THE NORTHERN TERRITORY INTERVENTION AND THE FABRICATION OF 'SPECIAL MEASURES'

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I Introduction

The provisions of the controversial Northern Territory Emergency Response (commonly called the 'Northern Territory Intervention') were and remain targeted directly at prescribed Aboriginal communities in the Northern Territory. In order to avoid any potential conflict with the *Racial Discrimination Act 1975* (Cth) ('*RDA*') – which is the instrument that enacts Australia's obligations under the *Convention on the Elimination of All Forms of Racial Discrimination*[1] ('*Race Convention*') – the Coalition Australian Government at the time ('former Government') excluded the *RDA*'s application to the Intervention.[2] Curiously, the former Government went further and adopted the device of declaring that all measures constituting the Northern Territory Intervention were 'special measures' for the purposes of the *RDA*.[3] Each of the three substantive legislative instruments that constitute the Northern Territory Intervention includes a provision to that effect.[4]

The current Labor Government, in opposition at the time, agreed. It stated its confidence that the measures of the Northern Territory Intervention were special measures based on their objectives to

> protect especially vulnerable Aboriginal children, to help rid Aboriginal communities of the scourge of alcohol abuse and to provide much needed infrastructure and housing improvements to remote Aboriginal communities.[5]

Providing an initial response to the report of the Intervention's Review Board, which had been charged by the newly elected Rudd Government with reviewing the Intervention's operation after 12 months, the Minister for Indigenous Affairs, Jenny Macklin, asserted that the core measures of the Northern Territory Intervention could be legitimately categorised as special measures, on the basis that they are of a beneficial nature;[6] and that there will be engagement and consultation with the affected individuals or group, ensuring that they are involved in the nature of the decisions.[7] However, the recent implementation of a consultation process has been decried as inadequate, even farcical.[8]

Inherent to the operation of the *Race Convention* is the ambition for *de facto* rather than *de jure* equality, such that the adoption of special measures is one element of a state party's obligation to eliminate racial discrimination by all appropriate means. Thus, under art 1(4) of the *Race Convention*, special measures, while involving differential treatment, do not constitute racial discrimination, and under art 2(2) of the *Race Convention*, state parties are obliged to enact them where circumstances warrant. Special measures are forms of favourable or preferential treatment, necessary to advance substantive equality for particular groups or individuals facing persistent disparities. They arise from an acknowledgment that formal equality before the law will not be sufficient to eliminate discrimination and will not achieve substantive or effective equality.

A number of Aboriginal people residing in prescribed communities in the Northern Territory who are subject to the measures of the Northern Territory Intervention recently requested that the UN Committee on the Elimination of Racial Discrimination ('CERD') invoke its urgent action procedure in relation to the Northern Territory Intervention.[9] The complainants specifically challenged the Government's contention that the Intervention's measures could be classified as special measures, arguing that they were not necessary to achieve the legitimate objectives of

addressing child sexual abuse, were not proportionate to achieving that aim and were not enacted with the consent of the people affected. In response to the complaint, CERD sent an Urgent Action Letter on 13 March 2009, calling upon the Australian Government to report in four months' time on the progress it has made to reinstate the *RDA* and to build a new relationship with Aboriginal Australians.[10]

This paper similarly questions the current and former Governments' assertions and contends that the purpose and, in particular, the effect of measures of the Northern Territory Intervention render them incapable of characterisation as special measures under the *Race Convention* and the *RDA*. It is, however, a moot point, since suspension of the *RDA* renders the Government's actions incapable of challenge.

While the focus of this paper is not on the suspension of the *RDA*, that suspension is arguably in itself an egregious violation of the *Race Convention* and has had profound impact on Aboriginal people in the Northern Territory. More than merely facilitating implementation of the other measures, suspension of the *RDA* was widely reported by the Review Board and other studies as engendering a deep sense of humiliation and shame and perception of second-class citizenship for people treated differently to other Australians. Worryingly, an escalation in racist incidents has also been reported.

Part II will provide an overview of the implementation of the Northern Territory Intervention and highlight its main measures, providing context for the examination. Part III will investigate the right of non-discrimination, especially as it is embodied in the principles and objectives of the *Race Convention*, paying particular regard to the application of the right of non-discrimination to Indigenous peoples and emerging specific obligations.[11] Part IV will explore the notion of 'special measures', focusing on what they are designed to achieve and criteria for characterisation of initiatives as special measures. Part V will apply the criteria of necessity, proportionality and consent to the Northern Territory Intervention in its entirety. Part VI will evaluate four specific measures of the Northern Territory Intervention and will contend that each does not have the characteristics of a special measure. While the Northern Territory Intervention is enormously broad, encompassing an extensive range of measures, the four measures that are the focus of this paper – namely, compulsory income quarantining, government acquisition of Aboriginal traditional lands, government powers over Aboriginal organisations, and the prohibition of consideration of Aboriginal customary law and cultural practice in certain criminal matters – represent measures that have a profound detrimental impact on Aboriginal communities in the Northern Territory.

II Background to the Northern Territory Intervention

In June 2007, the Northern Territory Government released a report arising from an inquiry into the protection of children from sexual abuse in Aboriginal communities in the Northern Territory, entitled *Ampe Akelyernemane Meke Mekarle: 'Little Children Are Sacred'* ('*Little Children Are Sacred* Report').[12] The report stressed the complexity of violence and sexual abuse in Northern Territory Aboriginal communities, pointing to an array of factors contributing to violence and sexual abuse. The report described past, current and continuing social problems in Aboriginal communities that have developed over many decades; the combined effects of poor health, alcohol and drug abuse, unemployment, gambling, pornography, poor education, inadequate housing, and a general loss of identity and control; the lack of coordination and communication between government departments and agencies, leading to a breakdown in services and poor crisis intervention; a desperate need for improvements in health and social services; and the need for sufficient funds and resources for long-term commitment.[13] It was estimated by the report's authors that at least 15 years would be needed to make inroads towards the community empowerment necessary to overcome the described 'malaise'.[14]

In the *Little Children Are Sacred* Report, the call was made for a radical change in the way government and non-government organisations consult, engage with and support Aboriginal people, with an emphasis on 'immediate and ongoing effective dialogue with Aboriginal people with genuine consultation in designing initiatives that address child sexual abuse.'[15] Previous approaches by consecutive Australian governments, the report found, had left Aboriginal people 'disempowered, confused, overwhelmed, and disillusioned.'[16]

Accusing the Northern Territory Government of months and months of inaction, six days after the public release of the *Little Children Are Sacred* Report the former Federal Government announced its intention to overturn a 'popularly elected government'[17] and introduce a 'national emergency response',[18] introducing 'immediate, broad

ranging measures to stabilise and protect communities' in response to the 'national emergency confronting the welfare of Aboriginal children in the Northern Territory'.[19] The Australian Labor Party, then in opposition federally, offered immediate in-principle support 'to deal with the crisis in child abuse in Indigenous communities.'[20] Within seven weeks of the Intervention's announcement, a comprehensive suite of measures was enacted in a legislative package[21] with the very broad aim of improving the wellbeing of certain prescribed communities in the Northern Territory.[22] The Commonwealth had ultimate legislative power to enact such legislation to apply to the Northern Territory by reason of ss 51(xxvi), 109 and 122 of the *Australian Constitution*.

Despite the introduction of 480 pages of legislation, the process of enactment, from the introduction of the Bills to Parliament on 7 August 2007 to Royal Assent on 17 August 2007, took a mere 10 days, with an inquiry by the Senate Standing Committee on Legal and Constitutional Affairs in the interim.[23] In fact, the former Minister responsible for enacting the Northern Territory Intervention, Mal Brough, revealed in June 2008 that it took just 48 hours to formulate the policy that was the foundation for the measures.[24]

There were reports of panic and anxiety within Northern Territory Aboriginal communities on the announcement of the Intervention,[25] including reports that women were hiding their children for fear of their removal. Child health checks began almost immediately. Police from around Australia and the Australian Defence Force were mobilised to facilitate implementation. Doctors, professionals and public servants from outside the Aboriginal communities were also recruited.[26] The Australian Defence Force was involved in planning and assisting with transport, communications, equipment and logistics.[27] The quasi-military nature of the operation only served to exacerbate the panic.

The Northern Territory Intervention legislation did not give effect to the recommendations contained in the *Little Children Are Sacred* Report.[28] Indeed, despite the Government's justifications for the Intervention, the terms 'children' or 'sexual abuse' do not appear in any of the legislative instruments. On the eve of introducing the legislation, former Minister Brough criticised the authors of the *Little Children Are Sacred* Report, saying that he was 'astounded that the report's authors provided no recommendations designed to immediately secure communities and protect children from abuse.'[29]

The former Government's response consisted of a range of extraordinary measures which were targeted directly at Aboriginal people residing in the Northern Territory. These measures included:

- an income management regime, which includes measures such as quarantining 50 per cent of social security entitlements for food and other essentials, and linking welfare payments directly to children's school attendance;
- the compulsory acquisition and control of specified Aboriginal land and community living areas in the Northern Territory through five-year leases to the Commonwealth, on terms favourable to and imposed by the Commonwealth and with no guarantee of compensation;[30]
- the deployment of military and police in traditional Aboriginal lands;
- the appointment of Commonwealth employees (Government Business Managers) to coordinate services in Aboriginal communities, implement the Northern Territory Intervention and become the key liaison and consultation contact;
- powers given to the Commonwealth to take over representative Aboriginal community councils and organisations in order to, for example, direct them to deliver services in a specific way, transfer council-owned assets to the Commonwealth, appoint observers, suspend community councils or appoint managers to run them;
- the abolition of the Community Development Employment Projects program ('CDEP Program'), which employed Aboriginal people in a wide variety of jobs directed towards meeting local community needs;
- the removal of consideration of Aboriginal customary law and cultural practice in bail applications and sentencing; and
- the granting of coercive 'star chamber' powers to the National Indigenous Violence and Child Abuse Intelligence Task Force, including powers to compel people to attend examinations, take oaths or affirmations and answer questions or produce documents.

After one year of operation of the Northern Territory Intervention, the newly elected Labor Government established the Northern Territory Emergency Response Review Board ('Review Board') to conduct 'an independent

and transparent review of the Northern Territory Intervention'.[31] The Review Board released its report on 13 October 2008, concluding that the situation in remote Northern Territory communities and town camps remained 'sufficiently acute to be described as a national emergency' and that the Intervention should continue.[32] In reaching this conclusion, the Review Board made three overarching recommendations:

1. there is a continuing need to address the unacceptably high level of disadvantage and social dislocation experienced by Aboriginal Australians living in remote communities in the Northern Territory;
2. there is a requirement for a relationship with Aboriginal people based on genuine consultation, engagement and partnership; and
3. there is a need for government actions affecting Aboriginal communities to respect Australia's human rights obligations and to conform to the *RDA*.[33]

Experiences of racial discrimination and humiliation under the Intervention were recounted to the Review Board with such passion and regularity that, during the course of the review, the Board felt compelled to advise the Minister for Indigenous Affairs that widespread Aboriginal hostility to the Government's actions should be regarded as a matter for serious concern.[34] Nonetheless, the Review Board observed definite gains and heard widespread, if qualified, community support for many Intervention measures.[35]

In its interim response to the Review Board's report, the current Government acknowledged that the Northern Territory Intervention will not achieve robust, long-term outcomes if measures do not conform to the *RDA*.[36] The Government recently released its final response to the Review Board's report in a discussion paper, *Future Directions for the Northern Territory Emergency Response* ('*Future Directions* Discussion Paper'), outlining how it will implement its recommendations and reiterating its intention to modify measures to conform to the *RDA*.[37] Highlighting key indicators of 'special measures', it restated the Government's belief that the measures are beneficial and affirmed the Government's intention to consult with people in the affected communities.[38] Nonetheless, at the date of writing this paper, the suspension of the *RDA* for the operation of the Northern Territory Intervention legislation remains in force.

III The Right to Equality and Non-Discrimination

A Non-Discrimination as International Norm

Equality is the most fundamental principle underlying the concept of human rights. Indeed, it is a well-settled norm of customary international law that states must not promote or condone systemic racial discrimination.[39] This obligation is entrenched in numerous international instruments, including the *United Nations Charter*,[40] the *Universal Declaration of Human Rights*,[41] the *International Covenant on Civil and Political Rights*,[42] the *International Covenant on Economic, Social and Cultural Rights*[43] and the *Declaration on the Rights of Indigenous Peoples*.[44]

Substantive equality is, especially in the political and social areas, one of the cornerstones of modern democracy. Particularly in the course of the 20th century, the prohibition of discrimination on the basis of certain personal characteristics, such as race, has come to be the most essential element of the principle of equality.[45]

B The *Race Convention*

The *Race Convention* provides specific obligations and standards for state parties that are directed at the elimination of racial discrimination. As Theodor Meron describes, the language of the *Race Convention* – 'without distinction of any kind', 'on equal footing' – illustrates that the achievement of *de facto* equality is central to the interpretation of the *Race Convention*, designed to allow various ethnic, racial and national groups the same social development.[46] In particular, art 2(1)(c) provides that any differential treatment on the basis of race is contrary to the *Race Convention* if it has either the *purpose or the effect* of impairing particular rights and freedoms.[47]

Australia signed the *Race Convention* on 13 October 1966 and ratified it on 30 September 1975.[48] The *Race Convention* was incorporated into Australian domestic law on 30 October 1975 with the commencement of the operation of the *RDA*. In particular, ss 9 and 10 were enacted to implement arts 2 and 5 of the *Race Convention*.[49] Indeed, Australia's ratification of the *Race Convention* – and its subsequent incorporation of the Convention into Australia's domestic law – represents Australia's intention to be bound by the obligations and duties contained within the treaty.

While particular actions may have varied purposes, an action has an effect contrary to the *Race Convention* if it has an *unjustifiable* disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.[50] A formal legal or programmatic approach may not be sufficient to attain *de facto* equality and may violate the *Race Convention* even in the absence of a discriminatory purpose.[51] Thus, the definition of racial discrimination in art 1(1) expressly extends beyond measures that are explicitly discriminatory such that policies and practices that are on their face neutral may nonetheless discriminate in fact and effect.[52]

The *Race Convention* extends protection from racial discrimination to all human rights and fundamental freedoms in the political, economic, social and cultural fields, regardless of their source. State parties, such as Australia, are guided as to their positive duty to provide for equality before the law in the enjoyment of a non-exhaustive range of political, economic, social and cultural rights articulated in art 5 of the *Race Convention*.[53] Where a state party purports to restrict a right listed in art 5 that applies ostensibly to all within its jurisdiction, it must ensure that the restriction is, in both purpose and effect, compatible with the *Race Convention*.

C CERD's *General Recommendation 23*

There are special implications of the right to equality and non-discrimination in its application to Indigenous peoples, who continue to experience racial discrimination as a result of a 'long historical process of conquest, penetration and marginalisation, accompanied by attitudes of superiority and by a projection of what is Indigenous as "primitive" and inferior'.[54] Racial discrimination against Indigenous peoples has been characterised as having a dual nature, consisting of destruction of the material and spiritual conditions underpinning Indigenous lifeways, and exclusion and negative discrimination when participating in the dominant society.[55]

The specific challenges to Indigenous culture and identity are recognised by CERD in its *General Recommendation 23: Rights of Indigenous Peoples*.[56] A 'General Recommendation' is an authoritative statement by the Committee on the interpretation of the rights, duties and standards contained within the Convention. Acknowledging the particular vulnerability of Indigenous peoples, *General Recommendation 23* recognises that Indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms, and that in particular they have lost their land and resources to colonists, commercial companies and state enterprises.[57]

The *Race Convention* must be read together with *General Recommendation 23* in order to discern the content of state party obligations as they apply to Indigenous peoples. Indeed, CERD has frequently reminded state parties of their specific obligations to Indigenous peoples arising from *General Recommendation 23*.[58] While it is true that the former Australian Government challenged *General Recommendation 23*'s binding status,[59] the basis of this challenge has been critiqued for underestimating the significance of general recommendations in providing guidance as to the content of the *Race Convention* and developing the jurisprudence.[60]

Relevantly, Australia has the obligation to:

a) recognise and respect distinct Aboriginal culture, history, language and ways of life as an enrichment of the state's cultural identity, and to promote their preservation;[61]
b) ensure that members of Aboriginal peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on Aboriginal origin or identity;[62]
c) provide Aboriginal peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;[63]
d) ensure that members of Aboriginal peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent;[64] and
e) ensure that Aboriginal communities can exercise their rights to practise and revitalise their cultural traditions and customs and to preserve and practise their languages.[65]

State parties have a specific obligation to recognise and protect the rights of Indigenous peoples to own, develop, control and use their communal lands, territories and resources. Where Indigenous peoples have been deprived of their lands and territories without their free and informed consent, state parties are obligated to return those lands and territories, or where this is not possible, provide just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.[66]

D The Discriminatory Operation of the Northern Territory Intervention

It is without question that the Northern Territory Intervention was directed at Aboriginal persons and communities.[67] The legislative provisions apply to Aboriginal townships on Aboriginal land that are predominantly populated by Aboriginal people. Many of the measures that constitute the Northern Territory Intervention apply only to 'prescribed areas'. These areas include 'Aboriginal land' under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) held by Aboriginal land trusts or land councils; 'Aboriginal community living areas' under the *Lands Acquisition Act* (NT) held by Aboriginal associations; and other declared areas.[68] Other measures, such as the prohibition of customary law and cultural practice in bail and sentencing and the grant of coercive powers to the National Indigenous Violence and Child Abuse Intelligence Task Force, apply disproportionately to Aboriginal people in the Northern Territory by effect.

Prescribed areas cover 600 000 square kilometres in the Northern Territory and encompass more than 500 Aboriginal communities. The focus of the Northern Territory Intervention measures is on 73 of the larger Aboriginal township settlements and associated outstations, as well as a number of Aboriginal town camps.[69] Over 70 per cent of the Aboriginal people who live in the Northern Territory live on Aboriginal-titled land within these prescribed areas.[70] Within those prescribed areas, it is estimated that approximately 87 per cent of the people living there are Aboriginal Australians.[71] Furthermore, of those people who live in very remote areas in the Northern Territory and who are unemployed or not in the labour force (and hence are likely to be in receipt of social security entitlements), 92.3 per cent of working-age individuals (15–64 years) are Aboriginal. The Northern Territory Intervention measures directly affect approximately 45 500 men, women and children.[72]

It is apparent that the Northern Territory Intervention was targeted directly at, and specifically impacts on Aboriginal people. Indeed, the inherently discriminatory nature of the Northern Territory Intervention is implicitly acknowledged by the exclusion of the *RDA* (and Northern Territory anti-discrimination legislation), preventing those who are subject to the Intervention's measures from seeking protection from discrimination or a remedy from harm by reason of discrimination. The effect of the exclusion of the operation of the *RDA* is that the Federal Government has removed the availability of any domestic remedies available to dispute or seek relief from that discrimination.[73]

As a result, a group of senior Aboriginal people in the Northern Territory requested urgent action from CERD, alleging that there are numerous violations of the *Race Convention* and of international human rights law generally under the Northern Territory Intervention.[74] These include: violations of the obligations to incorporate the Convention into domestic law, provide effective protection and remedies, and take immediate and effective measures to combat prejudice; and violations of the rights to equal treatment before the law, participation in public affairs, ownership of property, social security, equal participation in cultural activities and access to any public place or service.

Given the current Government's intention to reinstate the *RDA*, the challenge will be to prove that the discriminatory measures of the Northern Territory Intervention are special measures, with this much being acknowledged by the Government.[75] As is discussed in the next section, the difficulty arises because of the requirement for special measures to be positive measures, implemented to advance the subject group and undertaken with their consent.

IV Special Measures

Where certain groups of the population have traditionally been subjected to extensive structural discrimination, often mere statutory prohibitions of non-discrimination are insufficient to guarantee true equality. In these cases, states must resort to positive measures of protection against discrimination, such as temporary privileges for traditionally disadvantaged groups, that are aimed at accelerating the attainment of *de facto* equality.[76]

As described above, the *Race Convention* is concerned to achieve equality of outcome rather than equality at law. 'Special measures' are initiatives 'taken in favour of certain racial or ethnic groups or individuals in order to ensure to them equal enjoyment or exercise of human rights and fundamental freedoms'.[77] They are variously described as 'positive action', 'special rights', favourable or positive or reverse discrimination, 'affirmative action' and 'preferential treatment';[78] and are designed to achieve 'effective'[79] or 'substantive'[80] equality with an emphasis on their correctional or promotional or redistributive quality.[81]

Special measures are permitted under art 1(4) of the *Race Convention*; they are also *required* when 'when the circumstances so warrant' under art 2(2).[82] It has been emphasised by CERD that special measures must of necessity be adopted to address persistent disparities.[83] In this sense, special measures are not an exception to the right to non-discrimination but constitute a necessary strategy by state parties directed towards the achievement of *de facto* equality in the enjoyment of human rights and fundamental freedoms.[84] Whilst there was concern in the drafting of the *Race Convention* that special measures may perpetuate segregation or justify racial discrimination, the notion of special measures now 'sits comfortably within human rights discourse'.[85]

Differential treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the *Race Convention*, are legitimate, or fall within the scope of art 1(4) of the *Race Convention*.[86] In other words, differential treatment will be discriminatory if it is not applied pursuant to a legitimate aim or, if legitimate, is not proportionate to the achievement of that aim.[87] Article 1(4) provides that special measures have certain essential characteristics, including that they are taken for the sole purpose of securing the 'advancement' of some or all members of a racial or ethnic group; that they are 'necessary' for the group to achieve that purpose; and are 'temporary', ceasing on the achievement of the objectives for which they were taken.

In August 2008, CERD, non-governmental organisations, state parties and representatives participated in a thematic debate discussing the scope, nature and monitoring of special measures. Consensus was reached on certain indicia, including the need for periodic assessment and monitoring; distinction between permanent and temporary measures; harmonisation of terminology with other human rights treaty bodies; and participation of the affected group in their formulation.[88] Committee experts' views were also reported.

Participation of the affected group is a minimum requirement.[89] Where measures have a potentially negative effect, such as community-initiated alcohol bans, they can, according to the Aboriginal and Torres Strait Islander Social Justice Commissioner, only be special measures when enacted with the *consent* of the affected people.[90] In any event, the international standard elucidated in *General Recommendation 23* requires that no decisions directly relating to Indigenous peoples' rights and interests be taken without their informed consent. The question of consent to special measures where the rights of children and the rights of adults may differ raises complex issues but does not deny the need for proper consultation.[91]

The requirements for measurable advancement, necessity and termination upon achievement of designated aims necessitate clear objectives and specific criteria against which the measures can be periodically assessed and managed. Data on the political, social and economic status of groups serves to identify groups in need of special measures so that the state party can act.[92] Such examination of the objective and purpose of measures should be undertaken in the political context of each state party.[93] The Committee for the Elimination of Discrimination Against Women, which has given direction on the implementation of special measures (albeit in a different non-discrimination context),[94] advocates the preparation of action plans allowing for the design, application and evaluation of special measures, which should be monitored and enforced by an accountable institution.[95] State parties are requested to report on concrete goals, targets, timetables, reasons for implementing and details of the institution accountable for monitoring and enforcement.[96]

There is a distinction to be made between 'special measures' and general social policy[97] or the positive obligations on state parties under the *Race Convention*, especially under art 5. Special measures are temporary, existing only while the inequality persists. However, it is apparent that 'temporary' does not necessarily mean 'short term', as the process of addressing inequality, assessed against its functional result and not a pre-determined timetable,[98] could take decades.[99] Importantly, special measures arguably exist to overcome systemic and structural discrimination.[100] They should be proactive and enabling, designed to promote equality and opportunity, rather than responding to incidents of racism.[101]

The distinction between temporary and inherent rights has particular significance as it applies to Indigenous people. For example, certain inherent rights such as the right of Indigenous peoples to their land and the right of Indigenous peoples to speak their own language are arguably not subjects for special measures.[102] It has been requested that CERD clarify, in its proposed general recommendation on special measures, that Indigenous rights are inherent and not special rights, and that their protection is the duty of all states who are members of the *Race Convention*.[103]

In the Australian context, it is clear that Aboriginal poverty, discrimination and socio-economic disadvantage are examples of persistent, systemic disparity that provide proper justification for the adoption of special measures. While Part VI will examine specific measures of the Northern Territory Intervention, it must be borne in mind that the Intervention was implemented as an extensive package of measures; thus, it is also appropriate to consider whether the Northern Territory Intervention in its entirety fulfils the criteria for designation as a raft of special measures. That is, does the Intervention embody legitimate objectives, are the means taken proportionate to their aims, and was the Intervention enacted in collaboration with the affected group?

V Special Measures and the Intervention as a Whole

A Legitimate Objectives Necessary for the Advancement of Aboriginal People in the Northern Territory

Whether the Northern Territory Intervention embodies legitimate objectives and, indeed, what the *actual* objectives are have been the cause of bitter debate, polarising Aboriginal people and the wider Australian community. There are those who argue that the urgency of the crisis facing Aboriginal women and children in the Northern Territory required immediate attention, necessitating that human rights protections be pushed to one side for the sake of the protection of women and children. Others argue that addressing urgent social and economic problems did not require 'intervention' but could instead have been achieved by building on best practice and acting in concert with the Aboriginal people in the Northern Territory.

In fact, the issues are exceedingly complex and deserving of nuanced debate. As Megan Davis describes, the Intervention raises the complex interaction between a perceived conflict of rights, in an environment where an elucidation of intersectional human rights protection is lacking.[104] Davis observes that a proper consideration of the rights of women and children is needed and calls for a more balanced discussion that 'would reinforce the importance of critique and dissent as fundamental to the protection of human rights of all Indigenous men and women.'[105]

While the protection of women and children's rights is repeatedly stated to be at the centre of the Northern Territory Intervention, nuanced discussion engendering a human rights framework was lacking in the process of, and rhetoric surrounding, the implementation chosen by the former Government. There has also subsequently been little attempt by the current Government to engage in any proper analysis of balancing rights protections. Rather, there has been a focus on the protection of women and children as somehow being more important than – or, indeed, justification for – the Northern Territory Intervention's racially discriminatory measures. This approach fails to recognise that human rights are interdependent, inter-related, reinforcing and complementary, rather than separate, free-standing and conflicting rights to be fully enjoyed in isolation from other rights.

A full understanding of a state party's obligations under a human rights treaty is only possible by reading all of the human rights treaties to which a state is party as a whole. Australia's obligations under the *Race Convention* must therefore be understood in conjunction with Australia's obligations under other treaties, such as the *Convention on the Elimination of All Forms of Discrimination against Women* and the *Convention on the Rights of the Child*. Consequently, the right of Aboriginal people to enjoy their rights without discrimination on the basis of race cannot be abrogated on the basis of promoting the rights of women and children as being 'more important'. Rather, the Northern Territory Intervention measures must be undertaken in a way that is both compatible with the right to non-discrimination and complementary with the realisation of other relevant human rights. This nuanced 'balancing act' has been largely absent from the debate.

The *Little Children Are Sacred* Report, the Australian Human Rights Commission, and the Review Board have each situated the complex problem of child sexual assault in the context of Aboriginal disadvantage, past, current and continuing social problems, and decades of cumulative government neglect.[106] The clarion call is for structural reform but, while the Intervention certainly involves wide-ranging activity on a large scale, it is questionable whether the Intervention is effecting the necessary structural changes that the research identifies. The current Government's promotion of the merits of the Northern Territory Intervention occurs with great generality and attempts to articulate the connection between the general broad aims and the wide-ranging measures of the Intervention have been lacking. In short, it is unclear that the measures adopted have been necessary to achieve the Intervention's objectives.

As the Intervention legislation identifies, the primary objective of the Northern Territory Intervention is the very broad aim of 'improving the well-being of certain communities in the Northern Territory'.[107] Other objectives that have emerged include that Aboriginal children grow up in a safe community, live in a decent home, eat healthy food and are supported by a strong family.[108] Such objectives require better education and health services and employment opportunities to get and keep a job[109] and largely mirror the type of support that Aboriginal communities throughout Australia have sought over decades. While such objectives are worthy if they are genuine, they are nevertheless vague and therefore difficult to evaluate. Without a clear articulation of what the Government itself considers to be the specific, attainable objectives of the Northern Territory Intervention, there can be no proper, thoughtful analysis of the measures necessary to meet those aims.

In addition to the need for a legitimate objective, there is a requirement of necessity, which places the onus on the state party to justify differential treatment as a special measure. Thus, there must be an articulation of clear, measurable objectives and mechanisms of monitoring implementation and progress.[110] Yet, while the 'essential justification for the Northern Territory Intervention was the reported endemic sexual abuse of Aboriginal children in the Northern Territory',[111] this has lacked the specific criteria and articulation of objectives that generally characterise special measures.

Despite purportedly laudable aims, what is to constitute concrete, measurable 'advancement' under the Northern Territory Intervention is not clear. The Government uses the term 'benefit' where the focus is on the outcome itself; an 'ends justifies the means' approach. This is most clearly demonstrated in the repeated assertion by the Minister for Indigenous Affairs, Jenny Macklin, of the beneficial nature of income quarantining, with the increased sales of fresh food being cited as evidence.[112] Yet, apart from some initial scoping data, there is little evidence of baseline data being gathered in any formal way that would permit an assessment of the impact or progress of the Northern Territory Intervention upon communities.[113] Assertions of benefit arising from income quarantining, for example, have been based on limited empirical data, hearsay and anecdotal observations from third parties, and have not arisen from primary evidence obtained from those subject to the measure. It is apposite to note here Brennan J's caution in *Gerhardy v Brown*[114] that 'advancement' 'is not necessarily what the person who takes the measure regards as a benefit for the beneficiaries'.[115] His Honour went on to state that the requisite advancement in relation to special measures is

> not established by showing that the branch of government or the person who takes the measure does so for the purpose of conferring what it or he regards as a benefit for the group if the group does not seek or wish to have the benefit.[116]

Notwithstanding that Justice Brennan's comments are *obiter* and concern not the *Race Convention* directly but the *RDA*, they nevertheless provide useful guidance as to interpretation of the *Race Convention* itself.

B Proportionality in the Achievement of the Objectives

As referred to earlier, special measures require that measures are proportionate to achieving a legitimate aim. While special measures are designed to achieve 'substantive equality' or equality of outcome, the requirement for a proportionate response necessitates an analysis of the mechanism by which legitimate objectives are attained. Proportionality must be judged against the objectives and purposes of the *Race Convention*. Specifically, the implications of the right to equality and non-discrimination as it applies to Indigenous peoples, including those state party obligations enunciated in both *General Recommendation 21*[117] and *General Recommendation 23*, necessitate that objectives must be achieved in a manner that is culturally appropriate.

The cumulative effect of the extraordinary suite of measures that constitutes the Northern Territory Intervention is not proportionate to achieve the necessary improvements in health, housing, education and opportunity. It may be true, as a Labor MP asserted in 2007 when the Intervention was being implemented, that 'you can have positive and negative measures in your package and it can still constitute a special measure and not be deemed to be racial discrimination'.[118] Yet it is difficult to conclude that the overwhelmingly negative measures of the Intervention are proportionate or culturally appropriate within the requirements of the *Race Convention*. Many elements of the Intervention challenge the notion that the measures adopted are proportionate to the overarching aim of improving the wellbeing of Aboriginal communities in the Northern Territory. These include: numerous violations of rights and freedoms enshrined in the *Race Convention*, which Australia has a positive obligation to

protect; the weakening of Aboriginal autonomy and decision-making power; the undermining of cultural authority; threats to the stability of Aboriginal cultural and social norms; undermining of traditional collective ownership of land; and severe hardship on some of the most vulnerable people in the Australian community. It is evident that none of these elements, all involving the disempowerment of Aboriginal people, are necessary or proportionate to improving the wellbeing of Aboriginal communities in the Northern Territory. In fact, as the *Little Children Are Sacred* Report acknowledged, the advancement of Aboriginal wellbeing in the Northern Territory in a proportionate and culturally appropriate manner requires the opposite: the empowerment of Aboriginal communities.[119]

Adding weight to the idea that the Intervention's measures are disproportionate to an objective of improving the wellbeing of Aboriginal people in the Northern Territory are the findings of the Review Board. Investigating the experiences of Aboriginal people subject to the Intervention's measures, the Review Board found that people:

- had experienced racial discrimination, indignity and humiliation as a result of certain Intervention measures;[120]
- had experienced confusion and anxiety, and showed widespread hostility to the Government's actions;[121]
- felt intense hurt and anger at being isolated on the basis of race;[122]
- expressed the conviction that the measures would never be applied to other Australians;[123]
- demonstrated a sense of betrayal and disbelief;[124]
- showed exasperation at the focus on Aboriginal child abuse and neglect, when abuse and neglect occurs throughout Australia;[125] and
- expressed incomprehension at the link between child welfare and some of the measures.[126]

Such evidence strengthens the conclusion that the Northern Territory Intervention's means are disproportionate to its stated ends, thus precluding a characterisation of the Intervention in its entirety as a special measure under the *Race Convention*.

C The Requirement for Meaningful Consultation

The *Little Children Are Sacred* Report, the Australian Human Rights Commission and the Review Board all underscored the crucial need for genuine partnerships and 'immediate and ongoing effective dialogue with Aboriginal people' to design initiatives that address the wellbeing of the community as a whole.[127] Importantly, the *Little Children Are Sacred* Report attributed the weakening of Aboriginal communities in the Northern Territory to

> a combination of the historical and ongoing impact of colonisation and the failure of governments to actively involve Aboriginal people, especially Elders and those with traditional authority, in decision making.[128]

The report stated that there needs to be a radical change in the way government and non-government organisations consult, engage with and support Aboriginal people, placing an emphasis on dialogue and genuine consultation with Aboriginal people to design initiatives that address child sexual abuse.[129]

Yet two of the defining features of the Northern Territory Intervention were policy formation without consultation with affected Aboriginal communities and the unprecedented haste of its enactment so as to avoid 'talkfests' and 'red tape'.[130] As one of the authors of the *Little Children Are Sacred* Report described one year later, instead there was consultation with the Canberra bureaucracy.[131] Indeed, it would seem that, in reality, rather than engage in extensive and systematic consultation, the Government has to date largely preferred to rely on anecdotes from unnamed women, which, as Jon Altman identifies, is a poor basis for evidence-based policy.[132] The lack of formal systematic consultation must be viewed as especially problematic at a time when there is no Aboriginal representative body to interact with government.

From subsequent initiatives, it appears that the Government has identified consultation as a means of ensuring that the measures of the Northern Territory Intervention are made consistent with the *RDA* and the *Race Convention*. However, post-implementation consultation, even if adequate, cannot be used to justify measures as special measures. The requirement for consultation is in itself an integral aspect of ensuring that special measures are identified and developed to achieve legitimate ends. In any event, whether the Government's subsequent consultative initiatives can be described as genuine or meaningful has been questioned.

Consultation commenced in December 2007 when the Government established an advisory group of 25

Aboriginal leaders from the Northern Territory to discuss the implementation of the Northern Territory Intervention measures and to provide feedback to Minister Macklin.[133] However, the role of this group remains unclear. That the group was not referred to in the Review Board report suggests its impact has been minor. Further, caution must be adopted in advocating the benefit of such a group, mindful of CERD's warning that consultation with boards of appointed nominees could reduce Aboriginal peoples' participation in decision-making and alter a state party's capacity to address the full range of issues relating to Aboriginal peoples.[134]

In addition, the Government has recently commenced a consultation regime, providing an opportunity for people in the 73 targeted communities to comment on the Government's current position on the Northern Territory Intervention, outlined in its *Future Directions* Discussion Paper, the Government's final response to the Review Board's report.[135] The process has been described as farcical,[136] which may be said to be an accurate assessment for the following reasons. First, the Government announced that the measures of the Intervention would continue before the consultation process commenced, thereby foreclosing any other options that might emerge from the consultations. Second, consultation relates to the *Future Directions* Discussion Paper's description of how the Government is going to implement the Review Board's recommendations; [137] it is not an open agenda. Third, community members have complained that they have not been adequately informed about the meetings.[138]

While the requirement of consultation for status as a special measure is not contentious, it has been argued (and disputed) that the requirement as it applies to Indigenous people is of greater rigour. Specifically, it is argued that the obligation under art 5(c) of the *Race Convention*, which requires that state parties guarantee the protection of political and participatory rights, when read together with *General Recommendation 23*, provides that decisions directly relating to the rights and interests of Aboriginal people should be made with their informed consent.[139] Australia, under the former Government, has rejected that informed consent can be a requirement in its interactions with Aboriginal peoples, citing the inconsistency with Australia's democratic system.[140] At any rate, in each of the three Concluding Observations made by CERD in relation to Australia's periodic reports since 1994, the Committee has reminded Australia of its obligation to ensure effective participation of Aboriginal people in the conduct of public affairs, and in decision-making and policy formulation relating to Aboriginal rights and interests.[141] It is clear that, to date, this obligation has gone largely unmet in relation to the Intervention, and as a result, it is not possible to characterise the Intervention as it has proceeded thus far as a special measure under the *RDA* or at international law. The lack of consultation also bespeaks of a fundamental inconsistency with the right of Indigenous peoples to self-determination, the recognition of which is developing under international law, including by CERD.[142]

VI Specific Measures of the Northern Territory Intervention

In seeking to determine whether an action has an effect contrary to the *Race Convention*, CERD will investigate whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin by evaluating the actual effect of the action in question.[143] This Part examines specific measures of the Northern Territory Intervention and contends that, while the fundamental rationale for implementing special measures is to enable substantive equality, the measures of the Intervention in fact prevent Aboriginal Australians in the Northern Territory from enjoying their rights to the same degree as non-Aboriginal Australians. Further, a balancing of detrimental effect against attempted beneficial purpose demonstrates a net negative impact. As such, the measures cannot be characterised as special measures and breach the *RDA* and Australia's international obligations.

A Compulsory Income Quarantining

As the Review Board describes, income quarantining is synonymous with the Northern Territory Intervention, and is the most widely recognised[144] and certainly the most controversial of its measures.

1 The Measure

The Northern Territory Intervention introduced a regime of compulsory income quarantining[145] that diverts 50 per cent of income support and 100 per cent of advances and lump sum payments[146] of social security recipients to an 'income management account'.[147] Expenditure from the income management account is restricted to 'priority needs', such as food, clothing, household items, household utilities, childcare and development, education and training.[148] For money that is quarantined, the regime prevents spending in

relation to alcohol, tobacco, gambling and pornography.[149] In response to difficulties in accessing quarantined income, the Government has introduced the 'BasicsCard', which enables expenditure of quarantined income from a range of approved retailers in the Northern Territory.[150] At 10 December 2008, income quarantining was operating in 73 Aboriginal communities and their associated outstations, and in 10 town camp regions.[151] A total of 15 781 people were subject to income quarantining,[152] which the Review Board concluded has a 'direct and profound impact on their lives', is based on their residence in Aboriginal townships and is unrelated to a person's capacity to meet family responsibilities.[153]

Income quarantining is mandatory and non-discretionary in respect of the persons subjected to it without avenues of review for individuals to challenge its imposition.[154] By contrast, outside prescribed areas, income quarantining is triggered by factors such as risk of child neglect or abuse or inadequate school attendance, which are assessed on a case-by-case basis.[155] The absence of any criteria apart from race (which in practical terms coincides with a person receiving social security in a prescribed area) for the application of income quarantining makes that measure discriminatory. Such a measure may therefore only be justified as being a special measure if it is necessary and proportionate to achieving the aims of income quarantining.

In its review of the operation of the Northern Territory Intervention measures, the Review Board recommended that income quarantining continue on a voluntary basis imposed only as a precise part of child protection measures or where specified by statute, subject to independent review and supported by financial literacy services.[156] In its interim response to the Review Board, the Government rejected the Review Board's recommendation, asserting that income quarantining would continue to be compulsory 'because of its demonstrated benefits for women and children'.[157] The *Future Directions* Discussion Paper modifies the Government's position slightly, suggesting two future options: either maintaining the status quo through a compulsory scheme with no exceptions; or implementing a compulsory scheme that allows for individuals to apply for an 'exemption' based on individual assessment according to set criteria.[158] The latter proposal resonates with schemes throughout Australia in the early 1900s that allowed for 'mixed blood' Aboriginal people who fulfilled certain criteria to apply for exemptions to Protection Acts and regulations, so long as they agreed to relinquish ties with their families and communities. The hated exemption certificates, commonly known as 'dog tags', were issued in an era where legislators considered they knew best as to what was required for the advancement of Aboriginal people.

2 The Objectives of Income Quarantining

The objectives of income quarantining are broad and imprecise. They include promoting socially responsible behaviour, particularly in relation to the care and education of children; and meeting the priority needs of the recipient, their partner and their children or other dependants by setting aside the whole or a part of certain welfare payments.[159] Further objectives have also been articulated: reducing alcohol-related violence; protecting children; guarding against humbugging and promoting personal responsibility; directing money to the needs of children; and reducing the amount of cash in communities where substance abuse, gambling and other anti-social behaviours are problems that can lead to child abuse and community dysfunction.[160] Finally, Minister Macklin has identified the role of income quarantining in protecting the vulnerable, particularly women and children, claiming that the Government 'will not be responding to the interests of the most powerful'.[161]

3 Is Income Quarantining a Special Measure?

As discussed, the Government has signalled its intention to strengthen income quarantining so it is 'more clearly' a special measure or non-discriminatory.[162] Nonetheless, the Government has repeatedly asserted that income quarantining is yielding vital benefits.[163] The *Future Directions* Discussion Paper cites a Central Land Council survey conducted in 2008 and surveys of store operators to reiterate its previous claims[164] of evidence of substantial benefits to communities, including increased purchasing of healthy food, changed family spending patterns with greater male participation in family budgeting, less gambling and drinking, better quality stock in community stores, and people saving for whitegoods in addition to the support expressed by women.[165]

However, an analysis of whether income quarantining is necessary and proportionate to the achievement of a legitimate aim, and is supported by the affected communities, suggests that the Government needs to reassess its approach in order to ensure that the measure is a special measure. Indeed, the Social Justice Commissioner has concluded that the income quarantining regime cannot be classified as a

special measure.[166] To begin with, income quarantining is not a form of preferential treatment or affirmative action to obtain substantive equality. Rather, income quarantining is inherently detrimental and potentially violates a number of positive obligations under the *Race Convention*, such as the right to social security, the right to equal treatment before the law and the right to access public places and services. Second, the legitimacy of the Government's objectives is uncertain. The objectives are broad and imprecise, without clarification of necessary and measurable advancement and without a specification of the targets and criteria against which income quarantining is to be assessed.

Given the magnitude of the impact of income quarantining, it is unsurprising that it evokes positive and negative responses.[167] The evidence suggests that some Aboriginal people have benefited from income quarantining and support its continuation, albeit on a voluntary basis.[168] It is, however, instructive to note evidence obtained by the Central Land Council survey which indicated that, while responses to income quarantining were almost equally divided among survey participants, income quarantining was most likely to be supported by people on wages who are not subject to the scheme.[169] The survey also noted a link between support for income quarantining and successful operation of community stores.[170]

Further, the Government's repeated assertion of unqualified benefit[171] in relation to income quarantining is open to challenge as there is no baseline data and little empirical evidence as to the impact of income quarantining.[172] Caution should be adopted in relation to surveys of community store staff, as these did not obtain primary evidence from those subject to income quarantining and do not explore why changes in expenditure have occurred.[173] Similarly, an online survey of Government Business Managers based on their community experience and perceptions of effectiveness[174] must be treated with caution, given the Review Board's findings in regard to the lack of engagement and lack of professional qualifications of some managers.[175]

In addition, even if evidence as to 'beneficial' household expenditure and reduction of humbugging is accepted, it must be balanced against the overwhelming evidence of severe harm, impacting on the most vulnerable, including the elderly and those with disabilities.[176] Such evidence is too extensive to be adequately recorded in this paper. Nonetheless, the evidence suggests that income quarantining has resulted in: hunger and people criss-crossing family groups to find food; inability to travel between communities for ceremony and sorry business; strain being placed on kinship and family relationships; people becoming subject to quarantining without their knowledge; people contributing to services they don't have access to; the breakdown of computer systems; segregated queues in at least one store in Alice Springs;[177] a loss of dignity; disempowerment, disillusionment, resentment and anger; shame, frustration, embarrassment and humiliation; and a sense of reversion to a protectionist era evoking 'ration days', with the attendant loss of autonomy.[178] The overwhelming weight of evidence demonstrating the substantial negative impacts of income quarantining challenges any assertion of a net benefit.

Lastly, the notion of income quarantining as temporary, which would be required in order for it to be classified as a special measure, is problematic. This is because of the indefinite nature of the continuation of income quarantining[179] in combination with the lack of specific targets and criteria by which to assess the income quarantining's success. While 'temporary' does not necessarily connote 'short term', as the process of addressing inequality may take decades,[180] in relation to income quarantining there are no clear objectives or specific criteria identifying what constitutes 'adequate advancement', against which the measure can be assessed to determine its functional result.[181]

4 Summary

Overall, even if in furtherance of legitimate objectives, argument that income quarantining is appropriate or proportionate is unsustainable. The cogency of the evidence relied upon to assert that income quarantining is beneficial is not certain. Income quarantining is mandatory and non-discretionary, applying on the basis of residence in prescribed areas. It is punitive and targets individuals in an attempt to engender behavioural change; fails to address the structural reform needed to address social and economic disadvantage; and is applied without justification and without rigorous evidence of its success elsewhere. It represents untested theory applied to the most vulnerable people in the Australian community.

B Control Over Aboriginal Traditional Lands

1 The Measures

There are two measures of the Northern Territory Intervention that have had a profound impact on the control by Aboriginal people in the Northern Territory of their traditional lands. These are, firstly, the acquisition of 'Aboriginal land' and 'Aboriginal community living areas' through the statutory imposition of five-year leases of that land to the Commonwealth; and, secondly, the suspension of the future act provisions of the *Native Title Act 1993* (Cth), including traditional owners' right to negotiate over proposed future acts on their land, thereby effectively suspending the operation of native title rights and interests in relation to all proposed future acts on their land.

Under the Northern Territory Intervention, the Federal Government is empowered to compulsorily acquire five-year leases over townships on 'Aboriginal land' held by Aboriginal land trusts or land councils and over 'Aboriginal community living areas' held by Aboriginal associations and other specified areas.[182] These five-year leases come into effect by operation of the legislation without any requirement for consent by the relevant Aboriginal land trust, Aboriginal land council or Aboriginal association.[183] Currently, there are 64 five-year leases in force, all of which will expire on 18 August 2012.[184] However, the Federal Government has also signalled its intention is to replace the five-year lease regime with head leases of 40 to 99 years under s 19A of the *Lands Acquisition Act* (NT).[185] Sixteen communities have been targeted for housing and infrastructure expenditure but only communities that sign these longer land leases will receive government funding.[186] It is also now apparent the communities, such as those represented by the Tangentyere Council, that cannot come to agreement with the Government over the terms of the lease may have their land compulsorily acquired, as the Government is empowered to do under the Intervention legislation.[187]

Pre-existing rights, titles and interests in land covered by a five-year lease are preserved, other than native title rights and interests,[188] but can be terminated at will by the Commonwealth.[189] Native title is effectively suspended through the removal of the future acts regime in an expansive range of circumstances; from the grant of compulsory five-year leases,[190] to the vesting of rights, titles and interests over Aboriginal town camps in the Commonwealth,[191] to acts done by the Commonwealth or Northern Territory governments on any land on which a Commonwealth interest exists,[192] among other circumstances.

Although the relationship in the five-year lease regime is that of landlord and tenant, Aboriginal land owners do not posses the rights ordinarily enjoyed by landlords. The terms and conditions of the compulsory five-year leases are determined by the Federal Government, and may include:

- no liability on the Government to pay rent on the improved value of the land[193] (although the Government now has signalled its intention to pay rent on the unimproved value[194]);
- the ability of the Government to vary or terminate the lease without reference to the Aboriginal landholders,[195] while the Aboriginal land owners are explicitly precluded from doing so;[196] and
- the ability of the Government terminate the underlying right, title or interest,[197] by giving notice in writing.[198]

On 17 August 2007, the former Minister for Indigenous Affairs, Mal Brough, approved additional terms and conditions,[199] providing for wide-ranging control of the land, including the right to use, and permit use of, the land for any purpose the Government considers to be consistent with the objectives of the *Northern Territory National Emergency Response Act 2007* (Cth) ('*NTNER Act*');[200] and the right to carry out any activity on or in relation to the land consistent with permitted use.[201]

Under the lease regime, the ownership of all community houses and infrastructure is transferred from community housing associations and councils to the Government while the lease regime is in place, to be managed by the Northern Territory Government.[202]

2 Objectives of the Measures

The objectives underpinning the measures asserting control over Aboriginal property are varied in scope. On the one hand, in introducing compulsory five-year leases, former Minister Brough described the acquisition of leases as being 'crucial to removing barriers so that living conditions can be changed for the better in these communities in the shortest possible time frame.'[203] Minister Brough justified the action as giving the Government unconditional access to land and assets to facilitate repairs and new building and infrastructure

projects.[204] Similarly, in response to the Review Board report, the current Minister for Indigenous Affairs, Jenny Macklin, justified the continuation of compulsory five-year leases as providing the foundation for better housing services, which are crucial to the future viability and sustainability of remote communities,[205] although two years later not a single house has been built.[206]

However, the introduction of the five-year lease regime also had as an explicit objective the undermining of communal ownership.[207] At the time of the announcement of the Northern Territory Intervention, former Minister Brough claimed that historic land rights decisions like *Mabo*[208] and *Wik*[209] had impoverished Aboriginal people and had not freed or empowered them.[210] Minister Brough stated that such land rights decisions had locked people into collective tenure and that we 'need to actually recognise that communism didn't work, collectivism didn't work'. He claimed, 'It doesn't work to say a collective owns it and you don't have anything.'[211] In a similar vein, the current Government's stated intention is to promote private ownership in Aboriginal communities.[212]

By contrast, the objectives underpinning the removal of the future act regime have not been articulated. The only reference at the time of the implementation of the Northern Territory Intervention was that native title was to be suspended but not extinguished.[213] Native title was not referred to in the report of the Review Board, nor in the Government's response.

3 Are these Measures Special Measures?

A member of CERD has stated that government control of Indigenous property cannot be regarded as a special measure as it is of a permanent nature.[214] Further, in Australian domestic law, the measures relating to government control of Aboriginal property are normally legislatively precluded from being special measures by the operation of ss 8(1) and 10(3) of the *RDA*[215] – though, as we know, these sections of the *RDA* have been excluded from applying to the Intervention.

Nonetheless, an analysis of the measures themselves suggests their failure to fulfil the criteria for special measures. The extensive and all embracing power of the Government over Aboriginal land conferred by the compulsory five-year lease regime, and the removal of native title claimants' right to negotiate under the *Native Title Act 1993* (Cth), have no counterpart or precedent in Australian legislation and are not necessary or proportionate to the attainment of legitimate objectives.

Crucially, an assessment of the proportionality of the measures must take place in the context of their fundamental undermining of redress for dispossession, such redress being an obligation of state parties to the *Race Convention* under *General Recommendation 23*.[216] The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) was enacted in 1976 to restore Aboriginal possession, control and ownership of land and is considered to be the strongest regime for the protection of Aboriginal land rights in Australia.[217] Under the Act, Aboriginal land is granted in fee simple to recognise complete ownership by Aboriginal communities in the Northern Territory.[218] Similarly, the aspirations articulated in the preamble of the *Native Title Act 1993* (Cth) are to address the progressive dispossession of Aboriginal peoples that had occurred without compensation, to rectify the failure of successive governments to reach a lasting and equitable agreement with Aboriginal peoples concerning the use of their lands, and to honour the Government's international obligations to protect universal human rights and fundamental freedoms.[219]

Prior to the Northern Territory Intervention, Aboriginal land and Aboriginal community living areas in the Northern Territory were held or owned solely for the benefit of the traditional Aboriginal owners or residents. After the Intervention, the rights of the traditional owners and residents have become subject to the Government's overarching rights as tenant in possession under leases, the terms of which are able to be dictated and controlled by the Government as if it were the landlord. The incidents of ownership are restricted to such an extent that they arguably violate the right to own property under art 5 of the *Race Convention*.

It is acknowledged that the Government has a legitimate objective of providing better housing and infrastructure in Aboriginal townships. Overcrowding and poor living conditions in remote Aboriginal communities have been identified over decades as issues requiring a concerted and long-term response from government in partnership with the community.[220] Yet the land control measures under the Intervention serve to effectively remove Aboriginal control, and even input into decision-making or planning, with respect to their land. For example, the transfer of ownership of community housing and infrastructure from local

community housing associations and community councils to the Government[221] weakens Aboriginal capacity to respond to community requirements.

The connection between the acquisition of Aboriginal land on the one hand, and the need to provide housing on the other hand, has not been made. It cannot sensibly be argued that the provision of housing and related infrastructure requires the acquisition of Aboriginal township land with its attendant undermining of cultural authority and the right of self-determination.[222] Significantly, the Government's legitimate objective of tackling overcrowding and providing housing is questionable in light of the potential to undermine communal ownership. In this regard, it is essential that promotion of private ownership must only occur with the explicit consent of the Aboriginal peoples concerned and must be carefully monitored. It is appropriate to be mindful of the United States experience of privatisation of Indian land by allotment under the infamous 'Dawes Act',[223] with its vision of assimilation through land ownership and farming, which resulted in a dramatic decline in Indian-held land and the transfer of land into non-Indian hands.

It is clear that very few people living in prescribed areas are aware of the five-year lease regime.[224] Further, as recent research has shown, when informed of the leases' existence, people were overwhelmingly (85 per cent to 95 per cent) opposed to them[225] and, as a result, were indignant, angry and/or worried.[226] Such opposition to the Northern Territory Intervention measures was based on the perception that the lease gave more control to government at the expense of the community[227] and gave inadequate respect to traditional owners in decision-making.[228] Distrust of the Federal Government's intentions was exacerbated by its failure to pay rent as a tenant or compensation for the compulsory acquisition of land subject to the leases,[229] although the Government has now (with a High Court decision forcing its hand)[230] made clear that it will pay reasonable rent.[231]

The discussion now turns to the suspension of native title rights and interests in relation to future acts, including native title claimants' right to negotiate. Native title is a substantive legal right, recognising a pre-existing Aboriginal title that survived the acquisition of title by the Crown. It is not conferred by grant but instead exists without any affirmative act. Communal ownership is fundamental to traditional title and to providing the foundation for continuing social and cultural norms, and is explicitly protected by *General Recommendation 23*.[232] Pat Turner and Nicole Watson have identified that, for Aboriginal people, land is the source of their 'identity, economy and spirituality'; in essence, their 'life force.'[233] In recognition of the extensive period involved in the resolution of native title applications, the future act regime under the *Native Title Act 1993* (Cth) facilitates negotiation between native title claimants and project proponents, for the protection of native title rights and interests, by providing native title claimants a right to negotiate in relation to certain future acts.[234] As already noted, this right has been suspended under the Intervention.

In removing traditional owners' right to negotiate under the *Native Title Act 1993* (Cth), the Northern Territory Intervention has undermined traditional owners' ability to fulfil cultural obligations, a fundamental incident of Aboriginal ownership of traditional land. As previously witnessed in relation to the 1998 amendments to the *Native Title Act 1993* (Cth), the removal of the future act regime rolls back protections previously offered to Aboriginal people and creates certainty for governments and third parties at the expense of traditional owners.[235] The effect of removing the right to negotiate in relation to proposed future acts is that proponents of development on relevant land the subject of a native title claim are no longer constrained to give consideration to the preservation of Aboriginal rights and interests. With no objective identified for this measure by the Government at all, the removal of the future act regime cannot be said to be proportionate and is clearly not culturally appropriate.

4 Summary

Objectives of the land acquisition regime range from improving in housing and infrastructure to the undermining of communal ownership of land and promotion of private ownership, arguably from the legitimate to the illegitimate. However, even where justifiable, acquiring extensive Aboriginal lands cannot be said to have been necessary or proportionate to the improvement of housing and infrastructure – other more selective means could have and ought to have been adopted. In any event, given that the land control measures weaken the very rights which exist as restitution for dispossession – by restricting incidents of ownership and undermining community ownership and traditional authority – and considering the anger experienced by those subject to the land control measures, such measures are disproportionate to the achievement of any legitimate objective.

C Powers Over Aboriginal Community Councils and Organisations

1 The Measures

Part 5 of the *NTNER Act* vests broad powers in the Minister for Indigenous Affairs to intervene in the operation of representative community councils and organisations. The Minister's powers apply to 'community services entities' in 'business management areas', which include areas covered by five-year leases; 'Aboriginal land'; 'Aboriginal community living areas'; places specified to be business management areas under the *NTNER Act*; and areas declared by the Minister to be business management areas.[236] A community service entity can be a community government council under the *Local Government Act* (NT), an incorporated association under the *Associations Act* (NT), an Aboriginal corporation under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth); or any person or entity that performs functions or provides services in a business management area and is specified by the Minister to be a community service entity.[237]

The Minister's powers over community organisations are enormously broad. They include powers:

- to unilaterally vary or terminate funding agreements between the Commonwealth and a 'community services entity' which is funded to provide services in a 'business management area';[238]
- to direct how funds may be spent,[239] appoint a person to control funds,[240] and direct reporting requirements;[241]
- to direct how and what kind of services are to be provided;[242]
- to direct the use and management of assets[243] and even transfer possession and ownership of assets;[244]
- to appoint observers to attend any or all meetings of the community services entity;[245] and
- to take over management of community government council and incorporated associations.[246]

A failure to comply with a ministerial direction may result in a civil penalty[247] or possible appointment of a statutory manager to administer the affairs of the association.[248]

Apart from the extraordinary breadth of the Minister's powers, a number of unusual features are evident. First, it appears that direction is not limited to assets obtained with government funding.[249] Second, it seems that the Minister may appoint an observer to a wholly independent organisation that does not receive government funding.[250] Finally, a statutory manager can be appointed to administer the affairs of the association without the investigation into the affairs of the association that is normally required by the *Associations Act* (NT).[251]

2 Objectives of the Powers

The powers in Part 5 of the *NTNER Act* were introduced to support the role of Government Business Managers,[252] who are responsible for strategic management and coordination of Government services in Aboriginal communities and overseeing the implementation of the Northern Territory Intervention.[253] The powers are not vested in the Government Business Manager personally but are vested in the Commonwealth or the Minister.[254] When the Intervention legislative package was introduced, Minister Brough stated that the powers were introduced to apply where

> normal processes of discussion and negotiation had failed, or where community organisations are unable, or unwilling, to make the changes that are *necessary* to benefit their community and their children.[255]

3 Are the Minister's Powers Special Measures?

Like the land control measures, these statutory powers find no counterpart or precedent elsewhere in Australia. Together with the compulsory five-year lease and town camp regimes, they enable the Federal Government to dictate, direct and control all community service delivery to persons of the Aboriginal race within the prescribed areas, irrespective of the wishes or rights of those persons or of the representative bodies established to deliver those services. The Ministerial powers do not fulfil the criteria for special measures.

Importantly, the Minister's exercise of the powers of intervention is unrelated to any allegations of illegality, incompetence, mismanagement, corruption or fraud. Any underlying justification for the measure is not apparent, other than to facilitate control of Aboriginal communities by General Business Managers in the event of failed negotiations or unwillingness on the part of affected Aboriginal people to accede to external notions of benefit. Brennan J's caution as to the notion of what constitutes 'advancement' previously referred to is appropriate here, where powerful and intrusive powers can be utilised to enforce perceived benefit.[256]

Under these ministerial powers, the authority of councils and associations to exercise their responsibilities in accordance with their governing legislation and constitutions can be restricted in an unprecedented manner. The powers of intervention apply solely to councils and organisations in Aboriginal communities. They have the potential to shift the balance in negotiations to pressure service providers to act in a manner that may be contrary to that community's ambition or interest.

In effect, the Minister's powers, in curtailing the authority of Aboriginal councils, associations and communities, substantially restrict the right of Aboriginal people to participate in public affairs, and in particular in relation to matters that directly affect Aboriginal people. This is contrary to the principle and right of self-determination.

In many cases, strengthening the authority of Government Business Managers may result in the management of Aboriginal councils and communities in a way that is not appropriate to the individual circumstances of the communities concerned. The Review Board observed that many Government Business Managers did not have any professional community development training.[257] To date, 53 Government Business Managers have been appointed to service 73 communities and town camps.[258] The Review Board reported that some Government Business Managers were 'distant and apart from the community and, in some cases, from the key local service providers'.[259] In one instance, the Review Board found it necessary to introduce the Government Business Manager to senior staff at the local health clinic.[260]

There can be no assessment of necessity and proportionality in the absence of criteria crystallising the exercise of such powers, particularly in light of the breadth and magnitude of the powers. The powers were introduced as a measure of 'last resort', yet are apparently to be exercised on the breakdown of discussions or negotiations, seemingly regardless of whether those negotiations are being conducted in good faith or whether negotiations are undertaken by properly authorised officers of the council or organisation. This concern has particular resonance in light of the Government's stated intention to compulsorily acquire the Alice Springs town camps after negotiations in relation to 40-year leases with the Tangentyere Council failed over the question of management of housing tenancy.[261]

4 Summary

The breadth of the Minister's powers over Aboriginal representative councils and organisations far exceeds that which is necessary in the circumstances of failed negotiations, and has the tenor of punishment and coercion as means of ensuring the Government's will prevails. Consequently, the powers cannot be characterised as necessary, proportionate or culturally appropriate, especially where the undermining of effective governance structures through the Northern Territory Intervention is involved. In many instances, the implementation of the Northern Territory Intervention measures has not taken into account the individuality of each Aboriginal community.[262] A survey by the Central Land Council indicated that where 'good governance structures and systems were in place, they were ignored and undermined'.[263] Similarly, the Community Review observed that excellent programs that were in place before the Northern Territory Intervention have not received recognition and support.[264]

D Prohibition on Considering Aboriginal Customary Law and Cultural Practice in Certain Criminal Matters

1 The Measure

Part 6 of the *NTNER Act* precludes the consideration of customary law and cultural practice in bail applications[265] or in determining sentences[266] in relation to offences against a law of the Northern Territory.[267] A court may not take into account any form of cultural law or cultural practice as a reason for 'excusing, justifying, authorising, requiring or lessening the seriousness' of the criminal behaviour or alleged criminal behaviour in question.[268] Further, a court must not take into account any form or customary law or cultural practice as mitigating the seriousness of the criminal behaviour to which the offence or alleged offence relates.[269] A recent ruling in the Northern Territory Supreme Court has held that, at least in relation to sentencing, customary law and cultural practices can be considered for other purposes, such as the establishment of the defendant's character and prospects of rehabilitation.[270]

2 Objectives of the Prohibition

The prohibition was said to implement a 2006 Council of Australian Governments agreement that 'no customary law or cultural practice excuses, justifies, authorises, requires,

or lessens the seriousness of violence or sexual abuse' and further agreement to implement laws reflecting this. [271] However, what the complete prohibition in relation to *all* offences in the Northern Territory was designed to achieve was not stated. There was no reference to the measure in the Review Board report, nor has the Government commented on the measure.

3 Is the Prohibition a Special Measure?

Without clear objectives and justification articulated in relation to the blanket prohibition of customary law or cultural practice, any necessary advancement is a question for speculation. It is, however, self-evident that such a prohibition does not provide favourable or preferential treatment to Aboriginal people in the Northern Territory. To the contrary, the prohibition weakens respect for Aboriginal culture and undermines Aboriginal traditional jurisdiction in its rejection of customary considerations as being of intrinsic value to the mainstream legal system.

Indeed, when similar amendments were made by the Federal Government to the *Crimes Act 1914* (Cth) in 2006, a Parliamentary Committee identified that such measures would not 'provide substantive equality to Aboriginal offenders'[272] and 'will lead to increased racial discrimination against Indigenous Australians'.[273] The 2006 *Crimes Act 1914* (Cth) amendments were justified as necessary to ensure the protection of Aboriginal women and children from men who would attempt to claim that their violent or offensive behaviour was justified under Aboriginal customary law.[274] Those amendments were ostensibly in response to isolated cases of violent sexual assaults in which apparently lenient sentences were imposed at trial level.[275]

However, the perception of leniency in sentencing is contrary to the evidence that Australian courts have been generally consistent in sentencing decisions for violent and sexual offences.[276] This mirrors sentencing in the Northern Territory where customary law has never played a major role in arguments relating to mitigation.[277] The Chief Justice of the Northern Territory Supreme Court has stated that:

> Only on rare occasions has customary law been presented as lessening the moral culpability of the Aboriginal offender. Even less frequently has the sentencing court accepted the significance of the submission.[278]

Thus, if the aim was to protect women through specific or general deterrence, the measure is incapable of fulfilling this purpose due to the infrequency of using customary law as a mitigating factor in the past.

The prohibition of consideration of Aboriginal customs and practices is disproportionate and culturally inappropriate. Under Northern Territory legislation, courts must consider the 'extent to which the offender is to blame for the offence'[279] and the 'presence of any aggravating or mitigating factors concerning the offender.'[280] Thus, the impact of the prohibition is that, unlike non-Aboriginal offenders in the Northern Territory, the full context of an Aboriginal offender's situation cannot be taken into account by a court.

Of most importance is the departure from fundamental legal principle by excluding all relevant factors (which include cultural factors) from being considered in respect of moral culpability in sentencing. The practical effect of this exclusion is that longer and harsher sentences may be imposed on persons of the Aboriginal race in disregard of moral culpability factors that are unique to those persons. Thus, there is serious discrimination against Aboriginal persons by the exclusion of such considerations in bail and sentencing.

The measure provides for a permanent, mandatory and non-discretionary prohibition applicable to all offences in the Northern Territory, regardless of the gravity of those offences. Even if it were appropriate to prescribe that a court shall not consider cultural considerations relied upon to justify serious indictable offences of a sexual nature, the lack of discretion renders the prohibition disproportionate to any legitimate objective.

A pointed indicator of the complete lack of proportionality in enacting the prohibition is the increasing recognition across the rest of Australia of the importance of cultural context in the criminal justice system. This recognition has manifested in, for example, the development of Aboriginal community courts such as the 'Koori Court' and circle sentencing procedures,[281] both of which were advocated in the *Little Children Are Sacred* Report.[282] Similarly, the Australian Law Reform Commission has on many occasions recommended that the customary law of Aboriginal offenders is a necessary factor to be taken into account.[283]

4 Summary

Established sentencing principles mandate that all relevant factors must be considered in respect of moral culpability. The impact of the prohibition is to prevent consideration of the full circumstances of Aboriginal offenders, including significant cultural factors. The prohibition is mandatory and non-discretionary, and applies regardless of the nature or seriousness of the offence. It cannot be proportionate to the attainment of legitimate objectives, which, in any event, were not stated.

VII Conclusion

It has long been a source of frustration to Aboriginal people in the Northern Territory that decades of cumulative neglect by governments in failing to provide the most basic standards of health, housing, education and ancillary services enjoyed by the wider Australian community have not been addressed.[284] Historically, there has been a dearth of long-term initiatives taken in partnership with communities to address the broad issues of poverty, disadvantage and discrimination that ultimately lead to prevalent problems of family violence and abuse in some Aboriginal communities.[285]

Special measures are temporary initiatives, the target of which must be the conditions, structures or systems that lead to discrimination. Special measures must constitute a coherent package aimed specifically at correcting the position of members of a target group that has been discriminated against in one or more aspects of social life; and they must have as their underlying objective the achievement of effective equality.[286] They are mandatory to achieve the purposes of various treaties, including the *Race Convention*.[287]

There are certain requirements that need to be met in order to classify government action as a special measure. The action in question must be necessary to achieve legitimate objectives directed towards the advancement of the target group. The action must also be proportionate to the achievement of those objectives and developed in collaboration with, and arguably with the consent of, the target group. As vehicles of structural reform, special measures are characterised by specific criteria, timeframes, periodic assessment and external monitoring. They cease when their objective is reached.

It cannot be denied that the Northern Territory Intervention represents government activity on a grand scale. The imagery surrounding the Intervention was of an emergency requiring such haste that the army, police and volunteer doctors had to be mobilised en masse; this was justified by the contention that there was 'nothing less than a war zone in Australia'.[288] There are divergent views as to the extent to which the situation in the Northern Territory represented a crisis, but what is not contentious is the chronic underfunding of basic services, ongoing government neglect and the need for a concerted response.

As a package of measures, the Intervention fails when considered against the criteria by which government action can be characterised as a special measure. Crucially, measuring the detrimental effects of the Intervention against the purported beneficial purpose demonstrates a net negative impact. This becomes especially evident when judged against research findings that the Intervention has created a feeling of 'collective existential despair', is 'characterised by a widespread sense of helplessness, hopelessness and worthlessness', and has 'profound implications for resilience, social and emotional wellbeing and mental health of Indigenous people in the Northern Territory, and throughout the country.'[289]

The Intervention was imposed with extraordinary haste, without consultation, in a top-down, non-discretionary manner that has had the effect of disempowering communities and may have caused lasting cultural, social and emotional harm. The lack of consultation and haste represents a lost opportunity to craft a community-supported response. It has resulted in hostility to government and confusion, fear and frustration. Dysfunctional communication strategies have resulted in the spread of information by rumour, and there is a strongly articulated sense of helplessness with perceptions of a return to assimilationist policies. Furthermore, the Intervention has engendered further negative stereotyping of Aboriginal people and increased racism and racial tension.

Perhaps the ultimate source of the Northern Territory Intervention's fatality or futility is that, despite its scale, the Intervention attempts to change the behaviour of individual Aboriginal people while undermining social and cultural norms. It weakens traditional authority and diminishes traditional ownership of land. It does not ask the fundamental question of what conditions and approaches have led to the current conditions and how they may be addressed. In short, the potential for ongoing harm renders the Northern Territory Intervention unjustifiable racism.

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1 *Convention on the Elimination on All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) ('*Race Convention*').

2 See *Northern Territory National Emergency Response Act 2007* (Cth) ('*NTNER Act*'), ss 132(2), 133(2); *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) ('*FaCSIA Amendment Act*'), s 4(2); *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) ('*Welfare Payment Reform Act*'), ss 4(3) and 6(3).

3 Under s 8 of the *RDA*, that Act's prohibition on racial discrimination in pt 2 does not apply to 'special measures' as defined in art 1(4) of the *Race Convention*.

4 See *NTNER Act*, s 132(1); *FaCSIA Amendment Act*, s 4(1); *Welfare Payment Reform Act*, ss 4(2), 6(2). These sections provide that, for the purposes of the *RDA*, the provisions of the Acts, and any acts done under or for the purposes of those provisions, are special measures.

5 See Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 71–2 (Jenny Macklin, Shadow Minister for Indigenous Affairs and Reconciliation); Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 108–9 (Kevin Rudd, Leader of the Opposition).

6 Jenny Macklin, 'Compulsory Income Management to Continue as Key NTER Measure' (Press Release, 23 October 2008) <http://www.facsia.gov.au/internet/jennymacklin.nsf/print/nter_measure_23oct08.htm> at 11 August 2009; ABC Television, 'Govt Responds to Northern Territory Intervention Review', *The 7:30 Report*, 23 October 2008 <http://www.abc.net.au/7.30/content/2008/s2399696.htm> at 11 August 2009; ABC Radio National, 'Government's Response to the NTER Review', *Breakfast*, 24 October 2008 <http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/interview_fran_kelley_24oct08.htm> at 11 August 2009; Jenny Macklin, *Transcripts: Response to the NTER Review* <http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/nter_review_24oct08.htm> at 11 August 2009.

7 ABC Radio National, above n 6.

8 'Government Defends NT Intervention Consultations', *ABC News* (online), 17 June 2009 <http://www.abc.net.au/news/stories/2009/06/17/2600600.htm> at 11 August 2009.

9 See Human Rights Law Resource Centre, *Indigenous Rights: Request for Urgent Action on NT Intervention from UN CERD (March 2009)* <http://www.hrlrc.org.au/content/topics/equality/northern-territory-intervention-request-for-urgent-action-cerd/> at11 August 2009. The authors of this paper were involved in drafting the complaint to CERD.

10 A copy of the Urgent Action Letter is available at <http://www.hrlrc.org.au/files/cerd-letter-to-australia130309.pdf>.

11 In this paper, the term 'Indigenous' will be used in reference to international obligations to Indigenous peoples generally or to Australian Aboriginal and Torres Strait Islander peoples. The majority of the Indigenous peoples of the Northern Territory are Aboriginal and will be referred to as Aboriginal people or peoples.

12 Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse ('NT Board of Inquiry'), *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).

13 As summarised in Aboriginal and Torres Islander Social Justice Commissioner, *Social Justice Report 2007* (2008) 201–2.

14 NT Board of Inquiry, above n 12, 13.

15 Ibid 50.

16 Ibid.

17 ABC Television, 'One Year Anniversary of the NT Intervention', *The 7:30 Report*, 19 June 2008 <http://www.abc.net.au/7.30/content/2007/s2280250.htm> at 11 August 2009.

18 Mal Brough, 'National Emergency Response to Protect Children in the NT' (Press Release, 21 June 2007) <http://www.facsia.gov.au/internet/minister3.nsf/content/emergency_21june07.htm> at 11 August 2009.

19 Ibid.

20 Jenny Macklin, 'Federal Labor Offers Bipartisan In-Principle Support on Indigenous Child Abuse Measures' (Press Release, 21 June 2008).

21 *NTNER Act*; *FaCSIA Amendment Act*; *Welfare Payment Reform Act*.

22 *NTNER Act*, s 5.

23 Aboriginal and Torres Islander Social Justice Commissioner, above n 13, 215–19.

24 'Intervention Created in Just 48 Hours: Brough', *ABC News* (online), 16 June 2008 <http://www.abc.net.au/news/stories/2008/06/16/2275863.htm> at 11 August 2009.

25 ABC Television, 'Report Confirms NT Intervention Created Panic', *The 7:30 Report*, 27 October 2008 <http://www.abc.net.au/7.30/content/2008/s2402541.htm> at 11 August 2009; Australian Indigenous Doctors' Association ('AIDA'), *Submission to the Northern Territory Emergency Response Review Board* (2008) [7] <http://www.aida.org.au/pdf/submissions/Submission_8.pdf> at 11 August 2009.

26 Department of Families, Housing, Community Services and Indigenous Affairs ('FaHCSIA'), *Submission of Background Material to The Northern Territory Emergency Response Review Board – Appendix 1: Measures and Sub-Measures* (2008) 21 <http://www.facs.gov.au/sa/indigenous/pubs/nter_reports/Documents/nter_review_submission/appendix1.pdf> at 11 August 2009.

27 Ibid 76.

28 See Parliament of Australia Parliamentary Library, *Briefing Book for the 42nd Parliament: National Emergency Intervention in the Northern Territory* <http://www.aph.gov.au/library/Pubs/BriefingBook42p/18SocialPolicy-IndigenousAffairs/emergency_intervention.htm> at 11 August 2009.

29 Mal Brough, 'Howard Government Getting on with the Job of Protecting Children in the Northern Territory' (Press Release, 6 August 2007) <http://www.fahcsia.gov.au/internet/minister3.nsf/content/nter_6aug07.htm> at 11 August 2009.

30 Subsequently, the High Court of Australia rejected a claim brought by a group of Northern Territory land owners and upheld the constitutional validity of the compulsory five-year lease regime. However, while the constitutional challenge was unsuccessful, the High Court ruling means that Aboriginal people in the Northern Territory whose land has been compulsorily acquired by the Federal Government must be provided with fair compensation. See *Wurridjal v Commonwealth* [2009] HCA 2.

31 Jenny Macklin, 'NT Emergency Response Review Board' (Press Release, 6 June 2008) <http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/nt_emergency_reponse_06jun08.htm> at 11 August 2009.

32 Northern Territory Emergency Response Review Board ('NTER Review Board'), *Report of the Northern Territory Emergency Response Review Board* (2008) 10 <http://www.nterreview.gov.au/report.htm> at 11 August 2009; Macklin, 'Compulsory Income Management to Continue as Key NTER Measure', above n 6.

33 NTER Review Board, above n 32, 12.

34 Ibid 8.

35 Ibid 34. The final Review Board Report was apparently much less forthright in its criticisms of the Intervention than in a draft report that circulated widely. After being granted a two week extension by the Minister, the Review Board rewrote the report so that it had a markedly different tone. The Government denied interfering in the writing of the report or directing that the review be less negative. See Paul Toohey, 'Rewrite Takes Sting Out of NT Report', *The Australian* (online), 15 October 2008 <http://www.theaustralian.news.com.au/story/0,25197,24499037-601,00.html> at 11 August 2009.

36 Macklin, 'Compulsory Income Management to Continue as Key NTER Measure', above n 6.

37 Australian Government, *Future Directions for the Northern Territory Emergency Response: Discussion Paper* (2009) <http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/future_directions_discussion_paper/Documents/discussion_paper.pdf> at 11 August 2009.

38 Ibid 7–8.

39 S James Anaya, *Indigenous Peoples in International Law* (2nd ed, 2004) 130; Theodor Meron, 'The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination' (1985) 79 *American Journal of International Law* 283, 283.

40 *Charter of the United Nations*, art 1(3).

41 *Universal Declaration of Human Rights*, GA Res 217A (III), UN Doc A/810 at 71 (1948), art 2.

42 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 2(1) ('ICCPR').

43 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), art 2(2) ('ICESCR').

44 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, UN Doc A/RES/47/1 (2007) ('DRIP').

45 See, eg, Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev ed, 2005) 598.

46 Meron, above n 39, 288.

47 CERD, *General Recommendation 14: Definition of Discrimination*, 42nd sess, [1], UN Doc A/48/18 at 114 (1994).

48 See United Nations Treaty Collection <http://treaties.un.org> at 11 August 2009.

49 *Hagan v Australia*, CERD, 62nd sess, Communication No 26/2002, [4.13], UN Doc CERD/C/62/D/26/2002 (2003).

50 Ibid.

51 Meron, above n 39, 288; Nick O'Neill, Simon Rice and Roger Douglas, *Retreat From Injustice: Human Rights Law in Australia* (2004) 553; Committee for the Elimination of Elimination of Discrimination Against Women ('CEDAW Committee'), *General Recommendation 25*: *Article 4, Paragraph 1 – Temporary Special Measures*, 30th sess, [8], UN Doc HRI/GEN/1/Rev.7 at 282 (2004).

52 *L R v Slovak Republic*, CERD, 66th sess, Communication No 31/2003, [10.4], UN Doc CERD/C/66/D/31/2003 (2005).

53 CERD, *General Recommendation 20: The Guarantee of Human Rights Free From Racial Discrimination*, 48th sess, [1], UN Doc A/51/18, annex VIII at 124 (1996).

54 *Report of the United Nations Seminar on the Effects of Racism and Racial Discrimination on the Social and Economic Relations Between Indigenous Peoples and States*, UN Doc E/CN.4/1989/22, HR/PUB/89/5 (1989) 5, cited in Anaya, above n 39, 130.

55 Ibid.

56 CERD, *General Recommendation 23: Rights of Indigenous Peoples*, 51st sess, [3], UN Doc A/52/18, annex V at 122 (1997).

57 Ibid.

58 See, eg, CERD, *Concluding Observations: Australia*, 66th sess, [11], UN Doc CERD/C/AUS/CO/14 (2005); CERD, *Concluding Observations: Australia*, 56th sess, [9], UN Doc CERD/C/304/Add.101 (2000); CERD, *Concluding Observations: Costa Rica*, 60th sess, [13], UN Doc CERD/C/60/CO/3 (2002); CERD, *Concluding Observations: Botswana*, 61st sess, [304], UN Doc CERD/C/61/CO/2 (2002); CERD, *Concluding Observations: Bolivia*, UN Doc CERD/C/63/CO/2 (2003); CERD, *Concluding Observations: Norway*, [18], UN Doc CERD/C/63/CO/8 (2003); CERD, *Concluding Observations: United States of America*, [400], UN Doc A/56/18 at [370] (2001), among many others.

59 The Australian Government responded to CERD's 2005 *Concluding Observations* (see above n 58) rejecting that *General Recommendation 23* is binding. It noted that it was a highly contentious issue among states and noted much objection to such a broad, unqualified right. It also noted that there was much dissent as to the effect of *General Recommendation 23*: *Comments by the Government of Australia on the Concluding Observations of the Committee on the Elimination of Racial Discrimination*, [20], UN Doc CERD/C/AUS/CO/14/Add.1.

60 Greg Marks, 'Avoiding the International Spotlight: Australia, Indigenous Rights and the United Nations Treaty Bodies' (2002) 2(1) *Human Rights Law Review* 19, 55.

61 CERD, *General Recommendation 23*, above n 56, [4(a)].

62 Ibid [4(b)].

63 Ibid [4(c)].

64 Ibid [4(d)].

65 Ibid [4(e)].

66 Ibid [5].

67 The Intervention was argued to be implemented in response to the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse. In turn, the Inquiry was instigated in response to media accounts of shocking allegations of child sexual abuse, organised paedophile rings and sexual slavery in Northern Territory Aboriginal communities. Action was said to be taken to 'ensure the protection of Aboriginal children from harm'. See Brough, 'National Emergency Response to Protect Children in the NT', above n 18.

68 'Prescribed areas' are defined in *NTNER Act*, s 4(2).

69 FaHCSIA, *Submission of Background Material to The Northern Territory Emergency Response Review Board* (2008) 11 <http://www.facs.gov.au/sa/indigenous/pubs/nter_reports/Documents/nter_review_submission/nter_review_submission.pdf> at 11 August 2009 ('*Background Material*').

70 NTER Review Board, above n 32, 9, 19.

71 FaHCSIA, *Background Material*, above n 69, 11.

72 NTER Review Board, above n 32, 9.

73 The only potential challenge is to contend that measures imposed by the Northern Territory Intervention contravene the *Australian Constitution*, as was unsuccessfully argued in *Wurridjal v Commonwealth* [2009] HCA 2. The constitutional case is not able to be based upon any constitutional protection from discrimination on grounds of race because the *Constitution* provides no such protection.

74 Barbara Shaw et al, *Request for Urgent Action under the International Convention on the Elimination of All Forms of Racial Discrimination* (2009) 9–11 <http://www.hrlrc.org.au/files/E75QFXXYE7/Request_for_Urgent_Action_Cerd.pdf> at 12 August 2009.

75 See, eg, Australian Government, above n 37, 7–8; Australian Government and Northern Territory Government, *Response to the Report of the NTER Review Board* (2009) 10 <http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/response_to_reportNTER/Documents/Aust_response_1882953_1.pdf> at 11 August 2009.

76 See, eg, Nowak, above n 45, 599, 631.

77 Natan Lerner, *The UN Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (1970) 45.

78 See ibid 45–6, 51–2; Michael O'Flaherty, 'Substantive Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination' in Sarah Pritchard (ed), *Indigenous Peoples, the United Nations and Human Rights* (1998) 171; Alexandra Xanthaki, *Indigenous Peoples and United Nations Standards: Self-determination, Culture, Land* (2007) 16–17; Olivier de Schutter, 'Positive Action' in Dagmar Schiek, Lisa Waddington and Mark Bell (eds), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (2007) 759–62.

79 Marc Bossuyt, cited in de Schutter, above n 78, 759.

80 The Permanent Court of International Justice in its *Minority Schools in Albania (Advisory Opinion)* PCIJ, Ser A/B, No 64 (1935) distinguished between formal and substantial equality.

81 Meron, above n 39, 287; CEDAW Committee, *General Recommendation 25*, above n 51, [17].

82 The obligation on state parties to adopt special measures is also explicit in a number of other international instruments, including *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981), art 4(1). Conventions adopted under the auspices of the International Labour Organization (including *International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No 169)*, opened for signature 27 June 1989, 1650 UNTS 383 (1989) (entered into force 5 September

1991) ('*ILO No 169*') and various documents of the United Nations Educational, Scientific and Cultural Organization also explicitly or implicitly provide for such measures.

83 CERD, *Concluding Observations: United State of America*, 59th sess, [399], UN Doc A/56/18 (2001) at [380].

84 CEDAW Committee, *General Recommendation 25*, above n 51, [18]. See also note 3: 'The practice of treaty monitoring bodies, including the Committee on the Elimination of Racial Discrimination, the Committee on Economic, Social and Cultural Rights, and the Human Rights Committee, shows that these bodies consider the application of temporary special measures as mandatory to achieve the purposes of the respective treaties.'

85 Patrick Thornberry, *Indigenous Peoples and Human Rights* (2002) 208.

86 CERD, *General Recommendation 14*, above n 47, [2].

87 CERD, *General Recommendation 30: Discrimination Against Non-Citizens*, 64th sess, UN Doc CERD/C/64/Misc.11/rev.3 (2004).

88 CERD, 'Committee on Elimination of Racial Discrimination Discusses States' Obligation to Undertake Special Measures' (Press Release, 5 August 2008) <http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/696149E128473FAFC125749C004A5160?OpenDocument> at 12 August 2009 ('Special Measures Thematic Debate').

89 Ibid.

90 Aboriginal and Torres Islander Social Justice Commissioner, above n 13, 261; Human Rights and Equal Opportunity Commission, *Submission to the Senate Legal and Constitutional Committee on the Northern Territory National Emergency Response Legislation* (10 August 2007) at [20] – [21] references omitted.

91 Ibid at [22].

92 CERD, 'Special Measures Thematic Debate', above n 88.

93 Ibid.

94 The CERD Committee is frequently guided by other international human rights instruments and jurisprudence. In relation to special measures specifically, the CERD Committee has acknowledged the importance of the harmonisation of terminology across human rights instruments and invited contributions from representatives from the Committee on the Elimination of Discrimination Against Women, the International Labour Organization and UNESCO during its special measures thematic debate held in August 2008.

95 CEDAW Committee, *General Recommendation 25*, above n 51, [33]–[34].

96 Ibid [36].

97 Ibid [19].

98 Ibid [20].

99 Ibid.

100 Jose Lindgren Alves, CERD Expert, cited in CERD, 'Special Measures Thematic Debate', above n 88.

101 Representative of the United Kingdom, cited in CERD, 'Special Measures Thematic Debate', above n 88.

102 CERD, 'Special Measures Thematic Debate', above n 88.

103 Representative of the Forest Peoples Program, cited CERD, 'Special Measures Thematic Debate', above n 88.

104 Megan Davis, 'International Human Rights Law, Women's Rights and the Intervention' (2009) 7(10) *Indigenous Law Bulletin* 11.

105 Ibid 14.

106 NT Board of Inquiry, above n 12; Human Rights and Equal Opportunity Commission ('HREOC'), *Submission to the Northern Territory Emergency Response Review Board* (2008) [5]–[6] <http://www.hreoc.gov.au/legal/submissions/2008/20080815_nt_response.html> at 12 August 2009 ('*Review Board Submission*'); NTER Review Board, above n 32, 9.

107 *NTNER Act*, s 5.

108 Macklin, 'Compulsory Income Management to Continue as Key NTER Measure', above n 6.

109 Ibid.

110 CEDAW Committee, *General Recommendation 25*, above n 51, [33]–[36]

111 NTER Review Board, above n 32, 33.

112 Macklin, 'Compulsory Income Management to Continue as Key NTER Measure', above n 6; ABC Television, 'Govt Responds to Northern Territory Intervention Review', above n 6; ABC Radio National, above n 6; Macklin, *Transcripts: Response to the NTER Review*, above n 6.

113 NTER Review Board, above n 32, 43.

114 *Gerhardy v Brown* (1985) 159 CLR 70.

115 Ibid [37].

116 Ibid.

117 CERD, *General Recommendation 21: The Right to Self-Determination*, 48th sess, UN Doc. A/51/18, annex VIII at 125 (1996).

118 Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 92 (Darryl Melham).

119 See, eg, NT Board of Inquiry, above n 12, 21, 48.

120 NTER Review Board, above n 32, 8.

121 Ibid.

122 Ibid.

123 Ibid.

124 Ibid.

125 Ibid 34.

126 Ibid.

127 NT Board of Inquiry, above n 12, 50; HREOC, *Review Board Submission*, above n 106, [5]; NTER Review Board, above n 32, 9–11, 47.

128 NT Board of Inquiry, above n 12, 50

129 Ibid.

130 Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 18 (Mal Brough, Minister for Families, Community Services and Indigenous Affairs) ('Second Reading Speech')

131 Rex Wild, *The First Anniversary of The Report* (2008) <http://www.getup.org.au/blogs/view.php?id=1341> at 12 August 2009.

132 Jon Altman, 'NT Intervention: Macklin Ignores Review Board in Favour of Anecdotes', *Crikey* (online), 24 October 2008 <http://www.crikey.com.au/Politics/20081024-Macklins-response-to-NTER-Review-Report.html> at 12 August 2009.

133 FaHCSIA, *Background Material*, above n 69, 15.

134 CERD, *Concluding Observations: Australia* (2005), above n 58, [11].

135 Australian Government, above n 37.

136 'Government Defends NT Intervention Consultations', above n 8.

137 Australian Government, *Future Directions for the Northern Territory Emergency Response*, above n 37.

138 'Government Defends NT Intervention Consultations', above n 8.

139 See, eg, CERD, *Decision 2(54) on Australia*, [6]–[10], UN Doc CERD/C/54/Misc.40/Rev 2 (18 March 1999); CERD, *Concluding Observations: Australia* (2000), above n 58, [32]; CERD, *Concluding Observations: United States of America* (2001), above n 58, [400].

140 The Australian Government responded to the 2005 *Concluding Observations* (see above n 58) observing that, while it accepted that under international law citizens have the right to participate in public affairs and political processes, it did not consider that people had a right to participate in the political process in any specific way. It rejected the assertion that decisions could not or should not be made in relation to Indigenous Australians without their 'informed consent'. The Australian Government contended that it would be inconsistent with Australia's democratic system if Parliament's ability to enact and amend legislation were subject to the consent of a particular subgroup of the population. *Comments by the Government of Australia*, above n 59, [19]-[20].

141 See CERD, *Concluding Observations: Australia* (2005), above n 58, [11]; CERD, CERD, *Concluding Observations: Australia* (2000), above n 58, [9]; CERD, *Concluding Observations: Australia*, 45th sess, [545], UN Doc A/49/18 at [535] (1994).

142 See CERD, *General Recommendation 21*, above n 117; *Charter of the United Nations*; ICESCR; ICCPR; *ILO No 169*; DRIP; Anaya, above n 39, 97.

143 CERD, *General Recommendation 14*, above n 47, [2].

144 NTER Review Board, above n 32, 20.

145 Schedule I of the *Welfare Payment Reform Act* adds pt 3B to the *Social Security (Administration) Act 1999* (Cth).

146 *Social Security (Administration) Act 1999* (Cth), ss 123XA–123XH.

147 *Social Security (Administration) Act 1999* (Cth), ss 123WA–123WF, 123XA–123XH.

148 *Social Security (Administration) Act 1999* (Cth), s 123TH.

149 *Social Security (Administration) Act 1999* (Cth), s 123TI.

150 NTER Review Board, above n 32, 23; FaHCSIA, *Background Material*, above n 69, 28–32, 50–1.

151 FaHCSIA, *Northern Territory Emergency Response: Operation Update* (10 December 2008) <http://www.fahcsia.gov.au/nter/operation_update.htm> at 29 December 2008 (website no longer active).

152 Ibid.

153 NTER Review Board, above n 32, 20.

154 *Social Security (Administration) Act 1999* (Cth), ss 123UB, 123TD. A 'relevant Northern Territory area' includes prescribed areas under the *NTNER Act* and certain specified places.

155 The income management scheme also applies nationally where: a State or Territory child protection officer refers a person to Centrelink because their child is considered to be at risk of neglect or abuse, or because a person's child does not meet school enrolment and attendance requirements; a person subject to the jurisdiction of the Queensland Family Responsibility Commission is recommended for income management; or a person is subject to a voluntary income management agreement. See *Social Security (Administration) Act 1999* (Cth), ss 123UC–123UFA. This case-by-case approach stands in stark contrast to the scheme as it applies to people living in prescribed areas.

156 NTER Review Board, above n 32, 12, 21.

157 Macklin, 'Compulsory Income Management to Continue as Key NTER Measure', above n 6.

158 Australian Government, above n 37, 10–12.

159 *Social Security (Administration) Act 1999* (Cth), s 123TB.

160 Macklin, 'Compulsory Income Management to Continue as Key NTER Measure', above n 6; FaHCSIA, *Background Material*, above n 69, 25, 50.

161 Macklin, *Transcripts: Response to the NTER Review*, above n 6.

162 Macklin, 'Compulsory Income Management to Continue as Key NTER Measure', above n 6.

163 Ibid; ABC Television, 'Govt Responds to Northern Territory Intervention Review', above n 6; ABC Radio National, above n 6; Macklin, *Transcripts: Response to the NTER Review*, above n 6.

164 ABC Television, 'Govt Responds to Northern Territory Intervention Review', above n 6; Macklin, 'Compulsory Income Management to Continue as Key NTER Measure', above n 6.

165 Australian Government, above n 37, 10–11.

166 Aboriginal and Torres Islander Social Justice Commissioner, above n 13, 265.

167 FaHCSIA, *Final Stores Post Licensing Monitoring Report* (2009) 1–2 <http://www.facs.gov.au/sa/indigenous/pubs/nter_reports/final_monitoring_report/Documents/final_monitoring_report.pdf> at 12 August 2009; Claire Smith and Gary Jackson, *A Community-Based Review of the Northern Territory Emergency Response* (2008), 7, 8, 49ff; Central Land Council, *Northern Territory Emergency Response: Perspectives from Six Communities* (2008) <http://www.clc.org.au/Media/issues/intervention/CLC_REPORTweb.pdf> at 12 August 2009; AIDA, above n 25; Central Australian Aboriginal Legal Aid Service and the North Australian Aboriginal Justice Agency ('CAALAS and NAAJA'), *Joint Submission Senate Select Committee on Regional and Remote Indigenous Communities* (2008) <http://www.aph.gov.au/SENATE/committee/indig_ctte/submissions/sub24.pdf> at 12 August 2009. AIDA's field work exposes an 'overwhelmingly negative' response to income quarantining. See AIDA, above n 25, [45]. The results of the review by Claire Smith and Gary Jackson (see at 7, 8, 49) appear to be less emphatic – a majority reported that income management had been good for them but only a small minority would continue if income management was voluntary.

168 NTER Review Board, above n 32, 21.

169 Central Land Council, above n 167, 19.

170 Ibid 28.

171 Macklin, 'Compulsory Income Management to Continue as Key NTER Measure', above n 6; ABC Television, 'Government Responds to Northern Territory Intervention Review', above n 6; ABC Radio National, above n 6; Macklin, *Transcripts: Response to the NTER Review*, above n 6.

172 The Review Board described the lack of baseline data as a major problem requiring urgent attention. See NTER Review Board, above n 32, 16.

173 The survey conducted by FaHCSIA was based on interviews with store operators where income quarantining had been in place for at least 12 weeks. See FaHCSIA, *Final Stores Post Licensing Monitoring Report*, above n 167, 3.

174 Brian Walker-Catchpole, Lucy Phelan and Kate Snow, *Survey of Government Business Managers Relating to the Impact of the Northern Territory Emergency Response* (2008) <http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/gbm_survey_report/downloads/GBM_Survey_Report.pdf> at 12 August 2009.

175 NTER Review Board, above n 32, 44.

176 HREOC, *Review Board Submission*, above n 106, [37].

177 For example, the Eastside IGA in Alice Springs directs people subject to income quarantining to a specific cashier.

178 See HREOC, *Review Board Submission*, above n 106, [37]; NTER Review Board, above n 32, 20–1; AIDA, above n 25, [19]–[23], [43]–[54]; Smith and Jackson, above n 167, 123; Central Land Council, above n 167, 25–31; CAALAS and NAAJA, above n 167, 16–20.

179 Macklin, *Transcripts: Response to the NTER Review*, above n 6.

180 Dilip Lahiri, CERD Expert, cited in CERD, 'Special Measures Thematic Debate', above n 88.

181 CEDAW Committee, *General Recommendation 25*, above n 51, [20].

182 *NTNER Act*, s 31(1). 'Aboriginal land' is land granted to Aboriginal land trusts in fee simple under the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth). Aboriginal community living areas are created by grant to associations in fee simple under the *Lands Acquisition Act (NT)*.

183 FaHCSIA, *Background Material*, above n 69, 11, 59–60, 62.

184 NTER Review Board, above n 32, 39. Forty-eight of the leases are on 'Aboriginal land' as defined by the *Aboriginal Land Rights Act* 1976 (Cth) and the remaining 16 leases are over 'community living areas', granted in fee simple under the *Lands Acquisition Act (NT)*.

185 ABC Radio National, above n 6; Macklin, 'Compulsory Income Management to Continue as Key NTER Measure', above n 6.

186 Australian Government and Northern Territory Government, *Leasing* (2009) <http://www.territoryhousing.nt.gov.au/__data/assets/pdf_file/0017/63530/fs_about_leasing.pdf> at 12 August 2009.

187 Jenny Macklin, 'Alice Springs Town Camps' (Press Release, 24 May 2009) <http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/alice_springs_transcript_24may09.htm > at 12 August 2009.

188 *NTNER Act*, ss 34(2), 34(3).

189 *NTNER Act*, s 37(1).

190 *NTNER Act*, s 51(1)(a).

191 *NTNER Act*, s 51(1)(a).

192 *NTNER Act*, s 51(1)(d).

193 *NTNER Act*, s 35(2).

194 ABC Radio National, above n 6; Macklin, 'Compulsory Income Management to Continue as Key NTER Measure', above n 6.

195 *NTNER Act*, ss 35(5)–35(8).

196 *NTNER Act*, s 35(4).

197 *NTNER Act*, s 37(1).

198 *NTNER Act*, s 37(3).

199 *Additional Terms and Conditions for Leases Determination 2007* (Cth) <http://www.comlaw.gov.au/comlaw/Legislation/LegislativeInstrument1.nsf/0/797B910B7958F11CCA25733F001DADED?OpenDocument> at 12 August 2009.

200 *Additional Terms and Conditions for Leases Determination 2007* (Cth), cl 2.1.

201 *Additional Terms and Conditions for Leases Determination 2007* (Cth), cl 4.

202 Australian Government and Northern Territory Government, *Leasing*, above n 186.

203 Brough, 'Second Reading Speech', above n 130, 13.

204 Ibid 14.

205 ABC Radio National, above n 6; Macklin, 'Compulsory Income Management to Continue as Key NTER Measure', above n 6.

206 Paul Toohey, 'We'll Get NT Housing Right: Jenny Macklin', *The Australian* (online), 6 July 2009 <http://www.theaustralian.news.com.au/story/0,25197,25737961-2702,00.html> at 11 August 2009.

207 Indigenous land tenure was described as working against 'developing a real economy' and was to be transformed so that people can 'own and control' their own houses and obtain loans to establish small businesses. The Northern Territory Intervention was also supposed to provide the same services and infrastructure to town camps as 'normal suburbs'. See Brough, 'Second Reading Speech', above n 130, 11, 14.

208 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

209 *Wik Peoples v Queensland* (1996) 187 CLR 1. The *Mabo* and *Wik* decisions were seminal cases in Australia, providing recognition and protection of Aboriginal title. As CERD has identified, the *Mabo* decision provided a significant development in the recognition of Indigenous rights under the *Race Convention*. See CERD, *Concluding Observations: Australia* (2005), above n 58, [16].

210 Mal Brough, cited in 'Brough Questions Worth of Land Rights', *The Age* (online), 15 August 2007 <http://www.theage.com.au/news/national/brough-slams-land-rights/2007/08/15/1186857579661.html?s_cid=rss_news> at 12 August 2009.

211 Ibid.

212 Patricia Karvelas and Nicola Berkovic, 'Aborigines Told to Buy Homes by the Rudd Government', *The Australian* (online), 2 January 2009 <http://www.theaustralian.news.com.au/story/0,,24863938-2702,00.html> at 12 August 2009.

213 Brough, 'Second Reading Speech', above n 130, 15.

214 CERD, 'Special Measures Thematic Debate', above n 88.

215 Sections 8(1) and 10(3) of the *RDA* provide that, where a provision authorises management of Aboriginal-owned property or prevents termination of management of Aboriginal owned property, and is not a law of general application, it cannot be classified as a 'special measure'.

216 CERD, *General Recommendation 23*, above n 56, [5].

217 Marks, above n 60, 53.

218 Ironically, former Indigenous Affairs Minister Mal Brough described the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) as one of the two things that 'did more to harm indigenous culture and destroy it than any two other legislative instruments ever put into the Parliament. … you can be land rich but be absolutely poor in every other way.' See Mal Brough, 'Northern Territory Intervention' (Speech delivered as the 40th Alfred Deakin Lecture, Melbourne University, Melbourne, 2 October 2007) <http://www.facsia.gov.au/Internet/Minister3.nsf/content/alfred_deakin_02oct07.htm> at 12 August 2009.

219 *Native Title Act 1993* (Cth), preamble.

220 HREOC, *Review Board Submission*, above n 106, [16].

221 Australian Government and Northern Territory Government, *Leasing*, above n 186.

222 The lease areas have been reduced by approximately 50 per cent and now are said to be a closer approximation to the town footprints. See Australian Government, above n 37, 17.

223 *Dawes Act*, US Statutes at Large, vol XXIV, 388–91 (1887).

224 Central Land Council, above n 167, 58; Smith and Jackson, above n 167, 93–4; NTER Review Board, above n 32, 39.

225 Central Land Council, above n 167, 58; Smith and Jackson, above n 167, 121.

226 Smith and Jackson, above n 167, 11

227 Central Land Council, above n 167, 58.

228 Central Land Council, above n 167, 58; Smith and Jackson, above n 167.

229 NTER Review Board, above n 32, 40.

230 *Wurridjal v Commonwealth* [2009] HCA 2.

231 See Macklin, 'Compulsory Income Management to Continue as Key NTER Measure', above n 6.

232 CERD, *General Recommendation 23*, above n 56, [5].

233 Pat Turner and Nicole Watson, 'The Trojan Horse' in Jon Altman and Melinda Hinkson (eds), *Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia* (2007) 206.

234 The importance of the *Native Title Act 1993* (Cth) in providing a framework for continued recognition of Aboriginal land rights following the precedent established in the *Mabo* case has previously been acknowledged by the CERD: CERD, *Decision 2(54) on Australia*, UN Doc A/53/18 (11 August 1998).

235 CERD, *Concluding Observations: Australia* (2005), above n 58, [16].

236 *NTNER Act*, s 3.

237 *NTNER Act*, s 3.

238 *NTNER Act*, s 65. The Government has identified that this power has not been used and it proposes to remove it from the legislation. See Australian Government, above n 37, 22.

239 *NTNER Act*, s 65(2)(b).

240 *NTNER Act*, s 65(2)(d).

241 *NTNER Act*, s 65(2)(c).

242 *NTNER Act*, s 67.

243 *NTNER Act*, ss 68(2)(a), 68(2)(b).

244 *NTNER Act*, ss 68(2)(c), 68(2)(d).

245 *NTNER Act*, s 72(3).

246 *NTNER Act*, pt 5, div 4.

247 *NTNER Act*, s 69.

248 Item 2 of Table 2 in Schedule 4 of the *NTNER Act* amends s 78(1) of the *Associations Act* (NT) so that a statutory manager can be appointed to administer the affairs of the association where the association has wilfully contravened a direction given by the Minister.

249 The Minister can give direction as to the use of an asset owned, controlled or possessed by a community services entity that is providing services in a business management area. *NTNER Act*, ss 68(1)(a), 68(1)(b).

250 There are no preconditions for the appointment of an observer, other than that the community services entity performs functions or provides services in a business management area. See *NTNER Act*, s 72(1).

251 Item 3 of Table 2 in Schedule 4 of the *NTNER Act* amends s 78(1)(e) of the *Associations Act* (NT).

252 NTER Review Board, above n 32, 114.

253 Ibid 119.

254 Ibid 114.

255 Ibid 114; Brough, 'Second Reading Speech', above n 130, 15 (emphasis added).

256 See above n 116.

257 NTER Review Board, above n 32, 44.

258 FaHCSIA, *Operation Update*, above n 151.

259 NTER Review Board, above n 32, 44.

260 Ibid.

261 The Tangentyere Council had agreed to the 40-year lease insisted upon by the Government but refused to accept the Government's condition that tenancy management be handed over to the Northern Territory Housing Authority, which has a poor reputation with Aboriginal people. Instead, the Council proposed tenancy management through the Central Australian Affordable Housing Company, established with the Government's assistance. See Senator Rachel Siewert, 'Alice Springs Town Camps' (Press Release, 17 June 2009) <http://rachel-siewert.greensmps.org.au/content/speech/alice-springs-town-camps> at 12 August 2009.

262 Central Land Council, above n 167, 79.

263 Ibid.

264 Smith and Jackson, above n 167, 129.

265 *NTNER Act*, s 90.

266 *NTNER Act*, s 91.

267 *NTNER Act*, s 90(1).

268 *NTNER Act*, ss 90(1)(b)(i), 91(a).

269 *NTNER Act*, ss 90(1)(b)(ii), 91(b).

270 *R v Wunungmurra* [2009] NTSC 24.

271 Brough, 'Second Reading Speech', above n 130, 16.

272 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Report of the Inquiry into the Crimes Amendment (Bail and Sentencing) Bill 2006* (2006) 31. Cited in Law Council of Australia, *Review of the Northern Territory 'Emergency Intervention' in Regional and Remote Aboriginal Communities* (2008) 18 <http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=6A21A8E5-1C23-CACD-2213-AA87E5303B4E&siteName=lca> at 12 August 2009.

273 Ibid.

274 Law Council of Australia, above n 272, 17–18.

275 Ibid 18.

276 Ibid 18.

277 CAALAS and NAAJA, above n 167, 13.

278 Justice Brian Martin, 'Customary Law – Northern Territory' (Paper presented at the JCA Colloquium, Sydney, 5 October 2007) 1 <http://www.supremecourt.nt.gov.au/documents/speeches/commonwealth_intervention.pdf> at 12 August 2009.

279 *Sentencing Act* (NT), s 5(2)(c).

280 *Sentencing Act* (NT), s 5(2)(f).

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

282 NT Board of Inquiry, above n 12, 130.

283 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006) recommended (at [6.94]) the retention of cultural background in the factors listed in section 16(1)(2)(m) of the *Crimes Act 1914* (Cth)); New South Wales Law Reform Commission, *Sentencing: Aboriginal Offenders*, Report No 96 (2000) recommended (at [3.89]) that evidence concerning customary laws of both the offender and the victim be taken into account in sentencing; Australian Law Reform Commission, *Multiculturalism and the Law*, Report No 57 (1992) recommended (at [8.14]) an offender's cultural background should be expressly included as a factor to be taken into account in sentencing under s 16A(2)(m) of the *Crimes Act 1914* (Cth); Australian Law Reform Commission, *Sentencing*, Report No 44 (1988) recommended (at [94]) that an offender's cultural background be listed in the relevant legislation as a factor to be taken into account in sentencing; Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) concluded (at [507]–[509]) that

Aboriginal customary laws are a relevant factor in mitigation of sentence.

284 NT Board of Inquiry, above n 12; HREOC, *Review Board Submission*, above n 106, [5]–[6]; NTER Review Board, above n 32, 9. Note also CERD's concern as to the deep disparity in basic economic, social and cultural terms. See CERD, *Concluding Observations: Australia* (2005), above n 58, [19]; CERD, *Concluding Observations: Australia* (1994), above n 141, [545].

285 NT Board of Inquiry, above n 12, 50; HREOC, *Review Board Submission*, above n 106, [5]; NTER Review Board, above n 32, 9–11, 47.

286 Marc Bossuyt, cited in de Schutter, above n 78, 759.

287 CEDAW Committee, *General Recommendation 25*, above n 51.

288 Brough, 'Northern Territory Intervention', above n 218.

289 AIDA, above n 25, [17].