

NEVER MIND HUMAN RIGHTS, LET'S SAVE THE CHILDREN: THE AUSTRALIAN GOVERNMENT'S EMERGENCY INTERVENTION IN THE NORTHERN TERRITORY

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We've just passed through the parliament measures which give me the authority and the responsibility to impact on the lives of Indigenous children like no Minister has ever had ...

– Mal Brough, Minister for Indigenous Affairs,
8 August 2007¹

I Introduction

On 21 June 2007, the Australian Government declared that there was a 'national emergency' confronting the welfare of Indigenous children in the Northern Territory.² The stated basis for the Government's announcement was the Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle*, or *Little Children are Sacred*.³ The Government announced a package of far-reaching measures to respond to this 'emergency', including but not limited to widespread alcohol restrictions, pornography bans, compulsory health checks for Indigenous children, the quarantining of welfare payments, government acquisition of townships, and housing reforms.⁴ After some modification, the implementation of these measures (now known as the Northern Territory Emergency Response or 'NTER') subsequently commenced.

While the NTER was an initiative of the former Coalition Government, the Labor Party supported the NTER whilst in Opposition and, in government, agreed to continue most NTER measures until a 12-month review had taken place.⁵ Now that the report by the NTER Review Board is complete,⁶ there is little indication of substantive change in the immediate future. The Rudd Government has indicated that it will 'continue and strengthen the NTER', with existing NTER measures remaining in place for a 'transitional period' of 12 months at least.⁷

Although it is accepted that the policy rationale and strategic objectives of the NTER extended beyond child protection,⁸ attitudes towards Indigenous children and assumptions about how to best secure their protection undoubtedly fuelled and shaped the intervention. The mantra of 'protecting the children' and 'saving the children' was repeated over and over by the Howard Government, its supporters and certain media commentators.⁹ The Howard Government also asserted that the measures taken under the NTER were in compliance with the *Convention on the Rights of the Child* ('CRC'),¹⁰ a treaty Australia signed and ratified in 1990.

In light of these claims and context, this paper critiques the NTER and its purported aims for Indigenous children from a rights-based perspective. Specifically, it uses the standards and principles set down in international human rights law, and in particular the CRC, to critically assess the rhetoric and substance of the NTER. The focus of the analysis is on the genesis of the NTER and its first year of operation, but recent developments and future directions are also briefly discussed. Given the considerable breadth of the NTER, the paper does not seek to provide a comprehensive analysis of each of its measures, but rather considers several aspects of the intervention and their implications for Indigenous children. The aspects of the NTER considered are: (1) the framework used to understand the roles of, and relationships between, Indigenous children, their caregivers and the state; (2) the substantive 'child safety' and 'income management' policy measures under the NTER; and (3) the process by which the NTER was developed and implemented. An analysis of recent developments and future directions in the NTER is then provided. While the paper acknowledges that child protection is a serious human rights issue for Indigenous children, it argues that the policy framework, measures and

process employed by the NTER fall short of the principles and standards mandated by a rights-based approach.

II Analysis of the NTER

A The Framework Used to Define Roles, Responsibilities and Relationships in the NTER

1 Characterisations of Indigenous Children, Their Caregivers and the State

A rights-based approach is premised on the understanding that all people, including children, possess certain fundamental rights by virtue of their inherent dignity and common humanity.¹¹ It also, correspondingly, identifies duty-bearers, who have an obligation to ensure that these rights are respected, protected and fulfilled.¹² In this respect, a rights-based approach represents a significant departure from traditional welfare approaches that position children as passive objects of adult concern.¹³

A rights-based approach therefore has implications for the way in which Indigenous children, Indigenous adults and the state are characterised. It mandates that Indigenous children be understood as rights-holders, with entitlements and agency, rather than objects of discretionary adult intervention. Indigenous adults must also be understood as rights-holders, with their inherent dignity and worth affirmed. Furthermore, Indigenous adults occupy the role of duty-bearer in relation to their children under a rights-based framework. The CRC upholds the family as the 'natural environment for the growth and well-being of all its members' and recognises the 'primary role' of parents in the upbringing and development of children.¹⁴

The state also occupies the role of duty-bearer in relation to Indigenous children (and the wider Indigenous community) under a rights-based approach. The provisions of the CRC place a direct obligation on the state to realise the rights of Indigenous children.¹⁵ Other articles require the state to assist and support Indigenous parents in the performance of their child-rearing responsibilities.¹⁶ By defining roles and responsibilities in this way, a rights-based approach 'reconceptualises the power relationship between children, adults and the State'.¹⁷

In developing and communicating the NTER, however, the Howard Government used a paternalistic logic rather

than a rights-based framework to define the roles and responsibilities of Indigenous children, their caregivers and the state. Indigenous children were portrayed as passive victims in need of salvation, rather than rights-holders with agency. The Government stated that the intervention was about the nation standing up to 'answer the call for Aboriginal children in the Territory',¹⁸ to 'save Indigenous children'.¹⁹ It was 'hell-bent on doing everything it [could] to protect these innocent children'.²⁰ Commentators such as Noel Pearson endorsed this paradigm, suggesting that 'a bit of paternalism' is just what the 'terrified child huddling in the corner' needs.²¹

Indigenous parents, correspondingly, were portrayed as 'the problem'. The Howard Government stated that they were failing to adhere to 'normal community standards' and that their 'parenting behaviours' had 'broken down'.²² There was no mention of the *Little Children are Sacred* finding that '[m]ost Aboriginal people are willing and committed to solving problems and helping their children'.²³ The inference was that all Aboriginal parents were neglectful or abusive and no reference was made to any positive role they might have in ensuring their children's wellbeing.

The state, on the other hand, was cast as a (non-Indigenous) saviour who would assume complete responsibility for the welfare of Indigenous children. In the words of the then Prime Minister, the intervention was 'a sweeping assumption of power and a necessary assumption of responsibility'.²⁴ The extent to which the state intended to assume power and responsibility was made clearly evident in the following comment by Major General David Chalmers, Commander of Operations:

once we can assure the safety of children and that they are not being neglected, we will have to ensure that they are being educated, that all children are going to school, that their homes are hygienic.²⁵

Rather than offering the support and assistance to families mandated by the CRC, the model was one of state control over the upbringing, protection and development of Indigenous children.

This prism for viewing children, their families and the state is grounded in a 'child-saving' welfare model. Having its origins in the late 19th century, the model was informed by middle class concerns over the 'dangerous classes', which

drove a system of welfare designed to 'correct and control the poor'.²⁶ Influenced by biological determinists such as Darwin and Lombroso, the assumption was that children needed to be 'rescued from those parents who did not have the innate qualities, right values, correct attitudes and appropriate behaviours' necessary to raise children.²⁷

This model has long been applied to Indigenous people in Australia. In this context, it is Aboriginality, Aboriginal culture, or the perceived 'dysfunction' of Aboriginal families from which children must be saved. These attitudes propelled the policies and practices behind the Stolen Generations, the forcible removal of Aboriginal and Torres Strait Islander children from their families and communities. There is also evidence that these attitudes pervade much of contemporary child protection practice concerning Indigenous Australian children. In the *Bringing Them Home* Report, which was established to investigate the Stolen Generations history and legacy, Link-Up NSW observed:

Aboriginal families continue to be seen as 'the problem', and Aboriginal children continue to be seen as potentially 'savable' if they can be separated from the 'dysfunctional' or 'culturally deprived' environments of their families and communities ... Aboriginal adults are 'hopeless' and cannot be changed, but Aboriginal children 'have a chance'.²⁸

Deploying this paternalistic framework to define the roles of Indigenous children, their families and the state in the NTER has had symbolic and practical implications. By characterising Indigenous children as passive subjects of concern rather than rights-holders, the NTER has disempowered Indigenous children. It has denied them the capacity to be 'active agents in their own protective behaviour'.²⁹ By pathologising Indigenous parents, the NTER has deligitimised the human rights claims of Indigenous adults as well. Further, both the parents' role as duty-bearers in relation to their children and the concomitant obligation of the state to support them in this role have been obscured. Finally, by positioning itself in the role of saviour, the state framed itself and the NTER as benevolent and discretionary. There was little scope for analysis of the NTER based on notions of government obligation and accountability.

2 The Relationship Between the Rights of Indigenous Children and the Wider Indigenous Community

Contrary to popular misconception, a rights-based approach

to matters involving children does not require that children's needs or interests be automatically prioritised above those of other groups in society. A rights-based approach is guided by overarching principles,³⁰ which include:

- universality: all individuals everywhere enjoy human rights;³¹ and
- indivisibility and interdependency: all human rights are indivisible and interdependent.³²

These principles mandate that the human rights of all people must be respected in a comprehensive and integrated manner. While balancing exercises are often required, children's rights must be addressed in conjunction with those of other groups in society.³³ States are challenged with finding ways to 'mesh' the human rights of all citizens 'in a coherent, mutually reinforcing and workable whole'.³⁴

A rights-based approach also recognises that the rights of children are inextricably tied up with those of their caregivers. It is, as Woodhouse has noted, 'a fallacy' to assert that 'children can thrive ... while their care-givers struggle, or that care-givers' needs can be severed from the child'.³⁵ The CRC expressly recognises the importance of parents, family and the community to children's wellbeing. The Preamble refers to the family 'as the fundamental group of society and the natural environment for the growth and wellbeing of children'. It recognises that children should 'grow up in a family environment, in an atmosphere of happiness, love and understanding' and states that the family must 'be afforded the necessary protection and assistance so that it can fully assume its responsibilities to the community'. The importance of family is also underscored in various provisions of the CRC, including the right of a child to a name and nationality and, as far as possible, to know and be cared for by his or her parents (art 7); the right to identity, including nationality, name and family relations (art 8); and the right of a child not to be separated from his or her parents against the parents' will, unless such removal is in the child's best interests (art 9).

Specific emphasis has been placed on the importance of family and community wellbeing to Indigenous children under the CRC. The Committee on the Rights of the Child has urged states to 'take effective measures to safeguard the integrity of indigenous families and assist them in their child-rearing responsibilities'.³⁶ Commentators both domestically and overseas have also highlighted the way in which 'the

best interests' of Indigenous children are linked with those of their wider community and must be interpreted in this context.³⁷ Therefore, while in an individual crisis situation child safety will be paramount, strategies to ensure the protection and wellbeing of Indigenous children must also protect the child's culture, identity and the rights and interests of his or her community. Strategies must guard against violence and abuse, but also 'ensure safe, healthy communities and a meaningful life for the children born into these communities in the years to come'.³⁸

These principles have generally not been observed in the NTER. From the moment the intervention was announced, the right of Indigenous children to protection was portrayed as a 'meta-goal' – one that could not (or should not) be understood in the context of or balanced with other human rights concerns. The Howard Government and certain commentators defended various criticisms of the NTER – the infringements of Indigenous land rights, the suspension of the *Racial Discrimination Act 1975* (Cth) ('RDA') and the lack of consultation with Indigenous people – with the end goal of child safety. In an interview on ABC TV's *Lateline*, Noel Pearson stated: 'the imperative here is the protection of our children we ... have got to ask ourselves the hard question – do we put the protection of our children ahead of everything else'?³⁹ *The Weekend Australian* has also noted that it supported the NTER's suspension of the RDA on the basis that 'the rights of Aboriginal children to a decent life free of fear trumped every other consideration'.⁴⁰

In many respects the NTER has therefore embraced the concept or slogan of 'children first'. This approach places children on

[a] 'more equal than others' pedestal ... characterising more a charity-based approach to children, where sentimentality of children's vulnerability leads to facile 'separate' responses: never mind human rights, let's help children.⁴¹

Under such a model, children's rights or interests are often pitted against adults.⁴² It stands in direct contrast to rights-based principles which recognise the universality, indivisibility and interdependence of human rights, and the importance of family and community to children's protection and wellbeing.

B Substantive Policy Measures Taken Under the NTER

Under a rights-based approach, all law, policy and programs should further the realisation of human rights.⁴³ Human rights principles and standards not only set policy or development outcomes (such as fulfilling the right to health or the right to education); they also influence the way in which those outcomes should be achieved. Whilst there is no prescriptive process that must be followed, it is informed by human rights principles such as equality and non-discrimination, participation and empowerment.⁴⁴ United Nations agencies have also provided some guidance on the operationalisation of a rights-based approach in their Statement of Common Understanding on the Human Rights-Based Approach to Development Cooperation.⁴⁵ Relevantly, the Statement of Common Understanding provides that a human rights-based approach should:

- identify the human rights claims of rights-holders and the corresponding human rights obligations of duty-bearers;
- identify the immediate, underlying and structural causes where rights are not realised; and
- develop strategies to strengthen the capacities of rights-holders to make their claims and of duty-bearers to meet their obligations.⁴⁶

This section considers some of the substantive policy measures taken under the NTER against the provisions of the CRC and this associated framework for rights-based policy-making.

1 Child Safety Measures: Ensuring the Right of Indigenous Children to Protection

The CRC enshrines the right of children to protection from all forms of violence, abuse, injury, neglect, maltreatment and exploitation, including sexual abuse.⁴⁷ Under art 19(2), states are required to take a number of measures to protect children from such maltreatment, including:

- effective procedures for the establishment of social programs to provide necessary support for the child and for their carers;
- other forms of prevention;
- measures for identification, reporting, referral,

- investigation, treatment and follow-up of instances of child maltreatment; and,
- judicial involvement, as appropriate.

While all NTER measures were designed to protect Aboriginal children from harm, certain measures were specifically directed at 'community and child safety'. The key measures directed at this objective are:⁴⁸

- Increased police numbers: As part of the immediate emergency response, the Howard Government undertook to increase policing levels in Northern Territory Aboriginal communities, including through the deployment of Australian Federal Police and secondments from other jurisdictions.⁴⁹
- Expanded night patrol services: \$10.5 million funding was provided to the Commonwealth Attorney-General's Department to fund additional night patrol services in Aboriginal communities as well as financing extra legal services for Indigenous people.⁵⁰
- Safe houses and child protection workers: \$14.5 million was allocated to the Department of Families, 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.⁵¹
- Alcohol bans: The sale, consumption and purchase of alcohol in the 'prescribed areas' or 'NTER communities' were prohibited.⁵² Amendments were also made to mandate the compulsory collection of certain information for all liquor sales in the Northern Territory over \$100 or five litres of alcohol.⁵³
- Pornography bans: Pornographic material was banned in NTER communities. The possession, control or supply of such material was made a federal offence.⁵⁴
- Computer restrictions: Any computer in a NTER community owned by an individual or agency that receives government funding had to be installed with a filter accredited by the Telecommunications Minister. Records of each person who uses the computer and the time and purpose for which they use it must be kept for three years.⁵⁵

Subject to concerns over their form and manner of implementation, discussed below, some of these measures arguably constitute measures to ensure a child's right to protection in accordance with art 19(2) of the CRC. In terms of the preventive measures required by that article, they

provide 'primary' or 'situational' crime prevention, in that they make it more difficult for child maltreatment, and related problems of alcohol abuse, to occur.⁵⁶ The provision of more police, night patrols, safe houses and child protection workers also affords greater scope for child abuse and neglect to be identified, reported, referred and investigated. Acknowledging the importance of such measures, many remote Aboriginal communities have been calling for increased police, night patrols, child protection workers and safe houses for years.⁵⁷ Safe houses and night patrols were endorsed in *Little Children are Sacred*.⁵⁸

However, in many respects the NTER's child safety measures are inadequate from a rights-based perspective. Against the provisions of the CRC and associated principles and standards, there are a number of flaws and deficiencies with the approach taken to protect Indigenous children. The critique below seeks to highlight some of these (interrelated) deficiencies.

(a) Addressing structural and underlying causes when a child's right to protection is not realised

In accordance with the principles of a rights-based approach, noted above, measures taken under art 19 of the CRC must address not only the immediate causes of child abuse and neglect, but also the structural and underlying causes. Consistent with such an approach, the provisions of art 19(2) refer to preventive strategies that involve social programs to provide support for children and their carers. The Committee on the Rights of the Child has also advocated policy responses involving education, sensitisation and training, rather than punitive measures.⁵⁹ In its 2001 report on the Day of Discussion on Violence Against Children, the Committee noted the view that support and assistance to families 'must play the key role in preventing violence, particularly in helping to cope with economic and psychological stress and other risk factors.'⁶⁰

While the NTER child safety measures may have targeted some of the immediate and situational causes of Indigenous child maltreatment, many of the complex structural and underlying risk factors have not been addressed. The NTER has failed, for example, to resource healing programs to address the intergenerational trauma that fuels much violence, substance abuse and dysfunction in Indigenous communities.⁶¹ While admittedly hard to define, healing programs or processes recognise the interrelated physical,

spiritual and mental factors that impact on Indigenous wellbeing and seek to address these in a holistic manner.⁶² They have been recommended as a strategy to respond to Indigenous family violence, including child abuse and neglect, in a number of contexts.⁶³

The NTER has also failed to resource educational initiatives to counter social norms that condone or excuse child abuse, or to promote healthy alternatives to drug and alcohol abuse. Again, community education has consistently been endorsed as a strategy to respond to child maltreatment in Indigenous communities.⁶⁴ Indeed *Little Children are Sacred* stated that education in both school and community settings was 'the key to solving (or at least ameliorating) the incidence of child sexual assault in Indigenous communities.'⁶⁵ Finally, there have been no resources provided for programs to support Indigenous families and assist them to cope with the considerable economic and psychological stress that many experience.

(b) Strategies which empower, build capacity and give effect to self-determination

To be consistent with a rights-based approach, measures under art 19 must also build the capacity of children to claim their right to protection and of caregivers to realise this right.⁶⁶ Strategies must be empowering, not disempowering,⁶⁷ drawing on the existing strengths of individuals, families and communities. Again, initiatives involving education, training and family support fulfil this aim, equipping rights-holders and duty-bearers with the requisite skills and knowledge to ensure child protection.

As a related matter, measures to realise the right of Indigenous children to protection must be informed by the right of self-determination. The right of self-determination is a collective right of all peoples to, relevantly, 'freely determine their political status and freely pursue their economic, social and cultural development'.⁶⁸ The content of this right, particularly as it applies to minority Indigenous peoples, is contested. However, in the context of child protection, it implies a right of Indigenous people to 'exercise control over matters directly affecting their children, families and communities'.⁶⁹ This can take different forms in practice, including through partial or complete devolution of child protection to Indigenous communities.⁷⁰ The level of responsibility assumed by communities will be dependent on their needs, preferences, desires and capacity. The key

principle is the departure from 'the culture of control' which has marked and defined relationships between Indigenous peoples and the state since colonisation.⁷¹

The NTER, however, has not incorporated principles of empowerment, capacity-building and self-determination in its child safety measures. The focus has been on external intervention from police and child protection workers, and on measures which provide short-term or immediate protection from harm. While such measures are legitimate, they have not been complemented by long-term strategies which recognise and develop the child protection strengths of Aboriginal children, families and communities. For example, in addition to education and training, one relevant recommendation made by the *Little Children are Sacred* Report not implemented in the NTER was for the development of local child safety and protection plans.⁷² In these plans, communities would identify issues impacting on children in their community (such as those relating to supervision, school, food, media, pornography, play, reading, positive discipline and alcohol), and come up with strategies to address the negative impacts and strengthen the positive ones. The Report stated that these plans would 'provide a mechanism for demonstrating that child protection is "everybody's business", are community-owned and controlled and can assist in identifying community strengths'.⁷³ More recently, the Report of the NTER Review Board has recommended the development of community safety plans, which would

link police, child protection officers, teachers, health staff, Government Business Managers and other key service providers with community night patrols, safe houses and women's groups.⁷⁴

(c) The importance of culture to child protection

Strengthening Indigenous children's cultural rights must also form a part of any strategy to realise their right to protection. Children's cultural rights are expressly recognised by the CRC. The Preamble takes 'due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child'. Article 31 recognises the right of children to participate freely in cultural life and requires states to encourage the provision of appropriate and equal opportunities for cultural activity. Article 30 specifically provides that an Indigenous child must not be denied the right, in community with other members of his or her group, to enjoy his or her culture, to profess

and practice his or her own religion, or to use his or her own language.

While all rights are interrelated and interdependent, the right to culture can be regarded as an 'omnibus'⁷⁵ or 'umbrella' right which informs and facilitates the exercise of other rights. In the context of child protection, culture is a 'critical protective factor' which promotes resiliency.⁷⁶ Indigenous practitioners therefore emphasise the importance of maintaining and strengthening culture in child protection, and employing 'culturally embedded' responses.⁷⁷ Most if not all initiatives that have had some success in addressing Indigenous family violence have drawn on Indigenous culture or at least demonstrated cultural awareness in their design and implementation.⁷⁸ *Little Children are Sacred* also recognised this issue and made a series of recommendations around cross-cultural training.⁷⁹

There is little evidence that the NTER recognises the role of culture in ensuring Indigenous children's protection and wellbeing. While night patrols and safe houses are capable of providing culturally appropriate services to Indigenous people, the NTER does not address the wider issue of 'creating a culturally-competent child protection system in the Northern Territory'.⁸⁰ The response has seemed to assume that the simple deployment of more child protection workers, more police and more doctors in remote communities would be sufficient, failing to acknowledge that who they are and how they do their job is also significant. It is almost trite to note that reporting of child abuse will only occur where there is a relationship of trust and understanding. As Ian Anderson has observed, this relationship

is unlikely to develop through short-term encounters with fly in, fly out teams of professionals who do not speak local languages and who do not understand many of the cultural complexities, including customary kinship structures.⁸¹

In light of claims that there has been no noticeable increase in child sexual abuse charges and convictions as result of the NTER, these concerns appear well founded.⁸²

(d) Community-based interventions which are informed by local context

As a related matter, a rights-based approach requires policies and programs to be sensitive to, and informed by, local context. The human rights principles of equality,

non-discrimination and participation, as well the right to culture, demand responsiveness to community needs and desires. The Committee on the Rights of the Child has recognised the importance of these principles with respect to Indigenous children. In its 2001 Day of General Discussion on the Rights of Indigenous Children, it encouraged states to use 'community-based interventions in order to ensure the greatest possible sensitivity to the cultural specificity of the affected community'.⁸³ Recognising the diversity of Indigenous communities, it further recommended states pay 'particular attention to the variety of situations and conditions in which [Indigenous] children live'.⁸⁴

In stark contrast to these principles, the NTER has sought to address child protection in Indigenous communities with a top-down and blanket solution. The child safety (and indeed other NTER) measures have been generally applied to all NTER communities, with no acknowledgement of their considerable diversity and differing needs, priorities and desires. By taking this approach, the NTER has created a real risk that the measures it imposes will be inappropriate or inappropriately tailored for many communities. Further, by taking a top-down approach it is likely to be difficult to obtain local ownership of problems around child abuse and neglect and the leadership needed to drive strategies in response. In fact, contrary to the NTER's objectives, its top-down approach creates the potential for problems such as alcohol and substance abuse to be pushed further underground.⁸⁵

(e) Measures to promote recovery and reintegration

Article 39 of the CRC deals with rehabilitation needs of child victims and is closely related to a child's right to protection under art 19 of the CRC. It requires states to take all appropriate measures to promote the 'physical and psychological recovery and other social reintegration' of children who have been victims of neglect, exploitation or abuse. The article mandates that such recovery and reintegration take place 'in an environment which fosters the health, self-respect and dignity of the child'.

It is clearly evident, from the outline above, that measures to provide recovery and reintegration for Indigenous child victims of abuse or exploitation have been absent from the NTER. The child safety measures have provided immediate and situational prevention of child abuse and neglect, but nothing to address the rehabilitation needs of child victims. Given the evidence that large numbers of Indigenous

children have already suffered abuse, and the ongoing adverse impacts of such abuse, this omission has been another significant shortcoming of the NTER.

2 Income Management: Children's Right to Benefit from Social Security

Under the CRC, children have a right to benefit from social security and states are obliged to take the necessary measures to achieve the full realisation of this right (art 26(1)). Under art 26(2), the CRC provides that social security 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.

The NTER, through the *Social Security and other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth), established a scheme for the quarantining and control of social security payments to all people in the NTER communities.⁸⁶ Under this scheme, half of all income-support and family-assistance payments to people in NTER communities is quarantined.⁸⁷ One hundred per cent of all advances, lump sums and Baby Bonus payments is also quarantined.⁸⁸ Quarantined amounts are deducted from a person's social security payments and held in an income management account. Quarantined income may only be spent on 'priority needs', including food, beverages, clothing, basic household items, housing, household utilities, health, childcare and development, education and training.⁸⁹ The methods of payment available to meet priority needs include vouchers, store value cards, and the payment of expenses to various accounts.⁹⁰ The stated aims of these reforms were to: stem the flow of cash expended upon substance abuse and gambling; ensure funds that are provided for the welfare of adults and children are spent on their priority needs; and promote socially responsible behaviour, particularly in relation to the care and education of children.⁹¹

To the extent that the establishment of the income management scheme sought to ensure Aboriginal children benefit from social security, the NTER's income management reforms may be regarded as a measure taken in accordance with art 26 of the CRC. There are, however, a number of human rights-related concerns with the scheme, discussed below.

(a) *The right to non-discrimination*

The right to freedom from discrimination on the ground of race is a fundamental human right, enshrined in every major human rights instrument, including the CRC.⁹² It has the status of *jus cogens* (a peremptory norm) under customary international law and is non-derogable.⁹³ This means that states are not permitted to breach the right in any circumstances (including during a state of emergency) or to 'balance' a discriminatory measure against another human right.⁹⁴

Notwithstanding these obligations imposed upon states, they are able to take what are known as 'special measures', which are exempt from the prohibition on racial discrimination. Special measures constitute a form of 'beneficial' treatment aimed at enabling a racial group to fully enjoy their human rights. There are specific criteria that must be met in order for an action to qualify as a special measure.⁹⁵ First, the measure must provide a 'benefit' to some or all members of a group based on race. Under Australian law, the consent of the purported beneficiary is important in determining whether an action should be classified as beneficial or not.⁹⁶ Second, the measures must have the 'sole purpose' of securing the advancement of the group so that they can enjoy human rights and fundamental freedoms equally with others. Third, the measure must be necessary for the group to achieve that purpose. Finally, the measure must stop once its purpose has been achieved, and it must not set up separate rights permanently for different racial groups.

As income management was imposed on all social security recipients in the NTER communities (the sole criteria appeared to be race), the *Social Security and other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) simultaneously:

- a) declared the relevant provisions of the Act dealing with income management in these communities to be 'special measures' for the purposes of the RDA;

and, presumably in case the requirements for special measures were not met,

- b) exempted the provisions from the operation of pt II of the RDA and any relevant Northern Territory anti-discrimination law.⁹⁷

The Explanatory Memorandum to the legislation purported to provide some justification of the declaration of the income management scheme as 'special measures'. It stated that the 'impact of sexual abuse on Indigenous children, families and communities is a most serious issue, requiring decisive and prompt action.'⁹⁸ It referred to the 'significant social and economic barriers' that prevent Indigenous people in the Northern Territory from enjoying their rights to 'health, development, education, property, social security and culture'. The NTER legislative measures were aimed at ensuring Indigenous people can 'enjoy these rights and freedoms'.⁹⁹ It claimed that this could not be achieved 'without implementing measures that do not apply in other parts of Australia'.¹⁰⁰

However, there are real doubts over whether the income management scheme imposed on NTER communities meets the criteria of 'special measures'. First, it is difficult to argue that restricting a person's control over their finances in and of itself constitutes a 'benefit'. While the person or their children may benefit from the end result (expenditure of social security money on basic needs), the affected communities were not consulted and did not consent to the scheme. This renders the claim of 'benefit' problematic. Second, income management has been applied to all people in NTER communities, regardless of whether they care for children, of whether their children are at risk or of whether they gamble, abuse alcohol or manage money irresponsibly.¹⁰¹ Given this broad application, it is hard to maintain that the 'sole purpose' of the income management scheme is the realisation of human rights and in particular the right of children to protection from abuse, or the right of children to benefit from social security. The argument may be stronger if income management were only applied to those families where children were at risk of abuse and neglect, or where there was evidence that money was being spent inappropriately.¹⁰² Finally, it is questionable whether the blanket application of income management is really 'necessary' to realise the human rights of Aboriginal people in these communities. It is estimated that the income management scheme has cost \$88 million for the Government to administer.¹⁰³ As the Aboriginal and Torres Strait Islander Social Justice Commissioner Tom Calma has suggested, the Government would obtain 'better outcomes at a more reasonable cost' by taking measures to ensure there is 'appropriate education and awareness about social security issues in Indigenous communities'.¹⁰⁴

(b) *Considerations of human dignity*

While states have a 'margin of discretion' in assessing which specific measures are necessary to realise the right to social security, the Committee on Economic, Social and Cultural Rights has emphasised that states must be guided by the principles of human dignity and non-discrimination, 'so as to avoid any adverse effect on the levels of benefits and the form in which they are provided'.¹⁰⁵ The Committee has also stated that any conditions on eligibility must be reasonable and proportionate.¹⁰⁶ UNICEF has similarly noted that 'great care' must be taken to ensure that 'eligibility terms are non-discriminatory and non-stigmatizing to the families concerned'.¹⁰⁷

In the NTER scheme, both the criteria of race and the form in which the benefits are provided have the potential to offend these principles. In particular, the provision of food vouchers to Aboriginal people only may be seen as 'onerous and potentially undignified',¹⁰⁸ and risks stigmatising Aboriginal children and families. A report in *The Sydney Morning Herald*, for instance, noted that at some schools Aboriginal children were having to line up separately from non-Aboriginal children to redeem compulsory breakfast vouchers.¹⁰⁹ The Aboriginal and Torres Strait Islander Social Justice Commissioner expressed concern over this situation, noting the potential 'long-term psychological and mental health impacts' on Aboriginal children.¹¹⁰

(c) *Building capacity to realise children's right to benefit from social security*

Consistent with the principles of a rights-based approach noted above, measures taken by a state under art 26 of the CRC must also build the capacity of caregivers to ensure that children benefit from social security.¹¹¹ Measures that might be consistent with such an approach include education, training and other forms of support and assistance to families. For example, in addition to general community education campaigns about social security issues, as suggested by Commissioner Calma, individuals, couples and families might be provided with training in financial literacy or budgeting.

The NTER's income management scheme, however, has lacked strategies to build the capacity of caregivers who are not managing their finances responsibly or effectively. Rather than addressing issues around social security misuse through

community education or targeted assistance, it has imposed a punitive and paternalistic scheme on all Aboriginal people in NTER communities. In doing so, it has reduced the scope for Aboriginal people to exercise responsibility and is likely to impair rather than strengthen the financial capacity of Aboriginal families. As the Secretariat of National Aboriginal and Islander Child Care has commented, there is a real risk the reforms will 'further entrench dependency and strip away the capacity of parents to manage independently'.¹¹² It therefore seems unlikely that the measures will achieve lasting change to support child protection and the right of Indigenous children to benefit from social security.

3 Income Management, School Enrolment and Attendance: Children's Right to Education

Article 28 of the CRC recognises the right of children to education. States are required to take a number of measures with a view to achieving this right progressively and on the basis of equal opportunity, including measures 'to encourage regular attendance at schools and the reduction of drop-out rates' (art 28(e)). The Committee on the Rights of the Child has specifically recommended that states ensure access for Indigenous children to high quality and appropriate education.¹¹³ In acknowledgement of the complex cultural and linguistic factors that generally affect Indigenous children's access to education, the Committee on the Rights of the Child has recommended that states, with the active participation of Indigenous communities and children:

- a) review and revise school curricula and textbooks to develop respect among all children for Indigenous cultural identity, history, language and values;
- b) implement Indigenous children's right to be taught to read and write in their own language or in the language most commonly used by the group to which they belong, as well as in the national language(s) of the country in which they live; and
- c) take effective measures to increase the number of teachers from Indigenous communities or who speak Indigenous languages, provide them with appropriate training, and ensure that they are not discriminated against in relation to other teachers.¹¹⁴

In addition to the income management provisions for Aboriginal people, the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) set up a scheme of general application to enforce school attendance

by linking income support and family assistance payments to school attendance. If a parent is receiving income support and a child is not enrolled at school, then both parents will be subject to income management.¹¹⁵ Both parents can also be subject to income management if their child does not attend school sufficiently and there is no reasonable excuse why the child is not attending school.¹¹⁶ In these cases, 50 per cent of the principal carer's income support payments and 100 per cent of their family assistance payments will be quarantined for an initial period of 12 months.¹¹⁷ 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.¹¹⁸ While there is provision for these measures to apply nationally, the analysis below focuses on its application and implications for Indigenous children in the Northern Territory.

From a rights-based perspective, the school attendance and enrolment provisions in the NTER income management scheme may be characterised as a measure to realise Indigenous children's right to education. In particular, they may be interpreted as a means of encouraging regular attendance at schools and the reduction of drop-out rates under art 28(2)(e) of the CRC. Nevertheless, while this end goal may be worthy and consistent with the CRC, there are serious concerns over the effectiveness and appropriateness of the income management strategy used to achieve this goal.

(a) Addressing immediate, underlying and structural causes when a child's right to education is not realised

As noted earlier, a rights-based approach seeks to identify and address the immediate, underlying and structural causes when rights are not realised.¹¹⁹ In the context of the right to education, this requires a critical assessment of the reasons why Indigenous children are not enrolled in or attending school and corresponding strategies to address these issues. One key structural factor affecting Indigenous school enrolment and attendance is the lack of educational infrastructure in many Aboriginal communities. While reliable public data is not available, it is estimated that 94 per cent of Aboriginal communities in the Northern Territory have no pre-school, 56 per cent have no secondary school and 27 per cent have a local primary school more than 50 km away.¹²⁰ Furthermore, even where schools are provided, evaluations of successful and unsuccessful initiatives in this area have revealed the

complex factors that affect the enrolment and attendance of Indigenous children at school.¹²¹ These include teacher quality; school culture; children's attitudes towards school; the relationship between the school, community and local Indigenous culture; as well as the supportive or protective nature of a child's home environment and community.¹²²

The NTER appears to have attributed low school enrolment and attendance rates in Indigenous communities solely to parental neglect. When introducing the income management aspects of the NTER legislation, Minister Brough stated that 'the government wants individuals to take control over their lives'.¹²³ In further justification of the scheme, Minister Brough commented:

It is not too much to ask of a parent or a carer to get their child to school ... For those who do not, the measure will serve to encourage them to take more responsibility for, and be more involved in, their children's education and their future.¹²⁴

The non-realisation of children's right to education was therefore interpreted as a failure of parents to exercise responsibility or control over their children. Accordingly, the threat of sanctions was seen as an effective response.

As a consequence of this interpretation, there were inadequate measures to address the structural and underlying factors behind low school enrolment and attendance rates in Indigenous communities. While some resources have been directed to fund additional teachers and classrooms in the NTER,¹²⁵ it is not yet clear whether these will be sufficient to address the 'backlog' of Aboriginal educational disadvantage in the Northern Territory.¹²⁶ Furthermore, in defiance of international jurisprudence and domestic research in this area (noted above), the NTER has contained no strategies to address the cultural, linguistic and socio-economic factors that affect Indigenous school attendance. Rather, the NTER simply addresses the issue through punitive measures targeting parents. The prospect of the income management scheme realising Indigenous children's right to education therefore seems limited.

C Process and the Right to Participation

1 The Right to Participation Under International Law

Under a rights-based approach, participation is a policy

objective in itself, as well as a tool that should be used to achieve other policy outcomes.¹²⁷ It is a fundamental human right of all people(s), but is arguably of particular importance to Indigenous peoples given the marginalisation they traditionally experience. This has been recognised by the Committee on the Elimination of Racial Discrimination, which has specifically called upon states 'to ensure that members of Indigenous peoples have equal rights in respect of participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent'.¹²⁸ Similarly, the Human Rights Committee has affirmed that enjoyment of the cultural rights protected under art 27 of the *International Covenant on Civil and Political Rights*¹²⁹ may require 'positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them'.¹³⁰ The *Declaration on the Rights of Indigenous Peoples*¹³¹ affirms these principles in several of its articles.¹³²

The right of children to participation is enshrined in art 12 of the CRC. Under that article, a child who is capable of forming his or her own views must be given the opportunity to express those views freely in all matters affecting him or her, and those views must be given due weight in accordance with the child's age and maturity. Participation is regarded as one of the foundational or guiding principles of the CRC (and a rights-based approach to matters involving children).¹³³ It reinforces the notion of the child as a rights-holder with agency and recognises the role of the child as 'an active participant in the promotion, protection and monitoring of his or her rights'.¹³⁴

Specifically noting the importance of participation in addressing violence against children, the Committee on the Rights of the Child recommended that in conceptualising violence the 'critical starting point and frame of reference should be the experience of children themselves'.¹³⁵ The Committee has also stated that children and young people must be 'meaningfully involved in promoting and strategizing action on violence against children'.¹³⁶

In addition to the Committee's general discussion of children's right to participation, the Committee has also discussed the participatory right of Indigenous children. In its Day of General Discussion on the Rights of Indigenous Children, the Committee expressly recommended that states 'work closely with indigenous peoples and organizations to seek consensus on development strategies, policies and projects

aimed at implementing children's rights'.¹³⁷ It also noted the need for participation to be institutionalised and properly resourced, recommending that states establish

adequate institutional mechanisms involving all relevant actors and provide sufficient funding to facilitate the participation of children in the design, implementation and evaluation of these programmes and policies.¹³⁸

2 The Process by which the NTER was Developed and Implemented

The Howard Government announced the NTER on 21 June 2007, less than one week after the public release of *Little Children are Sacred*. The Government had not informed or consulted with the Northern Territory Government before the announcement of the NTER, let alone with the Indigenous communities concerned. Implementation of some of the administrative NTER measures, such as the deployment of additional police and health checks for Indigenous children, began immediately after the announcement. The legislation that was required to implement the other NTER measures was introduced into Parliament some seven weeks later, on 7 August 2007. The five Bills were almost 500 pages long and were not exposed for public comment. While the Senate Committee on Legal and Constitutional Affairs conducted an inquiry into the proposed legislation, the Committee was given only five days for its inquiry and only one public hearing was held. The Senate Committee released its report on 13 August 2007, putting forward seven recommendations, the last of which was that the Bills be passed.¹³⁹ The Government accepted most of the recommendations, but took the view that legislative amendments were not necessary to address them. All five Bills passed the Senate and received Royal Assent on 17 August 2007.

It is clearly evident from the truncated process described above that the right and principle of participation was not observed in the development of the NTER. Contrary to the first recommendation of *Little Children are Sacred* and established principles of international human rights law, the Government did not consult with the affected Aboriginal communities in designing the NTER, nor did it seek their free and informed consent prior to its imposition. As the name suggests, the measures taken represent an 'intervention' rather than a partnership.¹⁴⁰ Some commentators have implied that this was in part facilitated by the absence of an Indigenous representative institution, which is envisaged and

indeed required by the *Declaration on the Rights of Indigenous Peoples*.¹⁴¹

The lack of participation by Aboriginal children in the NTER process is even more starkly apparent. In reviewing literature on child abuse and neglect in Aboriginal communities more generally, commentators have observed that Indigenous children and youth 'appear to have no voice'.¹⁴² This pattern was certainly evident in the NTER. There was no effort by the Government to hear the views of Aboriginal children to help inform the design or implementation of the policy, despite it being carried out in their name. It is not even clear from *Little Children are Sacred* that systematic or targeted consultation with children and young people was carried out as part of that Inquiry. In this sense, there is some doubt that the views of Aboriginal children were the 'starting point and frame of reference'¹⁴³ for conceptualising violence and developing strategies in response.

Ensuring the participation of Indigenous people in the design and implementation of policies is not only a matter of human rights but also of effective policy-making. There is a wealth of literature highlighting the importance of participation in achieving meaningful and sustainable outcomes in Indigenous communities. Development research has consistently found that in order to succeed Indigenous development initiatives 'must be participatory, locally driven and cognisant of Indigenous aspirations'.¹⁴⁴ The failure of the Howard Government to properly engage and partner with Indigenous people in the formulation of the NTER therefore not only breached human rights principles but also undermined its chances of success.

Similar benefits flow in respect of the participation of Indigenous children specifically. Facilitating children's participation assists policy-makers better understand the nature and extent of violence, abuse and neglect, and also to develop effective policy in response. Furthermore, ensuring children's voices can be heard is itself an important strategy in child protection. Enabling children to have a voice and 'speak out' is a form of 'protective behaviour', in that it 'strengthens resilience'.¹⁴⁵ Actively engaging children in responses to violence is an important means of challenging traditionally-held views about children. It counters the notion that children are to be seen and not heard, affirming their status as rights-holders and active participants in their own protection and development, and that of their wider community.¹⁴⁶

III Future Directions

A Report of the NTER Review Board

The NTER Review Board was established by the Rudd Government to conduct 'an independent and transparent' review of the first 12 months of the NTER.¹⁴⁷ The Board's key task was to assess the NTER's progress in 'improving the safety and wellbeing of children and laying the basis for a sustainable and better future for residents of remote communities in the Northern Territory'.¹⁴⁸

Publicly released on 13 October 2008, the report of the NTER Review Board ('NTER Report') acknowledged some gains made by some aspects of the NTER and support for some of its measures. Overall, however, the Report underlined the need for significant change (in both individual measures and approach) in order for the NTER to realise its goals for Aboriginal children and their communities. While the Board did not explicitly adopt a rights-based approach, to a large extent its methodology and many of its findings and recommendations are consistent with the observations made in this article. Its three overarching recommendations were as follows:

1. The Australian and Northern Territory Governments recognise as a matter of urgent national significance the continuing need to address the unacceptably high level of disadvantage and social dislocation being experienced by Aboriginal Australians living in remote communities throughout the Northern Territory.
2. In addressing these needs both governments acknowledge the requirement to reset their relationship with Aboriginal people based on genuine consultation, engagement and partnership.
3. Government actions affecting Aboriginal communities respect Australia's human rights obligations and conform with the *Racial Discrimination Act 1975*.¹⁴⁹

The Review Board's findings in relation to child protection appear to confirm this article's reservations about the adequacy and appropriateness of the NTER's child and community safety measures. Importantly, the Board found no evidence of increased confidence in reporting child maltreatment in Aboriginal communities.¹⁵⁰ Furthermore, most communities 'reported little or no perceived change in the safety and wellbeing of Aboriginal children as a result of the NTER'.¹⁵¹ While the Report endorsed several of the child

and community safety measures (such as increased police and alcohol restrictions), it recommended they be amended and complemented by other strategies to provide more locally-owned, culturally appropriate and sustainable responses.¹⁵² The Review Board's observations and recommendations in relation to Indigenous child protection recognise the role of the family, community and culture in child protection, and are consistent with human rights principles of local ownership, empowerment, capacity-building and self-determination outlined earlier.

While acknowledging the potential benefits of income management, the NTER Report recommended against its blanket imposition. The Board reported that the blanket application of income management 'resulted in widespread disillusionment, resentment and anger in a significant segment of the Indigenous community'.¹⁵³ In line with the concerns raised in this article regarding human dignity and racial discrimination, the Review Board reported that Aboriginal people in major regional centres have suffered 'frustration, embarrassment, humiliation and overt racism' as a result of the income management scheme.¹⁵⁴ It was therefore recommended that income management be available 'on a voluntary basis and imposed only as a precise part of child protection measures or where specified by statute'.¹⁵⁵ It seems far more likely that such a scheme, together with the reinstatement of the RDA, would accord with human rights principles and standards. The Review Board also recommended that income management 'be supported by services to improve financial literacy'. This recommendation recognises the underlying or structural causes that threaten a child's right to benefit from social security, and would also build the capacity of Indigenous caregivers to fulfil this right.

The Review Board levelled perhaps its greatest criticism at the failure of the NTER to effectively consult and engage Aboriginal people. It stated that this failure had 'diminished its ... effectiveness' and undermined support for the NTER.¹⁵⁶ To rectify this issue, the Board recommended that the Federal and Northern Territory governments communicate and re-engage with Aboriginal communities.¹⁵⁷ It was noted that 'without the genuine engagement and active participation of the local community, deep seated change will not be achieved'.¹⁵⁸ These comments and recommendations are again consistent with a rights-based approach and, specifically, principles of local ownership, control and participation.

Surprisingly, however, Aboriginal children are somewhat invisible in the Report of the NTER Review Board. As with *Little Children are Sacred*, there is no express mention of consultation with Aboriginal children having been carried out as part of the Review, nor are there any recommendations directed at their engagement in the future. This is a serious failing considering that a key objective of the NTER is to improve the safety and wellbeing of children. It is also inconsistent with art 12 of the CRC.

B The Rudd Government's Interim Response to the NTER Report

At the time of writing, the Rudd Government had only issued an 'Interim Response' to the NTER Report.¹⁵⁹ The Government has stated that it accepts the three overarching recommendations of the Review Board, but at the same time has committed to continuing compulsory income management as 'a key measure of the NTER' for at least 12 months.¹⁶⁰ It has also pledged to reinstate the RDA but not until Spring 2009, because 'the Government is not prepared to disrupt current beneficial measures or place them at risk of legal challenge in the short term'.¹⁶¹ By Spring 2009, the Government has said it will have designed, in consultation with Aboriginal people, 'a compulsory income management policy which does not require the suspension of the RDA'.¹⁶²

This response casts doubt on the extent to which the Rudd Government understands human rights principles, and its commitment to a rights-based approach to matters affecting Indigenous children. As this article has outlined, the notion that the right to freedom from racial discrimination can be sacrificed in the name of other human rights (even in the short-term) is misplaced. Furthermore, the proposition that the Government can impose compulsory income management on all people in Aboriginal communities in the Northern Territory and simultaneously comply with human rights obligations seems tenuous at best.

The Government's Interim Response does not address the other recommendations made by the NTER Review Board (these are to be addressed in the coming months), but it does make some general comments about 'next steps'. It contemplates moving beyond the first phase of 'stabilisation' to a second phase of 'development', which will commence 'when increased levels of personal and community responsibility are demonstrated'.¹⁶³ It indicates that 'transitional arrangements' will apply until the

commencement of legislation to reinstate the RDA, and that the transitional period will have the following elements:

- The ongoing development and implementation of policies to close the gap on Indigenous disadvantage.
- An immediate, renewed emphasis on community engagement and development to build the foundations for more lasting change.
- Existing NTER measures [including compulsory income management] will continue while the legislation is being developed and considered.¹⁶⁴

While the emphasis on community engagement and development, and the commitment to addressing Indigenous disadvantage, are welcome, there is little to suggest that policy development will necessarily occur in a rights-based framework. First, the Government's interpretation of the Review Board's recommendation that governments comply with human rights obligations is narrow; it is limited to the issue of racial discrimination, which, while important, is only one of many human rights considerations at stake in the intervention. In this regard, it must be emphasised that compliance with Australia's human rights obligations involves much more than just reinstating the RDA, or achieving an isolated end goal of child safety. Second, as noted above, the Government's understanding of Australia's human rights obligations in relation to racial discrimination appears to be misplaced. As Commissioner Calma has noted, the right to protection from racial discrimination is not something that can just be 'turned on' and 'turned off' where convenient,¹⁶⁵ or dispensed with in the name of other human rights. Third, the Government's Interim Response refers to re-establishing the relationship with Indigenous communities based on the principle of 'mutual responsibility', and further implies that the reinstatement of the RDA is contingent on Aboriginal individuals and communities demonstrating 'increased levels of personal responsibility'.¹⁶⁶ These concepts have no foundation in international human rights law, which is premised on the principles of state accountability and obligation to its citizens.¹⁶⁷

Finally and perhaps most relevantly to this article, Indigenous children continue to be marginalised in the NTER. Although the Interim Response states that the Rudd Government's continuing support for the NTER stems from its 'obligation to protect children from violence, abuse and neglect and expand their life chances',¹⁶⁸ Indigenous children's views and role in this area of policy are not acknowledged or

articulated. They still feature as passive objects of concern in the NTER, rather than subjects with rights and agency. In this regard, the Rudd Government, like *Little Children are Sacred*, the Howard Government and the NTER Review Board, has failed to recognise the crucial role that Indigenous children must play in the development and delivery of policy that affects them.

IV Conclusion

The NTER was implemented with the stated objective of protecting the rights of Indigenous children, and in particular their right to protection from abuse and neglect. While child protection is a real and pressing human rights issue for Indigenous children, analysis reveals that the Howard Government's policy response to the issue was decidedly paternalistic. The NTER was hinged on constructions of Indigenous children, their caregivers and the state which are founded in a 'child-saving' welfare model rather than a rights-based approach. In developing and communicating the NTER, the Howard Government also erroneously implied that realising the rights of Indigenous children required those of the wider Indigenous community to be forsaken. The child safety and income management measures have overlooked fundamental rights-based principles such as non-discrimination, local ownership and empowerment. The strategies are also punitive and short-term, failing to address the structural and underlying causes behind the non-realisation of Indigenous child rights. Finally, in designing and implementing the NTER, the participation rights of Indigenous children and the wider Indigenous community were denied.

The Rudd Government's Interim Response to the NTER Report provides only minimal grounds for optimism around the future direction of rights-based policy in this area. While the Government purportedly accepts the NTER Review Board's recommendation that government action must respect Australia's human rights obligations and conform with the RDA, there is little evidence that the NTER will embrace a rights-based approach going forward. The Government has indicated that compulsory income management will continue for all people in NTER Aboriginal communities, and that the RDA will remain suspended until at least Spring 2009. Furthermore, Aboriginal children remain silent and invisible in the NTER. There has been no mention of strategies to engage them in the design, implementation and assessment of measures that are aimed at securing

their safety and wellbeing. These failures not only breach Australia's obligations under international human rights law; they also jeopardise the chances of the NTER achieving its stated goals for Aboriginal children, their families and their communities.

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- 45 *Common Understanding*, above n 11.
- 46 Ibid.
- 47 CRC, art 19. Article 34 of the CRC also specifically requires states undertake to protect children from sexual exploitation and sexual abuse.
- 48 FaCSIA, *About the Response* <<http://www.facsia.gov.au/nter/resources.htm>> at 23 March 2008. While the categorisation of these measures subsequently changed (they were grouped into 'law and order' and 'supporting families'), the content remained generally the same.
- 49 Brough, 'National Emergency Response to Protect Children in the NT', above n 2.
- 50 Commonwealth, Parliamentary Debates, House of Representatives, 7 August 2007, 24 (Mal Brough, Minister for Families, Community Services and Indigenous Affairs).
- 51 Ibid.
- 52 The report of the NTER Review Board notes that, while there is frequent reference to 73 NTER communities, the 'prescribed areas' to which the NTER measures apply encompass more than 500 Aboriginal communities. Seventy-three of the larger settlements were targeted for intense application. NTER Review Board, above n 6, 9.
- 53 See *Northern Territory National Emergency Response Act 2007* (Cth), pt 2.
- 54 See *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth), sch 1.
- 55 See *Northern Territory National Emergency Response Act 2007* (Cth), pt 3.
- 56 On different categories of crime prevention see Chris Cunneen, *The Impact of Crime Prevention on Aboriginal Communities* (2001) NSW Aboriginal Justice Advisory Council, 15–16 <http://www.lawlink.nsw.gov.au/lawlink/ajac//ajac.nsf/pages/ajac_publications#10> at 20 January 2009.
- 57 Larissa Behrendt, 'What Follows Sorry' (Paper presented at 'UTS Speaks', University of Technology, Sydney, 19 March 2008) 6 <<http://www.uts.edu.au/new/speaks/2008/March/resources/1903-transcript.html>> at 20 January 2009.
- 58 NT Board of Inquiry, above n 3, 190–1.
- 59 Committee on the Rights of the Child, *Violence Against Children in Families and Schools*, 28th sess, [701]–[702], UN Doc CRC/C/111 (2001) <<http://www.unhcr.ch/html/menu2/6/crc/doc/days/school.pdf>> at 20 January 2009.
- 60 Ibid [694].
- 61 For a discussion of intergenerational trauma and its relationship to Indigenous child abuse and neglect, see Stanley, Tomison and Pocock, above n 37, 4–5 and references cited therein.
- 62 Tom Calma, Aboriginal and Torres Strait Islander Social Justice

- Commissioner, *Social Justice Report 2007* (2008) 52.
- 63 Paul Memmott et al, *Violence in Indigenous Communities: Full Report*, Crime Prevention Branch of the Commonwealth Attorney-General's Department (2001) 17; Secretariat of National Aboriginal and Islander Child Care ('SNAICC'), *SNAICC News* (July 2007) 15 <http://www.snaicc.asn.au/_uploads/nwslt/00017.pdf> at 20 January; Calma, *Social Justice Report 2007*, above n 62, 52–4. See also NT Board of Inquiry, above n 3, 138–40.
- 64 Memmott et al, above n 63, 3; Calma, *Social Justice Report 2007*, above n 62, 23–6.
- 65 NT Board of Inquiry, above n 3, 15.
- 66 *Common Understanding*, above n 11.
- 67 Ibid.
- 68 Common art 1 of *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR') and *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('ICESCR'). The right of Indigenous peoples to self-determination is expressly enshrined in the *Declaration on the Rights of Indigenous Peoples*, art 3: *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, UN Doc A/RES/47/1 (2007).
- 69 National Inquiry, above n 26, 565.
- 70 In Australia, it has been suggested that Aboriginal self-determination over child protection could be given effect through a regional agreement and the establishment of regional authorities, community constitutions, the exercise of local government-style powers or full self-government: National Inquiry, above n 26, 575.
- 71 Ibid.
- 72 NT Board of Inquiry, above n 3, 190–1.
- 73 Ibid.
- 74 NTER Review Board, above n 6, 10. The report of the NTER Review Board is discussed in more depth in Part III of this article.
- 75 J Oloka-Onyango, 'Who's Watching "Big Brother"?: Globalisation and the Protection of Cultural Rights in Present Day Africa' (2005) 27(4) *Human Rights Quarterly* 1245, 1257.
- 76 Muriel Bamblett and Peter Lewis, 'Embedding Culture for a Positive Future for Koori Kids' (2006) 17 *Developing Practice: The Child, Youth and Family Work Journal* 58, 63.
- 77 Ibid.
- 78 See Calma, *Social Justice Report 2007*, above n 62, ch 1 generally.
- 79 NT Board of Inquiry, above n 3, 203.
- 80 Muriel Bamblett, 'Protecting our Culture and Protecting our Future for our Children', in SNAICC, *SNAICC News* (October 2007) 10, 11.
- 81 Ian Anderson, 'Health Policy for a Crisis or a Crisis in Policy?', in Jon Altman and Melinda Hinkson (eds), *Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia* (2007) 133, 138.
- 82 ABC Radio National, 'Chalmers: Intervention Succeeding', *PM*, 5 November 2007 <<http://www.abc.net.au/pm/content/2007/s2082318.htm>> at 20 January 2009. This is also suggested by the report of the NTER Review Board, above n 6, 28. For a discussion of the Board's findings on this issue see Part III.
- 83 Committee on the Rights of the Child, *Day of General Discussion on the Rights of Indigenous Children: Recommendations*, above n 36, [3].
- 84 Ibid.
- 85 Combined Aboriginal Organisations of the Northern Territory ('CAO'), *A Proposed Emergency Response and Development Plan to Protect Aboriginal Children in the Northern Territory: A Preliminary Response to the Australian Government's Proposals* (2007) 8 <http://www.acoss.org.au/upload/publications/papers/2787_CAO%20report%20%208%20july.pdf> at 20 January 2009.
- 86 See s 123UB in sch 1 of the *Social Security and other Legislation Amendment (Welfare Payment Reform) Act 2007* ('SSWPR Act'). The Act also set up a legislative framework for an income management scheme in Cape York (see s 123UF) and similar measures that could be applied to social security recipients Australia-wide on the basis of child protection notifications (s 123UC) and school enrolment and attendance (ss 123UD, 123UE).
- 87 *SSWPR Act*, sch 1, inserting a new pt 3B into the *Social Security Administration Act 1991* (Cth) (ss 123XA–123XH).
- 88 *SSWPR Act*, schs 1, 2.
- 89 *SSWPR Act*, sch 1 (see new s 123TH).
- 90 Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 3 (Mal Brough, Minister for Families, Community Services and Indigenous Affairs).
- 91 Explanatory Memorandum, *Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007* (Cth), 5.
- 92 CRC, art 2. See also ICCPR, art 26; ICESCR, art 2(2) and CERD generally.
- 93 Ian Brownlie, *Principles of Public International Law* (2nd ed, 1973) 513.
- 94 Calma, *Social Justice Report 2007*, above n 62, 239.
- 95 Ibid.
- 96 *Gerhardy v Brown* (1985) 159 CLR 70, 135 (Brennan J).
- 97 *SSWPR Act*, ss 4, 5.
- 98 Explanatory Memorandum, *Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007* (Cth), 2.
- 99 Ibid 2–3.
- 100 Ibid 3.

- 101 Calma, *Social Justice Report 2007*, above n 62, 276.
- 102 Ibid 277.
- 103 Behrendt, above n 57, 10.
- 104 Calma, *Social Justice Report 2007*, above n 62, 276–7.
- 105 Committee on Economic, Social and Cultural Rights, *General Comment 19: The Right to Social Security*, 39th sess, [22], UN Doc E/C.12/GC/19 (2008). See also [29]–[31], [66].
- 106 Ibid [24].
- 107 UNICEF, *Implementation Handbook for the Convention on the Rights of the Child* (revised ed, 2002) 384.
- 108 Calma, *Social Justice Report 2007*, above n 62, 277.
- 109 Joel Gibson, 'Don't Single Out Black Children: Commissioner', *The Sydney Morning Herald* (Sydney), 1 April 2008, 5.
- 110 Tom Calma, quoted in *ibid*.
- 111 *Common Understanding*, above n 11.
- 112 SNAICC, 'Northern Territory Update', in SNAICC, *SNAICC News* (October 2007) 4.
- 113 Committee on the Rights of the Child, *Day of General Discussion on the Rights of Indigenous Children: Recommendations*, above n 36, [19].
- 114 Ibid.
- 115 Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 5 (Mal Brough, Minister for Families, Community Services and Indigenous Affairs).
- 116 Ibid.
- 117 See *SSWPR Act*, sch 1 (inserting new pt 3B and divs 5 and 6 into the *Social Security Administration Act 1991* (Cth)).
- 118 See *SSWPR Act*, sch 1 (inserting new pt 3B and divs 5 and 6 into the *Social Security Administration Act 1991* (Cth)).
- 119 *Common Understanding*, above n 11.
- 120 CAO, above n 85, 18. In 2007, the then Northern Territory Minister for Education, Paul Henderson, also conceded that a 'significant' number of Indigenous children in the Northern Territory do not have access to primary or secondary education: Paul Henderson, cited in Calma, *Social Justice Report 2007*, above n 62, 279.
- 121 See, eg, Commonwealth Department of Employment and Workplace Relations, *Halls Creek Engaging Families Trial February–July 2006: Evaluation Report* (2006) (highlighting the limited success of the Halls Creek 'Engaging Families' Trial, and by contrast the successful strategies employed by Dr Chris Sarra in Cherbourg State School, Queensland). See also CAO, above n 85, 18.
- 122 Commonwealth Department of Employment and Workplace Relations, above n 121.
- 123 Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 3 (Mal Brough, Minister for Families, Community Services and Indigenous Affairs).
- 124 Ibid 6.
- 125 FaHCSIA, *Funding*, Northern Territory Emergency Response <http://www.facsia.gov.au/nter/docs/factsheets/overview/factsheet_nter_funding.htm> at 20 January 2009; FaHCSIA, *Northern Territory Emergency Response Fact Sheet: Supporting Early Childhood Development and Education* <http://www.facsia.gov.au/nter/docs/factsheets/health_education/factsheet_early_childhood.htm> at 1 March 2008 (this weblink is no longer active).
- 126 John Taylor, 'Demography is Destiny, Except in the Northern Territory', in Jon Altman and Melinda Hinkson (eds), *Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia* (2007) 173, 181.
- 127 Office of the United Nations High Commissioner for Human Rights, above n 11, 26.
- 128 Committee on the Elimination of Racial Discrimination, *General Recommendation 23: Rights of Indigenous Peoples*, 51st sess, [4(d)], UN Doc CERD/C/51/Misc.13/Rev.4 (1997).
- 129 ICCPR, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)
- 130 Human Rights Committee, *General Comment No 23: The rights of minorities (Art 27)*, 50th sess, [7], UN Doc CCPR/C/21/Rev.1/Add.5 (1994). The importance of Indigenous peoples' participation has also been reiterated by the Human Rights Committee in its complaints-based jurisprudence. See, eg, Human Rights Committee, *Länsman et al v Finland, Communication No 511/1992*, [9.5], UN Doc CCPR/C/52/D/511/1992 (1994); Human Rights Committee, *Apirana Mahuika et al v New Zealand, Communication No 547/1993*, [9.5], UN Doc CCPR/C/70/D/547/1993 (2000).
- 131 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, UN Doc A/RES/47/1 (2007).
- 132 Article 18 refers to the right of Indigenous peoples to participate in decision-making in matters which would affect their rights. Article 19 requires states to 'consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.'
- 133 Committee on the Rights of the Child, *General Comment No 5*, above n 32, [12].
- 134 Ibid.
- 135 Committee on the Rights of the Child, *Violence Against Children in Families and Schools*, above n 59, [704].
- 136 Ibid.
- 137 Committee on the Rights of the Child, *Day of General Discussion on the Rights of Indigenous Children: Recommendations*, above n 36, [8].
- 138 Ibid.

- 139 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Report on Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 and Four Related Bills Concerning the Northern Territory National Emergency Response* (2007).
- 140 Calma, *Social Justice Report 2007*, above n 62, 225.
- 141 See Michael Mansell, 'The Political Vulnerability of the Unrepresented', in Jon Altman and Melinda Hinkson (Eds), *Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia* (2007) 73.
- 142 Stanley, Tomison and Pocock, above n 37, 27.
- 143 Committee on the Rights of the Child, *Violence Against Children in Families and Schools*, above n 59, [704].
- 144 Michael M Cernea, *Sociology, Anthropology, and Development: An Annotated Bibliography of World Bank Publications 1975-1993* (1994), referred to in Bill Fogarty and Matthew Ryan, 'Monday in Maningrida', in Jon Altman and Melinda Hinkson (eds), *Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia* (2007) 263, 264. See also Calma, 'Tackling Child Abuse and Inequality', above n 34, 282.
- 145 Bamblett and Lewis, 'A Vision for Koorie Children and Families', above n 37, 44.
- 146 UNICEF Pacific, *Child Sexual Abuse and Commercial Sexual Exploitation of Children in the Pacific: A Regional Report* (2006) 134 <http://www.unicef.org/eapro/Pacific_CSEC_report.pdf> at 20 January 2009.
- 147 NTER Review, *Northern Territory Emergency Report Review*, Australian Government <<http://www.nterreview.gov.au/>> at 20 January 2009.
- 148 NTER Review Board, above n 6, 9.
- 149 Ibid 12.
- 150 Ibid 34.
- 151 Ibid.
- 152 For instance, the Board recommended the development of community safety plans. The community safety plans would 'link police, child protection officers, teachers, health staff, Government Business Managers and other key service providers with community night patrols, safe houses and women's groups'. NTER Review Board, above n 6, 10.
- 153 Ibid 20.
- 154 Ibid.
- 155 Ibid 10.
- 156 Ibid 9-10.
- 157 Ibid 12, 14, 49.
- 158 Ibid 11.
- 159 Macklin, above n 7.
- 160 Ibid.
- 161 Ibid.
- 162 Ibid.
- 163 Ibid.
- 164 Ibid.
- 165 Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, "Still Riding for Freedom": An Aboriginal and Torres Strait Islander Human Rights Agenda for the Twenty-First Century' (Speech delivered as The Charles Perkins AO Memorial Oration 2008, University of Sydney, 23 October 2008) <http://www.humanrights.gov.au/about/media/speeches/social_justice/2008/20081023_still_riding.html> at 20 January 2008.
- 166 Macklin, above n 7.
- 167 See discussion in Part II(1)(a) of this article and references in above n 11.
- 168 Macklin, above n 7.