10th Anniversary of Bringing them home Report*	The 1997 *Bringing them home* report has reunited many Indigenous peoples with their families and created a groundswell of compassion and support but the 10th Anniversary of the report is a bittersweet one, the Aboriginal and Torres Strait Islander Social Justice Commissioner said today. The Commissioner said government services should be expanded to support localised activities tailored to the needs of stolen generation members themselves. He said social and emotional wellbeing remained a great-unmet need in the Indigenous community generally and represented an urgent challenge for all governments to ensure appropriate services were provided.[68]

66 Brough, M., (Minister for Families, Community Services and Indigenous Affairs Minister Assisting the Prime Minister for Indigenous Affairs) and Roberts, M., (Minister for Employment Protection), *$112 million reforms package announced for Indigenous communities in WA*, Joint Media Release, 15 May 2007, available online at: http://www.facs.gov.au/internet/minister3.nsf/content/reforms_package_15may07.htm, accessed 24 January 2008.

67 Brough, M., (Minister for Families, Community Services and Indigenous Affairs Minister Assisting the Prime Minister for Indigenous Affairs), *Massive Boost for Indigenous NT Housing by Federal Government*, Media Release, 16 May 2007, available online at: http://ofw.facsia.gov.au/Internet/Minister3.nsf/print/nt-housing-16may07.htm, accessed 24 January 2008.

68 Calma, T., (Aboriginal and Torres Strait Islander Social Justice Commissioner), *10th anniversary is 'bittersweet'*, Media Release, 25 May 2007, available online at: http://www.humanrights.gov.au/about/media/media_releases/2007/34_07.html, accessed 24 January 2008.